

**KINGDOM OF CAMBODIA**  
**Nation King Religion**

Case number: 03/03  
Date of Award: 11-6-2003

**ARBITRATION COUNCIL**

**ARBITRAL AWARD**  
Issued under Article 313 of the Labour Law

Tonga Garment Co., Ltd.

(the “employer party”)

**AND**

Members of the Coalition of Cambodian Apparel W.D.U.

(the “worker party”)

**details of employer party:**

address: No. 26, St. 337, Sangkat Boeung Kok II, Khan Toul Kok, Phnom Penh

telephone: 00855-23 982 008.....fax: 00855-23 982 188

representative: Lim Vanna, David Chanawa and Associates

address: No. 116 E, Norodom Blvd, Phnom Penh

telephone: 023 212 318 .....fax: 023 212 319

**details of worker party:**

address: No. 6C, St. 476, Sangkat Toul Tompong I, Khan Chamcarmom, Phnom Penh

telephone: (855-23) 210 481.....e-mail: c.cawdu@forum.org.kh

representative: Chhorn Sokha and Puong Chantol, CCAWDU

## **ISSUES IN DISPUTE:**

This matter involved a number of issues that the arbitration panel needed to deal with. The first issue arose out of the employer's request for an adjournment of proceedings. The remaining issues arose out of the employees list of demands set out below. The full list of issues that the arbitrators had to decide were:

1. Whether to grant a postponement of the hearing to a later date in accordance with the employer's request.
2. Whether the "Temporary Workers" at the factory should change their status to that of "Normal Workers."
3. Whether the employer should enlarge the hospital room and provide a total of 12 hospital beds.
4. Whether the employer should divide the hospital room into male and female sections by the provision of a dividing wall.
5. Whether the employer should provide toilets and washrooms in the hospital room.
6. Whether the employer does, and if not, should, supply the hospital room with medicines as listed in the Prakas number 330.
7. Whether the employer should provide a child care center and a place for breast feeding.
8. Whether a sufficient number of toilets are provided for use by the employees with sufficient water provided in each toilet.
9. Whether the company should reinstate the practice of withholding union fees and passing such fees onto the union from the salary of each employee who requests such withholding.
10. Whether the company is discriminating against Ms Mai Ai by refusing to allow her to work overtime.

## **Jurisdiction of the Arbitration Council:**

The Arbitration Council, derives its power to make this Award from Section II B of chapter 12 of the Labor Law (1997); the Prakas on the Arbitration Council (no. 338, of 11 December 2002); and the Arbitration Council Procedural Rules which form an Annex to the same Prakas.

An attempt to conciliate the collective dispute which is the subject of this Award was made as required by Chapter XII Section 2A of the Labor Law. That conciliation hearing was unsuccessful and non-conciliation report of 16-05-2003 was submitted to the Secretariat of the Arbitration Council on 23-05-2003.

## **Composition of the arbitration panel:**

Arbitrator chosen by the employer party: Ouk Ry

Arbitrator chosen by the worker party: Tuon Siphann

Chair arbitrator (chosen by the two arbitrators): Matthew Rendall

## **Decision & Orders:**

On the basis of the above the Arbitration Council delivers the following decision and makes the following orders as a full resolution of the dispute before it:

Issue Number 1:           The arbitration hearing will not be postponed and will proceed as scheduled.

Issue Number 2:           The employer must cease using the temporary worker classification. All employees who have been working for longer than 3 months must be placed on either fixed duration contracts or undetermined duration contracts and paid at full rates and awarded all benefits applicable to full time workers. All workers must be paid according to the minimum conditions established by law regardless of their status.

The employer must also compensate any worker who has worked for less than the minimum wage the difference between her actual wage and the minimum wage or overtime minimum wage where applicable.

Furthermore, the employer must pay compensation to employees who have been working on a temporary basis without accruing leave. This compensation shall be equal to one day's pay for each day of leave accrued.

The parties shall reach an agreement on the amount of compensation to be paid within 1 month of the date of this award. If no agreement can be reached within this timeframe, the employer shall engage, at their expense an accountant approved by the employee party to quantify the compensation payable to the employees by the employer. The employer shall then pay the amount as quantified by the accountant within one month of the submission of the accountant's report.

Issue Number 3:           The employer shall provide a hospital room of adequate size to fit 13 beds and 13 beds must be provided in the hospital room. The employer shall do this within 1 month of the date of this award.

Issue Number 4:           The employer shall divide the hospital room into 2 sections. 1 section for male employees and 1 section for female employees. A divider must be used to separate the male and female sections and such divider must of sufficient height (minimum 2m) and length and made of opaque material so as to restrict vision from one section to the other. The employer shall do this within 1 month of the date of this award.

Issue Number 5:           The employer shall provide a male and female toilet and washroom either within the hospital room or at a distance from the hospital room that can be reached by walking no more than 20 meters from the hospital room.

Issue Number 6:           The employer shall equip the hospital room with all the medicines listed in the Annex to Prakas #330 of 2000 (a copy of which is attached to this award). The employer shall do this within 1 month of the date of this award.

Issue Number 7:           The employer shall provide adequate rooms of a size proportionate to the size of the employer's workforce must be provided to be used as a child care center and breast feeding room. If the employer is unable to provide child care facilities then the employer must pay for the employee's costs of utilizing external child care services. The employer must though provide a room within the factory premises that can be used for breastfeeding. The employer shall do this within 1 month of the date of this award.

Issue Number 8:           The employer shall provide 16 toilets on the factory premises for use by all factory employees. Each toilet must be supplied with water inside the toilet room and

water must be provided at all hours that employees are working in the factory premises. These changes must be completed within 1 month of the date of this award.

Issue Number 9: The company shall reinstate the practice of withholding union fees from employees salaries, and passing the collected fees onto to the union. This withholding shall commence from the next pay day and be done for those employees who have at any time made a written request to withhold union fees. The employer must also provide to the Ministry of Labor a certification of all employees who have made a request for withholding of union fees in the manner required by Article 5 of Prakas #305.

Issue Number 10: The company must immediately reinstate its previous practice of offering overtime work to Mai Ai on the same regular basis that it provided before the union activity of April, 2003.

### **Hearing and Evidence:**

date and place of hearing: 05-06-2003 (8am – 12 noon), Arbitration Council, Phnom Penh Center (A), Sothea Rors Blvd., Sangkat TonLeBasak, Phnom Penh

Evidence:

1. Written responses submitted by the employer on the 4<sup>th</sup> June, 2003.
2. Written responses submitted by the employees on the 3<sup>th</sup> June, 2003.
3. Copy of contract dated 22<sup>nd</sup> May, 2003 submitted by the employer.
4. The conciliation report submitted by labor inspection unit.
5. Copy of list of employees who agree to have union contributions withheld from salary.
6. Internal rules of Tonga factory.
7. Oral testimony of Ms Chhorn Sokha and Ms Pung Chantol.

### **Summary of the Case:**

The employer is a garment factory which employs 660 employees. Sometime prior to May, 2003 the employees made the following requests of the employer:

1. that all 'Temporary Workers' at the factory have their status changed to "Normal Workers"
2. The hospital room be enlarged and 12 beds be provided
3. In the hospital room the male and female sections be divided with a screen
4. Toilet be provided in the hospital room
5. Medicines be provided as required by the Prakas number 330 of 2000
6. A child care center be organized and a place for breast feeding
7. 15 toilets be provided for use by the employees and water be provided in each toilet
8. The company reinstate the practice of withholding union fees and passing such fees onto the union from the salary of each employee who requests such withholding.
9. The company cease discriminating against Ms Mai Ai by refusing to allow her to work overtime.

Each of these requests were denied by the employer and on the 5<sup>th</sup> May, 2003 the case was brought to the labor inspector of MOSALVY. The labor inspector arranged for a conciliation meeting to take place on the 9<sup>th</sup> May, 2003 in an effort to resolve this collective dispute. The employer failed to attend the meeting and a subsequent meeting was then scheduled for the 12<sup>th</sup> May, 2003. The employer again failed to attend the meeting. The Department of Labor Inspection then arranged for a meeting to take place at the premises of Tonga factory on the 16<sup>th</sup> May, 2003. Officer Sreng Ly from the Department of Labor Inspection conducted the conciliation meeting and Mr. Lim Vanna attended on behalf of the employer. The conciliation was also attended by 5 representatives of the employees. The conciliation meeting produced no result in that the employer did not agree to any of the employees' requests stated above and no agreement was reached between the employers and the employees.

The matter was then referred by MOSALVY for Arbitration.

Notice was given to each of the parties on 28 May 2003 informing them of the hearing date of the 5<sup>th</sup> June, 2003. Also on the 28 May 2003 a request for further information was made to both parties by the Secretariat of the Arbitration Council on behalf of the arbitration panel. On 3 and 4 June written responses were received from both parties. Part of the request to the employer was for copies of the contracts used to hire staff. A separate request was also made to the employer asking for a copy of any ILO reports relating to working conditions in the employer's factory. Although a number of the requests were answered by the employer, the ILO report was not submitted nor were the contracts used to hire employees prior to the complaints being lodged. The employer did however forward of a copy of a contract used to hire employees who commenced work after May 2003.

At 6.15pm on the 4<sup>th</sup> June the Ms. You Sindy, representing the employer, rang the secretariat of the Arbitration Council and requested a postponement of the hearing. No reason was provided indicating why a postponement was needed. The secretariat advised Ms You Sindy that a request would need to be made in writing or someone would need to appear at the hearing the next day before the arbitrators to make the request for postponement. No written request was submitted and no one appeared on behalf of the employer at the hearing to request a postponement or to provide reasons for the arbitrator's consideration.

### **Findings of Fact:**

1. That the number of employees in the factory is 660. This is based on the written evidence provided by the employer. The employees' evidence of 'more than 600' was, according to the oral testimony of the employee, only an assessment based on observations. It was agreed that the employer's estimation would be more accurate and based on actual company records.
2. That some workers at the employer have the status of "normal workers' and some have the status of 'temporary workers.' Temporary workers are paid 700 riel per hour. Temporary workers are not paid at an increased rate for overtime work nor are they paid extra when they work on Sundays or public holidays. Temporary workers are also not receiving annual or other forms of leave as mandated by the Labor Law. It is common for workers stay on 'temporary status' for up to two years. The above findings were based on uncontested oral testimony from the employee representatives.
3. That there are only 2 or 3 beds in the hospital room. There was conflicting evidence given by the parties. In oral testimony the employee repeated their submission that the number of beds was only 2. The employer was not present and as such the only submission on this issue from them was the written responses submitted prior to the hearing. It was determined by the arbitration panel that it was not necessary to make a finding as to which testimony was correct as either number was far less than the number required by law.
4. That the hospital room is currently not divided into male and female sections. This was an agreed fact by the parties.
5. That there is currently no toilet in the hospital room. There was conflicting testimony as to the distance of the toilets from the hospital room. In their written submissions the employer claimed that the toilet was 20 meters from the hospital room whereas the employee claimed that the toilets were 100 meters from the hospital room. In their oral testimony, the employee explained that the discrepancy between the party's submission on this matter was that the toilets may well be 20 meters from the hospital room, but to access them the employees have to walk 'around the building' which is a walk of approximately 100 meters. The employers, not being in the hearing, were not able to refute this assertion. The arbitration panel had no reason not to accept this explanation of the employees and found that for the purpose of access the toilets are approximately 100 meters from the hospital room.

6. That the employers are currently not providing the medicines required in the Annex to Prakas #330 of 2000. There was conflicting written submission on this from the parties. The employer submitted that all the required medicines were provided whereas the employees submitted that only 4 medicines were in fact provided. These are medicines for diarrhea, medicines for colds, medicines for coughs, and calcium. In their oral testimony the employees stated that this information was provided by the full time nurse working at the factory hospital room. The employer was not there to refute this statement. The arbitration panel had no reason to not accept the employees' evidence on this issue.
7. That there is currently no child care center or breast feeding room or facilities in the factory. This was an agreed upon fact by the parties in their written submissions.
8. That the company does permit each breastfeeding mother to take off 2 half hour periods per day in order to breast feed their child. This time is taken just prior to leaving for lunch and just prior to finishing work for the day. The mothers leave the premises to breast feed their children. The 30 minute time concession was an agreed upon fact by both parties: the employer in its written submission and the employee in their oral testimony.
9. That there are 13 toilets in the factory. This fact was agreed upon by the parties however the employees claim that 3 of those toilets are for office staff and thus inaccessible for the employees.
10. That there is insufficient water provided in the toilets accessible to the employees. The employees gave evidence that the toilets only contain enough water for 2 hours normal use. After that time employees have to get their own water from a 'pump' and bring it to the toilet. The employer did not refute this evidence. The arbitration panel had no reason not to accept this evidence.
11. That the employers have stopped withholding union fees from the workers salaries. Evidence was given by the employees that the employer used to withhold union fees from the salaries of those workers who requested this. A signed list was provided to the employer of each worker who requested the withholding and the employer made the withholdings on the basis of the provided lists. However, the employer stopped making the withholdings immediately following a strike at the factory in April 2003. Notice of the decision to stop withholding union fees was communicated to the union in a letter written by the management of the factory. The cessation of the withholding of union fees was directly related to the union action of April, 2003.
12. That the decision by the company not to offer Mai Ai overtime was in retaliation for her role in the strike of April 2003. Testimony was heard that some time around April 2003, Mai Ai suffered abuse at the hands of a member of the management of the factory. Mai Ai was, and continues to be, a cleaner at the house of the manager of the factory. A strike was conducted in April to seek compensation for the abuse suffered by Ms Mai Ai. Further testimony was heard that following the strike Ms Mai Ai was told by a member of the management that she would no longer be offered overtime work because of her role in causing the strike of April, 2003. This was not refuted by the employer. The arbitration panel had no reason not to accept the evidence of the employee that the management's stated reason for denying overtime was Ms Mai Ai's role in the April strike.

### **Reasons for Decision:**

Issue Number 1: Pursuant to the Prakas on the Arbitration Council (#338 of 2002) a postponement of an arbitration hearing may be granted where:

- A party cannot attend a duly scheduled hearing of the Arbitration Council and that party shows a good reason why they could not attend;<sup>1</sup> or
- The parties and the arbitration panel agree to a postponement and the arbitration panel finds that a such a delay in proceedings is in the interests of the fair, cost effective and timely resolution of the dispute.<sup>2</sup>

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<sup>1</sup> Prakas #338 of 2002 (Prakas #338); Article 21

<sup>2</sup> Prakas #338; Annex Rules 4.8 & 4.9

A postponement leading to an extension of the 15 day time limit for the arbitration process may only be allowed where both parties agree.<sup>3</sup>

In this case neither the employer nor their representative attended the hearing and no reasons were submitted by the employer for granting a postponement.

At the hearing on 5<sup>th</sup> June 2003, the arbitration panel asked the employee representative whether they agreed to a postponement under Article 30 and Rule 4.9. The employee representative submitted that they would be willing to a postponement if the hearing could be held on or before 12<sup>th</sup> June 2003. The Secretariat or the Arbitration Council then contacted the attorney for the employer by telephone who could not confirm his availability to attend a hearing on or before 12<sup>th</sup> June 2003. This information was relayed to the employee representative at the hearing and they decided that they did not agree to a postponement if there was no certainty that the hearing could be held without extending the 15 day period for arbitration. As there was no agreement to an extension of the 15 day period, the arbitration panel could not grant a postponement and the hearing proceeded without the presence of the employer in accordance with Article 21 of the Prakas.

Issue Number 2: Pursuant to the provisions of Article 66 of the Cambodian Labor Law of 1997 all employees must be hired on the basis of time, either under contracts of fixed duration (i.e., with a specific ending date), or contracts of undetermined duration (i.e., with no specific ending date). Pursuant to Article 68, Probationary contracts are also allowed for a maximum of 3 months for employees (*nijochet*), 2 months for specialized workers and 1 month for non specialized workers. In no circumstances can probationary periods be for longer than 3 months. At the expiry of the probation period any worker who continues to work for the employer must have their status changed to regular worker and be placed on either a fixed term duration contract or undetermined duration contract at full pay rates required by law. Pursuant to Article 9, workers may be defined as regular or casual depending on the stability of the work required. Casual work is limited to employment which is normally completed within a short period of time.<sup>4</sup> Regardless of the classification of worker or contract, pursuant to Articles 10 and 104 of the Labor Law, all employees (even casual employees) are guaranteed the minimum wage and working conditions.

The 'temporary worker' status applied by the employer is not a valid employee contract status recognized or sanctioned under Cambodian labor law. As the practice of the employer is to employ temporary workers for longer periods of time, these employees cannot be properly considered to be casual workers with the definition of Article 10 of the Labor Law. Accordingly, they must either be on probationary contracts, contracts of fixed duration or contracts of undetermined duration.

A probationary employee is one who has a clearly defined probationary period in their contract. This period must not be more than 2 months duration in the case of specialized workers. All other workers (who are not on probationary contracts) must by definition be regular workers on fixed or undermined duration contracts. All of these workers (probationary or otherwise) are entitled to the minimum wage and bonuses as set out in Notification#17 of 2000. All of these workers are also entitled to the full range of penalty rates for overtime and work on days off and public holidays as set out in the Labor Law. They are also entitled to leave as set out in the Labor Law

An employer is not allowed to circumvent the protections granted to employees by the labor law by hiring employees on an hourly basis as has occurred in this case. There is no basis for this sort of discrimination in the Labor Law. Part-time work is of course allowed. Where a person is working less than full time, that person is entitled to all of the benefits of full time work (wages; leave; bonus etc) in proportion to the percentage of full time which they work.

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<sup>3</sup> Prakas #338; Article 30

<sup>4</sup> Labor Law (1997); Article 10

Because the employer has in the past paid some workers less than the guaranteed minimum wage, those workers must be compensated by the difference between their actual pay and the guaranteed minimum wage, or guaranteed overtime minimum wage. They must also be compensated for the failure to provide benefits such as leave as required by law.

Issue Number 3: Pursuant to Prakas #330 of 2000, enterprises with more than 50 employees must have a hospital room of at least 20 square meters. Enterprises with more than 200 employees must have beds for 2% of its staff, in this case 13 beds. Given that the employer has 660 employees the hospital room must be large enough to adequately contain 13 beds.

Issue Number 4: There are no legal provisions that specifically address the issue of separating hospital rooms into male and female sections. Nevertheless, the arbitration panel has taken into consideration the requirement under Article 242 of the Labor Law and Prakas #330 of 2000 that employers establish an infirmary in the workplace and also the general obligation of employers under Article 229 of the Labor Law that employers must maintain working conditions which provide for the health of their employees. These provisions have been interpreted in the light of Article 38(2) of the Constitution of the Kingdom of Cambodia (1993) which states that the law shall "protect the life, honor and dignity of citizens." It is within this legal framework that the Arbitration Council has considered what an adequate infirmary should provide. In the context of Cambodian culture the Arbitration Council considers that in order to treat both men and women with dignity an infirmary must have some sort of divider separating male from female patients. The employees gave evidence that when physical checks are conducted by the nurse or doctor on a female patient bare skin is exposed and it is very embarrassing for this to be done within sight of male workers in the hospital room. The arbitration panel also finds that it will not be financially onerous for the employer to provide some kind of screen to separate the male and female sections of the hospital room. The arbitration panel therefore finds that the employer must separate the hospital room into male and female sections and provide adequate screening between the sections to block the ability of patients in one section from viewing patients in the other section.

Issue Number 5: Article 229 of the labor law requires that hygienic arrangements be made for the needs of those using the hospital room. Evidence was given that to access the toilet in its current location requires an employee to walk approximately 100 meters from the hospital room. Given that workers in the hospital room could be suffering afflictions such as diarrhea, the arbitration panel finds that this distance does not meet the requirements of 'hygienic arrangements' required under the law. The arbitration panel finds that the employer must place a toilet and washroom either inside the washroom or at a location that can be accessed without having to walk further than 20 meters.

Issue Number 6: Prakas #330 of 2000 determines the minimum medicine requirements for employers to provide in the workplace hospital room. Notwithstanding the discrepancy between the evidence of the employee and employer on this issue, the arbitration panel finds that the employer must keep, at all times, in the hospital room the medicines listed in Prakas #330, a copy of which is attached to this award.

Issue Number 7: Article 186 of the Labor Law requires that enterprises with more than 100 female workers must set up within their premises or nearby, a nursing room for breastfeeding and a child care center. If the employer is unable to do this the workers are entitled to arrange their own child care for which the employer must pay the cost. Both parties agree that there are no child care facilities within the factory premises and no breast feeding facilities within the factory premises. In accordance with Article 186 the employer must either set up a child care center or provide each worker with the funds to utilize external child care services. The employer must also set up, within the factory premises, a room for breastfeeding.

Issue Number 8: Pursuant to Prakas # 52 of February 10, 2000, all enterprises must provide toilets which are appropriate and sanitary. For enterprises with more than 150 employees but less than 1000 there must be 6 toilets for the first 150 employees and an additional toilet for every 50 employees over 150. On the basis that the enterprise has 660 employees the employer must provide 16 toilets. In addition, in compliance with Article 6 of Prakas #52, the employer must ensure that each toilet is permanently supplied with enough water for appropriate use at all hours that employees are working on the premises. The employer must cease the practice of forcing employees to obtain their own water from the pump for use in the toilets. Furthermore each toilet must comply with the construction requirements of Prakas #52.

Issue Number 9: Article 129 of the labor law states that workers can authorize deductions from their wages for union fees. Prakas #305 at Article 5 states that where an employee chooses to exercise his/her right under article 129 of the labor Law, the employer is bound to make such withholdings. Furthermore the employer has to provide to the ministry of labor a certification of all employees who have made a request for withholding of union fees.

Evidence was submitted by the employees (in the form of a signed list of union members) of the details of all employees who have duly requested that their union fees be withheld. It was further submitted that the employer did in fact make the withholdings according the union provided list prior to the strike action of April, 2003. The arbitration panel therefore finds that the employer is able to comply with the withholding requests as evidenced by their previous practice in doing so, has the necessary consents of individual union members to make withholdings, and, therefore, must immediately reinstate the practice of making the withholdings in the same manner as was practiced prior to the cessation of this activity. Furthermore, the employer should submit certification of the withholdings being made to the ministry of labor in accordance with article 5 of Prakas #305.

Issue Number 10: Article 12 of the Labor Law prohibits discrimination against employees in the assignment of work based on that employee's exercise of union activities. Evidence was submitted by the employees that up until the strike that took place in April 2003 to seek compensation for the abuse suffered by Ms Mai Ai at the hands of the management, Ms Mai Ai was offered and given regular, if not daily, overtime work. Ms Mai Ai worked this overtime on a regular, if not daily, basis. Following the strike Ms Mai Ai was no longer offered overtime work by the employer and instead a cleaner from other parts of the enterprise was brought in to work the overtime shifts that Ms Mai Ai had previously been doing. Evidence was further submitted that Ms Mai Ai was directly told by a member of the management that the reason she was no longer assigned or offered overtime work was because of her role in the union activity (the strike) of April 2003. None of this evidence was refuted by the employer in any of its submissions. The arbitration panel has no reason the not accept the evidence of the employee on this issue as submitted.

In light of the evidence before it, the arbitration panel finds that the refusal to assign overtime work to Ms Mai Ai is an act of discrimination against her due to her role in union activities, namely the strike of April 2003. Such discrimination is prohibited under the Labor Law. The employer is ordered to immediately cease such discriminatory practice and reinstate its previous practice of offering overtime work to Ms Mai Ai in the same manner and to the same degree that it did prior to the strike of April 2003.

### **Final Remarks:**

The Arbitration Council wants to put on the record its concern that this matter reached the arbitration stage of the dispute resolution process. It is clear that the majority of the issues that had to be dealt with were simple matters of law that could have been resolved at conciliation had the employer engaged in the dispute resolution process in good faith.

**Signatures of Members of the arbitration panel:**

Arbitrator chosen by the employer party:

name: Ouk Ry

signature: .....

Arbitrator chosen by the worker party:

name: Tuon Siphann

signature: .....

Chair of arbitration panel:

name: Matthew Rendall

signature: .....

*This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition with the Secretariat of the Arbitration Council within this time period.*

*This Award is immediately binding upon the parties if parties have agreed as such in writing before the notification of the Award, or if parties are bound to comply with a collective bargaining agreement stipulating that no opposition to the Award may be lodged.*