



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**ក្រុមប្រឹក្សាសវនកម្មជាតិ**

**THE ARBITRATION COUNCIL**

**Case number and name: 99/06-South Bay**

**Date of Award: 12 December 2006**

**ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

**ARBITRATION PANEL**

Arbitrator chosen by the employer party: **Ly Tayseng**

Arbitrator chosen by the worker party: **Suong Sophal**

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

**DISPUTING PARTIES**

**Employer party:**

Name: **South Bay Enterprise (Cambodia) Co. Ltd.**

Address: Vattanak Park, Building E, Sangkat Chom Chao, Khann Dangkor, Phnom Penh

Telephone: 012 838 094 Fax: N/A

Representative:

1. Mr. Li Bin Manager
2. Mr. Sok Huy Interpreter
3. Mr. Yim Sotheara Legal Coordinator

**Worker party:**

Name: **Local Khmer Youth Trade Union at South Bay Factory**

Address: # 34, Street 265, Sangkat Toeuk Laak 3, Khann Tuol Kork, Phnom Penh

Telephone: 012 260 723 Fax: N/A

Representative:

1. Mr. Mai Rattana Officer of KYFTU
2. Mr. Heang Ren President of KYTU at South Bay Factory

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**THIS IS AN UNOFFICIAL ENGLISH TRANSLATION OF THE AUTHORITATIVE  
KHMER ORIGINAL.**

### **ISSUES IN DISPUTE**

- 1- The workers demand the company to reinstate the union leader, Heang Ren, because the company did not follow the Labor Law to dismiss him. The company cannot reinstate him because he committed serious misconduct.
- 2- The workers demand the company to reimburse the health check fee of 10,100 riel. The company cannot pay this because it has no agreement with workers regarding the payment of the health check fee.
- 3- The workers demand the company to build a daycare center with babysitters and milk. If not, they demand \$15 per month. The company asserts it already has a daycare center.
- 4- The workers demand the company to add one more card-reading machine. The company does not agree as there is no blockade or lateness [ ].
- 5- The union demands the company to deduct the union contribution fee from members of KYTU. The employer says it does not have enough time to do this.
- 6- The workers demand the company to pay the 5% severance pay for past undetermined duration contracts. The company asserts that it will not pay the 5% severance pay unless it terminates the contract.
- 7- The workers demand the company not to reduce their wages which the company increased. The company asserts that it never reduced their basic wage but withheld the incentive from the workers who did not work well.
- 8- The workers demand the company to pay full wages when the company has no work for the workers to do. The company mentions that it will [ ] provide 50% for workers when there is no work.

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

*The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B (Article 309 to 317) of the Labour Law (1997); the Prakas on the Arbitration Council 099/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators 099/06 dated 11 May 2006 (Fourth 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. 1527 KKBV/AK/VK dated 17 October 2006 was submitted to the Secretariat of the Arbitration Council on 17 October 2006.*

### **HEARING AND SUMMARY OF PROCEDURE**

**Place of hearing:** Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd.,  
Sangkat Tonle Basak, Khan Cham Kar Mon, Phnom Penh

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KHMER ORIGINAL.**

**Date of hearing:**

- 10 November 2006 (From 2:30 p.m. to 3:30 p.m.)
- 27 November 2006 (From 2:30 p.m. to 5:30 p.m.)

**Procedural issues:**

On 04 June 2006, the Department of Labour and Vocational Training received a complaint from workers at South Bay factory to demand the company to implement labour conditions properly in accordance with the Labour Law. Upon receipt of the complaint, the Department of Labour and Vocational Training assigned a labour dispute officer to attempt to settle this dispute, and the last conciliation was on 06 October 2006 with the result that 3 of 11 issues were conciliated. The 8 non-conciliated issues were submitted to the Arbitration Council on 17 October 2006.

After receiving the case, the Arbitration Council summoned the employer party and the union at the factory to the hearing and attempted conciliation on the 8 non-conciliated issues two times-- the first time was on 10 November 2006 at 2:30 p.m. and the second time was on 27 November 2006 at 2:30 p.m. Both parties were present as invited by the Arbitration Council both times.

On the first hearing date, on 10 November 2006, representatives of the employer party requested to postpone the hearing as the manager was on a mission abroad. The union party agreed to this request. On the second hearing day, on 27 November 2006, the Arbitration Council attempted further conciliation on the 8 non-conciliated issues. As a result, 2 issues, Issues 3 and 4, were conciliated. Therefore, in this award, the Arbitration Council will consider only on Issue 1, Issue 2, Issue 5, Issue 6, Issue 7 and Issue 8 based on the evidence and findings of fact as follows:

**EVIDENCE**

**Witnesses and experts:** N/A

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

- Internal Work Rules of South Bay Enterprise, registration No. 47 KKBV/AK, dated 04 May 2005
- Letter dated 11 March 2006 to reprimand Mr. Heang Ren because he did not bring ID card to the restroom and stayed in the restroom for almost one hour.
- Letter dated 16 March 2006 to reprimand Mr. Heang Ren because he led workers to conduct a strike for 5 minutes.
- Letter dated 27 July 2006 to reprimand Mr. Heang Ren because he performed union work during working hours and talked on the phone for 20 minutes.

- Letter to confirm strike for 5 minutes on 13 March 2006
- Result of the solution to the demand of workers with the employer
- Minute of collective labour dispute resolution, dated 22 June 2006
- Model of application form, model of probationary contract and model of employment contract.
- Table of wage payment

Provided by the worker party:

- Letter No. 451 SSK, dated 17 July 2006, regarding notification about election of committee of KYTU at South Bay Company
- Certificate of registration of KYTU at South Bay Company, registration No. 758 KKBV/AK, dated 06 April 2005
- List of names of workers at South Bay Company who demand the company to reimburse medical check fee and 5% severance pay at the end of the fixed duration contract.

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

- Letter No. 1503 KKBV regarding request for resolution of collective labour dispute in South Bay Enterprise, dated 25 October 2006, by the Minister of the Ministry of Labour and Vocational Training.
- Report on the resolution of the collective dispute at Now Corp Company No. 1527 K.K.B.V./AK/VK dated 17 October 2006 by the President of Department Labour Dispute.
- Minute on the resolution of the collective dispute dated 06 October 2006.

Provided by the Secretariat of the Arbitration Council:

- Letter of invitation to the worker party to attend the hearing No. 478 LKA dated 01 November 2006.
- Letter of invitation to the employer party to attend the hearing No. 477 LKA dated 01 November 2006.

**FACTS**

- Having examined the documents parties submitted to the Arbitration Council
- Having examined the report of the collective dispute conciliation
- Having listened to the statements of the worker party and the employer party.

**The Arbitration Council finds that:**

- South Bay Enterprise (Cambodia) Co., Ltd. is a garment company located at Vattanak Park, Building E, Sangkat Chom Chao, Khann Dangkor, Phnom Penh.
- South Bay employs 650 workers; and there are two unions in the factory, C.CAWDU and KYFTU. KYFTU is a party to this case.

- KYFTU was registered with the Ministry in charge of Labour on 6 April 2005. The composition of the leadership include Mr. Chin Sophon, President of union; Mr. Ya Yan, vice President; Mr. Chhuon Bunthan, Secretary. The KYTU does not show that the union has the most representative status.
- In the hearing, the union mentioned that KYTU arranged an election to change to new leadership on 09 July 2006. The composition of the new leadership include Mr. Heang Ren, President of union; Mr. Kep Phearun, Vice-president; and Mr. Thoeung Yo, Secretary.
- The company mentioned that the company knew that Mr. Heang Ren was a member of the union but did not know that he was the President of the union. The company did not make a request to the Ministry of Labour and Vocational Training to terminate Mr. Heang Ren. The company adds that it has not had any letter from the Ministry of Labour and Vocational Training to confirm that Mr. Heang Ren is the President of the union.
- The union mentions that there is no confirmation letter from the Ministry but the union has already sent a letter regarding the changing of the composition of the union to the Ministry of Labour and received the receipt of the application.
- The Arbitration Council requested the KYTU to provide the following documents to support the claim:
  1. Letter regarding the changing of union components sent to the Ministry of Labour and Vocational Training;
  2. Receipt of application which it received from the Ministry of Labour; and
  3. Documents regarding the election.
- The union promised that it would provide those document but up to the day of Award issuance, the union still has not provided the document even though the Secretariat [of the Arbitration Council] has called as a reminder many times.

#### **Issue 1: Demand to reinstate Mr. Heang Ren**

- Mr. Heang Ren mentions that he started working for the company on 14 July 2005 and earned US\$45 per month. He claims that he joined the KYTU on 9 July 2006 by winning the union leader election as President of union. He was terminated from work on 31 July 2006.
- The company clarifies that the company terminated Mr. Heang Ren on 31 July 2006 because he has violated the Internal Work Rules and Article 83-B-5 of the Labour Law.
- Article 6 of the Internal Work Rules stipulates the minor, medium and serious misconduct:

- **Minor misconduct:** (Tardiness, leaving early, 2-day non-permitted absence, punching the piecework ticket for other people, eating, quarreling, and not respecting the supervisor's order). For the first time they must receive verbal advice and it will be noted in their personnel file. If there is still the same misconduct for a second time they must receive a written warning. In case they do not stop, leading to a third misconduct, they shall be dismissed.
- **Medium misconduct:** (Laziness in working; fighting; absence without permission from 2 days up to 6 days; punching the card for those who are absent from work; recruiting people to work by taking bribes; not obeying the changing of functions by the company; not paying attention at work; destroying clothes; wrongly examining the quality of products; using the tissue and materials wrongly; a lot of mistakes at the cutting section and mistakes at the finishing-work section which affects production). For the first time, they must receive a written warning and it will be noted in their personnel file. For the second time, they must be suspended from work without payment (not more than 7 days). For the third time, in case they still have misconduct, they shall be dismissed.
- **Serious misconduct:** It is accordance with the Labor Law. For necessary cases, the company will send the case to the authorized Ministry to deal with pursuant to the Law. For misconduct more than 12 months old, the company does not add together for having disciplinary action in the later period of time.
- In the hearing, the company claims that Heang Ren had committed misconduct 3 times:
  - + On 11 March 2006: He stayed in the restroom for one hour without punching his card, which was considered as first misconduct. The company gave one reprimand.
  - + On 16 March 2006: He led the workers to strike for 5 minutes; this was considered as a second misconduct. The company gave a reprimand and was about to dismiss him, however there was a conciliation at the Ministry and an agreement was made on 26 June 2006. The agreement stated that *"the company will reinstate Mr. Heang Ren. However he has to obey the following conditions: all leaders of the local union have to fulfill their own work as factory workers during working hours. They should not incite for union work. They must respect the factory's Internal Work Rules and the Labour Law. If they disobey the above mentioned conditions, the company will follow the factory's Internal Work Rule and the Labour Law of Kingdom of Cambodia."*
  - + On 27 July 2006: He talked on phone for 5 minutes during working hours, which was considered as the third misconduct. The company determined this to be a breach of the agreement already signed.
- Mr. Heang Ren admitted that he did commit the mistake as raised by the company.

- The union claims that the company failed to dismiss Mr. Heang Ren according to the Labour Law, because he is President of the union and the company did not make a request to the Ministry of Labour.
- The union claims that it sent a letter No. 451 SSYKh regarding the election of the committee of KYTU at South Bay company dated 17 July 2006 to a security guard at the company on 18 July 2006 at 12:05. According to the testimony of the worker party and a hand-written note in the letter No. 451, the security guard of the company received that letter but refused to sign a receipt. However, according to the employer party, the employer never received any letter regarding the changing of union leadership. The union did not deny the employer's claim.

### **Issue 2: Demand for reimbursement of medical check fees of 10,100 riel**

- KYFTU demanded the company to reimburse the medical check fee of 10,100 riel to its members –there are approximately 200 members. However, at the hearing, the union did not show clearly the names of the workers who are making the demand and when these workers had the medical check.
- Mr. Heang Ren, who was present at the hearing, says that he had medical check in 2005 and paid 10,100 riel.
- The representative of the company disagreed to the reimbursement since it is a condition stated in the Internal Work Rules of the company and Article 247 of the Labor Law does not state so specifically. The representative of the company also demands the workers to show the names of workers who demand the company to reimburse the medical check fee.
- After the hearing, the union provided the documents related to the list of 168 workers who demand the company to reimburse the medical check fee. The document indicates names of workers who started from 1998 to 2006 but it does not show the year when each worker had their medical check and the method of payment of the medical check. The company does not object to the list received after the hearing date.
- Point 3 (regarding physical checks and periodical medical checks) of the company's Internal Work Rules mentions that "Before starting the employment, all workers have to go to have a physical check at the Department of Labour's Hospital of the Ministry of Labour and Vocational Training. After starting the employment, all workers have to go to have a periodical medical check at the above mentioned place according to the determination of the group labour doctor."

**Issue 5: Demand for deduction of union contribution fee**

- The workers mention that the union filed an application form to the company to deduct union contribution fees of KYTU; but the company disagreed to make any deductions for KYTU directly and will only deduct for members of C.CAWDU.
- The company party argues that KYTU can send the names of their members to C.CAWDU and the company will deduct the union contribution fees through C.CAWDU. Then KYTU can take the contribution fees from C.CAWDU. The reason for the company to do so is because the company does not have enough staff and time to do this job.
- KYTU disagreed with this method of deduction and insists the company to deduct the union contribution fees for KYTU directly. The Company does not agree.
- The union promised to provide the Arbitration Council document related to: 1) the request for the company to deduct union contribution fees 2) the list of names of workers who demand the company to deduct union contribution fees and 3) the request in writing by each union member to deduct union contribution fees to the company. However, as of the date of Award issuance, the union has not provided those documents to the Arbitration Council even though the Secretariat of Arbitration Council has phoned to remind the union many times.

**Issue 6: Demand for payment of 5% severance pay**

- South Bay Company has entered into written fixed duration contracts of one year with each worker and the contracts of many workers have been renewed many times.
- The workers demand the company pay the 5% severance pay when each fixed duration contract expired based on Article 73 of the Labour Law.
- The company does not agree to pay the 5% for severance pay at the end of the contract to the workers because it understands that Article 73 of the Labour Law does not so provide. The company has a policy to pay the 5% severance pay when the company terminates the contract, which means when the company does not renew the contract.
- The company never pays the 5% severance pay to workers when it is the workers who request not to continue the contract or when each contract expires then is renewed.
- After the hearing, the union provided documents related to the names of 168 workers who demand the company to pay 5% of wage when each contract expires and is renewed. However, the documents do not mention when each contract expires, when they were renewed and how many times they were renewed. The company does not object to the documents received after the hearing day.

### **Issue 7: Demand for no reduction of basic wage**

- Mr. Heang Ren mentions that there are three kinds of the basic wage in the company - US\$45; \$48 and \$50 - and the workers accuse the company of reducing their basic wage. He shows his payment slip which shows his basic wage of US\$ 45.
- The company states that there is only one kind of basic wage, US\$ 45. The company asserts that workers are confused by the incentive payment, which the company adds from US\$1 to \$5 per month for those workers who worked hard.
- The company reduces the incentive payment but not the basic wage. The workers did not have enough evidence to show that the company has three kinds of wages. In order to prove this, the company promised to provide to provide employment contracts of workers and a table of workers' wage after the hearing day.
- After the hearing, the company provided employment contract and table of some workers' wages which clarifies that there is only one type of basic wage in the company, US\$ 45. The workers do not object to the document received after the hearing day.

### **Issue 8: Demand for 100% wages when there is no work in the future**

- The workers demand for 100% wages when there is no work in the future since, as of the submission of the claim, there has been no such problem yet.
- So far, when there was no work to do for short periods of time, the company provided the workers 50% of wage and it never asked for approval from the Ministry of Labour.

### **Reason for Decision**

#### **Issue 1: Demand to reinstate Mr. Heang Ren**

The Arbitration Council will consider this issue as follows:

1. Is Mr. Heang Ren entitled to special protection?
2. Is the termination of Mr. Heang Ren in accordance with the Labour Law regarding determination of normal workers?

#### **1. Is Mr. Heang Ren entitled to special protection?**

Regarding the termination of the President of union, Article 293 of the Labour Law states, "*The dismissal of a worker delegate or a candidate for worker delegate can take place only after authorisation from the Labour inspector. The same protective measures apply to former worker delegate ... is subject to the same procedure.*"

Article 4 of Prakas 305 states, "*...workers who are founders or all workers and who are voluntary members of union ... also receive protection like worker delegates. This protection lasts for 30 shall days after the date of registration of union.... the protection will be*

*granted to 3 union leaders in terms set out in articles 282 and 293 of labor law... To receive the protection, the union shall inform the employer about the names of people having to receive it by any reliable means. A copy of this information shall be sent to the Ministry of Labour and Vocational Training."*

In previous cases (No. 50/05-Fortune, No. 64/05-Chian Hwey, No. 09/06-Grand Diamond, and No. 43/06-Win Cam) the Arbitration Council determines that in order to receive special protections regarding dismissal, 3 conditions must be fulfilled: (1) the worker is the type of worker entitled to special protection (2) the date of termination must be within period of special protection; and (3) Workers must notify to the employer by any reliable means. If the 3 conditions are fulfilled, then the employer must receive approval of the Labour Inspector before terminating the worker.

In the case of terminating Mr. Heang Ren, the first condition is not fulfilled even though KYTU and Mr. Heang Ren mention that Mr. Heang Ren is the President of KYTU who was elected on 09 July 2006 as per letter No. 451 because the employer rejected to their claim and the union and Mr. Heang Ren himself do not provide enough evidence to support that Mr. Heang Ren is the new elected President of KYTU. The Arbitration Council requires both parties to provide some documents regarding his identity as the President of the union but he did not provide enough documents (see the fact finding above). Therefore, Mr. Heang Ren is not a specially protected person. Thus, the Arbitration Council will consider if the termination of Mr. Heang Ren was done legally according the Labour Law regarding termination of a normal worker.

## **2. Is the termination of Mr. Heang Ren in accordance with the Labour Law regarding determination of normal workers?**

Article 27 of the Labour Law mentions that *"Any disciplinary sanction must be proportional to the seriousness of the misconduct. The Labour Inspector is empowered to control this proportionality."*

The agreement on 26 June 2006 stated that *"the company will reinstate Mr. Heang Ren. However he has to obey the following conditions: all leaders of local union have to fulfill their own work as factory workers during working hours. They should not incite for the work of the union. They have to respect the factory's Internal Work Rules and the Labour Law. If they disobey the above mentioned conditions, the company will follow the factory's Internal Work Rule and the Labour Law of Kingdom of Cambodia."*

Based on the above mentioned facts, the employer mentions that Mr. Heang Ren committed misconduct three times. The first and second misconduct were conciliated through an agreement on 26 June 2006, and Mr. Heang Ren had followed the conditions set in the agreement for he did not perform union work during office hours anymore. Therefore, in principle, there is no longer the first and second misconduct. However, in this case, Mr.

Heang Ren committed the third misconduct by talking on the phone during office hours for 5 minutes. Therefore, the Arbitration Council will consider if this misconduct is in proportional to termination.

Based on Article 6 of the Internal Work Rules which provides for minor, medium and serious misconduct, the Arbitration Council cannot find any sentence mentioning talking on phones during office hours.

In the section of minor misconduct, it mentions “not respecting the supervisor’s order” which can be used as a measure of punishment on the point of talking on phone. Therefore, if to punish Mr. Heang Ren based on this, he should receive only an oral advice and it would be noted in his personnel file. (See the Internal Work Rules).

In the section of medium misconduct, it mentions “laziness at work” which can be used as a measure of punishment on the point of talking on a phone. If the employer punishes Mr. Heang Ren based on this, he should receive only an oral reprimand and state it in his own statement. (See the Internal Work Rules).

For the serious misconduct, the Internal Work Rules refers to the Labour Law. In Article 83 of the Labour Law, there is no provision stated which mentions talking on the phone as serious misconduct.

Therefore, the Arbitration Council considers that the termination of Mr. Heang Ren is not in accordance with Article 27 of the Labour Law. Thus the employer has to reinstate Mr. Heang Ren.

## **Issue 2: Demand for reimbursement of medical check fees of 10,100 riel**

In this case, the Arbitration Council considers if it is the employer or the workers who are responsible for paying for medical check fee.

Article 247 (c) (4) states, “*the condition under which the employers are required to establish and provide at their expenses: the medical exams of workers as stipulated in point a) of this article.*”

Article 247 (a) of the Labour Law states, “*The Ministry in charge of Labour shall issue a Prakas to determine the conditions under which pre-employment, re-employment, periodical, and special physical exams are given.*”

In relation to the demand of medical check fee reimbursement, in previous cases, AC noticed that “*Article 247(c), of the 1997 Labor Law has sufficient legal basis to require the employer to pay for the medical check of the workers before accepting workers to work.*” (See 63/04-Shine Well, 64/04-Mercury, 78/04-AIA, 98/04-Great Union, 106/04-Suit Way; 017/04-Jaqsintex, 05/05-GHG and 05/06-W&D).

In previous cases the Arbitration Council found that *“The employer party has to pay for the fee and reimburse to the worker party”* (See 02/03-Chou Sing, 21/03-Loyal Cambodia, 19/04-Kbal Koh 2, 53/04-Kong Hong, 60/04-United Art, 60/04-Shine Well, and 05/06-W&D).

Therefore in this case, Arbitration Council also agrees that the employer has to pay and reimburse the medical check fee of 10,100 riel to workers.

In this case, the union sent documents to the Arbitration Council which showed the names of 168 workers claiming for reimbursement of medical check fees. However, the document does not show the paying method and the exact date that they had medical check.

Based on point 3 of the company’s Internal Work Rules, the employer requires the workers to complete their medical checks before starting work. Based on this, the employer mentions in the hearing that it does not need to pay for medical check fees. Therefore, the Arbitration Council determines that the workers paid the medical checks fees by themselves before the date they started work at South Bay.

So AC considers whether the employer must reimburse the medical check fee to all of them and from when?

Article 120 of the Labour Law States, *“The statute of limitation for a law suit for the payment of wages in three years from the date the wage was due. Claims subject to the statute of limitation of a law suit include the actual wage, perquisites and all other claims of the workers resulting from the Labour contract, as well as the indemnity in the event of dismissal”*.

In the case 05/06-W&D, AC stated that *“For workers who paid for medical check fee for 10,100 riel by themselves to have a medical check certificate the statute of limitation is three years from the date the employment contract was concluded because the employment relations commenced at that point in time, although paragraph 2 of Article 120 of the Labour Law does not explicitly provide clarification [on this issue]. .... This means that the statute of limitation of the claim of medical check fee reimbursement in this case is 3 years from the date entering into contract or the date the workers started the work”*.

In this case, in the hearing day, Mr. Heang Ren Mr. Heang Ren mentions that he had the medical check in 2005 and paid 10,100 riel. For 168 workers who make the demand, there is no explicit date of the medical check but there is only the date of employment commencement from 1998 to 2006.

Based on the interpretation above, the Arbitration Council determines that workers paid for medical check fee by themselves before they started work at South Bay Company. Therefore, the right to demand the employer to reimburse the fee is limited to only three years *from the day of signing contract or the date when workers started work*. This means that if workers started work in 2003 this should be counted from 2003 to 2006 even though the medical check was done before commencement of work.

Because workers filed application on 04 July 2006, only workers who signed contract or started work on 04 July 2003 or after this date have right to demand the employer to reimburse the medical check even though the medical check was done before that day.

In conclusion, the Arbitration Council decides that the employer has obligation to reimburse medical check fees to Mr. Heang Ren and workers whose names are in the list and who *signed the employment contract or started work* on 04 July 2003 or after that date even though the medical check was done before that day.

#### **Issue 5:**

The Arbitration Council will consider on the following points:

1. Does the company have an obligation to deduct union contribution fees?
2. Has the Khmer Youth Trade Union fulfilled all legal procedures?

#### **1. Does the company have an obligation to deduct union contribution fees?**

Article 129, paragraph 2 of the Labour Law states, “... *However, the worker can authorise deduction of his wage for dues to the trade union to which he belongs. This authorisation must be in writing and can be revoked at any time.*”

Based on Article 5 or Prakas 305/2001, “*Any workers, who are member of union, may request in writing to the employer at least 15 days in advance to deduct his wage to pay the union contribution in compliance with Article 129 of Labor Law, and the employer shall properly acquiesce to it. Following the proposal of the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation, the employer shall confirm the number of workers that request the deduction of wage to pay contribution, source and name of union that has received interest from this procedure. This confirmation is an additional proof to determine the representativeness of the union.*”

In previous awards, the Arbitration Council interprets Article 129 of the Labour Law and article 5 of Prakas 305 that workers can allow the employer to deduct union contribution fee from their wage. However, the permission must be in writing at all times. When workers agree to allow the employer to deduct the contribution fee, the employer has to do it for the union and has to send [the fee] to the union. (See Arbitral Award No. 03/03-Tonga, No. 05/03-Top One Garment, and No. 16/05-New Point).

In this case the company does not agree to deduct wage of workers who are members of Khmer Youth Trade Union to contribute to the union directly but will do it through C.CAWDU. Regarding this issue, the Arbitration Council considers that the deduction of workers' wage in such a way is not correct as Khmer Youth Trade Union and C.CAWDU are legal persons, though both are professional organizations, with different structure of management. Legally registered unions have equal right in working in the factory for the

benefit of workers (See Article 268 of the Labour Law) especially in communicating directly with employer; the deduction of wage for contribution fee is one example.

Therefore, according to the law and in order to be consistence with previous awards, the Arbitration Council decides that the employer must make deductions from the wages workers who are members of Khmer Youth Trade Union [ ] who made the request in writing for union contribution fees for the union directly, not through C.CAWDIU.

## **2. Has the Khmer Youth Trade Union fulfilled all legal procedure?**

In this case, KYTU did not provide the Arbitration Council some documents: 1) Request to the company to deduct union contribution fees, 2) List of names of workers who demand the company to deduct the union contribution fee, and 3) Letter in writing by each member of the union to the company to deduct the union contribution fee.

Therefore, the Khmer Youth Trade Union has not satisfied Article 129(2) of the Labour and article 5 of Prakas 305 mentioned above. Therefore, the employer does not have an obligation to deduct union contribution fee for Khmer Youth Trade Union Directly.

In conclusion, the Arbitration Council rejects the demand of KYTU which demanded the employer to deduct union contribution fees without any request-letters in writing by each member of the union.

### **Issue 6:**

The Arbitration Council will consider on the following points:

1. Shall the 5% severance pay be paid at the expiration of each contract?
2. Is this demand a rights dispute or an interest dispute?

#### **1. Shall the 5% severance pay be paid at the expiration of each contract?**

Article 73 of the Labour Law 1997, paragraph 1 states, *“A labour contract of specific duration normally terminates at the specified ending date. It can, however, be terminated before the ending date if both parties are in agreement on the condition that this agreement is made in form of writing in the presence of a Labour Inspector and signed by the two parties to the contract.”*

Also, Article 73, paragraph 6 states, *“At the expiration of the contract, the employer shall provide the worker with the severance pay proportional to both the wages and the length of the contract. The exact amount of the severance pay is set by a collective agreement. If nothing is set in such agreement, the severance pay is at least equal to five percent of the wages paid during the length of the contract.”*

In Case No. 60/06-New Max Garment and 76/06-South Bay the Arbitration Council determined that *“the content of this Article can be interpreted in many ways. There is ambiguity in the point that states, “at the expiration of the contract” because it is unclear if this sentence refers to the conclusion of the contract of each worker or the end of the*

*employment relationship. However, the Arbitration Council understands that this Article refers to “severance pay to terminate the contract.” The severance to terminate the contract can be interpreted as the severance which should be paid when the employment relationship is terminated or the end of the employment relationship.”*

In this case, the Arbitration Council agrees with the interpretation of the Arbitrators in the above mentioned cases as this interpretation is reasonable because the content of Article 73 of the Labour Law is practiced only when the employment relationship between employer and employee is terminated. If a labour contract is renewed, it cannot be considered that the employment relationship is terminated because the employment relationship still continues and other benefits will be continued with the new contract as well.

Therefore, in this case, the employer is not bound to pay the 5 percent severance pay of the fixed duration contract each time the contract ends if the employment relationship still continues. Workers can receive this 5 percent of severance pay when the fixed duration contract is ended and employment relationship is terminated.

## **2. Is this demand a rights dispute or an interest dispute?**

Article 43 of Prakas 099 dated 21 April 2004 provides, “An Arbitral Award which settles an interest dispute takes the place of a collective bargaining agreement and shall remain in effect for one year from the date on which it becomes final unless the parties agree to make a new collective bargaining agreement replacing the Award.”

Based on the above interpretation, the Arbitration Council considers that this dispute is an interests dispute as this demand is beyond what is stated by law. According to Article 73(6) of the Labour Law, workers can receive the 5% severance pay when the fixed duration contract expires and employment relationship is terminated.

