



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអន្តរាជ្ញាធាន

THE ARBITRATION COUNCIL

Case number and name: 77/08-Xing Tai

Date of Award: 21 July 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Hem Hour Naryth**

Arbitrator chosen by the worker party: **Huon Chundy**

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

DISPUTING PARTIES

Employer:

Name: **Xing Tai Garment (Cambodia) Co. Ltd.**

Address: Sré Rorloeung Village, Sangkat Teuk Thla, Khan Russey Keo, Phnom Penh

Telephone: 012 336 717/ 012 570 976 Fax: N/A

Representative:

- | | |
|------------------|-------------------------|
| 1. Mr. Tang Meng | Chief of Administration |
| 2. Mr. Hom Hak | Staff of Administration |

Workers:

Name: **Khmer Youth Trade Union Federation (KYFTU) and local union of Khmer Youth Trade Union (KYTU) at Xing Tai Company**

Address: Sré Rorloeung Village, Sangkat Teuk Thla, Khan Russey Keo, Phnom Penh

Telephone: 012 990 227/ 011 926 756 Fax: N/A

Representative:

- | | |
|------------------------|---|
| 1. Mr. Hing Bunthoeurn | Coordination Officer of KYFTU |
| 2. Mr. Sous Sokha | Coordination Officer of KYFTU |
| 3. Mr. Chhum Saven | President of local union of KYTU at the company |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- Members of KYTU in Xing Tai Garment Company demand that the Company reimburse 12,100 riel for medical check fees (for both old and new workers from Eternity Company to Xing Tai Garment). The Company party states that it cannot pay this as it can reimburse the fee only to those workers for whom Company required to have the checks.
- 2- Members of KYTU demand that the Company be wholly responsible for work-related accidents, i.e., pay for treatment fees and maintain workers' wages and attendance bonus. The Company party disagrees with recording this in the conciliation report of the collective labour dispute because the Company already practices this (evidence attached).
- 3- Members of KYTU in Xing Tai Garment Company demand that the Company build a daycare center and nursing room and if the Company is unable to perform the construction, it should provide US\$ 20 and 3 cans of milk formula (1 kg per can) per month. The Company party states that it already has the nursing room and the Company pays US\$ 5 per month in lieu of building a daycare center.
- 4- Members of KYTU in Xing Tai Garment Company demand that when workers are 30 minutes late to work per month the Company should maintain their attendance bonus. The Company party states that it cannot provide this as it follows the Notification No 017 SKBY dated 18 July 2000.
- 5- Members of KYTU in Xing Tai Garment Company demand that the Company pay 50 percent of wages and perquisites for 90 days to women workers who take maternity leave before the leave starts because it is difficult for them to travel back and forth and transportation fare is costly. The Company party states that it cannot pay as requested because it is afraid that they will not come back to work.

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 .628 KB/AK/VK, dated 6 June 2008 was submitted to the Secretariat of the Arbitration Council on 9 June 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: 20 June 2008 from 2:00 p.m. to 2:30 p.m.
- Second hearing: 23 June 2008 from 2:00 p.m. to 5:00 p.m.
- Third hearing: 1 July 2008 from 9:00 a.m. to 5:00 p.m.

Procedural issues:

On 14 February 2008 the Department of Labour Dispute received a complaint No. 149 SSYK, dated 14 February 2008 by KYFTU at Xing Tai Garment Factory to demand for the company to improve some working conditions. The Department of Labour Disputes assigned its expert officer to resolve this case and the last conciliation session was held on 29 May 2008 with a result that 5 issues remained non-conciliated out of 12 issues. The 5 non-conciliation issues were referred to the Arbitration Council on 9 June 2008 through a non-conciliation report No. 628 KB/AK/VK, dated 6 June 2008.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer party and the worker party to the hearing and conciliation on the 5 non-conciliation issues for the first time to be held on 20 June 2008; but the company party submitted a letter dated 17 June to request for postponement of the hearing for the reason that the company was very busy with visitors inspecting products in the company. Because of that, the Arbitration Council rescheduled the hearing date to 23 June 2008 at 2:00 p.m. and [another] hearing was conducted on 1 July 2008 at 9:00 a.m.

Both parties were present at the arbitral hearings. The Arbitration Council tried to ask for more information related to this dispute and attempted to further the conciliation on the 5 non-conciliations issue with a result that issue 5 was conciliated and issue 4 was withdrawn by the worker party. Thus, the remaining issues are issue 1, issue 2 and issue 3. The Arbitration Council will consider and resolve the 3 non-conciliation issues based on evidence and findings of fact as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

A. Provided by the employer party:

1. Letter dated 26 May 2008 to authorize Mr. Tang Meng, chief of administration of Xing Tai Garment Company, to resolve and decides on case 77/08.

2. Certificate of commercial registration of Xing Tai Garment Company, dated 17 December 2004.
3. Internal Work Rules of Xing Tai Company, dated 23 March 2007.
4. Statute of Xing Tai Company, dated 26 December 2006.
5. Payroll for April 2008.
6. Payroll for June 2008.
7. List of payment in lieu of daycare center for February, March and April 2008.
8. Slip of paper to permit Pheap Phalla, a worker, ID E 67, to go for breast feeding.
9. Slip of paper to permit Chem Saona, a worker, ID E 65, to go for breast feeding.
10. Income statement of the Department of Labour Dispute No. 09, acknowledging receipt of 5,950,000 riels (five million nine hundred fifty thousand riles) from Xing Tai Company for medical check fee, dated 6 August 2007.
11. List of names of workers who are members of Federation Union of Solidarity (FUS) and C.CAWDU.
12. Agreement between FUS and C.CAWDU, dated 3 February 2008.

B. Provided by the worker party:

1. Certification of union registration of the local union of KYTU at Xing Tai Company No. 1411 KB/VK, dated 3 April 2008.
2. Statute of the local union of KYTU at Xing Tai Company, dated 18 January 2008.
3. Letter by workers to the president of KYFTU to request for intervention and resolution of dispute, dated 9 February 2008.
4. Letter by KYFTU to the director of Xing Tai Company regarding request for discussion and coordination on labour dispute of workers at Xing Tai Company, dated 12 February 2008.
5. Letter by KYFTU to the chief of Department of Labour Dispute to request for resolution of dispute case at Xing Tai Company, dated 14 February 2008.
6. ID of workers at Xing Tai who demand that the company reimburse their medical check fee, without date and signature of person responsible for this list of workers' ID number.

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

1. Report of collective labour dispute resolution at Xing Tai Garment Company No. 628 KB/AK/VK, dated 6 June 2008.
2. Minutes of collective labour dispute resolution at Xing Tai Garment Company, dated 29 May 2008.

D. Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to invite the worker party to attend the hearing, No. 410 KB/AK/VK/LKA, dated 25 June 2008.
2. Letter of invitation to invite the employer party to attend the hearing, No. 409 KB/AK/VK/LKA, dated 25 June 2008.

FACTS

- Having reviewed the collective labour dispute conciliation report
- Having listened to the statements by the worker party and the employer party
- Having examined additional documents

The Arbitration Council finds that:

- Xing Tai Garment Company employs approximately 800 workers.
- There are three unions in the company: (1) KYTU, (2) FUS and (3) C.CAWDU.
- KYTU is the claimant in this case. KYTU has 100 members and does not have the most representative status.

Issue 1: The workers demand that the company reimburse old and new workers 12,100 riels for medical check fees

- The company states that Xing Tai Company has changed its director three or four times already since 1999. From 2007 the company has been under direction of the new, current owner.
- The company party continues that in August 2007 the company arranged for 350 workers who had not had medical checks to receive them at the company. The company invited the Labour Doctor to conduct the check at the company and the company paid for the medical fee for all workers as mentioned in the Income Statement of the Labour Medical Department No. 09, acknowledging receipt of 5,950,000 riels (five million nine hundred fifty thousand riels) from Xing Tai Company for medical check fees, dated 6 August 2007.
- The company party mentions in the hearing that the company is responsible for payment of medical check fees for workers who work for the company. However, for those workers who have been working for a long time ago, the company does not pay this fee because it is unable to locate documents [to determine whether the company's former management paid for the medical check fees of such workers]. Moreover, the company considers that as the workers have been working for the company for a long time ago, why didn't they make such demand to the former

company (former managers) to pay this fee; why do they just make the demand for medical check fee from the new company (new manager) now? Hence, the company will not reimburse medical check fees as demanded by the workers.

- The worker party, on the other hand, argues in the hearing that they demand the company to pay for medical check fees for both old and new workers. However, the workers do not mention how many old workers and how many new workers are demanding the company to reimburse the medical check fee. The Arbitration Council directed the parties to make a list of names of workers who demand reimbursement of the medical check fee (with thumbprints and signatures) and dates of medical checks to the Arbitration Council. The workers responded that they needed 10 days to make the list of claimants for the Arbitration Council. However, up to the deadline on 10 July 2008 the worker party failed to submit documents or evidence related to the above demand. Instead, the Arbitration Council received a list of names of workers who volunteered for the company to deduct union contribution fees.
- The Arbitration Council also asked the company to provide a list of names of workers who demand for reimbursement of medical check fee to the Arbitration Council but the document was not submitted.

Issue 2: The workers demand that the company should be wholly responsible for work-related accidents, i.e., pay for treatment fees and maintain workers' wages and attendance bonus.

- The company states that work-related incidents happened in the factory in the past and the company was responsible for everything and it maintained the same wages and bonus for the workers if the workers had a medical letter from the doctors from whom they received treatment. The company adds that it has relations with Hong In Hospital in Steung Mean Chey, located near the company, to provide quick service to transport workers to the hospital when a work-related accident occurs.
- The workers agree with the employer's claim and they do not have any problems regarding responsibility of the company on work-related accidents happening in the factory, but the workers are concerned about work-related accidents that may happen outside of the company, such as when the workers commute from home to work or on their return from work and the company requires them to go to Hong In Hospital which is far from the location of the accident. The workers want the company to describe in writing its responsibility for work-related accidents happening outside of the factory, that would allow workers to choose a hospital without the requirement of only going to Hong In Hospital.

- The workers mentioned in the hearing that so far there has not been a worker who suffered from a work-related accident outside of the factory; this is a demand for the future.
- The company raises in the hearing that it is already responsible for work-related accidents and thus it is unable to resolve or make guarantees regarding the issue of work-related accidents outside of the factory which have not happened. However, whenever a work-related accident happens, whether it is inside or outside of the factory, the company is responsible for that. This is the reason why the company does not agree to record this issue in the minutes of the collective labour dispute conciliation.

Issue 3: The workers demand that the company build a daycare center and a nursing room.

- The workers demand that the company build a daycare center and a nursing room and if it is unable to build this the company should pay US\$ 20 (twenty US dollar) and 3 cans of 1 kg milk formula.
- The workers mentioned in the hearing that they demand that the company build a daycare center but not a nursing room because the company already provides a nursing room for women who have babies. The company submits slips of paper to acknowledge that it permits workers - Pheap Phalla, ID E 67 and Chem Saona, ID E 65 - to attend to breast feeding to the Arbitration Council.
- The workers agree that the company had an agreement dated 3 February 2007 with FUS and C.CAWDU whose members make up more than half of the total number of workers in the factory. Point 3 of the agreement states, "The company is unable to build a daycare center for the workers; so the company provides US\$ 5 per month in lieu of building a daycare center."
- The company agrees with the above mentioned statement and provided a statement of payments in lieu of the daycare center for February, March and April 2008, dated 21 May 2008.
- The workers add that the reason that they make this demand is because the market price of goods has increased. However, if the company is unable to pay US\$ 20, it can provide whatever amount is more than US\$ 5 because so far the company provided only US\$ 5.

REASONS FOR DECISION

Issue 1: The workers demand that the company reimburse 12,100 riels for medical check fees for old and new workers

The company has been responsible for medical check fees for workers employed in the company and in August 2008 the company arranged for 350 workers who had not had medical checks to receive them at the factory by inviting the Labour Medical Department to conduct the checks and the company paid for the fees for all workers as per the Income Statement of the Labour Medical Department No. 09 acknowledging receipt of 5,950,000 riels (five million nine hundred fifty thousand riels) from Xing Tai Company for medical check fees, dated 6 August 2007. However, for old workers who had been working since a long time ago, the company will not reimburse their medical check fee because it is unable to locate the documents of each such worker for whom the old company (former managers) did not pay medical check fees. The workers demand that the company pay medical check fees for both old and new workers. However, the workers failed to provide information as to how many old workers and new workers (including dates of the medical checks) demand the medical check fees.

The Arbitration Council has authority to require parties in dispute to provide evidence (See Clauses 18 and 24 of Prakas 099/2004). Clause 25 of Prakas 099, dated 21 April 2004 states, *"The arbitration panel shall be free to determine the admissibility, relevance, materiality and weight of evidence as well as the allocation of the burden of proof."* For that reason, the Arbitration Council asked the worker party in the hearing to make a list of names of workers (with thumbprints or signatures) who demand for the company to reimburse the medical fees for submission to the Arbitration Council. The worker party asked for 10 days to make the list of complainant workers. However, up to the deadline of 10 July 2008 the worker party did not provide any documents or evidence related to this demand to the Arbitration Council; instead it submitted to the Arbitration Council a list of names of workers who volunteered for the company to deduct their wages for union contribution fees. The Arbitration Council considers that a period of 10 days is sufficient for the worker party to make list of names of workers who make the demand for reimbursement of medical check fees.

In previous cases, the Arbitration Council considers that if a party to a dispute does not provide evidence to support their demand, the Arbitration Council will not accept the claim for consideration. (See Arbitral Awards 79/05-Evergreen, issue 1 and 99/06-South Bay, issue 1).

In this case, the Arbitration Council agrees with the decision of the Arbitration Panel in previous cases because the workers did not make list of names of workers who demand that the company reimburse medical check fees or provide documents or evidence related to the demand for the Arbitration Council to consider how many workers are making this demand? What are their names? Which sections are they working in? Which groups? When

did they start work? When did they have medical checks and how much did they pay for the medical checks by themselves?

Another reason that the Arbitration Council asked the worker party to provide this evidence is because the Arbitration Council needs to make sure about the time when the workers had medical checks (if the workers had provided correct dates of the medical check) so to ensure that the period is not longer than 3 years, which would be subject to the statute of limitations for reimbursement claims. (See Arbitral Award 05/06-W&D, dated 10 February 2006, issue 1).

Hence, the Arbitration Council does not have specific facts, documents and evidence related to this demand for the basis of consideration and decision.

Nonetheless, the Arbitration Council notices that in this case if the worker party had provided documents and evidence related to the demand to the Arbitration Council by the deadline as mentioned above, they Arbitration Council may have considered the demand for the company to reimburse such medical check fees and whether the company should reimburse medical check fees for the workers according to the Labour Law.

Therefore, in this case, the Arbitration Council decides to reject the workers' demand for the company to reimburse 12,100 riels for medical check fees to both old and new workers.

Issue 2: The workers demand that the company should be wholly responsible for work-related accidents, i.e., pay for treatment fees and maintain workers' wages and attendance bonus

In this case, the workers does not demand that the company to be wholly responsible for work-related accident happening inside the company because the company already takes responsibility for that and maintain wages and bonuses according to the recommendation of doctors who allow the workers to take leave. However, the workers demand that the company be wholly responsible for work-related accidents that happen outside of the company. Both parties acknowledge that so far an incident of a work-related accident outside of the company has never happened, rather this demand is for the future (See the Findings of Fact in issue 2 above).

The Arbitration Council has consistently determined that the Arbitration Council will decline to consider a demand for the future for the following reasons:

In relation to future demands, the Arbitration Council has determined that *"the Arbitration Council was established to settle labour dispute but not to resolve the problems that have not happened yet."* (See Arbitral Awards 10/03-Jaqsintex, issue 2; 14/06-Zheng Yong, issue 2; 41/07-M & V 3, issue 1; 74/07-Global Apparel, issue 2).

In this case, the Arbitration Council agrees with the interpretation in the above cases because no one can foresee what will happen in the future. Thus, the fact that the workers want to have written statement regarding the company's responsibility for work-related accident that happen outside of the company is not possible because we do not know if the problem will happen or not; where it will happen; when; and who are the specific worker who have the accident; whether it is serious or just minor accident. Moreover, we do not know how the company should be responsible for that.

Furthermore, both parties agree that the company will follow the Labour Law for both accident happening inside the factory or outside the factory regardless of whether the workers would use Hong In Hospital or not. However, what has not been agreed is that the workers want the company to write down its responsibility while the company does not agree to do so for the reason that such incident has never happened and the company already follow legal provisions.

Therefore, the Arbitration Council decides that it does not need to consider the workers' demand for the company to take full responsibility for work-related accidents that happen outside of the factory and the company should not be forced to write down its responsibility for the future.

Issue 3: The workers demand that the company build a daycare center and a nursing room

The workers demand that the company build a daycare center but they do not demand a nursing room because the company already arranged a nursing room for women workers who have babies. In relation to this demand for the company to build a daycare center, in case 144/07-Xing Tai, issue 3 in which C.CAWDU was the claimant, the claimant party agreed in the hearing on 3 January 2007 during the conciliation stage on issue 3 that *"The company agrees to finish building a daycare center within a period of one month from this agreement date."* After making this agreement, the company met with FUS and C.CAWDU and through this meeting it reached an agreement with the two unions dated 3 February 2007. One of the points in the agreement states, *"The company is unable to build a daycare center for the workers; so the company provides US\$ 5 per month in lieu of building a daycare center."*

Hence, the Arbitration Council will consider whether the company has an obligation to build a daycare center in accordance with the Labour Law and whether point 3 of the agreement dated 3 February 2007 is enforceable according to the Labour Law.

Does the company have an obligation to build a daycare center in accordance with the Labour Law?

Article 186 of the Labour Law states, *“Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a day-care center.*

If the company is not able to set up a day-care center on its premises for children over eighteen months of age, female workers can place their children in any day-care center and the charges shall be paid by the employer.”

Based on the contents of the above Article, the Arbitration Council considers that the employer has an obligation to build a daycare center. Moreover, in previous cases the Arbitration Council considers that an employer who employs at least 100 women has an obligation to build a daycare center and if the employer is not able to build its own daycare center for children aged above 18 months, women workers can place their children in outside daycare services and the employer should pay the daycare fee based on actual receipts. (See Arbitral Awards 63/04-Shine Well, issue 2 and 68/04-City New, issue 1).

In this case, the workers demand that the company provide payments in lieu of a daycare center. Thus, the Arbitration Council considers that the workers' demand for the company to pay payment in lieu of annual leave is not in accordance with the Labour Law.

Is the agreement dated 3 February 2007 enforceable according to the Labour Law?

In relation to point 3 of the agreement dated 3 February 2007, the Arbitration Council considers that a union has the right to represent its members in making an agreement on behalf of its members whether the agreement provides better or lower conditions than the Labour Law and the agreement will be reviewed and resolved when a dispute happens or when a disputing party refers to it.

Article 13 of the Labour Law states, *“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...”*

In this case, the company mentioned in the hearing that the company entered into an agreement with other two unions - FUS and C.CAWDU - but not KYTU who is the claimant in this case. The number of members of the two unions comprises more than 50 percent of the total number of workers in the factory. Point 3 of the agreement dated 3 February 2007 states, *“The company is unable to build a daycare center for the workers; so the company provides US\$ 5 per month in lieu of building a daycare center.”* Currently, more than 50 percent of workers in the factory agree to accept US\$ 5 in lieu of building a daycare center as the company submitted to the Arbitration Council the statement of payments in lieu of a daycare center for February, March, and April 2008, dated 21 May 2008. The Arbitration Council considers that the purpose of the Labour Law that requires building of a daycare

center is in order to encourage mothers and children to stay near each other to provide loving-care to the child and to breastfeed the baby naturally rather than using formula milk during the first six months in accordance with policy of the Royal Government of Cambodia and to maintain safety for the baby while the mother is working.

Therefore, the Arbitration Council considers that although the company and the unions agree to payments in lieu of a daycare center, the acceptance of money does not meet the intention of the Labour Law and the provision of payment in lieu of daycare center does not release the employer from its obligations in accordance with the Labour Law to build a daycare center.

In conclusion, the Arbitration Council decides to reject the workers' demand for the company to provide payment in lieu of daycare center and to order the company to build a daycare center. However, during the period the company has not built a daycare center, it can continue to implement point 3 of the agreement dated 3 February 2007.

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

DECISION AND ORDER

Issue 1:

- Reject the workers' demand for the company to reimburse 12,100 for medical check fees for both old and new workers.

Issue 2:

- Decline to consider the workers' demand for the company to write down its full responsibilities for work-related accidents that happen outside of the factory.

Issue 3:

- Reject the workers' demand for the company to provide payments in lieu of building a daycare center.

- Order the company to build a daycare center and during the period the company has not built a daycare center, it can continue to implement point 3 of the agreement dated 3 February 2007.

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: **Hem Hour Naryth**

Signature:

Arbitrator chosen by the worker party:

Name: **Huon Chundy**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: