

KINGDOM OF CAMBODIA
NATION RELIGION KING

THE ARBITRATION COUNCIL

Case: 04/05

Date of award: 7 February 2005

ARBITRAL AWARD

(Issued under Article 313 of the Labor Law)

Eternity Garment Co., Ltd

(Employer party)

AND

Coalition of Cambodian Apparel Workers Democratic Union (C.CAWDU)

(Employee party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Representative: 1- Ms. Yav Sokh Na, Head of Administration; and

2- Mr. Sar Samnang, Attorney;

Address: #646, Street 2, Chak Angre Leu commune, Mean Chey district,
Phnom Penh.

Tel: 023 425 838

Fax: 023 425 838

DETAILED INFORMATION OF EMPLOYEE PARTY:

Representative: 1- Mr. Ek Pheakdei, Head of C.CAWDU Office of Dispute;

2- Mr. Chhay Sophea, Financial President of the local union; and

3- Mr. Khot Haut, Financial Vice President of the local union.

Address: #2, Rorka commune, Chak Angre Krom commune, Mean Chey
district, Phnom Peh.

Tel: 012 445 012 or 012 369 069

Fax: N/A

ISSUES IN DISPUTE:

(In non-conciliation report)

- 1- The workers demand that the company produce clear and understandable pay slips, the title of which is written in Khmer.
- 2- The workers demand that the company perform proper calculations for 1 and 2 November 2004 because there was a blackout on those days and the company made the workers go home.
- 3- The workers demand that the company introduce the same annual leave and seniority for the security guards of the company as it does for other employees, since [the guards] have never been entitled to annual leave.

JURISDICTION OF THE ARBITRATION COUNCIL :

The Arbitration Council derives its power to make this Award from Section IIB of Chapter 12 of the Labor Law (1997); the Prakas on the establishment of the Arbitration Council No. 338, Dated December 11, 2002; the Prakas on the Arbitration Council No.099, dated April 21, 2004; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Nomination of Arbitrators No.103, April 26, 2004 and No.265 of July 13, 2004.

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. But the conciliation was not a success for the two parties. The non-conciliation report dated 5 January 2005 was submitted to the Secretariat of the Arbitration Council on 11 January 2005.

COMPOSITION OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party: **Mr. Hem H. Naryth**

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

Chair arbitrator (chosen by the two arbitrators): **Mr. Pen Bunchhea**

HEARING AND EVIDENCE:

Date and place of hearings:

1. *First hearing:* 18 January 2005 at 8:00AM at the Secretariat of Arbitration Council
2. *Second hearing:* 21 January 2005 at 2:00PM at the Secretariat of Arbitration Council

Witnesses and Experts:

1. Mr. Mon Chamreun, Head of Security of the company;
2. Mr. Ly Phea, guard of the company;
3. Mr. Nget Riem, guard of the company.

EVIDENCE THAT WAS CONSIDERED BY THE ARBITRATION PANEL IS AS BELOW:

Provided by the employer party:

- 1- Certificate of business registration (No. 3905), dated 23 December 1999;
- 2- Letter of request for approval of the company's internal work rules, dated 14 August 2000;
- 3- Internal work rules, dated 14 August 2000;
- 4- Letter of request to resolve three issues, dated 30 November 2004;
- 5- Payrolls for September, October and November 2004;
- 6- Letter of delegation for the company representatives to attend the hearing, dated 18 January 2005.

Provided by the employee party:

- 1- Letter of request for the representatives of the Union Federation to attend the hearing, dated 18 January 2005;
- 2- Petition for annual and seniority bonuses, dated 2 December 2004;
- 3- Letter of request for the resolution to the dispute between the workers and the Eternity;
- 4- Letter of complaint from the Eternity-based union to C.CAWDU for its immediate intervention in resolving certain issues, dated 1 December 2004;
- 5- The guards' statement on their working hours and punching in and out delivered to the President of C.CAWDU, dated 20 January 2005;
- 6- Certificate of registration of C.CAWDU Union of Eternity Co., Ltd, dated 29 April 2004.

Received from MoLVT:

- 1- Report of collective labour dispute conciliation, dated 31 December 2004;
- 2- Non-conciliation report from the Department of Labour Inspection, dated 5 January 2005.

CASE SUMMARY:

Eternity Company employs 600 workers and is located at building 646, National Road Number 2, Chak Angre Krom commune, Mean Chey district, Phnom Penh. On December 06, 2004 the Labor Inspector in Mean Chey district received a complaint dated December 30, 2004 from the Coalition of Cambodian Workers Democratic Union (C.CAWDU) demanding the company to apply working conditions properly in accordance with the Labor Law. After receiving the complaint, the Labor Inspectors in Mean Chey district arrived at the factory for conciliation and resolution on December 31, 2004 and the conciliation hearing succeeded in resolving two of the 5 issues demanded by the workers. The three unsuccessfully conciliated issues were described above. The workers' representatives and the company requested that the remaining issues be forwarded to the Arbitration Council for further resolution and conciliation. The issues arrived at the Arbitration Council on January 11, 2005. Having received the case, [the Arbitration Council] called both parties to a hearing on January 18, 2005 at 14h:00PM to conciliate the three issues. After the conciliation, the employer and the employees agreed on issue 1; as for issues 2 and 3, both parties were undecided and requested the two issues be re-conciliated before a decision was made. On January 21, 2005, the Arbitration Council called a second hearing at the Secretariat of the Arbitration Council to decide on the two issues. At the second hearing, Mr. Mon Chamreun, the Head of Security of the company and Mr. Ly Phea and Mr. Nget Riem, guards of the company, were summoned to the hearing. Then, on 1 February 2005, the Secretariat of the Arbitration Council received a letter from C.CAWDU dated 1 February 2005 asking [the Arbitration Council] to dismiss issue 2 in the December 31st, 2004 non-conciliation report between the employees and the Eternity company. Therefore, the Arbitration Council will, here in this award, decide only on issue 3.

FINDINGS OF FACT:

- After having examined the non-conciliation report
- After having listened to the company and the employee parties as described above.
- After having reviewed all the above documents.

We find that:

1st issue:

Regarding the information about wages, both parties have discussed and reached an agreement in the conciliation process at the Arbitration Council. Thus the Arbitration Council finds that it is not necessary to present any findings of fact about the first issue in this arbitral award.

2nd Issue:

C.CAWDU, which is the representative of the workers, decided to withdraw their complaint through a letter dated 1 February 2005. Accordingly, the Arbitration Council decides not to mention the findings about this issue in this award.

3rd Issue:

- 1- There are 16 security guards in the company: 12 men and 4 women.
- 2- Of the 16 security guards, 10 were selected by a supervisor and 6 others (including the selector) were selected by someone else outside the company known as Men Sopheap, who works for a parachute regiment.
- 3- Each security guard earned between 80 and 90 dollars per month.
- 4- Upon employment, both the guards and [other] employees are required to fill out a personal detail form for the company.
- 5- Formerly, all the guards always were paid at the Administration Office. However, for the last two months, the Administration of the company has given their pay to Mr. Mon Chamreun, the Head of Security Guards, and he distributed it to the other guards.
- 6- The security guards must punch in and out twice a day.
- 7- The guards work in two shifts, one from 7:00AM to 7:00PM and the other from 7:00PM to 7:00AM.
- 8- The guards both patrol and do the same work as other workers; that is, they may, for instance, count clothes sewn by workers. When they do not work properly or make any mistakes, for example, in counting clothes, Sister Xi Ling will give them advice.
- 9- Whenever they asked permission for leave due to an urgent matter, the company never deducted their wages, but one of [the guards] who does not take leave must replace the one on leave. Leave requests must be done through a supervisor and the head of security guards. Either the company or Administration decides whether or not permission should be given. However, the head of security guards may also make such a decision, to ensure there is a proper replacement.
- 10- Regarding their punishment and dismissal, Mr. Mon Chamreun gave evidence that it is the director of the company who has the right to dismiss a guard and that he has done so already.
- 11- The guards must wear uniforms designed by the guards themselves, and ordered and paid to by the company.
- 12- Ten of the 16 guards lodged the complaint to C.CAWDU through Mr. Mon Chamreun.
- 13- The worker party requests the company to give seniority bonus and annual leave to the 10 guards under the supervision of Mr. Mon Chamreun.

REASONS FOR DECISION:

1st Issue:

Based on the agreement of the parties on the hearing.

2nd Issue:

Based on the worker party's letter of request to withdraw the issue, dated 1 February 2005.

3rd Issue:

In order to decide whether these security guards have rights to take annual leave or are entitled to seniority bonus, the Arbitration Council must determine whether or not these security guards are covered by the Labour Law and Notification 017 of the Ministry in charge of Labour.

Article 2 of the Labour Law states that:

All natural persons or legal entities, public or private, are considered to be employers who constitute an enterprise, within the meaning of this law, provided that they employ one or more workers, even discontinuously.

Every enterprise may consist of several establishments, each employing a group of people working together in a defined place such as factory, workshop, work site, etc., under the supervision and direction of the employer.

A given establishment shall be always under the auspices of an enterprise. The establishment may employ just one person. If this establishment is unique and independent, it is both considered as an enterprise and an establishment.

Article 3 states that:

"Workers", within the meaning of this law, are every person of all sex and nationality, who have signed an employment contract in return for remuneration, under the direction and management of another person, whether that person is a natural person or legal entity, public or private. To clearly determine the characteristics of a worker, one shall not take into account of either the jurisdictional status of the employer nor that of the worker, as well as the amount of remuneration.

The question that the Arbitration Council must decide in this case is whether or not the security guards work under the direction and management of the company.

According to the facts, we know that at least 10 of the 16 security guards worked for the company and did not work for other places. They were recruited, had their wages and working hours (12 hours per day) determined, had their permission to take leave approved, were punished and dismissed all by the company; and only the company had the right to decide all those matters in relation to the 10 security guards. The Arbitration Council finds that the relationship between the employer and the security guards is within the meaning of Articles 2 and 3 above.

We know further that those security guards filled out their personal details for the employer when they commenced work. But they did not sign a written contract with the employer. They just received information such as working hours, wages and other benefits from the employer. The Arbitration Council finds that the employer and the security guards have a relationship through an oral contract with each other, which is binding on both parties in accordance with Article 65 of the Labour Law. Article 65 states that:

A labour contract establishes working relations between the worker and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties.

It can be written or verbal. It can be drawn up and signed according to local custom. If it needs registering, this shall be done at no cost.

The verbal contract is considered to be a tacit agreement between the employer and the worker under the conditions laid down by the labour regulations, even if it is not expressly defined.

Thus the Arbitration Council finds that the employer and the 10 security guards have a relationship through their oral contract, which provides a legal basis to bind them.

Article 166 states that:

Unless there are more favourable provisions in collective agreements or individual labour contracts, all workers are entitled to paid annual leave to be given by the employer at the rate of one and a half work days of paid leave per month of continuous service.

Any worker who has not worked for two continuous months is entitled, at the termination of his contract, to compensation for paid leave calculated in proportion to the amount of time he worked in the enterprise.

For jobs that are not performed regularly throughout the year, a worker is considered to have met the condition of continuous service if he works an average of 21 days per month.

The length of paid leave as stated above is increased according to the seniority of workers at the rate of one day per three years of service.

Official paid holidays and sick leave are not counted as paid annual leave.

The company alleged that when [the guards] commenced work the employer told them that they must work under the direction of the company and must work 12 hours per day without having annual leave and other benefits, except for wages. As for the workers, they objected to the employer's argument as not being true. The Arbitration Council finds that even though the argument from the employer is true, the clause of the agreement could not apply according to Article 166 above because it gives benefits less than the law, especially the benefit of annual leave which the employer must give to the workers and cannot avoid. In addition, Article 13 of the Labour Law states that any clause or provision of a labour contract or collective bargaining agreement that provides less benefit than the law shall be considered lawfully abrogated and null and void.

The Arbitration Council finds that Article 167(4) does not apply in this case because in this case, the employer refused to give the security guards their right to annual leave. Therefore, in this case, the guards did not agree to defer their rights to annual leave. Please see MS International Case 27/04. Therefore, the Arbitration Council finds that the company should compensate the security guards for their right to annual leave as from the date of their employment.

In addition to the benefit claimed above, the worker party demands that these security guards must be entitled to seniority bonus under Notification 017 dated July 18, 2000 issued by MoSALVY. The Notification applies in the textile, garment and footwear factories and enterprises within Cambodia. Article 5 of the Notification states that a worker who has worked for many years for an enterprise or factory shall be entitled to a US\$2 seniority bonus per month if (s)he has worked for 1 year or more, US\$3 per month if (s)he has worked for 2 years or more, US\$4 if (s)he has worked for 3 years or more and US\$5 per month if (s)he has worked from 4 years onwards, which must be calculated from 1 August 2000. The Arbitration Council finds that all the security guards should be entitled to the seniority bonus because (1) those security guards are under the jurisdiction of the Labour Law, and not under the jurisdiction of any other law, (2) those security guards have been working in the textile industry (garment factory), (3) besides their patrolling work, the company requires them to do other kinds of work done by other workers such as counting trousers and clothes.

In addition, the Arbitration Council finds that the company requires the security guards to work longer hours than are specified in the law; that is, the company orders them to work 12 hours per day and 7 days per week. Articles 137 to 148 of the Labour Law require workers to work 8 hours per day or 48 hours per week and 6 days per week. Because the two parties

did not raise these issues for the Arbitration Council to resolve, the Council will not decide these issues. However, the Arbitration Council notes that the employer should re-scheduled the security guards' working hours in compliance with Cambodian law, allowing them to work eight hours per day or 48 hours per week.

Based on the above facts, legal principles, and evidence, the Arbitration Council makes its decision as below:

DECISION AND ORDER:

- 1- The employer shall arrange and offer, for the 10 security guards who demanded this right, annual leave to be included with [other] rights since they started their employment, as of the day this award comes into effect.
- 2- The employer shall arrange and offer seniority bonuses to the 10 security guards who demanded this right, as of the day this award comes into effect. Their seniority shall be calculated from 18 August 2000 or, for those who started work after 18 August 2000, from the date that they started working for the employer.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party:

Name: **Hem H. Naryth**

Signed:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signed:

Chair of arbitration panel:

Name: **Pen Bunchhea**

Signed:

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.