



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល
THE ARBITRATION COUNCIL

Case number and name: 123/07 – E Garment

Date of Award: 14 January 2008

ARBITRAL AWARD
(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Ing Sothy**

Arbitrator chosen by the worker party: **An Nan**

Chair Arbitrator (chosen by the two Arbitrators): **Kong Phallack**

DISPUTING PARTIES

Employer party:

Name: **E Garment Co, Ltd. (E Garment Company)**

Address: Village 3, Svay Rolum Commune, Sa-Ang District, Kandal Province

Telephone: 012 864 088 Fax: N/A

Representatives:

- | | |
|---------------------|---------------------------|
| 1. Ms. You Cindy | Company's Representative; |
| 2. Mr. Leav Piseth | Company's Representative; |
| 3. Mr. Siv Chi Seng | Company's Representative; |
| 4. Ms. Kwat Man Yi | Company's Representative. |

Worker party:

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

Address: Village 3, Svay Rolum Commune, Sa-Ang District, Kandal Province

Telephone: 012 396 096 Fax: N/A

Representatives:

- | | |
|----------------------|-------------------------------|
| 1. Mr. Ek Sopheakdei | General Treasurer of C.CAWDU; |
| 2. Mr. Noeun Vuthy | President of CAWDU; |
| 3. Mr. Khun Sothy | Vice-President of CAWDU; |

4. Mr. Yorn Rith	Secretary of CAWDU;
5. Mr. Chan Pov	Secretary of CAWDU;
6. Mr. Meth Sopheak	Union Activist;
7. Mr. Reth Saroath	Union Activist;
8. Mr. Soeung Keila	Union Activist;
9. Mr. Suth Vanny	Union Activist;
10. Mr. Duong Tola	Union Activist;
11. Mr. Chum Pheakdey	Union Activist.

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. The worker party demanded that the company reinstate 29 union leaders and maintain their wages and perquisites during the period they were out of work. The employer party did not agree to reinstate the 29 workers because the company had terminated their contracts.
2. The worker party demanded that the company convert the fixed duration contracts to undetermined duration contracts and sign only undetermined duration contracts for new contracts. The company did not agree to convert the fixed duration contracts to undetermined duration contracts claiming that it only implements 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 hearing which took place on 5 November 2007 was unsuccessful, and the non-conciliation report No. 215 was submitted to the Secretariat of the Arbitration Council on 7 November 2007.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Centre, Building A, Sothearos Blvd., Sangkat Tonle Bassac, Khan Chamkarmon, Phnom Penh.

Date of hearing: 19 November 2007 (from 2:00pm to 5:00pm)

Procedural issues:

On 21 September 2007, the Kandal Provincial Department of Labour and Vocational Training received a complaint dated 20 September 2007 from C.CAWDU regarding a collective labour dispute at E Garment Factory about two issues. Having received the complaint, the Kandal Provincial Department of Labour and Vocational Training designated its officials to conciliate the dispute but none of the issues were conciliated. The two non-conciliated issues were submitted to the Secretariat of the Arbitration Council on 7 November 2007.

Having received the case, the Secretariat of the Arbitration Council summoned the employer party and the worker party to a hearing to conciliate the two non-conciliated issues on 19 November 2007 at 2:00pm. Both parties were present at the hearing scheduled by the Arbitration Council.

On the hearing day, the Arbitration Council attempted to conciliate the two non-conciliated issues listed in the non-conciliation report of the Department of Labour Disputes but was not able to conciliate either of the issues. Therefore, in this case the Arbitration Council considers these issues based on the evidence and statements of both parties as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council**Provided by the employer party:**

1. Letter requesting the withdrawal of Binding Award dated 22 November 2007;
2. Letter dated 19 November 2007 authorising Ms. You Cindy and Mr. Leav Piseth to settle the labour dispute;
3. Letter No. 923 requesting the registration of CAWDU at E Garment Factory;
4. Business registration certificate No. 2508 of E Garment Company dated 4 November 2005;
5. Payroll list on 12 September, 3 September, 21 August, 30 August, and 16 October 2007;
6. Trade Favour System Certificate dated 10 May 2006;
7. Internal Work Rules No. 007 of E Garment Company dated 3 October 2006;
8. Statute of E Garment Company dated 11 October 2005;
9. Non-renewal contracts, labour contracts of casual workers, job application, affidavit of Pring Tha, Reth Saroath, Soeung Keila, Pech Sokchea, Phon Sokhun, Mak Meng Kea, Thong Thanith, Yorn Rith, Chan Pov, Suth Vanny, Srun Kim Chhun, Thuk

Kanha, Try Sokheng, Noeun Vuthy, Yan Bunchhoeun, Meth Sopheak, Phang Kakada, Penh Lundy, Leng Pengly, Kov Thon, Kak Sochea, Oum Sopheap, Sok Hong, Chea Ratha, Chea Sambo, Suth Chandy, Iet Chamroeun, and Tha Srey Neang;

10. Pay slip and import card of Tha Srey Neang.

Provided by the worker party:

1. Thesis No. 055 on the demand of CAWDU at E Garment Factory dated 21 November 2007;
2. Name list of workers with fixed duration contract or short-term contract at E Garment Factory;
3. Minute of election to establish CAWDU at E Garment Factory dated 3 August 2007;
4. 31-page complaint against the Director of E Garment for violating the Labour Law and dismissing workers without valid reason;
5. Letter No. 061 on the election of new union leaders at E Garment Factory dated 31 July 2007;
6. Letter No. 083 notifying the result of election of CAWDU at E Garment Factory dated 6 August 2007;
7. Pay roll for July, August, January, and March 2007;
8. Two-page labour contract of Try Sokheng, casual worker;
9. Name list of workers with fixed duration contracts or short-term contracts at E Garment Factory;
10. Letter No. 0056 dated 22 November 2007 providing the names of Voeung Seng Hean and Dor Rady, who were dismissed after testifying at the Arbitration Council;
11. Pay slip, complaint, and minute of Dor Rady and Voeung Seng Hean;
12. Labour contracts of Sok Hung and Phon Sokhun, casual workers;
13. Cards and labour contracts for casual workers.

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

1. Report No. 215 on the collective labour dispute settlement at E Garment Company dated 5 November 2007;
2. Minutes of the collective labour dispute conciliation at E Garment Company dated 23 October 2007.

Provided by the Secretariat of the Arbitration Council:

1. Letter No. 542 inviting the worker party to attend the hearing dated 13 November 2007.

2. Letter No. 543 inviting the employer party to attend the hearing dated 13 November 2007.

FACTS

- Having examined the report on the collective labour dispute conciliation;
- Having listened to the testimonies from both the employer party and the worker party;
- Having reviewed other supplementary documents;

The Arbitration Council finds that:

- E Garment Company employs 2,000 workers.
- C.CAWDU is the claimant in this case. CAWDU at E Garment Factory is not yet registered. According to the worker party, the union has 200 members.
- CAWDU at E Garment Factory notified the employer about the union election on 31 July 2007 and organised the election on 3 August 2007. The union applied for registration with the Ministry of Labour on 3 August 2007.
- On 6 August 2007, the union notified the company about the result of the election listing 44 union leaders and activists. According to the union, the company received the notification on 7 August 2007.
- However, based on letter No. 923 dated 31 August 2007 from the Director of the Department of Labour Disputes to Mr. Noeun Vuthy, newly-elected union leader, the Department of Labour Disputes did not register the union because the documents were insufficient and not clear and requested the union to submit more comprehensive documents.

Issue 1: The worker party demanded that the company reinstate 29 dismissed union leaders

- 28 workers demanded to be reinstated. The non-conciliation minutes submitted to the Arbitration Council states that 29 workers made the demand. However, both parties said in the hearing that only 28 workers made the demand [and the mistake was due to a] typographical error.
- The worker party demanded that the company reinstate 28 dismissed workers because the dismissal amounted to union discrimination and the company recruited 25 workers to replace them.
- The Arbitration Council finds the facts related to the 28 workers are as follows:

N°	Name	Date of first contract	Date of last contract	Date of contract expiry	Date of termination

1	Yan Bunthoeun	-	2/07/2007	2 months after 2/07/2007	18/08/2007
2	Noeun Vuthy	16/11/2006	4/07/2007	2 months after 4/07/2007	31/08/2007
3	Kov Thon	-	4/07/2007	2 months after 4/07/2007	31/08/2007
4	Suth Vanny	16/11/2006	4/07/2007	2 months after 4/07/2007	31/08/2007
5	Thong Thanith	-	4/07/2007	2 months after 4/07/2007	31/08/2007
6	Kak Sopha	-	3/07/2007	2 months after 3/07/2007	31/08/2007
7	Chea Ratha	-	2/07/2007	2 months after 2/07/2007	29/08/2007
8	Meth Sopheak	9/12/2006	2/07/2007	2 months after 2/07/2007	29/08/2007
9	Suth Chandy	17/08/2006	2/07/2007	2 months after 2/07/2007	29/08/2007
10	Oum Sopheap	-	2/07/2007	2 months after 2/07/2007	29/08/2007
11	Thok Kanha	-	2/07/2007	2 months after 2/07/2007	29/08/2007
12	Phang Kakada	16/11/2006	2/07/2007	2 months after 2/07/2007	29/08/2007
13	Chan Pov	9/04/2007	23/07/2007	2 months after 23/07/2007	11/09/2007
14	Srun Kim Chhun	-	12/07/2007	2 months after 12/07/2007	13/09/2007
15	Try Sokheng	14/09/2006	12/07/2007	2 months after 12/07/2007	13/09/2007
16	Mak Meng Kea	15/01/2007	23/07/2007	2 months after 23/07/2007	11/09/2007
17	Pring Tha	2/01/2007	21/07/2007	2 months after 21/07/2007	11/09/2007
18	Soeung Keila	18/05/2007	21/07/2007	2 months after 21/07/2007	11/09/2007
19	Pech Sokchea	-	23/07/2007	2 months after 23/07/2007	11/09/2007
20	Yorn Rith	23/01/2007	10/09/2007	2 months after 10/09/2007	13/09/2007

21	Reth Saroath	22/01/2007	24/07/2007	2 months after 24/07/2007	11/09/2007
22	Chea Bo	-	13/07/2007	2 months after 13/07/2007	10/09/2007
23	Penh Lundy	19/07/2007	17/07/2007	2 months after 17/07/2007	11/09/2007
24	Leng Mengly	-	21/07/2007	2 months after 21/07/2007	11/09/2007
25	Iet Chamroeun	26/12/2006	3/08/2007	2 months after 3/08/2007	11/09/2007
26	Sok Hong	-	3/08/2007	2 months after 03/08/2007	11/09/2007
27	Chea Srey Neang	-	18/12/2007	2 months after 18/12/2007	12/09/2007
28	Phon Sokhun	-	23/07/2007	2 months after 23/07/2007	11/09/2007

- Among the 28 workers, Mr. Noeun Vuthy, was the President of the union and Mr. Yorn Rith was the union secretary. Other workers were members of the union. The Vice-President was also terminated in the same period.
- According to the worker and employer parties, the dismissed workers signed two-month contracts (casual) and when the contracts expired, the company paid them off and asked them to rest for one to three days before signing new contracts and in some cases the employer did not ask them to rest and [simply] renewed the contracts.
- According to the worker and employer parties, these workers worked full-time as regular workers did and the company had always renewed their labour contracts since their commencement at the factory.
- The worker party said that the dismissal was a result of union discrimination as the [workers were] dismissed after the notification of the election for union leaders. The company recruited at least 25 workers between 8 and 24 August 2007 to replace the dismissed workers in the Ironing Unit. The employer did not respond to the allegation about recruitment of new workers to replace the dismissed workers.
- The worker party said the union notified the company about the candidates for [the election as] union leaders on 31 July 2007. The worker party said that the company received the letter on 1 August 2007 via Em Samath, security guard. The letter was also copied to the Kandal Provincial Department of Labour and the Arbitration Council on 2 August 2007.

- The union said that the dismissal was made without permission from the Labour Inspector.
- The company dismissed the 28 workers prior to the expiration of their two month contract arguing that their labour contracts were short-term and the company did not have sufficient purchase orders. However, the company did not provide any evidence to support the claim that the company did not have work for the workers. The employer party said the dismissal was not [because the workers were union leaders]. The company did not respond [to the allegation] about the recruitment of new workers.
- In the hearing, the employer party insisted that the company agreed to pay two months wages according to the Labour Law.

Issue 2: The worker party demanded that the company convert the [workers'] fixed duration contract to undetermined duration contracts

- The worker party demanded that the company convert the [workers'] fixed duration contracts to undetermined duration contracts arguing that the fixed duration contracts meant the workers did not receive benefits such as: job security, paid maternity leave, seniority bonus, and breastfeeding time. The worker party did not provide evidence to support this claim and did not provide a legal basis to support their demand.
- The company did not agree with the demand, adding that the company did not violate the Labour Law.
- The company uses two types of contracts: six month fixed duration contracts with a three month probation period and short term contracts which are for a two month period. Both parties agreed that none of the workers have worked for more than two years. All contracts were handwritten.
- The worker party claimed that this demand was made for all workers and the union members were around 200. However, the worker party did not provide the Arbitration Council with the authorisation letter from non-union members.

Additional Issue: The employer party demanded to change from a binding award to a non-binding award

E Garment Company authorised Ms. You Cindy and Mr. Leav Piseth to settle the dispute via an authorisation letter dated 19 November 2007.

In the hearing on 19 November 2007, the Arbitration Council explained the arbitration procedures and types of arbitral awards to both the worker party and the employer party and gave the disputing parties time to ask questions before deciding whether to choose a binding or non-binding Award.

Both parties then signed an agreement to use a binding award for this case.

On 22 November 2007 the Arbitration Council received a letter dated 22 November 2007 requesting that the award be non-binding instead of binding.

REASONS FOR DECISION

Issue 1: The worker party demanded that the company reinstate the 28 dismissed union leaders

In this case, the worker party demanded that the company reinstate the 28 dismissed workers arguing that the dismissal amounted to discrimination on the grounds of union membership and the company recruited new workers to replace them. However, the employer party said that the termination of the contracts of the 28 workers did not amount to discrimination on the grounds of union membership adding that the company did not have work for them. The Arbitration Council determines this issue as follows:

Article 73 of the Labour Law stipulates that, *“A labor contract of specific duration normally terminates at the specified ending date. It can, however, be terminated before the ending date if both parties are in agreement on the condition that this agreement is made in form of writing in the presence of a Labor Inspector and signed by the two parties to the contract.*

If the both parties do not agree, a contract of specified duration can be canceled before its termination date only in the event of the serious misconduct or acts of God.

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...”

Based on the content of the above article, 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 dismissed 28 workers who were employed on fixed duration contracts before their contract expiration date. Based on the above article, the 28 workers were entitled to damages in amount at least equal to the remuneration they would have received until the termination of the contract. However, in this case the worker party did not demand compensation, but demanded reinstatement, adding that the termination was because of union discrimination. Therefore, the Arbitration Council considers whether or not the termination was due to union discrimination.

Generally, the Arbitration Council considers that the worker party is obliged to provide evidence to support the allegation that the employer discriminated against the union (see Arbitral Awards 90/06 – Evergreen, Issue 1; 112/06 – River Rich, Issue 1; and 01/07 – Supreme).

In this case, the Arbitration Council also agrees with previous panels that the worker party as the claimant is obliged to provide evidence to prove that the employer discriminated against the union. In this case, the worker party said that the dismissals were made on 18 and 29 August 2007 and 10, 11, 12, and 13 September 2007 after the union notified the employer of the election of the union leaders on 31 July 2007 and the company recruited new workers to replace them.

Based on the above facts, the Arbitration Council finds that the contracts of the 28 workers were always renewed and were only not renewed when the labour dispute occurred. The [company alleged that the] reason that the company did not renew their contracts was because there were no purchasing orders and no work for them, a reason that would allow the employer to terminate the contracts. However, the employer party did not provide evidence to support the claim. In contrast, the worker party said that the employer had recruited 25 new workers to replace them and provided the name list of the newly recruited workers. The Arbitration Council ordered the employer to respond to the [allegation about] recruitment of new workers to replace the 28 dismissed workers but the company did not respond. Therefore, the Arbitration Council assumed that the company had work and recruited new workers after dismissing the 28 workers.

Furthermore, the employer party said in the hearing that based on the Labour Law the company has the right to terminate the labour contract by the will of the employer alone before the contract expires and the company agreed to pay the unfinished contracts.

Based on this statement, the Arbitration Council considers that the dismissal of the 28 workers was not because there was no work for the workers to do but because of union discrimination as alleged by the claimant since all of the workers had joined the union leader election. In the hearing, the employer party did not provide evidence to counter the allegation of the workers in relation to the union discrimination claim.

Therefore, the Arbitration Council considers that the dismissal was because of union discrimination. Based on Article 12 and 279 of the Labour Law, employers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal. Violation of these two articles results in penalties in accordance with Article 369 and 273 of the Labour Law.

In relation to union discrimination, in previous cases the Arbitration Council ordered the company to reinstate workers because Article 12 and 279 of the Labour Law prohibits employers to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal (see Arbitral Award 28/07 – De Fang, Issue 3).

In this case, the Arbitration Council agrees with the decisions in the previous cases because Article 12 and 279 of the Labour Law forbids the employer to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal.

Therefore, the Arbitration Council decides that the employer should reinstate the 28 workers.

Issue 2: The worker party demanded that the company convert [workers'] fixed duration contracts to undetermined duration contracts

Article 67 (1) of the Labour Law provides that, *“A labor contract signed with consent for a specific duration must contain a precise finishing date.”*

In this case, the labour contracts of the workers were signed with a fixed duration of two or six months. That means the labour contracts were considered as fixed duration contracts. Article 67 (2) of the Labour Law stipulates that, *“The labor contract signed with consent for a specific duration cannot be for a period of longer than two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years.*

Any violation of this rule leads the contract to become a labor contract of undetermined duration.”

In the previous Arbitral Awards, the Arbitration Council interpreted Article 76 (2) of the Labour Law to mean that a labour contract can be renewed one or more times, as long as the renewals do not surpass a maximum duration of two years. If the total duration of the labour relation surpasses two years, the labour contract shall become an undetermined duration contract (see Arbitral Awards 10/03 – Jacqsintex, Issue 1; 02/04 – Cambodiana; and 36/06 – Mondotex, Issue 2).

In this case, both parties said that none of the workers' contracts surpassed the two year period. Therefore, the contract is not an undetermined duration contract.

Article 67 (7) of the Labour Law states that, *“A contract of a fixed duration must be in writing. If not, it becomes a labor contract of undetermined duration.”*

In this case, the labour contracts of the workers were in writing. Therefore, the contracts do not meet the requirements [under this section to become] an undetermined duration contract.

Article 65 of the Labour Law stipulates that, *“A labor 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.”* That means the principle of contract is the absolute right of a contracting party and no third party may force a contracting party to sign an agreement that he or she does not agree to. Moreover, a contracting party cannot force the other party to choose a form or type of contract that he or she does not agree with.

Therefore, the Arbitration Council considers that there is not sufficient legal basis to support the demand of the workers. In conclusion, the Arbitration Council decides to reject the demand of workers that the company convert the fixed duration contracts to undetermined duration contracts.

Additional Issue: The employer party demanded to change from a binding award to a non-binding award

Based on the above facts, the employer party requested to change from a binding award to non-binding award. The Arbitration Council determines [this issue] as follows:

In the hearing on 19 November 2007, the Arbitration Council explained the arbitration procedures, types of arbitral awards and differences between a binding and non binding award to the employer and worker party. The Arbitration Council also provided both parties with some time to ask questions if they were still in doubt about the arbitration procedures and types of arbitral awards before choosing a binding or non-binding award. In this case, neither party had any questions and signed the agreement to choose a binding award.

In the previous cases, the Arbitration Council rejected a request to change the type of Arbitral Award from a binding to non-binding because the worker party and the employer party had already signed an agreement to choose a binding award (see Arbitral Award 59/05 – Tack Fat, Additional Issue).

In this case, the Arbitration Council agrees with the previous decision of the Arbitration Council that the employer party cannot request to change from a binding to non-binding award because there is an agreement between the employer party and the worker party to choose a binding award. An amendment can only be made with consent of both parties. The change of this Arbitral Award would violate the agreement of both parties.

Therefore, the Arbitration Council rejects the request of the employer party to change the type of Arbitral Award from a binding to non-binding award.

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

DECISIONS AND ORDER

1. Order the company to reinstate the 28 workers.
2. Reject the demand of workers that the company convert the [workers'] fixed duration contracts to undetermined duration contracts.
3. Reject the demand of the employer to change the type of Arbitral Award from a binding to non-binding award.

Type of Award: Binding Award

This Award is immediately binding upon the parties after the notification of the award.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: