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Preliminary Report: Worker Rights Consortium Inquiry into Alleged Labor Rights Violations at Rising Sun Kenya EPZ (Kenya)

Abstract

Preliminary report detailing alleged labor rights violations at a textiles factory in Kenya, a producer of goods for Steve and Barry's University Sportswear.

Keywords

Assessment, Codes, Compliance, Conduct, Consortium, Corporate, Catherwood, Cornell, Economic, Factory, Free, Global, Globalization, Globalisation, Human, ILR, Industrial, Inquiry, International, Kenya, Labor, Labour, Legislation, Library, Monitoring, Preliminary, Portal, Relations, Report, Rights, School, Rising Sun Kenya EPZ, Trade, University, Violations, Work, Workers, Workplace, WRC



WORKER RIGHTS CONSORTIUM

**Preliminary Report: Worker Rights Consortium Inquiry into
Alleged Labor Rights Violations at Rising Sun Kenya EPZ
(Kenya)**

November 13, 2006

I. Introduction

This preliminary report reviews the WRC's findings with respect to code of conduct violations at an apparel facility known as Rising Sun Kenya EPZ (hereafter, referred to as "Rising Sun"). The factory is located in the Athi River export processing zone on the outskirts of Nairobi, Kenya. Rising Sun is a producer of goods for Steve and Barry's University Sportswear (through a subcontract relationship from another facility in the same zone known as Rolex Apparel) and for Jones Apparel Group under the labels Gloria Vanderbilt and Erika, among other brands.

The WRC undertook an investigation of the facility in response to complaints from individual workers and from the labor union that represents workers at the facility – the Tailors and Textile Workers Union of Kenya (TTWU) – regarding alleged code of conduct violations. Substantial, credible evidence supports the conclusion that serious code of conduct violations have occurred. Of greatest concern, the facility has conducted an unlawful mass firing of roughly 1,270 workers, carried out in early June of this year in response to protests by workers concerning working conditions in the factory, and has refused to pay legally mandated terminal compensation and back pay to these workers, with the amount owed totaling more than \$550,000. Thus far, there has been no progress in correcting the violations in this case; urgent remediation is necessary if irreparable harm to worker rights is to be averted.

The WRC has communicated its findings in this case to the two major brands present in the factory during and after the mass termination: Steve and Barry's University Sportswear and Jones Apparel Group. As discussed in greater depth below, while both companies have asked Rising Sun to correct the violations, the efforts by the brands thus far have not been sufficient to compel effective remediation.

II. Sources of Evidence and Allegations

The WRC's findings in this case are based on the following sources of evidence:

- Individual and group interviews with roughly 50 current and former Rising Sun workers
- Meetings with representatives of the Export Processing Zone Authority of Kenya (EPZA)
- Meetings with representatives of the Kenyan Ministry of Labor
- Meetings with representatives of the Tailors and Textile Workers Union of Kenya (TTWU)
- A review of relevant documentation, including proceedings of the Ministry of Labor and Industrial Court of Kenya
- Gathering and analysis of workers' individual employment histories and entitlements under Kenyan law to terminal compensation

It bears noting that Rising Sun has refused to cooperate with the WRC's inquiry. It has also refused to cooperate with an investigation carried out by the non-governmental organization Africa Now, which was contracted by Jones Apparel Group to investigate the case.

This report covers the following alleged code of conduct violations: that Rising Sun carried out an unlawful mass termination of Rising Sun workers; that the company has failed to pay legally mandated compensation to these workers; that the company has unlawfully engaged replacement workers on a casual employment status; that the company has violated a court order concerning removal of machinery from the facility prior to the resolution of the dispute; and that Rising Sun workers have been the subject of illegal blacklisting by other employers in the zone at the behest of Rising Sun management.

III. Findings

Unlawful Terminations

The allegations of unlawful terminations concern a series of events that occurred between May 30 and June 1, 2006. The following is an accurate chronological review of these events, based on evidence gathered by WRC investigators:

- On May 30, a Rising Sun production manager assaulted a female employee after an order was not completed on time. Workers who witnessed the event stated that the manager yelled at the worker, using abusive and sexually demeaning language, threw garments at the worker's face, and hit the worker with garments. The worker and union shop steward immediately brought a complaint to company management, then to the Export Processing Zone Authority, and then to the police. The production manager was brought to the police station that afternoon, though no charges were ultimately brought

against him.¹

- On May 31, the same production manager addressed the workforce using degrading language, gloating about the lack of sanction applied to him by the police for the events of the previous day and threatening to fire all of the facility's workers because of their low productivity. Following these statements, protest ensued throughout the factory and production slowed for a period of hours. Workers later testified that the protest was triggered by the behavior of the production manager, as well longer-standing grievances regarding such issues as late payment of wages, a problem which had occurred repeatedly throughout the year according to numerous workers and the EZPA officials. Later on this day, factory management called the police, who in combination with private security guards employed by Rising Sun, forcibly evicted the workers from the facility.
- On June 1, when Rising Sun workers returned to work, the factory gates were locked and there were signs posted stating that all "unionized" workers had been summarily dismissed. Neither on this day nor subsequently did the company present dismissal papers or allege wrongdoing against any individual worker, nor provide any worker opportunity to hear or answer any charge against him or her. Roughly 1,272 workers were effectively terminated.

In assessing these events, it is important to situate the developments of May 30 – June 1 in the context of past management practice. Rising Sun has a track record of serious code of conduct violations, including violations of workers' right to representation by a trade union. Since October of 2005, the company has refused to engage in negotiations with the workers' union concerning the renewal or replacement of a collective bargaining agreement covering the workforce, which had been in place between October 2003 and October 2005.² Despite numerous proposals by the union to renew the agreement, Rising Sun refused for a period of eight months prior to the mass termination to provide any counterproposal or participate meaningfully in contract negotiations, insisting that the company was no longer willing to recognize and bargain with the union. This refusal to respect workers' rights to collectively bargain terms and conditions of work, despite lawfully constituted representation by the union, represents a clear-cut violation of workers' right to bargain collectively under applicable codes of conduct.

The time period following the company's initial refusal to bargain with the union leading up to the mass termination was characterized by an overall breakdown in industrial relations in the plant and an apparent increase in code of conduct violations. On repeated occasions during the eight months prior to the terminations, the company had paid workers late, in some cases by several days and in others by as much as two weeks, causing widespread complaints among the workforce. Several disputes in which workers refused to work until they were paid for work they had performed were resolved by "return to work"

¹ According to several sources, the manager paid a bribe to the police officials of 50,000 Kenyan Shillings in order to avoid being charged, an allegation the WRC has not been able to verify.

² As discussed further in footnote 7, the agreement contains an extension to the effect that its provisions are to remain in force until a new agreement is reached.

formulas brokered by the EPZA, in which Rising Sun committed to paying the outstanding compensation by certain dates. EPZA officials have acknowledged that Rising Sun had repeatedly failed to adhere to the provisions of these agreements. Our investigation also found instances in which workers were unlawfully required to perform mandatory overtime in order to complete their production quotas, typically for one to two hours per day; that workers were unlawfully denied payment for these extra hours, as their supervisors would clock-out the workers' time cards prior to the extra hours; and that workers were also often made to work on Sundays, without payment. Finally, our investigation found that expatriate factory management had on repeated occasions addressed workers with demeaning language.

It was within this context of a disintegrated industrial relations system and repeated code of conduct violations that the verbal and physical assault of the female worker by the factory's production manager took place. This event and the inflammatory statements by the production manager on the following day represented a tipping point in an already dysfunctional environment, triggering protest among workers who, in our view, were understandably upset by the developments, and leading to lower than typical production levels in the plant for the remainder of the day. By all credible accounts, the protests occurred spontaneously by workers in reaction to the manager's actions, rather than being organized by the union that represents the workers.

The mass firing violated domestic law and applicable codes of conduct in three ways:

First, the mass firing flagrantly violated procedural requirements under Kenyan law and the applicable collective bargaining agreement for the dismissal of employees. Kenyan law requires that employers seeking to terminate a worker for just cause must provide an individual letter, spelling out the reason for the dismissal, to the worker it intends to dismiss.³ Prior to dismissal, workers must be provided the opportunity to hear and answer charges against them. At the time of the mass dismissal, Rising Sun provided no letter of dismissal or an explanation to workers through any other means as to the reason for their dismissal, nor did it provide workers with an opportunity to hear or answer charges against them. Instead, the company simply pinned a notice on the factory gate, addressed to "all unionized former employees of Rising Sun Kenya," stating that the workers were summarily dismissed, without indicating any reason for the dismissal.⁴ Additionally, the extant collective bargaining agreement in effect at the factory at the time of the dismissals goes beyond domestic law by setting out a system of escalating discipline, in which the company is to provide at least three warning letters prior to undertaking a termination for cause and in which workers are to be afforded representation by the union of which they are members in addressing the alleged infractions.⁵ The company provided no warning

³ Regulation of Wages and Conditions of Employment, Chapter 229.

⁴ It bears noting that Kenyan law also requires that workers be provided by management with a certificate of service at the time of their termination; such documents are often essential for workers in obtaining new employment. The company did not provide a certificate of service to any of the terminated workers.

⁵ Memorandum of Agreement between EPZ Apparel Manufacturers and Exporters Group of the Federation of Kenyan Employers and Tailors and Textile Workers in the Matter of Wages, Salaries and other Terms and Conditions of Service, October 17, 2003. Section 4: Warning.

letter to any worker concerning the events of May 30 or 31 prior to the mass termination, nor did it provide any opportunity for workers to have union representation in addressing any alleged inappropriate actions. For these reasons, the firings were clearly illegal under Kenyan law and applicable agreements on purely procedural grounds, independent of the company's motives for terminating the workers.

Second, in carrying out the mass termination, Rising Sun has sought to carry out what is in effect collective punishment for the supposed actions of some individual workers. In justifying the termination afterward in court filings and to the media, the company has asserted that workers engaged in violence and property destruction during and following their eviction from the factory. Our investigation found, based on substantial credible testimony from workers (including both supporters and non-supporters of the union) that the protests by workers were peaceful and that no violence occurred until the workers were forcibly removed by private security guards in combination with Kenyan riot police. It is possible that some violence occurred during or after the eviction – conflicting evidence precludes a definitive finding – but it is clear that any violence on the part of workers that did occur was the result of the uncoordinated actions of a small number of individuals. It would have been appropriate (and remains appropriate) for Rising Sun management to take action, based on concrete evidence, against any individual worker who engaged in an act of violence. However, instead of doing so, the company summarily terminated the entire workforce. Under Kenyan law, workers cannot be fired for a rules infraction without the showing of just cause. The actions of one individual, even if proven, do not constitute cause for the termination of another individual. By definition, collective punishment in the form of mass terminations is unlawful.

Third, there is credible evidence that the mass firing was motivated by a desire on the part of management to rid the factory of the union. As noted above, for more than a year, the company has refused to negotiate with the union and renew a collective bargaining agreement – demonstrating a persistent refusal to respect workers' associational rights and a clear hostility toward workers' exercise of those rights. In its mass termination of workers, management explicitly targeted union members, stating in the termination notice that "all unionized employees" were summarily dismissed (as noted above, no reason for the dismissal was provided). Finally, management filed a legal petition requesting that the union and its leadership be prohibited from entering the export processing zone; this petition was rejected by the Industrial Court. These facts support the conclusion that the mass termination was motivated, fully or in part, by a desire to rid the factory of the union and/or to punish union members, thereby violating workers' associational rights as protected by provisions of Kenyan law⁶ and applicable codes of conduct.

The appropriate remedy for unlawful terminations is an offer of reinstatement, with no loss of seniority, and with compensation for lost wages, to all affected workers. Workers who

⁶ In Kenya, the right to workplace representation and collective bargaining is enshrined in Section 80 of the country's Constitution. This right is enforced through the Regulation of Wages and Conditions of Employment Act (Chapter 229), the Trade Unions Act (Chapter 233), and the Trade Disputes Act (Chapter 234).

do not wish to return to work must receive full severance under the law with compensation for lost wages. Management has the right, if it can show just cause in accordance with the procedures set forth in Kenyan law and the standing union contract, to refuse reinstatement to any individual worker who can be shown to have engaged in an act of violence.

The WRC's assessment that the mass termination was inappropriate is consistent with rulings on the case by both the Ministry of Labor and the Industrial Court of Kenya. The Chief Industrial Relations Officer of the Ministry of Labor found in a July 15 findings and recommendations report that the industrial unrest at Rising Sun was a result of the breakdown of the industrial relations system in the factory and of the "provocation of the production manager" and that, while some workers engaged in property destruction during the dispute, "the behavior of those few employees should not be allowed to affect the livelihood of the majority." The Ministry of Labor issued the following recommendations (which, while not binding, carry significant weight in the Kenyan industrial relations system), quoted in full:

1. Employees who are willing and ready to go back to work be reinstated without loss of any benefits or period of service.
2. Employees who do not wish to be re-engaged be accorded normal termination with benefits in accordance with the parties' Collective Bargaining Agreement.
3. The dismissals of those who were positively identified as having participated in destruction of property be upheld.

On August 15, the Industrial Court of Kenya at Nairobi issued a binding interim order on the case that is consistent with the Ministry of Labor recommendations. It requires the company to reopen the facility without hindrance from the union and upon re-opening "to give priority of employment to the employees who are locked out and who are subject matter of this dispute." The order also denies the company's bid to block union members or leaders from entering the export processing zone, and from being rehired, on the grounds that such prohibitions would violate workers' rights of association. Under the Industrial Court order, workers who wished to return to work were to register with the Ministry of Labor office and Rising Sun was to hire workers from this list.

In violation of the binding order of the Industrial Court, the company has refused to hire any of the roughly 923 workers who registered with the district Ministry of Labor office. The company has instead opted to hire replacement workers under the status of "casual employment," the company's use of which, as discussed below, is itself a violation Kenyan law.

Failure to Pay Legally Mandated Compensation

Following the mass termination, Rising Sun also failed in virtually all cases to pay the compensation to which workers are legally entitled. The WRC conducted an extensive analysis to determine the sum of compensation owed to each of the terminated workers. Since the workers were terminated inappropriately, workers are entitled to the full scope of terminal compensation set out in the extant collective bargaining agreement between

Rising Sun and the TTWU,⁷ as well as applicable compensation for lost wages. Because Rising Sun refused to provide access to relevant personnel records, the process developing these computations required the laborious exercise of gathering and analyzing data from written submissions by and interviews with the workers concerned. The total for terminal compensation (including severance, notice pay, accumulated leave, and overtime) owed to the 923 workers for whom credible data was amassed is roughly \$196,717.83.⁸ The total including back pay since the date of termination – which would be appropriate given a finding that the terminations were unlawful – is roughly \$550,757.25.⁹ The average sum owed for terminal compensation, without back pay, is roughly \$211.07 per worker. Including back pay, the average is roughly \$590.94 per worker.

As noted, Rising Sun has refused in virtually all cases to pay the owed compensation. Where some compensation has been paid, it has been either well below the amounts to which workers are legally entitled and/or only in exchange for a substantial bribe.¹⁰ In one typical case, a worker who had been employed in the factory for more than three years was given only Ksh 1,000 (Kenyan Shillings; roughly \$14.15 USD), less than one tenth of the sum to which she was entitled. Another worker reported paying a bribe of Ksh 5,000 to the human resources department in exchange for Ksh 25,000 of terminal dues. It bears noting that Ksh 5,000 represents roughly \$70.78, nearly a month's base pay for apparel sector workers in Kenya. In most cases, however, the company has paid none of the compensation to which the workers are entitled.

Unfortunately, prospects are extremely poor that domestic mechanisms will lead to the payment of the unlawfully withheld compensation, given our experience with delays in the

⁷ The agreement, which was adopted in 2003, expired in 2005; however, it contains an extension clause indicating that its terms and conditions are to remain in force until a new agreement is reached. Since no agreement has been reached, the accord remains in effect. The Industrial Court order of August 15, 2006 affirms that the collective bargaining agreement remains in effect.

⁸ The collective bargaining agreement outlines the following requirements for terminal compensation: Severance pay at 16 days of salary for each completed year of service; notice pay for one month of service, based on each employee's base salary rate; accumulated unutilized leave days, compensated at a daily pay rate that is determined on the basis of 26 working days in a month; and overtime payment at 1.5 times the regular salary for overtime performed during the regular work week and 2 times the regular salary for work performed on rest days. Compensation should be paid for any work performed or benefits accrued up until May 31, 2006. The U.S. dollar figures presented in this report are based on the November 10, 2006 interbank exchange rate. The WRC can provide raw data and local currency numbers upon request.

⁹ It should be noted that the workers covered in this tabulation include only those who submitted information as part of an effort to recover the unpaid compensation - which amounts to 923 of the roughly 1,270 workers terminated on June 1. It does not include the remaining roughly 347 workers, many of whom did not pursue the issue because they had already accepted a partial payment of severance by the company (which, as noted below, often amounted to a small fraction of what was actually owed) or because they lost touch with worker advocates or monitors; these workers are also owed compensation. The figures above assume five months back pay, from June 1 – Oct 31. The obligation on employers to pay compensation for lost wages in the case of unlawful terminations has been established as a matter or precedent in Kenya's Industrial Court process, though the specific obligations are not spelled out in the labor law. The union has asked for 12 month's wages as compensation for the loss of employment.

¹⁰ Bribes were also required of workers seeking reemployment. One worker, for example, stated that when she sought reinstatement, company representatives demanded a payment of Ksh 8,000 (Kenyan Shillings); as she could only afford to pay Ksh 5000 upfront, she was admitted on the condition that she pay the remaining Ksh 3000, but after two weeks, the worker could not pay the remaining sum and she was dismissed.

Industrial Court process in Kenya – where the dispute is currently awaiting further hearings – and with the disturbing frequency with which orders issued by the Court are disregarded with impunity. Indeed, it is not uncommon for such disputes to take years to be resolved in the court process, by which time effective remediation for victims of inappropriate employer behavior is no longer possible, or for orders to simply be disregarded.¹¹ In light of these realities in the Kenyan context, it is clear that a timely resolution to the violations at Rising Sun will require aggressive action outside of the domestic court process to compel remediation by the licensee and brands whose products were or are produced at the facility.

Inappropriate Use of Casual Employment Status

On June 16, several weeks after the mass firing, Rising Sun began recruiting new workers and soon thereafter reopened the factory with approximately 600 workers, all of them on casual employment contracts. These included roughly 300 new employees and 300 former employees (though it included none of the workers who sought reemployment through the process established by the Industrial Court described above). Former employees were allowed to return to work only if they collected the terminal dues being offered by the company, which, as noted, were lower than the minimum legal requirement under Kenyan law, and under the condition that they sign new casual employment contracts and waivers forgoing their right to pursue further claims of severance. In addition to violating workers' rights by violating the Industrial Court ruling and denying these workers the terminal compensation to which they are entitled, the company's use of casual employment is itself a violation of Kenyan law.

Section 2 of the Employment Act (Chapter 226), Laws of Kenya defines a casual employee as “an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.” The casual employment status is intended for companies with need for temporary labor to perform a short-term project and is not to be used for normal work operations. Engagement of workers on casual terms for more than three consecutive months without transition into permanent employment is prohibited in Kenya.

As noted, each of the production workers hired by Rising Sun since the mass termination of June 1 have been engaged on casual status. Many, if not most, of these workers have been employed on casual status for well over three months, representing a clear violation of the law. The workers are in effect regular and permanent employees, but they are deprived of the legally mandated benefits accorded regular employees. In addition to benefits accrued through seniority, the practice deprives them of access to leave, medical coverage and statutory deductions, and the right to representation through a trade union.

¹¹ A case in point is Leena Apparels, another supplier of university apparel located in Mombasa, Kenya, where a complaint of illegal anti-union practices brought in early 2000 made its way through appeals and received a final ruling by the Industrial Court only four years later in mid-2004, by which time virtually none of the original victims of illegal practices were still employed at the firm; this ruling was then disregarded by the company, without sanction, for an additional two years and remains to this day unfulfilled.

The practice of essentially permanent casual engagement is a clear violation of workers' rights under Kenya's domestic law and international standards.¹²

It should be noted that the problem of permanent casual status is not confined to Rising Sun. Indeed, the practice has been identified as a key and frequent means through which employees' rights are violated in Kenya.¹³ According to the Deputy Labor Commissioner of Kenya, the misuse of casual employment has become pervasive in Kenya, with some employers keeping workers on casual status for more than 10 years.¹⁴ However, Rising Sun is – to our knowledge – the only apparel export factory in Kenya which uses casual status for 100% of its production workers.

Violation of Court Order Concerning Removal of Factory Property

On June 6, less than a week after the mass termination, the union representing Rising Sun workers filed a civil suit seeking to bar the company from removing assets from the factory or fleeing the country until the dispute was settled.¹⁵ Given the frequency of fly-by-night closures in the apparel industry, such injunctions can effectively save workers from losing substantial legally entitled terminal compensation. The High Court of Kenya subsequently granted the union's request and Rising Sun was ordered to refrain from removing any property from the Rising Sun premises.

Rising Sun has flagrantly violated the Court order. During September and October, Rising Sun removed hundreds of sewing machines from the facility (now known as Unit 1) where the terminated employees had worked. The removal of machines has, for the most part, taken place during the night; it is not clear where the machines were moved. At present, there are virtually no sewing machines left in the Rising Sun facility. The removal of machinery was confirmed during a tour of the plant by an Industrial Court judge on September 11, at the request of the union. As a result of the company's illegal removal of machinery, we are faced with the dispiriting prospect that Rising Sun may not have the capacity to re-employ the illegally terminated workers, even if it can be compelled to do so.

A sister plant owned by the same owners of Rising Sun known as Union Apparel (also referred to as Unit 2) retains some machinery; this is the facility in which most of the workers hired since the mass termination work. It remains unclear what the company's plans are. Rising Sun management apparently placed an advertisement during the week of November 30 in Kenya's Daily Nation newspaper and dispersed flyers in the Athi River zone seeking a wide range of apparel facility positions for "an establishing company" in the Athi River zone. It is possible that Rising Sun may be reopened as a new company with the same ownership, perhaps as part of a scheme to avoid legal obligations to reinstate the illegally terminated union members, or the facility may be sold to new owners. Under

¹² See, for example, International Labor Organization, Recommendation R166, Concerning Termination of Employment at the Initiative of The Employer, Sections 1-3.

¹³ See, for example, The Standard: *Financial Standard*, February 21, 2006; www.eastandard.net pp 1, 10, 11.

¹⁴ Ibid.

¹⁵ Civil Case Number 6871 of 2006.

either scenario, it is difficult to see how the illegally fired workers will be reinstated to their former positions.

Blacklisting

Following the mass termination at Rising Sun, the WRC received complaints to the effect that former Rising Sun workers were being blacklisted by other employers in the Athi River zone and elsewhere at the behest of Rising Sun management. Blacklisting against workers for their real or perceived association with a labor union or involvement in lawful protest activities is a serious violation of workers' rights of association, as protected by Kenyan law¹⁶ and applicable codes of conduct.

Specifically, it was alleged that Rising Sun management has circulated a list of roughly 30 workers to other EPZ employers in the region, recommending that they not hire any workers on the list. Workers and union leaders stated that they believed that a list of names had been written by Joseph Kithikwa, the human resources director of Rising Sun, on a blank piece of paper, and that the document had been distributed by the security guards of the Athi River zone. The WRC was not able to obtain a copy of or verify with certainty the existence of the alleged physical blacklist. However, investigators did interview several former Rising Sun workers who testified credibly that they were terminated within days of being employed by other factories in the zone and that they were told explicitly by facilities' managers at the time of their firing that the workers were on a list of persons whom the companies had been instructed not to hire. The workers interviewed included individuals who had participated in the protests of May 31 and who were active members of the TTWU union. We are aware of no specific allegation by Rising Sun that these workers engaged in violence; none have been charged with any crime.

Blacklisting is, by its nature, a difficult practice to document. In this case, the evidence available does not permit a firm conclusion that blacklisting is being carried out on a systematic basis at the behest of Rising Sun management; however it can be concluded, on the basis of the detailed, credible testimony from workers interviewed, that the practice has very likely occurred in the Athi River zone, on an informal if not formal basis, with respect to some former Rising Sun workers. The WRC will continue to investigate the issue of blacklisting in the Athi River zone and may provide further assessments on this issue.

Further Developments

Code of conduct violations and unrest have continued at the Rising Sun facility, even as it has employed a workforce of primarily new workers, unaffiliated to the union. On October 5, Rising Sun's current workers began a work stoppage in protest of delayed payment after they were paid only six day's wages for the entire previous month. In response, management fired approximately 50 workers. As with the firings that occurred in June, the company failed to provide any justification or bring any charge against any individual worker and did not pay terminal compensation. Following the unrest, management instructed workers to come to the factory on the following Saturday, October 7, to collect

¹⁶ See footnote 5.

the remainder of their wages. When workers arrived to collect payment on the appointed day, no one was at the factory, though they were paid the following week. Those workers who had been employed for longer than three months should have been provided notice pay and any accumulated benefits, though none was paid.

The developments at Rising Sun have contributed to widespread industrial unrest throughout the Athi River zone. On July 3, workers from most, if not all, of the zone's factories participated a wildcat strike. Workers stated that the strike was carried out in protest of the termination and failure to pay severance to the Rising Sun workers, as well as in protest of the refusal of other employers in the zone to renew the zone's collective bargaining agreement, among other grievances regarding practices in the zone. The strike involved violent confrontations between workers and Kenyan riot police. There are reports that some workers sustained serious injuries. Employers were given notice of a further planned strike – this one to be organized formally by the union – to take place on October 11. However, it did not occur, as hearings at the Industrial Court were ordered to address the dispute.

IV. Factory and Brand Response

Upon receiving complaints regarding the mass termination at Rising Sun in June (both from individual workers and from the TTWU), the WRC initiated an inquiry into the facts of the case. During this process, the WRC repeatedly approached Rising Sun management to seek cooperation with our investigation and subsequently to convey recommendations for remedial action. These efforts have proven fruitless. To this day, there has been no response from Rising Sun to any of the WRC's numerous communications, both in writing and by telephone. As noted above, the company has also refused to cooperate with an investigation by the non-governmental organization Africa Now, which was contracted by Jones Apparel Group to conduct its own inquiry.

The WRC has communicated with both Steve and Barry's University Sportswear and Jones Apparel Group on multiple occasions since the mass termination occurred. Our primary recommendation was that the brands press Rising Sun to reinstate those locked-out workers who wished to return to work and to pay all legally mandated severance to those who did not wish to be reinstated – recommendations, as noted, that had already been conveyed to Rising Sun by the Kenyan Ministry of Labor. In our communications with the brands, the WRC repeatedly stressed the need for rapid action, explaining that in cases involving unlawful firings it also becomes increasingly difficult to remediate the violations as time proceeds and it becomes increasingly difficult to maintain contact with the affected workers, who may be forced to leave the area in search of alternative employment or may simply lose touch with advocates and monitors.

Unfortunately, while both Steve and Barry's and Jones Apparel Group have asked Rising Sun to correct the violations, the exercise of pressure by the brands has not been sufficient to compel the company to correct the violations. While it is possible that Rising Sun was so intransigent that even the most aggressive and appropriate actions may not have produced progress, it is also the case that the specific response of Steve and Barry's and

Jones Apparel Group has not been as timely or as aggressive as was warranted by the circumstances of the case. A firmer and quicker response might have produced a different result.

Regarding Steve and Barry's University Sportswear, the WRC first communicated its urgent concern to the company on September 21, but did not receive a response until two weeks later on October 4. Steve and Barry's held considerable leverage in this case because – unlike Jones Apparel Group, as discussed below – Steve and Barry's goods were still being produced in the factory for at least four months following the mass termination, the period during which efforts to compel remediation were underway. The Steve and Barry's goods were being subcontracted to Rising Sun on an apparently unauthorized basis by another facility known as Rolex Apparel, which is Steve and Barry's primary supplier in the Athi River zone. In light of this leverage, the WRC asked Steve and Barry's to take the following actions:

- 1) To communicate directly to Rising Sun that it would be barred from producing Steve and Barry's goods if it did not promptly correct the violations, but that it could be expected to receive business from Steve and Barry's if it did do so – a “carrot and stick” approach, which the WRC has found effective in other cases;
- 2) To aggressively press its direct supplier, Rolex Apparels, to exercise pressure over Rising Sun to address the situation, with the threat that Steve and Barry's would not pay for goods produced under illegal conditions.

Steve and Barry's did follow through on the first recommendation, sending a letter to Rising Sun on October 12 conveying a message along the lines of that recommended by the WRC. However, it is not clear what action Steve and Barry's has taken with respect to the second – and more important – recommendation, to exercise pressure over Rising Sun through its direct supplier, Rolex Apparel. The WRC has not received any response from Steve and Barry's to follow-up communications regarding this issue, sent on October 16 and October 26. In the most recent communication of October 26, the WRC recommended, in light of the lack of progress and the intransigent posture of the factory, that Steve and Barry's proceed to deny payment for goods produced by Rising Sun and Rolex Apparel under illegal conditions, and to set aside the funds for the payment of these goods in a compensation fund for workers – an approach which has been used in similar cases involving collegiate apparel workers. Steve and Barry's lack of response to these communications, and tardiness in taking action, is of particular concern since Steve and Barry's primary leverage over Rising Sun is tied to the ongoing production of its goods at the factory. These orders are expected to be completed within weeks.

With respect to the response of Jones Apparel Group, which is not a licensee but which has a labor rights code of conduct and has acknowledged responsibility for the situation, the company responded promptly to the WRC's initial communication regarding the Rising Sun case and has since asked the factory to address the situation, though these efforts have not yielded progress in remedying the violations. At the WRC's recommendation, on October 2, Jones Apparel Group wrote a letter to Rising Sun urging Rising Sun to adhere

to the recommendation of the Ministry of Labor and interim order of the Industrial Court without delay and conveying that Jones would pursue the possibility of placing continued business at Rising Sun if the company effectively addressed the situation.

However, the effectiveness of Jones Apparel Group's response has been limited by several factors. Most importantly, this included a decision to cease production at Rising Sun shortly after the mass termination in late August. At the time that the production was pulled, Jones was already aware of the mass termination; the decision was apparently made by the company's agent out of concern about the factory's ability to deliver product on time. The decision to leave Rising Sun, rather than stay in the facility and use its presence to press for remediation, effectively eliminated from Jones' arsenal what are typically the most effective tools to compel a factory to correct violations – the ability to threaten to pull production or to refuse to pay for goods unless the violations are corrected – leaving Jones with only the “carrot” of promising to return production to the facility if the situation is resolved, a message which has not proven effective. The experience in this case illustrates how remediation can be severely undermined when production is removed from a non-compliant facility without adequate consideration for the effect of this action on efforts to compel remediation, even when the motive is not necessarily to “cut and run” from responsibility for the violations themselves.

It has now been more than five months since the unlawful mass termination occurred at Rising Sun. Rising Sun has since made clear that it has no intention of adhering to the WRC's recommendations, the Ministry of Labor's recommendations, or the Industrial Court interim order to reinstate or pay severance to the illegally fired workers. Instead, it appears Rising Sun will continue to appeal the matter through the court process, which may well take years to complete. Meanwhile, there have been indications that Rising Sun may soon go into bankruptcy or receivership and that the factory may close. In view of these developments, we consider it unlikely that the code of conduct violations documented in this report will be corrected and that the workers will be provided the legally mandated terminal compensation and/or back pay, absent new efforts by the brands involved.

V. Recommendations

In light of Rising Sun's continued intransigence and the apparent likelihood that neither reinstatement nor legally mandated compensation will be forthcoming, and in light of the fact that Rolex Apparel as the entity that has placed orders for Steve and Barry's goods at Rising Sun bears responsibility for the labor practices of its subcontractor, the WRC recommends that Steve and Barry's University Sportswear take the following steps:

- Notify Rolex Apparel that Steve and Barry's business relationship with Rolex Apparel will be terminated unless the Rising Sun workers receive back pay and either reinstatement or all legally mandated termination compensation.

- Withhold payment of any funds due to Rolex for work done on Steve and Barry's behalf until this has been accomplished.
- Inform Rolex Apparel that, in the event that it does not compel Rising Sun to fulfill its legal obligations to its workers, Steve and Barry's expects Rolex to make the workers whole through payment of legally due terminal compensation and back pay to these workers and by providing employment opportunities on a priority hiring basis to any of the terminated Rising Sun workers who wish to work at Rolex.
- Set aside any funds due to Rolex but held by Steve and Barry's pursuant to these recommendations for potential distribution to the Rising Sun workers in the event that Rolex fails to comply and it becomes necessary to proceed to terminate its business relationship with Rolex.

Appendix

Note on Deteriorating Working Conditions in the Athi River Export Processing Zone

The developments of Rising Sun discussed in this report may be regarded as part of an overall breakdown of industrial relations throughout the Athi River zone – developments which are deeply concerning from a code of conduct compliance standpoint. Our monitoring work indicates that labor rights violations have increased markedly in Athi River during the past year, a period that has coincided with the refusal of employers in the zone to renew or negotiate the collective bargaining agreement with TTWU which was in place for the period October 2003 through October 2005. (In refusing to negotiate on a new accord, the employers have argued that the fact that the Athi River zone is the only zone in Kenya in which workers are represented by a trade union puts them at a competitive disadvantage relative to other employers in Kenya). From our experience monitoring labor practices in this zone, we can attest that violations such as forced and unpaid overtime and sexual harassment were generally being addressed effectively through the shop steward/union representation system. It is apparent that violations have increased since this system of industrial relations broke down. This development bodes poorly for future code compliance in this important export processing zone. The WRC urges all brands sourcing from suppliers in this zone to press their suppliers to respect the associational rights of Athi River zone workers and commence negotiations of a new agreement.