



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 06/11-Sabrina

Date of award: 11 February 2011

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Ing Sothy**

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

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

DISPUTANT PARTIES

Employer party:

Name: **Sabrina (Cambodia) Garment MFG Corp. (the employer)**

Address: Street 4, Trapang Roeusey Village, Sambo Commune, Samraong Tong District,
Kampong Speu Province

Telephone: 012 263 522

Fax: N/A

Representatives:

1. Ms Hong Luy Head of Administration
2. Ms You Sokchan Administrative Staff
3. Mr Some Chantha Administrative Staff

Worker party:

Name: **Rights and Profit Workers Federation of Trade Unions (RPWFTU)**

Local Union of RPWFTU

Address: Street 4, Trapang Roeusey Village, Sambo Commune, Samraong Tong District,
Kampong Speu Province

Telephone: 017 430 312

Fax: N/A

Representatives:

1. Mr Hing Buntheoun General Secretary of RPWFTU
2. Mr Sus Sokha Official of RPWFTU

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| 3. Mr Kheng Phearun | Official of RPWFTU |
| 4. Mr Soum Sea | President of the Local Union of RPWFTU |
| 5. Mr Pheng Pisey | Vice-President of the Local Union of RPWFTU |
| 6. Ms Meas Phan | Secretary of the Local Union of RPWFTU |

ISSUES IN DISPUTE

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

1. The workers demand that the employer stop changing the public holidays without their agreement.
2. The workers demand that the employer reinstate Meas Phan, Secretary of the Local Union of RPWFTU, whom it has dismissed improperly.
3. The workers demand that the employer instruct the [Chinese] supervisor to use polite language towards the workers.
4. The workers demand that the employer maintain their wages and benefits when they take sick leave with a proper doctor's certificate from a public hospital.
5. The workers demand that the employer stop setting [excessive] targets for them to meet, because the targets are beyond their capacity.
6. The workers demand that if they commit minor misconduct the employer give them an explanation once or twice before giving them a written warning.
7. The workers demand that the employer stop discriminating against the union and its members.
8. The workers demand that the employer pay 50% three months' wages to female workers who take maternity leave.
9. The workers demand that the employer pay Meas Phan her monthly wages for November 2010.
10. The workers demand that the employer send workers for medical checks once every six months, and that it pay the medical fees.
11. The workers demand that the employer convert the status of workers who have worked for six months to that of permanent workers.
12. The workers demand that the employer share its profits with them in accordance with the Labour Law, in an amount equal to their wages for the last month of the year.
13. The workers demand that the employer deduct 1,000 riel for union contribution fees from the wages of workers who are members of the RPWFTU.

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. 133 dated 9 June 2010 (Eighth 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. 001 RBK/KSP dated 5 January 2011 was submitted to the Secretariat of the Arbitration Council on 10 January 2011.

HEARING AND SUMMARY OF PROCEDURE

Hearing venue: The Arbitration Council, No. 72, Street 592, Corner of Street 327 (Opposite Indra Devi High School), Boeung Kak II Commune, Tuol Kork District, Phnom Penh

Date of hearing: 17 January 2011 at 8:30 a.m.

Procedural issues:

On 15 December 2010, the Kampong Speu Department of Labour Disputes received a complaint from RPWFTU demanding the improvement of working conditions at Sabrina (Cambodia) Garment MFG Corp. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to conciliate the labour dispute and the last conciliation session was held on 28 December 2010. However, the employer did not attend the session because it did not recognise the union. The 13 non-conciliated issues were referred to the Secretariat of the Arbitration Council on 10 January 2011 via non-conciliation report No. 001 RBK/KSP dated 5 January 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the 13 non-conciliated issues, held on 17 January 2011 at 8:30 a.m.

Both parties were present at the hearing as summoned by the Arbitration Council. The Arbitration Council conducted a further conciliation of the 13 non-conciliated issues. As a result, the parties reached agreement on issues 1, 3, 4, 5, 6, 8, 9, 11, and 13. As issues 2 and 7 are related, the workers agreed to combine the two issues into one.

The Arbitration Council will consider the remaining issues in dispute [issues 2, 7, 10, and 12] based on the evidence and reasons below.

EVIDENCE

Witnesses and Experts: N/A

Documents, Exhibits, and other evidence considered by the Arbitration Council:

A. Provided by the employer party:

1. Authorisation letter from the manager of Sabrina for Hong Luy, You Sokchan, and Some Chantha, dated 5 January 2011.
2. Certificate of business registration, No. 4118 dated 1 August 2008.
3. Letter from the head of the Department of Labour Disputes to Soum Sea regarding the union's request for registration, No. 021 dated 4 January 2011.
4. Statutes and memorandum of the company, dated 19 August 1998.
5. Internal Work Rules of the employer, No. 689 dated 17 September 2008.
6. Collective bargaining agreement made between the employer and the Local Union of C.CAWDU (Coalition of Cambodian Apparel Workers' Democratic Union), No. 614 dated 14 July 2003.
7. Report on Meas Phan's dismissal, dated 7 December 2010.
8. Job application of Meas Phan, dated 2 April 2008.
9. Employment contract of Meas Phan, dated 2 April 2008.
10. Employment contract of Meas Phan, dated 2 June 2008.
11. Employment contract of Meas Phan, dated 2 December 2008.
12. Employment contract of Meas Phan, dated 2 June 2009.
13. Employment contract of Meas Phan, dated 2 December 2009.
14. Employment contract of Meas Phan, dated 14 December 2007.
15. Birth certificate of Meas Phan, dated 3 November 2004.
16. Residence Book, dated 9 September 1999.
17. Letter, dated 7 December 2010, from the manager of Sabrina to the president of the provincial Department of Labour and Vocational Training of Kampong Speu, notifying him of the termination of a worker's contract on 7 December 2010.
18. List of severance payments for December 2010.
19. Warning letter to Soum Sea, dated 19 January 2009.
20. Warning letter to Soum Sea, dated 21 May 2010.
21. Warning letter to Soum Sea, dated 11 March 2007.
22. Warning letter to Soum Sea, dated 6 April 2009.
23. Employment contract between the employer and Hoem Sreymom, dated 2 September 2010.
24. Employment contract between the employer and Hoem Sreymom, dated 2 November 2010.
25. Khmer Identity card of Hoem Sreymom.

26. Residence book of Srey Huot, No. 2543.
27. Letter from the manager of Sabrina to the head of the Department of Labour Disputes regarding the employer's objection to the registration of the Local Union of RPWFTU, dated 31 December 2010.

B. Provided by the worker party:

1. Letter from RPWFTU to the head of the provincial Department of Labour and Vocational Training of Kampong Speu requesting intervention to resolve the dispute at the Sabrina factory, No. 111 dated 15 December 2010.
2. Letter from RPWFTU to the manager of Sabrina requesting him to consider the 13 demands made by the workers, No. 109 dated 11 December 2010.
3. Letter from the workers to the president of RPWFTU requesting him to coordinate and resolve the 13 issues with the relevant institutions.
4. List of workers who have affixed their thumbprints to the request to RPWFTU to coordinate, negotiate, and resolve the 13 issues with the relevant institutions.
5. Letter from RPWFTU to the manager of Sabrina notifying the employer of the leaders of the Local Union of RPWFTU elected on 3 December 2010, No. 103 dated 4 December 2010.
6. Receipt of request for union registration issued by the Ministry of Labour and Vocational Training, dated 6 December 2010.
7. Case receipt issued by the Department of Labour Disputes of the Ministry of Labour and Vocational Training, dated 10 January 2010.

C. Provided by the Ministry of Labour and Vocational Training:

1. Report on collective labour dispute resolution at Sabrina (Cambodia) Garment MFG Corp., No. 001 RBK/KSP dated 5 January 2011.
2. Minutes of collective labour dispute resolution at Sabrina (Cambodia) Garment MFG Corp., dated 28 December 2010.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend the hearing addressed to the employer, No. 029 KB/AK/VK/LKA dated 11 January 2011.
2. Notice to attend the hearing addressed to the workers, No. 030 KB/AK/VK/LKA dated 11 January 2011.

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:

- Sabrina (Cambodia) Garment MFG Corp., (Sabrina) commenced its operation in 1998. It currently employs approximately 4,000 workers. The Local Union of the Coalition of Cambodian Apparel Workers' Democratic Union (C.CAWDU) has more than 3,000 members at the factory and holds a certificate of most representative status (MRS).
- The claimant in this case, the Local Union of RPWFTU, has approximately 270 members but does not yet have a certificate of union registration because it was only established on 3 December 2010. On 6 December 2010, it received a notification from the Ministry of Labour and Vocational Training acknowledging its application for registration.
- In this case, 91 workers have affixed their thumbprints to the claim, requesting RPWFTU to coordinate, negotiate, and resolve the 13 issues with the relevant institutions.

Issues 2 and 7: The workers demand that the employer reinstate Meas Phan, Secretary of the Local Union of RPWFTU, and stop discriminating against the union.

Demand for the employer to reinstate Ms. Meas Phan:

- Meas Phan commenced work in the sewing section on 2 April 2008. She held a fixed duration contract.
- On 3 December 2010, the Local Union of RPWFTU held an election for union leaders, attended by 48 workers. The election was held near the factory at Thanol Totoeung market at 12:00 p.m., during the workers' lunch time.
- On 3 December 2010, the union submitted an application for registration to the Ministry of Labour and Vocational Training.
- On 4 December 2010, the union notified the employer of the election result via the security guard at the front door. The union leaders were President Soum Sea, Vice-President Pheng Pisey, and Secretary Meas Phan. Upon receiving the letter, the security guard went into an office and returned with an acceptance signature from Channy, ID 1065. The workers asserted at the hearing that Channy was an administrative staff member. The employer objected to this assertion, stating that it had not received the notification [of the election result], and that Channy, ID 1065, was neither a member of the administrative staff nor the security guard.
- The Arbitration Council questioned the workers about the identity of the security guard who received the notification letter but the workers did not present evidence regarding his ID number, what he looks like, when he works, or when he took the

letter. They merely asserted that they had given the notification letter to the security guard.

- The employer objected to the assertion that Channy is a member of the administrative staff. The employer listed the names of all members of the administrative staff, and there is no one by the name of Channy. Further, the ID of all administrative staff starts with the letter "Z".
- The Arbitration Council asked the workers whether or not Channy was in fact a member of the employer's administrative staff. The workers said yes, but did not have any valid evidence to prove this, such as details of his daily work or work relationships.
- The employer stated that its procedure for receiving letters is that the security guard receives and signs to accept the letter before sending it to the office of administration, which is not required to sign to accept the letter.
- On 6 December 2010, the workers obtained a notification from the Ministry of Labour and Vocational Training acknowledging their request for union registration.
- On 7 December 2010, Meas Phan was dismissed by the employer. Meas Phan stated that at about 11:11 a.m. on 7 December 2010, an administrative officer called her over and told her that the head of the office could not accept her as a worker anymore because she walked back and forth [on the factory floor instead of sitting at her workstation] during working hours. Meas Phan stated at the hearing that on that day she did walk back and forth because she had to fix a shirt she had sewed incorrectly. On the day of her dismissal, Meas Phan did not agree to affix her thumbprint to accept the termination. Hence, on 7 December 2010, the employer wrote a letter to the provincial Department of Labour of Kampong Speu confirming that Meas Phan was no longer a worker of Sabrina.
- Meas Phan demands that the employer reinstate her because it discriminated against the union [by dismissing an elected union leader].
- The Arbitration Council finds that since she commenced work, Meas Phan has received two verbal warnings, but she has not received a written warning.
- The first warning was in 2008 for not having an ID card when entering the rest room.
- The second warning was in 2010 when she talked on the phone for a long time during working hours.

Demand for the employer to stop discriminating against the union

- The workers argue that the dismissal of Meas Phan was due to discrimination against the union. In addition, the employer also dismissed Soum Sea, President of the union, on 3 January 2011 and Pheng Pisey, Vice-President of the union, was convinced not to work as a union leader by his younger brother who is a supervisor.
- The workers assert that ever since the employer was notified of the union leaders, the cameras at the factory have focused only on the activities of the union leaders and do not rotate [to film other workers] as usual. On her dismissal date, 7 December 2010, the employer prohibited Meas Phan from talking to the other workers about her dismissal. The employer denied the assertion that the cameras do not rotate and focus only on the activities of the union leaders.

Issue 10: The workers demand that the employer send workers for medical checks once every six months, and that it pay the medical fees.

- The workers demand that the employer send workers, regardless of the section in which they work, for medical checks once every six months and that it pay the fees. They make this demand because the workers have been working for a long time and might have health problems due to chemical substances in the clothes and irregular diets, amongst other reasons. Moreover, *Prakas* No. 09 of 1994 provides for their demand.
- The employer asserts that it can only afford to pay for one medical check when the workers commence employment and cannot provide medical checks once every six months as the workers demand. If workers are sick they can see the administrator so that the employer can arrange for a doctor to check their health. If the doctor prescribes hospital treatment, the employer will be responsible for the fee.
- The employer maintained its position at the hearing that it cannot afford to provide medical checks once every six months as the workers demand.

Issue 12: The workers demand that the employer share its profits with them in accordance with the Labour Law, in an amount equal to their wages for the last month of the year.

- The workers state that the employer has not in the past shared its profits with them. Since the employer has increased its profits, has a sufficient amount of work for the workers, has opened more new branches and has an increasing number of workers, they demand that the employer share its profits with them, in an amount equal to their wages for the last month of the year.

- The workers argue that the reason for their demand is that they have worked for the employer for several years and the employer has gained considerable profits. Thus, the employer should reward them [for their contribution to its profits]. Moreover, the workers argue that Article 103 of the Labour Law states that actual wages include profit sharing. Hence, the workers should be entitled to receive [a share of] the profits.
- The employer asserts that it is unable to provide what the workers demand. Furthermore, the employer argues that it has provided the workers with benefits that are more than what the law requires, such as a monthly US\$ 10 attendance bonus, base wages of US\$ 62, and a monthly seniority bonus of US\$ 6 for those who have worked for more than six years.
- The Arbitration Council finds that there is no [provision in] an agreement, labour contract, collective agreement, or the employer's Internal Work Rules requiring the employer to share its profits with the workers.

REASONS FOR DECISION

The Arbitration Council will consider whether the Local Union of RPWFTU is able to represent the 91 workers involved in this case.

Article 268 of the Labour Law states:

In order for their professional organisation to enjoy the rights and benefits recognised by this law, the founders of those professional organisations must file their statutes and list of names of those responsible for management and administration, with the Ministry in Charge of Labour for registration...

If the Ministry in Charge of Labour does not reply within two months after receipt of the registration form, the professional organisation is considered to be already registered.

The Arbitration Council interprets Article 268 as meaning that a professional organisation is able to enjoy the rights and benefits recognised by the law when that organisation is registered with the Ministry in Charge of Labour.

The claimant in this case is the Local Union of RPWFTU. According to the facts, it submitted an application for union registration to the Ministry of Labour and Vocational Training on 3 December 2010 and received an acknowledgement of the application on 6 December 2010. However, on the hearing date the union had not yet obtained a certificate of union registration from the Ministry. Therefore, in accordance with Article 268 of the Labour Law, the union was not yet entitled to enjoy the rights and benefits stipulated in the Labour Law.

In previous arbitral awards, the Arbitration Council has held that the rights and benefits under the law include the right to represent union members at the Arbitration Council to resolve a labour dispute (*see Arbitral Awards 62/06-Quicksew, reasons for decision, issue 2; 30/08-E-Garment, reasons for decision, issue 1; 31/08-South Bay, reasons for decision, issue 1; 161/09-Prek Treng; and 40/10-Meng Yan*).

Thus, the Local Union of RPWFTU does not have legal standing to represent its members before the Arbitration Council.

However, Clause 19 of *Prakas* No. 99 SKBY dated 21 April 2004 provides that “[a] party may appear before the arbitration panel in person...or be represented by any other person expressly authorised in writing by that party.”

In this case, the Arbitration Council finds that Meas Phan was present at the hearing, and that the 91 workers affixed their thumbprints [to a letter] authorising RPWFTU to represent them. Thus, based on the above clause, the Arbitration Council will consider the demands made by the 91 workers.

Issues 2 and 7: The workers demand that the employer reinstate Meas Phan, Secretary of the Local Union of RPWFTU, and stop discriminating against the union.

The Arbitration Council will consider whether the dismissal of Meas Phan complied with the legal procedure.

Article 293 of the Labour Law provides that “[t]he dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector.”

Clause 3, paragraph 3 of *Prakas* No. 305 SKBY dated 22 November 2001 states:

All workers who are candidates for union leadership positions shall receive the same protection from work dismissal as worker delegates [i.e. shop stewards]. This protection begins 45 days prior to the election and ends 45 days after the election if the candidate is not elected. The union shall notify the employer of the worker’s candidacy through all reliable means. However, the employer shall only be required to comply with this provision once for each election of union leaders.

Moreover, Clause 4, paragraph 1 of *Prakas* No. 305 SKBY dated 22 November 2001, states:

From the time that the application for registration is submitted, all workers who are founding members of a union, as well as those workers who voluntarily join the union during the application period, shall enjoy the same protection as

worker delegates. This protection lasts for 30 days from the date of union registration.

In previous arbitral awards, the Arbitration Council has interpreted these clauses to mean that

workers are entitled to special protection as long as: (1) they are candidates for union leadership; (2) the termination takes place during the protection period; and (3) the union notified the employer of the worker's candidacy through all reliable means (*see Arbitral Awards 71/09-Hytex, reasons for decision, issue 1 and 09/10-Jung Hao*).

In this case, the Arbitration Council will consider whether Meas Phan fulfils the three abovementioned conditions in order to receive special protection against dismissal.

First condition: the worker belongs to the category of protected worker.

Meas Phan was a candidate for a union leadership position. Therefore, based on the above clause, she belongs to the category of worker entitled to special protection against dismissal. The first condition is fulfilled.

Second condition: the dismissal occurs within the period of special protection.

The Arbitration Council finds that the union submitted an application for union registration to the Ministry of Labour and Vocational Training on 3 December 2010 and received an acknowledgement of the application from the Ministry on 6 December 2010. The employer dismissed Meas Phan on 7 December 2010. The Arbitration Council considers that Meas Phan, a candidate for a union leadership position, is also a founder of the union. Thus, based on the above clauses, Meas Phan is also entitled to special protection against dismissal on the grounds that she is a founder of the union. The second condition is fulfilled.

Third condition: the union notified the employer of the candidacy through all reliable means.

The Arbitration Council finds the employer's procedure for receiving notifications is that the security guard receives and signs to accept the notification before sending it to the office of administration, which is not required to sign to accept it. The Arbitration Council considers that "notification through all reliable means" requires the workers to follow [the document submission] procedure determined by the employer. In this case, the Arbitration Council finds that the workers gave the notification to a security guard and Channy signed to accept it. The workers assert that Channy is a member of the administration staff. The employer objects to this assertion and argues that there is no member of the administration staff named Channy with ID 1064.

The Arbitration Council considers that the workers' argument is not credible because the employer does not require a member of the administration staff to sign to accept a

notification submitted to a security guard. Further, the workers recognised this procedure at the hearing.

At the hearing, the Arbitration Council asked the workers for particulars regarding Channy, who they claim is a member of the administration staff, and of the security guard who received the notification. However, the workers could not provide clear information. The Arbitration Council considers that even though the employer's procedure does not require an administrator to sign the notification, the notification will be valid if the workers have evidence proving that either the administrator or the security guard signed to accept it. However, the workers have not presented sufficient evidence of this and therefore the Arbitration Council is of the view that the workers' assertion is not credible and the notification of candidacy is, invalid.

In previous arbitral awards, the Arbitration Council has held that workers are not entitled to special protection if the union fails to notify the employer of the candidates for election before the employer dismisses them (*see Arbitral Awards 64/05-Chian Hwey; 66/07-Jia Fung; 131/10-Leader's Industrial, reasons for decision, issue 1*).

In conclusion, based on the abovementioned clause, Meas Phan is not entitled to special protection. The third condition is not fulfilled.

The Arbitration Council will consider whether the dismissal of Meas Phan was the result of union discrimination.

Article 12 of the Labour Law states:

Except for the provisions fully expressing under this law, or in any other legislative text or regulation protecting women and children...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.

Article 279 of the Labour Law states:

Employers 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.

In previous arbitral awards, the Arbitration Council has ordered employers to reinstate workers on the grounds that their dismissal violated Articles 12 and 279 of the Labour Law

(see *Arbitral Awards 28/07-Dae Kwang; 123/07-E-Garment, reasons for decision, issue 1; and 148/07-Pay Her*).

In relation to allegations of union discrimination in previous cases, the Arbitration Council has held that the workers bear the burden of proving that the employer has discriminated against the union (*93/06-Evergreen, reasons for decision, issue 1; 112/06-River Rich, reasons for decision, issue 1; and 01/07-Supreme, reasons for decision, issue 1*).

In this case, the Arbitration Council considers that the workers' allegations regarding the cameras [at the factory] and the termination of the union president are not sufficient for the Council to consider the case. Thus, the Arbitration Council rejects the workers' demand concerning union discrimination.

However, the Arbitration Council will consider whether the dismissal of Meas Phan complied with the Labour Law and the Internal Work Rules.

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 enterprise, establishment or group.

Based on this article, the Arbitration Council considers that the employer is entitled to dismiss workers at will by giving them notice, as long as it has reasonable grounds relating to their aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment, or group (*see Arbitral Awards 51/08-ASD, reasons for decision, issue 3 and 60/08-PCCS, reasons for decision, issue 6*).

In this case, the Arbitration Council finds that the employer immediately dismissed Meas Phan on 7 December 2010 because she walked back and forth during working hours. The Arbitration Council finds that this misconduct occurred only once on that date. Further, the Arbitration Council finds that she was given verbal warnings for misconduct; twice in 2008 and once in 2010, and she had never received a written warning. The employer did not state what type of misconduct she had committed when it dismissed her.

Clause 11 of the Internal Work Rules states:

[t]he company director is entitled to discipline the workers as follows:

- Minor Misconduct:...the worker must receive a verbal warning and the employer shall record the misconduct in a book with the thumbprint of the worker.
- Medium Misconduct: refers to two instances of the [same form of] minor misconduct and the worker must receive a written warning.
- Serious Misconduct: refers to misconduct which can lead to termination of the employment contract [and is comprised of] four instances of minor misconduct or two instances of medium misconduct.

Based on this clause, the Arbitration Council finds that the only type of misconduct that can lead to termination is serious misconduct.

The Arbitration Council finds that two of the instances of misconduct by Meas Phan that led to verbal warnings were not of the same form, and that when she committed her final act of misconduct she did not receive a verbal or written warning prior to her dismissal. Therefore, the Arbitration Council considers that Meas Phan did not commit minor misconduct four times, nor did she twice commit the same form of medium misconduct. The Arbitration Council is of the view that the employer did not comply with its Internal Work Rules when dismissing Meas Phan.

In Arbitral Award 51/08-ASD, the Arbitration Council determined that “dismissing a worker is the right of the employer. However, the employer has to comply with the employment contract, the Internal Work Rules, and the Labour Law.”

The Arbitration Council agrees with the above ruling in this case. The employer should educate or discipline Meas Phan in accordance with the Internal Work Rules when she commits an act of misconduct. In this case, the Arbitration Council finds that the termination was not based on any statement in the Internal Work Rules or the Labour Law to the effect that walking back and forth during working hours is considered to be serious misconduct.

Article 27 of the Labour Law provides that “[a]ny disciplinary sanction must be proportional to the seriousness of the misconduct.”

In previous arbitral awards, the Arbitration Council has held that discipline imposed on a worker by the employer must be proportional to the seriousness of the misconduct (*see Arbitral Awards 54/04-Cambodia Sportwear, reasons for decision, issue 2; 08/05-Winner Knitting, reasons for decision, issue 2; 90/07-GDM; 109/07-Kingsland, reasons for decision, issue 38; 134/08-Chevron, reasons for decision, issue 5; 131/10-Leader’s Industrial, reasons for decision, issue 1*).

The Arbitration Council finds that Meas Phan did not commit an act of misconduct which could lead to termination. Thus, the Council is of the view that the employer had no valid reason to dismiss her.

Clause 34 of *Prakas* No. 99 SKBY dated 21 April 2004 [gives the Arbitration Council the power to grant remedies including] “A. orders to reinstate dismissed employees to their former or any other appropriate position.”

In previous arbitral awards, the Arbitration Council has ordered employers to reinstate workers if they have not committed acts of misconduct justifying termination and if the employer has failed to follow the termination procedure set forth in its Internal Work Rules (see *Arbitral Awards 109/07-Kingsland; 134/08-Chevron, reasons for decision, issue 5; 106/10-Hi Fashion and Charm Textile, reasons for decision, issue 1*).

The Arbitration Council agrees in this case with the above decisions. Thus, the Arbitration Council orders the employer to reinstate Meas Phan because it did not comply with the termination procedure set forth in its Internal Work Rules.

Issue 10: The workers demand that the employer send workers for medical checks once every six months, and that it pay the medical fees.

In this case, the Arbitration Council will consider whether the employer is obliged to send workers for medical checks once every six months and pay the fees.

Article 247 of the Labour Law states:

The Ministry in Charge of Labour shall issue a *Prakas* to determine:

a) the conditions under which pre-employment, re-employment, periodical, and special physical exams are given;...

c) the conditions under which employers are required to establish and provide at their expense...

2) a bandaging room for a work force of 20 to 50 workers;...

4) the medical exams of workers as stipulated in point a) of this article.

Based on this provision, the Arbitration Council considers that the law merely states that the Ministry in Charge of Labour shall issue a *Prakas* [ministerial regulation] to determine the conditions under which special medical checks are given and does not specify how frequently the special medical checks must be undertaken or the conditions under which the checks are provided. Moreover, there is no *Prakas* issued by the Ministry in Charge of Labour clearly stating the frequency of special medical checks (see *Arbitral Awards 116/09-Xing Tai, reasons for decision, issue 9 and 117/10-Berry Apparel, reasons for decision, issue 4*).

In this case, the workers demand that the employer send them for special medical checks once every six months and that it pay the medical fees, because the workers worry about their health after working for the employer for several years.

Based on the facts and the law cited above, the Arbitration Council considers that if a special medical check is required, the fee is the employer's responsibility. However, the workers' demand is not based on the law or an agreement, thus giving rise to an interests dispute.

In previous arbitral awards, the Arbitration Council has declined to consider interests disputes if the union bringing the dispute to the Council does not have MRS (see *Arbitral Awards 81/04-Evergreen, reasons for decision, issue 4; 98/04-Great Union, reasons for decision, issue 3; 116/09-Xing Tai, reasons for decision, issue 2; and 64/10-Zhen Tai, reasons for decision, issue 3*).

The Arbitration Council considers that holding MRS gives a union the legal capacity to negotiate with an employer to establish a collective agreement and legal standing to bring an interests dispute to the Arbitration Council for resolution.

Clause 43 of *Prakas* No. 099 SKBY dated 21 April 2004 states:

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 this clause, the Arbitration Council considers that if it issues an award to resolve an interests dispute, that award will become a one-year collective agreement. Generally, a collective agreement must apply to all workers at an enterprise and the right to strike cannot be exercised before the agreement has expired (see *Arbitral Award 152/08-Wilson, reasons for decision, issue 2*).

In order to obtain MRS, Article 277 of the Labour Law states that the union must be registered and must satisfy other conditions stipulated in the article.

In this case, the Arbitration Council finds that the Local Union of RPWFTU is not registered because it was established at the election on 3 December 2010 and received an acknowledgement receipt from the Ministry of Labour and Vocational training on 6 December 2010. Therefore, the Arbitration Council considers that the union does not have legal standing to represent the workers before the Council in relation to an interests dispute.

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer send the workers for special medical checks once every six months.

Issue 12: The workers demand that the employer share its profits with them in accordance with the Labour Law, in an amount equal to their wages for the last month of the year.

In this case, the workers demand that the employer share its profits with them because the law states that wages include profit sharing. The employer states that it is unable to provide as the workers demand. Therefore, the Arbitration Council will consider this case as follows.

Article 103 of the Labour Law states:

Wage includes, in particular:

- actual wage or remuneration;
- overtime payments;
- commissions;
- bonuses and indemnities;
- profit sharing;
- gratuities;...

In previous arbitral awards, the Arbitration Council has interpreted Article 103 as stipulating the definition and elements of wage and not as imposing an obligation on the employer to share its profits with the workers at the end of each year (*see Arbitral Awards 70/07-LA Garment, reasons for decision, issue 2; 89/07-Lotus, reasons for decision, issue 1; 92/09-June Textile, reasons for decision, issue 4; 116/09-Xing Tai, reasons for decision, issue 4; and 165/09-Top One, reasons for decision, issue 4*).

Therefore, the Arbitration Council considers that the workers' demand is not based on the law or an agreement, thus making it an interests dispute (see reasons for decision, issue 10, for reasoning regarding interests disputes).

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer share its profits in an amount equal to their wages for the last month of every year.

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

DECISION AND ORDER

Issues 2 and 7:

- Order the employer to reinstate Meas Phan.
- Decline to consider the workers' demand concerning union discrimination.

Issue 10: Decline to consider the workers' demand that the employer send the workers for special medical checks once every six months.

Issue 12: Decline to consider the workers' demand that the employer share its profits in an amount equal to their wages for the last month of every year.

Type of award: non-binding award

This award 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 MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: