



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**ក្រុមប្រឹក្សាអន្តរាគ្នា**  
**THE ARBITRATION COUNCIL**

**Case number and name: 115/08-Top-One**

**Date of Award: 24 October 2008**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRATION PANEL**

Arbitrator chosen by the employer party: **Mar Samborana**

Arbitrator chosen by the worker party: **Liv Sovanna**

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

#### **DISPUTING PARTIES**

##### **Employer party:**

Name: **Top-One Garments Cambodia MFG Co., Ltd.**

Address: Lor Kambor Village, Sangkat Svay Pak, Khan Russey Keo, Phnom Penh

Telephone: 012 522 266 or 012 927 208 Fax: N/A

Representative:

1. Mr. Long Heang Officer of GMAC (Representative of the Company)

##### **Worker party:**

Name: **Democratic Independent Solidarity Union Federation (DISUF) and local union of Democratic Independent Solidarity Union (DISU) at Top-One Factory**

Address: No. 629, Lou Village, Sangkat Svay Pak, Khan Russey Keo, Phnom Penh

Telephone: 012 377 024 Fax: N/A

Representative:

- |                     |   |
|---------------------|---|
| 1. Ms. Long Poch    | President of local union of DISU at Top-One Factory       |
| 2. Ms. Meas Morokot | Vice- President of local union of DISU at Top-One Factory |
| 3. Ms. Thorn Sovan  | Secretary of local union of DISU at Top-One Factory       |
| 4. Ms. Yom Hong     | Advisor of DISU at Top-One Factory                        |
| 5. Ms. Lean Chenda  | Lawyer  |

## **ISSUES IN DISPUTE**

(In the Non-Conciliation Report)

- 1- The workers demand that the company should not discriminate against pregnant women workers, especially that it should not terminate their employment contracts. The company states that it does not discriminate against pregnant workers but it will follow the Labour Law if their contract is fixed duration contract
- 2- The workers demand that the company build a daycare center. The company states that it does not have sufficient space to build the daycare center. In addition, the company and workers had an agreement regarding payment of US\$ 5 in lieu of a daycare center.
- 3- When workers do overtime work for two hours from 4:00 p.m. to 6:00 p.m., the company should pay 2,500 riels for meal allowance or provide a free meal. The company states that it follows the Notification No. 017 S.K.B.Y dated 18 July 2000.
- 4- When workers work on public holidays and Sundays, the company should pay 1,500 riel for meal allowance. The company states it follows the Labour Law.
- 5- The workers demand that when they take leave with permission, the company should deduct their attendance bonus pro rata to the number of days they were absent from work. The company follows the Notification No. 017 S.K.B.Y dated 18 July 2000 and the Labour Law.
- 6- The workers demand that the company must provide valid reasons when it terminates their employment contract. The company states that it follows the Labour Law.
- 7- The workers demand back payment for those workers who have been working for the company for over four years and to whom annual leave was not provided correctly. The company follows the agreement dated 17 March 2008.
- 8- The workers demand that the company convert their employment contract from fixed duration contract to undetermined duration contract. The company states that it uses both fixed duration contract and undetermined duration contract and it follows the Law.
- 9- The workers demand that the company allow them to use their special leave for important personal commitments involving their family members and close relatives (father-in-law, brothers and sisters). The company states that it follows Prakas No. 267 S.K.B.Y dated 11 October 2001 and the Labour Law.

## **JURISDICTION OF THE ARBITRATION COUNCIL**

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labour Law (1997); the Prakas on the Arbitration Council No. 099 dated 21

April 2004; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators No. 076 dated 10 May 2007 (Fifth Term).

An attempt was made to conciliate the collective dispute that is the subject of this Award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and the non-conciliation report No. 969 KB/AK/VK, dated 3 September 2008 was submitted to the Secretariat of the Arbitration Council on 4 September 2008.

### **HEARING AND SUMMARY OF PROCEDURE**

**Place of hearing:** The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Basak, Khann Chamkarmorn, Phnom Penh.

**Date of hearing:** 23 September 2008, from 2:00 p.m. to 5:30 p.m.

#### **Procedural issues:**

On 7 August 2008, the Department of Labour Disputes received a complaint by DISUF dated 5 August 2008 regarding the demand for the company to improve some working conditions. After that the Department of Labour Disputes assigned expert officer to settle this collective labour dispute and the last conciliation was held on 26 August 2008 with a result of 9 of 15 non-conciliation issues. The 9 non-conciliation issues were referred to the Secretariat of the Arbitration Council on 4 September 2008 through the non-conciliation report No. 969 KB/AK/VK, dated 3 September 2008.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the worker party to the hearing and conciliation on the 9 non-conciliation issues on 23 September 2008 at 2:00 p.m.

Both parties were present at the arbitral hearing. The Arbitration Council tried to ask for further information relevant to this dispute and attempted to further the conciliation on the 9 non-conciliation issues. The worker party agreed to withdraw issue 6 and issue 9 from this case. Therefore, the Arbitration Council will consider the remaining issues - issue 1, issue 2, issue 3, issue 4, issue 5, issue 7 and issue 8 - based on the evidence and findings of fact as follows:

### **EVIDENCE**

**Witnesses and experts:** N/A

#### **Documents, Exhibits and other evidence considered by the Arbitration Council**

Provided by the employer party:

1. Power of attorney to authorise Mr. Long Heang, Coordination Officer of GMAC, to represent the company in the settlement of collective labour dispute with authorised institutions, dated 1 September 2008.
2. Summary statement of the labour dispute of the company, dated 3 October 2008.
3. Agreement between Top-One Garments company and DISU, dated 18 March 2008.
4. Certificate of commercial registration of Top-One Garments company, dated 29 August 1997.
5. Statute of Top-One Garments company, dated 11 August 1997.
6. Internal Work Rules of Top-One Garment company, dated 14 May 2004.
7. Minutes of collective labour dispute resolution at Top-One company, dated 17 March 2008.
8. Minutes of collective labour dispute resolution at Top-One company, dated 25 July 2008.
9. Minutes of collective labour dispute resolution at Top-One company, dated 26 August 2008.
10. Conditions in collective bargaining agreement between DISU and the employer of Top-One Garment factory, dated 1 March 1994.
11. Probationary employment contract.
12. Six-month fixed duration contract.
13. Notification of expiration of employment contract.
14. Monthly payroll list.

