

**KINGDOM OF CAMBODIA
Nation Religion King**

Case number: 10/03
Date of Award: 23-07-2003

ARBITRATION COUNCIL

ARBITRAL AWARD

Issued under Article 313 of the Labour Law

Jacqsintex Garment Co., Ltd.

(the “employer party”)

AND

Democratic Union of Jacqsintex

(the “worker party”)

details of employer party:

address: St. Chamka Daung, Sangkat Dan Kor, Khan Dan Kor, Phnom Penh
telephone: (855-23) 300 128 fax: (855-23) 310 128

representative: Chea Chin Hong

address: St. Chamka Daung, Sangkat Dan Kor, Khan Dan Kor, Phnom Penh
telephone: (855-23) 300 128 fax: (855-23) 310 128

details of worker party:

address: St. Chamka Daung, Sangkat Dan Kor, Khan Dan Kor, Phnom Penh
telephone: (855-11) 663 771 fax: no

representative: Meach Bun Noeun

address: St. Chamka Daung, Sangkat Dan Kor, Khan Dan Kor, Phnom Penh
telephone: (855-11) 663 771 fax: no

ISSUES IN DISPUTE:

1. Employees claim the company has to transform fixed duration labour contracts to undetermined duration labour contracts for the employees whose employment lasts for two years (or renewal occurs four times repeatedly and one time lasts for six months)
2. Employees claim they should not be terminated for reasons other than serious misconduct.
3. Employees claim the company provides a bonus of \$3 to the workers who work more than 10 days overtime without setting production targets.
4. Employees claim the company reinstates the workers Tan Sovannrithy, Waen Chan and Sak Kakada.

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 24-06-2003 was submitted to the Secretariat of the Arbitration Council on 30-06-2003.

Composition of the arbitration panel:

| | |
|---------------------------------------------------|---------------|
| Arbitrator chosen by the employer party: | You Suon Ti |
| Arbitrator chosen by the worker party: | An Nan |
| Chair arbitrator (chosen by the two arbitrators): | Kong Phallack |

Decision & Orders:

Issue 1:

The Arbitration Council finds that contracts of employment of fixed duration shall automatically be transformed to undetermined duration contracts where the total duration of the employment contract (including the period of the initial contract and any renewals) exceeds 2 years.

Issue 2:

The Arbitration Council cannot make an order on this point because the workers did not show evidence relating to the factual circumstances of their claim.

Issue 3:

The Arbitration Council orders that the Company may continue to set production targets for the payment of the overtime bonus so long as:

1. there is a clear method for the allocation of the bonus;
2. the method for the allocation of the bonus is applied fairly to all workers (whether they are union members or not);
3. the production target for the bonus is set at a level which can be achieved with out endangering worker health.

Issue 4:

The Arbitration Council decides that the Company shall reinstate the workers Waen Chan (#716) and Sak Kakada (#967) starting from 1 August 2003. The company shall reinstate both workers on contracts of undetermined duration with accumulated seniority. The company shall compensate the workers for the period of time during which they were out of work because of the dismissals:

In the case of Waen Chan (#716) \$96 (Waen Chan was entitled to a monthly wage of (\$48) and was out of work for 2 months)

In the case of Sak Kakada (#967) \$70.50 (Sak Kakada was entitled to a monthly wage of (\$47) and was out of work for 1.5 months)

No order is made with regard to the third worker, Tan Sovannrithy, because this worker's claim was withdrawn.

Hearing and Evidence :

Date and place of hearing: 07-07-2003 (8am – 10.20 am), Arbitration Council Secretariat, Phnom Penh Center (A), Sothea Rors Blvd., Sangkat TonLeBasak, Phnom Penh

Evidence:

1- The worker Waen Chan(#716) provided evidence as follows :

- + Notification dated 16th May, 2003.
- + Minute dated 22nd June, 2003.
- + Labour contract : 2 sets.
- + Fingerprint to renew contract.
- + Union's registration form dated 2nd March, 2002.
- + List of Union election candidates dated 6th April, 2003.
- + Waen Chan's Union Identification Card.

2- The worker Sak Kakada(#967) provided evidence as follows :

- + Notification dated 30th May, 2003.
- + Minute dated 9th June, 2003.
- + Labour contract : 2 sets.
- + Fingerprint to renew contract.
- + Union's registration form dated 2nd March, 2002.
- + List of Union election candidates dated 6th April, 2003.
- + Union Identification Card #029

3- List of employees who were recently hired.

4- Certification of the most representative union dated 8th January, 2003.

5- Internal Rules of company.

6- 2 letters of Mr. Huot Chanthy, Director of Labour Inspection Department dated 20th September, 2002 and 18th December, 2002.

7- Letter of company dated 7th July, 2003 asking to withdraw the 4th issue from the case and settle it through individual dispute.

8- Minute of collective dispute conciliation dated 24th June, 2003.

9- Report of Mr. Huot Chanthy, Director of Labour Inspection Department on collective dispute settlement in Jacqsintex Industry Garment (Cambodia) dated 30th June, 2003 to Minister of MoSALVY.

10- Letter of Minister of MoSALVY to Arbitration Council dated 7th July, 2003 asking to resolve the collective dispute in the company Jacqsintex Industry Garment (Cambodia).

11- Letter of Director of Company Jacqsintex Industry Garment (Cambodia) to Minister of MoSALVY dated 16th July, 2003 asking his intervention.

12- Letter of President of GMAC to Minister of MoSALVY dated 17th July, 2003 asking to clarify the interpretation of Labour Law on labour contract of fixed duration which was transformed to labour contract of undetermined duration and all regulations which the Department of Labour Inspection has clarified to enterprises.

Summary of the Case :

Employees request the employer some points as follows :

1. Employees claim the company has to transform fixed duration labour contracts to undetermined duration labour contracts for the employees whose employment lasts for two years (or renewal occurs four times repeatedly and one time lasts for six months)
2. Employees claim they could not be terminated for reasons other than serious misconduct.
3. Employees claim the company provides bonus of \$3 to the workers who work more than 10 days overtime without setting production target.
4. Employees claim the company reinstates the workers Tan Sovannrithy, Waen Chan and Sak Kakada.

Each of these requests were denied by the employer. The employer mentions that he will follow the labour law 1997.

The matter was then referred by MOSALVY to the Arbitration Council on 30th June, 2003.

After receiving this case, all parties to the dispute were questioned in July 3, 2003 by arbitration panel in order to get more information and also to conciliate before hearing in July 7, 2003. Because of the failure of questioning and conciliation, the arbitration panel suggests the parties to go back home and reflect on the case. At 14H00 in July 7, 2003 the arbitration panel held an official hearing in the arbitration council secretariat in which both parties participated. This hearing failed and the arbitration panel fixed 14th July, 2003 to hold hearing again.

Findings of Fact:

- 1- For the worker Waen Chan #716
 - + He made a labour contract on 1st June, 2000.
 - + This contract has been renewed 5 times, each time lasts 6 months.
 - + This contract was ended on 1st June, 2003.
 - + His employment is 3 years.
 - + He is an activist of Union.
- 2- For the worker Sak Kakada #967
 - + He made a labour contract on 18th June, 2001
 - + This contract has been renewed 3 times, each time lasts 6 months.
 - + This contract was ended on 18th June, 2003.
 - + His employment is 2 years.
 - + He is an activist of Union.
- 3- The company has hired new workers.
- 4- The company has no any reason except the ended contracts to stop the above workers.
- 5- The company recognizes their works are good.
- 6- Report of Mr. Huot Chanthy, Director of Labour Inspection Department on collective dispute settlement in Jacqsintex Industry Garment (Cambodia) dated 30th June, 2003 to Minister of Labour.
- 7- Letter of Minister of MoSALVY to Arbitration Council dated 7th July, 2003 asking to resolve the collective dispute in the company Jacqsintex Industry Garment (Cambodia).

Reasons for Decision:

Issue 1:

In the present case, the Company employs workers under six month, fixed duration contracts. Long term employment here consists of successively renewing these short term contracts. In order to enhance job security, the employees request that these fixed duration contracts convert to undetermined duration contracts where a renewal occurs four times, or employment lasts for two

years. The Arbitration Council's decision with regard to this issue is based on Article 67(2) of the Labor Law (1997) which states that:

"A labor contract made by agreement for a fixed duration cannot have a duration of over two years. Such a contract may be renewed one or more times so long as the renewals have a maximum duration not exceeding two years."

And Art 73(5) of the same law which states that:

"If the contract has a duration of more than six months the worker must be informed of the expiration of the contract or of its non-renewal ten days in advance. This notice period is extended to 15 days for contracts which have a duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed to be a contract of unspecified duration if the total length of the renewed contract exceeds the limit set out in Art. 67."

The Arbitration Council's understanding of Art. 67(2) is based on the fact that the use of the words "the renewal" in that Article is not clear. The lack of clarity in this Article leads to different interpretations. On the one hand "the renewal" could be understood to refer to *the duration of each renewed contract* which is the understanding of The Director of the Department of Labor Inspection in his letter #1230 which was presented to the Council by the employer party. On the other hand "the renewal" could be understood to refer to the *act total length of the employment contract including the initial contract and all subsequent extensions*. In considering which of these *of renewal*. In that case the length of time referred to in Art 67(2) would be *the* interpretations to prefer the Arbitration Council is obliged by Article 312 of the Labor Law to follow the law.

However, because the law on this point is not clear it is proper for the Arbitration Council to consider the context of this Article in order to understand its intended meaning. The Cambodian labor law has a bias toward contracts of undetermined duration as expressed in Art. 67(7) & (8). The reason for this bias comes from the fact that undetermined duration contracts lead to increased employment security which is important for workers and which is in the interests of the employer as well because long term employment leads to increased commitment to their work from employees. Further Art. 73(5) provides that contracts of specified duration be converted to contracts of undetermined duration where there is no notice of termination and their *"total length exceeds the time limit specified in Article 67."* Because Art. 73(5) refers to *the total length of time specified in Art. 67(2)* the Arbitration Council understands that the period of two years specified in Art. 67(2) is also a maximum total duration and not the duration of an individual renewal.

This interpretation is also supported by international labor standards; namely paragraph 3 of ILO Recommendation 166 of 1982 regarding Termination of Employment which provides that contracts of fixed duration should not be used for long term employment. This Recommendation of the ILO also states that fixed duration contracts should be converted to contracts of undetermined duration contracts if they are renewed one or more times. Though this Recommendation is not binding it is a useful instrument to assist in the interpretation of Article 67.

Finally, looking at the history of the 1997 Labor Law we see that it was drafted in French and then translated into Khmer. Although the Khmer version of the law was adopted by the National Assembly Art. 67(2) is not clear. For this reason we can look at the original French in order to gain a better understanding of the Khmer version. Art. 67(2) in French reads:

Le contrat de travail conclu pour une durée déterminée ne peut être conclu pour une durée supérieure à deux ans. Il peut être renouvelé une ou plusieurs fois pour autant que le renouvellement n'entraîne pas un dépassement de la durée maximale de deux ans.

Thus the French is clear in that fixed duration contracts convert to undetermined duration contracts if any renewal causes the total time under the employment contract to extend beyond the total duration of two years.

On the basis of the above arguments the Arbitration Council finds that Art.. 67(2) should be interpreted such that fixed duration contracts are converted into undetermined duration contracts where a renewal causes the total length of the employment contract to exceed two years.

Issue 2:

Issue 2 relates to the workers' request that workers not be terminated for reasons other than serious misconduct. However, the workers have not provided any evidence of workers' being dismissed other than in relation to issue 4.

The Arbitration Council was created to in order to resolve existing labor disputes and not in order to resolve disputes which have not yet occurred. With regard to issue 2 the workers have not provided any evidence to indicate that there is a existing dispute with regard to this issue. Therefore, the Arbitration Council does not make a decision about this issue. If workers want the Arbitration Council to address such issues in the future then they must present factual evidence regarding the dispute to the Council.

Issue 3:

The Arbitration Council understands that the Company has provided an overtime bonus of \$3 to workers who work more than 10 days overtime. However, about two years ago the Company changed the conditions on which this bonus was paid and required workers to meet a production target before the bonus was paid and this target was varied from time to time. The workers request is to remove the target.

The Arbitration Council find that an employer cannot reduce the salary of a worker unilaterally as to do so would be a breach of the employment contract. However, the employer does have the right to introduce or to change the system of work depending on the needs of the Company. Given that changes in production are a normal part of the garment industry in Cambodia employers will generally have significant discretion to set incentive bonuses depending on the circumstances. Thus the setting of production targets for incentive bonuses and the variation of these targets will not generally constitute a breach of the employment contract. Further, the fact that workers have accepted these conditions for approximately two years already adds strength to the argument that they should be considered part of the normal work system of the Company. Therefore the Arbitration Council rejects the claim of the workers.

In order to provide for justice and advantage to both parties, however, the Arbitration Council finds that there should be a fair method for the allocation of the overtime bonus. Principles of this method are contained in the orders above.

Issue 4:

Issue 4 relates to the termination of two employees, Waen Chan (#716) and Sak Kakada (#967). These two workers request reinstatement on the basis that their termination related to their activities as union members. The reasons for the decision relating to this issue above are as follows:

1. The employer requested to remove this issue on the basis that it relates to an individual dispute. According to Chapter XII, Part II of the Labor Law the Arbitration Council does not have the jurisdiction to deal with individual disputes, however, the Arbitration Council finds that the Labor Inspectorate and the Minister for Labor have the duty to decide if a dispute is an individual dispute or a collective dispute or an individual dispute before referring any dispute to the Arbitration Council. For this reason the Arbitration Council will generally follow the decision of the Labor Inspectorate and the Minister for Labor so long unless there are compelling reasons not to do so.

In any case, the Arbitration Council agrees with the decision of the Minister that this dispute fulfills the conditions for collective disputes set out in Article 302 of the Labor Law. These conditions are:

- a. there is a dispute between one or more employers and a number of employees;
- b. the issue at dispute relates to working conditions; the exercise of the rights of professional organizations; the recognition of professional organizations or relations between employees and employers;
- c. the dispute could lead to the disruption of the enterprise.

In this case conditions (a)-(c) are satisfied and therefore this dispute is a collective dispute. Condition (a) is satisfied because this dispute is brought by a union on behalf of workers. A

union is a professional organization which represents a group of workers. Thus the condition that the dispute must involve a group of worker is satisfied when the claim is brought by a union. Condition (b) is satisfied because this dispute relates to the question whether workers were terminated on the basis of their union activity and thus to the exercise of the rights of a professional organization (the right to conduct union activities without discrimination against workers). Condition (c) is also satisfied because this dispute could lead to a disruption of the enterprise because workers could conduct a strike in relation to this issue. Thus the Arbitration Council agrees with the decision of the Minister and the Head of the Department of Labor Inspection that this is a collective dispute.

2. The worker called Waen Chan (#716) signed an employment contract on 1 June 2000. The contract had a duration of 6 months and was renewed 5 times. The contract of employment was terminated on 1 June 2003. Thus the duration of the employment relationship was 3 years.

With regard to the worker Sak Kakada (#967) the situation is the same as for worker #716 except for the duration of the employment relationship. This worker entered into a contract of employment on 18 June 2001. This contract had a duration of 6 months and was renewed 3 times. The contract then ended on 18 June 2003. Thus the length of the employment relationship was 2 years.

According to the interpretation relating to issue 1 above the employment contract of worker #716 is of undetermined duration because the total duration of the contractual relationship is over two years. With regard to worker #967 it could be argued that this is a contract of fixed duration as the total duration of employment is only 2 years.¹

According to Art. 74 of the Labor Law an employer may terminate a worker on a contract of undetermined duration by giving notice if they have a reason which relates to the worker's behavior or capacity or it is necessary (to terminate the worker) for the operation of the enterprise. If there is no valid reason for the termination then the worker is entitled to damages (Art. 91). In any case (for contracts of fixed or undetermined duration) the employer is strictly prohibited from terminating or not hiring a worker for reasons of union membership or participation in union activities in accordance with Arts 12 and 279 of the Labor Law. In these circumstances both the decision not to renew a contract of fixed duration and the decision to terminate a worker on an undetermined duration contract should be considered to fall within the category of decisions which an employer cannot make for reasons of union membership or participation in union activity.

With regard to the above workers the employer agreed during the hearing that they were good workers thus behavior or competence cannot have been the reason for their dismissal. The employer also agreed that he hired new employees after the dismissal of workers #967 and #716. Thus the Arbitration Council finds that the dismissal of the workers did not occur for reasons of operational necessity.

The employees assert that their dismissal occurred after they became active in the union and stood for leadership positions in the union and they understand that their dismissals were related to their involvement in union activity. In response to this assertion the employer stated during the hearing that he did not know if any workers were union members and that he had the right to terminate any worker at the end of their contract. Further he added that he had reasons to terminate these workers and that these reasons were contained in a report of the company. But when the Arbitration Council requested further information the employer refused to provide further reasons or to provide a copy of this document saying that he could not provide the document because it was a private document of the company. The Arbitration Council then advised the employer that his refusal to provide the Council with the report would have consequences for the decision of the Arbitration Council. Still the employer was unwilling to provide the report. [no paragraph break] In these circumstances the Arbitration Council

¹ In the case of both workers #716 and #967 the employer gave 10 days notice prior to the ending date of their contracts. According to Art. 73(5) of the Labor Law a contract of fixed duration is automatically renewed for a period equal to its initial duration if an employer does not give notice prior to its expiry. The notice required is 10 days for contracts of over six months and 15 days for contracts of over 1 year. Though it is not necessary to decide in this case, the Arbitration Council considers that notice required relates to the total duration of the contractual relationship. Thus the notice required to terminate worker #967 at the end of two years of continuous employment under a contract of fixed duration would be 15 days and not the 10 days given by the Company.

does not have any choice but to accept the testimony of the workers that their dismissals were related to their participation in union activities.

3. Based on the above reasons the Arbitration Council decides that the Company must reinstate both workers. The Arbitration Council has the power to make such an order according to Article 34 A of the Prakas on the Arbitration Council issued 11 December 2002.

Other Issues:

In a letter to the Minister of Labor dated 7 July 2003 and copied to the Arbitration Council the Company raised the issue of conflict of interest. Specifically they complained about the presence of Mr. An Nan in the Arbitration Panel because they suggested that he was biased. With regard to the presence of arbitrator Mr. An Nan the Arbitration Council wishes to point out that the Company waived its right to object to the participation of Mr An Nan as an arbitrator during the hearing on 3 July 2003. The reason why the Arbitration Council decides like this is that during the hearing on 3 July 2003 the Arbitration Council explained the issue of conflict of interest to the parties but no party raised any point with regard to this issue. The Arbitration Council then told the parties that if any party believed that any arbitrator had a conflict of interest in this case then that arbitrator would withdraw from the hearing. In response to this the employer party said that he knew that Mr An Nan worked for CLO and that he had assisted the union to resolve similar disputes at Jacsintex but that he didn't have any problem with his participation in the panel.

Signatures of Members of the arbitration panel:

Arbitrator chosen by the employer party:

name: You Suon Ti

signature:

Arbitrator chosen by the worker party:

name: An Nan

signature:

Chair of arbitration panel:

name: Kong Phallack

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.