



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល
THE ARBITRATION COUNCIL

Case number and name: 38/09-AIA

Date of award: 8 April 2009

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **You Suonty**

Arbitrator chosen by the worker party: **Tuon Siphann**

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

DISPUTANT PARTIES

Employer party:

Name: **AIA Garment Co., Ltd. (the employer)**

Address: Street 253, Toeuk Laak Village, Toeuk Laak III Commune, Tuol Kork District,
Phnom Penh

Telephone: 016 328 226

Fax: N/A

Representative: Absent

Worker party:

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

Local Union of KYFTU

Address: Street 265, Toeuk Laak Village, Toeuk Laak III Commune, Tuol Kork District,
Phnom Penh

Telephone: 012 515 406

Fax: N/A

Representative:

Mr Ong Ra

Officer 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 pay their full wages for the duration of the period without work, with backpay.
2. The workers demand that the employer provide one free meal or a 2,000 riel meal allowance for overtime work on Sundays or public holidays.
3. The workers demand that the employer provide a termination payment in accordance with the Labour Law if it closes or relocates the factory.
4. The workers demand that the employer cease transporting equipment out of the factory during the work suspension.
5. The workers demand that the employer increase the attendance bonus by US\$ 3 per month.
6. The workers demand that the employer place a physician on standby during working hours and that it keep a sufficient supply of medicine for the workers.
7. The workers demand that the employer build a day-care centre and a nursing room in the factory.
8. The workers demand that the employer back pay the attendance bonus deducted in January 2009 to 1. Pot Ly, 2. Keut Sarith, and 3. Cheang Oeurn.
9. The workers demand that the employer implement Circular No. 1930 KB on wage payment dated 24 November 2008 issued by the Ministry of Labour and Vocational Training.

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. 214 KKBV/AK/VK dated 16 March 2009 was submitted to the Secretariat of the Arbitration Council on 17 March 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: 27 March 2009 from 8:00 a.m. to 10:30 a.m.

Procedural issues:

On 26 February 2009, the Department of Labour Disputes received a complaint from KYFTU dated 5 January 2009 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 on 4 March 2009, but because the employer was absent from the session none of the nine issues were resolved. The nine non-conciliated issues were referred to the Secretariat of the Arbitration Council on 17 March 2009 via non-conciliation report No. 214 KKBV/AK/VK dated 16 March 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 nine non-conciliated issues, held on 27 March 2009 at 8:00 a.m.

The workers attended the hearing as summoned by the Arbitration Council, but the employer was absent without providing reasons. The Secretariat of Arbitration Council attempted to contact the employer but was unsuccessful. Therefore, the Arbitration Council held the hearing in the presence of the workers only.

The Arbitration Council sought further information relevant to the issues and clarified the facts and reasons surrounding the nine issues in dispute. Issues 2, 5, 6, 7, and 9 were withdrawn by the workers. Therefore, the Arbitration Council will only consider only issues 1, 3, 4, and 8 based on the evidence and reasons provided by the worker party 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:

- AIA Garment Co., Ltd. commenced operation in 1997 (according to the workers). It currently employs approximately 300 workers in total.
- There is only union at the AIA factory, the Local Union of KYFTU, which is the claimant in this case.
- The union confirmed at the hearing that it has approximately 140 members. According to the list of thumbprints submitted to the Arbitration Council, an additional 49 non-member workers have authorised it to make on their behalf the demand for termination payments in the event that the employer closes the operation.
- The Local Union of KYFTU does not hold most representative status (MRS).

Issue 1: The workers demand that the employer pay their full wages for the duration of the period without work, with backpay.

- The workers demand that the employer pay full wages for the duration of the period of no work because it did not legally suspend their labour contracts in accordance with the Labour Law. The work suspension was illegal because the employer neither informed nor got approval from the Labour Inspector for the suspension.
- At the hearing, the workers stated that the employer had no work for them to do for approximately 15 days commencing in January 2009. Sometimes, it was only when the workers arrived at the factory that the employer told them there was no work for them to do and that they should go home. The workers did not explain the reason for this work suspension.
- In February 2009, the employer had even less work for the workers to do. It paid their full wages only when it had work for them to do. On the days without work, the employer only paid half of their wages.
- The workers confirm that the employer has already paid [part of] their wages for the months of January and February 2009. The workers demand payment of the other half of their wages for the periods in which there was no work, when they were only paid half of their wages.
- The workers demand full wages for the duration of the subsequent work suspensions which took place without permission from the Ministry of Labour and Vocational Training, that is, from 1 March to 17 March 2009, when the employer paid them only US\$ 8, and from 17 March to 18 April 2009, when the employer again offered to pay US\$ 8 if they attended the factory to punch in three times per month, on each

Sunday. However, none of the workers attended the factory to punch in, so the employer did not pay the US\$ 8.

- The workers state that due to the work suspension, they have all found work in other factories except for Pot Ly, a machinist, who is still working for the employer. Even though the workers are now working at other factories, they still demand back payment of their full wages and they are willing to return to work at the AIA factory if there is work for them, because they have worked there for years.
- There was no response from the employer because it was absent from the hearing.

Issue 3: The workers demand that the employer provide termination payments in accordance with the Labour Law if it closes down or relocates the factory.

- In this case, the workers demand that the employer provide termination payments in accordance with the Labour Law if it closes the operation, but they do not demand termination payments in the event that it relocates because the employer has not mentioned relocating, nor have the workers heard of any relocation.
- At the hearing, the workers stated that they want to know for sure whether the employer will permanently stop or continue operating the factory, because their contracts are currently suspended without permission from the Ministry of Labour and Vocational Training.
- The workers state that in early March 2009, the employer sent Seak Leng, its senior administration officer, to a meeting with the workers and the KYFTU at which he announced that the employer was unable to continue operating the factory. However, the next day the company director Ta Yov informed the workers that the factory would not close down but there would be a work suspension for a period of time.
- The workers state that despite working at other factories, they maintain their demand for termination payments in accordance with the Labour Law if the factory closes down because they have worked there for many years.
- There was no response from the employer because it was absent from the hearing.

Issue 4: The workers demand that the employer cease transporting its equipment out of the factory during the period of work suspension.

- The workers demand that the employer cease transporting its equipment out of the factory during the period of work suspension. They state that the employer removed 12 sewing machines and one generator in February, and one button-attaching machine in March 2009.

- The workers demand that the employer stop removing equipment from the factory because they are afraid that they will not have enough machines to use when they return to work. They did not explain the reasons for the employer's removal of equipment.
- There was no response from the employer because it was absent from the hearing.

Issue 8: The workers demand that the employer back pay the attendance bonus deducted in January 2009 to 1. Pot Ly, 2. Keut Sarith, and 3. Cheang Ourn.

- Generally, the employer pays the workers' wages on the tenth of the month. The employer paid the wages for December 2008 on 12 January 2009, except for the wages of Pot Ly, Keut Sarith and Cheang Ourn, which were paid on 13 January 2009 because it did not have enough money to pay their wages earlier.
- The workers argued at the hearing that on 13 January 2009 at 12:00 p.m., the three workers went to the office in order to get their wages but the accountant told them that the employer did not have money to pay them. Consequently, the workers were angry and disappointed and refused to work that afternoon. They just sat quietly.
- The workers state that the three workers worked regularly in December 2008. However, the employer deducted their US\$ 5 attendance bonus for December 2008 because they did not work on the afternoon of 13 January 2009. Therefore, they demand that the employer pay their attendance bonus for December 2008, which was deducted in January 2009.

REASONS FOR DECISION

In this case the employer did not attend the hearing as summoned by the Arbitration Council and did not provide any reasons for its non-attendance. On the hearing date, the Secretariat of the Arbitration Council telephoned the employer but could not make contact.

Therefore, the Arbitration Council will consider whether it is entitled to conduct a hearing in the absence of the employer.

Clause 21 of *Prakas* No. 99/04 on the Arbitration Council states:

In the case that one of the parties, although duly invited, fails to appear before the arbitration panel without showing good cause, the arbitration panel may proceed in the absence of that party or may terminate the arbitral proceedings by means of an award.

In this case, only the representative of the Local Union of KYFTU attended the hearing. The employer did not appear despite being notified by the Arbitration Council, nor did it provide a reason for its failure to attend.

Therefore, the Arbitration Council conducted the hearing with the workers' representative in the absence of the employer, in order to decide the case referred to it and to issue an Arbitral Award based on evidence and clarifications provided at the hearing by the union (*see Arbitral Awards 53/04-Kuong Hong; 63/04-Shine Well; and 06/08-Kingsland*).

Issue 1: The workers demand that the employer pay their full wages for the duration of the period without work, with backpay.

The workers demand in this case that the employer pay full wages for the duration of the work suspension. Therefore, the Arbitration Council will consider whether the employer suspended the workers' labour contracts in accordance with the Labour Law.

According to the Labour Law, the suspension of a labour contract [in cases of economic or other difficulties] must be carried out in accordance with Article 71(11):

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 should not exceed two months and shall be under the control of the Labour Inspector.

Article 72(1) of the 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.

The Arbitration Council considers that the above article of the Labour Law allows the employer to suspend the workers' labour contracts as long as it notifies the Labour Inspector of the reason for and the period of the suspension. Generally, the employer is obliged to inform the Labour Inspector because the Labour Inspector's control and approval is required to ensure that the employer follows the law and that it is in fact facing economic difficulties. Therefore, if the employer suspends the labour contracts in accordance with the Labour Law, it is not required to pay the workers' wages. However, if it does not legally suspend the labour contracts, it is obliged to pay full wages to the workers even if they do not have any work to do.

In previous cases, the Arbitration Council has ruled that if a labour contract is suspended pursuant to the Labour Law as set out in Article 71(11), the workers are not paid for the duration of the suspension. However, in cases where the employer does not have

work for the workers to do and it does not suspend their labour contracts in accordance with the Labour Law, it has an obligation to pay their full wages (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 & 2; 53/08-Yung Wah (Branch 1), issue 1; and 27/08-Archid, issue 6*).

In this case, the workers state that the employer did not inform the Labour Inspector of the suspension, nor did it obtain a letter of approval from the Labour Inspector during the work suspensions from January to April 2009. In January 2009, the employer had work for them on approximately 15 days. Sometimes, when the workers got to the factory the employer would tell them to go home because there was no work for them to do. In February 2009, there was work for them on less than 15 days. It paid the workers their full wages on the days that it had work for them, but only half their wages on days when it did not have work. In March and April 2009, the employer again suspended the workers' labour contracts without permission from the Ministry of Labour and Vocational Training. The first suspension took place from 1 March to 17 March, when the workers were paid only US\$ 8, and the second took place from 17 March to 18 April 2009, when the workers were again offered US\$ 8. Therefore, the Arbitration Council finds that the employer did not suspend the workers' labour contracts in accordance with the Labour Law.

Therefore, the Arbitration Council considers that even though the employer paid full wages on the days it had work for the workers to do and half when it did not have work in January and February 2009, the suspension was unlawful. With regard to the further suspensions in March and April 2009 when the employer offered the workers US\$ 8, the Arbitration Council considers that the employer must suspend the workers' labour contracts in accordance with Article 71(11) of the Labour Law when it does not have work for the workers to perform. If the employer fails to suspend the labour contracts in accordance with Article 71(11) of the Labour Law, it has an obligation to pay the workers their full wages.

Hence, the Arbitration Council orders the employer to pay the workers additional wages to constitute full wages for the days it had no work from January to April 2009.

Issue 3: The workers demand that the employer provide termination payments in accordance with the Labour Law if it closes down or relocates the factory.

In this case, the workers only demand that the employer pay them termination payments in accordance with the Labour Law if it closes down the factory.

Therefore, the Arbitration Council must consider whether or not the factory will close down.

At the hearing, the workers stated that they want definite confirmation of whether or not the employer will close the factory in the future because in early March 2009 the employer sent Seak Leng, its senior administration officer, to a meeting with the workers and the KYFTU. At the meeting he stated that the employer was unable to continue operating the factory. However, the next day the company director Ta Yov informed the workers that the factory would not be closed down but their labour contracts would be suspended for a period of time, i.e. from 1 March to 17 March 2009, when the employer would offer to pay only US\$ 8, and again from 17 March to 18 April 2009, when it would offer to pay them US\$ 8 if they punched in three times over the month, each Sunday. Thus, what the workers wanted to know was whether the factory would close in the future, which is unpredictable.

Therefore, the Arbitration Council considers that the workers' demand that the employer provide termination payments if it closes down in the future is a future claim. The Arbitration Council considers that it cannot find any facts or evidence enabling it to make a decision regarding a claim which does not yet exist.

In previous cases containing future claims, the Arbitration Council has explained that "the Arbitration Council was created to resolve existing labour disputes and not to resolve disputes which have not yet occurred" (see *Arbitral Awards 10/03-Jacqsintex, issue 2; 14/06-Zheng Yong, issue 2; 42/07-South Bay, issue 3; 58/07-8 Star Sportswear, issue 1; 122/07-Genuine Garment, issue 4; 27/08-Archid, issue 6; 53/08-Yung Wah (Branch 1), issue 4; and 136/08-Supertex, issue 2*).

The Arbitration Council applies the above interpretation in this case, because no one can accurately predict what might happen in the future, whether or not the employer will close down the factory, when it might happen, and how many workers will not be paid termination payments if the factory ceases to exist. Moreover, according to the findings of fact, the company director Ta Yov informed the workers that the factory would not close down, but the workers' contracts would be suspended for a period of time.

Therefore, the Arbitration Council declines to consider the demand that the employer provide termination payments if it closes down the factory in the future.

Issue 4: The workers demand that the employer cease transporting its equipment out of the factory during the period of work suspension.

The workers stated at the hearing that the employer had removed 12 sewing machines and one generator from the factory in February 2009 and one button-attaching machine in March. Therefore, the workers are afraid that they will not have enough machines to work with when they return to work.