Provided by the worker party:

1. Letter No. 714 KB/AK/VK, by the Department of Labour Disputes regarding recognition of new union leaders in its fourth mandate, dated 7 July 2008.
2. Conditions in collective bargaining agreement between DISU and the employer of Top-One Garments factory, dated 10 March 2004.
3. Certificate of most representative status of DISU at Top-One factory, dated 13 December 2002.
4. List of names of members of DISU at Top-One factory who had agreed for the company to deduct 1,000 riels from their wage to pay for union contribution fee (with thumbprint of each worker).
5. List of names [of workers] to whom the company needs to provide backpay for the annual leave the company owes to them (There are no signatures or thumbprints of individual workers, no date, no name of the person in charge, that is, the union leader who made the name list and is responsible on behalf of the workers).

Provided by the Ministry of Labour and Vocational Training [MoLVT]:

1. Report of collective labour dispute resolution at Top-One Company No. 969 KB/AK/VK, dated 3 September 2008.
2. Minutes of collective labour dispute conciliation at Top-One Company, dated 26 August 2008.

Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to invite the worker party to attend the hearing, No. 590 KB/AK/VK/LKA, dated 18 September 2008.
2. Letter of invitation to invite the employer party to attend the hearing, No. 589 KB/AK/VK/LKA, dated 18 September 2008.

**FACTS**

- Having reviewed the collective labour dispute conciliation report
- Having listened to the statements by the worker party and the employer party
- Having examined additional documents

**The Arbitration Council finds that:**

- Top-One company employs approximately 742 workers.
- In the company, there is only one union, DISU, the claimant in this case.
- DISU has approximately 200 members.

**Issue 1: The workers demand that the company should not discriminate against pregnant women workers, especially at the expiration of their fixed duration contract**

- The worker and the employer parties acknowledge that at the expiration of employment contract the company gives proper notification according to the Labour Law.
- The worker party claims that on average there are approximately 10 pregnant women workers per month, among all workers in the factory.
- The workers claim that the company never renews fixed duration contract for pregnant women workers when their employment contracts expire. For example, the company did not renew the contract of the women workers named Meas Sokkea in the sewing section and Ho Srey Mean in the checking section when their fixed duration contracts expired. The two workers do not demand for the company to renew their contracts. The workers make this demand for the future that the company should not discriminate by not renewing employment contracts for pregnant women workers.
- The workers argue that the livelihood of pregnant women workers depends on their work in the factory. If their fixed duration contract expires and the company does not renew their contract, it will affect their livelihood; especially after they deliver their

baby, women workers need money to raise their children. This will ultimately affect the society.

- The workers think that when a fixed duration contract expires the employer has a right to terminate (not renew) the contract or renew it with the workers because this is the right of the parties to the contract. However, pregnant women workers are [given particular consideration] by the Constitution and international conventions of the International Labour Organization. For example, the International Conventions of the International Organization No.'s 101 and 83.
- The workers stated that the company discriminates against pregnant women workers as their fixed duration contracts are not renewed when they expire even though there is still work to be performed by the pregnant workers and instead the company recruits new workers to replace them. The worker party promised to provide documents and evidence to support this claim to the Arbitration Council by 3 October 2008. However, up to the deadline, the Arbitration Council did not receive the documents and evidence from the worker party.
- The company party argues that it does not engage in discrimination. Generally, whether expired fixed duration contracts will be renewed depends on the requirement of the production line of the company. If the production line in a section needs many workers, the company will renew the contracts for many workers, but if the production line in a section needs few workers, the company will renew contracts for few workers. The company follows the Labour Law.

**Issue 2: The workers demand that the company establish a daycare center in which to keep their children**

- At the end of 2007, the workers and the employer verbally agreed to a provision of US\$ 5 (five US dollars) in lieu of building a daycare center. However, because the market price has currently increased and the US\$ 5 provided by the company in lieu of a daycare center is no longer sufficient for the workers to take their children to external care providers, the workers now request that the company build a daycare center in the factory for children of women workers.
- The workers state that they do not demand that the company provide payment in lieu of a daycare center but they want the company to build a daycare center. If the company is unable to build a daycare center, it should pay an additional fee on top of the US\$ 5 for the women workers to take their children to outside daycare.
- The workers add that the company rents the factory location and there is no space or room to build a daycare center. However, there are locations and flats for rent around the factory which the company can rent to arrange as a daycare center.

- The company states that the factory location it rents has very narrow space in which a daycare center cannot be built. The company requests to maintain the provision of US\$ 5 in lieu of building a daycare center.

**Issue 3: The workers demand for 2,500 riels as meal allowance for overtime work from 4:00 p.m. to 6:00 p.m.**

- The workers and the employer acknowledge that overtime is worked on a voluntary basis. The company provides 1,000 riels to those workers who volunteer to work overtime from 4:00 p.m. to 6:00 p.m.
- The workers states that the provision of 1,000 riels to workers who volunteer to work overtime could buy a meal in the past but because price of goods in the market has increased, the 1,000 riels cannot buy a meal. For this reason, the workers request that the company provide 2,500 riels to workers who agree to work overtime from 4:00 p.m. to 6:00 p.m. and if the company cannot provide this amount of money, the workers request that the company provide them with a free meal.
- The workers add that other companies provide 2,000 riels to workers who volunteer to work overtime from 4:00 p.m. to 6:00 p.m. such as New Riren, De loon, Sen Lando. However, the workers do not provide evidence to support the above allegation.
- The company states that it cannot provide 2,500 riels for meal allowance to the workers who volunteer to work overtime from 4:00 p.m. to 6:00 p.m. It requests to implement Notification 017 SKBY, dated 18 July 2000.

**Issue 4: The workers demand that the company provides 1,500 riels meal allowance to workers who volunteer to work on holidays**

- In the past, when workers worked on holidays the company paid them only their wages at the rate of 200 percent but there was no provision of meal allowance.
- The workers state that they request the company to provide 1,500 riels meal allowance for those workers who volunteer to work on holidays because they think that the fact that they volunteer to work on holiday is overtime work.
- The company party states that the company is unable to provide 1,500 riels meal allowance to those workers who volunteer to work on holidays because the company already provides them with 200 percent of wages. Moreover, the company considers that the work the workers volunteer to perform on holidays is not overtime work.
- In the hearing, the workers raised an additional demand for 1,500 riels meal allowance for work on Sunday but the demand for meal allowance for work on

Sunday is not mentioned as an issue of the non-conciliation report and it is not a direct consequence of this dispute. Thus, the Arbitration Council will not consider this.

- The workers claim that the reason they make this demand because there is not much food sold outside around the factory that it is hard for them to look for food and food prices are different than on normal days.

**Issue 5: The workers demand that the company deduct their attendance bonus in proportion to the number of days they are absent from work**

- In the past, if a worker takes one day leave the company would deduct US\$ 3 of attendance bonus and the company will deduct all the US\$ 5 attendance bonus if the worker takes two days off with or without permission.
- The workers agree that the company can deduct US\$ 3 attendance bonus if a worker takes one day off and US\$ 5 attendance bonus if the worker takes two day off without permission. However, for those who take leave with proper permission from the company, the company should deduct their attendance bonus in proportion to the number of days they are absent.
- The worker states that for those workers who have important an personal commitment and obtain proper permission from the company, the company should deduct their attendance bonus in proportion to the number of days they are absent because they are permitted to take the leave.
- The company asserts that it would like to maintain the current practice.

**Issue 7: The workers demand for back payment for those workers who have been working for the company for over four years and to whom annual leave was not provided correctly**

- The workers states that currently the company provides the correct number of days for annual leave. However, in the past the company did not provide the correct number of days of annual leave for those workers who have been working for over four years. Thus, the company should provide back pay for this.
- In the past, the company did not add one more day of annual leave to the 18 days of annual leave for workers who have been working for three years. Thus, when the company calculated payment in lieu of unused annual leave, it was not calculated correctly.
- The worker party promised to complete a list of names of workers, number of workers who have been working for more than four years, and number of days they request for the company to provide back pay for miscalculation in the past to the Arbitration Council by 3 October 2008. The Arbitration Council received the list by the deadline.

The list includes identification numbers, names, date of employment commencement, number of days the workers are entitled to, number of days each worker demands for back payment, but there was no signature of any complainant worker under the column prepared for signature and there was no date of the person responsible for making the list or the union leaders who made the list.

- The company party states that it cannot provide back pay for this and would like to implement an agreement dated 17 March 2008. The worker party objects to this and claims that they never had an agreement related to annual leave thus such agreement does not exist. The Arbitration Council does not see the agreement.
- The company party states that it is not sure if the agreement exists. However, if there is such an agreement the company would provide it to the Arbitration Council on 3 October 2008. By the deadline, the Arbitration Council had not received any agreement.

**Issue 8: The workers demand that the company convert their employment contract from fixed duration contract to undetermined duration contract**

- In the factory, there are two types of contracts: (1) undetermined duration contracts and (2) fixed duration contracts.
- The company used undetermined duration contracts with workers who started work for the company since the beginning of its operations. However, later on the company used three-month or six-month fixed duration contracts based on the requirement of the production line.
- The workers demand that the company should stop using fixed duration contracts or change the type of employment contract to undetermined duration contracts when a worker with three- or six-month fixed duration contract finishes their short term employment contracts. In the hearing the parties did not provide evidence as to the number of workers who have renewed their contracts multiple times for a [total employment] period of more than two years.
- The company does not agree with the workers' demand and continues to implement these two types of employment contracts based on the requirements of production line. The signing of all employment contracts is voluntary and without any coercion. In case the workers do not agree, they can choose not to sign the fixed duration contracts .

**REASONS FOR DECISION**

**Issue 1: The workers demand that the company should not discriminate against pregnant women workers, especially at the expiration of their fixed duration contract**

In relation to this demand, the workers and the company state that the company gives notification of the expiration of fixed duration contracts in accordance with Article 73(5) of the Labour Law and provides severance pay correctly in accordance with Article 73(7) of the Labour Law. However, the workers demand that the company should not engage in discrimination and should not discontinue fixed duration contracts for pregnant women workers when their fixed duration contracts expire because the work pregnant workers used to perform still must be performed and the company recruits new workers to replace them.

Hence, the Arbitration Council will consider whether the non-renewal of contract for women workers is a form of discrimination under the Labour Law.

Article 73(1) of the Labour Law states, *“A labour contract of specific duration normally terminates at the specified ending date...”*

In case 100/07-Hoyear, the Arbitration Council interprets this Article that *“The Arbitration Council considers that a fixed duration employment contract should expire automatically at the [specified end date]. This means that the obligations of the employer and the workers end. Thus, a party cannot force the other party to continue the contract if there is no agreement.”* (See reasons for decision issue 2).

In this case, the Arbitration Council agrees with the decision of the Arbitration Council in previous cases that the expiration of a fixed duration contract will cause employment contract between the workers and the employer to end automatically and the decision whether to continue or not continue the contract is the right of the parties to the contract because contract is an agreement between parties so that one party cannot force the other party to renew the contract without its consent.

In section 2, **“non-discrimination”** of the Labour Law, Article 12 states, *“Except for the provisions fully expressing under this law, or in any other legislative text or regulation protecting women and children, as well as provisions relating to the entry and stay of foreigners, no employer shall consider on account of: race, colour, sex, creed, religion, political opinion, birth, social origin, membership of workers’ union or the exercise of union activities to be the invocation in order to make a decision on: hiring, defining and assigning of work, vocational training, advancement, promotion, remuneration, granting of social benefits, discipline or termination of employment contract.”*

Article 182 of the Labour Law states, *“... The employer is prohibited from laying off women in labour during their maternity leave or at a date when the end of the notice period would fall during the maternity leave.”*

According to the contents of the above Articles, it means that the Law prohibits the employer from terminating women workers during their maternity leave or when they take leave to deliver their babies. However, the Law does not prevent or prohibit the employer from using this as an excuse for hiring or termination of employment contract during the pregnancy period [(when not on leave)]. The Arbitration Council considers that the Law does not have clear provisions related to discrimination against pregnant women workers, prohibiting the employer from discontinuing or not renewing [the employment of] women who are pregnant after their fixed duration contract expires. However, the Arbitration Council encourages the employer party to give priority to continue to employ pregnant women workers after their fixed duration contract is expired.

Article 11(2) of the Convention on the Elimination of All Forms of Discrimination Against Women states that *“In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:*

*(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status...”*

Article 11 of the Convention above provides for measures to prohibit the dismissal of women due to discrimination on the grounds of pregnancy. In this case, the workers states that the company discriminates against pregnant women workers because the company does not renew their expired fixed duration contract although the work pregnant workers used to perform still is required and the company recruits new workers to replace them. The Arbitration Council considers that in order to make a determination related to discrimination against pregnant women workers, there must be sufficient facts, documents and evidence.

In previous cases, generally the Arbitration Council determines that the worker party has the burden of proof to allege that the employer has discriminated against pregnant women workers to the Arbitration Council to support the accusation. (See Arbitral Awards 79/05-Evergreen; 9[3]/06-Evergreen, issue 1; 99/06-South Bay, issue 1; 01/07-Supreme; 123/07-E Garment, issue 1; 124/07-DA and 128/07-DA, issue 5; 77/08-Xing Tai, issue 1; 101/08-GDM, issue 1 and 2; and 108/08-Hugo, issue 4).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in the above cases that the worker party who is the complainant has a burden of proof to allege that the employer has discriminated against pregnant women.

In this case, the union does not provide any clear evidence to support its claim to prove that the employer discriminated against pregnant women by not renewing fixed duration contracts when they expired; or how many new workers were recruited by the

employer to replace them when the company still has work for all those pregnant workers to perform. The company claims that it does not have discrimination but generally when a fixed duration contract is expired the company will renew employment contract to the workers depend on the requirement of production line of the company.

According to employment contract of 4 workers provided by the company on 3 October 2008, the Arbitration Council found that employment contracts of four workers - *Se Sokunthea, Ly Aminas, Soeun Chanthy and Meas Sokea* - were always renewed by the company but in 2008 the company did not renew their contract. The Arbitration Council could not find the contract of a worker named *Ho Srey Mean*, as mentioned by the worker party in the hearing, among the employment contract provided by the company. Thus, the Arbitration Council does not have sufficient ground to make consideration on the ground of discrimination.

In general, the Arbitration Council usually ejects the workers' demand if there is not sufficient evidence. (See Arbitral Awards *63/04-Shine Well, issue 4; 99/06-South Bay, issue 5; 74/07-Global Apparel, issue 2; 91/07-JK, issue 2; 94/07-Fortune Garment, issue 6 and 8; 101/08-GDM, issue 1 and 2; and 108/08-Hugo, issue 4*).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in previous cases above because the Arbitration Council does not have sufficient basis such as documents and evidence to make a determination about the claim of discrimination.

Therefore, the Arbitration Council rejects the workers' demand that the company should not discriminate against pregnant women especially when their fixed duration contract expires.

## **Issue 2: The workers demand that the company establish a daycare center in which to keep their children**

In the hearing the workers and the employer stated that at the end of 2007 the two parties reached a verbal agreement in which the worker party agreed to accept and the employer party agreed to provide US\$ 5 (five US dollars) in lieu of building a daycare center in the factory.

For this reason, the company maintains the provision of US\$ 5 to women workers whose children are over 18 months old in lieu of building a daycare center. However, the worker party claims that they are not claiming for payment in lieu of daycare center but for the company to build a daycare center in the factory because the price of goods in the market has increased and the amount US\$ 5 is no longer sufficient to hire an external provider to take care of the women's children.

Hence, the Arbitration Council will consider whether the company has an obligation to build a daycare center pursuant to the Labour Law?

Article 186 of the Labour Law states, *“Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and daycare center.”*

*If the company is not able to set up a daycare center on its premises for children over eighteen months of age, female workers can place their children in any daycare center and the charges shall be paid by the employer.”*

According to the above Article, the employer has an obligation to set up a nursing room and daycare center if the company employs more than one hundred women workers. In this case, a nursing room is for women workers who have children aged under 18 months to use to care for and breastfeed their children in or near the factory while the daycare center is a place for women workers who have children aged above 18 months to take care of their children.

Paragraph 2 of Article 186 above allows women workers to place their children in an external daycare center and the employer has an obligation to pay for the expense of the daycare if the employer is unable to set up a daycare center by him/herself. This means that women workers need to bring the receipt for the fee charged by the external daycare center for the employer to provide payment and the employer has an obligation to provide payment according to the receipt provided.

However, in this case the worker and the employer party had a verbal agreement on the provision of US\$ 5 in lieu of building a daycare center. But now the workers demand that the company should build a daycare center instead of providing US\$ 5 because the market price of goods has increased so that the amount of US\$ 5 provided by the company in lieu of building a daycare center is not sufficient to pay for external daycare center.

The Arbitration Council considers that the workers demand that the company build a daycare center for their children in accordance with Article 186(1) of the Labour Law that requires the company to build a daycare center in which women workers can keep their children who are above 18 months in age.

The Arbitration Council also finds that the company is unable to set up a daycare center as it does not have space and currently the company provides US\$ 5 to women workers who have children who are above 18 months old in lieu of building a daycare center.

Article 13 of the Labour Law states, *“The provision of this law are of the nature of public order, excepting derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or a convention that do not comply with the provisions of this law or any legal text for its enforcement, are null and void..”*

The Arbitration Council considers that the reason the Labour Law requires the company to build a daycare center is in order for the mother and child can be close to each other to provide loving care and natural breastfeeding to the baby without the use of milk formula during the period of the first six months, which is in accordance with the policy of the Cambodian government, and to maintain the safety of the children while their mothers are working. (See Arbitral Awards 63/04-*Shine Well*, issue 2; 68/04-*City New*, issue 1; 79/07-*Terratex*, issue 8; 77/08-*Xing Tai*, issue 3 and 103/08-*Vivatino*, issue 2).

Hence, the Arbitration Council considers that although the company and the workers had an agreement about the provision of money in lieu of building a daycare center, according to the purpose of the Labour Law the acceptance of money is not sufficient to release the employer, and the provision of payment in lieu of building a daycare center does not mean that the employer is released, from the obligation to build a daycare center in accordance with the Labour Law. However, the employer does have a choice to provide payment in lieu of building a daycare center when he/she is not able to build a daycare center for children who are over 18 months old. In such a case, the women workers can keep their children in external daycare and the employer should pay the daycare fee according to the receipts.

In conclusion, the Arbitration Council decides to order the company to build a daycare center in the company and in which the women workers can keep their children. If the employer is not able to provide a daycare center for children aged above 18 months, women workers can keep their children in external daycare and the employer should pay according to actual amount of the receipt for external daycare service.

**Issue 3: The workers demand for 2,500 riels as meal allowance for overtime work from 4:00 p.m. to 6:00 p.m.**

The company provides 1,000 riels meal allowance to workers who volunteer to work overtime from 4:00 p.m. to 6:00 p.m. However, the workers demand that the company provide 2,500 riels or one free meal to workers who volunteer to work overtime from 4:00 p.m. to 6:00 p.m.

The workers' demand here has two options: **1.** demand for one free meal or **2.** demand for the company to provide 2,500 riels meal allowance. Thus, the Arbitration Council will divide the workers' demand into two and consider as follows:

**A. Demand for provision of 2,500 riels meal allowance**

Point 3 of Notification 745 KKBV, dated 23 October 2006 states, "*Benefits workers used to receive from Notification No. 017 SKBY dated 18 July 2000 on points 3, 4, 5 and 6 shall be retained.*"

Point 4 of Notification 017 SKBY, dated 18 July 2000 states, “*Workers who voluntarily work overtime upon request from the employer shall receive a meal allowance of 1,000 riels per day or receive one free meal.*”

In this case, the Arbitration Council found that the employer provides 1,000 riels when the workers volunteer to work overtime from 4:00 p.m. to 6:00 p.m. Thus, the Arbitration Council considers that the employer has fulfilled its obligation according to Notification 017. Furthermore, besides Notification 017 which provides 1,000 riels per day for meal allowance as mentioned above, there is no other legal provision that requires the company to provide 2,500 riels meal allowance to workers who work overtime from 4:00 p.m. to 6:00 p.m. Moreover, the Arbitration Council does not find that the two parties have any agreement or collective bargaining agreement in writing that requires the employer to provide 2,500 riels as meal allowance for workers who volunteer to work overtime.

In previous Arbitral Awards, the Arbitration Council considers, “*when workers work overtime voluntarily, they should receive 1,000 riel for a meal allowance or one free meal. This means that even when the overtime is more than or less than two hours, the workers should still receive 1,000 riel or one free meal because the specification in the Notification is only in regard to one day.*” (See Arbitral Awards 53/05-Finegis, issue 3; 39/07-San San, issue 1).

In previous Arbitral Awards, the Arbitration Council declines to consider the workers’ demand for the company to provide 2,000 riels as meal allowance when workers work overtime for two hours. (See Arbitral Awards 66/06-Gold Lida, issue 3; 51/07-Goldfame, issue 4; and 53/07-E Garment, issue 5).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in previous cases.

Thus, the Arbitration Council considers that the workers’ demand does not have a supporting legal ground and this demand is for more than what provided by the Law. Thus, this is an interests dispute. (See Reasons for Decisions in issue 1 regarding an interests dispute).

Therefore, the Arbitration Council decides to decline to consider the workers’ demand for 2,500 riels meal allowance for overtime work from 4:00 p.m. to 6:00 p.m.

#### **B. Demand for one free meal**

According to point 4 of Notification 017 above (see Notification 017 in issue 2 point “A” above), the Arbitration Council considers that the meaning of this Notification is broad because it uses the phrase, “***shall receive a meal allowance of 1,000 riels per day or receive one free meal,***” but it does not state clearly whether the employer has a choice among the two options or whether the workers have a choice among the two options above.

Thus, the Arbitration Council should consider the meaning and intention of this Notification as well as other relevant reasons.

According to a previous Arbitral Award, the Arbitration Council provided the following interpretation: *“Consistent with the intention of this Notification, the Arbitration Council finds that the employer has an obligation to provide **one free meal** to those workers who work overtime. This provision of one free meal is a motivation for workers to continue working overtime because the [meal] is daily necessity for people and cannot be avoided, and this is what the employer is required to give.”* (See Arbitral Award 47/07-Chung Fai, issue 5).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in the prior case that the main intention of the Notification 017, point 4, is for the employer to provide a meal, not money. The Arbitration Council acknowledges that the employer has the option to provide 1,000 riels in lieu of provision of one free meal when the workers work overtime, but the money is not the main intention as provided in the Notification.

The Arbitration Council observes that currently the amount of 1,000 riels cannot buy a meal as it could in the year 2000 (the year when the Notification was issued). When the 1,000 riels provided is not sufficient to buy a meal, the workers are entitled to demand that the employer provide a free meal and the demand is not contradictory to the contents of Notification 017. In addition, in this case the workers demand that the employer should provide one free meal as an alternative to the provision of money. Thus, the Arbitration Council needs only to consider whether the demand has a legal basis.

As interpreted above, the main purpose of Notification 017, point 4, is that the employer should provide one free meal to workers who work overtime. Thus, the Arbitration Council considers that the workers' demand for one free meal during overtime work is reasonable and consistent with the contents and purpose of Notification 017 above.

In conclusion, the Arbitration Council decides to order the employer to provide one free meal to workers who work overtime from 4:00 p.m. to 6:00 p.m.

#### **Issue 4: The workers demand that the company provides 1,500 riels meal allowance to workers who volunteer to work on holidays**

The workers demand that the employer provide 1,500 riels meal allowance to workers who agree to come to work on holidays as requested by the company and claim that this is also overtime work.

Article 137 of the Labour Law states, *“In all establishments of any nature, whether they provide vocational training, or they are of a charitable nature or liberal profession, the number of hours worked by workers of either sex cannot exceed eight hours per day, or 48 hours per week.”*

According to Article 137 of the Labour Law above this means that normal duration of working hours of workers cannot exceed 8 hours per day or 18 hours per week.

Point 4 of Notification 017 SKBY, dated 18 July 2000 states, *“Workers who voluntarily work overtime upon request from the employer shall receive a meal allowance of 1,000 riels per day or receive one free meal.”*

Thus, the Arbitration Council will consider whether working on holidays is considered overtime work.

Article 164 of the Labour Law states, *“In establishments or enterprises where work cannot be interrupted because of the nature of their activities requiring the workers to occupy with working during holidays; those workers shall be entitled to an indemnity in addition to wages for the work performed. The amount of this indemnity to be paid by the employer shall be set by a Prakas of the Ministry in charge of Labour.”*

Clause 2 of Prakas 10 SKBY, dated 4 February 1999 states, *“In special cases when the establishment or enterprise cannot interrupt its activities during the holidays as determined in the Prakas of MoSALVY, the owners or directors of an establishment or enterprise can coordinate with its employees to work on those holidays.”*

Clause 4 of the same Prakas states, *“Employees working on holidays are entitled to a payment of an amount equal to two times of the rate of the wage they receive on a normal working day.”*

This means that every year the Ministry of Labour and Vocational Training issues a Prakas to determine public holidays, approximately 20 to 25 days per year, that requires all establishment and enterprises to grant paid holiday to all of their workers. This means that, through this Prakas the Ministry of Labour designates approximately 20 to 25 days per year for workers to take paid leave on public holidays.

However, in urgent cases, the employer can coordinate with the workers to work on holidays. But the employer needs to pay an amount that is double the rate of normal working days. According to this, the Arbitration Council considers that work on holidays is not overtime work determined in the new Article 139 of the Labour Law and Prakas 80 SKBY, dated 1 March 1999 regarding overtime work outside normal working hours and the Notification 017 SKBY, dated 18 July 2000 by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation.

In this case, the workers demand that the employer provide 1,500 riels meal allowance when they volunteer to work on holidays because there is not much food sold outside of the factory on public holidays and the price of food on holidays is more expensive than on normal working days. The employer party, on the other hand, claims that working on holiday is on a voluntary basis and the company provides payment equal to two times of the

rate of normal working days in accordance with the law so the company is unable to provide an additional 1,500 riels for meal allowance.

The Arbitration Council considers that the workers' demand for the employer to provide 1,500 riels meal allowance for those who volunteer to come to work on holidays does not have valid a legal basis. Therefore, the Arbitration Council decides to reject the demand.

**Issue 5: The workers demand that the company deduct their attendance bonus in proportion to the number of days they are absent from work (with permission)**

The workers agree that the company can deduct US\$ 3 of attendance bonus from the wages of workers who take one day leave and US\$ 5 for two days of leave without permission. However, for workers who take leave with proper permission from the employer, the company should deduct the attendance bonus in proportion to the number of days they are absent. Thus, the Arbitration Council will consider as follows:

Point 3 of Notification 745 KKBV, dated 23 October 2006 states, "*Benefits workers used to receive from Notification No. 017 SKBY dated 18 July 2000 on points 3, 4, 5 and 6 shall be retained*".

Clause 3 of Notification 017 dated 18 July 2000 states that "*Any workers who regularly work according to number of working days per month shall have a reward at least 5 US dollars per month.*"

The Arbitration Council considers that the term attendance bonus in this Notification is an incentive to encourage and praise workers who have come to work regularly for one full month and are not absent without a valid reason.

In the previous cases involving the issue of attendance bonuses, the Arbitration Council held that the "*attendance bonus*" is an incentive bonus and [ensures] praise to workers who come to work regularly and are not absent without a valid reason." (See Arbitral Awards 62/04 – Ecent, Issue 1; 63/04 – Shine Well, Issue 5; and 15/05 – Wing Tay II, Issue 1; 62/07-Hong Mei, issue 11; 106/07-M & V 3, issue 2; 115/07-Whitex, issue 1; and 121/08-Sinomax, issue 2).

In the reasons for decision on issue 1 of case 84/05 – Manhattan, the Arbitration Council held that, "*The Notification does not clearly state the number of working days to be considered as regular for workers to receive the attendance bonus.*" (See Awards 48/05-Manhattan, Issue 1).

In this case, the Arbitration Council also agrees with the above interpretation that this Notification does not clearly state how many days a worker must work to be considered regular and entitled to receive the attendance bonus. However, according to Article 103 of the Labour Law, bonus is part of the wage.

Article 103 of the Labour Law provides that, "*Wage includes, in particular:*

- *actual wage or remuneration;*
- *overtime payments;*
- *commissions;*
- *bonuses and indemnities;*
- *profit sharing;*
- **gratuities”**

Article 71(6) of the Labour Law stipulates that, *“The labor contract shall be suspended under the following reasons:*

*Absence of the worker authorised by the employer, based on laws, collective agreements, or individual agreements.”*

*Article 72(1) of the Labour Law states that, “The suspension of a labor contract affects only the main obligations of the contract, that are, those under which the worker has to work for the employer, and the employer has to pay the worker, unless there are provisions to the contrary that require the employer to pay the worker.”*

Therefore, when a worker is absent with permission from the employer, the labour contract is suspended and the worker is not required to work for the employer. An employer is not required to pay him or her unless there is a contrary provision that requires the employer to pay the worker. That means the employer is not required to pay the worker on the day that he or she is absent with permission; but on the day that the worker is not absent (for example, the day the worker comes to work) the employer must pay the worker for those days.

Thus, the attendance bonus is a part of wages, and Notification 017, dated 18 July 2000, does not clearly state the number of working days to be considered as regular for workers to receive the attendance bonus. Therefore, the Arbitration Council considers that if the employer is required to pay the US\$ 5 attendance bonus to workers who take leave with permission from the employer, it is not fair to the employer party as the workers do not come to work for the company. However, it is not fair either to the worker party if they do not receive the attendance bonus when they take leave with proper permission from the employer as the company permits the workers to take the leave.

Therefore, the Arbitration Council considers that the employer can deduct the attendance bonus in proportion to the number of days the workers were absent with proper permission from the company.

In previous cases, the Arbitration Council orders the employer to deduct attendance bonus in proportion to the number of days the employer permitted the workers to take leave. (See Arbitral Awards 57/07-Seratex, issue 3; 106/07-M & V 3, issue 2 and 115/07-Whitex, issue 1).

In this case, the Arbitration Council agrees with the interpretation in previous cases above. Therefore, the Arbitration Council decides to order the employer to deduct attendance bonus in proportion to the number of days the workers were absent with proper permission from the company.

**Issue 7: The workers demand back payment for those workers who have been working for the company for over four years and to whom annual leave was not provided correctly**

In relation to this demand, the workers claim that currently the company provides annual leave correctly. However, in the past it did not implement this correctly to those workers who had more than four years of seniority. Thus, they demand that the company should reimburse this. Hence, the Arbitration Council will consider as follows:

Article 166 of the Labour Law states, *“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... 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.”*

According to this Article, the workers are entitled to 18 days of annual leave per year and they are entitled to one additional day of leave on top of the 18 days mentioned above when they have been working for the company for full 3 years. This means that from the fourth year of employment, workers are entitled to 19 days of annual leave and from the seventh year, 20 days.

In this case, the workers state that currently the company has implemented Article 166 correctly according to the Labour Law. However, the workers demand that the company should reimburse workers who had more than four years of seniority and to whom the company did not provide annual leave correctly. The Arbitration Council considers that in this case the Arbitration Council can consider this issue only if the workers and the union who are the claimants in this case provide sufficient documents and evidence such as list of names of workers to prove the number of workers who have been working for more than four years who request that the company reimburse them for their annual leave which the company did not provide correctly in the past, as well as documents to provide clear reasons to clarify how the company provided incorrect annual leave in the past years.

As a legal principle, the Arbitration Council determines that the claimant party has a burden to provide documents and evidence to support the demand. The Arbitration Council also determines that if the party who makes a demand for compensation fails to provide valid documents and evidences for the Arbitration Council to use as a basis for consideration, the demand will not be considered by the Arbitration Council. (See Arbitral Awards 63/04-Shine

*Well, issue 4; 99/06-South Bay, issue 5; 74/07-Global Apparel, issue 2; 91/07-JK, issue 2; 94/07-Fortune Garment, issue 6; 101/08-GDM, issue 1 and 2 and 108/08-Hugo, issue 4).*

In this case, the Arbitration Council agrees with the interpretation in the previous cases above. In this case, the worker party did not prepare sufficient and valid documents such as number of claimant workers, authorisation letter or documents to prove membership of claimant workers who are members of the union who appear at the hearing to make this demand as well as the specific amount demanded by each workers and so forth to the Arbitration Council. The Arbitration Council asked the representing union to prepare statement, documents and evidence to submit to the Arbitration Council and parties involved by 30 October 2008.

On 30 October 2008, the deadline set by the Arbitration Council for the parties to submit documents and evidence to support their demand, the union party provided name list of workers who had been working for more than four years who request for the company to reimburse their annual leave provided incorrectly by the company in the past.

The Arbitration Council found that in the name list of workers who demand for the company to reimburse their annual leave it mentions about ID number, names, date of employment commencement, number of days they are entitled to leave, and number of days the company should reimburse to each worker. However, there was no signature of each worker under their respective names in the column for signature and there was no date by the responsible person who prepared the list, the union leaders who made the list of the workers, thus to specify who would be responsible on behalf of the claimant workers. In addition, the name list does not mention clear reason and proof to support the claim that in the past year the company did not provide annual leave correctly. In conclusion, the document provided by the claimant workers for a demand for compensation was not prepared properly to be considered valid document.

Therefore, the Arbitration Council considers that the document and evidence the Arbitration Council received from the workers and the union is not valid and sufficient to be used as a basis for consideration and decision.

Based on this reason, the Arbitration Council decides to reject the workers' demand for the company to reimburse annual leave to workers who had more than four years of seniority and to whom the company did not provide correctly in the past.

The Arbitration Council considers that if there was clear and sufficient evidence related to this demand, the Arbitration Council could have decided this matter differently.

**Issue 8: The workers demand that the company convert their employment contract from fixed duration contract or undetermined duration contract**

Article 65 of the Labour Law states, “*A labour contract establishes working relations between the worker and the employer. It is subject to common law and can be made in a form that is agreed upon by the contracting parties.*”

Based on the above Article, the Arbitration Council considers that a labour contract is an agreement between workers and an employer and it must be in accordance with the legal provisions on general contracts.

Article 22 of Decree 38 on Contract and Other Liabilities stipulates that, “*A contract is a legally binding agreement between the parties. Amendments to the contract can only be made with the consent of both contracting parties. A contract shall be executed with honesty and according to the will of the parties.*”

Based on these Articles, the Arbitration Council considers that, in principle, it is at the discretion of parties to the contract to enter into a contract, and no party to the labour contract can force the other party to accept the form or type and content of the contract if the other party does not agree. Such act entitles the other party to nullify the contract or the contract is nullified by the law. When making a contract a party has the right to suggest the format, type or contents of the contract while the other party has the right to accept or reject the contract. Thus, a contract is established only with consent of all parties involved in the contract. An employment contract is made only with consent of the worker party and the employer party. (See Arbitral Awards 79/07-Terratex, issue 3; 106/07-M & V 3, issue 1; and 123/07-E Garment, issue 2).

In Arbitral Award 56/06 – Boric, the Arbitration Council explained that “*A labour contract establishes working relations between the worker and the employer and can be made in a form that is agreed upon by the contracting parties as long as the conditions are in accordance with the Labour Law. The contract is subject to common law. None of the contracting parties may force the other party to sign on the contract or accept the conditions that the other party finds unacceptable. A labour contract made by force can be considered null by the law or the other party.*” (See Award 56/06 – Boric, Issue 1)

In this case, the Arbitration Council also agrees with the interpretation of the Arbitration Council in the above case. In this case, the worker party demanded that the company should stop using fixed duration contracts or change to undetermined duration contracts for the reason that the fixed duration contract’s duration of three or six months is too short so that it is very likely that the workers will lose their job easily and it is hard to find another job.

The Arbitration Council finds that the workers demand that the employer should change from fixed duration contracts to undetermined duration contracts is not against the law because it is the right of the worker [to agree or not agree to the term of the contract] when signing the contract. On the other hand, the employer party’s refusal to change from fixed duration contract to undetermined duration contract does not violate the law either because it

is the right of the employer when making the contract. It means that in principle, no party may force the other party to accept conditions that the other party finds unacceptable. Thus, the workers cannot force the employer to change from fixed duration contracts to undetermined duration contract. The employer party, on the other hand, cannot force workers to sign three month or six month contracts if workers are not willing to. However, if workers and the employer agree upon a particular type of labour contract, both parties shall apply the [terms of the] labour contract for the duration except if the contracting parties agree to amend the contract. (See Arbitral Awards 106/07-M & V 3, issue 1).

Therefore, the Arbitration Council rejects the demand of workers that the company should stop using three or six month fixed duration contracts or change from fixed duration contracts to undetermined duration contracts.

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

#### **DECISION AND ORDER**

##### **Issue 1:**

- Reject the workers' demand that the company should not discriminate against pregnant women workers especially when their fixed duration employment contract expired.

##### **Issue 2:**

- Order the employer to provide a daycare center to women workers who have children who are above 18 months old or, in case the company is unable to provide a daycare center by itself, the employer should pay based on [actual] receipts for an external daycare center where women workers leave their children who are above 18 months old.

##### **Issue 3:**

- Decline to consider the workers' demand for the company to provide 2,500 riels meal allowance to workers who volunteer to work overtime from 4:00 p.m. to 6:00 p.m.

- Order the employer to provide one free meal to workers who volunteer to work overtime from 4:00 p.m. to 6:00 p.m.

##### **Issue 4:**

- Reject the demand for the company to provide 1,500 riels meal allowance when the workers work on holidays.

##### **Issue 5:**

- Order the employer to deduct attendance bonus in proportion to the number of days the workers are absent with proper permission from the company.

##### **Issue 7:**

- Reject the workers' demand for the company to reimburse annual leave to workers who had more than four years of seniority and to whom the company did not provide correctly in the past.

**Issue 8:**

- Reject the workers' demand that the company should stop using three or six month fixed duration contracts or change from fixed duration contracts to undetermined duration contracts.

**Type of Award: Non binding or binding awards**

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

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

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....