



**KINGDOM OF CAMBODIA**

**NATION RELIGION KING**

**ក្រុមប្រឹក្សាសវនកម្មជាតិ**

**THE ARBITRATION COUNCIL**

**Case number and name: 78/08-Unison**

**Date of Award: 2 July 2008**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRATION PANEL**

Arbitrator chosen by the employer party: **Mar Samborana**

Arbitrator chosen by the worker party: **Tuon Siphann**

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

#### **DISPUTING PARTIES**

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

Name: **Unison Garment Co., Ltd**

Address: Tuol Pong Ror Village, Sangkat Chom Chao, Khan Dangkor, Phnom Penh

Telephone: 016 822 481

Fax: N/A

Representative:

- |                         |   |
|-------------------------|---|
| 1. Mr. Kuy Yoeung       | Head of Administration and Staff Relations    |
| 2. Mr. Phon Phal Piseth | Labour Dispute Officer (Employer Association) |

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

Name: **Khmer Youth Federation Trade Union (KYFTU) and local union of Khmer Youth Trade Union (KYTU) at Unison Factory**

Address: Tuol Pong Ror Village, Sangkat Chom Chao, Khan Dangkor, Phnom Penh

Telephone: 017 370 363

Fax: N/A

Representative:

- |                    |                                     |
|--------------------|-------------------------------------|
| 1. Mr. Mai Vattana | Officer of KYFTU                    |
| 2. Mr. Chhay Pisey | President of KYTU at Unison factory |
| 3. Mr. Ry Rin      | Secretary of KYTU at Unison factory |
| 4. Mr. Toeung Tha  | Worker                              |

**ISSUES IN DISPUTE**

(In the Non-Conciliation Report)

- 1- Members of KYTU in Unison factory demand that the company provide a larger medical room with a physician to standby during working hours. The company requests to take this matter to discuss with the Labour Medical Department first before it can build this.
- 2- Members of KYTU in Unison factory demand that the company provide the same production bonus to workers in each group. The company states that it provides the bonus based on the results of work produced by the workers.
- 3- Members of KYTU in Unison factory demand that the company pay a meal allowance for overtime work on a daily basis whenever they work overtime. The company states that it can pay this once every two weeks.
- 4- Members of KYTU in Unison factory demand that the company reinstate Mr. Chhay Pisey and Mr. Toeung Tha. The company states that it is waiting for a decision from the Department of Labour Disputes before it can decide whether to reinstate both of them.
- 5- Members of KYTU in Unison factory demand that the company should not terminate those workers who cannot sew [enough garments] to meet the target the company set. The company states that it has never terminated any workers for this reason.
- 6- Members of KYTU in Unison factory demand that the company maintain their wage on 01 May 2008 which was International Labour Day. The employer states that the company and the workers agreed to exchange 01 May 2008 with 17 April 2008, the day after Khmer New Year.
- 7- Members of KYTU in Unison factory demand that the company convert workers who have been working for more than two months to permanent workers and if the workers find out that there are workers who have been working for more than three months, the company should back pay them. The company states that if there are any workers who have been working for two months, the company will convert them to permanent workers.
- 8- Members of KYTU in Unison factory demand that the company pay full wages during [periods there is] no work and that the company back pay for the periods during which the company did not have work for them to do in the past. The company states that when it does not have work for the workers to do, it pays them half wages.

- 9- Members of KYTU in Unison factory demand that the company implement voluntary overtime work. The company states that it has never forced any worker to do overtime 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. 626 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:** 19 June 2008 (from 2:00 p.m. to 5:30 p.m.)

**Procedural issues:**

On 5 May 2008 the Department of Labour Disputes received a complaint from KYTU at Unison factory regarding the demand for the company to improve working conditions. After receiving the claim, the Department of Labour Disputes assigned an expert officer to resolve this collective labour dispute and the last conciliation session was held on 28 May 2008 with the result that 7 issues out of 16 were conciliated. The 9 non-conciliation issues were referred to the Secretariat of the Arbitration Council on 9 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 9 non-conciliation issues on 19 June 2008 at 2:00 p.m. Both parties were present as invited by the Arbitration Council.

On the hearing day, the Arbitration Council attempted to further the conciliation on the 9 non-conciliation issues mentioned in the non-conciliation report. As a result, 8 issues were conciliated and only one issue remains unresolved. The issues conciliated were issues 1, 2, 3, 5, 6, 7, 8 and 9. Issue 4 was not conciliated. Therefore, in this case the Arbitration Council will only consider issue 4 based on the evidence and clarification by the parties in the hearing 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. Statute of Unison Garment Company, dated 30 July 2007.
2. Request for visa on the company's Internal Work Rules, dated 20 February 2008.
3. Internal Work Rules of Unison Garment Company No. 49 KB/AK/ATK, dated 7 April 2008.
4. Patent of Unison Company No. LTU019669.2008, dated 28 February 2008.
5. Certificate of commercial registration of Unison Garment Company No. 3083 PN.NTK, dated 8 August 2007.
6. Certificate of registration with the International Labour Organization of Unison Garment Company, dated 24 September 2007.
7. Certificate of registration with GMAC of Unison Garment Company No. 421, dated 13 December 2007.
8. Minutes of meeting and letter to notify exchanging of day off, dated 4 April 2008.
9. Certificate of union registration of KYTU at Unison Company, dated 14 March 2008.
10. Statute of KYTU at Unison Company, dated 14 March 2008.
11. Notification letter regarding [intention to conduct] strike of workers in Unison factory, dated 5 May 2008.
12. Letter to suspend employment of Mr. Chhay Pisey, representative of local union in Unison company, dated 5 April 2008.
13. Slip of paper to acknowledge receipt of case regarding termination of Mr. Chhay Pisey, representative of local union in Unison company, dated 7 April 2008.
14. Letter of termination of Mr. Chhay Pisey, representative of local union in Unison company, dated 7 April 2008.
15. Minutes of inquiry of Unison company regarding termination of Mr. Chhay Pisey, president of KYTU at Unison company, dated 22 April and 7 May 2008.
16. Minutes of individual labour dispute between the company and Mr. Chhay Pisey, dated 22 May 2008.
17. Minutes of collective labour dispute conciliation at Unison Company, dated 28 May 2008.

#### **B. Provided by the worker party:**

1. Certificate of union registration of KYTU at Unison Company, dated 14 March 2008.
2. Statute of KYTU at Unison Company, dated 14 March 2008.

3. Complaint letter by workers at Unison factory, dated 7 March 2008.
4. List of names of workers the company asked to take leave during the period of no work and paid 50 percent of wages.
5. List of probationary workers at Unison company who became permanent workers after three months of probationary work.
6. List of names of workers forced by the company to work [much] overtime.

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

1. Report of collective labour dispute resolution at Unison company No. 626 KB/AK/VK, dated 6 June 2008.
2. Minutes of collective labour dispute conciliation at Unison company, dated 28 May 2008.

D. Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to invite the employer party to attend the hearing, No. 391 KB/AK/VK/LKA, dated 13 June 2008.
2. Letter of invitation to invite the worker party to attend the hearing, No. 392 KB/AK/VK/LKA, dated 13 June 2008.

**FACTS**

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

**The Arbitration Council finds that:**

- Unison factory employs a total of approximately 543 workers.
- KYTU at Unison factory is the claimant in this case.
- Based on the documents the Arbitration Council received, KYTU has registration certificate No. 1403 KB/VK, dated 14 March 2008.
- By letter no. 096/08 regarding registration of workers' professional organization, the Arbitration Council found that there are three people recognized by the Ministry of Labour including: Mr. Chhay Pisey, President of the union; Mrs. Chea Srey, Vice-President of the union and Mr. Ry Rin, Secretary of the union.

**Issue 4: The workers demand that the company reinstate Mr. Chhay Pisey and Mr. Toeung Tha**

- **Case of Mr. Chhay Pisey**

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

- Mr. Chhay Pisey commenced his employment on 18 October 2007 under an undetermined duration contract. He received a main wage of US\$ 90 per month and a skill and incentive bonus of US\$ 40 per month.
- The company suspended the employment of Mr. Chhay Pisey on 4 April 2008 because Mr. Chhay Pisey performed union work during working hours on 3 April 2008; this affected the production line and he threatened the company [demanding] the reinstatement of a worker named Yann Navy, terminated by the company for stealing. The company considers that he committed serious misconduct in accordance with Article 82 of the Labour Law. The company video recorded the incident when he threatened the company [demanding the] reinstatement of a worker named Yann Navy.
- Mr. Chhay Pisey and representatives of the union who were present in the hearing did not object to the company's accusation above.
- The company filed a letter to request the termination of Mr. Chhay Pisey to the Department of Labour Disputes on 7 April 2008. As at the hearing date, the Department of Labour Disputes had not responded to the company's request regarding the termination of employment of Mr. Chhay Pisey. The company has not made an appeal to the Ministry of Labour in response to the Labour Inspector's failure to respond within one month of submission of the request to terminate Mr. Chhay Pisey. The company has already paid wages and other perquisites but the workers claim that the company still owes him 2 or 3 months wages.

• **Case of Mr. Toeung Tha**

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

- Mr. Toeung Tha commenced his employment on 20 September 2007 under an undetermined duration contract. He received a main wage of US\$ 60 per month and a skill and incentive bonus of US\$ 30 per month.
- Mr. Toeung Tha was terminated by the company on 23 April 2008 without prior notice for the reason that he was absent from work for one day longer than he had been permitted leave.
- Mr. Toeung Tha acknowledges his mistake and states that he took one day's leave with permission on 21 April 2008 to attend his sibling's wedding ceremony. The company permitted his leave and he was supposed to come back to work on 22 April 2008. However, Mr. Toeung Tha did not return to work on 22 April 2008 but presented at work on 23 April 2008 claiming that he was sick and he asked a

[mechanic] named Hun Tengpros to help him seek permission from a Chinese supervisor named Sia. The company decided to terminate him.

- In the hearing Mr. Toeung Tha claims that the termination was union discrimination because he was a union activist who always helped workers to raise their problems and at the termination time, the administration officer of the company told him that the company had wanted to terminate him since the time he joined the union.
- The company objects to Mr. Toeung Tha's statement. The employer argues that the termination was the employer's will based on Mr. Toeung Tha's behaviour (absence for longer than the permitted period of leave, left work station unattended and used working hours to recruit union members). The company does not have [practice] union discrimination as it continues to deduct union contribution fee for many union members.
- Mr. Toeung Tha acknowledges that he received two warnings from the company as he used working hours to perform union work. However, he left his working station unattended because his supervisor told him to do other work.
- The representative of the company did not object to Mr. Toeung Tha's claim. In the hearing the company states that it agrees to pay his termination payment in accordance with the law by providing payment in lieu of prior notice, indemnity for dismissal, last wages and payment in lieu of annual leave.
- The company had called Mr. Toeung Tha to come back to work again, but he did not come.

#### **REASONS FOR DECISION**

#### **Issue 4: The workers demand that the company reinstate Mr. Chhay Pisey and Mr. Toeung Tha**

In this case the company terminated two workers: Mr. Chhay Pisey, President of the union and Mr. Toeung Tha, a union activist. The Arbitration Council will consider the two cases as follows:

- **Case of Mr. Chhay Pisey**

Article 293 of the Labour Law states, *"The dismissal of a shop steward or a candidate for shop steward can take place only after authorization from the Labour Inspector. The same protective measures apply to former shop stewards three months following the end of their terms and to unelected candidates during 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 Labour 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 organisation to which the worker belongs, within one month at the latest upon receipt of the case.*

*One receipt of the decision, the employer, the worker in question, or the union organisation to which the worker belongs has a period of two months to appeal to the Ministry 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 of 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 contents of Article 293 of the Labour Law above, the Arbitration Council considers that all termination of protected workers requires prior notification to the Labour Inspector and their permission.

Thus, the employer must have prior permission from the Labour Inspector before terminating Mr. Chhay Pisey. The Labour Inspector who received the request for termination of the workers as mentioned in Article 293 of the Labour Law above should inform the employer and the terminated workers, as well as the union which the workers belong to, of its decision to within a period of one month after receiving the request. In this case, the workers made a request to the head of the Department of Labour Disputes on 7 April 2008. From 7 April 2008 to the date of this Arbitral Award is more than 30 days. Thus, based on the contents of Article 293 of the Labour Law above, the Arbitration Council considers that the head of the Department of Labour Disputes has rejected the employer's request to terminate Mr. Chhay Pisey since 7 May 2008. Thus, the employer shall have a period of two months to make an appeal to the Minister in charge of Labour starting from 7 May 2008. In this case, the employer party has not made an appeal to the Ministry in charge of Labour.

Furthermore, Article 295 of the Labour Law states, *"In case of serious misconduct, the manager of enterprise can render the decision to instantly suspend the party in question pending the Labour Inspector's decision. If the Labour Inspector turns down the dismissal, the suspension is annulled and its effects are cancelled lawfully."*

Based on the contents of Article 295 of the Labour Law above, the Arbitration Council considers that if workers who are union leaders have committed serious misconduct, the manager of an enterprise can make a decision to suspend the concerned worker, pending a decision from the Labour Inspector. In case the Labour Inspector does not approve the termination, the suspension is annulled and the effectiveness of the suspension is lawfully cancelled. In this case, the Labour Inspector does not approve the termination of Mr. Chhay Pisey. Thus, the Arbitration Council considers that the employer cannot terminate Mr. Chhay Pisey.

In conclusion, the Arbitration Council orders the employer to reinstate Mr. Chhay Pisey pending a decision from the Minister in charge of Labour within a period of two months after receiving an appeal from the employer.

- **Case of Mr. Toeung Tha**

Article 74 of the Labour Law states, *“The labour contract of unspecified duration can be terminated at will by one of the contracting parties. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party.”*

*However, no layoff can be taken without a valid reason relating to the worker’s aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or company.”*

Based on the contents of Article 74 of the Labour Law above, the Arbitration Council considers that the employer can terminate an undetermined duration contract at will but it needs to give prior notice in writing to the workers. Moreover, the Labour Law requires that the employer needs to have a valid reason related to the aptitude or behaviour of the workers based on the necessity of the requirements of the operation of the enterprise, establishment or the company.

In this case the employer did not notify Mr. Toeung Tha. Thus, based on Article 74 of the Labour Law above, the employer’s practice is not in accordance with the law. In addition, the employer stated that the termination of Mr. Toeung Tha was because he used working hours to perform union work and was absent from work without permission. The workers in this case do not object to the employer’s statement.

According to Arbitral Award 44/08-Siu Quinh, Issue 1, *“For the union and the union leaders, they have rights to perform their role to protect benefits and rights for their members. See examples in the Labour Law, Article 266, 267, 269, 274, 275 and 284 and Prakas 313 SKBY, dated 27 November 2000. However, generally the union does not have rights to use working hours to perform their union activities. There could be some exception if there is proper permission or in emergency case or in an emergency case related to health and safety of workers.”*

The Arbitration Council agrees with the above interpretation. Thus, the Arbitration Council considers that the employer had valid grounds to terminate Mr. Toeung Tha because he used working hours to perform union work. Moreover, Mr. Toeung Tha did not mention that he used working hours to perform union work because it was urgent work that required his participation. The company, on the other hand, followed clause 12 of the company’s Internal Work Rules regarding regulations and measures for employment hygiene and employment security as the company had already warned Mr. Toeung Tha twice.

In this case, the employer agrees to pay termination payments to Mr. Toeung Tha in accordance with the Labour Law. However, Mr. Toeung Tha does not agree to accept it and demands reinstatement claiming that the company terminated him because of union discrimination.

The Arbitration Council considers that Mr. Toeung Tha's claim does not have sufficient grounds to prove union discrimination. In previous Arbitral Awards, the Arbitration Council held that the worker party who claims that the termination was due to union discrimination has a burden to provide evidence to support the claim. (*See Arbitral Awards 93/06-Evergreen, Issue 1; 112/06-River Rich, Issue 1; 01/07-Supreme and 110/07-Now Corp, Issue 2*).

In this case, the employer stated that the termination was not discriminatory because many other union workers are working for the company and the company continues to deduct union contribution fees for them; and that the termination was because Mr. Toeung Tha committed misconduct in violation of the company's Internal Work Rules. The Arbitration Council considers that the employer's claim has stronger grounds than that of the workers.

Therefore, the Arbitration Council decides to reject the workers' demand for the company to reinstate Mr. Toeung Tha and order the company to pay termination payments to Mr. Toeung Tha in accordance with the Labour Law.

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

#### **DECISION AND ORDER**

##### **Issue 4:**

1. Order the employer to reinstate Mr. Chhay Pisey pending a decision by the Minister in charge of Labour as provided for in the law.
2. Reject the demand that the company to reinstate Mr. Toeung Tha and order the employer to pay termination payments to Mr. Toeung Tha in accordance with the law from the date this Arbitral Award enters into effect.

#### **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: **Mar Samborana**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....