



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

**ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល**

**THE ARBITRATION COUNCIL**

**Case number and name: 04/09–E Garment**

**Date of award: 16 February 2009**

### **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): **Kong Phallack**

#### **DISPUTANT PARTIES**

##### **Employer party:**

Name: **E Garment Co., Ltd.**

Address: Village three, Svay Rolom Commune, S'ang District, Kandal Province

Telephone: 012 991 988

Fax: N/A

Representatives:

- |                         |                                       |
|-------------------------|---------------------------------------|
| 1. Mr So Sok Ang        | Head of Administration                |
| 2. Mr Buth Keo Kol Reak | Representative of E Garment Co., Ltd. |
| 3. Mr Kim Chantha       | Administration staff                  |
| 4. Mr Veng Saroeun      | Former staff of Grace Co., Ltd.       |

##### **Worker party:**

Name: **Cambodian Union Federation (CUF)**

##### **Local Union of CUF**

Address: Village three, Svay Rolom Commune, S'ang District, Kandal Province

Telephone: 012 658 129

Fax: N/A

Representatives:

- |                  |                                   |
|------------------|-----------------------------------|
| 1. Mr Mom Thon   | Dispute Resolution Officer of CUF |
| 2. Mr Chea Sopha | Dispute Resolution Officer of CUF |
| 3. Mr Ki Mi      | Security Guard representative     |

- |                      |                               |
|----------------------|-------------------------------|
| 4. Mr Teng Sambath   | Security Guard representative |
| 5. Mr Pen Pisith     | Security Guard representative |
| 6. Mr Chan Chamroeun | Security Guard representative |
| 7. Mr Khorn Sokhoeun | Security Guard representative |
| 8. Ms Sea Sothean    | Security Guard representative |
| 9. Ms Chet Phearum   | Security Guard representative |
| 10. Ms Song Thea     | Security Guard representative |
| 11. Ms Muth Pov      | Security Guard representative |

#### **ISSUES IN DISPUTE**

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

1. The security guards demand that the employer reinstate all the security guards unfairly dismissed by So Sok Ang and Veng Saroeun on 23 November 2008. If the employer does not agree to reinstate them, it should compensate them according to the Labour Law.
2. The workers demand that the employer refund the amount of the deposit paid by each person to become a security guard, ranging from US\$ 80 to US\$ 150. The employer rejects the claim dated 23 November 2008 and states that it reserves its right to sue the workers for defamation and to request that the authority help it find justice.

#### **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. 006/09 KB/KN, dated 8 January 2009 was submitted to the Secretariat of the Arbitration Council on 9 January 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:** First hearing: 19 January 2009 at 2:00 p.m.

Second hearing: 2 February 2009 at 8:30 a.m.

**Procedural issues:**

On 25 November 2008 the Department of Labour and Vocational Training of Kandal province received a complaint from 45 workers regarding the closure of the security guard section without prior notice or proper reasons. Upon receiving the claim, the Department of Labour and Vocational Training of Kandal province assigned an expert officer to conciliate the dispute. At the conciliation session held on 11 December 2008, neither of the two issues in dispute was resolved. The two non-conciliated issues were referred to the Arbitration Council on 9 January 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 19 January 2009 at 2:00 p.m. A second hearing was held on 2 February 2009 at 8:30 p.m. Both parties were present at the hearing as invited by the Arbitration Council.

At each hearing the Arbitration Council conducted a further conciliation of the two non-conciliated issues but neither was resolved. The Arbitration Council will consider the issues in dispute in this case 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:**

- There were 45 workers, who perform duties as security guards at the E Garment factory, involved in this dispute.
- However, only 37 workers continue to be involved in the claim and have authorised Mom Thon, Dispute Resolution Officer of CUF, to act as their representative.
- The workers receive monthly wages ranging between US\$ 70 and US\$ 90.
- The workers have already submitted the names of the 37 claimants to the Arbitration Council.

**Issue 1: The security guards demand that the employer reinstate all security guards unfairly dismissed by So Sok Ang and Veng Saroeun on 23 November 2008. If it does not agree to reinstate them, it should pay them according to the Labour Law.**

- On 23 November 2008, 45 security guards stationed at the E Garment factory were removed from the factory and replaced by security guards employed by KRS Cambodia Security Co., Ltd. Some of the 45 security guards commenced employment at the E Garment Factory on 10 June 2008, some on 1 July 2008, and others were employed after 1 July 2008. The workers did not sign contracts and only one CV was submitted.
- The employer states that on 1 July 2008, the majority of the security guards received ID cards as security staff of **Grace Co., Ltd.** whilst others did not have cards because they had lost them. The workers do not object to this.
- The employer states that the 45 security guards are not employed by of Garment Co., Ltd., but by Grace Co., Ltd. E Garment Co., Ltd. signed a contract for the provision of security services with Grace Co., Ltd., a security services provider. The payment of wages, rostering and management is taken care of outside the factory under the direction of Grace Co., Ltd., with Im Sothea as director, Veng Saroeun as general manager, and So Sok Ang (working on a part-time basis) assisting in the payment of wages. The workers object to this claim and state that when they were recruited to work at the factory they were not told that they would be working for Grace Co., Ltd. and that they receive their wages from E Garment Co., Ltd., specifically from So Sok Ang, an administration officer at E Garment Co., Ltd.
- E Garment Co., Ltd. signed two security service contracts with Grace Co., Ltd., one on 1 July 2008 and the other on 1 October 2008.
- The workers did not present contracts signed with E Garment Co., Ltd.
- Im Sothea is the director of Grace Co., Ltd. He did not attend the hearing but made a statement confirming that the security guards are employed by Grace Co., Ltd. and that the company has not terminated their employment contracts.
- At the hearing the workers demanded reinstatement and that E Garment Co., Ltd. back pay their wages from 23 November 2008 to the date of their reinstatement.

**Issue 2: The workers demand that E Garment Co., Ltd. reimburse the amount they paid as bribes in order to get their jobs.**

- The workers state that when they commenced employment Im Sothea and Veng Saroeun required them to pay an amount between US\$ 50 and US\$ 110 in order to obtain the job and an additional US\$ 15 to US\$ 50 for their security uniforms. Veng

Saroeun agrees to this assertion but states that he only received the money from about 10 people because there were already around 40 security guards when he started employment. The money he received was given to Im Sothea, Director of Grace Co., Ltd.

- The representative of E Garment Co., Ltd. states that the company is not involved in this case. The issue is between Grace Co., Ltd. and its workers. The workers do not refute the employer's claim.
- The workers demand reimbursement of the amount paid as a condition of obtaining their jobs. The workers state that they will not demand reimbursement of the amount they paid for their security guard uniforms if they are reinstated.

### **REASONS FOR DECISION**

**Issue 1: The security guards demand that the employer reinstate all security guards unfairly dismissed by So Sok Ang and Veng Saroeun on 23 November 2008. If it does not agree to reinstate them, it should pay them according to the Labour Law.**

Based on the findings of fact above, 45 workers filed this complaint but on the hearing date only 37 workers continued with the claim for reinstatement by E Garment Co., Ltd. The Arbitration Council will consider the demand as follows:

- What are the employment relationships between the 45 workers (or the 37 workers who continue to make this demand) and E Garment Co., Ltd.?
- Is E Garment Co., Ltd. responsible for the reinstatement of the 45 workers (or the 37 workers who continue to make this demand)?
- Are the workers entitled to demand that their wages be back paid by E Garment Co., Ltd. for the period from 23 November 2008 until the date of their reinstatement?

**A. What are the employment relationships between the 45 workers (or the 37 workers who continue to make this demand) and E Garment Co., Ltd.?**

The Arbitration Council has not found any evidence proving that the 45 workers (or the 37 workers who continue to make this demand) are employed by E Garment Co., Ltd. Thus, the Arbitration Council concludes that the 45 workers (or the 37 workers who continue to make this demand) are employed by Grace Co., Ltd.

Article 2 of the Labour Law provides that:

All natural persons or legal entities, public or private, are considered to be employers who constitute an enterprise, within the meaning of this law, provided that they employ one or more workers, even discontinuously.

Every enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in factory, workshop, work site, etc., under the supervision and direction of the employer.

The above article defines the term “employer” as the entity with authority to supervise and direct workers.

Article 3 of the Labour Law states that:

“Workers”, within the meaning of this law, are every person of all sex and nationality, who has signed an employment contract in return for remuneration, under the direction and management of another person, whether that person is a natural person or legal entity, public or private.”

According to this article, a worker is an individual under the management and direction of an employer.

In previous cases, the Arbitration Council has interpreted this as meaning that the employer is the individual with the authority to direct and manage workers (*see Arbitral Award 04/05-Eternity, reasons for decision, issue 3*).

In this case, Grace Co., Ltd. employs the 45 workers (or the 37 workers who continue to make this demand) and determines their work rosters, manages them, and pays their wages. Thus, the Arbitration Council concludes that the 45 workers (or the 37 workers who continue to make this demand) are the workers of Grace Co., Ltd.

In addition, the security services contract between E Garment Co., Ltd. and Grace Co., Ltd. provides that Grace Co., Ltd. has the obligation to provide security services to E Garment Co., Ltd., who will pay a lump sum of money for those services. Grace Co., Ltd. recruited the 45 security guards to work at the E Garment factory in accordance with the requirements of the contract (28 workers for day shift and 16 workers for night shift, totalling 44 workers).

Article 45 of the Labour Law states:

The labour contractor is a sub-contractor who contracts with an entrepreneur and who himself recruits the necessary work force or workmen for the execution of certain work or the provision of certain services for an all-inclusive price.

Such a contract must be in writing.

Thus, the Arbitration Council considers that Grace Co., Ltd. is a sub-contractor who accepted an assignment from E Garment Co., Ltd. to recruit workers to provide security services at the E Garment factory (*see Arbitral Awards 47/06-Flying Dragon, reasons for decision, issue 1 and 53/07-E Garment, reasons for decision, issue 1*).

Article 47 of the Labour Law provides that “The labour contractor is required to observe the provisions of this law in the same manner as an ordinary employer and assumes the same responsibilities as the latter.”

Therefore, in accordance with Article 47 of the Labour Law, Grace Co., Ltd. is required by the Labour Law to serve as the employer of the 45 workers (or the 37 workers who continue to make this demand). Conversely, E Garment Co., Ltd. is not the employer of the 45 workers (or the 37 workers who continue to make this demand), as alleged by the workers.

In conclusion, the Arbitration Council considers that there is no employment relationship in the form of an employment contract between the 45 workers (or the 37 workers who continue to make this demand) and E Garment Co., Ltd.

**B. Is E Garment Co., Ltd. responsible for the reinstatement of the 45 workers (or the 37 workers who continue to make this demand)?**

At the hearing, the workers demanded that E Garment Co., Ltd. reinstate them to their positions as security guards at the E Garment factory. The Arbitration Council will consider this case as follows:

Based on the interpretation in point “A” above, the Arbitration Council considers that there is no employment relationship borne from an employment contract between the 45 workers (or the 37 workers who continue to make this demand) and E Garment Co., Ltd. because Grace Co., Ltd. is the employer of the 45 workers (or the 37 workers who continue to make this demand), whilst E Garment Co., Ltd. has terminated its security supply service agreement with Grace Co., Ltd. Therefore, the Arbitration Council considers that E Garment Co., Ltd. is not responsible for reinstating the workers involved in the dispute to their positions at the E Garment factory. In conclusion, the Arbitration Council rejects the workers’ demand that E Garment Co., Ltd. reinstate the 45 workers (or the 37 workers who continue to make this demand).

Nonetheless, the Arbitration Council received a statement from Im Sothea, Director of Grace Co., Ltd., confirming that Grace Co., Ltd. did not terminate the employment contracts of the workers and it is willing to reinstate those workers who have not withdrawn their CVs. The Arbitration Council will consider its jurisdiction as follows:

Article 312 of the Labour Law states that “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.”

Clause 33 of *Prakas* No. 099 on the Arbitration Council from the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, dated 21 April 2004, states that:

The power of an arbitration panel to consider a dispute shall be limited to addressing those issues which are contained in the non-conciliation report including issues which are the direct consequences of the dispute but which arise from events subsequent to the date of the report.

In previous cases, the Arbitration Council has declined to consider demands that are not included in the non-conciliation report and which are not the direct consequence of the dispute or matters that arose before the date of the non-conciliation report (*see Arbitral Awards 18/04-Intercontinental, reasons for decision, issue 1 and 56/04-Huy Ing, reasons for decision, issue 4*).

In this case, based on the report of collective labour dispute resolution at E Garment Co., Ltd., No. 006/09 KB/KN dated 8 January 2009 [the non-conciliation report], which was referred to the Arbitration Council, the employer party to this dispute is E Garment Co., Ltd. and not Grace Co., Ltd. Therefore, the Arbitration Council cannot include Grace Co., Ltd. as a party to this dispute. The Arbitration Council considers that those workers who intend to return to work should meet with Im Sothea, Director of Grace Co., Ltd., to discuss the issue with him directly.

In conclusion, the Arbitration Council does not have jurisdiction to make a decision in this case with respect to Grace Co., Ltd.

**C. Are the workers entitled to demand that their wages be back paid by E Garment Co., Ltd. for the period from 23 November 2008 until the date of their reinstatement?**

Based on the findings of fact above, the Arbitration Council concludes that from 23 November 2008 onward, the workers involved in this dispute did not receive any work or wages. The Arbitration Council considers that the termination of the contract for security services between E Garment Co., Ltd. and Grace Co., Ltd. has caused an actual loss of benefits for the workers.

Article 48 of the Labour Law states that:

In case of insolvency or default by the labour contractor, the entrepreneur or the manager of enterprise shall substitute for the contractor to fulfil his obligations to the workers.

The harmed workers, in such case, may file a case directly against the entrepreneur or manager.

According to Article 48 of the Labour Law set out above, the entrepreneur (E Garment Co., Ltd.) is responsible for the workers of the sub-contractor (Grace Co., Ltd.) Although the entrepreneur does not have a direct relationship with the workers, it has an indirect relationship with them through the sub-contractor. This means that the entrepreneur has an indirect legal relationship with the workers because:

- (1) The entrepreneur has a legal contract in writing with the sub-contractor regarding the provision of security services at the enterprise; and
- (2) The sub-contractor has a legal employment relationship with the workers, who are employed to provide services at the enterprise.

Therefore, based on Article 48 of the Labour Law, the entrepreneur can be responsible for the workers in some situations. However, the entrepreneur is responsible only when it is found that there is an indirect legal relationship between the entrepreneur and the workers. If there is not a legal relationship (either direct or indirect), the entrepreneur is not responsible.

In this case, E Garment Co., Ltd. had a contract in writing with Grace Co., Ltd. to provide security services at the E Garment factory. Grace Co., Ltd. employed workers to provide services for E Garment Co., Ltd. Thus, the Arbitration Council considers that E Garment Co., Ltd. had an indirect legal relationship with the workers. However, after the contract in writing between E Garment Co., Ltd. and Grace Co., Ltd. was terminated, E Garment Co., Ltd. ceased to have any legal relationship (either direct or indirect) with the workers.

In conclusion, E Garment Co., Ltd. is not responsible for the loss of benefits suffered by the workers after the contract in writing to provide security services was terminated on 23 November 2008.

Based on the interpretation regarding the jurisdiction of the Arbitration Council in point B above, the Arbitration Council considers that the workers who demand the back payment of their wages from 23 November 2008 should meet Im Sothea, Director of Grace Co., Ltd., to discuss the issue with him directly because the Arbitration Council does not have jurisdiction to make a decision with regards to Grace Co., Ltd.

**Issue 2: The workers demand that E Garment Co., Ltd. reimburse the amount they paid as bribes in order to get their jobs.**

Based on the findings of fact above, each worker in this case paid between US\$ 50 and US\$ 110 to Im Sothea and Veng Saroeun in order to obtain their jobs as security guards with Grace Co., Ltd. stationed at the E Garment factory and to receive their security

uniforms. Thus, the Arbitration Council will consider whether E Garment Co., Ltd. is responsible for the reimbursement of the amount paid by the workers.

Article 44 of the Labour Law states that “The employer cannot subject the signing or the maintaining of employment contract to a cash guarantee or bond of any form.”

Article 46 of the Labour Law states that “The exploitation or underestimation of workmen by the labour contractor or sub-contractor is forbidden.”

Article 48, paragraph two of the Labour Law states that “The harmed workers, in such case, may file a case directly against the entrepreneur or manager.”

Article 126 of the Labour Law states that “Wage deductions for the purpose of job placement that are provided directly or indirectly to an employer, to his representative, or to any intermediary such as a labour recruiter are prohibited.”

Article 127(2) states that, “None of the balance can be made...with the exception of...2. Items and materials under the control and usage of the worker.”

In previous cases, the Arbitration Council has determined that the Labour Law does not support the deduction of wages or the payment of wages prior to the commencement of employment of the workers. (See *Arbitral Awards 21/03-Loyal, reasons for decision, issue 7 and 86/06-Kingsland, reasons for decision, issue 3*).

In this case, Grace Co., Ltd. demanded that the workers pay an amount before they commenced their employment as compensation for the job opportunity. The amount was received by Grace Co., Ltd. before the workers commenced employment relationships with the company. E Garment Co., Ltd., on the other hand, is not involved in this issue. The person responsible for the reimbursement of the money to the workers is the one who received it. According to Veng Saroeun’s testimony at the hearing, the whole amount was given to Im Sothea, Director of Grace Co., Ltd. Thus, whilst the payment was not legal, only Grace Co., Ltd. is obligated to reimburse the amount to the workers.

The Arbitration Council notes that the workers’ demand that E Garment Co., Ltd. reimburse the amount paid was directed at the wrong party.

Article 312 of the Labour Law states that “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.”

Clause 33 of *Prakas* No. 099 on the Arbitration Council from the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, dated 21 April 2004, states that:

The power of an arbitration panel to consider a dispute shall be limited to addressing those issues which are contained in the non-conciliation report including issues which are the direct consequences of the dispute but which arise from events subsequent to the date of the report.

In this case, based on the report of collective labour dispute resolution at E Garment Co., Ltd., No. 006/09 KB/KN dated 8 January 2009, which was referred to the Arbitration Council, the party to this dispute is E Garment Co., Ltd. and not Grace Co., Ltd. Therefore, the Arbitration Council cannot include Grace Co., Ltd. as a party to the dispute in this case. The Arbitration Council advises that the workers meet Im Sothea, Director of Grace Co., Ltd., to discuss the issue with him directly. In conclusion, the Arbitration Council does not have jurisdiction to make a decision in this case with respect to Grace Co., Ltd. (*see Arbitral Awards 14/07-Shoe Premier; 42/07-South Bay, reasons for decision, issue 3; and 06/08-Kingsland, reasons for decision, issue 2*).

Based on the reasoning and legal principles above, the Arbitration Council decides to reject the workers' demand that E Garment Co., Ltd. reimburse the amount they paid to obtain their employment and uniforms.

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

#### **DECISION AND ORDER**

**Issue 1:** (a) Reject the workers' demand that E Garment Co., Ltd. reinstate them.

(b) Reject the workers' demand that E Garment Co., Ltd. back pay their wages from 23 November 2008.

**Issue 2:** Reject the workers' demand that E Garment Co., Ltd. reimburse the amount they paid to obtain their employment and uniforms.

#### **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: **Ing Sothy**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....

**Dissenting Opinion to Issue 1**

In accordance with Clause 37 of *Prakas* No. 099 SKBY, dated 21 April 2004, issued by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, I, **Liv Sovanna**, would like to dissent to the reasons for decision in issue 1 of Arbitral Award 04/09-E Garment as follows:

**A. What are the employment relationships between the 45 workers (or the 37 workers who continue to make this demand) and E Garment Co., Ltd.?**

The Arbitration Council has not found any evidence to prove that the 37 workers are workers of E Garment Co., Ltd. but they have a direct relationship with Grace Co., Ltd. Therefore, the Arbitration Council concludes that the 37 workers are workers of Grace Co., Ltd.

Article 45 of the Labour Law states, “The labour contractor is a sub-contractor who contract with an entrepreneur and who himself recruits the necessary work force or workmen for the execution of certain work or the provision of certain services for an all-inclusive price.”

The Arbitration Council considers that to be considered a “**sub-contractor**” the following conditions must be met: (a) there must be a contract with an entrepreneur to provide certain work or services in exchange for an all-inclusive price; (b) there is autonomy in the recruitment of workers; (c) the workers are recruited to perform work or provide services only for the entrepreneur who signs the contract with the sub-contractor; and (d) at the termination of the contract to provide work or services, the recruited workers also end their work.

According to the contract for security services supply between E Garment Co., Ltd. and Grace Co., Ltd., Grace Co., Ltd. has an obligation to provide security services to E Garment Co., Ltd. and E Garment Co., Ltd. must pay a lump sum fee for the security services. Thus, condition (a) is fulfilled.

At the hearing both parties agreed that Im Sothea (director of Grace Co., Ltd.) and Veng Saroeun (a staff member of Grace Co., Ltd.) recruited workers to work as security guards at the E Garment factory. Thus, Grace Co., Ltd. has autonomy in recruiting workers. Thus, condition (b) is fulfilled.

During their interview, the workers were informed that they would work as security guards at the E Garment factory. The 45 workers recruited to perform security services

performed their work at the factory in accordance with the contract signed with E Garment Co., Ltd. requiring Grace Co., Ltd. to provide 44 security guards (28 workers on day shift and 16 workers on night shift, totalling 44 workers) to provide security services at the E Garment factory. Thus, I consider that condition (c) is fulfilled. I note that security companies other than Grace Co., Ltd. do not recruit workers to a specific destination and they do not assign a number of security guards solely to one entrepreneur.

When E Garment Co., Ltd. and Grace Co., Ltd. terminated the contract for the supply of security services (on 23 November 2008), the 45 workers no longer had work to perform. Thus, I consider that condition (d) is also fulfilled. The statement provided by Grace Co., Ltd. after the workers filed this complaint is not reasonable because, although it claims that it employs the 45 workers, those workers do not know the location of their employer and do not receive work or wages.

Based on the interpretation above, I consider that Grace Co., Ltd. is a sub-contractor who accepted work to recruit workers to perform security services at the E Garment factory.

Article 47 of the Labour Law states, "The labour contractor is required to observe the provisions of this law in the same manner as an ordinary employer and assumes the same responsibilities as the latter."

Thus, in accordance with Article 47 of the Labour Law, Grace Co., Ltd. is the employer of the workers in this dispute. Conversely, E Garment Co., Ltd. is not the employer as alleged by the workers.

#### **B. The Arbitration Council will consider the workers' demand for reinstatement**

At the hearing the workers demanded to be reinstated to their positions as security guards at the E Garment factory. Because the workers in this dispute are employed by Grace Co., Ltd. and E Garment Co., Ltd. has terminated the contract with Grace Co., Ltd. for the supply of security services (as found in point "A" above), E Garment Co., Ltd. does not have an obligation to reinstate the workers in this dispute to their roles at the factory.

Based on the above reasoning, the Arbitration Council rejects the workers' demand that E Garment Co., Ltd. reinstate them.

Moreover, the Arbitration Council received a statement from Im Sothea, Director of Grace Co., Ltd., confirming that Grace Co., Ltd. did not terminate the employment contracts of the workers and that it is willing to reinstate those workers who have not withdrawn their CVs. The Arbitration Council should consider its jurisdiction as follows.

Article 312 of the Labour Law states that "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.”

Clause 33 of *Prakas* No. 099 on the Arbitration Council from the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, dated 21 April 2004, states that:

The power of an arbitration panel to consider a dispute shall be limited to addressing those issues which are contained in the non-conciliation report including issues which are the direct consequences of the dispute but which arise from events subsequent to the date of the report.

In the non-conciliation report referred to the Arbitration Council by the Minister in Charge of Labour and Vocational Training, the employer party to this dispute is E Garment Co., Ltd. The Arbitration Council cannot include Grace Co., Ltd. as a party to the dispute in this case. Therefore, the Arbitration Council does not have jurisdiction over this issue in dispute.

Since 23 November 2008 the workers in this dispute have not received any work or wages. The Arbitration Council considers that the termination of the contract for the supply of security services between E Garment Co., Ltd. and Grace Co., Ltd. has caused an actual loss of benefits for the workers.

Article 48 of the Labour Law states that:

In case of insolvency or default by the labour contractor, the entrepreneur or the manager of enterprise shall substitute for the contractor to fulfil his obligations to the workers.

The harmed workers, in such case, may file a case directly against the entrepreneur or manager.

In this dispute, when the contract to provide security services was terminated (on 23 November 2008), the workers’ employment also ended. However, the workers received only their last wages. Upon termination of the contract, according to the Labour Law, Grace Co., Ltd. has the following obligations:

**1. Payment in lieu of prior notice**

Article 75 of the Labour Law provides that “The minimum period of a prior notice is...Seven days, if the workers’ length of continuous service is less than six months”

Article 77 of the Labour Law states that “The termination of a labour contract at will on the part of the employer alone, without prior notice or without compliance with the prior notice periods, entails the obligation of the employer to compensate the worker the amount equal to

the wages [and all kinds of benefits the worker would have received during the notice period].”

The termination of a contract unilaterally by the employer without prior notice or compliance with the prior notice period requires the employer to pay the worker an amount equal to the wages and all kinds of benefits that the worker would have received during the notice period.

In this case, the employer (Grace Co., Ltd.) did not provide proper notification during the period of the termination of its contract with E Garment Co., Ltd. Thus, Grace Co., Ltd. must provide payment in lieu of prior notice to the workers in accordance with their employment seniority and Article 75 of the Labour Law.

## **2. Payment in lieu of annual leave**

Article 167 of the Labour Law states, “If the contract is terminated or expires before the worker has acquired the right to use his paid-leave, an indemnity calculated on the basis of Article 166 above is granted to the worker.”

According to this article, in the case of termination or expiration of a contract, the worker is entitled to payment in lieu of annual leave. Thus, based on the reasoning above, Grace Co., Ltd. must provide payment in lieu of annual leave to the workers.

Regarding damages (in accordance with Article 91 of the Labour Law), I consider that Grace Co., Ltd. does not have obligation to pay the workers because the termination of the contract for the supply of security services between E Garment Co., Ltd. and Grace Co., Ltd. was due to its expiration.

Regarding the calculation of the indemnity for dismissal, Article 89 of the Labour Law states:

If the labour contract is terminated by the employer alone, except in the case of a serious offense by the worker, the employer is required to give the dismissed worker...the indemnity for dismissal as explained below:

1. Seven days of wage and fringe benefits if the worker's length of continuous service at the enterprise is between six and twelve months.
2. If the worker has more than twelve months of service, an indemnity for dismissal will be equal to fifteen days of wage and fringe benefits for each year of service. The maximum of indemnity cannot exceed six months of wage and fringe benefits.

According to the findings of fact, the workers' employment with Grace Co., Ltd. lasted from July 2008 until 23 November 2008; thus the workers' service was not longer than six months. Thus the workers are not entitled to an indemnity for dismissal.

Moreover, although I consider that E Garment Co., Ltd. is not the employer of the workers in this dispute (based on the interpretation in point “A” and point “B” above), according Article 48 of the Labour Law, E Garment Co., Ltd. is responsible for the loss of the workers’ wages due to the fact that Grace Co., Ltd., the sub-contractor, did not provide termination payments to the workers because the loss of benefits occurred during the period when the contract between E Garment Co., Ltd. and Grace Co., Ltd. was still valid. Regarding the demand for wages from 23 November 2008 to the date of reinstatement, I do not consider this as a valid demand. From 23 November 2008 onward, E Garment Co. Ltd. and Grace Co., Ltd., the sub-contractor, no longer had a legal relationship with each other.

Based on the above findings of fact, evidence, and legal principles, I consider that **E Garment Co., Ltd. should provide payment in lieu of prior notice and payment in lieu of annual leave to the 37 workers who are claimants in this dispute.** The demand for more than this shall be rejected.

Phnom Penh, 16 February 2009

Arbitrator

**Liv Sovanna**