In case 07/06- Da Young, the Arbitration Council mentions, “*Generally for dispute related to interests, the Arbitration Council always considers on the most representative status of the union to the dispute.*”

In cases 31/03-Hong Wah, 60/04-United Art and 99/04-AIA, the Arbitration Council mentions, “*Union without the most representative status cannot raise interest disputes to the Arbitration Council for resolution.*”

In cases 04/03-Lida, 06/04-Chou Sing, 24/03-Top One, 61/04-Best Honour, 62/04-Ecent, 09/05-Kin Tai and 07/06-Dai Young, the Arbitration Council mentions “*If the Arbitration Council issue an Award on this issue it will become a collective bargaining agreement which applies to all workers in the factory and it would also make the other workers lose the right to strike to demand interests disputes in the future, and it will become unfair for the other workers.*”

In this case, based on the finding of the Arbitration Council, the union does not have the most representative status yet. Therefore, in order to be consistent with previous Arbitral

Awards, the Arbitration Council considers that the union does not have enough legal capacity to represent workers regarding the common interests of all workers in this company.

In conclusion, the Arbitration Council decides to decline to consider the demand.

**Issue 7:**

**In this case, the Arbitration Council will consider if the company has deducted workers' wage.**

Article 312 of the Labour Law states, *"The Council of Arbitration has no duty to examine issues other than those specified in the non-conciliation report or matters, which arise from events subsequent to the report, that are the direct consequence of the current dispute."*

*The Arbitration Council legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council's decisions are in equity for all other disputes.*

*The Arbitration Council has the considerable power to investigate the economic situation of the enterprises and the social situation of the workers involved in the dispute."*

Similarly, article 34 of Prakas 99/04 also provides the Arbitration Council with full power to settle disputes.

In this case, the workers' demand does not have proper [factual basis] because the company does not deduct the main wage but the incentive bonus. The deduction of the incentive bonus decreases the total wage workers received. This is what confuses the workers. Based on the above facts, the basic wage is maintained at US\$ 45 and it is not deducted.

Therefore, the Arbitration Council decides to reject this demand.

**Issue 8: Demand for 100% wage during the time of no work in the future:**

In the Arbitral Award 10/03-Jacsintex, the Arbitration Council mentions that *"The Arbitration Council is established to settle labour dispute but not to settle problem which have not happened yet... Therefore, the Arbitration Council will not make decision about this issue. If workers want the Arbitration Council to settle this issue, workers have to bring factual evidence about the dispute."*

In addition, in case 42/05-Yong Wa, the Arbitration Council mentions, *"The Arbitration Council cannot make a decision on a rights dispute which may occur in the future because we can never know what scenarios may occur in the future including which parties may be involved, or which provisions of the law, of the contract, or of the CBA [are relevant]. Moreover, to decide on a rights dispute, the Arbitration Council needs specific evidence of actual events to compare with the provisions of the law."*

In this case, the workers demand the company to provide 100% wages when there is no work in the future, i.e., workers are not demanding the company pay 100% wages in regard to an issue of no work when the company suspended their work without informing to the Labour Inspector in the past. Hence, the Arbitration Council considers that this right dispute has not happened yet. Regarding the issue of rights disputes in the future, no one knows or can predict in advance. This means that we cannot know if in the future 1) *the workers will have no work*; 2) *the company will suspend workers' work*, 3) *the company will inform to the Labour Inspector*, 4) *the company will provide 100% wage or 50% wage or not at all* and 5) *the workers who make this demand still work for the company*.

In addition, so far, in deciding on right dispute the Arbitration Council resolves only issues in which workers raise explicit evidence that can be measured against provisions in the Labour Law and other relevant laws as a basis for consideration in such case.

Based on the above interpretation, the Arbitration Council considers that the demand for the Arbitration Council to resolve the dispute of rights which will happen in the future is not an appropriate demand. Therefore, in order to be consistent with previous Awards, the Arbitration Council decides to reject this demand.

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

### **Decision**

**Issue 1:** Order the company to reinstate Mr. Heang Ren.

**Issue 2:** Order the company to reimburse medical check fee of 10,100 riel to Mr. Heang Ren and all workers whose names are in list of demand and whose labour contract or date of work commencement on 04 July 2003 and after that day even though the medical check was done before that time.

**Issue 5:** Reject the Khmer Youth Trade Union's demand to that the company to deduct union contribution fee because it has no written request by each member of the union.

**Issue 6:** Decline to consider workers' demand that the employer pays 5 percent of severance pay at the end of each fixed duration labour contract, in case the labour contract is renewed.

**Issue 7:** Reject the workers' demand which demand the company not to decrease wage.

**Issue 8:** Reject workers' demand that the company pays 100 percent wage during period of no work in the future.

**Type of Award: Non binding awards**

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 Ministry 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: **Ly Tayseng**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Suong Sophal**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....