KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

**Case number and name: 15/09-Charm Textile**

**Date of award: 3 March 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: **Huon Chundy**

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

## DISPUTANT PARTIES

**Employer party:**

Name: **Charm Textile Co., Ltd. (the employer)**

Address: Bonla Saet Village, Khmuonh Commune, Russei Keo District, Phnom Penh

Telephone: 012 393 677 Fax: N/A

Representatives:

1. Mr Heng Vireak — Chief of Administration
2. Mr Hong Sopheap — Assistant in the Production Section

**Worker party:**

Name: **Local Union of the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC)**

Address: No. 16A, Street 376, Boeung Keng Kang III Commune, Chamkamorn District, Phnom Penh

Telephone: 012 728 471 Fax: N/A

Representative:

1. Mr Khim Chamnan — Officer of the Local Union of FTUWKC
2. Mr Lak Tola — President of the Local Union of FTUWKC
3. Ms Sok Sophon — Workers' representative

## ISSUES IN DISPUTE

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

1. The workers demand that the employer pay 50% of their wages plus other benefits for the two months that it suspended the workers' contracts without a permission letter from the Labour Inspector.
2. The workers demand that the employer reinstate approximately 300 workers and maintain the workers' seniority and other benefits once the work suspension is over.
3. The workers demand that if the employer does not reinstate the workers and instead terminates their contracts, it provide severance pay in accordance with the Labour Law.

## 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. 076 KB/AK/VK dated 10 February 2009 was submitted to the Secretariat of the Arbitration Council on 10 February 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:** 16 February 2009 at 2:00 p.m.

**Procedural issues:**

On 28 January 2009, the Department of Labour Disputes received a complaint from the Local Union of FTUWKC outlining the workers' demands for the improvement of working conditions by the employer. 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 2 February 2009, concluding with three issues unresolved. The three non-conciliated issues were referred to the Secretariat of the Arbitration Council on 10 February 2009 via non-conciliation report No. 076 KB/AK/VK, dated 10 February 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 three non-conciliated issues,

held on 16 February 2009 at 2:00 p.m. Both parties were present as summoned by the Arbitration Council. At the hearing, the Arbitration Council conducted a further conciliation of the three non-conciliated issues but none were resolved.

Therefore, 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:**

- Charm Textile Co., Ltd. currently employs approximately 596 workers.
- The Local Union of FTUWKC, the claimant in this case, confirmed at the hearing that it has approximately 400 members, but it has not yet submitted a letter to the employer requesting it to deduct union contribution fees from its members' wages. The employer denied any knowledge of the number of members of the union. The Arbitration Council ordered the union to submit evidence confirming the number of members and the number of workers authorising representation by the union before the Arbitration Council by 19 February 2009. The employer was given until 20 February 2009 to object to the evidence.
- On 18 February 2009, the Arbitration Council received a large number of Local Union of FTUWKC membership registration letters along with the workers' thumbprints.
- On 19 February 2009, the employer objected to the documents containing the workers' thumbprints on the basis of irregularities such as vague and duplicated thumbprints. However, it did not object to the membership registration letters.
- The Local Union of FTUWKC does not hold a certificate of most representative status (MRS).

**Issue 1: The workers demand that the employer pay full wages and other benefits for the duration of the two month work suspension, on the basis that the workers' contracts were suspended without permission from the Labour Inspector.**

- The non-conciliation report of the Ministry of Labour and Vocational Training states that the workers demand that the employer pay 50% of their wages plus other benefits during the period of work suspension. However, at the hearing the workers confirmed that they are demanding that the employer pay their full wages plus other benefits for the duration of the work suspension, which took place without a permission letter from the Labour Inspector.
- On 27 November 2008, the employer submitted a letter to the Ministry of Labour and Vocational Training requesting permission to suspend the workers' labour contracts for two months, from 28 November 2008 to 27 January 2009, because there was no work for the workers following the buyers' withdrawal of their orders.
- The employer reasons that the buyers withdrew all of their orders because the workers had gone on strike without negotiating with or notifying the employer. During the strike, the buyers came to inspect the goods and saw the situation. Dissatisfied, the buyers delayed their orders and worse, withdrew all orders from late March to early April 2009. As a result, the employer had no work for the workers to do.
- The employer further explains that since the buyers withdrew their orders due to strikes by the workers, the employer faced an economic crisis and therefore decided to suspend the contracts of all its workers. The workers did not object to this claim.
- The employer confirmed that on 27 November 2008, it submitted a letter to the Ministry of Labour and Vocational Training requesting permission to suspend all labour contracts. However, it did not receive a response from Labour Inspector granting permission to suspend the workers' labour contracts.

**Issue[s] 2 [and 3]: The workers demand that the employer reinstate approximately 300 workers and maintain the workers' seniority and other benefits after the work suspension is over. If the employer does not reinstate the workers and instead terminates their contracts, it must offer severance pay in accordance with the Labour Law.**

- The workers stated at the hearing that all 300 workers held undetermined duration contracts. The employer does not object to this claim.
- The employer stated at the hearing that it informed the workers of the work suspension and locked the factory gates to prevent the workers from entering for the duration of the two month suspension from 28 November 2008 to 27 January 2009.

During that time, it only required the workers to present themselves and to punch in their cards once a week, each Thursday. Workers who did not attend were considered as having abandoned their employment.

- The workers state that approximately 300 workers did not present themselves at the factory, leading the employer to believe that they had abandoned their employment.
- The employer claims that 140 workers presented themselves and received an accommodation allowance of US$ 10 per month, and that they were willing to work at the nearby Hi Fashion factory.
- The employer claims that 417 workers did not present themselves and did not punch in their cards and that it notified the Labour Inspector of their abandonment of work in a letter dated 22 January 2009 with an attached list of the workers' names.
- The employer and the workers agree that approximately 596 workers were employed in various sections of the factory, including ironing, sewing, folding, cutting, and storage (warehouse). However, there is currently no work to do, apart from in the storage section (warehouse) where there are approximately 10 workers.
- The employer further states that it cannot make any promises as to when it will have work for the workers to do.
- The employer considers that the workers who did not present themselves at the factory have abandoned their employment. Thus, it will not reinstate these workers nor will it terminate their labour contracts in accordance with the Labour Law.

**REASONS FOR DECISION**

Before considering the issues in dispute, the Arbitration Council will consider whether the claimant union has most representative status and the union's claim that it has been authorised by workers who are not its members to represent them before the Arbitration Council.

The Local Union of FTUWKC claims to make the demands on behalf of 596 workers. However, the two parties do not agree upon the number of workers making the demands in this case. Therefore, the Arbitration Council will consider as follows.

Paragraphs one and two of Article 268 of the Labour Law state:

> 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 finds that paragraphs one and two of Article 268 of the Labour Law mean that a professional organisation can enjoy the rights and benefits recognised by law when that professional organisation is registered and recognised by the Ministry in Charge of Labour.

Furthermore, paragraph two of Article 266 of the Labour Law states that "[p]rofessional organisations of workers are called 'workers' unions'."

Based on paragraph two of Article 266 of the Labour Law, the Arbitration Council finds that generally, local unions that are registered have the right to represent workers who are their members.

However, Clause 19 of *Prakas* No. 099 SKBY on the Arbitration Council, dated 21 April 2004, states:

> A party may appear before the arbitration panel in person, be represented by a lawyer who is a member of the Bar Association of the Kingdom of Cambodia, or be represented by any other person expressly authorised in writing by that party.

The Arbitration Council finds that the above clause allows the union to represent workers who are not its members and to bring a dispute before the Arbitration Council as long as the union has been expressly authorised in writing by those workers.

The Arbitration Council ordered the union to provide evidence to support the workers' demands by 19 February 2009. The workers promised to provide evidence and other documents to confirm the union's membership and the fact that some non-member workers had asked the union to represent them to settle the dispute before the Arbitration Council. On 18 February 2009, the Arbitration Council received a large number of membership registration letters and the workers' thumbprints. However, the document containing the thumbprints does not contain a date or title specifying union authorisation; it only contains the workers' thumbprints and names. The Arbitration Council finds that the thumbprint evidence is vague and invalid. This is because some of the workers' thumbprints are duplicated, and the document does not have a title confirming that the workers authorise the Local Union of FTUWKC to settle their dispute before the Arbitration Council.

Therefore, the Arbitration Council will consider the issues in this case on behalf of the members of the Local Union of FTUWKC only.

**Issue 1: The workers demand that the employer pay full wages and other benefits for the duration of the two month work suspension, on the basis that the workers' contracts were suspended without permission from the Labour Inspector.**

The Arbitration Council will consider whether the two month work suspension was carried out in accordance with legal principles.

According to the Labour Law, a labour contract can only be suspended in accordance with the reasons set out in in Article 71. Relevantly, Article 71(11) states:

> When the enterprise faces a serious economic or material difficulty or any particularly unusual difficulty, which leads to a suspension of enterprise operation. This suspension shall not exceed two months and [shall] be under the control of the Labour Inspector.

According to Article 71(11) of the Labour Law, a work suspension can take place as long as it is confirmed that the enterprise is facing a serious economic or material difficulty or any particularly unusual difficulty. Importantly, the suspension shall be under the control of the Labour Inspector.

In this case, the employer argues that it suspended the workers' contracts because it had no work for them to do after the buyers withdrew their orders upon the emergence of the world economic crisis. The Arbitration Council finds that the employer had a sound reason for suspending the workers' contracts and that the duration of the suspension did not exceed two months. However, what does it mean to say that the suspension shall be under the control of the Labour Inspector?

In Arbitral Award 22/05-Ocean, issue 2, the Arbitration Council stated that "suspension under the control of the Labour Inspector generally means that the suspension must be notified to and approved by the Labour Inspector" *(see Arbitral Awards 22/05-Ocean, issue 2 and 72/05-North Gaiety, issue 1)*.

Thus, the employer must notify the Labour Inspector, who will inspect and confirm the circumstances surrounding the suspension. This means that the Labour Inspector has an obligation to inspect and determine whether the suspension was prompted by a real economic difficulty, so as to avoid a serious impact upon the national economy and for the benefit of workers *(see Arbitral Awards 27/08-Archid, issue 6 and 105/04-United Eternity, issue 1).*

The Arbitration Council finds in this case that the Labour Law allows the employer to suspend the workers' labour contracts. However, the employer must have notified the Labour Inspector of the suspension and detailed the reasons for and period of the suspension.

If the employer correctly follows the procedure stated in the Labour Law for suspending the workers' labour contracts (i.e. that the suspension shall be under the control of the Labour Inspector) it is not required to pay the workers' wages (see Article 72(1) of the Labour Law below). However, if the employer does not follow the procedure in the Labour Law for suspending the workers' contracts, it has an obligation to pay the workers' full wages plus other benefits even though it does not have work for the workers *(see Arbitral Awards 21/03-Loyal, issue 8; 01/04-New Point; 46/04-M & A, issue 1; 60/06-New Max, issue 2; 74/07-Global Apparels, issue 1; 27/08-Archid, issue 6; 28/08-Finegis, issues 1 and 2; and 53/08-Yung Wah (Branch 1), issue 1).*

In this case, the employer submitted a letter to the Ministry of Labour and Vocational Training on 27 November 2008 requesting permission for a two month work suspension, from 28 November 2008 to 27 January 2009, with payment of a monthly US$ 10 accommodation allowance to the workers, due to the fact that the employer had no work for the workers after the buyers withdrew all their orders upon the emergence of the world economic crisis. On 27 November 2008, without waiting for a response from the Ministry of Labour and Vocational Training or the Labour Inspector, the employer announced the suspension to the workers and locked the factory entrance gate to prevent the workers from entering. It required the workers present themselves at the factory to punch in their cards each Thursday.

The Arbitration Council finds that although the employer submitted a request for work suspension to the Ministry of Labour and Vocational Training, it decided to suspend the contracts immediately without waiting for a response from or inspection by the Labour Inspector. Because it did not wait for a decision as to whether the Labour Inspector would allow or disallow the suspension, the suspension was inconsistent with the Labour Law.

Therefore, the employer has an obligation to pay the workers' full wages and other benefits from the date the labour contracts were suspended, 28 November 2008, until 27 January 2009.

Therefore, the Arbitration Council orders the employer to pay full wages and other benefits to those workers who are members of the Local Union of FTUWKC for the two months of the work suspension, from 28 November 2008 to 27 January 2009, because the employer suspended their labour contracts without permission from the Labour Inspector.

**Issue[s] 2 [and 3]: The workers demand that the employer reinstate approximately 300 workers and maintain the workers' seniority and other benefits after the work suspension is over. If the employer does not reinstate the workers and instead**

**terminates their contracts, it must offer severance pay in accordance with the Labour Law.**

In this case, the workers made two alternative demands: 1. that the employer reinstate approximately 300 workers; and 2. if the employer does not reinstate the workers, it offer them severance pay in accordance with the Labour Law.

The employer considers that those workers who did not attend the factory to punch in their cards abandoned their employment. Consequently, it will not reinstate those workers and will not terminate their labour contracts in accordance with the Labour Law.

Therefore, the Arbitration Council will consider whether the workers indeed abandoned their jobs. If they did, are the workers entitled to an indemnity for the termination of their contracts as contemplated by the Labour Law?

According to the facts, all workers hold undetermined duration contracts.

Article 74, paragraph one of the Labour Law provides that "[t]he 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."

This has been interpreted to mean that one party to an undetermined duration contract may terminate the contract. Termination at the employer's will is considered dismissal, whilst termination by the worker is deemed resignation. In both cases, the termination must be carried out in accordance with the Labour Law *(see Arbitral Awards 09/05-Kin Tai, issue 1; 91/07-J K Forever, issue 2; and 101/07-Planet Textile)*.

According to the facts, the employer required the workers to present themselves (to punch in their cards) each week of the work suspension. If workers did not attend to punch in their cards, the employer considered that they had abandoned their employment. However, the Arbitration Council interprets Article 74 of the Labour Law to mean that a worker's intent to resign should be clear and the act of resignation must be voluntary.

In this case, the workers had to present themselves at the workplace (to punch in their cards), during the work suspension in order for the employer to determine which of the workers had resigned or abandoned their work and which were still employed. The Arbitration Council finds that this requirement is inconsistent with the law because Article 74 above stresses that resignation stems from the will of the worker.

Furthermore, Article 72(1) of Labour Law states:

> The suspension of a labour contract affects only the main obligations of the contract, that are those under which the worker has to work for the employer,

> and the employer has to pay the worker, unless there are provisions to the contrary that require the employer to pay the worker.

Based on Article 72(1), the Arbitration Council finds that a legitimate suspension of a labour contract affects the main obligations of the contract, meaning that the worker does not have to work for the employer and the employer has no obligation to pay the worker's wages. Therefore, the workers do not have to attend the factory to punch in their cards, and the employer does not have to pay the workers' wages.

Therefore, the Arbitration Council finds that it was the employer who terminated the workers' labour contracts, and that the workers did not resign from or abandon their employment. Therefore, the employer must offer the following payments provided by the Labour Law for contract termination:

**1. Indemnity for dismissal**

Article 89 of 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 Article 89, the employer is required to provide an indemnity for dismissal when it terminates an undetermined duration contract. In this case, the Arbitration Council finds that the employer terminated the workers' contracts, and therefore they are entitled to an indemnity for dismissal. The amount of the indemnity is based the workers' seniority, as set out in Article 89 of the Labour Law [see above].

**2. Damages**

Article 91 of Labour Law states:

> The termination of a labour contract without valid reasons, by either party to the contract, entitles the other party to damages.
>
> These damages are not the same as the compensation in lieu of prior notice or the dismissal indemnity.

> The worker, however, can request to be given a lump sum equal to the dismissal indemnity. In this case, he is relieved of the obligation to provide proof of damage incurred.

The Arbitration Council interprets this article to mean that when either of the parties terminates the contract unilaterally without valid reasons, the other party is entitled to damages.

In Arbitral Award 84/08-Trinunggal Komara, the Arbitration Council found that the workers were not entitled to damages because the employer had proper reasons for terminating their labour contracts *(see Arbitral Award 84/08-Trinungal Komara)*.

The facts of this case differ from those of case 84/08 because here the employer terminated the workers' labour contracts because it considered that they had abandoned their jobs after they failed to present themselves (to punch in their cards) during the work suspension either each Thursday or at least twice a month.

Therefore, the Arbitration Council finds that the employer did not have adequate reasons for terminating the workers' labour contracts.

According to Article 91 of the Labour Law, the workers have the right to demand damages in an amount equal to the dismissal indemnity. In this case, the workers did not provide evidence of the amount of damage they suffered. Thus, the Arbitration Council orders the employer to pay damages amounting to the indemnity for dismissal.

**3. Compensation in lieu of prior notice**

Article 75 of Labour Law States:

> The minimum period of a prior notice is set as follows:
>
> - Seven days, if the worker's length of continuous service is less than six months;
> - …

Article 77 of Labour Law states:

> 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 that the worker would have received during the official notice period.

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

that the worker would have received during the official notice period. In this case, the employer did not give the appropriate prior notice before terminating the workers' labour contracts. Therefore, it is required to pay compensation in lieu of prior notice as set out in Article 75 of the Labour Law, in accordance with each worker's seniority.

**4. Compensation in lieu of paid-leave**

Article 167 of Labour Law states that "[i]f 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."

Based on Article 167, the Arbitration Council finds that the workers are entitled to compensation in lieu of paid-leave on account of the employer's unilateral termination of the workers' labour contracts.

**5. The last wage which has not been paid**

Article 116, paragraph five of the Labour Law states that "[i]n the event of termination of a labour contract, wage and indemnity of any kind must be paid within forty-eight hours following the date of termination of work." Based on this article, the workers involved in this dispute are entitled to their unpaid wages.

In conclusion, the Arbitration Council orders the employer to provide the following termination payments to those workers who are members of the Local Union of FTUWKC: 1. dismissal indemnity; 2. damages; 3. compensation in lieu of prior notice; 4. compensation in lieu of paid-leave; and 5. any last wages which have not been paid.

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 pay full wages and other benefits to those workers who are members of the Local Union of FTUWKC for the two months of the work suspension, from 28 November 2008 to 27 January 2009, because the employer suspended their labour contracts without permission from the Labour Inspector.

**Issue 2:** Order the company to provide the following termination payments to those workers who are members of the Local Union of FTUWKC: 1. dismissal indemnity; 2. damages; 3. compensation in lieu of prior notice; 4. compensation in lieu of paid-leave; and 5. any last wages which have not been paid.

**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: **Huon Chundy**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....