



KINGDOM OF CAMBODIA
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THE ARBITRATION COUNCIL

Case number and name: 131/07 – Focus Footwear

Date of Award: 12 December 2007

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Ouk Ry**

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

Chair Arbitrator (chosen by the two Arbitrators): **Run Saray**

DISPUTING PARTIES

Employer party:

Name: **Focus Footwear Co., Ltd.**

Address: Tuol Sangke Village, Sangkat Tuol Sangke, Khan Russei Keo, Phnom Penh

Telephone: 011 886 100

Fax: N/A

Representatives:

1. Ms. Van Kunthea Administrative Manager;
2. Mr. Tieng Tong Lip Administrative Assistant.

Worker party:

Name: **Khmer Youth Trade Union (KYTU) at Focus Footwear Factory**

Address: Tuol Sangke Village, Sangkat Tuol Sangke, Khan Russei Keo, Phnom Penh

Telephone: 092 486 346

Fax: N/A

Representatives:

1. Mr. Nong Samnang Official of KYFTU;
2. Ms. Prum Chan Narin Official of KYFTU;
3. Mr. Hing Bunthoeun Official of KYFTU;
4. Mr. Norin Theryuth Official of KYFTU;
5. Ms. Mov Sovanna President of KYTU at Focus Footwear;

6. Ms. Thy Ny Vice-President of KYTU at Focus Footwear;
7. Ms. Von Sophon Secretary of KYTU at Focus Footwear.

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. The worker party demanded that the company pay the 5 percent severance pay to workers whose two-year fixed duration contracts have been terminated. The employer party did not agree to pay the 5 percent severance pay because the labour contracts have become undetermined duration contracts.
2. The worker party demanded that the company provide US\$ 1 of seniority bonus each year after the workers have worked up to five years. The company did not agree to the demand claiming that the company has been complying with Notification 017 dated 18 July 2000 of the Ministry of Labour and Vocational Training.

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 15 November 2007 was unsuccessful, and the non-conciliation report No. 1227 was submitted to the Secretariat of the Arbitration Council on 16 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: 27 November 2007 (from 2:00 p.m. to 5:00 p.m.)

Procedural issues:

On 4 September 2007, the Department of Labour Dispute received a complaint from the KYFTU on the demand for the improvement of three working conditions. Having received the complaint, the Department of Labour Dispute designated its officials to conciliate the dispute on 19 October 2007; as a result, one out of three issues was conciliated. The two remaining non-conciliated issues were submitted to the Arbitration Council for further resolution.

Having received the case, the Secretariat of the Arbitration Council summoned both the employer party and the employee party to a hearing to conciliate the dispute on 27 November 2007 at 8:00 a.m. Both parties were present at the hearing summoned by the Arbitration Council.

On 27 November 2007 at 2:00 p.m., the Arbitration Council conducted a hearing to resolve the non-conciliated issues. The Arbitration Council encouraged both parties to continue the negotiation in the hearing and at the enterprise to find resolution, but both parties could not reach an agreement so the Arbitration Council considers these issues as follows.

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Minute of the collective labour dispute conciliation dated 19 October 2007;
2. Business Registration Certificate No. 1449 dated 16 May 1997;
3. Internal Work Rules of Focus Footwear;
4. Business Registration application of Focus Footwear Factory;
5. Sample of the employment contract and renewal contract;
6. Letter authorising Ms. Van Kunthea, Administrative Manager, to resolve the labour dispute dated 27 November 2007.

Provided by the worker party:

1. Thumb-print of workers at Focus Footwear Factory requesting KYFTU for help;
2. Eight samples of renewal contract.

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

1. Report No. 1227 on non-conciliated dispute resolution dated 15 November 2007 of the Department of Labour Dispute;
2. Minute of the collective labour dispute conciliation dated 19 October 2007.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 568 dated 20 November 2007 to the employer party to attend the hearing.
2. Invitation No. 569 dated 20 November 2007 to the worker party to attend the hearing.
3. Name list of members of the employer party and the worker party who attended the hearing.

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:

Focus Footwear Factory employs 1,124 workers and there is only one union, Khmer Youth Trade Union, in the factory. Khmer Youth Trade Union at Focus Footwear has 800 members but it does not have the most representative status yet.

Issue 1: The worker party demanded that the company pay the 5 percent severance pay to workers whose two-year fixed duration contracts have been terminated

- Previously, Focus Footwear Factory has been using the fixed duration contracts and has renewed them several times exceeding two years in total length. Through Arbitral Award 64/07 – Focus Footwear (Issue 1), the Arbitration Council ordered the company to convert the fixed duration contracts to undetermined duration contracts for those who have worked for more than years. The company has implemented the Arbitral Award 64/07 – Focus Footwear.
- Workers, in that case, were also members of Khmer Youth Trade Union and now demanded that the company pay 5 percent severance pay to workers when their fixed duration contracts converted to undetermined duration contracts.
- The worker party did not clearly say how many workers are its members and how many are not. The Arbitration Council considers that this demand was made for only members of the Khmer Youth Trade Union.

Issue 2: The worker party demanded that the company provide US\$ 1 seniority bonus each year after the workers have worked up to five years

- The worker party demanded that the company provide US\$ 1 seniority bonus each year after the workers have worked up to five years arguing that Notification 017 dated 18 July 2000 of the Ministry of Labour and Vocational Training provides example from year one to year four but does not specify from year five.
- The employer party claimed that the company has already implemented Notification 017 dated 18 July 2000 of the Ministry of Labour and Vocational Training.
- The worker and employer parties agree that there is no related contract or agreement between the workers and the employer.

REASONS FOR DECISION

Issue 1: The worker party demanded that the company pay the 5 percent severance pay to workers whose two-year fixed duration contracts have been terminated

The worker party demanded that the company pay the 5 percent severance pay to workers whose two-year fixed duration contracts were converted to undetermined duration contracts.

Article 73 (6 & 7) of the Labour Law provides that, *“At the expiration of the contract, the employer shall provide the worker with the severance pay proportional to both the wages and the length of the contract. The exact amount of the severance pay is set by a collective agreement. If nothing set in such agreement, the severance pay is at least equal to five percent of the wages paid during the length of the contract.*

If a contract of unspecified duration replaces a contract of specified duration upon the latter's expiration, the employment seniority of the worker is calculated by including periods of the both contracts.”

The Arbitration Council considers that based on Article 73 of the 1997 Labour Law, a worker is entitled to the agreed severance pay or the 5 percent severance pay when the fixed duration contract is finished and both parties do not renew the contract. In case the undetermined duration contract replaces the fixed duration contract, the seniority status of the worker shall include the length of both contracts.

In case 60/06 – New Max Garment (Issue 6), the Arbitration Council determined that, *“Therefore, the Arbitration Council considers that the workers are entitled to this severance pay when the fixed duration contracts are finished, which mean the labour relation has been severed. If the employment contract is renewed at the end of that contract, the labour relation is not considered as severed because it still continues and other benefits will still continue in the new contract.”* (See Arbitral Award 60/06 – New Max, Issue 6)

In this case, the Arbitration Council also agreed with the interpretation of the previous Panel that the severance pay will be paid only after the employment contract is finished and the labour relation is ended. In this case, the worker party demanded that the company pay the 5 percent severance pay to workers whose two-year fixed duration contracts had been converted to undetermined duration contracts. So ***does the conversion of the two-year fixed duration contract into undetermined duration contract mean the employment contract is finished and the labour relation between the worker and the employer is ended?***

Article 67 (2) of the Labour Law stipulates that, *“The labour contract signed with consent for a specific duration cannot be for a period 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 labour contract of undetermined duration.”

In the previous Arbitral Awards, especially Arbitral Awards 57/06 – Ever Green Garment, Issue 3; 10/03 – Jacqsintex, Issue 1 and 36/06 – Mondotex, Issue 2, the Arbitration Council considered that, **“Article 67 (2) of the Labour Law means that *fixed duration contract will become undetermined duration contract when the total length of the first contract plus the length of the renewed contract exceeds two years.*”**

Based on the above interpretation, the Arbitration Council considers that the contracts of the workers exceed two years so they are undetermined duration contracts not fixed duration contracts. Therefore, ***the whole employment contracts of the workers “previously”*** were undetermined duration contract. Moreover, in this case the workers are still working for the company and none of the contracts has been terminated.

Therefore, the Arbitration Council considers that employment contracts of the workers are undetermined duration contracts and none of them has been terminated; therefore, the workers are not entitled to the 5 percent severance pay.

Based on the above interpretation, the Arbitration Council considers that the employer party has no obligation to pay the 5 percent severance pay as demanded by the worker party.

Issue 2: The worker party demanded that the company provide US\$ 1 seniority bonus each year after workers have worked up to five years

The worker party demanded that the company provide US\$ 1 seniority bonus each year to workers who have worked up to five years.

Notification 745 (3) dated 23 October 2006 of the Ministry of Labour and Vocational Training states that, *“other benefits that workers used to receive in accordance with Notification 017 dated 18 July 2000 in point 3, 5 and 6 shall remain the same.”*

Clause 5 of Notification 017 dated 18 July 2000 of the Ministry of Social Affairs, Labour, Vocational Training, and Youth Rehabilitation states that, *“Workers who have been working for a long time in a factory or an enterprise shall receive a seniority bonus as follows:*

- 5.1 those who have been working more than one year shall receive a seniority bonus of US\$ 2 per month;*
- 5.2 those who have been working more than two years shall receive a seniority bonus of US\$ 3 per month, that is US\$ 2 for the first year plus US\$ 1 for the second year;*

- 5.3 *those who have been working more than three years shall receive a seniority bonus of US\$ 4 per month, that is US\$ 2 for the first year plus US\$ 1 for the second year and US\$ 1 for the third year;*
- 5.4 *those who have been working more than 4 years shall receive a seniority bonus of US\$ 5 per month, that is US\$ 2 for the first year plus US\$ 1 for the second year, US\$ 1 for the third year and US\$ 1 for the fourth year.”*

Based on Clause 5 of Notification 017, the Arbitration Council considers that for workers, who have been working for more than four years, are entitled to the US\$ 5 seniority bonus. This Notification does not state how much seniority bonus the workers should receive in year five. Therefore, the workers who have been working for more than four years are still entitled to US\$ 5 of seniority bonus.

The demand for US\$ 1 of seniority bonus each year after the workers have worked more than five years is a demand beyond what was provided by Notification 017 dated 18 July 2000 of the Ministry of Social Affairs, Labour, Vocational Training, and Youth Rehabilitation. Moreover, there is no seniority bonus related contract or collective bargaining agreement between the workers and the employer. Therefore, the Arbitration Council considers that the demand of the worker party is a demand beyond what was stated in the provision of law and generally the Arbitration Council considers it as an interests dispute.

Generally, the Arbitration Council always declines to consider the interests dispute if the union that brings the dispute before the Arbitration Council does not have the most representative status. Such decision is because:

Clause 43 of Prakas on the Arbitration Council determines that Arbitral Award that resolves the interests dispute will replace the collective bargaining agreement for one year.

Article 96(2B) of the 1997 Labour Law and Clause 9(1&2) of Prakas 305 dated 22 November 2001 of the Ministry of Social Affairs, Labour, Vocational Training, and Youth Rehabilitation determine that collective bargaining agreement negotiation must be done by the union that has the most representative status or all/several unions (in case the enterprise does not have the most representative union).

Because the Arbitral Award that resolves the dispute will replace the collective bargaining agreement for a period of one year and the collective bargaining agreement negotiation can only be done by the most representative union or all/several unions (in case the enterprise does not have the most representative union), the Arbitration Council generally requires that the union that brings the dispute before the Arbitration Council must be the most representative union or all/several unions (in case the union does not have the most representative union). In order to receive the most representative status, Article 277 of the 1997 Labour Law states the requirements and requires the union to be registered. (See

Arbitral Awards 57/04 – Evergreen; 60/04 – United Art, Issue 3; 08/07 – Sao Quinh, Issue 3; 33/07 – Gold Fame, Issue 2; and 116/07 – Grace Sun, Issue 4 & 5). In this case, the Arbitration Council also agreed with the interpretation of the previous panels.

In this case, Khmer Youth Trade Union at Focus Footwear factory does not have the most representative status. Therefore, the Arbitration Council declines to consider the demand of Khmer Youth Trade Union.

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

DECISIONS AND ORDERS

Issue 1: Reject the demand of workers that the company pay the 5 percent severance pay to workers whose two-year fixed duration contracts had been converted.

Issue 2: Reject the demand of workers that the company increase US\$ 1 seniority bonus each year when workers have worked for more than five years.

Type of Award: Non-Binding Award

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 period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Ouk Ry**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Run Saray**

Signature: