



KINGDOM OF CAMBODIA

NATION RELIGION KING

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THE ARBITRATION COUNCIL

Case number and name: 16/09-Bloom Time

Date of Award: 4 March 2009

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Ly Tayseng**

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

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

DISPUTING PARTIES

Employer party:

Name: **Bloom Time Embroidery Pte Ltd**

Address: Tropang Thloeung, Street Chom Chao, Sangkat Chom Chao Khan Dangkor,
Phnom Penh

Telephone: 012 827 755

Fax: N/A

Representative:

- | | |
|----------------------|--------------------------|
| 1. Mr. Sry Kimyou | Company's lawyer |
| 2. Mr. Albert Tan | Company's representative |
| 3. Mr. Wong Weishiue | Company's representative |
| 4. Ms. Regine Tan | Company's representative |
| 5. Mr. Vorng Ratha | Administration staff |
| 6. Ms. Chea Savuth | Administration staff |

Worker party:

Name: **Worker Union at Bloom Time Embroidery Factory**

Address: Tropang Thloeung, Street Chom Chao, Sangkat Chom Chao Khan Dangkor,
Phnom Penh

Telephone: 012 782 978

Fax: N/A

Representative:

- | | |
|--------------------------|-------------------------------|
| 1. Ms. Heng Bong | Workers' lawyer |
| 2. Mrs. Sary Both Charya | Workers' lawyer |
| 3. Mr. Seng Seyha | President of local union |
| 4. Mr. Mean Em | Vice-president of local union |
| 5. Mr. Phum Sina | Secretary of local union |
| 6. Ms. Suos Hoeun | Member |
| 7. Ms. Thorn Kea | Member |
| 8. Ms. Saang Ren | Member |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- The workers demand that the company continue the practice of employing workers under undetermined duration contracts as it practiced in the past because the workers were forced to convert their contracts from undetermined duration contracts to fixed duration contracts; thus the agreement was not the manifestation of the workers' free will and the termination payment was not calculated correctly according to the Labour Law. The company states that it would continue the practice of fixed duration contracts because this originated from a bilateral agreement. Regarding termination payments, the company already paid those workers whose undetermined duration contracts were terminated. The company's intent is to use fixed duration contract when it recruits workers.

- The company insist that the worker representatives should provide clear names and date of workers employed under fixed duration contracts who wished to nullify their contracts during the conciliation session on 15 June 2009. The worker party agreed to provide the list of names and dates of workers to the employer party after they finish the dispute resolution process at the Arbitration Council.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labor 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. 078 KB/AK/VK, dated 10 February 2009 was submitted to the Secretariat of the Arbitration Council on 10 February 2009.

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: 17 February 2009 (at 10:00 a.m.)

Procedural issues:

On 24 December 2008 the Department of Labour Dispute received a complaint by worker representatives, dated 22 December 2008, regarding the demand for nullification of fixed duration contracts and the re-implementation of undetermined duration contracts. After receiving the claim, the Department of Labour Dispute assigned an expert officer to resolve this labour dispute on 15 January 2009, resolving one of the two issues. The one non-conciliation issue was referred to the Secretariat of the Arbitration Council on 10 February 2009.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer party and the worker party to the hearing and conciliation on the one non-conciliation issue on 17 February 2009 (at 10:00 a.m.). Both parties were present as invited by the Arbitration Council.

On the hearing day, the Arbitration Council attempted to further the conciliation on the one non-conciliation issue but did not receive any conciliation result. Therefore, in this case the Arbitration Council will consider the issue in dispute based on evidence and reasoning as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

A. Provided by the employer party:

1. Notification regarding changing of type of employment contract, dated 18 September 2008.

B. Provided by the worker party:

1. Authorization letter by eight workers to authorize Lawyer Sary Both Charya and Lawyer Heng Bong to participate in the dispute resolution on 22 December 2008.
2. Letter to submit documents, dated 16 February 2009.
3. Summary statement of labour dispute, dated 16 February 2009.

4. Letter by Worker Union Federation to the company regarding notification of establishment of professional organization No. 142/08 SSK, dated 23 December 2008.
5. List of names of members of local union of Worker Union at Bloom Time Company, led by the eight leaders, 4 sheets of paper.
6. List of names of workers who endorsed their thumbprints to authorize the seven workers, four sheets of paper.
7. Letters by workers to authorize 7 representatives to participate in the dispute resolution, 14 sheets of paper, dated 22 December 2008.
8. Complaint letter dated 22 December 2008 by workers regarding request for nullification of fixed duration contract the employer asked them to sign in September 2008.
9. Minutes of collective labour dispute resolution at Bloom Time Embroidery Company, dated 15 January 2009.

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

1. Report of the collective labour dispute resolution at Bloom Time Embroidery Company, No. 078 K.B/A.K/V.K dated 10 February 2009.
2. Minutes of collective labour dispute conciliation at Bloom Time Embroidery Company, dated 15 January 2009.

D. Provided by the Secretariat of the Arbitration Council:

1. Invitation letter No. 076 KB/AK/VK/LKA, dated 12 February 2009 to invite the worker party to attend the hearing.
2. Invitation letter No. 075 KB/AK/VK/LKA, dated 12 February 2009 to invite the employer party to attend the hearing.

FACTS

- Having examined documents submitted to the Arbitration Council;
- Having reviewed the report of collective labour dispute conciliation;
- Having listened to statements by the representatives of the workers and the employer.

The Arbitration Council finds that:

- Bloom Time Embroidery factory employs approximately 508 workers.
- Complainants in this case include 105 workers.
- The 105 workers used to be employed under undetermined duration contracts before September 2008.

- According to the company's notification dated 18 September 2008 regarding the changing of the type of employment contract it is stated that the company has changed the type of workers' employment contract from undetermined duration contracts to fixed duration contracts in September 2008 with a provision of some money as compensation for such change.
- Based on the minutes of collective dispute conciliation, dated 15 January 2009, on the issues agreed by the parties: *"The company party agrees to nullify fixed duration contract as requested by workers in Bloom Time Company."* On the non-conciliation section, on the other hand, it is stated *"... the company will not re-employ and will not implement undetermined duration contracts as the company has terminated and paid for the undetermined duration contracts..."* The minutes of the collective labour dispute conciliation was signed by the worker and the employer parties.
- In the arbitral hearing the employer's representative states that the company cannot implement undetermined duration contracts even though during the conciliation session at the Ministry of Labour and Vocational Training it had agreed to nullify the fixed duration contracts. The company considers that nullification of the contract means to terminate the contract (cancel the contract) and to enter into a new contact. The company's policy is to implement fixed duration contracts.
- Up to the hearing date on 17 February 2009 the two parties continue to have a worker-employer relationship.
- The workers states that according to Article 21 of Decree 38, nullification of contract means that parties should return to the state of undetermined duration contract as it was before September 2008. The worker party requests that the Arbitration Council make a decision on the workers' demand based on the agreement the employer made on the nullification of the fixed duration contract during the conciliation session at the Ministry of Labour and Vocational Training.

REASONS FOR DECISION

In this case, the workers demand that the company return to the state where it implements undetermined duration contracts (before September 2008) based on Article 21 of Decree 38, dated 28 October 1998, on the basis that the company has agreed to nullify the fixed duration contracts. Nonetheless, the employer party states that the company cannot return to use undetermined duration contracts because the employer understands that nullification of contract means termination (cancellation) of the contract and entry into a new contact. The Arbitration Council will consider this case as follows:

In this case the Arbitration Council found that there is no provision in the Labour Law specifying the meaning of nullification of employment contracts. However, according to

Article 65 of the Labour Law 1997 regarding employment contracts, it is provided that 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 by the contracting parties.***

Based on the content of Article 65 of the Labour Law 1997 above, the Arbitration Council considers that employment contract is subject to common law. Thus, Decree 38 regarding Contract and Other Liabilities, dated 28 October 1988, shall cover this employment contract. Thus, the Arbitration Council will consider the contents of Article 21 of Decree 38 KrC regarding Contract and Other Liabilities, dated 28 October 1988.

Article 21 of Decree 38 KrC regarding Contract and Other Liabilities, dated 28 October 1988 states, *“In the case where there is nullity of a contract, the situation prior to entering into contract shall be restored.”*

Based on the contents of Article 21 of Decree 38, dated 28 October 1988, the Arbitration Council found that in principle in case a contract is nullified, the legal enforceability that the relevant parties intended to exercise is not exercised which means that the situation before the contract should be restored. In this case, based on the minutes of the collective dispute conciliation, dated 15 January 2009, on the issues agreed by the parties, the Arbitration Council found that *“The company party agrees to nullify the fixed duration contract as requested by workers in Bloom Time Company.”* The minutes of the collective labour dispute conciliation was signed by the worker and the employer parties. Thus, the Arbitration Council considers that the nullified fixed duration contract lost its legal enforceability [] which means that the worker and the employer parties cannot continue to exercise the nullified fixed duration contract; and the parties need to return to the original state before the nullified fixed duration contract was entered into. In this case, the Arbitration Council found that there are two original states before the nullified fixed duration contract was entered into including: (1) the implementation of undetermined duration contracts and (2) provision of an amount of money to the workers as a compensation for changing from the undetermined duration contract. Therefore, the Arbitration Council considers that the two original states before the nullified fixed duration contract was entered into: (1) the implementation of undetermined duration contract and (2) provision of an amount of money to the workers to compensate the change from the undetermined duration contract. Thus the Arbitration Council considers that the two original states (1 and 2) should be restored in accordance with meaning of nullity in Article 21 of Decree 38, dated 28 October 1988. This means that (1) *the workers and the employer should re-implement the undetermined duration contract* and (2) *the workers should return the amount of money paid to them as a compensation for changing from undetermined duration contract to the nullified fixed duration*

contract back to the employer. The Arbitration Council will consider on the two states as follows:

Regarding the first original state (whereby the workers and the employer should re-implement the undetermined duration contract): based on the minutes of collective labour dispute conciliation dated 15 January 2009 and the argument raised by the employer in the hearing, the company states that it cannot re-implement the undetermined duration contract because the company considers that the meaning of nullification of contracts means the termination of contracts (cancellation of contracts) and entry into a new contract; and in this case the company has a policy to implement the fixed duration contract. In relation to this claim, the Arbitration Council considers that the interpretation is not correct because according to Article 21 of Decree 38, dated 28 October 1988, nullification means that the situation prior to the contract should be restored. In this situation, the workers and the employer should continue to implement undetermined duration contracts.

Regarding the second original state (whereby the workers should return the amount of money paid to them as the compensation for changing to the nullified fixed duration contract back to the employer): in this case the Arbitration Council does not find that this point is mentioned in the minutes of collective labour dispute conciliation, dated 15 January 2009. Moreover, in the hearing the employer party does not demand that the workers should pay back the amount of money paid as a compensation for the changing from undetermined duration contract to the nullified fixed duration contract. Therefore, the Arbitration Council will not [further] consider this issue.

However, in response to the question based on the actual situation at Bloom Time company, whether the two original situations mentioned above should be restored, it depends on the willingness of the workers and the employer. This means that the two parties should discuss about the consequence that will follow after the return to the two original states mentioned above based on the contents of Article 21 of Decree 38, dated 28 October 1988. The real original states at this time means that *if the employer has to renew undetermined duration contract, do the employees have the ability to return the money paid to them as a compensation for the changing from undetermined duration contract to the nullified fixed duration contract.* The Arbitration Council considers that the key point to resolve this issue is to let each worker to make a decision by themselves. This means that for those workers who want to return to undetermined duration contracts, the worker needs to *return the money paid to them as a compensation for the changing from undetermined duration contract to the nullified fixed duration contract back to the employer in accordance with the General Principle of Unjust Enrichment.* Currently the General Principle of Unjust Enrichment is stipulated in Article 736 of the Cambodian Civil Code, although this Code has not yet entered into effect. According to the General Principle of Unjust Enrichment,

regarding those who benefit from property or labour of other people, if this gain of benefits by the first party causes the loss of benefits by other people, the first party can have a responsibility –without a precise legal ground-- to return the benefits.

In conclusion, the Arbitration Council orders the employer to implement undetermined duration contracts based on the choice of each worker.

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

DECISION AND ORDER

- Orders the employer to implement undetermined duration contract based on the choice of each worker.

Type of Award: Non 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: **Ly Tayseng**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature:

Annex to Arbitral Award 16/09-Bloom Time

Dissenting Opinion

According to Clause 37 of Prakas 099 SKBY, dated 21 April 2004 by the Ministry of Social Affairs, Labour and Vocational Training and Youth Rehabilitation, in this case I, Arb. **Ly Tayseng**, arbitrator from the employer list, would like to dissent to the reasoning and decision in the Arbitral Award **16/09-Bloom Time**, as follows:

Findings of Fact:

According to the information provided in the hearing and in the evidences submitted by the parties:

- Before 18 September 2008, the company and the employer implemented undetermined duration contracts. However, on 18 September 2008 the company gave a notification regarding the changing of employment contracts from undetermined duration contracts to fixed duration contracts with provision of an amount of money to compensate the change of the employment contract. The workers received the money paid to them before Pchum Ben.
- The disputant parties agreed to nullify the fixed duration contract but the employer does not agree to re-implement the nullified undetermined duration contract.
- The workers request that the Arbitration Council decide to apply Article 21 of Decree 38 regarding the effect of nullification of contract the employer already agreed to in the minutes by the Ministry of Labour.

I dissent to the decision by the Arbitration Council in which it *“orders the employer to implement undetermined duration contract based on the choice of each worker.”*

Reasons for Decision:

1. Regarding the agreement in the minutes of collective labour dispute conciliation

I consider that the Arbitration Council has presumed that the fixed duration contract was nullified according to the agreement between the parties without going further to consider the findings of fact to determine whether the parties' claim of the reasons that led to the nullification of the contract was valid and in accordance with the law. The Arbitration Council applies Article 21 of Decree 38 immediately.

I considers that the Arbitration Council should consider the reasons around the agreement before deciding that the nullification was effective and enforceable.

According to Article 3 of Decree 38, *“A contract is valid provided that it: arises out of a real and free agreement...”* Article 7 of Decree 38 states, *“An agreement that is the result of **mistake**, duress, or fraud is not a valid agreement.”*

If we look at the claim and intention of the parties in the hearing and in the minutes of the collective dispute conciliation, the employer makes a strong objection to the re-implementation of undetermined duration contracts although it agrees to nullify the fixed duration contract. To the employer's understanding, after the fixed duration contract is nullified, the two parties will sign a new contract for their employment relationship. On the other hand, the workers understand that after the fixed duration contract was nullified, the employer should have an obligation to re-implement the undetermined duration contract existed prior to the fixed duration contract in accordance with Article 21 of Decree 38. This means that the two parties have different positions and expectations. I consider that in this case the Arbitration Council should not differentiate between the conciliation and non-conciliation part because the two issues are closely interconnected; in other words, the agreement or disagreement on one issue directly impacts the implementation of another issue.

The above statement reflects that the two parties did not **validly and genuinely** agree to the nullification of the fixed duration contract.

Based on my analysis above, I consider that the parties had some confusion on the essence of the subject of their agreement at the Ministry of Labour and Vocational Training which was the factor that led to the agreement for nullification in accordance with Articles 3 and 7 of Decree 38. As a consequence, this agreement should not be taken as a basis to make a decision that requires the employer to have an obligation to re-implement undetermined duration contracts. Thus, the Arbitration Council should consider findings of fact around this dispute in order to be a basis to make a decision whether there are other reasons that could lead to the nullification of a fixed duration contract in effect.

2. Regarding the reasons for nullification of fixed duration contract

According to the complaint by the workers to the Department of Labour Disputes, dated 22 December 2008, and statement dated 16 February 2009 by the lawyer who represent the workers, the workers claim that the change of employment contracts from undetermined duration contracts to fixed duration contracts was under acts of pressure from the employer such as transferring of work shifts from night shift to day shift, suspension of employment contracts, forcing workers to go on suspension with pay, changing of employment contracts, requirement that workers should come to receive indemnity for dismissal before Pchum Ben otherwise it would be considered void. The workers, then, had no choice and they were worried about losing their job so they signed the fixed duration contract against their will. In contrast, the employer objected to the workers' claim and argues that the change of employment contracts was through an agreement in which indemnity for dismissal was paid out to the workers; the company has a policy to implement fixed duration contracts with workers newly recruited.

I consider that the dispute in this point is whether the fixed duration contract was made under duress or against the will of the workers.

Article 7 of Decree 38 mentions about [duress] that lead to nullification of contract. Article 9 of the Decree states, *“Violence is a ground for voiding a contract if such violence is in the form of mental or physical duress against a party to the contract, his/ her husband or wife, any ascendants, or any descendants of the party”*

In reality, the law does not specify the scale of mental or physical duress. However, I consider that in order for violence to become a reason for the voiding of a contract it requires **actual and serious threat that can lead to severe financial or physical injury to the party** that necessitates the party to sign the agreement in order to circumvent the entailed dangers. If [such elements do] not exist, the party cannot use the reason of duress as a reason for nullification of a contract. In this case, the workers do not mention or provide actual evidence of threat or coercion.

Furthermore, generally as part of the freedom to establish a contract, parties to a contract can use all legal means and strategies in order to negotiate something with the other party. Suspension of employment contracts, request for workers to take leave with pay or changing of employment contract could all be considered legal circumstances that may occur lawfully in the life span of employment relations if the parties have reasons permitted by law. The workers' worry that they would lose their job cannot be considered a legal ground to justify that it is a coercion by the employer because the workers still have their basic rights to negotiate, choose the types of jobs they like and in accordance with agreed working conditions or terminate their employment contract in accordance with the law then look for another job outside.

3. Freedom to choose a type of contract

Article 1, Decree 38, states *“A contract is an agreement between two or more persons to create, change or terminate one or more obligations which bind them.”* In this sense, parties concerned must be free to choose to establish, create or terminate a contract following their agreement or legal provisions in effect. The Labour Law also allows for termination of employment through agreement or termination payment.

The employer summoned the workers by notification in order to change their employment contract from undetermined duration contracts to fixed duration contracts on 18 September 2008 on a voluntary basis. Article 67 of the Labour Law provides for conversion of fixed duration contracts to undetermined duration contracts after the duration of the contract exceeds 2 years. However, there is no provision in the Labour Law that permits the parties to change the form of contract from undetermined duration contracts to fixed duration contracts. Thus, although in the notification the employer used the term ‘change,’ I consider that this is a termination of the undetermined duration contract before establishing a fixed

duration contract. The parties did not mention whether the compensation was in accordance with the law. Thus, if we look at the above mentioned situation, we can see that the undetermined duration contracts were terminated and fixed duration contracts were implemented immediately after that.

As described in the three points above, I consider that the parties should continue the existing fixed duration contracts until the expiration of the six-month employment contract. Therefore, the Arbitration Council should have rejected the demand of the workers.

Phnom Penh, 4 March 2009

Arbitrator

Ly Tayseng