



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

**ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល**

**THE ARBITRATION COUNCIL**

**Case number and name: 75/07 - GDM**

**Date of Award: 4 September 2007**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRATION PANEL**

Arbitrator chosen by the employer party: **Seng Vuochhun**

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

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

#### **DISPUTING PARTIES**

##### **Employer party:**

Name: **GDM Cambodia Branch**

Address: National Road No. 5, Sangkat Russey Keo, Khan Russey Keo, Phnom Penh

Telephone: 023 430 256 Fax: N/A

Representatives:

1. Siem Sovannarith Liaison Officer;
2. Taing Meng Administrative Manager.

##### **Worker party:**

Name: **Khmer Youth Federation Trade Union (KYFTU) and Khmer Youth Trade Union (KYTU) at GDM Cambodia Branch**

Address: National Road No. 5, Sangkat Russey Keo, Khan Russey Keo, Phnom Penh

Telephone: 012 796 007 Fax: N/A

Representatives:

1. Norin Thirayuk Coordinator of KYFTU;
2. Prum Chanarin Coordinator of KYFTU;
3. Markh Sarith Secretary of KYTU;
4. Chhan Pisith President of KYTU at GDM Cambodia Branch;
5. Keut Romdoul Vice-President of KYTU at GDM Cambodia Branch.

## ISSUE IN DISPUTE

(In the Non-Conciliation Report)

1. Mr. Chhan Pisith, the President of Khmer Youth Trade Union at the company demanded that the company reinstate him. The company party claimed that Mr. Chhan Pisith could not be reinstated because he was [under a] two month probationary period. The company did not discriminate against the union leaders.

### 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 hearing which took place on 13 August was unsuccessful, and the non-conciliation report No. 802 was submitted to the Secretariat of the Arbitration Council on 14 August 2007.*

### HEARING AND SUMMARY OF PROCEDURE

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

**Date of hearing:** 20 August 2007 (from 2:00 p.m. to 5:00 p.m.)

**Procedural issues:**

On 6 July 2007 the Department of Labour Disputes was contacted by telephone by the workers, who made a complaint that the company improve working conditions. The Department designated its expert official to settle and conciliate the dispute. As a result, ten out of a total of eleven issues were successfully conciliated on 25 July 2007. The non-conciliated issue was submitted to the Arbitration Council on 13 August 2007 through the non-conciliation report No. 801 dated 13 August 2007.

Having received the case, the Arbitration Council summoned the two disputing parties to attend a hearing to settle the non-conciliated issue on 20 August 2007 at 2:00 p.m.

Both parties were present at the hearing summoned by the Arbitration Council. The Arbitration Council made a further attempt to find out more information related to the dispute and to conciliate the non-conciliated issue, but the issue remained unresolved. Therefore, the Arbitration Council will consider and resolve the non-conciliated issues 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:

1. Minutes of an agreement dated 4 December 2006;
2. Mr. Chhan Pisith's resume;
3. Invitation to conciliate the dispute from the Department of Labour Disputes dated 25 July 2007;
4. Announcement about the launch of the enterprise dated 26 October 2006;
5. Minutes of the collective labour dispute conciliation dated 25 July 2007;
6. Visa application of Internal Work Rules of the company dated 26 October 2007;
7. Internal Work Rules of GDM Enterprise Co. Ltd. dated 26 October 2007;
8. Announcement of the Minister of Industry, Mines and Energy dated 10 November 2006;
9. Report of the Laundry Unit regarding probationary workers;

#### Provided by the worker party:

1. Notification of the candidates for election as leaders of the Khmer Youth Trade Union at GDM Branch dated 1 July 2007;
2. Minutes of the election of Committee Members of the Khmer Youth Trade Union at GDM Cambodia Branch Company dated 2 July 2007;
3. Notification of the election of Committee Members of the Khmer Youth Trade Union at GDM Company dated 4 July 2007.

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

1. Report No. 802 on the collective labour dispute conciliation dated 13 August 2007;
2. Minutes of the collective labour dispute conciliation dated 25 August 2007.

#### Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 344 dated 15 August 2007 to the worker party to attend the hearing;
2. Invitation No. 343 dated 15 August 2007 to the employer party to attend the hearing.

## FACTS

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

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

### **Issue 1**

- GDM Company commenced operation in August 2006 and currently employs approximately 420 workers.
- The worker party demanded that the company reinstate Mr. Chhan Pisith.
- The company employed Mr. Chhan Pisith in the Laundry Unit under a two-month probationary contract from 19 June 2007 to 19 August 2007. [Whilst under probation he received a] wage of US\$45 per month.
- The Company dismissed Mr. Chhan Pisith at 8:30am on 3 July 2007.
- On 21 August 2007, the Arbitration Council received the name list of workers who attended the union election (with workers' thumbprints).
- The worker party claimed in the hearing that the dismissal of Mr. Chhan Pisith amounted to discrimination against the union because:
  - on 1 July 2007 the workers notified the factory of the candidates for the union election. The Arbitration Council finds that 1 July 2007 fell on Sunday, which the Company claimed was not a working day. Moreover, the Arbitration Council finds that the notification letter of the union leaders election did not have a name and signature to acknowledge that it had been received.
- At 4:20pm on 2 July 2007, the Khmer Youth Federation Trade Union held an election to select the Committee Members for the Khmer Youth Trade Union at GDM Factory which is located in Toul Sangke Village, Sangkat Toul Sangke, Khan Russey Keo of Phnom Penh. 64 members went to vote.
- On 3 July 2007, the workers [attempted to] notify the company again about the elected candidates. The workers claimed that security guards of the company did not allow the workers to bring the letter in. The workers claimed that Mr. Heng Sopheak was the person who delivered the letters to the company both times and Heng Sopheak has now resigned from the union. The Arbitration Council received evidence about the notification addressed to the Company dated 4 July 2007, which contradicted what the workers claimed in the hearing.
- The worker party claimed that the union had already submitted the Registration application with the Ministry of Labour, but they had not yet received the receipt from the Ministry because the Ministry has requested a number of changes.
- The employer party claimed in the hearing that the dismissal of Mr. Chhan Pisith did not amount to discrimination against the union because:
  - The company dismissed Mr. Chhan Pisith because he was under probation. His work performance was poor and he chatted during working hours.

- The company claimed that the company had noticed the poor performance of Mr. Chhan Pisith on not only one day, but over several days.
  - The company added that Mr. Chhan Pisith worked under a supervisor. The supervisor was the person who had made the assessment that the worker's performance was poor and that he chatted during working hours. The supervisor was the person who had dismissed Mr. Chhan Pisith.
- The Arbitration Council finds that the claims and the reasons for dismissal of Mr. Chhan Pisith were given by the supervisor, who was in charge of the work performance assessment, and notified to the Administrative Department; and the supervisor himself made the dismissal. In the hearing, the supervisor did not show up but was represented by the representative of the company who brought the claims and reasons of the supervisor.

### **REASONS FOR DECISION**

In the hearing, the worker party claimed that the company's dismissal of Mr. Chhan Pisith was an act of discrimination against the union. The company claimed that the dismissal of Mr. Chhan Pisith was because his contract was a probationary labour contract of fixed duration and because of his poor work performance. Thus, the Arbitration Council will consider each claim as follows:

1. Was the dismissal of Mr. Chhan Pisith an act of discrimination against the union?
2. Did the dismissal of Mr. Chhan Pisith comply with the Labour Law?

#### **1. Was the dismissal of Mr. Chhan Pisith an act of discrimination against the union?**

Article 12 of the Labour Law provides that, "*Except for the provisions fully expressing under this law, or in any other legislative text or regulation protecting women and children, as well as provisions relating to the entry and stay of foreigners, no employer shall consider on account of:*

- ...
- *membership of workers' union or the exercise of union activities;*

*to be the invocation in order to make a decision on:*

- ...
- *discipline or termination of employment contract."*

Article 279 of the Labour Law stipulates that, "*Employers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal."*

In previous Arbitral Awards, the Arbitration Council held that the worker, who makes the claim of union discrimination, shall bear the burden of proof. The Arbitral Awards also decided that if there is no evidence showing that the employer party is aware of the union membership of the worker, then the discrimination claim will not be considered by the Arbitration Council. (See Arbitral Award 50/05 – Fortune)

In this case, the Arbitration Council considers that the company's claim that the dismissal of Mr. Chhan Pisith was due to his poor work performance does not have a valid basis because the Arbitration Council received evidence from the employer party regarding the operation of washing machines that shows the same PO number, EDP number, starting time, and finishing time of Chhan Pisith with ID T00795 and another worker with ID T00789. The result proves that Mr. Chhan Pisith managed to wash the clothes six times and the worker with ID T00789 managed to wash the clothes only five times. Thus, the claim of the employer that Mr. Chhan Pisith's performance was poor does not have a valid basis. Therefore, the Arbitration Council finds that the dismissal of Mr. Chhan Pisith seemed to be for other reasons related to the union, but the Arbitration Council is not able to determine whether or not the dismissal of Mr. Chhan Pisith was a result of his union membership because the worker party did not provide any concrete evidence. The claim that the union notified the company of the candidates for the positions of union leaders on 1 July 2007, which fell on Sunday, cannot be relied upon. Moreover, the Arbitration Council also considers that the claim of the worker party that they notified the company on 3 July 2007 was contrary to the document submitted which is dated 4 July 2007; thus, the claim of the workers cannot be used as the basis to make a decision.

Therefore, the Arbitration Council declines to consider the claim of the worker party that the dismissal of Mr. Chhan Pisith amounted to discrimination against the union because the evidence and claims were not clear and the Arbitration Council cannot use them as a basis to make a decision.

Furthermore, the Arbitration Council will consider whether or not Mr. Chhan Pisith is entitled to special protection.

Clause 3 of Prakas No. 305 of the Ministry of Social Affairs, Vocational Training and Youth Rehabilitation dated 22 November 2001 provides, "*All workers, who are candidates to be elected as union leaders, shall be protected from the dismissal like those of the worker delegates. This protection lasts for 45 days prior to the election and is terminated 45 days after the election if these candidates are not elected.*"

The Arbitration Council considers that in order to find out whether or not Mr. Chhan Pisith is entitled to receive special protection in accordance with the law, the Arbitration Council will give consideration to the following three areas:

1. Does the worker fall into the category of worker that is entitled to receive special protection?

In Mr. Chhan Pisith's case, he was one of the candidates for election and later he was elected as the President; thus, by law he is entitled to special protection.

2. Was the dismissal made during the special protection period?

The Arbitration Council considers that the dismissal of Mr. Chhan Pisith on 3 July 2007 was made during the special protection period as stated in the above Prakas, 45 days after the election.

3. Did the union notify the employer about the candidates who received special protection?

As set out above, the Arbitration Council finds that workers' evidence of notification of workers cannot be used to prove that the company was aware of the election or the elected union leaders. Thus, the worker party did not fulfill this third requirement.

Therefore, the Arbitration Council considers that Mr. Chhan Pisith does not belong to the type of worker who is entitled to receive special protection as stated in Prakas No. 305 dated 22 November 2001.

## **2. Did the dismissal of Mr. Chhan Pisith comply with the Labour Law?**

Article 68 of the Labour Law provides that, "*A contract for a 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 specialised workers and one month for non-specialised workers.*"

Based on the Arbitration Council's jurisprudence, the duration of a probationary period for a specialised garment worker is two months. In Arbitral Award 69/04 – Common Way, the Arbitration Council found that a garment worker was a specialised worker. Similarly, in Arbitral Award 53/06 – Hong Mei, the Arbitration Council found that the worker in the Sewing Unit was a specialised worker. In this case, the Arbitration Council finds that Mr. Chhan Pisith's work is also specialised because the washing machines (the workers claimed in the hearing that there were 13 washing machines) require specialised workers to operate them. Thus, the two-month probationary contract of Mr. Chhan Pisith complied with the Labour Law.

Article 67 of the Labour Law provides that, "*A labour contract signed with consent for a specific duration must contain a precise finishing date.*"

The Arbitration Council considers that based on Article 67 of the Labour Law, this probationary labour contract is a fixed duration contract since this contract was made in writing and states the start and finish dates of the contract.

Based on Article 73 of the Labour Law, a fixed duration contract will terminate at the specified end date of the contract or at the will of the parties.

In this case, the employer party claimed that it terminated the contract before the expiry date due to Mr. Chhan Pisith's poor work performance. However, as set out above, the Arbitration Council finds that the employer did not have enough evidence to support its claim that Mr. Chhan Pisith performed poorly which led to his dismissal.

Article 73 of the Labour Law also states that the termination of a fixed duration contract before the expiry date entitles the workers to the following:

1. Damages in an amount at least equal to the remuneration he would have received until the termination of the contract;
2. Severance pay at least equal to five percent of the wages as calculated below:

All the wages within the two months of the labour contract x 5

100

Article 166 of the Labour Law stipulates that, *"Unless there are more favourable provisions in collective agreements or individual labour contracts, all workers are entitled to paid annual leave to be given by the employer at the rate of one and a half work days of paid leave per month of continuous service."*

Article 167 of the Labour Law provides that, *"If the contract is terminated or expires before the worker has acquired the right to use his paid-leave, an indemnity calculated on the basis of Article 166 above is granted to the worker."*

The Arbitration Council finds that based on the above Articles, all workers are entitled to paid annual leave of one and a half work days for each month of continuous service or if a worker has not worked for two continuous months, the calculation shall be proportional to the amount of time he worked.

Moreover, the Arbitration Council finds that Clause 10 of the probationary contract between the employer and Mr. Chhan Pisith, which was provided as evidence, provides that: *"During this probationary period, each party has the right to terminate the contract by himself without the consent from the other party and party shall not compensate or demand compensation from other party besides the wage."*

The Arbitration Council finds that the contract provides workers with less benefits than what the law provides and based on Article 13 of the Labour Law which states that, *"The provisions of this law are of the nature of public order, excepting derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or a*

convention that do not comply with the provisions of this law or any legal text for its enforcement, are null and void.” Thus, the Arbitration Council considers that Clause 10 of the contract is null and void.

The Arbitration Council decides that the employer should pay the worker damages equal to the total period of the two month contract, severance pay equal to five percent of two months wages multiplied by 5 and divided by 100, and paid annual leave of one and a half days per month.

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

**DECISION AND ORDER**

- Reject the demand of workers that the company reinstate Mr. Chhan Pisith.
- Order the employer to pay damages to the worker equal to the total period of the two month contract, severance pay equal to five percent of two months wages, multiplied by 5 and divided by 100, and paid annual leave of one and a half days per month.

**Type of Award: Non-Binding Award**

This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition 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: **SENG VUOCH HUN**

Signature: .....

Arbitrator chosen by the worker party:

Name: **LIV SOVANNA**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **PEN BUNCHHEA**

Signature: .....