



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

**ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល**

**THE ARBITRATION COUNCIL**

**Case number and name: 58/11-United Apparel**

**Date of award: 21 June 2011**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRAL PANEL**

Arbitrator chosen by the employer party: **Mar Samborana**

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

Chair Arbitrator (chosen by the two Arbitrators): **Kong Phallack**

#### **DISPUTANT PARTIES**

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

Name: **United Apparel Cambodia Inc. (the employer)**

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

Telephone: 077 777 811 Fax: N/A

Representatives:

1. Mr Seng Tekhout Director
2. Mr Ban Sophal Assistant to the Director

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

Name: **Coalition of Cambodian Apparel Worker Democratic Unions (C.CAWDU)**

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

Telephone: 089 960 860 Fax: N/A

Representatives:

1. Mr Mou Chheang Legal officer of C.CAWDU
2. Mr Sat Yout Legal officer of C.CAWDU
3. Mr Thai Sros Legal officer of C.CAWDU
4. Mr Hun Narin Candidate for leadership of the Local Union of C.CAWDU

## ISSUES IN DISPUTE

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

1. The workers demand that the employer refrain from discriminating against the local union and reinstate Hun Narin, a candidate for leadership of the local union, to his former position and provide him with back pay from the date of his dismissal to the date of reinstatement. The employer denies the allegation of union discrimination and refuses to reinstate Hun Narin due to his poor performance.
2. The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of leave taken for personal commitments. The employer argues that it is complying with Notification No. 041/11 KB/SCN dated 7 March 2011.
3. The workers demand that the employer pay 50% of three months' wages to pregnant workers prior to their taking maternity leave. The employer argues that it is complying with the Labour Law.
4. The workers demand that the employer refrain from employing casual workers. The employer states that its practice is not to employ casual workers for longer than two months.

## 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. 136 dated 7 June 2011 (Ninth 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. 499 KB/RK/VK dated 12 May 2011 was submitted to the Secretariat of the Arbitration Council on 18 May 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:** 31 May 2011 at 2:00 p.m.

### **Procedural issues:**

On 25 March 2010, the Department of Labour Disputes received a complaint from C.CAWDU 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 dispute and the last conciliation session was held on 29 April 2011. Two of the six issues were resolved at the session. The four non-conciliated issues were referred to the Secretariat of the Arbitration Council on 18 May 2011, via non-conciliation report No. 499 KB/RK/VK dated 12 May 2011.

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 31 May 2011 at 2:00 p.m. Both parties were present at the hearing.

The Arbitration Council conducted a further conciliation of the four issues, resulting in issues 2 and 4 being resolved.

As both parties are signatories to the Memorandum of Understanding On Improving Industrial Relations in the Garment Industry (MoU) dated 28 September 2010, the Arbitration Council will divide the issues into two types: rights disputes and interests disputes. In accordance with the MoU, both parties have agreed to choose binding arbitration of rights disputes. However, the parties are able to choose non-binding arbitration of interests disputes and can object to an arbitral award on such disputes.

Such an objection will not affect the parties' obligation to implement an award on rights disputes in accordance with the MoU.

The Arbitration Council will consider the issues in dispute based on the evidence and reasons below.

## **EVIDENCE**

**Witnesses and Experts:** N/A

**Documents, Exhibits, and other evidence considered by the Arbitration Council:**

**A. Provided by the employer party:**

1. Letter from the Ministry of Environment to the director of United Apparel Cambodia Inc. regarding a request to change the name of the factory, No. 450 dated 6 August 2010.
2. Declaration of the opening of the enterprise, dated 10 June 2010.
3. Certificate of commercial registration, No. 07/10 dated 5 July 2010.
4. Letter from the Council for the Development of Cambodia to the director of United Apparel Cambodia Inc. regarding a proposal to invest in the establishment of a garment factory, No.1372/09 dated 29 June 2009.
5. Letter from the Ministry of Commerce to the chairman of United Apparel Cambodia Inc., No. 2491 dated 17 June 2009.
6. Operational certificate of the factory, No. 031 dated 13 July 2009.

7. Certificate of value added tax, No. 118 dated 1 June 2009.
8. Certificate of membership of the Garment Manufacturers' Association in Cambodia, No. 468.
9. Company statute, dated 11 June 2009.
10. Internal Work Rules of the employer, dated 2 September 2010.
11. Membership withdrawal letter from Hun Narin, dated 5 March 2011.
12. Resignation letter of Hun Narin.
13. Document detailing the method of calculating 50% of wages for maternity pay.
14. Maternity leave form of Mang Srey.
15. Doctor's certificate for Mang Srey, dated 11 March 2011.
16. Ultrasound examination certificate for Mang Srey, dated 10 March 2011.

B. Provided by the worker party:

1. Brief statement on the labour dispute, No. 053/11 dated 3 June 2011.
2. Letter from C.CAWDU regarding a review of documents, dated 3 June 2011.
3. *Prakas* on The Representative of Professional Organisations of Workers at the Enterprise or Establishment Level and the Right to Collective Bargaining for the Conclusion of Collective Agreements at that Level, No. 305 dated 22 November 2001, issued by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation.
4. Letter from C.CAWDU notifying the employer of the election for the local union, No. 042/11 dated 2 June 2011.
5. Letter from C.CAWDU demanding that the employer reinstate Hun Narin, No. 022/11 dated 7 March 2011.
6. Authorisation letter from workers at the factory for the president of C.CAWDU.

C. Provided by the Ministry of Labour and Vocational Training:

1. Report on collective labour dispute resolution at United Apparel Cambodia Inc., No. 499 KB/RK/VK, dated 12 May 2011.
2. Record of collective labour dispute resolution at United Apparel Cambodia Inc., dated 29 April 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend the hearing addressed to the employer, No. 338 KB/AK/VK/LKA dated 24 May 2011.
2. Notice to attend the hearing addressed to the workers, No. 339 KB/AK/VK/LKA dated 24 May 2011.
3. Agreement on binding arbitration of rights disputes, dated 31 May 2011.

## **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:**

- United Apparel Cambodia Inc., established in 2009, is a garment and textile factory employing 3,700 workers.
- There are two registered unions at the factory: the Local Union of Trade Union Federation for Increasing Khmer Employees Lifestyle (TUFIKEL) and the Local Union of Trade Union Federation Cambodia Workers Power (TUFCWP).
- The Local Union of C.CAWDU has not been formally registered. According to the authorisation letters submitted to the Arbitration Council, 73 workers have authorised C.CAWDU to represent them in this case.

### **Issue 1: The workers demand that the employer refrain from discriminating against the Local Union and reinstate Hun Narin, a candidate for leadership of the Local Union, to his former position and provide him with back pay from the date of his dismissal to the date of reinstatement.**

- Hun Narin commenced work on 27 December 2008 as a group leader in the cutting section. He held successive three month fixed duration contracts. His final three month contract was effective from 1 March to 31 May 2011. Under his final contract, the employer agreed to provide him with an additional US\$ 10 per month.
- On 5 May 2011, the employer prematurely terminated his contract due to misconduct committed by members of his group. The employer provided him with severance pay of US\$ 693.63 and his wages for February 2011.
- In this case, the employer prematurely terminated his contract due to misconduct. The employer states that Hun Narin committed misconduct involving incorrect cutting on three occasions whilst leading his group, in April and July 2010 and April 2011. More specifically, [the employer alleges that] he was incompetent in leading his group.
- The employer did not provide Hun Narin with verbal or written warnings in relation to the abovementioned misconduct.
- The workers state that Hun Narin was unaware of incorrect cutting by his group members. He was not informed of it by the head of the cutting section. The workers

contend that all products are endorsed by the Chinese supervisor and the general manager after being cut.

- According to the workers' brief statement, the premature termination of his contract was the result of union discrimination. At the hearing, the workers stated that they notified the employer of the candidates for leadership of the Local Union of C.CAWDU on 2 March 2011 at 2:20 p.m. via the chief security guard Phany, who accepted the notification but did not acknowledge its receipt. The workers add that they did not try to notify the employer through other means. The employer denies any knowledge of the notification.
- Hun Narin is among the five candidates whose names appear on the notification sent to the employer.
- The workers contend that upon being notified of the candidacy for leadership of the Local Union of C.CAWDU, the employer held a meeting with the five candidates and suggested that they withdraw their membership from the Local Union of C.CAWDU. The employer did not dismiss four of the candidates after they withdrew their membership of the union, but prematurely terminated the contract of Hun Narin, who refused to follow the employer's suggestion. The employer refutes the workers' contention, arguing that the group leader Hun Narin and another Chinese supervisor were dismissed because they were responsible for the excessive incorrect cutting of cloth by their group members.

**Issue 3: The workers demand that the employer pay 50% of three months' wages to pregnant workers prior to their taking maternity leave.**

- Approximately 70 female workers are on maternity leave each month.
- The employer's practice is to provide maternity pay calculated by dividing the previous 12 months' wages by 12 and 2. The employer provides maternity pay on a monthly basis. If a payday falls on a public holiday, the employer pays bonuses to workers on maternity leave even though they do not attend work.
- The employer refuses to accommodate the workers' demand because its method of calculating maternity pay has been integrated into its accounting system and it is not possible to modify the system. The employer contends that if it provides them with three months' wages [all at once], workers will lose bonuses paid to them when a payday falls on a public holiday.
- The workers maintain their demand for the three months of maternity pay to be paid at once because workers need the payment to meet the expenses of child delivery.

They assert that the employer can pay the bonuses that it provides when a payday falls on a public holiday without this affecting its accounting system.

### **REASONS FOR DECISION**

Before determining the issues in this case, the Arbitration Council will consider whether the demands give rise to interests disputes or rights disputes.

In previous arbitral awards, the Arbitration Council has ruled that “a rights dispute is a dispute concerning entitlements in the law, an agreement, or a collective agreement” (see *Arbitral Awards 05/11-M & V (Branch 1), reasons for decision, issues 1 and 5; 13/11-Gold Kamvimex, reasons for decision, issues 1 and 2; 14/11-GHG, reasons for decision, issue 4; and 37/11-ASD, reasons for decision, issue 1*).

The Arbitration Council applies the abovementioned ruling in this case; a rights dispute is a dispute concerning entitlements in the law, an agreement, or a collective agreement. As the workers’ demands, which concern a claim for reinstatement and payment of maternity leave entitlements prior to taking leave, arise out of employment contracts and the Labour Law, the Arbitration Council considers that the demands give rise to a rights dispute.

**Issue 1: The workers demand that the employer refrain from discriminating against the Local Union and reinstate Hun Narin, a candidate for leadership of the Local Union, to his former position and provide him with back pay from the date of his dismissal to the date of reinstatement.**

Before considering this demand, the Arbitration Council will consider what type of contract Hun Narin held.

Article 67(2) of the Labour Law states that “[t]he labour contract signed with...consent for a specific duration cannot be for a period longer than two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years.”

In previous arbitral awards, the Arbitration Council has interpreted Article 67(2) to mean that “a fixed duration contract will become an undetermined duration contract if the renewal of the contract makes the total term of the initial contract and the renewal more than two years” (see *Arbitral Awards 10/03-Jacqsintex, reasons for decision, issue 1; 36/06-Mondotex, reasons for decision, issue 2; and 57/06-Evergreen, reasons for decision, issue 3*).

According to the facts, Hun Narin held successive three month contracts. He commenced work on 27 December 2008 and his final contract expired on 28 February 2011. Based on [the dates of] his contracts, he served at the factory for two years and one month.

Thus, the Arbitration Council considers that Hun Narin held an undetermined duration contract.

Article 74 of the Labour Law states:

The 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.

However, no layoff can be taken without a valid reason relating to the worker's aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or group.

Based on this article, the Arbitration Council considers that an employer is entitled to dismiss workers at will by giving them notice with reasonable grounds regarding their aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment, or group (*see Arbitral Awards 60/08-PCCS, reasons for decision, issue 6 and 131/10-Leader's Industrial, reasons for decision, issue 1*).

According to the facts, Hun Narin led his group members in cutting incorrectly three times, but the employer did not inform, educate, or warn him. The Arbitration Council considers that if Hun Narin was incompetent in leading his group, the employer should have informed or educated him before dismissing him, unless he committed serious misconduct. The Internal Work Rules do not contain specific disciplinary measures for cases of misconduct by workers. Thus, the termination of Hun Narin's contract on the basis of misconduct was not legitimate.

Clause 34 of *Prakas* No. 099 states:

In matters referred to the arbitration panel, the panel shall have the power and authority to fully remedy [any violation of provisions in the Labour Law, regulations implemented under the Labour Law, collective bargaining agreements or other obligations arising from the professional relationship between employer and employee. Within the limitations of the Labour Law and this *Prakas*, it has the power and authority to provide any civil remedy or relief which it deems just and fair, including:]

A. Orders to reinstate dismissed employees to their former or any other appropriate position;

In this case, the Arbitration Council orders the employer to reinstate Hun Narin and provide him with back pay from the date of his dismissal to the date of reinstatement.



According to the facts, Hun Narin has been given a termination payment of three months' wages. If the employer reinstates him, it can reclaim the termination payment that has already been paid to him.

If the employer refuses to reinstate him, it can terminate his contract by providing a termination payment in accordance with [the provisions of the Labour Law governing] undetermined duration contracts as follows:

### **1. Indemnity for dismissal**

Article 89 of the Labour Law states:

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

...

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. If the worker's length of service is longer than one year, time fractions of service of six months or more shall be counted as an entire year.

Thus, workers are entitled to an indemnity for dismissal in accordance with their seniority.

As the employer has provided Hun Narin with severance pay equal to 5% of his wages upon termination of each successive three month contract, the employer can pay the difference between the severance pay that has already been paid to him over the past two years and the indemnity for dismissal payable in accordance with [the provisions in the Labour Law governing] undetermined duration contracts.

### **2. Damages**

Article 91 of the 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.

Based on this article, a worker is entitled to damages upon termination of their contract by their employer without valid reasons.

In conclusion, the Arbitration Council orders the employer to pay damages equal to the indemnity for dismissal to Hun Narin.

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

Article 75 of the Labour Law states:

The minimum period of prior notice is set as follows:

...

- Fifteen days, if the worker's length of continuous service is from six months to two years;...

Article 77 of the 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 [in] 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 [in] 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, if the employer failed to give prior notice or to provide proper compensation at the termination of Hun Narin's contract, the employer must provide him with compensation in lieu of prior notice equal to 15 days' wages.

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

Article 167 of the Labour Law provides 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 this article, a worker is entitled to payment in lieu of annual leave if their contract is terminated or expires. In this case, if the worker's annual leave has not been exhausted and the employer has not yet provided payment in lieu of unused annual leave, it must make this payment at the rate of 18 days per year.

## 5. Outstanding wages

Article 116 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, a worker is entitled to their outstanding wages.

### [Conclusion]

According to the facts, Hun Narin has already been paid a termination payment. Thus, he can repay the termination payment to the employer and the employer can make a new termination payment in accordance with [the provisions of the Labour Law relating to] undetermined duration contracts as set out above.

The workers contend that the premature termination of Hun Narin’s contract was the result of union discrimination. The Arbitration Council will consider whether union discrimination exists [in this case].

Article 12 of the Labour Law states:

Except for the provisions fully expressing under this law, or in any other legislative text or regulation protecting women and children...no employer shall consider on account of:

...

- membership of workers' union or the exercise of union activities.

to be the invocation in order to make a decision on:

...

- discipline or termination of [an] employment contract.

Article 279 of the Labour Law states:

Employers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal.

According to the facts, the workers contend that after C.CAWDU notified the employer of the candidates for leadership of the Local Union of C.CAWDU via Phany, the chief security guard, the employer held a meeting with Hun Narin and the other four candidates. Two days later, the employer dismissed Hun Narin. The employer denies the workers’ contention.

In relation to claims of union discrimination, the Arbitration Council considers the arguments made at the hearing and examines evidence relevant to the case in order to determine whether union discrimination was the basis of non-renewal of a contract (see *Arbitral Award 40/09-Goldfame, reasons for decision, issue 1*).

Based on the facts, the Arbitration Council finds that the employer denies the workers' contention that they notified the employer of the candidates for leadership of the Local Union of C.CAWDU and that the employer held a meeting with the five candidates.

At the hearing, the workers failed to prove that the employer received the notification of candidature, and failed to prove that they attempted to provide the notification to the employer by other admissible means in accordance with Clause 3 of *Prakas* No. 305; for example, through local authorities, post, the employer's fax, or through the head of administration, who can acknowledge receipt of the notification.

Clause 3 of *Prakas* No. 305 dated 22 November 2001 provides that: "[t]he union shall notify the employer of the worker's candidacy through all reliable means."

The Arbitration Council rejects the workers' claim of union discrimination due to insufficient evidence. The Arbitration Council considers that the premature termination did not involve union discrimination.

In conclusion, the Arbitration Council orders the employer to reinstate Hun Narin and provide him with back pay from the date of his dismissal to the date of reinstatement. If the employer refuses to reinstate him, it must calculate a termination payment (including outstanding wages, compensation in lieu of prior notice, payment in lieu of annual leave, indemnity for dismissal, and damages equal to the indemnity for dismissal as explained above) in accordance with [the provisions in the Labour Law governing] undetermined duration contracts, [taking into account the period] from the date his commencement to the date of dismissal.

**Issue 3: The workers demand that the employer pay 50% of three months' wages to pregnant workers prior to their taking maternity leave.**

Article 183, paragraph one of the Labour Law states that "[d]uring the maternity leave as stipulated in the preceding article, women are entitled to half of their wage, including their perquisites, paid by the employer."

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."

In a previous arbitral awards, the Arbitration Council has offered a detailed interpretation of Article 115 of the Labour Law and has ruled that maternity pay must be paid

to pregnant workers prior to their taking maternity leave, on the grounds that maternity payments should not be made on those days workers are entitled to [be absent on] maternity leave; they must be made one day prior to their taking the leave (*see Arbitral Award 91/07-J K Forever, reasons for decision, issue 3*).

The Arbitration Council applies the abovementioned interpretation and ruling in this case.

According to the facts, the employer provides maternity payments to female workers on a monthly basis because its accounting system makes it impossible for the employer to make three months' worth of payments at once. Based on the Labour Law and the Council's previous rulings, the Arbitration Council considers that the employer is obliged to pay the entire three month maternity payment before female workers commence maternity leave.

In conclusion, the Arbitration Council orders the employer to pay the entire three month maternity payment before female workers commence 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 Hun Narin and provide him with back pay from the date of dismissal to the date of reinstatement. If the employer refuses to reinstate him, it must calculate a termination payment in accordance with [the provisions of the Labour Law governing] undetermined duration contracts.

**Issue 3:** Order the employer to pay the entire three month maternity payment before female workers commence 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: **Mar Samborana**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....