Article 2 of Labour Law states that “[e]very 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.”

In previous cases, the Arbitration Council has interpreted Article 2 to mean that the employer has the right to supervise and direct the enterprise as long as this right is exercised both lawfully and reasonably (see *Arbitral Awards 62/06-Quicksew, issue 5; 108/06-Trinunggal Komara, issue 1; 33/07-Goldfame, issue 3; 106/07-M & V (Branch 3), issue 3; 84/08-Trinunggal Komara, issue 1; and 08/09-Global Apparels*)

The Arbitration Council applies this interpretation in this case, that is, the employer has the right to supervise and direct the enterprise, including its assets, provided that this right is exercised lawfully and reasonably.

The Arbitration Council considers that equipment such as sewing machines, generators, button-attaching machines, etc. are the employer’s assets. Therefore, the employer has the legal right to manage these assets, including the right to relocate them from the factory. Furthermore, the employer has the right to manage its assets in order to make the production line run smoothly. The Arbitration Council considers that the workers do not have sufficient evidence proving that the employer will not have enough machines for them to perform their work when they return to work. On the contrary; based on the findings of fact, the employer removed 12 sewing machines and one generator in February and one button-attaching machine in March. The Arbitration Council considers that this is a small number of machines compared with the 300 workers at the factory. Moreover, the workers did not explain why the employer has transported the machines out of the factory.

Generally, the Arbitration Council will reject a demand when there is insufficient evidence to support it (see *Arbitral Awards 63/04-Shine Well, issue 4; 99/06-South Bay, issue 5; 74/07-Global Apparels, issue 2; 94/07-Fortune Garment, issues 6 & 8; 101/08-GDM, issues 1 & 2; and 108/08-Hugo International, issue 4*).

In this case, the Arbitration Council does not have any basis on which to consider the workers’ claim that the employer will not have enough machines for them to use when they return to work.

Therefore, the Arbitration Council rejects the workers’ demand that the employer cease transporting its equipment out of the factory during the period of work suspension.

Issue 8: The workers demand that the employer back pay the attendance bonus deducted in January 2009 to 1. Pot Ly, 2. Keut Sarith, and 3. Cheang Oeurn.

The workers argued at the hearing that Pot Ly, Keut Sarith, and Cheang Oeurn attended work regularly in December 2008. From 12:00 p.m. on 13 January 2009, after the employer's accountant informed them that the employer did not have enough money to pay their wages, they were angry and disappointed and sat quietly without doing any work.

Therefore, the Arbitration Council will consider whether the employer was permitted to deduct the workers' attendance bonuses.

Point 3 of Notification No. 745 KKBV dated 23 October 2006 provides that "Benefits to which workers are entitled in accordance with points 3, 4, 5, and 6 of Notification No. 017 SKBY dated 18 July 2000 shall be retained."

Point 3 of Notification No. 017 SKBY dated 18 July 2000: "workers who attend work regularly in accordance with the number of working days in each month will receive a bonus of at least US\$ 5 per month."

In previous cases, the Arbitration Council has defined "attendance bonus" as a bonus to motivate or reward those workers who attend work regularly for a full month without taking leave for an invalid reason (*see Arbitral Awards 62/04-Ecent, issue 1; 63/04-Shine Well, issue 5; and 15/05-Wing Tai (Branch 2), issue 1*).

Based on the above findings of fact, Pot Ly, Keut Sarith, and Cheang Oeurn attended work regularly in December 2008, so they should receive the US\$ 5 attendance bonus for December 2008.

Therefore, the Arbitration Council considers that that the employer's act of deducting the workers' US\$ 5 attendance bonus for December 2008 is inconsistent with the law.

Clause 34 of *Prakas* No. 099 SKBY on the Arbitration Council, dated 21 April 2004, states that "[w]ithin the limitations of the Labour Law and this *Prakas*, [the Arbitration Council] has the power and authority to provide any civil remedy or relief which it deems just and fair, including...orders to cease immediately any other illegal or prohibited conduct..."

Therefore, based on the above facts and the interpretation of the *Prakas*, the Arbitration Council orders the employer to back pay the attendance bonus for December 2008 to Pot Ly, Keut Sarith, and Cheang Oeurn, which it deducted in January 2009.

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 the workers additional wages to constitute full wages for the days it had no work from January to April 2009.

Issue 3: Decline to consider the demand that the employer provide termination payments if it closes down the factory in the future.

Issue 4: Reject the demand that the employer cease transporting its equipment out of the factory during the period of work suspension.

Issue 8: Order the employer to back pay the attendance bonus for December 2008 to Pot Ly, Keut Sarith, and Cheang Oeurn, which it deducted in January 2009.

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: **You Suonty**

Signature:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: