

**KINGDOM OF CAMBODIA**

**NATION RELIGION KING**

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**THE ARBITRATION COUNCIL**

Case: 91/04

Date of award: 22 November 2004

**ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

**Honey Wear Garment**

(Employer party)

**AND**

**Cambodian Garment Industry Union**

(Employee party)

**DETAILED INFORMATION OF EMPLOYER PARTY:**

**Representatives:**

- 1- Mr. Liu Jian Xing, Manager of the company
- 2- Mr. Long Heang, Representative of the company
- 3- Mr. Tuon Leurn, Administration Chief
- 4- Ms. Tann Sok Meiv, Translator
- 5- Mr. Nguon Bunlong, Shop Steward

**Address:** Angkeo Village, Kantork quarter, Angsnuol district, Kandal.

**Tel:** 012 522 266

**DETAILED INFORMATION OF EMPLOYEE PARTY:**

**Representatives:**

- 1- Mr. Lou Sak, President of CIUF
- 2- Mr. Hem Sok Ponlork, Vice-president of CIUF
- 3- Ms. Sun Tang, Acting-President of Cambodian Garment Industry Union
- 4- Mr. Heng Sothy, Union financier
- 5- Ms. Chea Mom, Secretary
- 6- Mr. Prum Tola, workers' representative
- 7- Ms. Tuy Rarng, workers' representative

**Address:** # 60A, Street 3386, Beung Keng Kang III quarter, Chamkarmorn district, Phnom Penh.  
**Tel:** 012 580 912

### **ISSUES IN DISPUTE:**

(In non-conciliation report)

- The employee party demands that the company reinstate Ms. Sun Tang, the worker representative, whom the employer had suspended in order to be dismissed.

### **JURISDICTION OF THE ARBITRATION COUNCIL:**

The Arbitration Council derives its power to make this Award from Section II B of Chapter 12 of the Labour Law (1997); the Prakas on the establishment of the Arbitration Council 338/02, the Prakas on the Arbitration Council 099/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas and the Prakas on the Nomination of Arbitrators 103/04.

An attempt to conciliate the collective dispute which is the subject of this Award was made as required by Chapter XII Section 2A of the Labour Law. That conciliation hearing was unsuccessful. The non-conciliation report no. 247, dated 26 October 2004 was submitted to the Secretariat of the Arbitration Council on 27 October 2004.

### **COMPOSITION OF THE ARBITRATION PANEL:**

Arbitrator chosen by the employer party:	Mr. Mar Sambona
Arbitrator chosen by the worker party:	Mr. Liv Sovanna
Chair arbitrator (chosen by the two arbitrators):	Mr. Kong Phallack

### **HEARING AND EVIDENCE:**

#### **Date and place of hearing:**

-1: 29 October 2004, at 2:30 p.m., at the Secretariat of the Arbitration Council

-2: 6 November 2004, at 8:30 a.m., at the Secretariat of the Arbitration Council

**Witnesses and experts:** N/A

#### **EVIDENCE THAT WAS CONSIDERED BY THE ARBITRATION PANEL IS AS BELOW:**

**Provided by the employer party:**

- 1- The company's certificate, no. 1298, dated 25 April 2002
- 2- Internal Work Rules, dated 28 May 1999, dated 3 June 1999
- 3- Report of Angksnuol Police Headquarters, dated 25 October 2004 on the workers' strike
- 4- Report of Angksnuol Police Headquarters, dated 26 October 2004 on the workers' strike and the company's situation
- 5- Report of Angksnuol Police Headquarters, dated 27 October 2004 on the workers' strike and the company's situation
- 6- Report of Angksnuol Police Headquarters, dated 28 October 2004 on the workers' strike and the company's situation
- 7- Photos of the ongoing strike of the employees after the Arbitration Council issuing an order for them to return to work
- 8- Ms. Sun Tang's notification letter about her suspension, dated 22 October 2004
- 9- The company's letter to the Labour Inspector of Kandal Province, requesting the dismissal of Ms. Sun Tang, dated 22 October 2004
- 10- Decision of the Labour Inspector of Kandal Province to allow the employer to fire Ms. Sun Tang, dated 5 November 2004

**Provided by the employee party:**

- 1- Cambodian Garment Industry Union Honey Wear's registration certificate, no. 497, dated 7 October 2004 and registration letter, no. 459, dated 7 October 2004
- 2- List and fingerprints of Honey Wear employees who demanded the company follow the working conditions and to reinstate Ms. Sun Tang
- 3- Ms. Sun Tang's letter transferring rights to Lawyer Lim Vanna to represent her in this dispute settlement, dated 4 November 2004
- 4- Invitation letter of Ministry of Labour of the Kandal Province, dated 3 November 2004 to Ms. Sun Tang to give more information and conciliate on the complaint lodged by the company Honey Wear
- 5- Letter to Minister of the Ministry of Labour dated 8 November 2004 to recourse the decision made by the Department of Labour of Kandal Province

**Received from MoLVT:**

- 1- Non-conciliation report on the collective dispute of the Ministry of Labour of the Kandal Province no. 247, dated 26 October 2004
- 2- Minutes on the collective dispute conciliation, dated 30 July 2004
- 3- Minutes on collective dispute conciliation, dated 27 July 2004

**Presentation by employers and employees in the hearing.**

**The two parties decided in the hearing that: THIS AWARD IS NOT IMMEDIATELY BINDING.**

**CASE SUMMARY:**

Honey Wear Company is located in Angkeo Village, Kontork quarter, Angsnuol district, Kandal and has about 400 employees. On 25 October 2004, the Department of Labour of Kandal Province received the employees' complaint of 11 points. On 26 October 2004, officials of the Department of Labour of Kandal Province conciliated the two parties of the Cambodian Garment Industry Union, representing the employees, and the employer. During the conciliation process, the employee party ended the conciliation with the employer when the employer denied the first point of the dispute. The first point is about the Union's demand for the company to reinstate Ms. Sun Tang. But, the employer did not agree because the company had already suspended Ms. Sun Tang and submitted the suspension to the Department of Labour of Kandal Province to seek her dismissal due to her serious misconduct. The other ten points were not yet negotiated by the two parties and conciliated by the Labour Inspector of the Ministry of Labour of Kandal Province.

The employees started striking on 25 October 2004. On 27 October 2004, the Arbitration Council issued its order to the employees to suspend their strike immediately and return to work at 2:00 p.m. on 27 October 2004 onwards, and to the employer to allow the employees to return to their work without any punishment or taking any measures towards any workers returning to work after 27 October 2004. The Secretariat of the Arbitration Council invited the two parties to appear in the hearing at the Secretariat on 29 October 2004 at 2:30 p.m. On 29 October 2004 at 2:30 p.m., the two parties attended the hearing at the Secretariat of the Arbitration Council. In the hearing, the Arbitration Council found that the employees did not stop their striking as ordered by the Arbitration Council, and the employer asked to proceed with the hearing until all the employees agreed and returned to work. In the meantime, the two parties reached an agreement that they would follow the order of the Arbitration Council, dated 27 October 2004. The Arbitration Council decided to delay the hearing to 6 November 2004 at 8:00 a.m. to hear a non-conciliated point submitted by the Ministry of Labour. On 6 November 2004 at 8:00 a.m. the two parties attended the hearing at the Secretariat of the Arbitration Council. The two parties said that the employees stopped the strike, and returned to work, except Ms. Sun Tang who had to wait for the decision by the Arbitration Council. In the hearing, the employer party also submitted letter no. 268 about the decision of the Department of Labour of Kandal Province, dated 5 November 2004, allowing the employer to dismiss Ms. Sun Tang. During the hearing, the employer refused the Arbitration Council's request to give a list of names, plaintiffs and witnesses that are related

to the suspension and dismissal of Ms. Sun Tang to appear in the hearing in order to give information about the seriousness of the misconduct committed by Ms. Sun Tang.

**FINDINGS OF FACT:**

- Having examined the minutes on collective conciliation
- Having listened to the presentation of the two parties and minutes in the hearing
- Having checked the above mentioned documents

**We find that:**

According to the complaint by four workers the company suspended Ms. Sun Tang with a notification letter, dated 22 October 2004. On the same day of 22 October 2004, the company submitted a letter to the Department of Labour of Kandal Province, requesting a dismissal of Ms. Sun Tang according to the complaint of the four workers. After having received the complaint from the four workers, the company failed to call in Ms. Sun Tang to provide clarification [of the accusations] or defend herself.

The letter of the company to the Department of Labour of Kandal Province accused Ms. Sun Tang, based on the complaint by the four workers, of committing serious misconduct as stated in Article 83 of the Labour Law, that is, her insulting the four workers as mentioned in the complaint. During the hearing, Ms. Sun Tang argued that on 6, 7, 8 and 15 October 2004, she did not insult or intimidate any worker. Instead, she said that on 6, 7, and 8 October 2004, she was discussing with the company's administrator about the ten-point demand of the employees.

Ms. Sun Tang added that on 18 October 2004 at the time-card place she used the following insulting words, although she said she was joking: "gate keeping dog!" with her friends including a friend Tuy Rorng, who used to be a security guard. There were some other workers who were Ms. Sun Tang's friends, observers and security guards of the company. Tuy Rorng did not get angry and complain about Ms. Sun Tang, knowing that Ms. Sun Tang was just kidding. Ms. Sun Tang said that she did not mean to insult any security guard, nor to intimidate any worker.

Ms. Sun Tang is the acting President of Cambodian Garment Industry Union and the workers' representative who was always actively cooperating with other leaders of unions in order to protest for and to defend the workers. For instance, not long before she was suspended by the company, she was involved in a ten-point demand, asking the employer to implement the employer and the employees' agreement, presided over by the Labour

Inspector as mentioned in the minutes of the collective dispute conciliation, dated 30 July 2004 and the negotiation with the company over the disputes.

On 28 October 2004, the Labour Inspector of the Department of Labour and of Kandal Province intervened to question the witnesses about the complaint about Ms. Sun Tang being accused of insulting and intimidating four workers. Ms. Sun Tang was not allowed to respond or defend herself. Ms. Sun Tang did not know who the plaintiffs were that accused her of [being] insulting and intimidating. Thus, she could not react or defend herself. Despite the request from the Arbitration Council, the employer party refused to mention the plaintiffs and witnesses for the above accusation. The employer did that for the sake of the plaintiffs' and witnesses' security.

On 5 November 2004, the Department of Labour issued its decision no. 268, dated 5 November 2004, to allow Ms. Sun Tang's dismissal.

#### **REASON FOR DECISION:**

According to Article 295 of the Labour Law in relation to rights protection and freedom of the Union, *"In the case of Serious misconduct, the company director has the power to immediately suspend the party in question while awaiting the Labour Inspector's decision..."* According to the Article, the employer has the right to immediately suspend any shop steward or leaders of the union who commits serious misconduct awaiting the Labour Inspector's approval of the dismissal. In this case, the problem is whether or not Ms. Sun Tang committed a serious misconduct.

In addition, when the Arbitration Council proceeded with the case, the Labour Inspector of Kandal issued his decision saying that he did not oppose the dismissal of Ms. Sun Tang. This results in another problem about whether the Arbitration Council has jurisdiction over the case.

#### **1. The Arbitration Council's jurisdiction**

At first, the Arbitration Council considered if it had jurisdiction over the case. In response to the case, the Arbitration Council considered two things:

- 1.1 Does the decision by the Department of Labour of Kandal Province in response to the request of the company for the dismissal of Ms. Sun Tang make the Arbitration Council lose its jurisdiction over the case?

According to Article 293, paragraph 1 of the Labour Law, a shop steward can be terminated only if there is permission from the Labour Inspectors. The Labour Inspector has to give his decision within two months of receiving the complaint (Article 293, paragraph 2). The employer submitted a request seeking permission from the Department of Labour and Vocational Training of Kandal Province based on Article 293, paragraph 1 of the Labour Law, via a letter dated 22 October 2004. On 5 November 2004, the Department of Labour of Kandal Province issued letter no. 268, dated 5 November 2004, stating that “the Department does not oppose the request for the dismissal of Ms. Sun Tang because she had committed serious misconduct as mentioned in point 4 of Article 83 of the Labour Law.”

The Arbitration Council finds that the letter is inconsistent with Article 293 and 295 of Labour Law.

Article 293, paragraph 3 of the Labour Law states that *“the employer, the employee in question, or the union to which he belongs have a two-month deadline after the receipt of the decision to appeal to the Minister of Labour. The latter can cancel or reverse the decision of the Labour Inspector”*. In this sense, Ms. Sun Tang or the Cambodian Garment Industry Union is entitled to appeal to the Ministry of Labour in order to reject the above letter no. 268 of the Department of Labour of Kandal Province within two months, counting from 5 November 2004.

On November 8, 2004, after the hearing the Union did recourse to the Ministry of Labour by protesting against the decision of the Department of Labour of Kandal Province, no. 268.

In this regard, does the Arbitration Council have jurisdiction over the dismissal of Ms. Sun Tang?

Article 293-295 of Chapter 11 of the Labour Law mentions the rights and freedoms of the union and representatives of workers in an enterprise. The Arbitration Council finds that the purposes of the provisions are to prevent the leaders of the union and shop stewards from discrimination and abuse from the employers. When the dismissal is related to the rights of the union, the Law requires the employer to get permission from the Labour Inspector in advance. These provisions provide additional protection to the employees (similar to the immunity given to the deputies and senators) to ensure that their dismissals do not affect their position as or shop stewards or leaders of the union. When the Labour Inspector approves the dismissal,

the leaders of the union or shop stewards lose their immunity, and they become normal workers. In this case, Ms. Sun Tang lost her immunity provided for by the law, and became a normal worker. Therefore, the dismissal is that of a normal worker. The law requires that the employer has to have enough evidence in order to terminate the labour contract.

Therefore, the Arbitration Council finds that it still has jurisdiction over the consideration of facts and appropriateness in relation to the dismissal of normal workers who are not shop stewards and of whether the employer has reasonable evidence to fire the workers.

In this case the Arbitration Council has to determine if the worker committed serious misconduct.

Moreover, the Arbitration Council notices that Article 293 of the Labour Law does not reject the Arbitration Council's jurisdiction over the consideration of the dismissal of the union leader or shop steward. Naturally, here, the collective dispute stems from the dismissal. The Arbitration Council will not consider any decision or procedure of the Labour Inspector who allowed the dismissal of Miss. Sun Tang. However, it is the task of the Ministry of Labour as mentioned in Article 293 (or of the court in revising the Minister's decision in case there is an appeal).

The Arbitration Council finds that the case is not the same as 78/04 - MV, because in that case the Labour Inspector had not yet approved the dismissal.

## **1.2 Is the dismissal of Ms. Sun Tang an individual or collective dispute?**

The Arbitration Council finds that even though the case is related to the dismissal of only one worker, Ms. Sun Tang, it is a collective dispute since the dispute falls into the three characteristics of a collective dispute as mentioned in Article 302 of Labour Law. The three requirements are as follows:

- a. A dispute of some employees and one or more employers. In the dispute, there were many employees involved in the strike to demand the company to reinstate Ms. Sun Tang.
- b. A dispute over working conditions, the exercise of the recognized rights of professional organisations, the recognition of professional organisations within the business and questions regarding relations between employers and

workers. In this case, it is a dispute of the relationship between Ms. Sun Tang and the company because Ms. Sun Tang is the acting president of the company's union, who was accused of committing serious misconduct.

- c. The dispute can compromise the effective operation of the enterprise. Of course, there was strike a leading to the order by the Arbitration Council on 27 October 2004 to stop the strike.

Therefore, the Arbitration Council finds that it is a collective dispute.

The Arbitration Council makes its decision that it still has its jurisdiction over this case.

## **2. The dismissal of Ms. Sun Tang**

Here, the employer party accused Ms. Sun Tang of committing serious misconduct based on Article 83 (B) (4) and on the complaint of the four workers who accused Ms. Sun Tang of insulting them. In the hearing, the Arbitration Council finds that Ms. Sun Tang was accused of by four workers of whom she (herself) did not know the names.

Based on equity and justice, a person accused of a crime has the right to information about the charge—to know who the plaintiffs are —and has the right to self-defense or to find a lawyer or representative to defend. In the hearing, Ms. Sun Tang testified that she did not know about the identity and lawsuit of the plaintiffs and was never called in for clarification by the employer or any labour official.

In addition, in the hearing the employer refused to give over the complaint file of the four workers and did not allow the four workers to appear in the hearing as required by the Arbitration Council so that they can prove their charge against Ms. Sun Tang. It means that the employer failed to give evidence to the Arbitration Council to support their accusation against Ms. Sun Tang of committing serious misconduct. The employer still refused although the Arbitration Council kept ordering him to bring in the plaintiffs and evidence repeatedly.

In previous cases, the Arbitration Council found that if any party fails to provide evidence, it can make unfavorable decisions for the party, or the Arbitration Council accepts the evidence by the another party as true (See Arbitral Awards 10/03 - Jacques Shintex and 25/03 - Advance).

Therefore, since the employer cannot show evidence to prove the seriousness of the accusation, the Arbitration Council finds that the accusation that Ms. Sun Tang committed serious misconduct is unfounded, unreasonable and unjustified.

The Arbitration Council finds that there is no evidence to prove that Ms. Sun Tang committed serious misconduct. Hence, the Arbitration Council finds that the employer dismissed Ms. Sun Tang for unfounded reasons.

So, the Arbitration Council decides that the company should reinstate Ms. Sun Tang.

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

**DECIDES:**

1. The Arbitration Council has jurisdiction over case 91/04
2. The company accepts the worker Ms. Sun Tang to return to work immediately after this order comes into force.

**SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:**

**Arbitrator chosen by the employer party:**

Name: Mar Sambona

Signed: .....

**Arbitrator chosen by the worker party:**

Name: Liv Sovanna

Signed: .....

**Chair of arbitration panel:**

Name: Kong Phallack

Signed: .....

This Award will become binding after eight days of the date of its notification unless one of the parties lodges a written opposition with the Secretariat of the Arbitration Council within this time period.

This Award is immediately binding upon the parties if the parties have agreed as such in writing before the notification of the Award, or if the parties are bound to comply with a collective bargaining agreement stipulating that no opposition to the Award may be lodged.