



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអន្តរាជ្ញាភាព

THE ARBITRATION COUNCIL

Case number and name: 60/08- PCCS

Date of Award: 28 May 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: Chhiv Phyum

Arbitrator chosen by the worker party: Toun Siphann

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

DISPUTING PARTIES

Employer party:

Name: **PCCS Garment Limited**

Address: Sleng Roling Village, Sangkat Toeuk Thla, Khan Russey Keo, Phnom Penh

Telephone: 012 939 755

Fax: N/A

Representative:

1- Mr. Chong Chin Siong

Vice-President General

2- Mr. Kao Simunira

Chief of Human Resources

Worker party:

Name: **Khmer Youth Federation Trade Union (KYFTU) and local union of KYFTU at PCCS Factory**

Address: Sleng Roling Village, Sangkat Toeuk Thla, Khan Russey Keo, Phnom Penh

Telephone: 017 430 312

Fax: N/A

Representative:

1- Mr. Hing Buntheourn

KYFTU Officer

2- Mr. Sous Sokha

KYFTU Officer

3- Mr. Yun Shing

President of local union of KYFTU at PCCS

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The union leaders of local union KYFTU in the factory (union is currently undergoing the registration process) demand that the Company pay 50% of wages and perquisites to women workers who take maternity leave before they submit the leave form.
- 2- Local KYFTU union leaders ask that the Company convert workers who have been working over two months to be permanent or full-right workers.
- 3- Local KYFTU union leaders ask that the Company take measures against physician personnel and some of their representatives who are accomplices in extorting money from workers when they ask for permission to take leave and reimburse the workers accordingly.
- 4- For any individual who takes money from workers during recruitment, the Company should take measures against them and the Company should reimburse workers according [to what the workers actually paid] from US\$ 30 to US\$ 80.
- 5- The workers ask that the Company should not discriminate against the union and that it should take measures in accordance with the Company's Internal Work Rules or the Labor Law against any union leader who commits misconduct.
- 6- The workers ask that the Company reinstate Mr. Yun Sinh, alias Yun Fou, President of the local union of KYFTU (union under registration process).
- 7- The workers ask that the Company reimburse medical check fees for worker who paid for the checks by themselves.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labor Law (1997); the Prakas on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators No. 076 dated 10 May 2007 (Fifth Term).

An attempt was made to conciliate the collective dispute that is the subject of this Award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and the non-conciliation report No. 480 K.B/RK/VK dated 17 March 2008 was submitted to the Secretariat of the Arbitration Council on 28 April 2008.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Basak, Khann Chamkarmorn, Phnom Penh.

Date of hearing: 09 May 2008 (from 2:00 p.m. to 4:30 p.m.)

Procedural issues:

On 05 February 2008 the Department of Labour and Vocational Training received a complaint from KYFTU No 94 SSYK dated 28 January 2008 demanding an improvement in working conditions. After receiving the complaint, the Department of Labour and Vocational Training assigned an officer to settle the collective dispute and conducted conciliation on 14 March 2008 but the issues were not able to be resolved on 7 non-conciliated issue. The seven non-conciliation issues were referred to the Secretariat of the Arbitration Council on 28 April 2008 by Department of Labour and Vocational Training through the non-conciliation report on settling the collective dispute at PCCS No 480 KB/RK/ VK dated 17 March 2008.

Having received the case, the Secretariat of the Arbitration Council summoned both the employer party and the worker party to the hearing and conciliation on the seven non-conciliation issues on 09 May 2008 at 2:00 p.m. Both parties were present as invited by the Arbitration Council.

In the hearing the Arbitration Council tried to conciliate the seven non-conciliation issues. The workers requested to withdraw issue 1, issue 2, issue 3, issue 4 issue 5 and issue 7, without consideration from the Arbitration Council. Therefore, the Arbitration Council will consider only issue 6 based on the evidence and clarification of the parties in the hearing 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 Rule registered No 118 SKBY. RK dated 17 December 1999 of PCCS
- Statement of Labour Dispute on demand of local union KYFTU of PCCS dated 08 May 2008
- Statute on commercial registration No 998/02 BN.NTK.BB dated 19 October 2005 of PCCS
- Minute on Mr. Yun Fu who immediately excused from a meeting by saying it is lunch time dated 12 January 2008.
- Letter No 169 KB/RK/VK dated 31 January 2008 on requesting for local KYFTU union registration of PCCS
- Letter of workers in PCCS requested to withdrawal their signature from local KYFTU 2 sheets.
- Minute of conciliation of collective dispute of PCCs dated 14 March2008

- Minute on investigation from employer representative of PCCS dated 06 March 2008
- Notification No 02 SSYK dated 02 January 2008 on local KYFTU committee election of PCCS
- Letter of promise of Mr. Yun Fu on quarrel dated 03 April 2004

Provided by the worker party:

- Receipt receiving case on evidence to prove about Mr. Yun Fu's representativeness of PCCS dated 13 February 2008
- Receipt receiving union registration application dated 03 January 2008
- Letter 94 SSYK dated 28 January 2008 on requesting to settle labour dispute in PCCS
- Thumb print to support president of local KYFTU of PCCS whose name Mr. Yun Shing
- Family book of Mr. Yun Shing dated 21 May 1999
- Khmer citizen ID of Mr. Yun Shing dated 06 April 2002
- Notification letter No 02 SSYK dated 02 January 2008 on local KYFTU committee election of PCCS

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

- Non-conciliation report on collective dispute of PCCS No 480 KB/ RK/VK datd 17 March 2008
- Minute of conciliation on collective dispute of PCCS company dated 14 March 20

Provided by the Secretariat of the Arbitration Council:

- Invitation letter for the hearing to worker on 297 KK/RK/VK/LKR dated 05 may 2008
- Invitation letter for the hearing to employer on 296 KK/RK/VK/LKR dated 05 may 2008

FACTS

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

The Arbitration Council finds that:

- PCCS factory employs approximately 5,100 workers.

- Local union of KYFTU of PCCS factory, the claimant in this case, does not have a certificate of union registration.
- Workers arranged the election for KYFTU union leader on 29 December 2008. The union prepared documents to notify the company on 02 January 2008 and the security guard of the company, ID No.1054, received the documents of the KYFTU union leader election results on 09 January 2008.
- The union applied for a [union registration] certificate at the Ministry of Labour and Vocational Training on 03 January 2008. The Ministry of Labour and Vocational training received the application form on 11 January 2008.
- The company submitted an objection letter on the candidacy of Mr. Yun Shing on 14 January 2008 because the company said that there is no worker named Yun Shing and only has worker name Yun Fu.
- The Ministry of Labour and Vocational Training sent a letter No.169 KB/RK/VK dated 31 January 2008 to Mr. Yun Shing for his clarification because he used two names: Yun Shing and Yun Fu.
- On 04 February 2008 Yun Shing sent a letter to the Ministry of Labour and Vocational Training to clarify about his name: Yun Shing is the correct name according to his Cambodian ID card and Family Book, while Yun Fu is the name for working at PCCS factory. On 13 February 2008 union and Mr. Yun Shing appeared in person at the Ministry of Labour and Vocational Training in order to affirm that his name is really Yun Shing.
- The Arbitration Council finds that the name on the ID was Mr. Yun Shing. In the hearing employer representative agrees that Yun Shing and Yun Fu is the same person.

Issue 6: Workers demand the company to reinstate Mr. Yun Shing who is the union President

- Mr. Yun Shing, called Yun Fu, started work with PCCS company in 2001 and resigned from work on July 2007 because the company did not increase his salary. Before he resigned from work his salary was \$140 per month.
- Mr. Yun Shing, called Yun Fu, resumed his work on 23 October 2007. Mr. Yun Shing and the company did not sign any written contract. Mr. Yun Shing was a technical manager. According to Mr. Yun Shing, the company asked him back to work and paid him \$160 per month and provided an additional \$20 on the salary every month. In total, he received \$180 per month.
- After that the company dismissed Mr. Yun Shing from work on 22 January 2008 based on the reason that he had no capacity and he was a probationary worker. The

company explained that based on the Internal Work Rules of the company Mr. Yun Shing was a probationary worker. Therefore, the company had the right to dismiss him. Regarding the lack of capacity, the company said that workers always complained about Mr. Yun Shing and the company always resolved his disputes and the company added that Mr. Yun Shing did not know how to manage workers.

- Mr. Yun Shing, called Yun Fu, states that when the company invited him back to work, the representative of the company did not inform him that he was on probation because he had been working for the company since 2001. He claims that the allegation by the company that he was an incapable worker was not true because whenever the workers had a complaint about him, the company always defended him.
- Mr. Yun Shing, called Yun Fu, argued that his dismissal from work was because he was elected President of the local union of KYFTU. The company asked him to have a discussion and to persuade him to resign from the union on 15 or 16 January 2008 after it learned that he was elected union President. Mr. Yun Shing mentioned that Mr. Monira, Mr. Kong Ra and Mr. Rong Fhea told him to resign from the union but he did not want to resign from his position as the president of the union.
- Mr. Monira, present at the hearing, testified that he did have a discussion with Mr. Yun Fu but talked about the dispute that the workers made against Mr. Yun Fu, not about the union issue.
- The company's representative said that he did not recognize Yun Shing name because in the company there is only the Yun Fu name.
- The company mentioned that Mr. Yun Shing and Yun Fu is the same person.
- The Arbitration Council finds that the name Yun Shing was mentioned in the Family Book and ID Card.
- The company claimed that when he came to work the company did not examine the Family Book and ID of Mr. Yun Fu because the company knew him personally. Moreover, the company did not follow the procedure of the Internal Work Rules dated 15 December 1999 Clause 1, on condition and procedures to recruit worker, as point 5 required workers to provide copies of their identification or letter of residence.
- The Arbitration Council finds that the company did not provide evidence to support that the Yun Fu name is officially used.

REASONS FOR DECISION

Issue 6: Workers demand the company to reinstate Mr. Yun Shing who is the union President

Workers demand the employer to reinstate Mr. Yun Shing or Yun Fu whom the company dismissed on 22 January 2008 on the grounds that the dismissal is related to union discrimination because Mr. Yun Shing is union president. However, the employer raised that the termination of the contract of Mr. Yun Shing is because he had no capacity to manage and he is a probationary worker.

The Arbitration Council will consider as follows:

Article 67 paragraph 7 of the Labour Law states “...7- A contract of a fix duration must be in writing . If not , it becomes a labour contract of undertermined duration. “

Base on the meaning of Article 67 paragraph 7 of the Labour Law and the agreement of the company to reinstate Mr. Yun Shing called Yun Fu to work and the acceptance of Mr. Yun Shing called Yun Fu to work for the company at 23 October 2007 by not signing any written contract the Arbitration Council considers that his contract is an undetermined duration contract.

Article 74 of the Labour Law states “*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 enterprised, establishment or group. “

Based on the meaning of Article 74 above the Arbitration Council considers that undetermined duration contract can be terminated by the will of one party (by the employer) through giving prior notice as written to other party (the worker). However, there can be no termination without a valid reason related to the workers’ aptitude or behavior based on the requirements of the operation of the enterpirse or group.

In this case, the employer provided evidence relating to the letter of promise of Mr. Yun Fu regarding a misunderstanding leading to a quarrel, dated 03 April 2004. Based on this document the Arbitration Council considers that this incident happened in 2004 during the first phase of his employment, and in the hearing the company did not raise this as the reason to dismiss Mr. Yun Fu, so the Arbitration Council considers that this letter of promise is not related to the dispute.

In this case, the Arbitration Council finds that the employer did not act according to Article 74 because the employer did not give a valid reason relating the workers’ aptitude or behavior based on the requirements of the operation of the enterprise or group.

However, the employer raises that the employer has the right to terminate the contract of Mr. Yun Shing called Yun Fu because he is a probationary worker. Mr. Yun Fu, however, mentioned that the company did not tell him whether or not he worked as a probationary worker and they did not provide any written contract.

The Arbitration Council considers that Mr. Yun Shing called Yun Fu worked for the company since 2004 and he stopped work shortly thereafter. He then was called to work for the company again until 22 January 2008; but was not a probationary worker. Moreover, there is no written contract which specifies anything about probationary work.

Generally the Arbitration Council determines that the party who makes an accusation has a burden of proof to the Arbitration Council to support the claim. (*See Arbitral Awards and 112/06-River Rich, issue 1*).

In this case the Arbitration Council agrees with the interpretation of the Arbitration Council in previous cases that the worker who is the complainant shall have the burden to provide evidence to support their accusation. In this case the workers raised that the dismissal of Mr. Yun Shing or Yun Fu was done by the employer on 22 January 2008 after the union notified the company about the list of union leaders to the company on 02 January 2008. The security guard of the company, ID No 1054, received the documents regarding the result of the local KYFTU election of union leaders on 09 January 2008. After that the company raised an objection to Mr. Yun Shing's status as a representative on 14 January 2008 because the company did not have the name Yun Shing but only had the name Yun Fu.

Base on these facts the Arbitration Council considers that the dismissal of Mr. Yun shing called Yun Fu is not based on lack of capacity, rather it is because of union discrimination as claimed by workers. Mr. Yun Shing was elected to be union president and the employer did not have any specific reason to terminate his contract. In the hearing the employer did not give any evidence to refute the accusation of the workers regarding the union discrimination.

Thus, the Arbitration Council considers that this dismissal is based on union discrimination. According to Article 12 of the Labour Law states, "*..., no employer shall consider on account of... membership of workers' union or the exercise of union activities ...to be the invocation in order to make a decision on...discipline or termination of employment contract*" and Article 279 of the Labour Law states, "*Employer are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal.*" Based on these two Articles above, the employer can not discriminate against unions in recruiting or disciplining or terminating workers' contracts.

In relation to union discrimination, in previous cases the Arbitration Council ordered the employer to reinstate the workers when the termination of workers was due to union discrimination in violation of Article 12 and 279 of the Labour Law. The Articles prohibit the employer from using the reason of union membership or union activities to be the invocation for hiring or disciplinary action or termination of workers' employment contracts. (See also Arbitral Awards 28/07-Dae Kwang, issue 3 and 123/07-E Garment, issue 1).

Thus, the Arbitration Council orders the employer to reinstate Mr. Yun Shing or Yun Fu.

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

DECISION:

Order the company to reinstate Mr. Yun Shing after the Arbitral Award comes into effect.

Type of Award: Non-binding award

This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition to the Minister of Labour through the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Chhiv Phyrum**

Signature:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: