



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 30/11-South Bay

Date of award: 5 April 2011

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): **Pen Bunchhea**

DISPUTANT PARTIES

Employer party:

Name: **South Bay Enterprise Co., Ltd. (the employer)**

Address: Kambol Village, Kambol Commune, Dangkor District, Phnom Penh

Telephone: 012 385 705

Fax: N/A

Representatives:

1. Ms Chea Sovannchansambath Assistant to the Head of Administration
2. Mr Sran Many Assistant to the Head of Administration

Worker party:

Name: **Khmer Workers Power Federation Union (KWPFU)**

Local Union of KWPFU

Address: No. 2G, National Road 4, Borey Kammarkor Village, Bek Chan Commune,
Angsnoul District, Kandal Province

Telephone: 012 529 404

Fax: N/A

Representatives:

1. Mr Chhey Sovann President of KWPFU
2. Mr Lor Sopheak General Secretary of KWPFU
3. Mr Prum Bunthoeun General Treasurer of KWPFU
4. Ms Chea Ny President of the Local Union of KWPFU

ISSUES IN DISPUTE

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

1. The workers demand that the employer reinstate Chea Ny and Chek Savoeun, president and vice-president of the Local Union of KWPFU, and back pay their wages from the date of their dismissal to the date of reinstatement. The employer refuses to reinstate them as the union failed to notify it of their election.
2. The workers demand that the employer deduct from the attendance bonus as follows:
 - If workers take authorised leave of one day, the employer should maintain their attendance bonus.
 - If workers take unauthorised leave of two days, the employer should deduct US\$ 4 from their attendance bonus.
 - If workers take unauthorised leave of three days, the employer should deduct US\$ 6 from their attendance bonus.
 - If workers take unauthorised leave of four days, the employer should deduct US\$ 8 from their attendance bonus.
 - If workers take unauthorised leave of between five days and one month, the employer should deduct the full attendance bonus.

The employer refuses to accommodate the demand in favour of its existing practice of deducting the full attendance bonus for absences over two hours.

3. The workers demand that the employer allow female workers who are over two months pregnant to take one day off each month for medical checks with their wages and bonuses maintained. The employer states that it allows female workers who are over two months pregnant to take only two hours off per month for medical checks with their wages and bonuses maintained.
4. The workers demand that the employer pay 50% of three months' wages and perquisites (calculated on the basis of the worker's average wage over the last 12 months) to pregnant workers before they take maternity leave. The employer states that it will pay 50% of two months' wages and pay the remaining month's wages later.
5. The workers demand that the employer allow pregnant workers to leave 10 minutes early. The employer states that it will allow pregnant workers to leave only five minutes early.

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. 255 KB/KN dated 3 March 2011 was submitted to the Secretariat of the Arbitration Council on 3 March 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: 15 March 2011 at 2:00 p.m.

Procedural issues:

On 8 February 2011, the Department of Labour Disputes received a complaint from KWPFU outlining the workers' demands for the improvement of working conditions by the employer. Upon receiving the complaint, the Department of Labour Disputes assigned an expert officer to conciliate the dispute on 24 February 2011. One of the six issues was resolved. The five non-conciliated issues were referred to the Secretariat of the Arbitration Council on 3 March 2011. Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing, held on 15 March 2011 at 2:00 p.m. Both parties were present at the hearing. The Arbitration Council conducted a further conciliation of the five issues, resulting in issues 2, 3, and 5 being resolved. The remaining issues in dispute are issues 1 and 4.

Normally, parties who appear before the Arbitration Council have the right to choose between binding or non-binding arbitration, regardless of whether the issues give rise to interests or rights disputes. However, in the Memorandum of Understanding On Improving Industrial Relations in the Garment Industry (MoU) signed by the Garment Manufacturers Association in Cambodia (GMAC) and six leading union confederations on 28 September 2010, the signatories agreed to submit rights disputes to binding arbitration. The signatories are still able to choose either binding or non-binding arbitration of interests disputes.

As both parties are signatories to the MoU dated 28 September 2010, they are bound to select binding arbitration of rights disputes. However, they are not bound to select binding

arbitration of interests disputes. Any objection by the parties to an award on interests disputes will not affect their obligation to implement an award on rights disputes in accordance with the MoU.

The Arbitration Council will consider the remaining 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:

Issue 1: The workers demand that the employer reinstate Chea Ny and Chek Savoeun, president and vice-president of the Local Union of KWPFU, and back pay their wages from the date of their dismissal to the date of reinstatement.

Case of Chea Ny:

- Chea Ny commenced work on 5 May 2009 as a sewing worker. Her last contract had a duration of one year, effective from 5 May 2010 to 5 May 2011.
- Chea Ny was dismissed on 31 January 2011.
- According to the certificate of registration of the Local Union of KWPFU dated 24 January 2011, Chea Ny is the union's president.
- Chea Ny was not given a warning letter by the employer.
- Chea Ny received a monthly main wage of US\$ 61, a US\$ 2 seniority bonus, and a US\$ 13 attendance bonus. She earned approximately US\$ 100 per month including overtime payments.
- Chea Ny did not receive a termination payment from the employer.
- The workers claim that Chea Ny's dismissal was the result of union discrimination. The workers contend that upon receiving the certificate of registration on 26 January 2011, an administration officer held two meetings with Chea Ny; one on 28 January

and another on 29 January 2011. At the meeting, the officer told her that the local union had not been established in accordance with the law and requested her to resign.

- The workers did not raise legal arguments to support their claim.

Case of Chek Savoeun:

- Chek Savoeun commenced work on 24 May 2010. Her final contract had a duration of one year, effective from 24 May 2010 to 24 May 2011.
- Chek Savoeun was dismissed on 31 January 2011.
- According to the certificate of registration of the Local Union of KWPFU dated 24 January 2011, Chek Savoeun is the union's vice-president.
- Chek Savoeun was not given a warning letter by the employer.
- Chek Savoeun received a monthly main wage of US\$ 61 and a US\$ 13 attendance bonus. She earned approximately US\$ 90 per month including overtime payments.
- Chea Ny did not receive a termination payment from the employer.
- The workers claim that her dismissal was the result of union discrimination. The workers contend that after receiving the certificate of registration on 26 January 2011, an administration officer held a meeting with Chek Savoeun on 31 January 2011. At the meeting, the officer told her that the local union had not been established in accordance with the law and requested her to resign. As she refused to resign, the employer dismissed her on 31 January 2011.
- The workers did not raise legal arguments to support their claim.

[Employer's arguments]

- The employer states that it dismissed the workers on the grounds of serious misconduct as per the Internal Work Rules. The employer asserts that the workers falsified documents in order to have the local union registered. The employer alleges that, in fact, Chek Savoeun, the vice-president, does not have seniority of one year and Chung Kimouy, the secretary, does not work at the factory.
- The employer did not obtain approval from the Labour Inspector to dismiss Chea Ny and Chek Savoeun.

Issue 4: The workers demand that the employer pay 50% of three months' wages and perquisites (calculated on the basis of the worker's average wage over the last 12 months) to pregnant workers before they take maternity leave.

- The employer's practice is to provide the 90 day maternity payment in monthly instalments. On 12 February 2008, the employer entered into an agreement with the Workers Trade Union (WTU) in which it agreed to provide two months' worth of maternity pay prior to the commencement of maternity leave and the balance when the workers return from the leave. The agreement was concluded before WTU received its first certificate of most representative status (MRS), dated 17 September 2008 and effective until 17 September 2010. The union's second certificate of MRS is dated 9 February 2011 and is effective until 9 February 2013.
- The employer's practice is to calculate the 90 day maternity payment by taking 50% of the worker's monthly main wage and seniority bonus and multiplying by three. The employer does not include other benefits in the calculation.
- Eight to 10 female workers take maternity leave each month.
- The workers base their demand on the Labour Law and previous arbitral awards of the Arbitration Council. The workers state that workers need the full maternity payment prior to taking leave to cover their expenditure over a three month period and the expenses involved in child delivery. The workers contend that because some workers live far away from the factory, the cost of transportation [to the factory to obtain their pay] is another burden on them if they are paid on a monthly basis.
- The employer refuses to accommodate the demand, arguing that workers can authorise friends or relatives to collect the payments for them if it is difficult for them to attend the factory. The employer refuses to calculate the payment on the basis of a worker's average wage over the last 12 months and to provide the full maternity payment in advance, on the grounds that it made an agreement with WTU, the union at the factory with MRS, under which it is required to provide two months' maternity pay and the balance when workers return from maternity leave.

REASONS FOR DECISION

Issue 1: The workers demand that the employer reinstate Chea Ny and Chek Savoeun, president and vice-president of the Local Union of KWPFU, and back pay their wages from the date of their dismissal to the date of reinstatement.

According to the findings of fact, Chea Ny and Chek Savoeun are leaders of the Local Union of KWPFU. The Arbitration Council will consider whether their dismissal was consistent with the legal procedure.

Article 293, paragraph one of the Labour Law states that "[t]he dismissal of a shop steward [worker delegate] or a candidate for shop steward can take place only after authorisation from the Labour Inspector."

Clause 4, paragraphs one and two 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.

After the period of expiration stipulated in the above paragraph, this protection shall be provided to the three union leaders pursuant to the conditions stipulated in Articles 282 and 293 of the Labour Law.

In previous arbitral awards, the Arbitration Council has ruled that approval from the Labour Inspector is required for the dismissal of workers entitled to special protection (*see Arbitral Awards 79/06-Woosu, reasons for decision, issue 1; 74/08-Generation International, reasons for decision, issue 1; and 107/08-Seratex, reasons for decision, issue 2*).

Chea Ny and Chek Savoeun are listed as the president and vice-president of the Local Union of KWPFU on the certificate of registration, No. 2048 dated 24 January 2011. The Arbitration Council considers that the certificate of registration was obtained in accordance with the law and authorises the union leaders to represent the union's members. Therefore, regardless of the reasons the employer has for dismissing the union leaders, it must comply with the legal procedure.

Based on the above, Chea Ny and Chek Savoeun are entitled to special protection. Therefore, their dismissal must be authorised by the Labour Inspector.

According to the facts, the employer failed to seek authorisation from the Labour Inspector to dismiss Chea Ny and Chek Savoeun. Consequently, the employer must reinstate Chea Ny and Chek Savoeun and back pay their wages from the date of their dismissal to the date of reinstatement.

In Arbitral Award 12/11-Dai Young, the Arbitration Council ruled that a rights dispute concerns entitlements in the law, an agreement, or a collective agreement.

The Arbitration Council considers that the issue in dispute in this case is a rights dispute, as it is based on the law.

In conclusion, the Arbitration Council orders the employer to reinstate Chea Ny and Chek Savoeun and back pay their wages from the date of their dismissal to the date of reinstatement upon issuance of this award.

Issue 4: The workers demand that the employer pay 50% of three months' wages and perquisites (calculated on the basis of the worker's average wage over the last 12 months) to pregnant workers before they take maternity leave.

The Arbitration Council will consider whether the employer is obliged to pay 50% of three months' wages and perquisites before female workers commence maternity leave.

Article 182, paragraph one of the Labour Law states that “[i]n all enterprises covered by Article 1 of this law, women shall be entitled to a maternity leave of ninety days.”

Article 183, paragraphs one and four of the same law state:

During the maternity leave as stipulated in the preceding article, women are entitled to half of their wage, including their perquisites, paid by the employer.

However, the wage benefits specified in the first paragraph of this article shall be granted only to women having a minimum of one year of uninterrupted service in the enterprise.

Based on Article 183, paragraphs one and four set out above, the Arbitration Council has ruled in previous arbitral awards that employers must pay half of the wages and perquisites of female workers who have at least one year of service and work at enterprises covered by the Labour Law (*see 06/08-Kingsland, reasons for decision, issue 1*).

According to the findings of fact, the employer failed to pay 50% of the workers' perquisites in addition to 50% of their main wages, with the exception of the seniority bonus. The Arbitration Council considers that the employer's practice is contrary to Article 183, paragraph one of the Labour Law. Therefore, the employer is obliged to pay half of the workers' wages including perquisites.

Article 115, paragraph three of the Labour Law states that “[p]ayment shall not be made on a day-off. If payday falls on such a day-off, the payment of wages shall be made a day earlier.”

Based on this provision, the Arbitration Council considers that female workers are entitled to receive 50% of three months' wages and perquisites prior to taking maternity leave (*see Arbitral Award 139/08-Supreme, reasons for decision, issue 8*).

The employer argues that it is already bound by the agreement dated 12 February 2008 with WTU, the union at the factory with MRS, requiring the employer to provide two months' maternity pay prior to workers taking maternity leave and the balance upon the workers' return from leave.

The Arbitration Council finds that, according to the facts, the said agreement was concluded before WTU received its first certificate of MRS dated 17 September 2008 and

effective until 17 September 2010 and its second certificate of MRS dated 9 February 2011 and effective until 9 February 2013. Thus, only the parties to the agreement (the employer and the members of WTU) are bound by it. The agreement is not applicable to the members of the Local Union of KWPFU as it is not a party to the agreement. The Arbitration Council considers that the agreement is contrary to the law relating to the provision of wages to workers taking maternity leave.

Article 13 of the Labour Law states:

The provisions of this law are of the nature of public order, excepting derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or a convention that do not comply with the provisions of this law or any legal text for its enforcement, are null and void.

Based on this provision, any agreement or collective agreement that does not comply with the provisions of the Labour Law is null and void. Therefore, the agreement made between the employer and WTU is not enforceable.

Based on the foregoing, the employer is obliged to provide the 90 day maternity payment to female workers prior to their commencing maternity leave.

In conclusion, the Arbitration Council orders the employer to pay 50% of 90 days' wages and perquisites to female workers prior to their commencing maternity leave.

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

DECISION AND ORDER

Part I. Rights dispute:

Issue 1: Order the employer to reinstate Chea Ny and Chek Savoeun and back pay their wages from the date of their dismissal to the date of reinstatement upon issuance of this award.

Issue 4: Order the employer to pay 50% of 90 days' wages and perquisites to female workers prior to their commencing maternity leave.

Type of award: binding award

The award of the Arbitration Council in Part I will be final and is enforceable by the parties in accordance with the MoU dated 28 September 2010.

Part II. Interests dispute: N/A

Type of award: non-binding award

The award in Part II 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: **Pen Bunchhea**

Signature: