



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 65/09-Nugget Textile

Date of award: 11 June 2009

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

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

Arbitrator chosen by the worker party: **Ven Pov**

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

DISPUTANT PARTIES

Employer party:

Name: **Nugget Textile (Pte) Ltd. (the employer)**

Address: Trea Village, Trung Mon Street, Stung Meanchey Commune, Meanchey District,
Phnom Penh

Telephone: 012 689 896

Fax: N/A

Representative:

1. Ms Dok Socheata

Head of Administration

Worker party:

Name: **Khmer Youth Trade Union Federation (KYFTU)**

Local Union of KYFTU

Address: Kok Chombok Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 017 370 363

Fax: N/A

Representatives:

1. Mr Mai Vattana

Officer of KYFTU (Team Leader of Dangkor
District Working Group)

2. Ms Yen Kanha

Officer of KYFTU

3. Mr Pov Bonna

Officer of KYFTU

4. Ms Suos Sinoeun

President of the Local Union of KYFTU

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5. Ms Ly Na
6. Ms Yim Thavy

Vice-President of the Local Union of KYFTU
Secretary of the Local Union of KYFTU

ISSUES IN DISPUTE

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

1. The workers demand that the employer build a day-care centre and nursing room. The employer states that it cannot afford to build a day-care centre or provide payment in lieu for milk formula.
2. The workers demand that the employer not terminate the contracts of pregnant workers. The employer states that it only follows the Labour Law.
3. The workers demand that the employer provide termination payments when it terminates the workers' contracts. The employer states that when it terminates fixed duration contracts it provides a payment equal to 5%. It provides an annual leave payment once per year.
4. The workers demand that the employer provide a 5,000 riel meal allowance for work on Sundays and holidays. The employer states that it only follows the Labour Law and cannot afford to provide the meal allowance as demanded.

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. 364 dated 18 May 2009 was submitted to the Secretariat of the Arbitration Council on 20 May 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: 29 May 2009 at 8:00 a.m.

Procedural issues:

On 5 May 2009, the Department of Labour Disputes received a complaint from the Local Union of KYFTU 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 collective labour dispute and a final conciliation session was held on 18 May 2009, after which four of the eleven issues remained unresolved. The four non-conciliated issues were submitted to the Secretariat of the Arbitration Council on 20 May 2009 via non-conciliation report No. 364 dated 18 May 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 four non-conciliated issues, held on 29 May 2009 at 8:00 a.m. Both parties were present at the hearing as summoned by the Arbitration Council. The Arbitration Council sought further information on the issues in dispute and conducted a further conciliation, resulting in the resolution of issue 3 and the withdrawal of issue 4 by the workers.

The workers objected to the attendance of Dok Socheata, the head of administration, as the representative of the employer, arguing that she was not entitled to make decisions in relation to the workers' demands. Therefore, the Arbitration Council will consider whether Dok Socheata has the right to represent the employer.

Dok Socheata attended the hearing as authorised by Mr Lin Yansan, company president. However, the workers argued that Clause 10 of the company statute registered on 3 May 2007 stipulates in relation to decisions affecting the enterprise:

All decisions are under the jurisdiction of the enterprise owner, who is directly responsible for third parties. The enterprise owner has the authority to demote the company director, who is a third party. If the demotion is made for an unspecified reason, the enterprise owner shall pay reparation to the director, who will not be allowed to hold that position again.

Thus, the workers argue, only the owner of the enterprise Mrs Tsai Shu Mei has the right to make decisions on behalf of the enterprise.

The Arbitration Council is of the view that generally the management team or company president should fulfil the role of managing and supervising the enterprise, not the owner of the enterprise. Moreover, Clause 9 of the company statute stipulates that "[a]n enterprise shall be managed and supervised by a president or entrepreneur who is not the owner of the enterprise. The president shall receive a salary or other bonuses decided and agreed upon by the owner of the enterprise and the president."

The Arbitration Council ordered the employer to resubmit an authorisation letter from company president Mr Hong Shiu Suoy, who signed and submitted a letter for registration of the employer's Internal Work Rules following agreement by the worker delegates on 29 November 2007. The Arbitration Council finds that the Internal Work Rules should be compiled by a director of the enterprise and contain regulations regarding working conditions such as working hours and remuneration, as stated in Articles 22, 23, and 24 of the Labour Law.

In this case, the employer's Internal Work Rules were prepared by Hong Shiu Suoy with the agreement of the worker delegates. Thus, Hong Shiu Huoy is the company president and Tsai Shu Mei is the enterprise owner. Thus, the Arbitration Council finds that Dok Socheata was given full rights to represent the employer via the authorisation letter from Hong Shiu Suoy.

Therefore, the Arbitration Council will consider issues 1 and 2 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:

- Nugget Textile (Pte) Ltd. commenced operation in September 2007 and employs approximately 671 workers.
- The Local Union of KYFTU, the claimant in this case, claims to represent 266 workers who are union members (evidenced by a list of workers whose wages are deducted for union contribution fees). The employer agrees to this claim.

Issue 1: The workers demand that the employer build a day-care centre and nursing room.

- The employer explains that it rents the factory premises and due to limited space it is unable to build a day-care centre. Instead, it provides a room for nursing care. The workers deny any knowledge of the existence of a nursing room.

- The employer states that it used to provide a US\$ 5 allowance in lieu of a day-care centre, but this payment was disputed by the workers. Due to the global financial crisis, the employer can no longer afford to pay the US\$ 5 allowance.
- The workers demand that the employer build a day-care centre and nursing room to enable female workers to breastfeed their babies, on the basis that the Labour Law requires it to do so.

Issue 2: The workers demand that the employer renew the fixed duration contracts of pregnant workers when they expire.

- The workers assert that when the fixed duration contracts of pregnant workers expire, the employer never renews them. For example, when the fixed duration contracts of Pheap Phally and Praj Chamroeun, the team leader in the sewing section, expired, the employer did not renew them. Rather, it told them to take [unpaid] maternity leave and said that they could resume their work after the birth of their children.
- The workers clarified that the two female workers are not demanding that their contracts be renewed, but they do demand that the employer renew pregnant workers' three month fixed duration contracts expiring in May 2009. The workers acknowledge that when a fixed duration contract expires, the employer has the right to decide whether or not to renew the contract because this is the right of the contractual parties. However, the case of pregnant workers is an exception.
- The workers assert that the employer discriminates against pregnant workers by not renewing their contracts, because the work performed by the workers still exists and the employer recruits new workers to replace the pregnant ones. However, the workers did not show any evidence or documents to substantiate their claim. The workers add that if the employer did renew the contracts of pregnant workers it would be legally bound to provide maternity payments to those workers.
- The employer asserts that pregnant workers usually leave work five minutes early and possess maternal prescriptions from three months. Generally, the employer chooses not to renew workers' contracts if they have committed serious or minor misconduct or have received negative evaluation reports from team leaders, regardless of their being pregnant. The employer takes action against all workers on an equal footing.
- The employer maintains that it does not discriminate against any workers. Generally, it renews workers' fixed duration contracts when required by the production line. If any assembly lines need more workers, the employer will renew more workers' contracts, but if the production line declines, the employer will renew fewer contracts.

Furthermore, due to the effects of the global financial crisis, the employer was not in a position to renew the workers' fixed duration contracts, so it decided to terminate the employment of the two workers on 31 May 2009. The employer complied with the Labour Law.

REASONS FOR DECISION

Issue 1: The workers demand that the employer build a day-care centre and nursing room.

Article 186 of the Labour Law states:

Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a day-care centre.

If the company is not able to set up a day-care centre on its premises for children over eighteen months of age, female workers can place their children in any day-care centre and the charges shall be paid by the employer.

Based on the above article, the Arbitration Council finds that the employer is obliged to set up a nursing room and a day-care centre. If the employer cannot afford to build a day-care centre for female workers who have children aged over 18 months, those workers can place their children in an external day-care centre and the employer must pay the fees.

Moreover, in previous cases the Arbitration Council has found that an employer who employs more than 100 female workers is obligated to provide a nursing room and a day-care centre. If the employer cannot afford to build a day-care centre for female workers who have children aged over 18 months, those workers can place their children in an external day-care centre and the employer must pay the fees (*see Arbitral Awards 63/04-Shine Well, reasons for decision, issue 2; 68/04-City New, reasons for decision, issue 1; 103/08-Vivatino, reasons for decision, issue 2; and 115/08-Top One, reasons for decision, issue 2*).

In this case, the employer asserts that it rents the factory premises and, due to limited space, it is unable to build a day-care centre. It once provided US\$5 per month in lieu of a day-care centre, but the workers disputed this payment. Due to the global financial crisis, the employer can no longer afford to provide the US\$ 5 allowance.

The Arbitration Council finds that the objective of the provision of the Labour Law requiring the employer to provide a nursing room and a day-care centre is to make it possible for mothers to breastfeed their babies for the first six months without using milk formula, in accordance with the policy of the Royal Government of Cambodia concerning the safety of babies whilst their mothers are working (*see Arbitral Awards 77/08-Xing Tai, reasons for*

decision, issue 3; 103/08-Vivatino, reasons for decision, issue 2; and 115/08-Top One, reasons for decision, issue 2).

Therefore, the Arbitration Council finds that even if the female workers had agreed to the provision of a payment in lieu of building a day-care centre (with which they did not in fact agree), this would not fulfil the objective of the Labour Law and would not exempt the employer from its legally binding obligation to provide a day-care centre. However, the employer has the alternative of paying the fees of an external day-care centre if it is unable to build a day-care centre and nursing room.

Therefore, the Arbitration Council decides that the employer should notify the workers of the location of the nursing room and build a day-care centre. If the employer cannot afford to build a day-care centre for female workers who have children aged over 18 months, those workers can place their children in an external day-care centre and the employer must pay the fees.

Issue 2: The workers demand that the employer renew the fixed duration contracts of pregnant workers when they expire.

The workers clarified at the hearing that they do not demand that the employer renew all pregnant workers' fixed duration contracts; rather that it renew pregnant workers' three month fixed duration contracts that expired in May 2009 because when the contracts expired the employer did not renew them.

Thus, the Arbitration Council will consider whether or not the employer has the right to decide whether or not to renew the workers' fixed duration contracts.

Article 73, paragraph one of the Labour Law states:

A labour contract of specific duration normally terminates at the specified ending date. It can, however, be terminated before the ending date if both parties are in agreement on the condition that this agreement is made in [the] form of writing in the presence of a Labour Inspector and signed by the two parties to the contract.

In Arbitral Award 100/07–Hoyear Cambodia, the Arbitration Council interpreted Article 73 as follows: "The Arbitration Council finds that a fixed duration contract shall expire automatically. This means that the obligations between the employer and worker come to an end. Thus, neither party can force the other to renew a contract without agreement."

In this case, the Arbitration Council agrees with its decision in previous awards, that the expiry of a fixed duration contract automatically puts an end to the employment relationship; the decision as to whether or not to renew a contract depends on the parties to that contract, and neither party can force the other to renew a contract without mutual

agreement. Therefore, the employer has the right to decide whether to renew an expired fixed duration contract, as long as union discrimination is not the basis of the decision.

In the previous cases, the Arbitration Council has determined that the workers must present evidence to support allegations of discrimination against pregnant workers (see *Arbitral Awards 79/05-Evergreen; 90/06-Evergreen, reasons for decision, issue 1; 99/06-South Bay, reasons for decision, issue 1; 01/07-Supreme; 123/07-E Garment, reasons for decision, issue 1; 77/08-Xing Tai, reasons for decision, issue 1; 101/08-GDM, reasons for decision, issues 1 and 2; and 108-Hugo International, reasons for decision, issue 4*).

In this case, the Arbitration Council agrees with its previous interpretation that the claimant workers must show concrete evidence that the employer discriminated against pregnant workers.

In this case, the workers demand that the employer renew the three month fixed duration contracts of pregnant workers whose contracts were due to expire in May 2009. They did not provide any concrete facts, arguments, or evidence as to how many pregnant workers' contracts were not renewed or how many new workers were recruited to replace those workers. The employer denied discriminating against pregnant workers on the basis that it does not usually renew expired contracts due to production requirements.

The Arbitration Council generally refuses to consider demands by workers in the absence of sufficient evidence (see *Arbitral Awards 63/04-Shine Well, reasons for decision, issue 4; 99/06-South Bay, reasons for decision, issue 5; 74/07-Global Apparels, reasons for decision, issue 2; 91/07-J K, reasons for decision, issue 2; 94/07-Fortune Garment, reasons for decision, issues 6 and 8; 101/08-GDM, reasons for decision, issues 1 and 2; and 108/08-Hugo International, reasons for decision, issue 4*).

Therefore, the Arbitration Council decides to reject the workers' demand that the employer renew the fixed duration contracts of pregnant workers when they expire.

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

DECISION AND ORDER

Issue 1: Order the employer to provide a day-care centre and nursing room for female workers. If the employer cannot afford to build a day-care centre for female workers who have children aged over 18 months, those workers can place their children in an external day-care centre and the employer must pay the fees.

Issue 2: Reject the workers' demand that the employer renew the fixed duration contracts of pregnant workers when they expire.

Type of award: non-binding award

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

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ly Tayseng**

Signature:

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: