



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាពន្ធដំណាច

THE ARBITRATION COUNCIL

Case number and name: 85/07 - Vivatino Design

Date of Award: 20 September 2007

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: **AN NAN**

Chair Arbitrator (chosen by the two Arbitrators): **KONG PHALLACK**

DISPUTING PARTIES

Employer party:

Name: **Vivatino Design (Cambodia) Pty. Ltd.**

Address: Maida Street, Sangkat Toeuk Thla, Khan Russey Keo, Phnom Penh

Telephone: 012 885 911 Fax: N/A

Representative:

Ann Eath

Deputy Administrative Manager.

Worker party:

Name: **Cambodian Labour Union Federation (CLUF) and Cambodian Labour Union (CLU)**

Address: No. 30C, Street 371, Sangkat Toeuk Thla, Khan Russey Keo, Phnom Penh

Telephone: 016 657 556 Fax: N/A

Representatives:

1. Khin Sokhorn

Secretary General of CLUF;

2. Huor Pov

Officer of CLUF;

3. Chhan Samen

President of CLU at Vivatino Company;

4. Kroeung Sat Secretary of CLU at Vivatino Company;
5. Keo Sophea Vice-President of CLU at Vivatino Company.

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. Ms. Chhan Samen, President of the Cambodian Labour Union at Vivatino Company, demanded that the company compensate her for hiring body guards to beat her in front of the factory on the strike day. The company party cannot compensate her because the incident happened outside the factory and therefore it shall be handed over to the authorities to resolve.

2. Workers Norng Sam Ath, Cheab Samnang, Yos Baris, and Kim Mao demanded that the company pay their severance according to the Labour Law for previously dismissing them. The company party said that it would need some time to re-check [the figures].

3. Female workers demanded that the company pay them US\$5 more instead of building a day care center. The company party said that it would need some time to discuss with the company management.

4. Leaders of Cambodia Labour Union at the factory demanded that the company reimburse the 1,000 riel contribution fee which union members had agreed and thumb printed to have deducted from their wage for the period from January to June 2007. The company party said that the company had not deducted the contribution fee therefore the company could not reimburse it to 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 27 August 2007 was unsuccessful, and the non-conciliation report No. 892 was submitted to the Secretariat of the Arbitration Council on 27 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: 5 September 2007 (from 2:00pm to 5:00pm)

Procedural issues:

On 13 July 2007, the Department of Labour Disputes received a complaint from the Cambodia Labour Union at Vivatino Design Factory demanding that the company improve working conditions. Having received the complaint, the Department of Labour Disputes designated its officials to conciliate this dispute and the last conciliation session took place on 8 August 2007 and resulted in 10 of 14 issues being conciliated. The four remaining non-conciliated issues were forwarded to the Arbitration Council on 27 August 2007.

Having received the case, the Secretariat of the Arbitration Council summoned both employer and worker parties to attend a hearing and to conciliate the four non-conciliated issues on 5 September 2007 at 2:00pm. Both parties were present as summoned by the Arbitration Council.

On the hearing day, the Arbitration Council attempted to conciliate the four non-conciliated issues as stated in the non-conciliation report from the Department of Labour Disputes; as a result, issue 2 was conciliated. Therefore, in this case the Arbitration Council considers only issue 1, issue 3, and issue 4 based on the evidence and parties' statements as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council**Provided by the employer party:**

1. Arbitration Council's Order dated 26 April 2007;
2. Commercial registration certificate dated 11 February 2000;
3. Collective Bargaining Agreement between the employer and the employees of Vivatino Design (Cambodia) Pty. Ltd. dated 22 February 2007;
4. Letter to request the withdrawal and end the case of labour dispute between Vivatino and the union and the workers in case 40/07 dated 30 April 2007;
5. Request letter for visa for the Internal Work Rules of Vivatino Company dated 10 October 2007;
6. Internal Work Rules of Vivatino Company dated 10 October 2007;
7. Letter certifying the permanent delegate of Vivatino Company dated 10 October 2007;
8. Minutes of Collective Labour Dispute Conciliation dated 24 April 2007.

Provided by the worker party:

1. Cambodian Labour Union at Vivatino Factory's registration certificate dated 22 January 2007;
2. Statement of Ms. Chhan Samen;
3. Leave permission of Ms. Chhan Samen dated 31 May 2007.

Provided by the Ministry of Labour and Vocational Training:

1. Report on the collective labour disputes conciliation at Vivation Design Company dated 27 August 2007;
2. Minutes of the collective labour dispute conciliation at Vivatino Company dated 8 August 2007.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 378 to the worker party to attend the hearing dated 29 August 2007;
2. Invitation No. 377 to the employer party to attend the hearing dated 29 August 2007;
3. Minutes on the selection of the Arbitrator on the Employer List by lot dated 29 August 2007.

FACTS

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

The Arbitration Council finds that:

- Vivatino Design Factory employs around 1,000 workers;
- the union and employer party confirmed that in this factory there are six unions including the Cambodian Labour Union, the claimant in this case. However, they could not remember the names of the other unions and there is no union that has most representative status. This includes the Cambodian Labour Union;
- the Cambodian Labour Union, the claimant in this case, has around 120 members.

Issue 1: Ms. Chhan Samen, President of the Cambodian Labour Union, demanded that the company compensate her US\$500

- On 11 April 2007, workers went on strike because the company did not allow them to take their annual leave on 13 and 18 April 2007, the days before and after

Khmer New Year. According to the employer, the reason the employer did not allow workers to take their annual leave was because the company received orders from buyers and if the company could not deliver the goods on time, the company would have to pay compensation to the buyers.

- On 13 and 18 April 2007, the workers took leave from the employer without permission.
- On 19 April 2007, the workers returned to work. However, some of them worked and some did not work. According to the workers, on the same morning Mr. Ly Chheng, Vivatino Factory's Administrative Manager, accused Ms. Chhan Samen, President of the Cambodian Labour Union, of inciting workers not to work before the Khmer New Year on 11 April 2007 and to cause the the company loss. Mr. Ly Chheng shouted at workers causing fear among them and they ran outside the factory to stage a strike in front of the factory. The employer party agreed that the workers went on strike on 19 September 2007 but it did not know the reason [for the strike] because the employer representative had just started work with the company.
- Ms. Chhan Samen claimed through two photographs sent to the Arbitration Council that two of Mr. Ly Chheng's body guards on instructions from Mr. Ly Chheng, tried to take away the loudspeaker from the striking workers. She said she and other workers heard the conversation between Mr. Ly Chheng and his body guards. Mr. Ly Chheng ordered his body guards to confiscate the loudspeakers from the striking workers by all means. At around 11:20am before noon, some workers went for lunch and in front of the factory there was only Ms. Chhan Samen and some workers. At that time two body guards tried to confiscate the loudspeakers for the third time, but Ms. Chhan Samen prevented them and the clash occurred. At that time the body guards punched her twice – once on her shoulder and another on her left back causing so much pain. She was very angry and wanted to fight back but she was prevented by the other workers.
- The employer party said that the company does not have any body guards and it did not know who ordered the body guards to beat Ms. Chhan Samen. The company did not order any body guards to beat Ms. Chhan Samen.
- According to Ms. Chhan Samen's statement, she was two months pregnant when she was beaten. After being beaten, she went for a medical check at Phnom Penh Hospital. She did not give the date that she went for the medical check. The doctor certified that she had no problems but her baby might have some problems. The baby miscarried a few days later. She did not give the exact date that her baby miscarried. Later on she went to clean her womb at a small private

clinic opened in a Nokia Phone Shop. Due to her miscarriage, she had requested one months leave without pay to take care of herself.

- According to her statement, later on she became pregnant again but the baby also miscarried. She did not give the exact date of her second miscarriage. At that time, she requested half a months leave without pay. She did not provide documents related to the expenses of the medical checks and associated with the miscarriage.
- Mr. Ly Chheng was dismissed on 26 April 2007 as demanded by the workers after the Ms. Chhan Samen incident.
- In the hearing, Ms. Chhan Samen demanded that the company compensate her [in the amount of] US\$500. The employer party said the investigation about who beat Ms. Chhan Samen had not yet come up with any result. The company did not order any body guard to beat Ms. Chhan Samen. Therefore, the company would not compensate [her]. Ms. Chhan Samen claimed that the persons who beat her up were body guards of Mr. Ly Chheng, the former Administrative Manager of Vivatino Factory; therefore, the company must [be accountable?]. The employer party said that accountability should rest with the culprit not the company.
- The Arbitration Council ordered both parties to provide all related documents by 10 September 2007. Up until the deadline, the Arbitration Council did not receive any evidence from both parties. The Arbitration Council noticed that the Arbitration Council received some additional documents from the worker party on 11 September 2007. However, the worker party did not provide any reason why the documents were submitted after the deadline. Therefore, in this case the Arbitration Council will not consider this evidence.

Issue 3: The workers demanded that the company pay them [an additional] US\$5 more instead of building the day care center

- The company does not have a breastfeeding room and the day care center. The company allows female workers to breastfeed their children for one hour a day for a period of one year.
- According to the company's current practice, the company pays workers US\$5 per month for a period of one year instead of building the day care center.
- The company disagreed because there is an agreement with another union that covers this issue. The workers did not reject this claim.

- The Arbitration Council ordered both parties to provide all related-document by 10 September 2007. Up until the deadline, the Arbitration Council did not receive any evidence from either party.
- The company has more than 1,000 female workers. The union demanded this additional payment for its 120 members.

Issue 4: The workers demanded that the company reimburse the 1,000 riel contribution fee to every union member for the period from January to June 2007

- The workers demanded that the company reimburse the 1,000 riel union contribution fee for the period from January to June 2007 in cases where workers had agreed to and thumb-printed allow the company to deduct this from their wage but the company had not deducted this. The worker party did not give the exact amount of money that the union is demanding.
- The company said that it could not reimburse the money because the company had not deducted the 1,000 riel contribution fee from workers who are union members.
- The worker party agreed that the company had not deducted the 1,000 riel from workers who are union members. However, they still demanded that the company reimburse the money because the company had not followed the demands of workers.

REASONS FOR DECISION

Issue 1: Ms. Chhan Samen, President of the Cambodian Labour Union, demanded that the company compensate her US\$500

Before considering this case, the Arbitration Council will consider whether or not this claim is a work-related accident.

Article 248 of the Labour Law stipulates that, *“An accident is considered to be work related, regardless of the cause, if it happens to a worker working or during the working hours, whether or not the worker was at fault; it is the accident inflicted on the body of the worker or on an apprentice with or without wage, who is working in whatever capacity or whatever place for an employer or a manager of an enterprise.*

Equally, accidents happening to the worker during the direct commute from his residence to the work place and home are also considered to be work-related accidents as long as the trip was not interrupted nor a detour made for a personal or non-work-related reason.

All occupational illness, as defined by law, shall be considered a work-related accident and shall be remedied in the same manner.”

If we look at article 248, a work-related accident can occur in three cases: (1) the accident occurs when a worker is performing work or in working hours for whatever reason and even if it is the worker’s mistake, (2) the accident occurs when a worker travels from and to home without stopping or without going to another place for personal interest or outside where the work requires, and (3) all illnesses caused by their occupation.

Article 249 of the Labour Law provides that, *“Managers of enterprise are liable for all work-related accidents stipulated in the Article above regardless of the personal status of each worker.”*

Based on article 249 of the Labour Law above, an employer [bears liability] for all work-related accidents suffered by workers or professional trainees who work in the company or enterprise. Please see Arbitral Award 23/07 – You Ming, Issue 2 which held that where there is work-related accident the victim of the work-related accident is entitled to reimbursement of medical fees. The victim is entitled to the right [to be reimbursed] regardless of the reason for the accident and regardless of who committed the mistake. The provisions of the Labour Law do not specify who must commit the mistake or that the mistake must be caused intentionally .That means the law does not specify whether the conduct will amount to criminal or civil misconduct. The provision of the Labour Law about work-related accidents, defines only that a work-related accident [is an accident] that occurs to workers or professional trainees working in the company or enterprise.

In this case Ms. Chhan Samen was hurt during the strike on 19 April 2007 and she accused Mr. Ly Chheng’s body guard of punching her twice. Therefore, this case does not relate to a work-related accident of the type referred to in paragraphs 2 and 3 of Article 248 and the Arbitration Council will consider only the first type of accident, which is an accident that takes place when a person is performing their job or during working hours regardless of the reason and whether or not it was caused by the worker’s mistake.

Generally the provisions about work-related accidents [provide that] the accident occurs in the course of the normal employment relationship between an employer and a worker. That means the accident occurs during the period of the labour contract and the accident is caused by work or during the working hour. If we look at the content of Article 248 of the Labour Law, one may think that the accident that happened to Ms. Chhan Samen was a work-related accident because the accident occurred during the hours that the company operated and because Ms. Chhan Samen was injured during the strike demanding the company improve working conditions on 19 April 2007. The right to strike is protected by the Labour Law (Article 319) and the Constitution of Kingdom of Cambodia (Article 37). The right to strike has a direct connection with the relationship between workers and employers and

workers go on strike in order to demand their employer improve working conditions. Therefore, the accident suffered by Ms. Chhan Samen during the strike at the factory that caused her to receive two punches from the body guard of Mr. Ly Chheng on 19 April 2007 was connected to the relationship between employer and worker.

However, in this case the Arbitration Council considers that the accident was not a work-related accident because during the strike the workers did not work for the employer and that means during the strike, the labour contracts were suspended (see Article 332 of the Labour Law). The accident that happened to Ms. Chhan Samen occurred during the time that the company operated but during the strike the workers did not work for the company. The Arbitration Council considers that the content of Article 248, which stipulates that, “*accident happens to a worker working or during the working hours, whether or not the worker was at fault*” is an accident that occurs during working hours not during a strike period.

The Arbitration Council considers that it is not reasonable to interpret the term “during working hours” in a broad sense to mean, “**any accident that occurs to a worker during regular working hours when the company is operating its work.**” Generally, the Arbitration Council finds that “during working hours” should mean, “**the period that the worker is working or should be working for the employer.**” Therefore, based on Article 248 of the Labour Law, if any accident to a worker occurs during the period that a worker does not work for the employer, the accident is not considered a work-related accident. In this case the accident occurred during the period when workers were striking. During the strike the workers did not work even though the law gives them this right. Therefore, [the accident happened] during the strike not during working hours.

In conclusion, the accident that happened to Ms. Chhan Samen was not a work-related accident as defined by Article 248 of the Labour Law. Therefore, the Labour Law does not provide any compensation [to Ms Chhan Samen] for her medical treatment because it was not a work-related accident.

Therefore, the Arbitration Council rejects the demand of Ms. Chhan Samen for US\$500 compensation from the company. The rejection of the Arbitration Council does not prevent Ms. Chhan Samen from finding other legal solutions or prevent the employer from defending this claim. The Arbitration Council notes that the incident that happened to Ms. Chhan Samen was a bad and tragic accident and that it should not have happened.

Issue 3: The workers demanded that the company pay them US\$5 more instead of building the day care center

Article 186 of the Labour Law stipulates that, “*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 crèche (day care center).*”

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

Article 186 (2) above means that for children, the company must build a day care center for children from 18-months old up, but if the company has no ability to build the day care center, the company shall instead reimburse the day care fee to workers (See Arbitral Award 53/04 – Kong Hung, Issue 4 and 79/07 – Teratex, Issue 10). This article does not state the amount the employer has to pay for the day care fee, it depends on the actual fee on the invoice that the worker brings to the employer.

In this case the employer party disagreed with the demand of workers and asked for the implementation of the agreement that the company signed with another union that the company provides US\$5 per month for a period of one year.

The Arbitration Council considers that the agreement of the workers and employer clearly states the amount of the day care fee. This agreement states the point that Article 186 of the Labour Law does not state. The Arbitration Council considers that that the provision about US\$5 in the agreement is not inconsistent with the intention of the Labour Law. Based on this agreement, the employer does not have an obligation to pay [an additional] US\$5 instead of building the day care center. Therefore, the demand for additional US\$5 by workers was not valid.

The demand of workers in this case was to demand benefits that were not stated in this agreement. That means the dispute is an interests dispute.

Normally, the Arbitration Council declines to consider an interests dispute, if the union that brought the labour dispute does not have most representative status in the factory. Most representative status of the union gives the union legal [standing] to negotiate a collective bargaining agreement with a company (see Article 96 (2B) and Article 9 (1) of Prakas No. 305) and legal rights to bring an interests dispute before the Arbitration Council for resolution. In order to achieve most representative status, Article 277 of the 1997 Labour Law states that the union must be registered and must fulfill other conditions as stated in this Article. (See Arbitral Award 57/04 – Evergreen, Issues 1 and 2, 60/04 – United Art, Issues 3, 08/07 – Siu Quinh, Issues 3, and 33/07 – Gold Fame, Issue 2).

In this case the Cambodian Labour Union at Vivatino Factory does not have most representative status. Therefore, the Arbitration Council declines to consider the union’s demand in this issue.

Issue 4: The workers demanded that the company reimburse the 1,000 riel contribution fee to every union member for the period from January to June 2007

Article 129 (2) of the Labour Law stipulates that, “...*the worker can authorize deductions of his wage for dues to the trade union to which he belongs. This authorization must be in writing and can be revoked at any time.*”

Moreover, Article 5 of Prakas No. 305 dated 22 November 2001 of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation states that, “*Any worker who belongs to a union may request in writing at least 15 days in advance that her/his union dues be withheld from her/his salary, in accordance with Article 129 of the Labor Code.*”

However, Article 281 of the Labour Law provides that, “*All employers are forbidden to deduct union dues from the wage of their workers and to pay the dues for them.*”

In previous awards, the Arbitration Council decided that, “*the content of Article 281 was stated in the purpose of protecting the rights of workers and preventing employer from interfering union activities and put union under its influence as stated in Article 280.*” (See Arbitral Award 62/05 – Jin Tai and 74/07 – Global Apparel, Issue 2).

In this case both parties agreed that in January 2007 workers requested the company deduct their 1,000 riel monthly union contribution fee. However, the company did not deduct the union contribution fee from workers’ wages nor did it keep the workers’ wages itself.

The union party said that the union suffered some damage because the employer did not deduct union contribution fees from workers’ wages for the period January to June 2007. Therefore, the union demanded that the company pay them damages equal to the union contribution fees for the period from January to June 2007. The employer party argued that the employer did not have an obligation to pay damages because the employer did not deduct nor did it keep those fees for itself.

The Arbitration Council considers that in this case the employer did not keep the union contribution fee and the fee remained in the wages of workers who are members of the Cambodian Labour Union and workers had already received that wages. The employer did not receive any benefit from the deduction of union contribution fees; the union should resolve this issue among its members, who had yet paid the contribution fee.

In this issue the Arbitration Council considers that the demand of union was not valid. Therefore, the Arbitration Council decides to reject this demand.

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

DECISIONS

Issue 1: Reject the demand of Ms. Chhan Samen for US\$500 compensation from the company.

Issue 3: Decline to consider the demand of workers for an additional US\$5 in replacement of the day care center.

Issue 4: Reject the demand of the union for [reimbursement of the] 1,000 riel union contribution fee for every [union] member for the period from January to June 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: **AN NAN**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **KONG PHALLACK**

Signature: