



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 95/09 – Tack Fat

Date of Award: 21 August 2009

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: **Ven Pov**

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

DISPUTING PARTIES

Employer party:

Name: Tack Fat Garment (Cambodia) Ltd.

Address: National Road 2, Chak Angre Leu Quarter, Meanchey District, Phnom Penh.

Telephone: 011 957 576 Fax: N/A

Representative:

- | | |
|----------------------|-----------------------------|
| 1. Mr. Hom Phea | Attorney of Appointed Agent |
| 2. Ms. Men Sotha | Administrative Director |
| 3. Mr. Cheat Khemara | GMAC Officer |
| 4. Mr. Liv Man | Administrator |
| 5. Mr. Seng Vutha | Administrator |
| 6. Mr. Rim Vireak | Assistant to Lawyer |

Worker party:

Name: Coalition of Cambodian Apparel Workers' Democratic Union in Tack Fat Co., Ltd

Address: Prek Takong Village, Chak Angre Leu Quarter, Meanchey District, Phnom Penh

Telephone: 012 282 653 Fax: N/A

Representative:

- | | |
|------------------|-----------------|
| 1. Mr. Oum Visal | C.CAWDU Officer |
|------------------|-----------------|

2. Mr. Meas Samphos	C.CAWDU President
3. Mr. Ly Vannaro	C.CAWDU Vice-President
4. Mr. Oum Sok San	C.CAWDU Secretary
5. Mr. Kos Sothea	Activist
6. Ms. Chheang Thida	Activist
7. Ms. Yong Leap	Activist
8. Ms. Pheng Sopeak	Activist
9. Ms. Ngon Ly	Activist
10. Mr. Seng Thea	Worker Delegate
11. Mr. Chhay Si Ngoy	Worker Delegate

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. The workers demand that the company reimburse 10,000 riels for medical check-up as ordered by the binding Arbitral Award of the Arbitration Council. The company states that it will not discuss this issue again because it was already decided by the Arbitration Council.
2. The workers demand that the company pay back US\$ 220 of funds from October 2008 to the date the money is repaid by the company. The company states that it will not follow suit because it already deals with sick workers and the national social security fund.
3. The workers demand that the company provide a termination payment to carpenters who were dismissed by the company. Nevertheless, the company states that it cannot discuss the issue again, as it was decided by the Arbitration Council.
4. The workers demand that the company provide severance pay to workers who worked in the Sewing Section, Finishing Section, and Laundry Section before transferring them to other places or buildings because they have been working for more than 10 years (they do not possess other skills). The company states that it did not terminate their employment contracts as it is only transferring them from one place to another (transferring them from the Finishing Section) because the Section has too many workers (the company did not make any changes to the Laundry Section).
5. The workers demand that the company compensate them US\$ 15 per month in lieu of a functional daycare center. The company states that it had a daycare center in the past but not any more. The company stated that when it operates smoothly again, it

will arrange for a daycare center (that is, the company is unable to provide US\$ 15 in lieu of a daycare center).

6. The workers demand that the company reinstate a worker delegate called Roeun Alin, ID No. 5035, in the Super Linking Section and maintain her wages from the date she was terminated to the date of reinstatement. The company states that it will not reinstate the worker because she had sold goods inside the company's premises (during working hours).
7. The workers demand that the company issue pay slips two days before payment. The company does not agree to the demand, saying that it only follows the existing practice.
8. The workers demand that the company adopt the punch-in rather than swiping card. The company states from now on it will stick to the punch-in system because the swiping card machine broke down and it could not afford to repair it.
9. The workers demand that the company deduct contribution fees from the members of the Apparel Workers Democratic Trade Union. The company states that it could not follow suit because the union incited unrest (to not cooperate well with the company), and if the union had good relations with the company, it will deduct the fees.
10. The workers demand that the company provide 100 percent of wages for the suspension of workers from 15 June 2009 to the end of June 2009. The company asserts it could not follow suit because the workers did not adhere to the assignment of the company.
11. The workers demand that the company pay them full wages when it does not have much work for them to do, and let the workers return home. The company states that in case of not much work, the company could not afford to provide full wages to the workers because they do not work for the company.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B (Articles 309 to 317) of the Labour 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. 076/07 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. 591 dated 15 July 2009 was submitted to the Secretariat of the Arbitration Council on 16 July 2009.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Bassac, Khan Chamkarmon, Phnom Penh.

Date of hearing: 24 July 2009 at 8:30 a.m.

Procedural issues:

On 24 June 2009, the Department of Labour Disputes received a complaint from the Coalition of Cambodian Apparel Workers' Democratic Union on the demand for the company to improve working conditions.

Having received the complaint, the Department of Labour Disputes assigned expert officials to deal with the collective labour dispute and conducted a final conciliation on 9 July 2009 on the 13 points of the dispute with the result of two out of 11 points being dealt with successfully. The 11 non-conciliation points were submitted to the Secretariat of the Arbitration Council on 16 July 2009.

Having received the case, the Secretariat of the Arbitration Council extended the invitations to both employer and worker parties to attend a hearing, and conciliate the 11 non-conciliation points on 24 July 2009 at 8:30 a.m. Both parties appeared before the hearing at the invitation of the Arbitration Council.

On the hearing day, the Arbitration Council attempted to seek more information with regard to the disputes and conciliated the 11 points with the result that points 7 and 8 were conciliated and points 1, 4, 5, 9 and 11 were withdrawn by the union. Thus, in this case, the Arbitration Council will consider points 2, 3, 6, 10 based on evidence, and reasoning as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. A statement on the collective labour dispute No. 95/09 – Tack Fat Garment dated 29 July 2009.
2. The authorisation letter of the President of Tack Fat Garment to Ms. Men Sotha and Mr. Liv Manh dated 24 July 2009.
3. The authorisation letter of an appointed agent of the President of Tack Fat Garment to Lawyer Hom Phea dated 23 July 2009.

4. A letter dated 15 June 2009 of the President of Tack Fat Garment to the Director the Department of Labour Disputes on the request to suspend Roeun Alin.
5. A legal challenge on Arbitral Award, issue 3 dated 22 April 2002.
6. A letter No. 054/09 of the Coalition of Cambodian Apparel Workers' Democratic Union in Tack Fat Co., Ltd sent to the Director of the Department of Labour Disputes on the request for labour dispute resolution in Tack Fat factory dated 23 June 2009.
7. A minute of the collective labour dispute resolution in Tack Fat factory dated 9 September 2009.
8. Arbitral Award 53/09 – Tack Fat dated 18 May 2009.
9. A legal challenge lodged by the Coalition of Cambodian Apparel Workers' Democratic Union in Tack Fat factory against the Arbitral Award 53/09 – Tack Fat dated 25 May 2009.
10. A letter No. 179 of the Director the Department of Labour Disputes to the President of Tack Fat Garment on the suspension of a worker dated 10 March 2009.
11. Statute of Tack Fat Garment.
12. A certificate of business registration of Tack Fat Garment dated 23 June 2008.
13. A letter No. 162/94 dated 19 July 1994 of the Council for the Development of Cambodia on the establishment of Tack Fat Garment.
14. The Internal Work Rules of Tack Fat factory dated 20 January 1999.
15. A suspension letter to Roeun Alin dated 13 June 2009.
16. A Salary Schedule for June 2009, the Laundry Section dated 8 July 2009.
17. A Salary Schedule for June 2009, the Sewing Section dated 10 July 2009.
18. A Salary Schedule for June 2009, the Table Cutting Section dated 8 July 2009.
19. A Salary Schedule for June 2009, the Packaging Section dated 25 July 2009.
20. A Salary Schedule for June 2009, the Packaging Section dated 10 July 2009.
21. A Salary Schedule for June 2009, the Trousers Section dated 10 July 2009.
22. A Salary Schedule for June 2009, the Trousers Section dated 25 July 2009.
23. A Salary Schedule for June 2009, the Super Linking Section dated 8 July 2009.
24. A Salary Schedule for June 2009, the Super Linking Section dated 17 July 2009.
25. A Salary Schedule for June 2009, the Stitching Section dated 25 July 2009.

Provided by the worker party:

1. A statement for Arbitral Award 95/09 – Tack Fat dated 30 July 2009;
2. An authorisation letter of management team, workers and members of C.CAWDU working in Tack Fat factory sent to Tack Fat Garment dated 11 July 2009;

3. A complaint filed by Nop Rithy dated 21 January 2009;
4. A complaint filed by Sok Heng dated 21 January 2009;
5. A complaint filed by Chek Keng dated 21 January 2009;
6. A complaint dated 21 January 2009 filed by C.CAWDU in Tack Fat Garment factory to the President of Tack Fat Garment;

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

1. A report on the collective labour dispute resolutions in Tack Fat Garment Ltd No. 591 dated 15 July 2009.
2. A minute on the collective labour dispute resolutions in Tack Fat Garment Ltd dated 9 July 2009.

Provided by the Secretariat of the Arbitration Council:

1. An invitation letter for the employer party to attend the hearing No. 464 dated 20 July 2009.
2. An invitation letter for the worker party to attend the hearing No. 465 dated 20 July 2009.

FACTS

- Having examined a report on the collective labour dispute resolutions
- Having listened to the argument of representatives of workers and employer, and
- Having reviewed additional documents

The Arbitration Council finds that:

- Tack Fat Garment factory is currently employing approximately 2,035 workers.
- The Coalition of Apparel Workers' Democratic Union is the claimant in this case, and has 782 members. The union does not have the most representative status in Tack Fat Garment.

Issue 2: The workers demand the company reimburse funds of US\$ 220 per month from October 2008.

- The employer argued that with the request of the workers in November 2006, the company and the union agreed to found the Health and Safety Fund Commission with the company offering to finance US\$ 220 per month. The commission comprised Dr. Teav Kunthea Ratana, who was the Chief of Administration and Deputy Director; and the union, who held the position of a member. The funds were given by the company to the commission since November 2006, but stopped in October 2008.

- The employer added that the reason why it decided to stop financing the commission was that the company was faced with a financial crisis because it did not have any more purchasing orders. At the time, it was not usual [for the company to face such crises]. Moreover, the company had fulfilled its obligation to make payment to the National Social Security Fund since 2008.
- The worker party asserted that the company in the past provided US\$ 220 of funds per month, and it was the Health and Safety Commission who managed and oversaw the funds to help the workers who faced difficulties such as death, bereavement, houses set ablaze by flame, medical operation, and abject poverty. According to the statement provided by the union, the union still stands firm on the demand on the grounds that:
 - (1) The funds had been provided for some time; the union argues that it is binding practice which was agreed upon by the company and workers, except for where there is another agreement in lieu of the binding obligation.
 - (2) According to Article 13 of the Labour Law, any perquisites provided by the company to workers above and beyond the [Labour] Law shall not be withdrawn by a unilateral decision of the company.
 - (3) Moreover, the funds of US\$ 220 per month is contrary to what the company paid to the National Social Security Fund because the social security fund is required by the law, and provided to the workers in case of work-related accidents. However, the funds for the Commission were intended for workers or their families who were living in extreme poverty or experiencing grave difficulties.

Issue 3: The workers demand the company provide remuneration to the suspended carpenters.

- The workers argued that three carpenters were dismissed by the company, and they demand termination payments based on the [Labour] Law. According to the Arbitral Award No. 53/09 dated 18 May 2009, the worker party sought to conciliate with the employer to progress stifled negotiations.
- The employer also argued that the reason why it refused to negotiate with the union was that the worker party issued a legal challenge against the Arbitral Award [issued on 22 April 2002] in writing to the Minister of Labour and Vocational Training.
- According to the report provided by the worker party, there were three workers who once served in the Carpentry Section – Mr. Chek Keng commenced on 14 July 2000, Mr. Sok Heng commenced on 29 September 2001, and Mr. Nop Rithy commenced on 20 August 1997. On 14 January 2009, the company dissolved the Carpentry

Section and dismissed them unilaterally, and they were not provided with any severance pay for dismissal from the Carpentry Section. For now, the workers demanded the company reimburse the three workers with remuneration in compliance with the Labour Law such as payment in lieu of prior notification [Article 75 of the Labour Law], severance pay [Article 89], payment of damages [Article 91]; and payment in lieu of annual leave [Article 166].

- Moreover, according to the report provided by the company party, as a consequence of the reorganisation of production to adjust to the global financial crisis, and the frequent problems in the Carpentry Section – for example, the workers joking with each other, playing cards and smoking and so on – the company decided to disband the Carpentry Section and moved the three workers to the Kiln and Water Purification Sections, but the workers in turn did not follow the orders of the employer, who had issued several warnings to them. The Arbitration Council issued Arbitral Award 53/09 on 18 May 2009 on the same issue. Therefore, the Arbitration Council has no jurisdiction to deal with the issue again.

Issue 6: The workers demand the company reinstate a worker delegate called Roeun Alin, ID No. 5035 and maintain the wages from the date of suspension to the date of reinstatement.

- The company suspended a worker called Roeun Alin on 13 June 2009 because the worker had committed serious misconduct by selling meat balls to workers in another section during working hours. The company informed the Labour Inspector on 15 June 2009.
- The company added that the dispute over the suspension is an individual dispute because the worker had committed serious misconduct, and the company followed the Internal Work Rules, which states that dismissal shall be applied.
- The worker party asserted that it is not an individual dispute, but a collective one since the dismissal of Roeun Alin had a bearing on her right as a worker delegate, who represents all the workers in the factory. Moreover, the worker party argues that the fact that the union filed a complaint means that the worker is represented by a professional organisation, and helps the worker to be reinstated.
- The worker party added that the suspension of Roeun Alin was not due to her serious misconduct and the worker had never received any warnings about her behaviour. It is noted that the suspension was not granted by the Labour Inspector.

Issue 10: The workers demand the company provide full wages for suspended workers from 15 June 2009 to the end of June 2009.

- The worker party argued that there were approximately 500 workers working in the Finishing Section and 231 workers affixing their fingerprints to the demand. From 15 June until the end of June 2009, the company had no work for the workers, who came to punch in every day, and stayed at the company for eight hours. However, the company agreed to pay 50 percent of their wages.
- The employer party also argued that during the time of no work, the company sought work for the workers by recruiting 60 workers from the Finishing Section to volunteer to work in Super Text Co., Ltd, and those who did not volunteer would receive only 50 percent of wages. The company allowed them to return home but they defied the order of the company, thereby prompting the company to reverse its decision to provide wages during the suspension.
- The worker party said the employment suspension was not notified to the Labour Inspector.
- The employer argued that it submitted the suspension letter to the Labour Inspector on 17 June 2009. In this case, the Arbitration Council ordered the company to provide the letter, but the company did not provide the documents relevant to the suspension before the deadline.

REASONS FOR DECISION

Issue 2: The workers demand the company reimburse funds of US\$ 220 per month from October 2008.

In this case, the workers demanded the company reimburse US\$ 220 of funds per month it has ceased to pay to the Commission, from October 2008 on the basis of binding past practice. The company asserted that it could not provide the funds anymore despite its previous practice because it had made payments to the National Social Security Fund. Therefore, the Arbitration Council will consider (A) whether or not the company's practice to provide US\$ 220 of funds per month is binding past practice, and (B) whether or not the company is obligated to continue to provide US\$ 220 per month to the Commission.

(A) Is the company's practice to provide US\$ 220 of funds per month binding past practice?

In this case, the Arbitration Council finds that the principle "past practice" is a technical, legal term and part of jurisprudence of the Arbitration Council.

Based on the definition in law, past practice in the Labour Law context is the practice recognised by the two parties in dispute and implemented several times in the past. The agreement to conduct such practice need not be in writing and it is possible that the practice is based on regular activities.

The legal principle of “past practice” is advocated by a provision of the Labour Law, Article 65, paragraphs 2, 3, 4; and Decree 38 which put an emphasis on verbal agreements.

Moreover, Article 23 of Decree 38 provides, “*If the contract is not clear in meaning, that contract shall be interpreted according to common practices or customs of the place where the contract has been made, but the interpretation shall not conflict with the provisions of this law.*”

Based on Article 23 of Decree 38 above, the Arbitration Council finds that a practice which becomes customary and can be called “past practice” can be used to interpret and clarify any ambiguous terms in the contract.

Thus, “past practice” can be defined as a practice that is applied for a long time, which occurs repeatedly, and it is a precise, sustained, recognised and accepted practice to both parties, the workers and employer.

The previous Arbitral Awards decided on past practice included issues such as (1) **the use of annual leave** (See *Arbitral Award 21/05–Sino Max, Reason for decision, issue 1*); (2) **Wage payments** (See *AA 14/06–Seng Yong, Reason for decision, issue 1*); (3) **Allowance** (18/07–Trinonggal Komara, Reason for decision, issue 2); (4) **Meal Allowance** (136/07–Phnom Penh Garment, Reason for decision, issue 1).

On the other hand, the Arbitration Council has found that some practices are not “past practice”, for example, the practice with regard to the assembly line of the company which will be under the supervision and oversight of an employer. (See *Arbitral Award 116/07–Grace Sun, Reason for decision, issue 2*; and *AA 114/07–Union Power, Reason for decision, issue 1*).

In summary, the Arbitration Council is of the view that the practice of fund provision which commenced in November 2006 and continued to October 2008 was past practice.

(B) Is the company obligated to provide US\$ 220 of funds to the Commission?

Generally speaking, if a practice is past practice, parties have the right to continue the practice. However, the past practice could end lawfully, definitively or substantively; for example, the parties may negotiate to end the practice or the parties agree to another new practice instead of the previous one whereby the fundamental conditions of past practice are changed. Thus, past practice may become unnecessary or for other reasons, not be continued in the future.

In *Arbitral Award 10/03–Jacqsintex, Reason for decision, issue 2*, it was ruled that “[t]he Arbitration Council allows the employer to implement a new formula – a strategy for calculating payments to workers [which has been in place for two years], and reject the demand by workers that the company implement the previous practice adopted two years ago. In this case, the Arbitration Council is of the opinion that two years since the workers

have implemented a new formula means the workers accept the practice, and the previous practice is not legally binding on the employer for implementation.”

Meanwhile, in Arbitral Award 48/09–Roo Hsing, Reason for decision, issue 19, it was found that *“[i]n the past the company paid the workers only when they work overtime on holidays and provided them with 300 percent of wages. The practice had been pursued for about seven years, but in November 2008, the company declared that it would only provide 200 percent of wages instead, and this practice would come into force in January 2009. At that time, the workers objected to the change and until March 2009, the workers lodged a protest demanding the company provide 300 percent of wages. In this issue, the Arbitration Council is of the view that the fact that the workers did not protest against the change when the company announced the change means they were willing to accept the new principle of the company. Therefore, the Arbitration Council decides to reject the demand by the workers that the company continue with its past practice.”*

In this case, despite the fact that the Arbitration Council finds the company’s payment of US\$ 220 to the Health and Safety Commission as past practice, it does not mean that the company is required to fulfill the obligation regardless of economic difficulties, thereby leading the company to be unable to continue the practice. The Arbitration Council finds that the world today is experiencing a global economic recession, and such a crisis could have a significant bearing on the investors in Cambodia. The Arbitration Council is of the view that the argument raised by the employer is convincing because the company has been in a difficult situation due to the economic crisis.

Furthermore, since November 2008, the company fulfilled another obligation by making payments to the National Social Security Fund as required by the Ministry of Labour. The Arbitration Council finds that even if the National Social Security Fund is slightly different to the Health and Safety Commission, this Fund is intended to help workers who encounter work-related accidents, with a payment of damages that will be based on the extent of the loss suffered by the workers. It seems to the Arbitral Panel, that in determining the payment to the workers, the Fund is better than the Commission.

In conclusion, the Arbitration Council decides that the company is not obligated to continue providing US\$ 220 of funds every month to the Commission

Thus, the Arbitration Council decides to reject the demand by the workers that the company pay back US\$ 220 of funds to workers from October 2008.

Issue 3: The workers demand the company provide remuneration to the suspended carpenters.

The worker party argued that three carpenters – Chek Keng, Sok Heng, and Nop Rithy, were dismissed and they made a demand for remuneration in accordance with the

Labour Law. The company asserted that regarding this dispute, the Arbitration Council already issued Arbitral Award 53/09 on 18 May 2009. Thus, the Arbitration Council has no jurisdiction to deal with the issue again. In this case, the Arbitration Council will consider only two issues: (A) whether the Arbitration Council has jurisdiction on the issue, and (B) whether or not the company should reimburse the three workers with severance pay.

(A) Does the Arbitration Council have jurisdiction to deal with this dispute?

“*Res judicata*” is a legal principle which prevents a case to be brought by the same disputing parties regarding the same dispute to the same forum for adjudication where the legal authority has already issued a ruling on the dispute.

Based on this principle, the Arbitration Council is of the view that when the Arbitration Council rules on a dispute, it has the discretion to consider whether or not to bring the issue for further discussion. (See *Arbitral Award 45/07–Wilson, Reason for decision, issue 2*; *AA 14/08–Quicksew, Reason for decision, issue 1*; *AA 64/09–Sino Max 2*).

Based on *res judicata*, the Arbitration Council rejects the demand by the workers because this claim fulfills the three conditions for *res judicata*: (1) the identical disputing parties were previously involved in the dispute; (2) the issue has already been brought to the Arbitration Council; and (3) the Arbitration Council has ruled on the facts. The purpose of the *res judicata* rule is to avoid conflicting results to the same issue and to conclude the dispute with a final resolution at first instance. (See *AA 42/07–South Bay, Reason for decision, issue 1*).

In this case, the Arbitration Council agrees with the above interpretation, and it finds that not all the conditions for the *res judicata* principle are fulfilled. This case and Arbitral Award 53/09–Tack Fat, have the same parties, but the issues are different, and the Arbitration Council has not issued a decision whether or not the three workers should receive severance pay. Thus, the *res judicata principle* will not be applied in this case. Therefore, the Arbitration Council will consider the issue as follows:

(B) Does the company need to reimburse the three workers with severance pay?

After considering the arguments of the parties in the hearing, the Arbitration Council finds that the facts in issue 2 of the Arbitral Award 53/09 are the same as that in this issue. Thus, Arbitral Award 53/09, issue 2 shows that when the employer decided to move the three workers to another section, they defied the order, thus prompting the employer to consider that they walked out on their jobs.

Based on the facts and the Labour Law in Arbitral Award 53/10, the Arbitration Council found that the removal of the three workers was improper, and they did not abandon their work. Moreover, the Arbitration Council found that the employer is willing to reinstate the

workers, and the workers are eager to work in the company. Thus, the Arbitral Award issued by the Arbitration Council ordered the two parties to enter into good faith negotiations.

In another previous case, the Arbitration Council found that, “[w]hen there is an improper transfer of the workers to another place, and the workers do not agree to the change, it is considered that the employer does not respect the employment contracts with the workers, thus leading the workers to demand the employer to pay them severance pay in conformity with the Labour Law.” (See Arbitral Award in Case 153/08–High Text).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in previous cases. Therefore, the Arbitration Council will consider, according to the Labour Law, whether or not the three workers have the right to benefits when the company terminated their contracts.

1. Severance Pay

Article 89 of the Labour Law stipulates, “[i]f the labour contract is terminated by the employer alone, except in the case of a serious offence by the worker, the employer is required to give the dismissed worker, in addition to the prior notice stipulated in the present Section, the indemnity for dismissal as explained below:

- *Seven days of wage and fringe benefits if the worker's length of continuous service at the enterprise is between six and twelve months.*
- *If the worker has more than twelve months of service, an indemnity for dismissal will be equal to fifteen days of wage and fringe benefits for each year of service. The maximum of indemnity cannot exceed six months of wage and fringe benefits. If the worker's length of service is longer than one year, time fractions of service of six months or more shall be counted as an entire year.”*

Based on the facts, the three workers who had worked in the Carpentry Section included Mr. Chek Keng, who started his work on 14 July 2000; Mr. Sok Heng, who started on 29 September 2001; and Mr. Nop Rithy, who started on 20 August 1997. Thus, their contracts were undetermined duration contracts. Article 89 of the Labour Law requires an employer to provide severance pay for the workers when the former terminates the contract of the latter who has an undetermined duration contract. In this case, the employer breached the contracts by transferring the workers without agreement. Thus, the Arbitration Council finds that the workers are entitled to receive severance pay depending on their seniority status – the severance pay shall be calculated to be equal to wages and perquisites of 15 days per year, and not exceed the wages and perquisites of one month.

2. Compensation in lieu of prior notification

Article 75 of the Labour Law states, “[t]he minimum period of a prior notice is set as follows:

- Seven days, if the worker's length of continuous service is less than six months;
- Fifteen days, if the worker's length of continuous service is from six months to two years;
- One month, if the worker's length of continuous service is longer than two years and up to five years.
- Two months, if the worker's length of continuous service is longer than five years and up to ten years.”

Article 77 of the Labour Law states, “[t]he termination of a labour contract at will on the part of the employer alone, without prior notice or without compliance with the prior notice periods, entails the obligation of the employer to compensate the worker the amount equal to the wages and all kinds of benefits that the worker would have received during the official notice period.”

With regard to mutually agreed termination of the employment contracts without prior notice or non-compliance with the period of prior notice, the employer is required to pay the workers an amount equal to wages and other perquisites the workers should receive during the prior notice.

3. Payment in lieu of annual leave

Article 167 of the Labour Law states, “[i]f the contract is terminated or expires before the worker has acquired the right to use his [or her] paid-leave, an indemnity calculated on the basis of Article 166 above is granted to the worker.”

Based on this article, it means that in light of termination or termination prior to the expiry of the contract, workers are entitled to receive payment in lieu of annual leave. Thus, based on the reason mentioned above, the Arbitration Council finds that the transfer of the workers violated the agreement made between the employer and workers, thus leading to the termination of the contract. Therefore, the workers are entitled to receive the payment in lieu of annual leave.

4. Unpaid final wages

Article 116, Paragraph 5 of the Labour Law, states “[i]n the event of termination of a labour contract, wage and indemnity of any kind must be paid within forty-eight hours

following the date of termination of work.” Therefore, the workers are entitled to receive the wages and unpaid remuneration based on Article 116 of the Labour Law.

5. Damages

Article 91 of the Labour Law states, “[t]he termination of a labour contract without valid reasons, by either party to the contract, entitles the other party to damages.

These damages are not the same as the compensation in lieu of prior notice or the dismissal indemnity.

The worker, however, can request to be given a lump sum equal to the dismissal indemnity. In this case, he is relieved of the obligation to provide proof of damage incurred.”

The Arbitration Council finds that this article means the other party may receive damages upon the termination of the contract at will by either party without a proper reason. (See *Arbitral Award 99/09–Kingsland, Reason for decision, issue 3*).

In this case, the Arbitration Council finds that when there was no work at the Carpentry Section, the employer attempted to move the three workers to the Kiln Section. Thus, the employer had no intention of dismissing them. So, Article 91 of the Labour Law will not be applied in this case and the three workers would not be provided with damages.

In summary, the Arbitration Council orders the employer to provide remuneration to the three workers as follows: 1. severance pay, 2. compensation in lieu of prior notification, 3. payment in lieu of annual leave, and 4. unpaid final wages.

Issue 6: The workers demand the company reinstate a worker delegate called Roeun Alin, ID No. 5035 and maintain wages from the date of suspension to the date of reinstatement.

The company suspended a worker called Roeun Alin because of serious misconduct of selling meat balls to other workers during working hours. The company added that the fact that it had suspended the worker was an individual dispute due to her serious misconduct, and according to the Internal Work Rules, she would be dismissed. In this case, the Arbitration Council will consider whether (A) the Arbitration Council has jurisdiction to deal with the issue and (B) whether the company should reinstate the worker by maintaining her wages from the date of dismissal to date of reinstatement.

(A) Does the Arbitration Council have jurisdiction to deal with the issue?

In principle, the Labour Inspector and the Minister of Labour and Vocational Training have the discretion to decide which dispute is considered to be a collective one before submitting it to the Arbitration Council, who will abide by the decision of the Labour Inspector, and the Minister of Labour unless there is a specific reason to consider it to be an individual dispute. (See *Arbitral Award in Case 10/03–Jaqsintex, Reason for decision, issue 4, AA 02/04–Cambodiana Hotel; AA 41/04–Mikaza; and AA 07/05–Coca Cola*).

In previous cases, the Arbitration Council assumed that all demands in the non-conciliation reports of the Ministry of Labour are collective disputes except when the Arbitration Council discovers during the hearing that they are individual disputes. The employer disputes the assumption and so it is obliged to provide the evidence to prove its argument. (See *Arbitral Award 45/07–Wilson, Reason for decision, issue 4*). Therefore, the Arbitration Council will consider the argument of the employer based on legal principles, and evidence as follows:

Article 302 of the Labour Law states, “A collective labour dispute is any dispute that arises between one or more employers and a certain number of their staff over working conditions, the exercise of the recognised rights of professional organisations, the recognition of professional organisations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardise the effective operation of the enterprise or social peace.”

In *Arbitral Award 45/07–Wilson, issue 4*, the Arbitration Council interpreted that the collective labour dispute shall fulfill three conditions:

- A. A dispute between a number of workers and one or more employer.
- B. A dispute regarding working conditions, the enjoyment of rights given to professional organisations, recognition of professional organisations, or an issue arising out of relationships between an employer and workers.
- C. A dispute which presents difficulties to the enterprise or harms social peace.

According to Article 302 of the Labour Law and interpretation of the Arbitration Council in previous decisions, a dispute, if it is to be considered a dispute shall fulfill the three conditions of the collective labour disputes as stipulated in Article 302 of the Labour Law. In this case, the Arbitration Council finds that the employer party did not show that the dispute is an individual one by providing concrete evidence for it. Moreover, the Arbitration Council is of the view that the parties to the dispute were represented by C.CAWDU, which acted on

behalf of a professional organisation, and helped workers to be reinstated (first condition is fulfilled). The dispute affected the working conditions regarding the suspension of Ms. Roeun Alin, which led to the dismissal of the worker (second condition is fulfilled). Furthermore, the worker was a worker delegate, who represented workers in the factory. Therefore, the dismissed workers would receive support from other workers and this may disrupt the operation of the enterprise (third condition is fulfilled). Therefore, the Arbitration Council finds that the present dispute is not individual one. [It follows that the Arbitration Council has jurisdiction to deal with this issue.]

(B) The Arbitration Council will consider whether or not the dismissal of Ms. Roeun Alin, a worker delegate, was legitimate.

Article 293 of the Labour Law stipulates, “[t]he dismissal of a shop steward or a candidate for shop steward can take place only after authorisation 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.

On 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 Minister 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 Minister in charge of Labour within two months upon receipt of the appeal, the case and the appeal are considered to be rejected.”

This article shall be applied to the union leaders as stated in Clause 4 of *Prakas* No. 305 dated 22 November 2001 of the Ministry of Social Affairs, Labour, Vocational Training, and Youth Rehabilitation which states, “... *the protection is provided to three union leaders according to the conditions set in Articles 282 and 293 of the Labour Law.*”

Based on Article 293 of Labour Law, regarding the dismissal of a worker delegate who shall receive protection, the employer shall be granted permission from the Labour Inspector. It means that the Labour Inspector who receives a complaint for dismissing a worker delegate as stated in the article shall deliver its decision to the employer and the worker in question as well as the union that represents the worker, within one month at the latest of receipt of the complaint.

In previous cases, the Arbitration Council decided that the dismissal of a worker who receives protection and who is under the jurisdiction of the Labour Inspector will not be considered by the Arbitration Council regarding the reason for the suspension. (*See Arbitral Award 74/08–Generation, Reason for decision, issue 1; AA 149/08–Camboa Hansae, Reason for decision, issue 1*).

In this case, the Arbitration Council finds that the employer could suspend the worker, Roeun Alin, only when there is permission from the Labour Inspector at the request of the company. The company issued a suspension letter to the worker on 13 June 2009, and submitted a dismissal letter to the Director of the Department of Labour Disputes on 15 June 2009. The period between 15 June 2009 to the hearing day (24 July 2009) is beyond 30 days.

In Arbitral Award 149/08–Camboa Hansae, the Arbitration Council decided if, within a one month period, the Department of Labour Disputes had not responded to the request for dismissal of a worker who is entitled to protection, then it means that the request was rejected. (*See AA 149/08–Camboa Hansae, Reason for decision, issue 1*).

In this case, the Arbitration Council finds that the Department of Labour Disputes already rejected the dismissal of worker named Roeun Alin because the Department of Labour Disputes had not given its decision in the one month period since 15 July 2009. The company was given an opportunity to appeal this decision to the Ministry of Labour and Vocational Training within two months [but the company did not make an appeal within this time].

Based on the above facts, the company suspended the contract of Ms. Roeun Alin on 15 June 2009. Article 295 of the Labour Law stipulates, "*In the 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 Article 295 of the Labour Law, the Arbitration Council interprets that the company has the right to suspend the employment contract of union leaders pending the decision from the Labour Inspector. This article asserts that if the Labour Inspector does not approve the dismissal, then the suspension shall be considered null and void. (See AA 107/08–Seratext, Reason for decision, issue 2; and AA 149/08–Camboa Hansae, Reason for decision, issue 1).

Therefore, according to the above interpretation and the fact that the Labour Inspector turned down the request for dismissal of Roeun Alin, leads the Arbitration Council to decide that the worker, Roeun Alin, shall be reinstated, and her wages shall be maintained from the date of entry into force of this Arbitral Award.

Issue 10: The workers demand the company provide full wages to the suspended workers from 15 June 2009 to the end of June 2009.

There are approximately 500 workers in the Finishing Section, and 231 of the workers affixed their fingerprints to the union's petition to demand the company provide full wages to the workers in case of not having much work for them.

Article 71 (11) of the Labour Law states:

"11. When the enterprise faces a serious economic or material difficulty or any particularly unusual difficulty, which leads to a suspension of the enterprise operation. This suspension shall not exceed two months and be under the control of the Labour Inspector."

Based on this article with regard to the suspension of an employment contract, the company shall notify the Labour Inspector, and the request for suspension shall be examined by the Labour Inspector. It means that the Labour Inspector shall give a response to the request for suspension and determine whether or not the dismissal is due to economic difficulties of the enterprise. (See AA 51/09–Yung Wah 1 and 2).

Article 72 (1) of the Labour Law states: *"The suspension of a labour contract affects only the main obligations of the contract, that are, those under which the worker has to work for the employer, and the employer has to pay the worker, unless there are provisions to the contrary that require the employer to pay the worker."*

The Arbitration Council is of the view that the Labour Law allows the company to suspend an employment contract, and if the company issues a suspension according to the Labour Law, then it is not required to pay remuneration to workers (See Article 72 [1] of the

Labour Law). However, if the company does not follow the Labour Law regarding the suspension of the contract as mentioned above, it is obliged to pay 100 percent of wages to workers regardless of the amount of work for the workers to do. (See *Arbitral Award 53/08–Yung Wah 1, Reason for decision, issue 1; AA 42/09–River Rich Textile, Reason for decision, issue 4*).

The Arbitration Council finds that the company is obligated to pay 100 percent of wages to the workers despite not having much work for the workers because the employer has not abided by the Labour Law.

Based on the facts, when the company did not have much work for the workers between 15 June and 30 June 2009, it did not follow the procedures of suspension in the Labour Law, to seek permission from the Labour Inspector. Thus, the Arbitration Council orders the company to pay 100 percent of wages to the 231 workers in the Finishing Section.

Based on the above facts, legal principles, and reasons, the Arbitration Council decides as follows:

DECISION AND ORDER

- Issue 2:** Reject the demand by the workers that the company reimburse US\$ 220 to the workers.
- Issue 3:** Order the company to provide the three workers with termination payment, which includes 1- severance pay; 2- payment in lieu of prior notification; 3- payment in lieu of annual leave; and 4- unpaid final wages.
- Issue 6:** Order the company to reinstate Ms. Roeun Alin and maintain her wages from the date of dismissal to the date of reinstatement upon the entry into force of this Arbitral Award.
- Issue 10:** Order the company to pay 100 percent of wages to the 231 workers in the Finishing Section for the period when the company had no work for them to do from 15 June to 30 June 2009.

Type of Award: Non binding or binding awards

1- 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: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: