

KINGDOM OF CAMBODIA
NATION RELIGION KING

THE ARBITRATION COUNCIL

Case: 70/04

Date of award: 13th September 2004

ARBITRAL AWARD

(Issued under Article 313 of the Labor Law)

Workers of the Hanna Cambodia Factory

(Employee party)

AND

Hanna Cambodia Factory

(Employer party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Representative: 1- Mr Go Jun Bung (Company Director)
2- Mr Sin Chhun (Assistant to the Director)
3- Mr Ly Chheng (Administration Manager)
4- Mr Nu Tepirith (Lawyer)
5- Mr Chheng Sophorn (Lawyer's associate)

Address: On National Road #4, Angkaev Village, Kontok Commune, Ang Snuol District, Kandal Province.

Tel: 023 890 382

DETAILED INFORMATION OF EMPLOYEE PARTY:

Representative: 1- Yong Sophol
2- Nut Serey
3- Chom Pov
4- Seoung Chia

Tel: 012 946 882

ISSUES IN DISPUTE:

(In non-conciliation report)

- 1- The worker party demands that two worker representatives, namely Mr Chom Pov and Ms Nut Serey who the employer has suspended from employment be allowed to return to work.
- 2- The worker party demands that the employer party dismiss Mr Ly Chheng, General/Administration Manager.
- 3- The worker party claims that if this company does not dismiss the General/Administration Manager then the company must pay workers their wages and bonuses for regular attendance for the time they were on strike.

During the hearing the worker party requested that the Arbitration Council consider the following issue:

- 4- The worker party demands that the company cease discriminating against workers involved in the strike.

As for the employer party, they requested [during the hearing] that the Arbitration Council consider the following issues:

- 5- The employer party demands that the employee party pay damages for the following losses arising from the strike:
 - a. The employer party requested that the Arbitration Council decide to allow the suspension of an additional worker representative, namely Y Souen.
 - b. The employer party requested that they be allowed to terminate the three workers who the company has suspended including the one for whom it is currently requesting permission to suspend.
 - c. The employer party demands compensation for losses which the company sustained arising for this dispute.

JURISDICTION OF THE ARBITRATION COUNCIL :

The Arbitration Council derives its power to make this Award from Section IIB of Chapter 12 of the Labor Law (1997); the Prakas on the establishment of the Arbitration Council (No. 338, Dated December 11, 2002, the Prakas on the Arbitration Council No.099, dated April 21, 2004; the Arbitration Council Procedural Rules which form an Annex to the same Prakas and the Prakas on the Nomination of Arbitrators No.103, April 26, 2004 and No.265 of July 13, 2004.

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 Labor Law. That conciliation hearing did not succeed in resolving two issues. The non-conciliation report #155 (MOLVT) dated 19 August 2004 was submitted to the Secretariat of the Arbitration Council on 23 August 2004.

COMPOSITION OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party:	Ms You Suonty
Arbitrator chosen by the worker party:	Mr Tuon Siphann
Chair arbitrator (chosen by the two arbitrators):	Mr Men Nimmith

HEARING AND EVIDENCE:

Date and place of hearing: 25 August 2004 at the Secretariat of the Arbitration Council

Witnesses: None

EVIDENCE THAT WAS CONSIDERED:

- 1- Internal work rules of the Hanna Garment Factory Cambodia.
- 2- Minutes of investigation dated 14 August 2004.
- 3- Letter of request issued by Hanna Garment Factory Cambodia dated 19 August 2004
- 4- Letter requesting permission for leave of Ms Krek Chantha (worker) dated 23 August 2004
- 5- Letter regarding the illness of Ms Krek Chantha (worker) from the medical consultation room dated 13 August 2004.

Both parties decided in the hearing that **the award in this case would be non-binding.**

CASE SUMMARY:

Hanna Cambodia has approximately 700 workers and is located on National Road #4, Ang Kaev Village, Kontoak Commune, Ang Snuol District, Kandal Province. This company commenced its business of making hats at the above location on 26 June 2000. The parties have been in dispute with each other over numerous issues in the past. Starting from June 2004 right through until 19 August 2004 there were in all five attempts to reconcile the parties

which took place on the following dates: (1) 29 June 2004; (2) 27 July 2004; (3) 13 August 2004; (4) 14 August 2004; and (5) 19 August 2004. Concurrently with the final attempt to negotiate between the parties, which was facilitated by the labor inspectorate the workers conducted a strike starting from 14 August through 19 August 2004. They were on strike while negotiating. On 21 August the Arbitration Council received the claim from the office of the Ministry for Labor in Kandal Province with two non-conciliated points, namely (1) the worker party demanding that two worker representatives, namely Mr Chom Pov and Ms Nut Serey who the employer has suspended from employment be allowed to return to work; and (2) The worker party demanding that the employer party dismiss Mr Ly Chheng, General/Administration Manager and that if this individual could not be dismissed then that the employer party provide wages and the US\$5 bonus for regular work for the days of the strike, namely 14 through 18 August 2004.

After conciliation and the conduct of a hearing at the Arbitration Council on 25 August 2004, both parties requested that issues be added to the proceedings some of which were consequences of the conciliation [at the Ministry] and others of which were not related to the unresolved points which were sent to the Arbitration Council by the Labor Inspectorate.

FINDINGS OF FACT:

- After having examined the report of non-conciliation of a collective dispute;
- After having listened to the representatives of the workers and of the employer;
- After having examined the documents listed above;

We find that:

1st issue:

Having considered the minutes of the conciliation session conducted by MOLVT on 25 August 2004 the Arbitration Council finds the following facts:

Regarding issue 1 the workers demand that the employer accept to return to work Mr Chom Pov (the deputy president of the textile workers union at Hanna) and Ms Nut Serey (the secretary of the same union) who are also worker representatives. The worker party claims that the suspension of these two people from work as of 14 August 2004 was not proper because neither worker committed unlawful acts which would justify suspension. The important facts which lie at the heart of this issue and which led to the strike on 14 August 2004 related to requests for leave made by another worker, Ms Kret Chantha because she was sick.

Mr Chom Pov and Ms Nut Serey told the Arbitration Panel during the hearing that most workers followed and were sympathetic to requests for sick leave made by workers over a long period [prior to the current dispute] because there had been difficulties in requesting sick leave. The case of Ms Kret Chantha became a focus for the efforts of all of these workers. They followed and prepared to resist around the issue of Kret Chantha's request for sick leave, meaning that if there was an unfavorable result then they would hold a strike.

Mr Chom Pov and Nut Serey added that when they went to ask for sick leave for Chantha, the director of administration did not issue a letter granting leave in which they could have confidence, rather the director of administration, Mr Ly Chheng, had only signed on a small piece of paper and had not shown that he was taking responsibility for Ms Chantha's sick leave. And so these two tried again to negotiate in order to get a permission slip in which they could feel secure, but there was no outcome to these negotiations.

After these negotiations about the permission slip, these two worker representatives returned to their workplaces and when the other workers asked about the results of the negotiations, the two worker representatives replied that the outcome was negative as far as they understood. This response disappointed the workers when the information circulated among them. According to the worker party, after they received this news, the workers stopped work in order to protest against the actions of the director of administration. This was a strike which occurred spontaneously out of anger and without prior notification of the employer. The two worker representatives mentioned above testified that they did not lead this strike, but rather that the workers went on strike of their own accord.

The employer party stated that the two worker representatives mentioned above were trouble makers who: (1) committed misconduct by spreading information about the request for sick leave to the other workers when in fact, the director of administration, Mr Ly Chheng, had already provided a valid signature and particularly because Ms Chantha's request for sick leave had already been approved. (2) The spreading of this information was such as to provoke the workers to conduct an illegal strike. Further the employer stated that this strike was contrary to the results of many prior negotiations between the employer and the worker party in that these worker representatives were raising the same issues for discussion again.

For the above 2 reasons and on the basis of their internal rules and Art. 83 of the Labor Law the employer party suspended the employment of these two worker representatives effective 17 August through 10 October 2004.

2nd issue:

The worker party demands that the employer party dismiss the general manager/director of administration (referred to from here on as the director of administration) because this director of administration has not performed his duties properly; not issuing permission slips [for leave] according to the proper procedures in response to requests from workers. The workers claim that it was the director of administration's actions which led to the strike.

The employer party answered these claims stating that the workers' claim had no basis in law because: (1) the workers have no right to rupture the contract between the employer and his director of administration because this would breach the private and civil rights of the parties to that private contract, and (2) according to the law it is only the parties to the contract who have the right to terminate it.

3rd issue:

The worker party demanded that the company preserve their pay and attendance bonus for the period of the strike from the 14th to the 14th (sic.) of August 2004. This strike action was taken without giving prior notice. The workers and management had an agreement that if a worker was sick and asked for leave and had a letter from a doctor then the company would allow them to take this letter to the administrator and not cut their pay. On 14 August 2004 a worker, Ms Krek Chantha, was sick and went to ask for permission for leave, taking a letter from her doctor with her to the administrator, but the administrator replied that the company director was not in. At this juncture, the worker wanted the administrator to state they agreed or that the company director was not in, but the company administrator refused to do this, and instead issued a piece of paper acknowledging receipt and gave this to the worker and her representatives.

As this time the workers understood that the administrator had not provided permission for leave and thus they went on strike. The worker party set the condition that if the company did not dismiss the administrator then the company would have to pay this money to the workers. The employer did not agree to pay this salary and attendance bonus for the time when they were on strike because the employer saw that there was no prior notice of the strike and that it happened out of anger and when workers go on strike they don't get paid anyhow.

4th issue:

The worker party claimed that the employer was discriminating against the workers who had taken part in the strike from the 14th to the 19th of August 2004 in that the employer had varied their work. The worker party stated that these changes to the employment of the workers (who went on strike) was a sort of penalty. However, the employer party claimed that

they were not in fact discriminating against any workers. The employer agreed that they had varied the work of some workers, but that these changes did not amount to discrimination against workers who had taken part in the strike. Rather, these changes were undertaken as a sort of punishment for workers who had been working slowly or who had not been working conscientiously in accordance with the employer's instructions. Generally, the employer had decided to impose these penalties after the issuance of two or three oral warnings from the administration. The workers did not deny these claims made by the employer.

5th issue:

During the hearing before the arbitration panel the employer party proposed: (1) that they suspend a further worker who is the president of the textile workers union at Hanna, Mr Y Souen; (2) that they dismiss all three of these workers (Mr Chom Pov, Ms Nut Serey and Mr Y Souen); and (3) to claim against these three individuals for damages amounting to US\$230,000 (two hundred and thirty thousands dollars).

The employer party claimed that they should receive these damages because these three members of the leadership of the union incited the workers to go on strike without giving notice to the employer in accordance with the procedures which are set out in the law. As a result of this strike which occurred without notice the employer could not manage to send his merchandise to the buyer by sea before the deadline as stipulated in the contract of purchase. Thus the employer had to send the merchandise by air at a high cost. Furthermore, the strike also caused an interruption in the employer's production.

REASONS FOR DECISION:

1st issue:

The Arbitration Council must consider whether the act of the employer in suspending the workers Mr. Chom Pov and Ms Nut Serey amounted to the imposition of a proper penalty or not with regard to the actions which these workers took on 14 through 19 August 2004. In order to reach a decision on this issue Arbitration Council has considered the following:

1. Art. 71 (7) of the Labor Law provides that the employment contract may be suspended if an employee is temporarily laid off for a period of time with a valid reason in accordance with internal rules. The internal rules of the employer do not include a provision for the suspension of workers. Article 10(B-5) of the internal rules provide that "... if any worker leads other workers to undertake any action which is not in accordance with the law the company shall issue a written warning. If there is no improvement the company will terminate the worker from employment." Thus

even if the company can show that the workers did commit acts of serious misconduct the Arbitration Council finds that the response to the acts of serious misconduct of Mr Chom Pov and Ms Nut Serey should be in accordance with the internal rules of the company which require a written warning before dismissal.

2. The issue of whether these workers did commit acts of serious misconduct is determined by Article 83, paragraph B(5) of the Labor Law which provides that it is serious misconduct for a worker to commit acts including “inciting other workers to commit acts of serious misconduct.”
3. According to the Khmer dictionary written by *Samdach Chuon Naat* the word “incite” means to speak provocatively in a way which may inflame others’ anger, quarrel with each other, fall out with each other, alternatively spreading false information which leads to anger or quarreling should also be considered as incitement. With reference to the facts set out above both worker representatives related [to the other workers] the negative response which they received, namely that “the request for a permission slip could not be granted.” This response led to the workers becoming upset and angry, and as this news spread among the workforce finally a strike occurred. Is this incitement? The Arbitration Council finds that this is incitement because (1) at the time the two workers knew clearly that all of the other workers planned to protest against the information which they were about to announce; (2) They had received the signature of the director of administration allowing Ms. Kret Chantha permission [for sick leave] and what was still in doubt was the possibility that there might be problems in the future.
4. The result of the inquiry which was made by a person named Ret Chia under the supervision of Mr Som Kosal, who is the deputy director of the office of the Ministry of Labor in Kandal Province, and to which others also contributed, which involved hearing testimony from some 20 witnesses who were team leaders in the factory, all of whom confirmed that Chom Pov and Nut Serey returned from the administration office and incited the other workers, who were working, not to continue work but to sit down and rest in the factory.
5. The Arbitration Council considers that in this case Mr Chom Pov and Ms Nut Serey did incite the other workers to go on strike illegally. However, the labor law does not state that a strike is an act of serious misconduct. Thus the actions of the worker representatives who incited the other workers to go on strike was not incitement to

serious misconduct as is set out under Art. 83 paragraph B(5). Thus the employer may not terminate these two workers based on Art. 83 B (5) of the Labor Law.

Based on the reasons set out above the Arbitration Council finds that the decision of the company to suspend the employment or to terminate Mr Chom Pov or Ms Nut Serey was not in accordance with the law.

2nd issue:

The Arbitration Council, refers to the arbitral award in case 17/03, 18/03, 04/03 and 14/03, in which it was found that Art. 65 of the Labor Law provides that an employment contract is a contract which establishes the employment relationship between an employer and an employee, and thus in general that it is only the parties to such a contract who can make decisions with regard to its termination. This means that the hiring and firing of an employee within a company is a prerogative of the employer and the employee in question. Even if the actions of Mr. Ly Chheng were deficient or entailed some misconduct with regard to the issuing of permission slips the Arbitration Council finds that this carelessness in the issuing of permission slips cannot be considered an act of serious misconduct which would justify dismissal in accordance with Art. 83 of the Labor Law.

However, the Arbitration Council could order Mr Ly Chheng to be transferred or dismissed from employment if it were found that he presented a danger to other employees in the factory. The Arbitration Council does not find that this employee is a persons who presents such a danger to others in the factory. The claim made by the representatives of the workers in the hearing that Mr Ly Chheng's actions in issuing an improper permission slip for sick leave to Ms Kret Chantha was the cause of the strike represents an improper understanding. Rather, the Arbitration Council finds that the spreading of the information by the worker representatives, Chom Pov and Nut Serey, was in fact the cause of the strike.

3^d issue:

The strikers went on strike from the 14th to the 19th of August 2004 without giving prior notice. Article 324 of the Labor Law provides that "a strike must be preceded by prior notice of at least seven working days and be filed with the enterprise or establishment...". Article 320 paragraph 4 states that "the right to strike can be exercised only when all peaceful methods for settling the dispute with the employer have already been tried out." The procedures which must be gone through before undertaking a strike include attempts at resolution of the dispute through conciliation and arbitration as well. This strike was not conducted in accordance with any of these procedures. Furthermore, even if a strike is conducted in accordance with the legal procedures the employer does not have the obligation to pay

wages. In accordance with Article 332 of the Labor Law “strike suspends the labor contract. During a strike, the allowance for work is not provided and the salary is not paid.” For these reasons the Arbitration Council finds the employer does not have the obligation to pay wages to the workers who were on strike from 14th through 19th August 2004.

With regard to the \$5 attendance bonus, the Arbitration Council has decided as follows (please see the cases of *Lida Garment* (04/03), *Wash Concept* (08/04), *Lucky Zone* (15/04), *Yada Printing* (16/04), *Standard Garment* (25/04), and *Eternity* (71/04)):

1. In accordance with Article 332 of the Labor Law, a labor contract is suspended during the period of a strike and workers do not receive their wages;
2. The bonus of \$5 for regular work which is a component of the minimum wage as provided for in Notice 017/2000 (MOSALVY) dated 18 July 2000, must be provided to workers who work regularly on the number of days which must be worked in a month.
3. In the case of a strike that is conducted without respect to the requirements of the law the Arbitration Council has found that workers have not worked regularly on the number of days which must be worked in a month and thus they do not receive this bonus.
4. In the case of workers who conduct a strike in accordance with the correct procedures, the Arbitration Council has found that the deduction of the bonus is an unlawful punishment (in breach of Article 333 of the Labor Law). For these reasons the Arbitration Council has decided that workers who go on strike in accordance with the law have the right to receive their \$5 bonus in proportion to the number of days in the respective month.

In the current case of Hanna, the strikers did not give prior notice of their strike in accordance with the procedures set out in the law. For this reason, even if their strike had only lasted one hour, the result would be the workers involved had not performed their duties regularly in accordance with the law. Thus the strikers do not have the right to receive their attendance bonus as provided for in Notice 017/2000 (MOSALVY) dated 18 July 2000.

4th issue:

The 4th and 5th issues were not contained in the non-conciliation report with regard to this case which was sent to the Arbitration Council by MOLVT. According to Article 312 paragraph 1 of the Labor Law the Arbitration Council is to decide on the issues which were contained in the report of non-conciliation and directly related issues which arise after the date of that report.

The Arbitration Council finds that issue 4 regarding discrimination against workers who took part in the strike from the 14th to the 19th of August 2004 occurred after the date of the non-conciliation report, namely 19th August 2004. Furthermore, the Arbitration Council finds that the 4th issue arose as a direct result of the original dispute which was related to the conduct of a strike and the consequences of this strike. Thus the Arbitration Council has the jurisdiction to decide on this point.

Article 333 of the Labor Law prohibits the employer from imposing any penalty on workers who take part in a strike. At the hearing the Arbitration Council did not find that the employer had imposed any penalty or discriminated against workers for participating in the strike. In fact the employer only disciplined workers who had not carried out their jobs in accordance with instructions or who had worked slowly causing interruption to the process of production. Such disciplinary actions included transferring workers once warnings had been given.

5th issue:

Similarly to the previous issue, issue 5 points (a) through (c) were not included in the non-conciliation report either. But, differently to the 4th issue which was related to the actions of the employer after the strike, issue 5 relates to the actions of the workers during the strike. As the employer knew about these actions at the time of the strike, he should have raised them at the conciliation meeting. On the contrary, however, these issues were not raised [until the hearing before the Arbitration Council.]

Thus according to Article 312 of the Labor Law the Arbitration Council does not have jurisdiction over this issue.

DECISION:

1. Order the employer to end the suspensions of the worker representatives named Chom Pov and Nut Serey and accept them back to work immediately when this award comes into force.
2. Reject the workers' claim that the employer dismisses the general manager and director of administration of the company.
3. The worker representatives, Chom Pov and Nut Serey shall be considered to have received written notice of their misconduct in inciting other workers at the company to go on strike in the past.

4. Reject the employers request to add the three sub-issues under issue 5 above which were not contained in the MOLVT report of non-conciliation.
5. Reject the workers' complaint that the employer had discriminated against workers who took part in the strike.
6. Reject the workers' claim that the employer pays salaries and attendance bonuses to workers who participated in the strike from the 14th to the 19th of August 2004.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party:

Name: **You Suonty**

Signed:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signed:

Chair of arbitration panel:

Name: **Men Nimith**

Signed:

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.

This Award is immediately binding upon the parties if parties have agreed as such in writing before the notification of the Award, or if parties are bound to comply with a collective bargaining agreement stipulating that no opposition to the Award may be lodged.