



KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 85/08 – Yung Wah I

Date of Award: 06 August 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: **Toun Siphann**

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

DISPUTING PARTIES

Employer party:

Name: **Yung Wah Industrial (Cambodia) Co., Ltd. I**

Address: Thmey Village, Ta Khmao Commune, Ta Khmao District, Kandal Province

Telephone: 012 510 966

Fax: N/A

Representative:

1. Mr. NG Min Chuan Office Manager
2. Ms. Ly Muychheng Administration Officer

Worker party:

Name: **Khmer Youth Federation Trade Union (KYFTU) and Local Union of Khmer Youth Trade Unions (KYTU) at Yung Wah I**

Address: Thmey Village, Ta Khmao Commune, Ta Khmao District, Kandal Province

Telephone: 012 906 811

Fax: N/A

Representative:

1. Mr. Huy Sopharith Officer of KYFTU
2. Mr. Pea Phearun President of local union of KYTU at Yung Wah I
3. Mr. Bang Koeurn Vice President of local union of KYTU at Yung Wah I

- | | |
|--------------------|-----------------|
| 4. Mr. Yan Tonsay | Union Secretary |
| 5. Mr. Neang Vandy | Union Committee |
| 6. Ms. Hong Saran | Union Committee |
| 7. Ms. Pov Chenda | Union Committee |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

Ninety-six workers demand that the head of group T1, named Shea Mei Li, ID 20277, head of group D1 named Qin Xi Feng, ID 20449, and Cambodian head of group D1, named Ban Sotheary, pay back US\$5 of attendance bonus and two days of their wages on 4 and 5 April 2008. The workers state that the three group heads caused the Company to deduct their money when it did not have work for them to do; in addition, the attendance list [made by the three people] did not have sufficient justification to prove that the workers did not perform their work (as there is no provision in the Internal Work Rules which mentions that calculation of wages is based on attendance list). The Company does not agree to provide US\$ 5 attendance bonus and two days of wages on 4 and 5 April 2008 because workers in cutting section did not work on those days after they failed in the negotiation. The Company issued an internal announcement requiring the workers to return to work as normal (see the urgent internal announcement as attached). After that the Company ordered supervisors of all section to record attendance of workers who were working in each section. The Company then decided to calculate workers' payment based on the attendance list received from each supervisor.

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 was unsuccessful, and the non-conciliation report No. 344/08 K.B/KN, dated 07 July 2008, was submitted to the Secretariat of the Arbitration Council on 09 July 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: 15 July 2008 (From 2:00 p.m. to 4:30 p.m.)

Procedural issues:

On 9 June 2008, the Department of Labour Dispute of Kandal Province received a complaint from the Khmer Youth Federation Trade Union, dated 7 June 2008, demanding that the company improve working conditions in accordance with the Cambodian Labour Law and International labour standards. After receiving the complaint, the Department of Labour and Vocational Training of Kandal Province assigned an expert officer to conciliate the collective labour dispute on 25 June 2008 with a result of 4 of 5 issues were conciliated. The one non-conciliation issue was referred to the Secretariat of Arbitration Council on 9 July 2008.

After receiving the case, the Secretariat of the Arbitration Council summoned the employer and worker parties to the hearing and conciliation on the one non-conciliation issues on 15 July 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 conciliate the one non-conciliation issue but did not achieve a result. Therefore, the Arbitration Council will consider and settle this dispute based on evidence and clarification by the parties at the hearing as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Internal Work Rules of Yung Wah Industrial (Cambodia) Co. Ltd., No. 047 SKBY, dated 19 February 2002.
2. Certificate of commercial and company registration of Yung Wah Industrial (Cambodia) Co., Ltd. No. 981 PN.NTK, dated 27 March 1998.
3. Memorandum and statute of Yung Wah Industrial (Cambodia) Co., Ltd., dated 2 April 2002.
4. 23 Photographs.
5. Authorization letter by Mr. Fan Xiao Fen, director of Yung Way Company to Mr. Ng Min Chuan, dated 15 July 2008.
6. Urgent internal announcement by Yung Wah Company No. 551 YW, dated 4 April 2008.
7. List of names of workers who did not perform their work on 4 April 2008.
8. List of names of workers who did not perform their work on 5 April 2008.
9. List of names of night shift workers in cutting section in April 2008.
10. Record of workers' daily working hours on 4 April 2008.
11. List of names of night shift workers in Group D1 for April 2008.

Provided by the worker party:

1. Letter to certify that the local KYTU for night shift work at Yung Wah I company is a legal union No. 139 KB, dated 2 June 2008.
2. Certificate of union registration of KYTU for night shift work at Yung Wah I, dated 2 June 2008.
3. Statute of KYTU for night shift work at Yung Wah I, registration No. 1447 KB/VK, dated 2 June 2008.
List of names of members of KYTU who agreed to allow the company to deduct 1000 riels per month (for June 2008).

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

1. Report No. 344/08 KB/KN, dated 7 July 2008 on the collective labour dispute settlement at Yung Wah I Company.
2. Minutes of the collective labour dispute resolution at Yung Wah I Company, dated 25 June 2008.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 427 KB/AK/VK/LKA dated 10 July 2008 to invite the employer party to attend the hearing.
2. Invitation No. 428 KB/AK/VK/LKA dated 10 July 2008 to invite the worker party to attend the hearing.

FACTS

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

The Arbitration Council finds that:

- Yung Wah I Company employs approximately 5,000 workers.
- Local union of KYTU at Yung Wah I is the complainant in this case. According to the worker party, local union of KYTU at Yung Wah I has approximately 1,100 workers as its members.
- As claimed by the worker party and the employer party, there is no union with the most representative statute in the factory.

Issue 1: 96 workers demand that head of group T1 named Shea Mei Li, ID 20277, head of group D1 named Qin Xi Feng, ID 20449 and Cambodian head of group D1 named Ban

Sotheary payback US\$5 of attendance bonus and two days of their wages on 4 and 5 April 2008

- The dispute involved 96 night shift workers in cutting group (Group T1) and sewing group (Group D1).
- In the hearing, both the employer and the workers parties could not provide the exact number of workers working in groups T1 and D1. However the employer stated that there are approximately 90 workers in group T1 and 96 workers in group D1.
- Night shift workers work from 3:15 p.m. to 12:00 a.m.
- The worker party stated that the company did not have work for them to do from 1 to 3 April 2008. However, the workers claimed that they came to work normally [...]. On that same day, worker delegates had a negotiation with the employer about wage increase but the negotiation was unsuccessful. The workers stated that they do not remember the exact date [...] from 1 to 3 April 2008.
- The workers stated that on 04 April 2008 before 7:00 a.m., they worked normally but they did not remember the exact time and number of hours of their negotiation with the employer about wage increase.
- The employer stated that on 04 April 2008, the Company issued an urgent internal announcement No 551/08 YW, dated 04 April 2008, at around 7:00 p.m. to 8:00 p.m. after the head of group saw that some workers has not done their work. The announcement explained the company would not provide either the daily wage or the monthly attendance bonus to any worker who do not do their work as assigned by the company. For those who did the work as assigned by the company, the Company would provide daily wages and attendance bonus in accordance with the Labour Law.
- In the hearing, the employer stated that the internal urgent announcement was posted on the information board and head of groups were told to spread the news to their group members.
- The workers did not acknowledge the existence the urgent internal announcement No. 551/08 YW, dated 4 April 2008, claiming that majority of workers were not aware of it.
- The workers stated that on 05 April 2008, they came to work normally as on 04 April 2008, but then stopped working after they had worked for a short period time. The workers claimed that they did not remember the time and number hours that they worked or did not work.
- The employer stated that it did not remember the time and number of hours the workers worked and did not work on 4 and 5 April 2008 either because head of group T1 and D1 recorded only 96 names of workers who did not work.
- According to the workers, they were unable to work because the company did not have sufficient work for them to do. The employer stated that the company had work for the

worker to do, but they did not perform their job. Instead, they sat idly after negotiations failed. The employer provided photos to show the scene inside the factory where some workers in sewing section were sitting and fabric material lying on tables. The employer said that the photos proved that some workers were working while other workers were just sitting and sleeping. The workers stated that the photos of fabric material could be newly shot ones because there were no dates on the photos. A worker named Yan Tonsay stated that workers stopped working after the negotiation failed. In addition, the workers claimed that the company really did not have much work for workers to do.

- The Arbitration Council ordered the employer party to submit additional evidence, for inspection, to the Arbitration Council by 18 July 2008 at the latest. Examples included electronic pictures, the attendant list, and the number of workers who performed and did not perform their work their work on 4 and 5 April 2008 The Arbitration Council set the deadline for the workers to make any objections to the evidence by 22 July 2008.
- The Arbitration Council ordered the worker party to submit additional evidence to support their claim that the company did not have work for them to do on 4 and 5 April 2008 by 18 July 2008. The Arbitration Council set the deadline for the company to make any objections to the evidence by 22 July 2008.
- The worker party made an objection to the evidence submitted by the company and stated that the company did not have work for them to do on 4 and 5 April 2008.
- Head of group of T1 named Shea Mei Li, ID 20277; head of group D1 named Qin Xi Feng, ID 20449 and Cambodian head of group D1 name Ban Sotheary recorded their names as workers who did not perform their work on 4 and 5 April 2008. The company relied on the report produced by the three head of groups to justify a deduction US\$5 of attendant bonus and an entire two days of wages on 4 and 5 April 2008 from the 96 workers.
- The workers did not demand that the company pay these monies back to them. Instead, they demanded that the three head of groups offer the back-pay because they were the ones who recorded their names that led the company to deduct their wages. The company stated that it was responsible for the three group heads because they followed the company's command and instruction.
- The workers added that the Internal Work rules do not have provisions about deducting wages. They argued that Article 28 of the Labour Law also prohibits the employer from deducting workers' wages.
- In the Internal Work Rules, there is no clause that mentions the deduction of either wages or of the attendance bonus when workers arrive at company and refuse to perform their jobs in accordance with the company's arrangement.
- The employer did not issue a warning letter to the 96 workers whom the company accused of not following the company's arrangement.

REASONS FOR DECISION

Issue 1: 96 workers demand that head of group T1 named Shea Mei Li, ID 20277, head of group D1 named Qin Xi Feng, ID 20449 and Cambodian head of group D1 named Ban Sotheary payback US\$5 of attendance bonus and two days of their wages on 4 and 5 April 2008

Based on the aforementioned arguments and evidence provided by the parties, the Arbitration Council finds that employer arguments and evidence is most genuine and consistent. By contrast, the worker party's answers were inconsistent - some said that there was work for them to do; others said that there was not. In addition, if the workers did their work according to the employer's arrangement, the employer would not have issued the urgent internal announcement No 551/08 YW dated 04 April 2008. This means that logically, according to the principles of management, if all the workers had agreed to perform their work, there would have been no urgent internal announcement No 551/08 YW dated 04 April 2008. Therefore, the Arbitration Council considers that on 4 and 5 April 2008 the employer had work for the workers to do but the 96 workers did not perform their job according to the company's arrangement.

In this case, the 96 workers demand that head of groups T1 and D1 provide back pay for two days of their wage on 4 and 5 April 2008 and the attendant bonus deducted by the company. In the hearing the employer stated that the company was responsible for what the head of groups did because they followed what company ordered and instructed them to do. Thus, the Arbitration Council will consider the workers' demand regarding their wages and attendant bonus as follows:

A. Attendant Bonus:

The question for this point is whether the workers are entitled to get US\$5 attendant bonus when they did not perform their work on 4 and 5 April 2008.

Point 3 of Notification No. 745 KKBV dated 23 October 2006 stated, "*Benefits workers used to receive from Notification No. 017 SKBY dated 18 July 2000 on points 3, 4, 5 and 6 shall be retained.*"

Point 3 of Notification No. 017 dated 18 July 2000 states, "*Workers who come to work regularly on regular working days of a month shall receive a bonus of at least \$ 5.00 per month.*"

In this case, the Arbitration Council found that on 4 and 5 April 2008 the 96 workers did not fully perform the work under their responsibility although the employer issued an urgent internal announcement No. 551/08 YW dated 04 April 2008 at around 7:00 p.m. or 8:00 pm to encouraged the worker to return to work as normal. The Arbitration Council finds that the 96 workers did not work regularly to the number of working days per month as they failed to work on 4 and 5 April 2008. This means that, according to point 3 of the Notification No. 017, the 96 workers are not entitled to get US\$5 attendant bonus. (See Arbitral Awards 04/03-Lida, issue 1; 15/04-Lucky

Zone, issue 4; 03/05-Flying Dragon, issue 3; 63/07-Phnom Penh Garment and 54/08-Zhong Yov, issue 3).

Therefore, the Arbitration Council decides to declines to consider the workers' demand for the company to reimburse their attendant bonus.

B. Wages

In this point, the Arbitration Council will consider whether the workers are entitled to wages on 4 and 5 April 2008 when they did not fully work.

In the hearing, the workers claimed that Article 28 of Labour Law prohibits the employer from deducting workers' wage. Thus, based on this Article, the employer is not entitled to deduct their wages on 4 and 5 April 2008.

Article 28 of the Labour Law states, "*The employer shall not impose fines or double sanctions for the same misconduct. These fines mean any measure that leads to a reduction of the remuneration being normally due for the performance of work provided.*"

Based on Article 28 of the Labour Law above, the Arbitration Council considers that this article's wording means that **fines are any measure that leads to a reduction of the remuneration normally due for the performance of workers provided.** In this case, on 4 and 5 April 2008, the 96 workers did not fully work. Thus, wages the workers were supposed to receive normally, should they perform their work, shall not be included when they did not work on 4 and 5 April 2008. It follows that the fact that the employer did not pay the workers' wages for the period that they did not do their work does not reduce the normal wages to which the workers are entitled when they perform their work. The Arbitration Council holds that Article 28 of the Labour Law is not applicable for this case.

The Arbitration Council noted that general labour provision put strict concern to the mater of deduction of workers' wage. (See Article 126 to 129 of the Labour Law regarding wage deduction). However, the Arbitration Council considers that it is not necessary to discuss these Articles. They are applicable in certain situations, although not one in which where the employer has failed to pay workers' wage when the workers have not performed their work.

In the hearing, the workers claimed that the registered Internal Work Rules No. 047 SKBY dated 19 February 2002 does not discuss the deduction of workers' wages. The Arbitration Council considers that although the company's Internal Work Rules do not discuss wage deductions, generally the employment relationship between the employer and the workers is governed by law, especially with regard to employment contracts that establish labour obligations for both parties.

Article 65 of the Labour Law defines employment contract as a type of contract that "establishes a labour relationship between the workers and employer." In principle, labour contracts establish rights and obligations for the employer and the workers. Under this contract,

the employer has an obligation to provide wages to the workers for their service provided to the employer.

In this case, the 96 workers did not fully do their work under their responsibilities, although the employer issued an urgent internal announcement No 551/08 YW dated 4 April 2008, at around 7:00 p.m. to 8:00 p.m. to encourage the workers to go back work as normal. Because workers did not fully do their work on 4 and 5 April 2008, they do not qualify to receive the remuneration mentioned in their contract for their services provided to the employer. Thus, the employer has full right to not to provide wages for the period the workers did not perform their work. (See Arbitral Awards 63/07-Phnom Penh Garment; 110/07-New Corp, issue 3 and 54/08-Zhong Yov, issue 3).

Thus, Arbitration Council considers that the workers' demand for the company to pay their wages on 4 and 5 April 2008 is not valid.

However, in this case, the employer deducted all the wages on 4 and 5 April 2008 of the 96 workers although they did some work on each of the days. In this case, the Arbitration Council considers that even though the workers did not fulfill their responsibility in providing labour service to the employer, they completed part of the work under their employment contract. Therefore, the 96 workers are entitled to a wage in proportion to the period of time they worked on 4 and 5 April 2008.

In the hearing, both parties agreed that the workers did some part of their work on 4 and 5 of April 2008. However, the two parties did not provide the exact duration that the workers worked on each of the days. Because there was not sufficient fact finding regarding the duration of work, the Arbitration Council does not have the grounds to make a specific decision. Therefore, the Arbitration Council holds that the employer needs to pay wages to 96 workers in proportion to the period they worked on each of the days on 4 and 5 April 2008 and both parties should continue to discuss in good-faith in order to determine about the period of time the workers worked.

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

DECISION AND ORDER

Issue 1:

1. Reject the workers' demand for the company to backpay their attendance bonus.
2. Order the employer to pay wages to 96 workers in proportion to the period they worked on each of the days on 4 and 5 April 2008 and both parties should continue to discuss in good-faith in order to determine about the period of time the workers worked.

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 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: **Toun Siphann**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature:

Annex to Arbitral Award 85/08-Yung Wah I

Dissenting Opinion by Arbitrator Tuon Siphann

According to Clause 37 of Prakas 099 SKBY, dated 21 April 2004 by the Ministry of Labour and Vocational Training, in this case, I, Arbitrator Tuon Siphann, do not agree with the other two arbitrators who recognized the employer's claim that, although it had work opportunities on 4 and 5 April 2008, the workers did not work, [and the other two arbitrators therefore] rejected the workers' demand for the employer to provide US\$5 attendance bonus and full wages on 4 and 5 April 2008; [I thus dissent] for the following reasons:

Reasoning:

A. Attendance bonus:

The other two arbitrators in this case held that the 96 workers who did not work fully for the employer on 4 and 5 April 2008 were not entitled to the US\$ 5 attendance bonus. They based their reasoning on point 3 of Notification 017, dated 18 July 2000, which provides that "*workers who come to work regularly on regular working days of a month shall receive a bonus of at least \$ 5.00 per month.*"

I find that the Notification 017 above is applicable only to employment discipline regarding workplace arrival and departure times, and regular work attendance on the days mutually agreed upon between both employee and employer in accordance with the law. However, the two parties did not state that they had dispute about working hours, and the workers had regular attendance during their working hours. Thus, the Notification is not applicable to this case, and the employer cannot rely on this regulation to deduct the workers' attendance bonus. Moreover, the company's Internal Work Rules does not have a provision regarding deduction of attendance bonus. Thus, the employer cannot deduct this money.

Therefore, the workers should be entitled to their full attendance bonus.

B. Wages on 4 and 4 April 2008

The other two arbitrators in this case decided that the 96 workers who did not work fully for the employer on 4 and 5 April 2008 were not entitled to their full wages on 4 and 5 April based on the fact that the workers did not fully perform their work. However, in this case the employer deducted whole wages of the 96 workers on 4 and 5 April 2008 although they did some work for on each of the days. In this case, the other two arbitrators consider that although the workers did not performed their work fully to provide service to the employer but they did some part of the work required under their employment contract. Thus, the 96 workers are entitled to a part of wage in proportion to the duration of their work on 4 and 5 April 2008.

I do not agree with the above statement because based on the findings of fact, the workers were in the factory for 8 hours to perform their work but the employer did not have sufficient work

for them to do. I consider that the employer has an obligation to provide work for the workers to do and that, in this case, the fact that the employer did not provide sufficient work for the workers to do is not the workers' fault. Moreover, the company's Internal Work Rules do not have any provision about wage deduction when the company does not have sufficient work for the workers to do. In the past the company always paid full wages to the workers when it did not have work for them to do. When there is no work, like the incident of 4 and 5 April 2008, the employer still had an obligation to pay wages to the workers, except when the employer had suspended employment contract properly in accordance with Articles 71 and 72 of the Labour Law.

Therefore, the employer should provide wages the company deducted from the 96 workers on 4 and 5 April 2008.

6 April 2008

Signature of Arbitrator:

Name: **Toun Siphann**

Signature: