



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអន្តរាជ្ញាភាព

THE ARBITRATION COUNCIL

Case number and name: 73/06-F.Y.

Date of Award: 18 September 2006

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Chhiv Phyum**

Arbitrator chosen by the worker party: **Liv Sovanna**

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

DISPUTING PARTIES

Employer party:

Name: **F.Y. Cambodia Fashions Limited**

Address: #1 A, Norodom Blvd, Sangkat Tonle Basac, Khann Chamkarmorn, Phnom Penh

Telephone: (855)23 214 087/ 214 097 Fax: (855) 23 214 077

Representative:

- | | |
|----------------------|-------------------------|
| - Mr. Steven Koo | Chief of Administration |
| - Ms. Siu Wailing | Chief of Production |
| - Mr. Prak Poranet | Administration Officer |
| - Ms. Theng Putheavy | Chief of Human Resource |

Worker party:

Name: **CFITU and**

Local CFITU at F.Y. Factory

Address: #250 A, Norodom Blvd, Sangkat Tonle Basac, Khann Chamkarmorn, Phnom Penh

Telephone: 012 899 530

Representative:

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KHMER ORIGINAL.**

- Ms. Hol Mom	Head Secretariat of CFITU
- Mr. San Chamroeun	Head of Local CFITU at F.Y. Company
- Ms. Eng Socheata	Vice- head of Local CFITU at F.Y. Company
- Mr. Pho Phorst	Secretary of the Local CFITU at F.Y. Company
- Ms. Kong Chandaly	Staff Delegate
- Ms. Rath Vannak	Labourer
- Ms. Nov Lim	Labourer
- Mr. Ek Phirum	Labourer
- Mr. Phy Seng	Labourer
- Mr. Khuon Sopheaktra	Labourer
- Ms. Eng Channarin	Labourer
- Mr. Sbong Sophal	Labourer
- Mr. Mee Makara	Labourer
- Mr. Phy Sao	Labourer
- Mr. Phorn Sophal	Labourer
- Mr. Nget Phoeun	Labourer
- Mr. Hang Sokly	Labourer
-Mr. Nuon Puthminea	Labourer

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

Workers demand the company to reinstate 15 workers claiming that the Company recruited new workers and uses them once in a while during the night shift. The Company party does not agree to accept the 15 workers because it has no work for them and they did not pay attention at work.

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 the Arbitration Council No. 099 dated 11 May 2006 (Fourth 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

was unsuccessful, and the non-conciliation report No. 1190 was submitted to the Secretariat of the Arbitration Council on 23 August 2006

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Center Building "A", Sothearos Blvd,

Sangkat Tonle Basac, Khan Chamkamorn, Phnom Penh

Date of hearing:

- 29 August 2006 (8:00 a.m. to 12:00 p.m.)
- 12 September 2006 (2:00 p.m. to 4:00 p.m.)

Procedural issues:

Upon receipt of the complaint of workers to demand the company to implement work conditions in conformity with the Labour Law, on 09 August 2006 the Department of Labour Disputes assigned its expert officials to settle and conciliate this collective labour dispute. [The single issue was not] successfully conciliated. The one non-conciliated dispute was submitted to the Arbitration Council on 23 August 2006.

After receiving the case the parties to the dispute were summoned by the Arbitration Council to appear at the hearing on 29 August 2006 at 8:00 a.m. and on 12 September 2006 at 2:00 p.m.

Both parties attended the hearing at the Arbitration Council. The Arbitration Council attempted to further conciliate the non-conciliated issue but was not successful.

Thus, the Arbitration Council will make its decision and resolve the non-conciliated issue based on the evidence and the 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:

- Minute of the collective dispute conciliation dated 26 July 2006
- Invitation letter dated 28 August 2006, by Mr. Kho Thilit, Chief of Administration of F.Y. Company, to the president of the Arbitration Council.
- Notification to the Chief of the Labour Disputes Department about the situation at the F.Y. Factory after the strike on 25-28 July 2006.
- Internal Work Rules of the factory, dated 21 April 2003

- Letter No. Adm 022-08/ 06 by the director of the company to the chief of the Labour Disputes Department, to reject the claim of the Local CFITU at F.Y. Factory.
- List of wage payment for July 2006 for workers in the cutting section.

Provided by the worker party:

- Certificate of registration, dated 07 October 2003
- Statute of the Local CFITU at F.Y. Factory, dated 17 May 2003
- Certificate of the most representative status of the Local CFITU at F.Y. Factory, dated 04 March 2004.
- Letter by the Local CFITU at F.Y. Factory, dated 01 September 2006, to the Arbitration Council to report about the result of work of the 15 workers before and after the strike.
- Letter by the Local CFITU at F.Y. Factory, dated 09 August 2006, to the Arbitration Council to complain about the director of F.Y. Factory who did not follow the order of the Arbitration Council by terminating 15 workers from ironing section.

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

- Letter requesting for a conciliation of collective dispute of F.Y. Company (No. 1155, dated 05 September 2006).
- Report of the conciliation of collective dispute of F.Y. Company (No. 1190, dated 23 August 2006).
- Minute of conciliation of collective labour dispute of F.Y. Company, dated 17 August 2006.

Provided by the Secretariat of the Arbitration Council:

- The letter of invitation to the employer party to attend the hearing, No.337, dated 24 August 2006
- The letter of invitation to the worker party to attend the hearing, No.338, dated 24 August 2006

FACTS

The F.Y. Cambodia Fashions Limited is located at No.1 A, Norodom Blvd, Group 62, Village 10, Sangkat Tonle Basac, Khann Chamkarmorn, Phnom Penh. It employs 600 workers.

- After having examined documents submitted to the Arbitration Council

- After having examined report of conciliation of collective dispute
- After having listened to statements the worker party and the employer party

The Arbitration Council finds that:

- F.Y. Company terminated 15 workers, 12 from the ironing section and 3 from the fray trimming section. The Company claims that the workers did not pay attention at work, were careless, which made the production slow, decreased [the quality of the production] and interrupted the production after the strike on 27-28 July 2006.
- In the second hearing, the worker party added that the 15 workers were terminated because of the following: 1) The Company had examined and evaluated the workers from the day they commenced work to the termination day; the Company noticed that the workers were slow and could not meet the criteria and demands of the Company. 2) Ten workers were on a probationary period that the Company could terminate without providing reason or reprimand; the other five workers were full-right workers; the Company could terminate them by giving them the indemnity as stated in the law. 3) After recruiting the 15 workers, the buyer(s) sent letter(s) mentioning that the quality of the product decreased at the ironing section.
- Workers demand the Company to reinstate the 15 workers claiming that the Company recruited new workers and used them once in a while for the night shift during the strike.
- The Company accepted that it did recruit 12 new workers during the strike as floating workers to work at night after the 15 workers the Company terminated finished their working hour at 5:00 p.m. to assist the flow of production and to meet the buyers' order. Two or three of the new workers work during the day time. The Company continues to employ the 12 workers because they do good work.
- In the hearing, the employer claimed that the Company employed the 15 workers on probation and they received \$ 40 a month.
- The workers asserted that they did not know what type of contract they are working on because the Company did not tell them. First of all, workers went to contact the company to ask for work. The Company handed application forms to them to fill in which were then handed back to the Company. After that the Company let them start working and some of them were tested but other just began work. The workers did not know the content of the contract and did not sign the contract, instead printed their thumb-prints in the top-portion of the application form.
- At the hearing, the Company stated that it asked the workers to take the form to fill in at their homes then bring them back to the company. Regarding the space [in the form] for the probationary period, the Company filled it in by itself. The Company claimed that it generally told workers about the probationary period but sometimes it

also forgot to tell [sometimes]. The Company never gave any reprimand to the 15 workers about the slowness which caused a decrease in the production because the workers were in the probationary period.

- During the hearing, the 15 workers were asked one-by-one by the Arbitration Council if they were informed about the probationary period. The workers stated that Company did not inform them.
- On 04 August 2006, the Company summoned 5 workers at a time to ask them about their siblings, their work places, etc. and asked them to put their thumb-print on that biography.
- On 07 August 2006 the Company drafted a document which included names, card numbers, and the date to receive money on the following day (08 August 2006), which informed the 15 workers of their termination then handed such document to each worker.
- On the same date, 07 August 2006, workers made their complaint to the union.
- On 08 August 2006 the union asked to meet the Company. The Company [participated in the meeting] but did not tell the reason(s) for the termination of the workers.
- On 08 August 2006, the 15 workers went to get their wages for August. They did not receive the wage for September at the time because the Company asked them to get it on 06 September 2006.
- On 26 June 2006 the Company called 5 workers from among the 15 workers to put their thumb-prints on an application form, which date was not yet filled in, and told the 5 workers that they were full-rights workers.
- In the hearing, the Company recognized that the 15 workers were ironers and fray trimmers and non-specialized workers. But the Company wrote a note of a three months probation period in the bottom column of the application form.

REASONS FOR DECISION

The Company terminated the 15 workers based on reasons that 1) The Company had examined and evaluated the workers from the day they commenced work to the date of termination; the Company noticed that the workers were slow and could not meet the criteria and demands of the Company. 2) Ten workers were on probation which allowed the Company to terminate them without providing any reason or reprimand. The other five workers were full-right workers; but, the Company can terminate them by giving them the indemnity as stated in the law. 3) After recruiting the 15 workers, the buyer(s) sent letter(s) indicating that the quality of the products decreased at the ironing section.

To see if the employer's termination of the 15 workers is legal, the Arbitration Council considers the issues as follows:

A. Labour Contract

In the hearing, the Company stated that it asked the workers to bring the application form to fill in at home then bring back to the company. For the space for probationary period, the Company filled in by itself. The Company claimed that it told workers about the probationary period but sometimes it also forgot to tell.

Article 65 of the Labour Law states: "A labour contract establishes working relations between the workers and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties."

Ordinary law is the law which controls all contracts. Currently, ordinary law which is in effect is Decree No. 38, issued on 28 October 1998. According to the contents of this [Decree], a contract can only be made if there is agreement of both parties without coercion from either party to the other. Both parties can agree to make a contract in any form if the meaning of the contract does not diverge from the Labour Law.

In addition, Article 67-4 of the Labour Law provides: "At the signing of the contract, the employer must inform and clarify the worker of the eventual sensitive issues and the approximate duration of the contract."

In this case, the Company used the application form as a contract. First the Company asked the workers to bring the application form to fill in at home, then the Company itself filled-in the column regarding the probationary period. In some cases, the probationary period was indicated, in some cases it was not. The Arbitration Council considers that such practice is not properly in conformity with the Labour Law and legal procedures for forming a contract because such practice does not allow workers to know the meaning in the contract and understand the main terms which may be the consequences of the agreement. Further, the workers did not sign to give their consent on the content of the contract, [they only provided] a thumb-print at the upper-part [of the form], which is the part of the application for work. In order to be easy to practice and to confirm that workers did make a written agreement with the Company, the Arbitration Council considers that the Company should make a contract which is in the form of a contract and which has the agreement of both parties.

Therefore, the Arbitration Council found that, based on the above mentioned practice of the employer, it cannot be considered that the workers made written labour contract but they made an oral contract with the Company.

Article 67-7 of the Labour Law states: "A contract of fixed duration must be in writing. If not, it becomes a labour contract of undetermined duration."

Based on the above mentioned contract, the Arbitration Council considers the oral contact an undetermined duration contract.

B. Probationary period

In this case, the company accepted in the hearing that the 15 workers are ironers and fray trimmers, and **non-specialized workers**. However, the company indicated three-month probationary period in the column at the bottom of the application form.

Article 68 of the Labour Law provides: “A contract for 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**. “

Based on Article 68 mentioned above, the Arbitration Council sees that this type of employee should be considered in the group of workers with one month probationary period and the existence of the probationary period should be clearly written in the labour contract. The employer cannot use the application form, which is only a document for information about the workers and documents the intention of the workers to work, as a labour contract. Moreover, the company filled in the probationary period by itself without informing the workers. Thus it cannot be considered that the workers accepted the contract for a probationary period.

Therefore, the Arbitration Council found that the employer filled in the probationary period by itself without informing the workers about this probationary period, thus the 15 workers have a labour contract without a probationary period.

C. Termination

In this disputed case, the worker party demands that the Company reinstate the 15 workers. The worker party does not make any demand for indemnities provided by the Labour Law about termination of work.

In the hearing, the worker party recognized that the 15 workers are normal members of the union. Therefore, these workers cannot receive the legal protection regarding termination from work as stated in Article 293 of the Labour Law and the Prakas No. 305 dated 22 November 2001.

Article 74 of the Labour Law provides: “The labour contract of unspecified duration can be terminated at will be one of the contracting parties. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party. However, no layoff can be taken without a valid reason relating to the worker’s aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or group.”

According to the Article, termination is the cancellation of the labour contract and the cancellation of the contract can be done by only one party but the cancellation must be done by written notification in advance and it demands proper reason. Therefore, the Arbitration Council sees that the employer can terminate its workers if there is proper reason.

In the hearing, the company claimed that the 15 workers were terminated because:

1. The Company had examined and evaluated the workers from the day they commenced work to the termination day; the Company noticed that the workers were slow and could not meet the criteria and demands of the Company. 2) Ten workers were on their probationary period during which the Company can terminate them without providing reasons or reprimand. The other five workers were full-right workers. Yet, the Company can terminate them by giving them the indemnity as stated by the law.

The Arbitration Council found that, because in this disputed case the Company did not properly execute contracts, as mentioned in points A and B [above], the contract of the 15 workers are undetermined duration contracts. Therefore, in the Arbitration Council's view, the employer cannot terminate the 15 workers unless they committed serious misconduct as provided in Article 83 of the Labour Law and point 12 of the Company's Internal Work Rules or the company has a proper reason regarding the aptitude or behaviour of those workers or based on the necessity of the enterprise as provided in Article 74 of the Labour Law.

In this disputed case, the employer claims that the workers did not pay attention at work, their carelessness slowed production, and there was a decrease and interruption of production after the strike on 27-28 July 2006.

The Arbitration Council determines that if the workers did commit the above mentioned misconduct, the misconduct is not serious misconduct stated in Article 83 of the Labour Law and point 12 of the Company's Internal Work Rules. The Arbitration Council found that the above mentioned misconduct is only a disciplinary mistake.

In previous cases, the Arbitration Council determined that the employer cannot use disciplinary mistakes to terminate a worker immediately. The employer can terminate a worker because of discipline mistakes only when it has warned the workers many times but the worker does not change/improve that the disciplinary mistake becomes serious misconduct. (See award No. 76-05-Global Footwear)

In previous cases, the Arbitration Council found that the punishment by the employer must be in accordance to the company's internal work rules. (See award No. 70-04-Hana, 64-05-Chien Hwey).

In this case, the Arbitration Council found that, though the employer has the Internal Work Rules, the employer does not implement it properly in punishing workers who committed misconduct as provided in the Internal Work Rules.

The Internal Work Rules of the company dated 01 April 2003, point 12 mentions serious misconduct, medium misconduct, and light misconduct as follows:

Internal Work Rule Point 12 about Misconduct and Punishment

A. Serious Misconduct: The Management board has the right to terminate a worker immediately without reprimand in the following circumstances:

- 1. During the assignment, if a worker is involved in obtaining interest from an outside individual institute or organization which at the expenses of the Company. In this case, the worker will be terminated immediately and be responsible for the loss to the company.
- 2. If a worker divulges a company's secret to an outsider without agreement from the management board, the worker will be terminated immediately and be responsible for the loss to the company.
- 3. If a worker incites other workers not to work or to join in an illegal strike (see "Labour Law" of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation), the worker will be terminated immediately.
- 4. If a worker commits serious misconduct or seriously violates the Company's Internal Work Rules or any law of the country, the worker will be terminated immediately.
- 5. If a worker committed misconduct as stated in type one of annex "A".

B. Medium Misconduct: If worker committed misconduct as listed in type two of annex "A", he/she will receive a written reprimand. After being reprimanded two times, and if there is no improvement, the worker will be terminated.

C. Light Misconduct: If worker commits light misconduct, he/she will receive an oral reprimand. In case of continuation of the misconduct, it is considered medium misconduct.

In this disputed case, because the Arbitration Council understands that 1) the 15 workers did not commit serious misconduct as stated in Article 83 of the Labour Law, nor [as provided in] point 12 of the Company's Internal Work Rule on serious misconduct, 2) the Company has not issued a reprimand letter as stated in the Company's Internal Work Rules point 12 regarding serious misconduct, medium misconduct, and light misconduct, the Arbitration Council decided to order the Company to reinstate the 15 workers.

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

DECISION

- Order the company to reinstate the 15 workers and provide back-pay to the 15 workers counting from the day the company terminated the workers. The

reinstatement and back payment to the 15 workers have to be completed by the day this Award comes into effect.

Type of Award: Non binding

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: **Chhiv Phyrum**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: