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THE ARBITRATION COUNCIL

Case number and name: 49/09-Bloomtime

Date of award: 18 May 2009

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

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

Arbitrator chosen by the worker party: **Liv Sovanna**

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

DISPUTANT PARTIES

Employer party:

Name: **Bloomtime Embroidery Pte Ltd. (the employer)**

Address: Trapang Thleung Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 012 827 755

Fax: N/A

Representatives:

- | | |
|-------------------|-----------------------------|
| 1. Mr Sry Kimyou | Lawyer |
| 2. Ms Regine Tan | HR/Administration Executive |
| 3. Mr Chea Savuth | Administration Staff |

Worker party:

Name: **Worker Union at Bloomtime Embroidery Factory**

Address: Trapang Thleung Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 012 596 297

Fax: N/A

Representatives:

- | | |
|-------------------------|-----------------------|
| 1. Ms Sary Both Chakrya | Lawyer |
| 2. Ms Heng Bon | Lawyer |
| 3. Mr Kieve Pearum | Worker Representative |
| 4. Ms Sous Heurn | Worker |
| 5. Mr Mearn Em | Worker |

ISSUES IN DISPUTE

(From the Non-Conciliation Report of the Ministry of Labour and Vocational Training)

1. The workers demand that the employer not recognise three worker representatives at Bloomtime Embroidery Pte Ltd.; Mr Peum Sophart, Mr Preak Chandeth, and Mr Chan Meoung, because they do not serve the workers' interests. The employer argues that it does not have the legal authority to fulfil the workers' request.
2. The union and union delegates demand that the employer reinstate Kieve Pearum, worker delegate, and Seng Piset, union delegate, to their former positions and pay them the benefits they should have received before the termination. Further, the employer should pay their wages and other benefits as follows from December 2008 to the date of reinstatement:
 - annual leave payment for 2008;
 - last month's wages; and
 - wages for the period the two were required to attend a training program.

The employer asserts that according to its internal work rules, it cannot reinstate the two workers since they were absent without permission for more than six consecutive days. This means that they both abandoned their employment. The employer states that it cannot pay wages and other benefits to the two workers for the period of absence.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this award from Chapter XII, Section 2B of the Labour Law (1997); the *Prakas* on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same *Prakas*; and the *Prakas* on the Appointment of Arbitrators No. 076 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 non-conciliation report No. 262 KB/AK/VK, dated 30 March 2009 was submitted to the Secretariat of the Arbitration Council on 31 March 2009.

HEARING AND SUMMARY OF PROCEDURE

Hearing venue: The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Tonle Bassac Commune, Chamkarmorn District, Phnom Penh

Date of hearing: 6 April 2009 at 2:00 p.m.

Procedural issues:

On 17 February 2009, the Department of Labour Disputes received a complaint from the worker union at the Bloomtime Embroidery factory demanding the reinstatement of two former union leaders and that the employer not recognise three new worker representatives. Upon receiving the complaint, the Department of Labour Disputes assigned an expert officer to conciliate the labour dispute on 23 March 2009, but the two issues were not resolved. The two non-conciliated issues were referred to the Secretariat of the Arbitration Council on 31 March 2009.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the two non-conciliated issues, held on 6 April 2009 at 2:00 p.m. Both parties were present as summoned by the Arbitration Council. However, neither of the two issues was resolved.

The Arbitration Council will consider the issues in dispute based on the evidence and reasons below.

EVIDENCE

This section has been omitted in the English version of this arbitral award. For further information regarding evidence, please refer to the Khmer version.

FACTS

- Having examined the report on collective labour dispute resolution;
- Having listened to the statements of the representatives of the employer and the workers; and
- Having reviewed the additional documents;

The Arbitration Council finds that:

- The Worker Union at Bloomtime Embroidery Factory is the claimant in this case.
- Bloomtime Embroidery Pte Ltd., the respondent in this case, employs 800 workers.

Issue 1: The workers demand that the employer not recognise three worker representatives; Peum Sophart, Preak Chandeth, and Chan Meoung.

- In this case, the workers do not want the employer to recognise three worker representatives; Peum Sophart, Preak Chandeth, and Chan Meoung, since they do

not serve the workers' interests. The representatives agreed to shift working hours and alter the employment contract.

- The workers failed to provide specific evidence showing that the three worker delegates had not served the workers' interests. The Arbitration Council still questions whether the shift in working hours and alteration to the employment contract was made by the three worker delegates, other worker delegates, or by each individual worker.
- The employer states that it does not have legal authorisation to resolve the issue because it is not a labour dispute between the employer and workers, but rather a conflict between the workers and the worker delegates. The employer is prepared to implement the Arbitration Council's decision according to the law.
- On 31 May 2008, 10 full-right worker delegates and 10 assistant worker delegates were elected. Of the 10 full-right worker delegates, Peum Sophart placed 7th, Chan Meoung placed 9th, and Preak Chandeth placed 10th in the election.
- The head of the Department of Labour Disputes issued a letter, No. 615 KB/RK/VK dated 5 June 2008, regarding the recognition of the worker delegates' mandate in conformity with Article 299 of the Labour Law and *Prakas* No. 286 SKBY, dated 5 November 2001. The worker delegates' mandate will expire on 31 May 2010.

Issue 2: The workers demand that the employer reinstate Kieve Pearum, worker delegate, and Seng Piset, union delegate, to their former positions and pay their wages and other benefits from the date of dismissal to the date of reinstatement.

- Kieve Pearum, worker delegate, and Seng Piset, union leader and union delegate, were both employed on 7 July 2005 on undetermined duration contracts.
- Kieve Pearum and Seng Piset demand reinstatement because the employer violated Articles 6, 293, and 295 of the Labour Law by dismissing them as both received protection as worker delegate and union leader.
- The employer claims that it did not dismiss the two workers; rather they violated Point B-05 of Clause 5 of the Internal Work Rules, which states that workers who are absent for more than six consecutive days in a month are considered to have committed serious misconduct and therefore voluntarily abandoned their employment.
- Kieve Pearum and Seng Piset claim that they did not abandon their employment. The reason they did not go to work was that they were assigned to attend a month long training program on the textile industry from 22 December 2008, arranged by the USA Development Agency in order to improve their skills and knowledge of the

industry. They state that it was a full time course, running from 6:00 a.m. until 2:45 p.m. They submitted a letter to the employer rejecting the offer of training because they already possessed those skills.

- On 26 December 2008, Albert Tan, the company director, responded to Kieve Pearum and Seng Piset's letter stating that he regretted that the two refused to attend this training and he requested them to respect the Internal Work Rules [and attend the training] so that the employer could maintain their wages.
- According to the evidence submitted by the employer, on 5 January 2009 the two workers sent an email to the employer stating that they were not quitting their jobs.
- The employer's representative explained that the reason the employer ordered Kieve Pearum and Seng Piset to attend the training was that it has changed its organisational structure. Therefore, their previous roles were no longer assigned to them. Kieve Pearum's representatives, who were present at the hearing, did not object to this claim. Furthermore, the workers' representatives did not submit an objection to the explanation by the employer's representative.
- On 17 January 2009, the employer issued a notification to all workers that Kieve Pearum and Seng Piset had violated Point B-05 of Clause 5 of the Internal Work Rules, which states that workers who are absent for six consecutive days in a month are considered to be committing serious misconduct and voluntarily abandoning their employment. In this case, Kieve Pearum and Seng Piset were absent from 24 December 2008. Therefore, the employer considered that their employment contracts had been terminated.
- At the hearing, the employer's representative stated that the employer considers that Kieve Pearum and Seng Piset violated Point B-05 of Clause 5 of the Internal Work Rules when they were absent for six consecutive days. This constitutes serious misconduct and the workers are considered to have abandoned their employment. The employer considers the date of termination of their employment contracts to be 31 December 2008. Therefore, the employer did not take disciplinary action to terminate the contracts and was not required to inform the Labour Inspector because it believes that Kieve Pearum and Seng Piset voluntarily abandoned their positions.
- Kieve Pearum and his representative stated at the hearing that he and Seng Piset had not abandoned their positions when they did not return to work. Rather, they were waiting to hear a solution from the employer.
- The workers filed a complaint with the Labour Inspector regarding this case on 13 February 2009. Following receipt of the complaint on 17 February 2009, on 23

February 2009 the Minister of Labour and Vocational Training assigned an officer to conciliate the dispute. The case was conciliated on 23 March 2009.

Additional Issue:

- At the hearing, the workers' lawyers requested the Arbitration Council to issue an arbitral award ordering the employer to suspend the termination of the employment contracts of other workers.
- The employer claimed that it terminated each worker's fixed duration contract upon the expiration date. It will provide wages for December with the termination payment if the workers agree to accept them.
- The workers' lawyers argued that this dispute was still being examined by the Ministry of Labour and Vocational Training. However, the employer continued to terminate the workers' employment contracts.

REASONS FOR DECISION

Issue 1: The workers demand that the employer not recognise three worker representatives; Peum Sophart, Preak Chandeth, and Chan Meoung.

In this case, the workers demand that the employer not recognise three worker representatives; Peum Sophart, Preak Chandeth, and Chan Meoung, because they do not serve the workers' interests. The workers allege that they agreed to shift working hours and alter the employment contract. The employer, however, argues that it does not have the legal authority to resolve the issue because it is not a labour dispute arising between the employer and the workers, rather a conflict between the workers and their delegates. The employer is prepared to implement a decision in accordance with the law. In this case, the Arbitration Council finds as follows:

According to Chapter 12, Section 2(B), Articles 309-317 of the Labour Law (1997), the *Prakas* on Arbitration Council No. 099 SKBY dated 21 April 2004, and the Procedure of the Arbitration Council annexed to *Prakas* No. 099 SKBY dated 21 April 2004, the Arbitration Council only has jurisdiction over collective disputes and the consequences of such disputes.

Article 302 of the Labour Law states:

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

Based on Article 302, the Arbitration Council finds that a dispute is considered to be a collective dispute if it fulfils three conditions: 1) The dispute is between one or more employers and a group of workers. 2) The issue in dispute relates to working conditions, the exercise of the rights of professional organisations, the recognition of professional organisations, or problems in the relationship between the employer and workers. 3) The dispute could lead to the disruption of the operation of the enterprise or threaten social peace.

Based on the above facts, the workers claim that they are not satisfied with the three new worker delegates and have declared to the employer that they should not be recognised. The Arbitration Council considers that this dispute is between the workers and the worker delegates, not between the workers and the employer regarding working conditions or the exercise of the rights given to professional organisations and it does not affect the operation of the factory. Therefore, this dispute is not considered a collective dispute under Article 302 of the Labour Law.

The Arbitration Council considers whether workers have the right to dismiss worker delegates if they find that the worker delegates are not fulfilling their obligations or furthering the workers' interests.

Clause 7 of *Prakas* No. 286 SKBY, dated 5 November 2006, states:

Workers can dismiss a worker delegate before the expiration of his or her mandate if the worker delegate fails to fulfil his or her obligations. The dismissal shall follow the same procedure and model of voting as the process for selecting worker delegates. Workers must give official notice to the Labour Inspector within three days of the dismissal at the latest. After a worker delegate is dismissed, an assistant worker delegate will handle the duties of the dismissed worker delegate until the election of a new mandate of worker delegates.

At the hearing, the workers did not specify the identity of the worker delegates to be dismissed. However, they demand that the employer not recognise the three new worker delegates. The Arbitration Council considers that a worker delegate can be dismissed if he or she does not fulfil his or her obligations. After the dismissal, an assistant worker delegate will take responsibility for the mandate of the dismissed full-right delegate until the election of a new mandate of worker delegates. The Arbitration Council also finds that workers have the right to demand that the employer hold an election to dismiss any worker delegate who does not perform his or her responsibilities; the workers, however, cannot demand an election to end the mandate of all worker delegates prior to the expiration date of their mandate (see *Arbitral Award 106/06-Quick Sew, issue 3*).

Furthermore, Article 292, paragraph two of the Labour Law states that the election of new worker delegates must take place 15 days prior to the expiration of the current term. Hence, according to Article 292 of the Labour Law and Clause 7 of *Prakas* No. 286 SKBY, a new election of worker delegates can be called as long as the current worker delegates' mandate is due to expire (see *Arbitral Awards 66/04-Winner Garment, issue 4; 67/04-Jasca, issue 1; and 76/05-Global Footwear, issue 8*).

In conclusion, the Arbitration Council decides to reject the workers' demand that the employer not recognise the three worker delegates Peum Sophart, Preak Chandeth, and Chan Meoung.

Issue 2: The workers demand that the employer reinstate Kieve Pearum, worker delegate, and Seng Piset, union delegate, to their former positions and pay their wages and other benefits from the date of dismissal to the date of reinstatement.

The workers demand that the employer reinstate Kieve Pearum, worker delegate, and Seng Piset, union leader and union delegate. The employer declines the demand because the two workers did not follow its order to attend a training program [and they were absent for six consecutive days]; consequently, it was deemed that they voluntarily abandoned their employment.

The Arbitration Council considers the issue below.

Article 2, paragraph two of the Labour Law provides that “[e]very enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in [a] factory, workshop, work site, etc., under the supervision and direction of the employer.”

Based on the aforementioned Article 2, paragraph two, the Arbitration Council has ruled in previous cases that the employer has the right to supervise and direct the enterprise so long as this is carried out reasonably and lawfully (see *Arbitral Awards 39/07-San San, issue 2; 54/07-Yung Wah (Branch 1), issue 9; and 47/08-Grandtex, issue 2*).

According to the above facts, the employer assigned Kieve Pearum and Seng Piset to a one month training program to improve their knowledge of the textile industry, maintaining their wages and other benefits from 22 December 2008. However, the workers did not comply with the assignment and wrote to the employer declining the offer of training on 23 December 2008 because they felt that they already possessed the skills. The two workers were then absent from work and tried to negotiate the matter with the employer from 24 December 2008, two days after the employer issued the assignment. The Arbitration Council is of the view that the employer's assignment of the workers to training to obtain

further skills was reasonable, and that the claim of the two workers that they already possessed the skills was not sufficiently reasonable.

Paragraph one of Article 69 of the Labour Law states that “[w]ithin the framework of his contract, the worker shall perform all of his professional activities for the enterprise. Primarily, he must do the work for which he is hired, and perform it by himself with due care and attention.”

Based on paragraph one of Article 69, the Arbitration Council considers that the two workers, Kieve Pearum and Seng Piset, are obliged to work for the employer with due care and attention as long as they receive wages from the employer and are under its supervision.

Point B-05 of Clause 5 of the Internal Work Rules of the employer states that “[e]ach worker who is absent for more than six consecutive days in a month is considered to have committed serious misconduct and therefore voluntarily abandoned their employment.”

The Arbitration Council finds in this case that the two workers were absent from the workplace from 24 December 2008. Further, the Arbitration Council has not received any evidence proving that they went to the factory to negotiate with the employer. However, it is clear from the evidence that they were absent from work since the date of their letter informing the employer that they did not like the direction to attend training

The Arbitration Council also finds that on 26 December 2008, the company director Albert Tan responded to the letters of the two workers stating that he felt sorry that they declined to attend the training. He asked them to follow the Internal Work Rules so that the employer could maintain their wages and other benefits. On 5 January 2009, the employer received an email from the two workers stating that they had not abandoned their jobs.

Based on Point B-05 of Clause 5 of the Internal Work Rules, the Arbitration Council considers that Kieve Pearum and Seng Piset did not comply with the employer’s order and were absent without an appropriate reason.

The Arbitration Council believes that both workers were unwilling to work for the employer; as a result, their absence from the workplace showed clearly that they had abandoned their employment.

In conclusion, the Arbitration Council decides to reject the workers’ demand that the employer reinstate Kieve Pearum and Seng Piset and provide their wages and other benefits.

Additional issue:

At the hearing, the workers’ lawyers requested the Arbitration Council to order the employer to postpone the termination of other workers’ employment contracts because the

issue is being examined by the Ministry of Labour and Vocational Training. It is asserted that the employer has continued to terminate employment contracts. The Arbitration Council considers the issue as follows.

Article 312 of the Labour Law (1997) provides that “[t]he 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.”

In previous arbitral awards, the Arbitration Council has declined to consider issues that are not specified in the non-conciliation report of the Labour Inspector, or which are not the direct consequence of the specified issues (*see Arbitral Awards 153/08-Hytex, issues 1, 2 and 3; 06/08-Kingsland, issue 2; 14/07-Shoe Premier, additional issues; 42/07-South Bay, issue 3; 29/05-Kang Ning, issue 7; and 78/04-AIA, issue 3*).

According to the facts in this case, this issue is still being examined by the Ministry of Labour and Vocational Training. Moreover, the issue is not mentioned in the non-conciliation report. The Arbitration Council, therefore, declines to consider the demand that the employer suspend the termination of other workers’ employment contracts.

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

DECISION AND ORDER

Issue 1: Reject the workers’ demand that the employer not recognise the three worker delegates Peum Sophart, Preak Chandeth, and Chan Meoung.

Issue 2: Reject the workers’ demand that the employer reinstate Kieve Pearum and Seng Piset and provide their wages and other benefits.

Additional issue: Decline to consider the demand that the employer suspend the termination of other workers’ employment contracts.

Type of award: non-binding award

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

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ly Tayseng**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: