

**KINGDOM OF CAMBODIA**

**NATION RELIGION KING**



**ក្រុមប្រឹក្សាពន្ធដារកម្ពុជា**

**THE ARBITRATION COUNCIL**

**Case number and name : 96/06 – WILSON**

**Date of Award : 24 November 2006**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRATOR PANEL**

Arbitrator chosen by the employer party:

**SENG VUOCHHUN**

Arbitrator chosen by the worker party:

**ANN VIREAK**

Chair Arbitrator (chosen by the two Arbitrators):

**SOK MATHOEUNG**

#### **DISPUTING PARTIES**

##### **1- Employer Party**

Name : **Wilson Garment (Cambodia) Co., Ltd.**

Address : Prey Trea Village, Sangkat Chaom Chao, Khan Dangkor, Phnom Penh

Telephone : 023 890 191/ 012 555 829 Fax: N/A

Employer Representatives:

1. Mr. Long Phally Company's Administrative Manager.

##### **2- Worker party**

Name : **Cambodian Apparel Workers' Democratic Union (CAWDU) in Wilson  
Factory**

Address : No. 6C, Street 478, Sangkat Tuol Tumpung I, Khan Chamkarmon,  
Phnom Penh

Telephone : 023 210 481, 012 282 653 Fax: 023 210 481

Worker Representatives:

1. Mr. Oum Visal C.CAWDU Labour Officer;
2. Ms. Roeun Chanthan C.CAWDU Trainer;
3. Mr. San Socheat President of C.CAWDU in Wilson Factory;

- |                       |   |
|-----------------------|---|
| 4. Ms. Hun Sina       | Vice President of C.CAWDU in Wilson Factory;        |
| 5. Ms. Te Sela        | Secretary General of C.CAWDU in Wilson Factory;     |
| 6. Ms. Chheng Saroeun | Former President of C.CAWDU in Wilson Factory;      |
| 7. Ms. Hun Sina       | Former Vice President of C.CAWDU in Wilson Factory. |

### **ISSUES IN DISPUTE**

(In the non-conciliation report)

- 1- The workers demanded that the company properly calculate wages during maternity leave by adding the average wage in the last 12 months with 100 percent of bonus plus compensation for annual leave (one and a half days per month) plus 100 percent seniority increment. The company said that it provides 50 percent of regular wages plus 50 percent of the seniority increment plus 50 percent of the attendance bonus. The company added that it would calculate the wages for maternity leave in accordance to the Labour Law;
- 2- The workers demanded that the company provide a US\$15 allowance to female workers who have small children, for a period of 24 months if the company cannot build a day-care centre. The company argued that the company provided female workers who have small children US\$5 for 18 months, commencing when the children reach 18 months of age, instead of building a day-care centre;
- 3- The union demanded that the company reinstate Ms. Chheng Saroeun, the Union President and Chin Sopheap, the Union Vice President. The company argued that the company would not reinstate both of them because the company followed the legal procedures and obtained permission from the Minister of Labour.

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

*The Arbitration Council derives its power to make this award from Chapter XII, Section 2 (B) (Articles 309 to 317) of the Labour Law (1997); the Prakas on the Arbitration Council 099/04; the Arbitration Council Procedural Rules annexed to Prakas 099/06; and Prakas on the Appointment of Arbitrators 099/06 (Fourth Term).*

*An attempt was made to conciliate the collective labour dispute that is the subject of this Award, as required by Chapter XII, Section 2(A) of the Labour Law. However, the conciliation hearing was unsuccessful, and the non-conciliation report No. 1513 dated 16 October 2006 was submitted to the Secretariat of the Arbitration Council on 16 October 2006.*

### **HEARING AND SUMMARY OF PROCEDURE BEFORE ARBITRATION COUNCIL:**

**Place of Hearing** : **The Arbitration Council**, Phnom Penh Centre, Building A,  
Sothearos Blvd, Sangkat Tonle Bassac, Khan Chamkarmon,  
Phnom Penh.

**Date of the Hearing** : - 27 October 2006 at 08:00 a.m.;  
- 13 November 2006 at 08:00 a.m.;  
- 21 November 2006 at 2:00 p.m.

**Procedural Issues:**

On 21 July 2006, the Department of Labour Disputes received a complaint from the workers demanding that the company improve seven areas related to working conditions. Having received the complaint, on 5 October 2006, the Department of Labour Disputes designated an expert official to settle and conciliate the disputes and four out of seven issues were conciliated. The three non-conciliated issues were submitted to the Arbitration Council on 16 October 2006. Having received the case, the Arbitration Council summoned both parties to attend three hearings (as stated on the above dates).

Both parties were present at the hearings as summoned by the Arbitration Council. At the hearing, the Arbitration Council made a further attempt to conciliate, but the issues remained non-conciliated. Therefore, in this Award, the Arbitration Council will consider the non-conciliated issues based on the evidence and the findings of fact as follows:

**EVIDENCE**

**Witnesses and experts besides parties:**

1. Mr. Nut Sokla                      Payroll staff of Wilson Company;
2. Mr. Chin Bunthoeun              Husband of Ms. Chheng Saroeun.

**Documents, exhibits and other evidence considered by the Arbitration Council**

- a. Provided by the employer party:
  - 1- Business Registration License No. Inv. 640/99 E dated 26 July 1999;
  - 2- Statute of the company;
  - 3- Internal Work Rules of the company registered No. 045 dated June 2000;
  - 4- Minute of the collective labour dispute conciliation dated 5 October 2006;
  - 5- Calculation of wages for maternity leave of a number of female workers in Wilson Factory;
  - 6- List of female workers who received US\$5 baby-sitting allowance in October 2006 for their children, who are from 18 to 38 months of age;
  - 7- Letter authorizing Mr. Long Phally to take part in the collective labour dispute settlement in Wilson Company dated 5 October 2006;
  - 8- Letter No. 804 dated 9 June 2006 from the Department of Labour Disputes to the Director of Wilson Company on the dismissal of Ms. Chheng Saroeun and Ms. Chin Sopheap;

- 9- Order No. 372 dated 30 August 2006 to the designated official to investigate the objection of C.CAWDU to the letter of the Department of Labour Disputes on the dismissal of union leaders in Wilson Company;
- 10- Minute of the information inquiry of the employer representative of Wilson Company dated 6 September 2006 of the Ministry of Labour and Vocational Training on the objection of C.CAWDU to the letter of the Department of Labour Disputes on the dismissal of union leaders;
- 11- Letter dated 1 June 2006 from Wilson Company to Ms. Chheng Saroeun on the short-term suspension;
- 12- Letter dated 1 June 2006 from Wilson Company to Ms. Chin Sopheap on the short-term suspension;
- 13- Minute of the information inquiry of the employer representative of Wilson Company dated 31 May 2006 of the Department of Labour Disputes on the suspension and dismissal of Ms. Chheng Saroeun and Ms. Chin Sopheap;
- 14- Minute of individual labour dispute settlement (dismissal of Ms. Chin Sopheap) dated 1 June 2006;
- 15- Minute of individual labour dispute settlement (dismissal of Ms. Chheng Saroeun) dated 1 June 2006;
- 16- Letter dated 25 October 2006 from Wilson Company to the Director of the Department of Labour Disputes on the request for the dismissal of Ms. Chheng Saroeun and Ms. Chin Sopheap;
- 17- Minute of the information inquiry of Wilson Company dated 23 May 2006 on her absence, but her work was recorded in the report;
- 18- Letter dated 25 May 2006 from Wilson Company to Ms. Chheng Saroeun on the seven-day work suspension;
- 19- Letter dated 25 May 2006 from Wilson Company to Ms. Chin Sopheap on the seven-day work suspension;
- 20- List of the worker payroll for May 2006;
- 21- Explanation letter dated 13 November 2006 of Mr. Nut Sokla, Payroll staff, ID Card No. 1373, working in the Administrative Department of Wilson Company;
- 22- Compensation of annual leave that had not been used by Ms. Chheng Saroeun and Ms. Chin Sopheap;
- 23- Other bonuses that the company provided to Ms. Chin Sopheap;
- 24- Other bonuses that the company provided to Ms. Chheng Saroeun;
- 25- Report on the working hours of Ms. Chheng Saroeun in May 2005;
- 26- Report on the working hours of Ms. Chin Sopheap in May 2005;

- 27- Payslip of Ms. Chheng Saroeun for March and May 2006;
- 28- Payslip of Ms. Chin Sopheap for March and May 2006;
- 29- Table of working hours of Ms. Chheng Saroeun and Ms. Chin Sopheap in May 2006.

**b. Provided by the worker party:**

- 1- Receipt of babysitting services that workers in Wilson Factory who hire babysitter to look after their children have provided;
- 2- Petition with thumb prints of workers demanding that the company provide US\$15 allowance instead of establishing a day-care centre and demanding that the company commence payments from the date the workers return to work until the child is 24 months old;
- 3- Letter No. 194/06 dated 20 November 2006 from C.CAWDU to the Secretariat of the Arbitration Council on the notice of the case of Ms. Chheng Saroeun and Ms. Chin Sopheap;
- 4- Invitation letter to Ms. Chheng Saroeun and Ms. Chin Sopheap to attend the experience sharing meeting of GINA Union from 13 to 20 May 2006;
- 5- Letter No. 109/06 dated 11 May 2006 from C.CAWDU to the Director of Wilson Company on the request for leave permission for Ms. Chheng Saroeun and Ms. Chin Sopheap;
- 6- Letter No. 182/06 dated 26 May 2006 from C.CAWDU to the Secretariat of the Arbitration Council on the submission of the report of the Wilson case;
- 7- Letter 412 dated 21 March 2006 from the Department of Labour Disputes to the President of C.CAWDU in Wilson Factory on the application for recognition of new union leaders in the second mandate;
- 8- Letter dated 16 July 2006 from C.CAWDU in Wilson Factory to H.E Minister of Labour and Vocational Training on the request for reshuffling new union leaders of C.CAWDU in Wilson Factory (no signature);
- 9- Minute of the election of union leaders for C.CAWDU in Wilson Factory dated 16 July 2006;
- 10- Case receipt of the Department of Labour Disputes dated 11 September 2006 on the request for reshuffling union leaders.

**c. Provided by the Ministry of Labour and Vocational Training:**

- 1- Letter No. 1437 dated 19 October 2006 on the request for the collective labour dispute conciliation in Wilson Company of the Minister of Labour and Vocational Training;
- 2- Report No. 1513 dated 16 October 2006 on the collective labour dispute conciliation in Wilson Company of Mr. Koy Tepdaravuth, the Director of the Department of Labour Disputes;

3- Minute of the collective labour dispute conciliation dated 5 October 2006.

**d.** Provided by the Secretariat of the Arbitration Council:

- 1- Invitation No. 448 dated 19 October 2006 to the employer party to attend the hearing;
- 2- Invitation No. 449 dated 19 October 2006 to the worker party to attend the hearing;
- 3- Invitation No. 473 dated 27 October 2006 to the employer party to attend the second hearing;
- 4- Invitation No. 474 dated 19 October 2006 to the worker party to attend the second hearing;
- 5- Invitation No. 516 dated 17 November 2006 to the employer party to attend the third hearing;
- 6- Invitation No. 515 dated 17 November 2006 to the worker party to attend the third hearing.

#### **FINDING OF FACTS**

Wilson Company is located in Prey Trea Village, Sangkat Chaom Chau, Khan Dangkor, Phnom Penh and employs approximately 1,020 workers.

- Having examined the report on the collective labour dispute conciliation;
- Having listened to the testimonies from both the employer party and the worker party;
- Having listened to the witnesses and experts;
- Having reviewed other supplementary documents;

#### **The Arbitration Council finds that:**

- In the previous [maternity leave] wage calculation, Wilson Company provides workers with 50 percent of regular wages, 50 percent of the seniority increment and 50 percent of the attendance bonus;
- The workers demanded that the company calculate wages during maternity leave by adding the average wages including regular wages, overtime wages, seniority increment and attendance bonus during the last 12 months before the leave with 100 percent of the seniority increment, 100 percent of the attendance bonus and compensation replacing annual leave.
- At the hearing, the employer party, represented by the Administrative Manager, said that since 27 October 2006, the company has applied the calculation of wages during maternity leave by providing 50 percent of average wage during the last 12 months - which includes regular wages, overtime wages, seniority increment and attendance

- bonus; however, the company will not add the seniority increment, the attendance bonus or compensation for annual leave;
- The company does not have a day-care centre;
  - Previously, the company provided US\$5 to female workers who have babies for a period of 18 months starting from the time the baby turns 18 months of age in substitution for establishing the day-care centre. According to the workers' claim, before applying the above practice the company used to provide female workers who have babies of 18 months of age with US\$5 for a period of 18 months starting from the date she returns to work, but this claim was rejected by the employer party;
  - There are three unions in Wilson Company and C.CAWDU does not have most representative status yet;
  - On 10 May 2006, Ms. Chheng Saroeun and Ms. Chin Sopheap, who are the President and the Vice President of C.CAWDU in Wilson Factory, worked overtime from 4:00 p.m. to 8:00 a.m. the next day;
  - 12, 13, 15, 16 and 17 May 2006 were public holidays which had been determined by the Prakas of the Ministry of Labour. However, workers in Wilson Company worked during the public holidays,
  - Ms. Chheng Saroeun and Ms. Chin Sopheap asked for three days leave for 18, 19 and 20 May 2006 in order to attend a workshop in Thailand which was held from 13 to 20 May 2006. The two workers came to work only on the morning of 12 May 2006 (7:00 a.m. to 11:00 a.m.), but not in the afternoon;
  - The company received the leave application from C.CAWDU certifying that the two workers would be attending a workshop in Thailand from 13 to 20 May 2006;
  - The company granted permission for both workers as requested accepting the reason they took leave to be for attending a workshop in Thailand. [The company] did not deduct their wages;
  - Both workers gave their identification cards to Ms. Chheng Saroeun's husband before parting at around 11:20 a.m. on 12 May 2006;
  - Ms. Chheng Saroeun's husband gave the cards to his brother in order to have them punched after he had parted with his wife. Chheng Saroeun's husband did not know the consequences that might happen of having the cards punched;
  - Ms. Chheng Saroeun's card was punched on 12, 13, 15, 16 and 17 May and Ms. Chin Sopheap's card was punched on 12, 13 and 17 May.
  - Both workers said that they saw their cards at home on Sunday morning and that they did not receive the cards from anyone. They also realised that the cards were punched one day after returning from Thailand on 21 May, but did not know who punched the cards for them because the husband refused to tell the truth. However, at the third hearing, Chheng Saroeun's husband said that the cards had been kept at

- his brother's house since 12 May and he had never brought the cards back until his wife returned from Thailand;
- The company's timesheet of Sunday 21 May 2006 showed that both workers' cards were punched on that day. Neither worker punched their card on Sunday and the company also asserted that there was no punching of their cards on that day, but the company added the extra hours that both of them had worked as overtime after 10:00 p.m. on 10 May 2006 [to that day on the timesheet];
  - The workers' timesheets can be changed. Mr. Nut Sokla, a Payroll staff, said that he always checked and changed the timesheet everyday; he would check two points: whether the card has not been punched at all in one day, and whether the card has not been punched up to four times [in a day]. He would change the timesheet by verifying with the attendance list of each team;
  - A valid timesheet that has not been changed would be shown in black on the computer while a timesheet that has been changed would be shown in red. A timesheet in black can be changed to red, but cannot then be changed back to black;
  - On 21 May 2006, some workers came to work;
  - At the hearing, both workers said that they clearly knew of the disciplinary sanction which would be imposed if their cards were punched by someone else. [They knew] they would be dismissed because lately a few of the other workers were dismissed because it was considered serious misconduct;
  - On 22 May, both workers came to work at 7:00 a.m., but they did not report the incident to the company at that time. At approximately 8:00 a.m. they were questioned by the Administrative staff about their ID cards, which were punched while they were in Thailand and on public holidays;
  - On 23 May, both workers were questioned again by the Administrative Department and they also had a written minute signed by Ms. Chheng Saroeun;
  - Both workers said that the union has never had any serious problems with the company. Previously, the union had a good relationship with the company and they have never committed misconduct or received any previous warnings;
  - The company suspended both workers twice – first, from 25 May to 2 June and second, from 2 June onwards;
  - Both workers were dismissed by the company on 12 June 2006 after the Director of the Department of Labour Disputes of the Ministry of Labour and Vocational Training agreed to the dismissal through letter No. 804 dated 9 June 2006;
  - At the second and third hearing, a Payroll staff member said that during public holidays he would not check the timesheet as he would on normal working days. Workers did not punch their cards when working during public holidays and he therefore only had a list of workers who voluntarily came to work. Therefore, the

company and he himself did not know whether or not particular workers came to work during public holidays. He also stated that he had checked the two workers' timesheets as instructed by the Administrative Manager the day after they resumed their work;

- Both workers demanded that the company reinstate them arguing that they did not commit fraud and that they had permission to attend the workshop in Thailand;
- The company still stood firm as to not reinstating the workers because the company determined that they committed serious misconduct and the company had dismissed both workers in accordance with the legal procedures.

## **REASONS FOR DECISION**

### **Issue 1: Regarding the calculation of wages during maternity leave**

Based on Article 182 and 183 of the Labour Law, the Arbitration Council considers that female workers, who work in an enterprise for at least one year, are entitled to 50 percent of wages including bonuses [during the period of maternity leave]. Based on the facts, both parties agreed on the manner in which wages should be calculated during maternity leave, that is that 50 percent of average wages during the last 12 months shall be paid. The wage refers to wages received by the worker every month, which includes the regular wage, overtime wages and seniority increment, and the attendance bonus.

However, the worker party also demanded 100 percent of the seniority increment and the attendance bonus in addition to compensation for annual leave. [The workers] argued that the seniority increment and attendance bonus are perquisites that they are entitled to [in full]. The company did not agree to add 100 percent of the seniority increment and the attendance bonus and also would not pay compensation for annual leave. [The employer] claimed the company complied with the law.

Based on the Labour Law and other provisions related to labour, the term "perquisites" is not clearly defined as to what payments are included.

In case 68/04 – City New, the Arbitration Council found that seniority increments can be perquisites but the attendance bonus is part of the wage; in the same case, the Arbitration Council decided to provide workers with 50 percent of wage and perquisites during maternity leave based on the average total wages (including the seniority increment and attendance bonus) during the last 12 months before leave.

In this case, based on Article 103, the Arbitration Council considers that wage does not only include regular wage, overtime wage but also bonuses. We see that in wages there are “bonuses”. Are the seniority increment and the attendance bonus part of the wage?

Based on Notification No. 017 dated 18 July 2000, attendance bonus is a payment provided to those who work regularly during the working days of each month. In considering this Notification, workers who are on maternity leave do not go to work regularly, so they are not entitled to this bonus. However, the Arbitration Council considers that as maternity leave is permitted by law and the employer, thus the workers are entitled to this bonus in accordance with the Labour Law. Moreover, according to the above Notification, the seniority increment is provided to those who have worked for over one year. Therefore, the Arbitration Council considers that the attendance bonus and seniority increment are parts of the wage based on the content of Article 103 of the Labour Law regarding “Wage.”

Therefore, the Arbitration Council considers that 50 percent wages during maternity leave shall be calculated based on the average of the total wages during the last 12 months before the leave is taken. [The calculation can be made] by dividing the wage, which includes the seniority increment and attendance bonus, by two.

Moreover, the worker party demanded that the company pay in substitution for annual leave based on Article 167 of the Labour Law. The Arbitration Council considers that annual leave can be calculated as a monetary payment only prior to contract termination or expiration. Maternity leave is not prior to a contract termination or expiration, but a contract suspension (Article 71). Therefore, during maternity leave, annual leave cannot be calculated as money, even if there is an agreement or collective bargaining agreement; the agreement or collective bargaining agreement shall be null and void in accordance with Article 167.

Furthermore, the worker party demanded that the company add 100 percent of the seniority increment and 100 percent of the attendance bonus arguing that both bonuses are perquisites as explained in Article 183. The Arbitration Council considers that the attendance bonus and the seniority increment are part of the wage and cannot be considered as perquisites and cannot be added to the calculation of wages during maternity leave. According to the law, moreover, those who have worked at least one year are not entitled to the 50 percent of wages during maternity leave and perquisites; therefore, the demand is beyond what the law provides. Thus, the Arbitration Council considers that the demand is an interests demand. In regards to interests demands, the Arbitration Council in previous cases has always considered this issue with respect to whether or not the union that represents the workers has most representative status.

Based on the facts and evidence, C.CAWDU in this case does not have most representative status. Moreover, the workers did not provide evidence to support their demands but just made some assertions about inflation. The Arbitration Council considers that the assertion is not enough evidence to support the demand; therefore, the Arbitration Council declines to consider this issue (see Arbitral Awards 31/03 – Hong Hwa, 60/04 – United Art, 99/04 – AIA, 45/05 – B & N, 49/05 – Ocean, 53/05 – Finegis, 07/06 – Dai Young, 44/06 – Gold Fame, 48/06 – Build Up and 84/06 – Pak Shun).

## **Issue 2: Regarding the day-care centre**

The workers demanded that the company provide US\$15 to each female worker who has a baby, for a period of 24 months starting from the time she returns to work, if the company fails to establish a day-care centre.

Article 186 provides,

*“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 day-care centre (day-care centre).*

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

In previous cases, the Arbitration Council has considered that any employer, who employs at least 100 female workers, is obliged to set up a day-care centre. If the employer is not able to set up a day-care centre for children over 18 months of age, female workers can place their children in any day-care centre and the employer shall provide them with US\$15 per month for the day-care service. Generally the workers demanded this day-care fee from the time the babies turn 18 month of age. However, in this case, the worker party demanded the day-care fee from the date they returned to work for a period of 24 months.

In this case, the worker party demanded that the company provide them with an allowance of US\$15 per month for a period of 24 months starting from the date the female worker returns to work in substitution for establishment of a day-care centre. The employer party argued that the company can only provide US\$5 per month and for a period of 18 months for children from 18 to 36 months of age. Based on the facts, the company used to provide its workers with US\$5 per month for a period of 18 months starting from the date the female worker returned to work, in substitution for the establishment of a day-care centre, but later on the company changed its policy.

According to Article 186 of the Labour Law, the Arbitration Council considers that Wilson Company is obliged to set up a nursing room and a day-care centre for its workers because the company employs around 1,020 workers and 90 percent of them are women. The Article does not clearly state the age of children who are entitled to the day-care centre and the duration of the day-care; however, based on Article 184, women, who breastfeed for one year after delivery, are entitled to one hour per day for breastfeeding. Thus, the Arbitration Council considers that the nursing room and the day-care centre must be available starting from the date the women return to work and that the day-care centre is not only for children over 18 months of age.

Moreover, according to the Labour Law, female workers can bring their children who are over 18 months of age to any outside day-care centre and the employer shall bear the cost in cases where the employer is not able to set up a day-care centre. This indicates that outside day-care services are available only for children who are over 18 months of age.

The Arbitration Council considers that the company has an obligation to set up a nursing room and day-care centre for female workers who have just delivered babies and return to work, so that they can use it for breastfeeding and that they can keep their babies at the day-care centre until they turn 18 months of age. During this period they need not switch to an outside day-care service. The outside day-care service can be used [as an alternative to on-site day-care] only after the babies are over 18 month of age.

The worker party has provided evidence to the Arbitration Council that the fee of outside day-care services cost US\$15 per month. The Arbitration Council finds that the invoices are all the same and it seems that the invoices have been prepared as evidence [rather than being actual evidence of the payments made], so the Arbitration Council rejects entirely this evidence regarding the cost of outside day-care services. However, the Arbitration Council considers that US\$15 per month for day-care service is reasonable and [has been set in comparable] previous Awards [of the Arbitration Council] such as Arbitral Awards 63/04 – Shine Well and 68/04 – City New, in which the Arbitration Council found that the average cost of day-care services are US\$15 per month.

**Issue 3: The union demanded that the company reinstate Ms. Chheng Saroeun and Ms. Chin Sopheap, the Union President and the Union Vice President**

The two workers were dismissed on 12 June 2006, by reason that they had committed serious misconduct by asking someone else to punch their cards in order to cheat the company between 12 and 17 December 2006.

Based on Article 83(B) of the 1997 Labour Law, serious misconduct is described as follows: "*On the part of worker:*

1. *Stealing, misappropriation, embezzlement;*
2. *Fraudulent acts committed at the time of signing (presentation of false documentation) or during employment (sabotage, refusal to comply with the terms of the employment contract, divulging professional confidentiality).*
3. *Serious infractions of disciplinary, safety, and health regulations.*
4. *Threat, abusive language or assault against the employer or other workers.*
5. *Inciting other workers to commit serious offenses.*
6. *Political propaganda, activities or demonstrations in the establishment.”*

Article 295 provides, *“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...”* Clause 4 of Prakas 305 stipulates, *“...Beginning when the application for registration is submitted, all workers who are founding members of a union, as well as those who voluntarily join the union during the application period, shall enjoy the same protection as shop stewards. This protection shall last for a period of 30 days following the date of registration of the union. Beyond the date specified in the preceding paragraph, this protection shall cover, under the conditions specified in Articles 282 and 293 of the Labor Code...”*

Based on Article 295 and Clause 4, the employer party has the right to suspend a worker delegate or union leader who commits serious misconduct instantly pending the Labour Inspector’s decision. In this issue, the Director of the Department of Labour Disputes agreed with the [employer’s] request for dismissal via letter No. 804 dated 9 June 2006. At the second hearing, the worker party objected to the decision of the Director of the Department of Labour Disputes and the Minister of Labour (of which there is no written decision as yet), which approved the request of the employer to dismiss the two workers, who are union leaders. The workers argued that the dismissal was unfair and unreasonable because it was based only on the explanation of the company without evidence to prove that both workers had committed serious misconduct as accused.

Therefore, the issue concerns whether or not Ms. Chheng Saroeun and Ms. Chin Sopheap committed serious misconduct as accused by the employer and approved by the Director of the Department of Labour Disputes.

Because the Department of Labour Disputes has issued a decision that it would not object to the dismissals of Ms. Chheng Saroeun and Ms. Chin Sopheap and the Minister also agreed in a meeting on 26 September 2006 with C.CAWDU to the dismissal (based on the

claim of the worker party), after the union had lodged an objection to the decision of the Department of Labour Disputes and before the case was submitted to the Arbitration Council, another issue arises:

**Do the decisions of the Department of Labour Disputes and of the Minister of Labour, which approved the request to dismiss Ms. Chheng Saroeun and Ms. Chin Sopheap, lead to the Arbitration Council losing its jurisdiction to consider the dispute with respect to the company reinstating Ms. Chheng Saroeun and Ms. Chin Sopheap?**

The employer party submitted a request to dismiss both workers to the Department of Labour Disputes via a letter dated 25 May 2006 because the company determined that both workers had committed serious misconduct as stated in Article 83 (B) of the Labour Law and Clause 9 and 10 of the Internal Work Rules of the company. The Director of the Department of Labour Disputes agreed with the request to dismiss both workers via letter No. 804 dated 9 June 2006 and the Minister of Labour also agreed with the dismissal on 26 September 2006.

Article 293 of the 1997 Labour Law provides, *“The dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector... 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 Arbitration Council considers that this Article is intended to protect union leaders and worker delegates from union discrimination and victimization, by requiring the employer to request permission from the Labour Inspector in advance [of the dismissal] in order to avoid terminations which relate to union rights and freedoms and to ensure that the termination is not related to their positions as union leaders or worker delegates. However, in cases where the Labour Inspector agreed with the dismissal, the workers are not entitled to the protection provided by the provisions of the above Article because their rights to protection as union leaders or worker delegates have been lost.

Therefore, Ms. Chheng Saroeun and Ms. Chin Sopheap have lost their rights to the protections (additional) awarded as union leaders; thus, the employer only has to follow the legal procedures to dismiss normal workers in order to dismiss the two workers [lawfully]. The law requires the employer to provide valid evidence in order to terminate labour contract.

Even though, the Director of the Department of Labour Disputes agreed with the dismissal of Ms. Chheng Saroeun and Ms. Chin Sopheap, the Arbitration Council considers that Article 293 does not restrict the Arbitration Council's jurisdiction to consider the dismissal of union leaders or worker delegates. However, the Arbitration Council will not consider the decision of the Department of Labour Disputes and the decision of the Minister of Labour.

As a result, the Arbitration Council considers that the Arbitration Council still has the jurisdiction to consider the reason and therefore legality of the dismissal of both workers while they no longer receive protection from the Labour Law as union leaders (they are now the same as normal workers [for the purposes of dismissal]) and whether or not the employer has valid evidence to dismiss the workers (*see Arbitral Award 91/04 – Honey Wear*).

The Arbitration Council will consider the issue as follows:

**A. Did the two workers commit serious misconduct?**

Did Ms. Chheng Saroeun and Ms. Chin Sopheap commit serious misconduct?

- Clause 10 of the company's Internal Work Rules states, "... Serious misconduct as stated in the Labour Law..." Besides this provision, no other provision in the Internal Work Rules provides a definition of serious misconduct. The Arbitration Council considers that the above provision, which is related to serious misconduct, refers to the Labour Law. Hence, the Arbitration Council will examine the provisions in the Labour Law which are related to serious misconduct.
- Article 83 of the Labour Law provides, "...

*B - On the part of worker:*

*1. Stealing, misappropriation, embezzlement..."*

In order to prove whether or not Ms. Chheng Saroeun and Ms. Chin Sopheap committed theft or misappropriation, the Arbitration Council will examine whether Ms. Chheng Saroeun and Ms. Chin Sopheap did these acts knowingly.

At the hearing, both parties agreed that Ms. Chheng Saroeun's card was punched on 12, 13, 15, 16 and 17 May 2006 and Ms. Chin Sopheap's card was punched on 12, 13 and 17 May 2006. Based on the facts, Ms. Chheng Saroeun and Ms. Chin Sopheap had requested leave on 18, 19 and 20 May 2006 in order to attend a workshop in Thailand held from 13 to 20 May 2006. The workers did not request leave for 13, 15, 16 and 17 May 2006 because they were public holidays. At the hearing, the company admitted that they did receive the request for by letter from C.CAWDU dated 11 May 2006 certifying that both workers were going to attend a workshop in Thailand from 13 to 20 May 2006. Furthermore,

the employer also permitted both workers to take paid leave. This indicates that both workers intended to inform the company about the duration of their attendance at the workshop in Thailand and based on this fact, the employer clearly knew that both workers would not come to work on 13, 15, 16 and 17 May 2006. The Arbitration Council considers that card-punching while the card's owner was not going to work, might be an act of misappropriation against the employer. In respect of this issue, although the cards were punched, the Arbitration Council considers that Ms. Chheng Saroeun and Ms. Chin Sopheap had no intention to cheat the employer because if they really wanted to cheat the employer they would not have informed the employer that they were going to Thailand to attend a workshop on 13, 15, 16 and 17 May 2006. This prior notification made it easy for the employer to verify whether or not the employees had come to work during the mentioned period.

Based on this fact, although the cards were punched on behalf of the workers, the Arbitration Council finds that neither worker cheated the employer; that is that neither worker committed serious misconduct within the meaning of Article 83 of the Labour Law.

However, the Arbitration Council considers that Ms. Chheng Saroeun and Ms. Chin Sopheap were careless in giving their cards to Ms. Chheng Saroeun's husband without thinking that the cards might be punched on their behalf or lost. Moreover, based on the facts, the Arbitration Council finds that both workers returned from Thailand on the night of 20 May 2006. On Sunday 21 May 2006, both workers realized that their cards had been punched on their behalf, but they did not rush to contact the company [about the inappropriate punching]. On 22 May 2006, upon their returning to work, the workers still did not rush to inform the company of the issue related to the punched cards. Instead both workers worked for one hour from 7:00 a.m. to 8:00 a.m. [without telling the company anything], when the employer asked them to come and resolve the issue. However, the Arbitration Council finds that both workers were willing to talk with the employer to resolve this issue, as they said that they were waiting for the Administration Manager to come to work and that was the reason why they had not informed the Administrative Department expediently; and that the employer party summoned them first. The Arbitration Council considers that failure and carelessness to immediately take action to resolve the issue was a mistake on the part of both workers. In respect of this issue, the Arbitration Council considers that the evidence provided by the parties does not provide an adequate basis to prove that the two workers' misconduct was serious [within the meaning of the Labour Law].

**B. Did the dismissals of Ms. Chheng Saroeun and Ms. Chin Sopheap follow the legal procedures?**

As analyzed above, the Arbitration Council finds that both workers did commit misconduct, but that this misconduct was not serious.

Article 27 of the Labour Law provides, “*Any disciplinary sanction must be proportional to the seriousness of the misconduct...*” The Arbitration Council considers that the dismissal of Ms. Chheng Saroeun and Ms. Chin Sopheap was not proportional to the misconduct of carelessness and not taking action in a timely fashion to resolve this issue.

Ms. Chheng Saroeun started working on 16 November 2000. Ms. Chin Sopheap started working on 17 November 2000. Therefore, the length of the two workers’ labour contracts is approximately six years.

Both workers might have signed an undetermined duration contract or a fixed duration contract. However, the Arbitration Council considers that their labour contracts have become undetermined duration contracts, even if they had previously signed fixed duration contracts. This consideration is based on the following analysis:

Article 67 of the Labour Law provides, “*The labour contract signed with consent for a specific duration cannot be for a period longer than two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years.*”

*Any violation of this rule leads the contract to become a labour contract of undetermined duration.”*

In previous Awards, the Arbitration Council has decided that this Article means that a renewed fixed duration contract where the cumulative total length of the first contract and any of the renewed contracts is more than two years, then the contract shall [automatically] become an undetermined duration contract (see Arbitral Awards 10/03 – Jacqsintex and 56/06 – Evergreen).

In this case, both workers have been working for the company for six years. Therefore, in accordance with the Labour Law and previous decisions of the Arbitration Council, the Arbitration Council considers that the labour contracts of both workers are undetermined duration contracts.

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

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

In this issue, the employer did not follow this Article when dismissing the workers.

Article 91 of the Labour Law provides, “*The termination of a labour contract without valid reasons, by either party to the contract, entitles the other party to damages...*” In this issue, when the employer wanted to terminate the labour contracts of the workers, who have been working for six years, the employer has to provide them severance pay calculated as follows:

- Payment in substitution for prior notice in accordance with Article 75 and 77 equal to two-month wages and other benefits;
- Indemnity for dismissal in accordance with Article 89 of the Labour Law equal to 15-days payment per year of service, [therefore] multiplied by 6 for the six-year duration of work [in this case];
- Compensation in accordance with Article 91 of the Labour Law, [calculated with reference to] the workers’ evidence or in an amount equal to the workers’ severance pay. In this case, the workers are exempted from providing evidence to prove their damages;
- Payment in lieu of accrued annual leave in accordance with Article 167 of the Labour Law, if any.

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

### **DECISIONS**

- 1- A. Order the company to calculate 50 percent of regular wages to workers who take maternity leave [in the following manner:] by dividing the average wage during the last 12 months, which includes seniority increment and the attendance bonus, by two;  
B. Reject the demand of the workers regarding the seniority increment and the attendance bonus;  
C. Reject the demand of the workers regarding the payment in substitution for annual leave during maternity leave;
- 2- A. Order the company to set up a nursing room and day-care centre for women who have babies starting from the date the women return to work. The company shall establish the nursing room and day-care centre within three months of this Award coming into effect;  
B. The company shall provide a US\$15 allowance to female workers who have babies aged over 18 months, if the company is not able to establish a day-care centre for babies over 18 months of age;

- 3- A. Reject the workers' demand that the company reinstate Ms. Chheng Saroeun and Ms. Chin Sopheap;  
B. Order the company to pay termination payments to Ms. Chheng Saroeun and Ms. Chin Sopheap in accordance with the Labour Law.

**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 and Vocational Training 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: **SENG VUOCH HUN**

Signature: .....

Arbitrator chosen by the worker party:

Name: **ANN VIREAK**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **SOK MATHOEUNG**

Signature: .....