

**KINGDOM OF CAMBODIA  
NATION RELIGION KING**

**THE ARBITRATION COUNCIL**

Case: 107/04

Date of award: 6 January 2005

**ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

**Jacqsintex Co., Ltd.**

(Employer party)

**AND**

**Confederation of Union of Jacqsintex factory**

(Employee party)

**DETAILED INFORMATION OF EMPLOYER PARTY:**

**Representatives:**

- |                        |                              |
|------------------------|------------------------------|
| 1. Mr. Wang Hive Ing   | Director of the company      |
| 2. Mr. Chea Chin Hong  | Vice Director of the company |
| 3. Mrs. Sok Chanthy    | Translator                   |
| 4. Mr. Soun Nhean Mony | Administrator                |
| 5. Mr. Cheat Khemara   | GMAC representative          |

**Address:** Phum Morl Sangkat Dangkor, Khan Dankor, Phnom Penh

**Telephone:** 012 803 753, 012 593 388

**DETAILED INFORMATION OF EMPLOYEE PARTY:**

**Representatives:**

- |                         |                                    |
|-------------------------|------------------------------------|
| 1- Mr. Ek Sopheakdy,    | Chief of Dispute Office of C.CAWDU |
| 2- Mr. Meach Bunthoeun, | Union committee member             |
| 3- Mr. Sek Loo,         | Union President                    |
| 4- Mr. Sok Sarin,       | Union Secretary                    |

**Address:** # 6C, Street 476, Sangkat Tou Tompong 1, Khann Chamkarmorn, Phnom Penh

**Telephone:** 012 988 623

## **ISSUES IN DISPUTE**

(In non-conciliation report)

- 1- The workers demand that the employer pay wages to workers in the cutting section, group 13 according to a percentage of the production like other groups and sections or provide an allowance of US\$3 to workers who work overtime for ten nights per month.
- 2- The workers demand that the employer pay for milk in the amount of US\$10 to women who have just given birth instead of setting up a day care center as required by the law.
- 3- The workers demand that the employer pay back medical check fees of 10,100 riel to each worker.
- 4- The workers demand that the employer pay compensation for notice of seven days and unused annual leave to four probationary workers whom the company has just dismissed from work.

### **JURISDICTION<sup>1</sup> OF THE ARBITRATION COUNCIL:**

The Arbitration Council derives its power to make this Award from Section II (B)<sup>2</sup> of Chapter 12 of the Labour Law (1997); the Prakas on the establishment of the Arbitration Council 338/02; the Prakas on the Arbitration Council 99/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas and the Prakas on the Nomination of Arbitrators 103/04 and 265/04.

An attempt to conciliate the collective dispute which is the subject of this Award was made on 30 November 2004 as required by Chapter XII Section 2A of the Labour Law. As a result the parties have conciliated three of seven points.

### **COMPOSITION OF THE ARBITRATION PANEL:**

Arbitrator chosen by the employer party:	Mr. KOL Vathana
Arbitrator chosen by the worker party:	Mr. KOY Neam
Chair arbitrator (chosen by the two arbitrators):	Mr. TUON Siphann

### **HEARING AND EVIDENCE:**

**Date and place of hearing:** 24 December 2004 at 2:30 p.m. at the Secretariat of the Arbitration Council.

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<sup>1</sup> Jurisdiction: refers to the power of the Arbitration Council

<sup>2</sup> Articles 309 to 317 of the Labour Law

**Witnesses and Experts:** None.

**EVIDENCE CONSIDERED BY THE ARBITRATION PANEL IS AS BELOW:**

**Provided by the employer party:**

- 1- Report on conciliation meeting between the workers and the employer;
- 2- Receipt;
- 3- Employment contract;
- 4- Letter to the Arbitration Council dated 23 December 2004 on non-conciliation between the company and union representative;
- 5- Internal Work Rules dated 18 February 1999;
- 6- By-laws of the company dated 8 March 1999;
- 7- Certificate of commercial registration;
- 8- Monthly payrolls from 2003;
- 9- Sample of daily outcome; and
- 10- Time recorded cards of four workers whom the company dismissed.

**Provided by the employee party:**

- 1- Letter of request to the Chief of Labour Inspection of Khan Dongkor to resolve the problem at Jacqsintex dated 21 October 2004;
- 2- Sample of employment contract;
- 3- Letter of request to the Chief of Labour Inspection of Khan Dongkor to resolve the problem at Jacqsintex dated December 14, 2004; and
- 4- Workers' complaint from CCAWDU (no clear date).

**Received from the Ministry of Labour and Vocational Training (MoLVT):**

- 1- Non-conciliation report on the collective labour dispute dated 30 November 2004; and
- 2- Report on the collective labour dispute at Jacqsintex dated 7 December 2004 from MoLVT.

**CASE SUMMARY:**

Jacqsintex Co., Ltd. employs 820 workers. The workers at Jacqsintex filed a complaint with the Labour Inspectors in the Daung Kor district on 3 November 2004 demanding that the company improve seven labour conditions. The Labour Inspectors in the Daungkor district held a conciliation between the disputing parties in accordance with procedures of labour dispute resolution on 3 November 2004, successfully conciliating three issues. The non-conciliation report dated 7 December 2004 of the Ministry of Labour and Vocational Training was sent to the Secretariat of the Arbitration Council on 13 December 2004. The Arbitration Council conducted a hearing on 24 December 2004. After the hearing

the Secretariat of the Arbitration Council received a letter from CCAWDU requesting that the Arbitration Council not issue an award on the interests issues.

**BOTH PARTIES DECIDED TO HAVE A NON-BINDING AWARD.**

**FINDINGS OF FACT:**

- Having examined the conciliation minutes of the collective labour disputes
- Having listened to the employer and the employees sides as described in the minutes of the hearing
- Having checked all relevant documents above

**We find that:**

First issue:

- A-
- 1- The workers demand that the company provide wages to the cutting workers section in group 13, according to a percentage of production like other groups and sections;
  - 2- Today the cutting workers section received wages of US\$45 per month;
  - 3- Other workers' groups or sections received their wages according to a percentage of total production that they have completed.
  - 4- The workers in the cutting section have operated since the company started its business in 1998 when there was only five people, and then increased to 20, and now [the section] has grown to approximately 44 to 50 people including casual and floating workers.
- B-
- 1- The workers of group 13 demand an incentive bonus of US\$3 for overtime for [working] ten nights per month.
  - 2- From 1998 to 2000, the company used to give a monthly incentive bonus of US\$3 to all workers who worked overtime beyond ten nights per month.
  - 3- Today the company still applies the same policy except for group 13.
  - 4- Since 2000, group 13 no longer receives the incentive bonus, although they have worked overtime beyond ten nights per month.
  - 5- On 22 September 2003, the employee party and the employer signed an agreement on a bonus for overtime work.
  - 6- On 15 November 2003, the company and group 13 signed an agreement that determined that the company would offer an incentive bonus of US\$3 to workers who worked overtime for 15 nights or more per month.

Second issue:

- 1- The workers demand that the company pay for the cost of milk of US\$10 per month instead of a day care center to women who have given birth.

- 2- The employer did not agree on this request because the workers had already signed an agreement with the employer for a condition of building a day care center. This agreement said that if the women had children aged 18 months to five years, they were paid US\$5 per month for each child in order to replace the day care center.
- 3- The employer said that they pay US\$5 per month to male workers of the company whose wives have just given birth.
- 4- The employees demand that the employer must follow the Labour Law and pay US\$10 to women workers who have just given birth.

Third issue:

- 1- Under point 4 of the employment contracts, the Jacqsintex Company requires workers to have a medical check at the state hospital [prior to employment] and if the workers are in good health, the company will accept them for work at the company.
- 2- The company party said that because the company needed the workers immediately, the company allowed some workers who had not yet had a medical check to [start] work, [whereas] some others had a medical check already.
- 3- Based on the Labour Law, the workers must have medical checks in order to work in the factory; therefore, the company ordered the workers who had not yet had a medical check to have it at the Labour Department Medical Center located at building #482, National Road 2, Sangkat Chack Angre, Mean Chey district, Phnom Penh (Joint Prakas 9/94).
- 4- In regard to this medical check fee, the employees demand that the employer reimburse each worker 10,100 riel (both those workers who have had a medical check before and those who had a medical check after commencing employment).
- 5- The employer claimed that it did not have the capability to fully reimburse and could afford to pay only 40 percent. However, the workers still retain their demand of payment of 100 percent of 10,100 riel.

Fourth Issue:

- 1- The workers demand that the company compensate four workers who were dismissed on 20 October 2004. Compensation demanded includes:
  - a- Severance pay of five percent;
  - b- Compensation as the company failed to give prior notice of seven days before terminating the contract; and
  - c- Compensation for unused annual leave.

The workers' demand was based on Articles 75 and 166 of the Labour Law and Notification 06/97 of the Ministry of Social Affairs, Labour and Veterans.

- 2- Based on Article 82 of the Labour Law, [the company] understood that it does not have an obligation to give notice regarding the termination of the labour contracts because those workers were in a probation period or were employed on apprenticeships. The company did not respond to the other two points that were demanded by the workers.
- 3- Four contracts were given by the company to the Arbitration Council. These contracts are the written contracts of the following four workers:
  - a- Ho Saroi, probationary period from 1 September to 1 November 2004;
  - b- Chan Ly Chheang, probationary period from 7 August to 7 October 2004;
  - c- Thau Chanry, probationary period from 1 August to 1 October 2004;
  - d- Sem Lakhana, probationary period from 1 August to 1 October 2004.

The Arbitration Council did not receive other contracts in addition to the above contracts.

The company said that those four workers were terminated on 24 September 2004. The time record cards also showed that the termination date was 24 September 2004. There was an opposing argument in respect of the contract termination date between the workers and the company, and the workers argued that they were terminated on 20 October 2004 but the company argued that the workers were terminated on 24 September 2004. The Arbitration Council requested the worker party submit evidence to prove the actual termination date, but they did not submit anything. Therefore, the Arbitration Council has to refer to the company's documents and recognize 24 September 2004 as the contract termination date.

#### **REASONS FOR DECISION:**

##### First issue:

1- The worker party demand the [employers] pay the workers from group 13 of the cutting section according to a percentage of [total production] because wages based on a percentage can be more than fixed wages of US\$45 per month. The worker party did not raise any particular law to prove that they are entitled to wages based on a percentage [of total production].

The employer party argued that s/he has the right to provide wages to the workers based on a percentage or a monthly payment. The employer party argued that s/he followed the law and has paid wages of US\$45 per month. Moreover, paying wages according to a percentage to workers of the cutting section is difficult because they are working as a group and the company could not know who performed work well or how productive [each worker] had been. Furthermore, there was no requirement for the cutting workers to have any

specific skills to work because the work is easy. Only the chief of the cutting section and a person printing works in a difficult role and the company gives them enough wages already.

The Arbitration Council did not find any law that requires the employer to pay the same wage to all workers. In addition, there is no law requiring the company to give wages to the workers according to a percentage [of total work]. Therefore, the Arbitration Council finds that this demand is an interests issue.

However the Arbitration Council received a letter from the worker party dated 4 January 2005 requesting the Arbitration Council not arbitrate the issue regarding interests because the workers want to negotiate with the employer for a collective bargaining agreement. In reference to this request, the Arbitration Council decides not to issue an award on the interests issue.

Second issue:

The company has not yet organized a day care center. The employer side recognized that an average of 20 workers had children every month. The first sentence of Article 184 of the Labour Law states that, "For one year from the date of child delivery, mothers who breast-feed their children are entitled to one hour per day during working hours to breast-feed their children."

Article 186 [paragraph 1] states that "Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a crèche (day-care centre).".

Pursuant to the above Articles of the Labour Law, the Arbitration Council finds that the employer has three obligations to female workers who have children and work in the factory:

- 1- provide one hour of breaks during working hours to women in order that they may nurse their babies until the babies are one year old.
- 2- provide a nursing room for women who nurse their babies
- 3- provide a day care center for their children, but only for children older than 18 months; [alternatively] the employer can pay for day care services instead of providing a day care center

At the hearing the employer party agreed that they will organise an hour break per day for women to nurse their babies, and organise a day care center in the factory because

the company has the ability to do so. The Arbitration Council finds that the decision and commitment of the employer party proved their desire to follow Articles 184 and 186 of the Labour Law. Therefore, the Arbitration Council decides to order the employer to organise a day care center and nursing room within an appropriate time.

Third issue:

Article 247(c) of the Labour Law states that "the Ministry in charge of Labour shall issue a Prakas to determine: (a) the conditions under which pre-employment, re-employment, periodical, and special physical exams are given; ... (c) the conditions under which employers are required to establish and provide at their expense: ... 4) the medical exams of workers as stipulated in point (a) of this article."

Even though there is no new Prakas prepared by the Ministry of Labour, the Arbitration Council finds that Article 247 of the Labour Law provides sufficient legal basis to conclude that the employer has an obligation to pay for medical check fees, including medical check fees when recruiting new workers. The meaning of Article 247(c) clearly states that when there is a Prakas it requires the employer to pay for the workers' medical check costs (see 60/04 – United Art and Prakas 09/94 Sar Kor Aor on medical checks for Cambodian and foreigner workers who work in Cambodia and requiring the employer to pay the medical costs for workers).

Previous awards of the Arbitration Council referred to Joint Prakas 09/94 made under the Labour Law 1992 which was replaced by the Labour Law 1997 (see 02/03 – Chou Sing, 21/03 – Loyal, 19/04 – Kbal Koh II and 53/04 – Kong Hong). Article 7 of this Prakas clearly states that an enterprise or company must pay for the workers' medical check. However the Arbitration Council had a different view of this Prakas and whether this Prakas should still be effectively implemented or not (see 60/04 - United Art and attached descending as an annex). Although in this case the Arbitration Council notes that Article 247 of the Labor Law 1997 has a sufficient legal basis to require the employer to pay for medical checks before hiring new employees.

According to this view the employer has a legal obligation to pay the medical check fee for its workers. In this case the employer argued that because of an urgency in hiring workers the company hired some workers who had not yet had a medical check, [while] some others had [been checked] already and some others had done so after commencing work when the company asked them to do so. The employer argued that the company is able to reimburse only 40 percent of the medical check fee. The workers had their medical

checks and paid it by their own. The act of the workers paying for the medical check fee does not release the employer from its legal obligation as stated in Article 247(c) of the Labour Law 1997.

Therefore the Arbitration Council decides that the employer has to reimburse the amount of the medical check fee of 10,100 riel per worker, to all workers who had a medical check and paid on their own.

*Fourth Issue:*

The Arbitration Council finds that under Article 67 of the Labour Law, the four contracts are fixed duration contracts because the contracts are written and have specific start and end dates. The Arbitration Council also finds that the duration of these contracts overlap with the probationary period of two months. Therefore, the probationary period was a part of the whole contract.

**1- Notice and compensation:**

Article 73(5) of the Labour Law requires prior notice for contracts which have a duration longer than six months. This means that when a contract's [duration] is less than six months, prior notice [of termination] is not required. In this case, the four workers signed contracts which had a fixed duration of two months. Therefore, [the employer] is not required to give prior notice of termination. However, Article 73 paragraph 3 of the Labour Law states that "The premature termination of the contract by the will of the employer alone for reasons other than those mentioned in paragraphs 1 and 2 of this article entitles the worker to damages in an amount at least equal to the remuneration he would have received until the termination of the contract." In this case the employer argued that those workers were under probationary periods; therefore, the company can terminate the contracts without giving prior notice and without paying any compensation, based on Article 83 of the Labour Law. Article 82 of the Labour Law is in the section headed "undetermined duration contracts". In this section, seven days prior notice is [obliged to be given] to a worker who works less than six months (Article 75). The Arbitration Council finds that the contracts of those four workers are not undetermined duration contracts, but are fixed duration contracts; thus, the Article cannot apply in this case.

Moreover, the employer did not provide any evidence to prove that these four workers committed serious misconduct; therefore, the Arbitration Council finds that the employer canceled the contract based on its own intention.

Referring to evidence submitted by the employer party, the Arbitration Council finds that the employer terminated the contracts on 24 September 2004:

- a. Ho Saray was terminated 32 days before the expiration date provided in his contract of 1 November 2004. Therefore, Ho Saray is entitled to damages, in accordance with Article 73 (3) as explained above, equal to his wages of 32 working days.
- b. Chan Lychheang's contract expired on 7 October 2004; thus, the company terminated his contract 11 days before its expiration date. Therefore Chan Lychheang is entitled to damages in accordance with Article 73 (3) as explained above, equal to his wages of 11 working days.
- c. Thor Channy and Sem Lakhana were terminated on 1 October 2004, but only six days before their contracts expired. The two workers are entitled to damages in accordance with Article 73 (3) as explained above, equal to their wages of six working days.

## **2- Severance pay of 5 percent:**

Article 73 paragraph 6 requires the employer compensate workers when there is a termination of an employment contract [in the amount] as determined in a [relevant] collective bargaining agreement, or if there is no collective bargaining agreement, the employer must pay 5 percent of the wages which were paid during the employment contract. Therefore, the company had an obligation to the four workers when the company terminated their contracts. Therefore, the employer must calculate all [the employees'] wages from the date they commenced working until the company terminated them, multiplied by five and divided by 100.

## **3- Compensation for paid annual leave:**

Under Article 166 the workers are entitled to paid annual leave of one and a half days for those who work continuously, or if they do not work continuously for two months, it shall be calculated in proportion to the period of work. Article 167 paragraph 2 requires the employer to pay workers according to the number of annual leave days that were saved by the workers.

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

**DECISION:**

- 1- Allow the worker party to withdraw the demand that the employer pay wages for workers in the cutting section as a percentage of work completed and pay a bonus for overtime work of more than 10 nights.
- 2- Order Jacqsintex to build a nursing room for women who have just given birth, in accordance with the Labour Law, Chapter 6, Section VII, Article 186 (1) (c), and order the company to build a day care center for children aged between 18 months and five years, in accordance with Chapter 6, Section VII Article 186(2)(c) of the Labour Law, within 30 days from the date this Award came into effect.
- 3- Order Jacqsintex to reimburse the cost of medical checks in the amount of 10,100 riel to workers within 30 days from the date this Award comes into effect.
- 4- Order the employer to pay severance pay to the four workers pursuant to the following formula:

For the purpose of this Award, there are 26 working days per month.

Daily wages = Monthly wage / 26

A- Compensation

To calculate “compensation” the “monthly wage” is equal to the “monthly basic wage in addition to overtime and other monthly benefits”:

- 1- Ho Saray: Monthly wages x 32/26
- 2- Chan Lychheang: monthly wages x 11/26
- 3- Thor Chanry and Sem Lakhana; each receives: monthly wages x 6/26

C- Severance pay in respect of termination of the labour contract: each worker shall receive severance pay based on the following formula:

$5 \times (\text{total wages earned until the date of termination of the contract}) / 100$
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$5 * (\text{all basic wages that were cashed up to a termination of contract}) / 100$
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Annual leave for workers who work longer than one month but less than two months shall be calculated by three days of annual leave for two months of work divided by 52 [days] and multiplied by the number of working days in the past duration.

To calculate annual leave compensation generally, take the number of [days] of annual leave multiplied by daily wages. Therefore, each worker shall receive annual leave compensation based on the below formula:

$$1.5 * (\text{number of months that the workers worked regularly for one month}) * (\text{basic monthly wage}) / 26$$

**SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL :**

Arbitrator chosen by the employer party:

Name: KOL Vathana

Signed: .....

Arbitrator chosen by the worker party:

Name: TUON Siphann

Signed: .....

Chair of arbitration panel:

Name: KOY Neam

Signed: .....

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