



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 74/08-Generation

Date of Award: 7 July 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Ing Sothy**

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

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

DISPUTING PARTIES

Employer party:

Name: **Generation International Co. Ltd**

Address: Thnork Village, Tror Pang Korng Commune, Samrong Torng District, Kampong Speu Province

Telephone: 012 985 467

Fax: N/A

Representative:

- | | |
|---------------------|------------------------|
| 1. Kao Ping | General Manager |
| 2. Huon Liming | Head of Administration |
| 3. Mr. Tray Vichet | Interpreter |
| 4. Mr. Ly Mingkorng | Mechanic |
| 5. Mr. Chap Keo | Company Lawyer |
| 6. Mr. Thong Y | Witness |
| 7. Mr. Chhin Ling | Witness |
| 8. Mr. Orn Thoeurn | Witness |

Worker party:

Name: **Local Union of CLUF in Generation Company**

Address: Street 371, Troppang Chhouk, Sangkat Toeuk Thla, Khann Russey Keo, Phnom Penh

Telephone: 016 657 556

Fax: N/A

Representative:

- | | |
|-----------------------|--|
| 1. Mr. Leang Sunheang | Vice-president of CLUF |
| 2. Mr. Khin Sokhorn | General Secretary of CLUF |
| 3. Mr. Chey Sovann | Officer of CLUF |
| 4. Mr. Nov Phorn | President of local union of CLUF at Generation Factory |
| 5. Mr. Khon Phalla | Vice-president of local union of CLUF at Generation
Factory |
| 6. Mr. Liv Sarath | Secretary of local union of CLUF at Generation Factory |
| 7. Mr. Nov Chantha | Treasurer of local union of CLUF at Generation Factory |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The workers demand that the Company reinstate 4 union leaders dismissed on 24 April 2008 :
 - Nov Phorn, male, ID: 3537, electrician, president of the local union
 - Khon Phalla, male, ID 3845, electrician, vice-president of the local union
 - Liv Sarath, male, ID 5631, mechanic, secretariat of the local union
 - Nov Chantha, male, ID 661, mechanic, accountant of the local union
- 2- The workers demand that the Company implement voluntary overtime work.
- 3- The workers demand that the Company prepare clean and hygienic food.
- 4- The workers demand that the Company ensure the card punch-in/out system functions properly. If a worker is present at work and punched in but the system does not record it, the Company should not deduct their wage.
- 5- The workers demand that the Company allow female pregnant workers to come to work 15 minutes late and to leave 15 minutes early. In addition, the Company should allow them to take one day of leave per month to have medical checks and maintain their wages and bonus.
- 6- The workers demand that the Company allow one hour per day for female workers who have a small baby to breastfeed by dividing it into two parts, half an hour in the afternoon and another half in the evening.
- 7- The workers demand that the Company make it easier for them to ask for leave for personal commitments.
- 8- The workers demand that the Company calculate their wage according to the Labour Law and labour regulations.
- 9- The workers demand that the Company make a detailed pay slip in Khmer, which is easy to understand.

- 10- The workers demand that the Company reimburse 12,100 riels for medical check fees which the Company required them to have at the Department of Labour.
- 11- The workers demand that when a worker takes sick leave with an official certificate from a public hospital, the Company should maintain their wages and perquisites and pay all the treatment expenses.
- 12- The workers demand that the Company provide bonuses to the workers in the warehouse section who load goods into container trucks.
- 13- If the Company does not include the perquisites in the basic wage when calculating overtime wage, then the Company should not include perquisites in the basic wage when calculating the amount of deduction when workers take leave or are absent from work.
- 14- The workers demand that the Company should repair the building(s) where workers stay as well as the electricity, water systems, doors, and windows.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labor Law (1997); the Prakas on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators No. 076 dated 10 May 2007 (Fifth Term).

An attempt was made to conciliate the collective dispute that is the subject of this Award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and the non-conciliation report No. 410 KBV/KSp, dated 22 May 2008 was submitted to the Secretariat of the Arbitration Council on 27 May 2008.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing:

- First hearing: 6 June 2008 (from 2:00 p.m. to 5:45 p.m.)
- Second hearing: 11 June 2008 (from 2:00 p.m. to 5:00 p.m.)

Procedural issues:

On 20 May 2008 there was a strike at Generation Company to demand that the Company reinstate four workers who were terminated on 24 April 2008 and [in relation to] another thirteen demands. The Department of Labour and Vocational Training in Kampong Speu Province conducted a conciliation on the 14 issues on 21 May 2008 but was unable to

conciliate the issues. The 14 non-conciliation issues were forwarded to the Secretariat of the Arbitration Council on 27 May 2008.

After receiving the case, the Secretariat of the Arbitration Council invited the employer party and the worker party to the hearing and conciliation on the 14 issues on 6 and 11 of June 2008 at 2:00 p.m. Both parties were present as invited by the Arbitration Council.

On both hearing dates, the Arbitration Council attempted to conciliate the 14 non-conciliation issues in the non-conciliation report; 12 issues were conciliated and two other issues remained unresolved. The issues conciliated were: issues 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14. The two non-conciliated issues were issues 1 and 13. Therefore, in this case the Arbitration Council will consider only issue 1 and issue 13 based on the evidence and clarification of the parties in the hearing as follows:

EVIDENCE

Witnesses:

1. Employer's witnesses:

- | | |
|--------------------|------------------------|
| 1. Huon Liming | Head of Administration |
| 2. Mr. Thong Y | Head of mechanic |
| 3. Mr. Orn Thoeurn | Worker |
| 4. Mr. Tray Vichet | Interpreter |

2. Workers' witness:

- | | |
|-------------------|----------|
| - Mr. Khon Phalla | Mechanic |
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Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Certificate of commercial registration of Generation International Company, No. 1010 PN. NTK, dated 10 April 2006;
2. Statute of Generation International Company, dated 27 March 2006;
3. Internal Work Rules of Generation International Company, No. 172 KBV/KSp, dated 24 April 2007;
4. Minutes of individual dispute conciliation between the Company with Mr. Nov Phorn, dated 30 April 2008;
5. Minutes of individual dispute conciliation between the Company with Mr. Liv Sarorth, dated 30 April 2008;
6. Minutes of individual dispute conciliation between the Company with Mr. Nov Chantha, dated 30 April 2008;

7. Minutes of individual dispute conciliation between the Company with Mr. Khon Phalla, dated 30 April 2008;
8. Summary statement of dispute at Generation International Company, dated 04 June 2008;
9. Letter by Generation International Company to the chief of the Department of Labour and Vocational Training of Kampong Speu Province, regarding a request for termination of four workers: Nov Phorn, Khon Phalla, Liv Sarath and Nov Chantha, dated 24 April 2008.
10. Witnesses statement on the case of Mr. Nov Chantha, dated 24 April 2008;
11. Warning letter to Nov Chantha, dated 13 November 2007;
12. Witness statement on the case of Mr. Liv Sarath, dated 24 April 2008;
13. Warning letter to Liv Sarath, dated 13 November 2007;
14. Employment contract of Nov Phorn, dated 03 March 2008;
15. Announcement by Generation International Company, dated 03 April 2008;
16. Brief biography of Nov Phorn, Khon Phalla, Liv Sarath, and Nov Chantha.

Provided by the worker party:

1. Letter by CLUF No. 2038 SSKK, regarding notification about union election at Generation International Company, dated 22 April 2008;
2. Slip by the Department of Labour Dispute of the Ministry of Labour and Vocational Training confirming receipt of application for registration of the local union of CLUF at Generation International Factory, dated 6 June 2008;
3. Letter by workers at Generation International Factory regarding notification for non-violent strike or demonstration, dated 25 April 2008;
4. Letter by workers at Generation International Factory regarding notification for non-violent strike or demonstration, dated 20 May 2008;

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

1. Report of the collective labour dispute at Generation International Company, No. 410 KBV/KSp, dated 22 May 2008;
2. Minutes of collective dispute conciliation, dated 21 May 2008;

Provided by the Secretariat of the Arbitration Council:

1. Letter No. 360 KBV/AK/VK/LKA, dated 2 June 2008 to invite the employer party to attend the first hearing.
2. Letter No. 361 KBV/AK/VK/LKA, dated 2 June 2008 to invite the worker party to attend the first hearing.

3. Letter No. 380 KBV/AK/VK/LKA, dated 9 June 2008 to invite the employer party to attend the second hearing.
4. Letter No. 381 KBV/AK/VK/LKA, dated 9 June 2008 to invite the worker party to attend the second hearing.

FACTS

- Having examined documents submitted to the Arbitration Council
- Having reviewed the report of the collective labour dispute conciliation
- Having listened to statements by the worker party and the employer party

The Arbitration Council finds that:

- Generation factory employs a total of approximately 2,500 workers.
- The local union of CLUF at Generation factory is the complainant in this case.
- The union has approximately 100 workers as its members. However, the union does not have a certificate of union registration yet. The Arbitration Council ordered the union to submit an authorization letter from workers who are making the demand to the Arbitration Council on 16 June 2008. However, by the deadline, the union did not submit the letter.
- According to the union, it held an election on 20 April 2008. The union notified the Company about the result of the election on 23 April 2008 but Mr. Ly Ming, who was the representative of the Company, did not agree to accept the letter.
- The union received a slip [from the Ministry of Labour and Vocational Training] confirming receipt of application for union registration on 6 June 2008.
- The Ministry of Labour and Vocational Training required the union to show up at the Ministry to discuss the union registration on 17 June 2008.
- Mr. Ly Ming, the head of administration, was present at the hearing and said if the union had evidence that he did not accept the letter, the union should prove it. He mentioned that the termination of the four workers was relevant to their misconduct, not to the union.
- The Company made a request to terminate the four workers to the Department of Labour and Vocational Training in Kampong Speu Province on 24 April 2008. However, as of the hearing date, the Company had not received an answer from the Department of Labour and Vocational Training of Kampong Speu Province. The Company did not make an appeal to the Minister of Labour and Vocational Training.

- According to the employer party, when terminating workers in the past the Company never asked the Department of Labour and Vocational Training of Kampong Speu Province.

Issue 1: The workers demand that the Company reinstate four union leaders who were terminated on 24 April 2008

- The Company wrote a letter requesting termination of the four workers to the Department of Labour and Vocational Training of Kampong Speu Province on 24 April 2008. However, as of the hearing date, there had been no response from the Department. The Company has not made any appeal to the Minister of Labour and Vocational Training.
- According to the Company, when terminating workers in the past the Company never made a request to the Department of Labour and Vocational Training of Kampong Speu Province.
- The Arbitration Council received documents dated 22 April 2008, 25 April 2008, and 7 May 2008 from the worker party which indicates the names of the four elected leaders of the union and their termination from work. The four elected union leaders are:
 1. Nov Phorn, male, ID 3537, mechanic, the president of the union
 2. Khon Phalla, make, ID 3845, mechanic, the vice-president of the union
 3. Liv Sarath, male, ID 5631, mechanic, the secretary of the union
 4. Nov Chantha, male, ID 661, mechanic, the treasurer of the union

Case of Mr. Nov Phorn

Based on the Company's clarification in the hearing and documents it submitted, the Arbitration Council finds as follows:

- Mr. Nov Phorn commenced employment with the Company on 29 September 2006 on an undetermined duration contract. He received a wage of US\$ 80 per month and a skill bonus of US\$ 20 per month. The average of total wage he received per month was between US\$ 100-170.
- He was terminated on 24 April 2008 without prior notification as the Company alleged that he committed serious misconduct in violation of the Internal Work Rules and the Labour Law. The misconduct is:
 - **First misconduct:** occurred on 3 March 2008; he collected contributions for a ceremony during working hours. Mr. Nov Phorn confessed that he made the mistake and signed to acknowledge it. The Arbitration Council received a document in relation to the acknowledgement of Mr. Nov Phorn regarding this misconduct.

- **Second misconduct:** occurred on 21 April 2008; Mr. Nov Phorn did not follow the company's assignment. However, Mr. Nov Phorn does not accept this because he did not know about it. In the hearing the Company stated that Mr. Nov Phorn committed misconduct on 21 April 2008 at 3:30 p.m. because he argued against the assignment directed by the Company telling him to move his work from the waterflow section to work in the cutting section; the Company told this to him in the sample room. All witnesses of the employer said that Mr. Nov Phorn went to the sample room on 21 April 2008 at 3:30 p.m. and argued against the Company's assignment from the waterflow section to the cutting section. Mr. Nov Phorn's witness, Mr. Khon Phalla, who was also terminated from work, stated that on 21 April 2008 at 3:30 p.m. he went with Mr. Nov Phorn to fix a machine in the waterflow section. He did not have any other evidence. The Arbitration Council asked the Company's witnesses to draw a map of each person's location in the sample room. All witnesses drew similar pictures.
- **Third misconduct:** happened on 24 April 2008; Mr. Nov Phorn did not follow the Company's assignment to move from the waterflow section to the cutting section. Mr. Nov Phorn accepted this mistake.
 - According to the clarification in the hearing, the Company did not issue a warning letter in writing to Mr. Nov Phorn for his second and third acts of misconduct.
 - The Company stated that Mr. Nov Phorn violated Article 83B(3) of the Labour Law regarding serious misconduct of workers and Clause 2 of Chapter 3 and Clause 1-6-8 of Chapter 5 of the Company's Internal Work Rules.
 - The Company filed an application to terminate Mr. Nov Phorn, together with three other workers in this dispute, to the Department of Labour and Vocational Training of Kampong Speu on 24 April 2008.
 - As of the hearing date and the issuance of the Arbitral Award date, the Department of Labour and Vocational Training of Kampong Speu Province had not responded to the Company's letter and the Company has not filed any objections to the lack of response by the Department to the Ministry of Labour according to legal procedure.
 - Mr. Nov Phorn and the three other workers terminated by the Company have been outside of the Company since 24 April 2008.

Case of Mr. Nov Chantha

Based on the Company's clarification in the hearing and documents the Company submitted, the Arbitration Council finds as follows:

- Mr. Nov Chantha commenced his employment with the Company on 19 June 2006 on an undetermined duration contract. He received a wage of US\$ 80 per month and a skill bonus of US\$ 20 per month. The average total wage he received per month was between US\$ 100-170.
- He was terminated on 24 April 2008 without prior notification as the Company maintained he committed serious misconduct which violated the Internal Work Rules and the Labour Law. The misconduct is:
 - **First misconduct:** happened on 12 December 2007 at 3:45 p.m.; Mr. Nov Chantha left work early. He confessed that he made the mistake and signed to acknowledge it. The Arbitration Council received a document in relation to the warning to Mr. Nov Chantha on this misconduct.
 - **Second misconduct:** happened on 24 April 2008 because Mr. Nov Chantha was threatening and used improper behaviour towards the General Director. However, Mr. Nov Chantha did not accept the accusation. The Company's witnesses who were present in the hearing mentioned that they did not witness the incident with their own eyes because it was over when they arrived; they observed Mr. Nov Chantha was sitting and speaking while the General Director was standing and talking. Mr. Nov Chantha said that he was sitting and talking because it was during working hours.
- According to the clarification in the hearing, the Company did not issue a warning letter in writing to Mr. Nov Chantha for his second misconduct.
- The Company stated that Mr. Nov Chantha violated Article 83B(3) of the Labour Law regarding serious misconduct of workers and Clause 1-2 of Chapter 6 of the Company's Internal Work Rules.
- The Company filed an application to terminate Mr. Nov Chantha, together with three other workers in this dispute to the Department of Labour and Vocational Training of Kampong Speu on 24 April 2008.
- As at the hearing date and the date for issuance of the Arbitral Award, the Department of Labour and Vocational Training of Kampong Speu Province had not responded to the Company's letter and the Company has not filed any objection to the lack of response by the Department to the Ministry of Labour according to legal procedure.
- Mr. Nov Chantha and three other workers terminated by the Company have been outside of the Company since 24 April 2008.

Case of Mr. Liv Sarath

Based on the clarification in the hearing and documents the Company submitted, the Arbitration Council finds as follows:

- Mr. Liv Sarath commenced his employment with the Company on 6 June 2007 on an undetermined duration contract. He received a wage of US\$ 80 per month and a skill bonus of US\$ 20 per month. The average total wage he received per month was between US\$ 100-170.
- He was terminated on 24 April 2008 without prior notification as the Company maintained he committed serious misconduct in violation of the Internal Work Rules and the Labour Law. The misconduct is:
 - **First misconduct:** happened on 12 December 2007 at 3:45 p.m.; Mr. Liv Sarath left work early. He confessed that he made the mistake and signed to acknowledge it.
 - **Second misconduct:** happened on 24 April 2008; Mr. Liv Sarath was threatening and used improper behaviour toward the General Director. Mr. Liv Sarath accepted that he did it because the Director looked down on Cambodian labourers and used her finger to point at his head. He said, "... [Just because] I'm working for you does not mean I sell my soul to you...". The Arbitration Council received document(s) in relation to the incident on 24 April 2008.
- According to the clarification in the hearing, the Company did not issue a warning letter in writing to Mr. Liv Sarath for his second misconduct.
- The Company stated that Mr. Liv Sarath violated Article 83B(4) of the Labour Law regarding serious misconduct of workers and Clause 1-6-8 of Chapter 5 and Clause 6-2 of Chapter 6 of the Company's Internal Work Rules.
- The Company filed an application to terminate Mr. Liv Sarath, together with three other workers in this dispute to the Department of Labour and Vocational Training of Kampong Speu on 24 April 2008.
- As at the hearing date and the date for issuance of the Arbitral Award, the Department of Labour and Vocational Training of Kampong Speu Province has not responded to the Company's letter and the Company has not filed any objection to the lack of response by the Department to the Ministry of Labour according to legal procedure.
- Mr. Liv Sarath and the three other workers terminated by the Company have been outside of the Company since 24 April 2008.

Case of Mr. Khon Phalla

Based on the clarification in the hearing and documents the Company submitted, the Arbitration Council finds as follows:

- Mr. Khon Phalla commenced employment with the Company on 10 October 2006 on an undetermined duration contract. He received a wage of US\$ 80 per month and a skill bonus of US\$ 20 per month. The average total wage he received per month was between US\$ 100-170.
- He was terminated on 24 April 2008 without prior notification as the Company maintained he committed serious misconduct in violation of the the Internal Work Rules and the Labour Law. Those misconducts are:
 - **First misconduct:** happened on 14 February 2008; he played games on his mobile phone. Khon Phalla confessed that he made the mistake. The Arbitration Council received documents related to this incident.
 - **Second misconduct:** happened on 17 April 2008.
 - **Third misconduct:** happened on 24 April 2008; Mr. Khon Phalla did not follow the Company's assignment. Mr. Khon Phalla accepted the incident. The Arbitration Council received documents related to this incident.
- According to the clarification in the hearing, the Company did not issue a warning letter in writing to Mr. Khon Phalla for his misconduct.
- The Company stated that Mr. Khon Phalla violated Article 83B(3) of the Labour Law regarding serious misconduct of workers and Clause 6-7 of Chapter 5 and Clause 1-10 of Chapter 6 of the Company's Internal Work Rules.
- The Company filed an application to terminate Mr. Khon Phalla, together with three other workers in this dispute to the Department of Labour and Vocational Training of Kampong Speu on 24 April 2008.
- As at the hearing date and the date for issuance of the Arbitral Award, the Department of Labour and Vocational Training of Kampong Speu Province had not responded to the Company's letter and the Company had not filed any objection to the lack of response by the Department to the Ministry of Labour according to legal procedure.
- Mr. Liv Sarath and the three other workers terminated by the Company have been outside of the Company since 24 April 2008.
- Representatives of the Federation who were present at the hearing alleged that the termination was due to union discrimination because the workers' misconduct was not proportional to termination, according to Article 27 of the Labour Law. The termination was after the union election and the union had already notified the Company on 23 April 2008.

- The Company stated that the termination is not related to the union but to the misconduct stated in the Labour Law and the Company's Internal Workes Rules.
- The Company states that in general, when terminating workers the Company never makes a request to the Department of Labour and Vocational Training but because it is a termination of many workers, this time the Company filed a request to the Ministry of Labour and Vocational Training of Kampong Speu Province.

Issue 13: The workers demand that the Company include a worker's skill bonus when calculating [the rate of pay for] overtime work; like it does when calculating [the amount to be deducted] when workers are absent from work

- The worker party and the employer party stated that the Company pays skill bonuses to each worker based on the skill and work experience of each worker; they range from US\$ 10 to US\$ 50. This means that some workers receive US\$ 10, US\$ 20, US\$ 30, US\$ 40, and US\$ 50.
- The workers mentioned that when workers were absent the Company deducted their wages by taking the skill bonus adding it to their wage then dividing by 26; then it subtracted that amount from the number of days workers were absent. The workers gave an example that if a worker earned US\$ 80 per month and she received a US\$ 20 skill bonus and she was absent for two days, the Company would calculate [the amount to be deducted] by adding US\$ 80 to US\$ 20, dividing by 26 days and multiplying by 2; after that taking the total amount to subtract from the total amount of money for the days the worker was absent. However, when workers work overtime, the Company calculated the overtime work by taking the worker's wage, dividing by 26 and then dividing by 8 hours to find the hourly wage and then multiplying it by the number of hours the workers worked. The workers gave an example that if a worker work for 10 hours, the Company would calculate by taking US\$ 80, dividing by 26 days and then dividing by 8 and then multiplying by 10 hours.
- The workers considered the Company's calculation in this way is not correct because it is unfair. Therefore, the workers requested that the Company calculate their overtime payment in the same way that the Company calculated [their wage] when they were absent.
- The Company did not agree because it considered this amount of money as an incentive bonus. Therefore, if workers were absent and did not work, the Company should calculate in this way. The Company requested the Arbitration Council to consider on this matter.
- There has been no agreement on this issue.

REASONS FOR DECISION**Issue 1: The workers demand that the Company reinstate 4 union leaders who were terminated on 24 April 2008**

In this case, the Arbitration Council will consider whether the four workers are protected by the law and whether the employer followed the Labour Law procedures when terminating the workers.

1. Are the four workers protected?

Paragraph 3, Clause 3 of Prakas 305 SKBY, dated 22 November 2001 states, " *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.*"

In addition, Clause 4 of Prakas 305 SKBY, dated 22 November 2001 provides this protection to all employees that are union founders or all employees that voluntarily joined the membership. This protection lasts for 30 days after the date of union registration. In order to receive this protection, the union shall notify the employer of the names of people receiving protection by official means. A copy of this information shall be sent to the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation.

Based on the content of the above mentioned provision, the Arbitration Council considers that candidates for election as union leaders and members who join the union at the union registration stage are protected from employment termination after the employer learns about their candidacy or their membership.

In previous Arbitral Awards, the Arbitration Council held that in order to receive protection, the worker should fulfill "three conditions includes, (1) the worker is the type of workers stated in Prakas 305, (2) the termination is made within the special protection period and (3) the union has notified the employer of the employees entitled to special protection through all reliable means. (See Arbitral Awards 50/05-Fortune, Issue1; 64/05-Chian Hwey, Issue 1; 07/06 – Dai Young, Issue I; 09/06 – Grand Diamond City, Issue 1; and 148/07-Pay Her).

In this case, the Arbitration Council agrees with the decision above that workers can receive [special] protection as long as they can fulfill the three conditions mentioned above. Therefore, in this case, the Arbitration Council considers whether the four terminated workers have fulfilled the three conditions.

1st Condition: the worker is the type of worker stated in Prakas 305

Based on the above mentioned finding of facts, the Arbitration Council finds that Mr. Nov Phorn, ID 3537 is an electrician and president of the local union; Mr. Khon Phalla, male, ID 384 is an electrician and vice-president of the local union; and Mr. Liv Sarath, male, ID

5631, is a mechanic and secretary of the local union. Therefore, they are workers who are protected according to Paragraph 3, Clause 3 of Prakas 305 SKBY, dated 22 November 2001 because they are candidates for union leader election.

Based on the above mentioned facts, the Arbitration Council found that Mr. Nov Chantha, male, ID 661 is mechanic and treasurer of the union. Thus, he is a worker protected by paragraph 1, Clause 4 of Prakas 305 SKBY, dated 22 November 2001 because he is a founder of the union who volunteered to join the union.

Therefore, the Arbitration Council considers that the four workers fulfilled the first condition.

Condition 2: the termination is made within the special protection period

Based on the above mentioned facts, the Arbitration Council finds that the union held an election on 20 April 2008 and the four workers were terminated on 24 April 2008. Thus, the Arbitration Council considers that the four workers were terminated during the period they received protection based on the content of paragraph 3, Clause 3 and paragraph 1, Clause 4 of Prakas 305 SKBY, dated 22 November 2001 because the three candidates were elected as union leaders and received protection from termination for 45 days before election days and for 45 days after the election. For Mr. Nov Chantha who is a union founder or a volunteer to become union member during registration period, he received protection from termination up to 30 days after the date of union registration.

In conclusion, the Arbitration Council considers that the four workers fulfill the second condition.

Condition 3: the union has notified the employer of the employees entitled to special protection through all reliable means.

Based on the above findings of fact, the Arbitration Council considers that the workers notified the employer about the candidates elected on 23 April 2008 but the employer did not agree to accept it. The employer party, on the other hand, denied receipt of the notification letter. However, when asked what the Company's practice in terminating its workers in the past was, the Company responded that it's [practice was to] issue the termination letter right away. But in this case, the Arbitration Council found that the employer had filed a request to terminate the four workers to the Department of Labour and Vocational Training of Kampong Speu Province on 24 April 2008. In the hearing, the Arbitration Council asked the Company why in this case the Company filed a request to terminate the four workers to the Department of Labour and Vocational Training of Kampong Speu Province. The Company stated that it was because the termination involved too many workers. Based on the clarification, the Arbitration Council concluded that the employer knew that the four workers were protected by the law. That was the reason why the Company filed a request to

terminate the four workers to the Department of Labour and Vocational Training of Kampong Speu Province.

Therefore, the Arbitration Council considers that the union was notified about the members of the union leadership according to paragraph 3, Clause 3 and Paragraph 2, Clause 4 of Prakas 305 SKBY, dated 22 November 2001. The refusal to accept the letter is not a reason for lack of knowledge about the members of the union leadership.

In conclusion, the Arbitration Council considers that the four workers fulfilled the third condition.

2. Did the employer follow the Labour Law procedures in terminating the workers

Article 293 of the Labour Law states, *“The dismissal of a steward or a candidate for steward can take place only after authorization from the Labor Inspector. The same procedure applies to former stewards during the three months that follow the end of their terms, as well as to the losing candidates within the three months following the proclamation of the results of the ballot. Any reassignment or transfer that would end the shop steward’s term is subject to the same procedure.*

The Labor Inspector, who has been referred a request to authorise the dismissal of a worker covered by the present article, shall give his decision to the employer and to the worker in question as well as to the union organization to which the worker belongs, within one month at the latest upon receipt of the case.

On receipt of the decision, the employer, the worker in question, or the union organization to which he belongs has a period of two months to appeal to the Minister in charge of Labour. The Minister in charge of Labour can cancel or reverse the decision of the Labour Inspector.

If there is no notification of the Labour Inspector’s decision within the allotted time, or if there is no notification or the decision of the Minister in charge of Labour within two months upon receipt of the appeal, the case and the appeal are considered to be rejected.”

Based on the content of Article 293 of the Labour Law as mentioned above, the Arbitration Council considers that [in order to] terminate workers who [are entitled to] receive [special] protection, the employer should have permission from the Labour Inspector and the Minister in charge of Labour. This means that the Labour Inspector who has been referred a request to authorise the dismissal of a worker covered by the present article should give their decision to the employer, to the workers who were terminated and to the union organization, whom the worker is a member of, within one month at the latest after receiving the request. In this case, the employer party filed a request to the Department of Labour and Vocational Training of Kampong Speu Province on 24 April 2008. From 24 April 2008 to the date of this Arbitral Award, 30 days has passed.

Thus, based on the content of Article 293 of the Labour Law above, the Arbitration Council considers that the Department of Labour and Vocational Training of Kampong Speu Province has rejected the requested for termination of the four workers since 24 May 2008. Thus, the employer party has two months time to make an appeal to the Minister in charge of Labour from 24 May 2008. In this case, the employer did not make an appeal to the Minister in charge of Labour but decided to terminate the four workers before the decision of the Minister.

Therefore, the Arbitration Council considers that the termination of the four workers is not in accordance with legal procedure.

In a nut shell, the Arbitration Council decides to order the employer to reinstate the four workers from 24 April 2008, the date when the Company terminated the four workers in order pending any decision from the Minister in charge of Labour.

This means that the decision to terminate the four workers is under the authority of the Minister in charge of Labour but not of the Arbitration Council.

Issue 13: The workers demand that the Company include a worker's skill bonus when calculating [the rate of pay for] overtime work; like it does when calculating [the amount to be deducted] when workers are absent from work

In this case, the workers requested that the Company calculate their overtime payment in the same way it does when calculating their wage when they are absent. Thus, the Arbitration Council considers this issue as follows:

The new amendment of Article 139 of the Labour Law, dated 20 July 2007 states, *"In case of special urgency which requires workers to work overtime other than the usual working hours, the overtime hours shall be paid at an increased rate of 50% (fifty percent)..."*

Based on the content of the new Article 139, the Arbitration Council considers that the Labour Law does not clearly state whether the calculation of overtime payment is based on main wage (minimum wage). Therefore, the Arbitration Council will consider the meaning of wage in this Article.

Clause 5 of Prakas 80 SKBY, dated 01 March 1999 on Overtime Work Outside of Normal Working Hours states, *"An owner or director of an establishment/enterprise shall pay overtime workers as follows:*

- a) *an amount equal to 150 percent (one hundred and fifty percent) of the payment of normal working hours for the overtime work performed during the daytime of the normal working days..."*

Based on the content of Clause 5 of Prakas 80 SKBY, dated 01 March 1999, the Arbitration Council considers that this Prakas does not clearly determine about the calculation of wage during overtime work and whether it is based on main wage (minimum wage). In conclusion, the Arbitration Council considers that the contents of the new Article

139 of the Labour Law and Clause 5 of Prakas 80 SKBY, dated 01 March 1999 on Overtime Work Outside of Normal Working Hours as mentioned above do not provide a clear definition to the term **“payment during normal working hours”**. Thus, the Arbitration Council will consider the meaning of the term “payment during normal working hours” and whether the **“payment during normal working hours”** includes a skill bonus or function bonus.

The Khmer Dictionary of venerable Chuon Nath, page 476, defines the word “normal” as “regular or something which has happened as a custom”. Thus the term **“payment during normal working hours”** means **“wage workers received regularly when they work on normal working days”**.

In this case, when the employer finds that a workers’ skill has reached a level [that they are entitled] to receive a monthly skill bonus, the workers will receive the bonus regularly every month. This means that it does not depend on good or bad performance of the workers in a specific month or the achievement of a target set by the Company in a month. The workers expect that they will receive this amount of money every month and consider it as part of the package of benefits they are entitled to regularly when they work for the employer.

Based on the above mentioned interpretation, the Arbitration Council considers that the skill bonus or function bonus the workers receive when they work normally is a part of their wage during normal working hours. Thus, the Arbitration Council considers that the skill bonus or function bonus the workers receive during normal working hours is a part of [the worker’s] wage which the employer should include when calculating the overtime payment for workers.

Moreover, during overtime work the workers who are skillful/functional also use their skill or function to perform their work for the employer just like when they are working during normal hours. Therefore, they are entitled to payment like they are working during normal hours.

In addition, the Arbitration Council notes that in this case the employer calculates overtime payment based on [a worker’s] main wage. This means that if a worker receives [a main wage of] US\$ 80 and a skill bonus of US\$ 20 then works overtime for 10 hours, the Company calculates the payment by taking US\$ 80, the main wage, dividing it by 26 and dividing by 8 hours of work and multiplying by 10 hours of overtime work.

To the contrary, if workers are absent from work, the employer deducts their wage from their main wage plus their skill bonus. This means that if a worker receives a main wage of US\$ 80 and a skill bonus of US\$ 20 and they work overtime for 10 hours, the Company calculates this by taking US\$ 80 plus US\$ 20 then divides by 26 days then divides by 8 working hours then multiplies by 10 hours of overtime work.

In relation to the above mentioned calculation of the employer, the Arbitration Council considers that the practice is not in accordance with the principle of equity. This means that the method of calculation of overtime payment and payment when workers are absent from work should follow the same formula because during overtime hours workers who have skill/function use their skill or function to perform work for the employer as [they do when working] normal working hours.

Based on the interpretation above, the Arbitration Council considers that the calculation of overtime payment for workers in Generation Company is not correct. In conclusion, the employer should calculate overtime payment by using the same formula as when the workers are absent from work.

However, in this case the CLUF at Generation International factory is not registered nor it has an authorization letter from other workers. Therefore, the Arbitration Council will consider whether the union is entitled to make a demand on issue 13 on behalf of its members.

Article 268, paragraph 1, of the Labour Law states, *"In order for their professional organization to enjoy the rights and benefits recognised by this law, the founders of those professional organisation must file their statutes and list of names of those responsible for management and administration, with the Ministry in charge of Labour for registration. All request for registration shall be appended with the statement of constitution of the organisation."*

The Arbitration Council also consider that these rights and benefits include the union's right to represent its members to resolve a dispute at the Arbitration Council. (See Arbitral Awards 62/06-Quick Sew, Issue 2; 49/07-Genuine, Issue 1 and 31/08-South Bay, Issue 1). This means that in this case the union does not have a legal right to bring a dispute on behalf of its members to the Arbitration Council.

However, Clause 19 of Prakas 099 KSBY, dated 21 April 2004 on the Arbitration Council allows for a person who is not a party in dispute [but] who is authorized in writing by a party in dispute to represent them to resolve a dispute at the Arbitration Council. This clause means that even though the union does not have union registration, the union can represent a party in dispute to settle a dispute at the Arbitration Council as long as the union is authorized in writing by workers who are making the demand.

The Arbitration Council requested the worker party to provide evidence to support its demand by 16 June 2008. The worker party promised to provide evidence or documents such as the name list of workers who are the union members (with signature or thumbprint) who authorized the union to represent them to settle their dispute at the Arbitration Council as a basis for decision. However, the union party did not provide any evidence in relation to the above mentioned authorization letter to the Arbitration Council by the deadline.

Hence, the Arbitration Council decides that the worker party who is the claimant is not eligible to represent its members. Therefore, the Arbitration Council considers that the union can only resolve this dispute for the four workers who are the claimants in this dispute.

Therefore, the Arbitration Council decides that the employer should provide overtime work payment to four workers - Nov Phorn, Khon Phalla, Liv Sarath and Nov Chantha - based on their main wage plus their skill/function bonus.

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

DECISION

Issue 1: Order the employer to reinstate the four workers from 24 April 2008 when the Company terminated the four workers pending any decision by the Minister in charge of Labour.

issue 13: Order the employer to provide payment to Nov Phorn, Khon Phalla, Liv Sarath, and Nov Chantha when they work overtime by calculating based on actual wage (main wage plus skill/function bonus) like the Company used to calculate when workers are absent.

Type of Award: Non binding awards

This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition to the Minister of Labour through the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: