

**KINGDOM OF CAMBODIA
NATION RELIGION KING**

THE ARBITRATION COUNCIL

Case: 23/05

Date of award: 5 May 2005

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

Jung Min (Cambodia) Apparel Co., Ltd

(Employer party)

AND

Cambodian Industrial Union Federation (CIUF)

(Employee party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Representative: 1- Mr. Phoung Revith, Administration manager
Address: Mol Village; Street Chamkardong; Khan Daunkor; Phnom Penh
Tel: (855) 023 300 350 and (855) 12 942 120
Fax: 023 310 452

DETAILED INFORMATION OF EMPLOYEE PARTY:

Representative: 1- So Vy; President of union;
2- Peu Sinoun; Vice president of union;
3- Ly Veng; General Secretariat of CIUF
4- Pen Mai; Official CIUF;
5- Sok Sreylot; Secretariat of CIUF;
6- Ton Sreyrun; Workers' representative; and
7- Soung Siphanna; Workers' representative.
Tel: (016) 704 587 or (012) 995 523
Fax: N/A

ISSUES IN DISPUTE:

(In non-conciliation report)

- 1- The workers demand that the company accept as regular workers all workers who have worked regularly for three consecutive months or more.

JURISDICTION OF THE ARBITRATION COUNCIL:

The Arbitration Council derives its power to make this Award from Section IIB of Chapter 12 of the Labour Law (1997); the Prakas on the Arbitration Council No. 099, dated 21 April 2004; the Prakas on the Nomination of Arbitrators No. 103, dated 26 April 2004 and No. 265, dated 13 July 2004 and the Arbitration Council Procedural Rules (which form an Annex to the Prakas No. 099 dated 21 April 2004).

An attempt to conciliate the collective dispute which is the subject of this Award was made in accordance with Chapter XII Section 2A of the Labour Law. However, that conciliation was unsuccessful and a non-conciliation report numbered 491/MoLVT dated 1 April 2005 was sent to the Secretariat of the Arbitration Council on 4 April 2005.

COMPOSITION OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:	Ms. Seng Vuochhun
Arbitrator chosen by the worker party:	Mr. Ven Pov
Chair arbitrator (chosen by the two arbitrators):	Mr. Koy Neam

HEARING AND EVIDENCE:

Place of hearing: Secretariat of the Arbitration Council, Phnom Penh Center building A, room 331, Sothearos Street, Sangkat Tonlebasac, Khan Chamkarmorn, Phnom Penh.

Date of hearing: - 8 April 2005 at 8:00 a.m.
- 4 May 2005 at 9:00 a.m.

Witnesses and Experts: N/A

EVIDENCE THAT WAS CONSIDERED BY THE ARBITRATION PANEL IS AS BELOW:

Provided by the employer party:

- 1- Letter to delegate dated 7 April 2005;
- 2- Business license certifying commercial registration dated 18 December 1998;
- 3- Template of labour contract;
- 4- Basic table template of the company (not implemented yet);
- 5- Internal Work Rules of the company registered on 11 August 1999;
- 6- Conciliation report of a collective labour dispute dated 28 March 2005.

Provided by the employee party:

- 1- List of casual workers who have worked consecutively for more than three months;

- 2- Announcement dated 10 January 2005;
- 3- Template of a temporary job application;
- 4- Application form requesting to negotiate over workers' demands of 11 issues from the union dated 16 March 2005.

Received from MoLVT:

- 1- Letter to resolve a collective labour dispute of Jung Min (Cambodia) Apparel Co., Ltd. numbered 511/MoLVT of H.E Nhep Bunchin, Minister of Labour and Vocational Training dated 19 April 2005.
- 2- Non-conciliation report numbered 491/MoLVT dated 1 April 2005 of the Ministry of Labour and Vocational training.
- 3- Minute of conciliation of a collective labour dispute dated 28 March 2005.

Statements and answers of witnesses from the employer and worker parties.

The two parties decided in the hearing that the award would be binding.

CASE SUMMARY:

Jung Min (Cambodia) Apparel Co., Ltd employs 1600 workers. Among those workers there are approximately 600 to 700 workers who were considered as casual workers by the company even though the majority of them have worked since 2004.

On 14 March 2005 the workers filed a complaint to the Labour Inspector at Daungkor district through their representative, making demands in respect of 12 issues. After receiving the information the Labour Inspector participated to resolve the disputes. As a result the parties reached an agreement with respect to 11 issues.

In the hearing the Arbitration Council encouraged both parties to negotiate to settle the dispute together and the parties asked the Arbitration Council to delay issuing an arbitral award from 27 April 2005 to 5 May 2005 in order to give sufficient time for the parties to conciliate their issues outside of the hearing. The parties agreed to a deadline of 25 April 2005 to submit evidence to the Arbitration Council. However, the parties did not reach an agreement, thus the Arbitration Council decided to consider and resolve the dispute as follows:

FINDINGS OF FACT:

- Having examined the non-conciliation report;
- Having examined all documents provided by both parties; and
- Having listened to both parties, the employer and the employees,

We find that:

- 1- The employer employs approximately 1600 - 1700 workers in total; this total includes approximately 600 - 700 workers whom the Company calls "floating" workers. Most of the floating workers work in the sewing, ironing and trimming sections of the factory.
- 2- According to the employer, the Company's peak production activity generally occurs between October to March of each year (the "Peak Season").
- 3- The Company hires the floating workers to work from October to March every year.
- 4- Generally, such floating workers have fixed duration contracts (FDCs) with terms that last 3 to 6 months.
- 5- Floating workers work 8 hours per day and 26 days per month.
- 6- At the end of each 3-month term, the contract of floating workers terminates; then the Company re-hires many of the same workers under another 3 month FDC.
- 7- The Company provides the floating workers (i) wages that vary from US\$35 to US\$45 per month, and (ii) different benefits (including an overtime rate of 100% to 150%). But the Company does not provide any floating worker (i) annual leave or (ii) severance pay at the end of their employment contracts.
- 8- At the hearing the workers demanded that floating workers receive the same wages and benefits as permanent workers.

REASONS FOR DECISION:**A- Evidence provided**

At the hearing on 8 April 2005, the Arbitration Council requested that each party submit more evidence regarding the dispute. The Arbitration Council set 25 April 2005 as the deadline to submit such evidence. At the same hearing, the parties also agreed to extend the deadline by which the Arbitration Council would issue the award to 5 May 2005.

On 21 April 2005, the employees submitted documents for the Arbitration Council to consider. The employer party submitted documents for the Arbitration Council to consider on 27 April 2005. On 29 April 2005 the Secretariat of the Arbitration Council telephoned the

employer party (Phoung Revith) to ask the employer to offer a reason why the documents were submitted after the deadline (two days). The employer stated that he would fax his reason by the end of the day on 29 April 2005; but the employer did not do so.

On 4 May 2005, the Arbitration Council held a hearing and asked the employer if s/he had any reason for submitting the documents after the deadline (of 25 April 2005). The employer responded that he was confused about the deadline and thought the deadline to submit the evidence was the end of April 2005. The employer offered no other reasons for submitting evidence late.

The Arbitration Council has the power to require parties to a dispute to submit evidence (see Article 18 and 24 of Prakas 99/04). Under Article 25 of Prakas 99/04, the Arbitration Council shall be free to determine the admissibility, relevance, materiality and weight of evidence as well as the allocation of the burden of proof and has a power to indicate to any party that they bring evidence for the purpose of proof. In this case, the employer submitted evidence two days after the deadline set by the Arbitration Council. The Arbitration Council understands that in some cases there may be valid reasons for missing deadlines. However, in this case, the Arbitration Council gave the employer multiple opportunities to provide a valid reason for submitting the documents late; but the employer did not offer any reason for the late submission; the employer only stated that s/he was confused about the date of deadline. Thus; the Arbitration Council finds that the employer did not have a valid reason for missing the deadline to submit evidence.

Therefore; for the reasons above, the Arbitration Council decides that it will not take into consideration documents which were submitted by the employer party on 27 April 2005.

B- Casual workers issued

In this case, Jung Min (Cambodia) Apparel Co. Ltd., calls workers who were hired seasonally, "floating workers". The Labour Law does not recognize the status of floating workers. All workers who work in Cambodia are recognized by Article 9 of the Labour Law as either casual workers or regular workers. Article 9 of the 1997 Labour Law states that "...casual workers are those who are contracted to: perform a specific work that shall normally be completed within short period of time; perform work temporarily, intermittently and seasonally."

In prior cases, the Arbitration Council has looked to Article 166 (regarding annual leave) and Article 68 (regarding the length of a probation period) to determine the meaning of

regularly performing a job for a long period of time (see for example, 03/03-Tonga; 53/04-Kong Hong; 26/04-Cambodia Sportswear). Article 166, paragraph 3 provides that, "For jobs that are not performed regularly throughout the year, a worker is considered to have met the condition of continuous service if he works an average of 21 days per month." Article 68 provides that "A contract for a probationary period cannot be for longer than the amount of time needed for the employer to judge the professional worth of the workers and for the workers to know concretely the working conditions provided. However, the probationary period cannot last longer than three months for regular employees, two months for specialized workers and one month for non-specialized workers". In cases related to probationary periods the Arbitration Council has found that workers in a garment factory must be considered specialized workers and must become regular workers after two months of probationary period (see 27/03-Standard Garment).

In prior awards the Arbitration Council has reviewed Articles 9, 166 and 168 and determined that, whether the employer calls a worker "floating worker" or any other name, if a worker works an average of at least 21 days for two consecutive months, then such worker should be considered a regular worker. This principle of 21 working days in two consecutive months has become a part of the Arbitration Council's established jurisprudence. (Please see 55/04-You Chheng; 69/04-Common Way and 85/04-Kang Ning).

The Arbitration Council questions whether the Arbitration Council jurisprudence of converting casual workers to regular workers after "21 days/2 months" is appropriate in this case. Under Arbitration Council's Guideline #1, the Arbitration Council generally follows jurisprudence that has been established in prior cases, but the Arbitration Council also has the power to interpret the law, in cases [where] the Arbitration Council does not agree with the Arbitration Council's previous decisions and there are different facts requiring a new decision.

In this case, the workers worked for 8 hours per day, 26 days per month, for 3 to 6 months consecutively. Under the Arbitration Council's jurisprudence, the workers should be regular workers. But even if the workers are casual workers, Article 10 of the Labour Law provides that they would be entitled to the same rights and benefits as regular workers. Article 10 states that "casual workers are subject to the same rules and obligations and enjoy the same rights as regular workers, except for the clauses stipulated separately." Please see the arbitral award of 03/03-Tonga, where the Arbitration Council reasoned that, regardless of the classification of the workers or their labour contracts, under Articles 10 and 104 of the Labour Law, all workers (even casual workers) must be ensured minimum working conditions and wages. See also 26/04-Cambodian Sport Wear; 30/04-Honey Wear; 53/04-Kong Hong.

Moreover in this case, the Arbitration Council finds that each of the workers signed fixed duration contracts with the company. Therefore, whether the workers are casual workers or regular workers, they are entitled to all the rights and responsibilities that the Labour Law provides to workers on fixed duration contracts, including minimum working conditions during the term of their contract, as well as severance pay at the termination of their fixed duration contracts (see Article 73 of the Labour Law).

At the hearing, both the employer and the workers testified that some of the workers did not receive severance pay, some received less than minimum wage, and some were paid less than the [required] 150% rate for overtime work. Thus the Arbitration Council finds that the employer party is in violation of the Labour Law (Articles 10, 73 104 and 139) and the employer must pay wages and benefits to those workers (casual workers) as regular workers.

Hence the employer must provide wages and benefits to the workers called floating workers [by the employer], who have worked for Jung Min company 8 hours per day/26 days per month for a period of three months to six months and signed fixed duration contracts with the company as regular workers.

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

DECISION:

Order the employer to provide the workers who signed fixed duration contracts and whom the employer called floating workers the wages and other benefits, the same as the wages and other benefits of regular workers who are under fixed duration contracts, in accordance with the Labour Law.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Seng Vuochhun**

Signed:

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signed:

Chair of arbitration panel:

Name: **Koy Neam**

Signed:

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

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