



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអន្តរាគមន៍

THE ARBITRATION COUNCIL

Case number and name: 27/08- Archid

Date of Award: 07 March 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: **An Nan**

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

DISPUTING PARTIES

Employer party:

Name: **Archid Garment Factory Cambodia Limited**

Address: **Damnak Thom Village, Sangkat Steung Mean Chey, Phnom Penh**

Telephone: **012 852 646**

Fax: **N/A**

Representative:

- | | |
|--------------------|-----------------------------|
| 1. Mr. Oeun Sam Ol | Chief of administration |
| 2. Mr. Ly Samnang | Assistant to administration |

Worker party:

Name: **Khmer Youth Federation Trade Union (KYFTU) and Local Union of Khmer Youth Trade Union (KYTU) at the Factory**

Address: **Boeung Kror Peu Village, Sangkat Steung Mean Chey, Phnom Penh**

Telephone: **092 462 476 or 092 967 293**

Fax: **N/A**

Representative:

- | | |
|------------------------|---|
| 1. Mr. Nhang Sambo | Coordination Officer of KYFTU |
| 2. Mr. Poeun Sam Oeurn | Coordination Officer of KYFTU |
| 3. Mr. Toeuk Sal | President of local KYTU at the Company |
| 4. Mr. Prak Kimsok | Vice-president of local KYTU at the Company |
| 5. Mr. Suo Kimse | Secretary of local KYTU at the Company |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The workers demand that the Company provide a parking place for their bicycles and motorbikes with a proper roof to protect their vehicles from the rain and heat. The Company states that it can not prepare such roof because this is not allowed by the local authority, but it is able to provide a netting roof to reduce heat.
- 2- The workers demand that they do not need to obtain a [permission] letter from a Chinese supervisor when they come to work 5 minutes late (working hour starts at 7:00 am). The Company party does not agree to the demand, it requires a [permission] letter issued by a Chinese supervisor.
- 3- The workers demand that the Company allow them to relax in the factory compound from 11:20 a.m. because there is no space for them to relax outside of the factory and it is hot there. The Company party does not agree to the demand, it allows the workers to relax in factory compound at 11:40 a.m.
- 4- The workers demand that the Company prepare separate medical infirmaries, one for men and another one for women. The Company party states that it is not able to prepare this because the space for the medical infirmary is narrow. However, the Company prepares a curtain to block the view of one another.
- 5- The workers demand that the Company allow pregnant women workers to take one day off per month to have their health check and maintain their benefits. The Company party states that it allows pregnant workers to take a half-day off per month to have their health check and maintains their benefits.
- 6- The workers demand that the Company pay them 100 percent of wage when it has no work for them to do. The Company party states that it is able to provide only 50 percent of wages.
- 7- The workers demand that the Company provide a 2,000 riel food allowance when they work overtime from 4:00 p.m. to 9:00 p.m. The Company party states that it can provide only 1,500 riel.
- 8- The workers demand that workers whose fixed duration contracts have been renewed many times and the duration exceeds two years be converted to undetermined duration contracts. The Company party states even though a fixed duration contract has been renewed many times it remains a fixed duration contract.

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 hearing was unsuccessful, and the non-conciliation report No. 232 KB/AK/VK, dated 14 February 2008 was submitted to the Secretariat of the Arbitration Council on 18 February 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: 27 February 2008 (from 02:00 p.m. to 05:00 p.m.)

Procedural issues:

On 22 January 2008, the Department of Labour Disputes received a complaint from workers in Archid Company demanding that the Company improve some working conditions. The Department designated officers to settle this dispute and the last conciliation was held on 05 January 2008; 8 out of 11 were not conciliated. The 8 non-conciliation points were referred to the Arbitration Council on 18 February 2008 through a non-conciliation report of the 8 issues No. 232 KB/AK/VK, dated 14 February 2008.

After the receipt of the case, the Secretariat of the Arbitration Council summoned the employer party and the worker party in the factory to the hearing and conciliation on the 8 non-conciliation issues on 27 February 2008 at 02:00 p.m.

Both parties were present as invited by the Arbitration Council. The Arbitration Council tried to ask for more information relevant to this dispute and tried to further the conciliation on the non-conciliation issues. As a result, five issues were conciliated: issues 1, 2, 3, 4, and 5 and the worker party asked to withdraw issue 7. Therefore, the Arbitration Council will consider issues 6 and 8 based on the evidence and clarification of the parties in the hearing as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Certificate of commercial registration No. 153 PN.NTK, dated 18 January 2000;
2. Summary statement of the labour dispute, dated 25 January 2008;
3. Memorandum and statute, dated 09 December 2008;

4. Company's Internal Work Rules, registration No. 096 SKBY.AK, dated 25 October 2000;
5. Minutes of meeting on union contribution fee, dated 02 February 2008;
6. Minutes of meeting on increase of meal allowance, dated 16 February 2008;
7. Agreement between worker delegate and the Company on coming to work late, dated 20 October 2004;
8. Request for meeting to solve some issues, dated 03 January 2006;
9. Minutes of collective dispute conciliation, dated 27 March 2006;
10. List of names of workers who agreed to accept 50% of wages when the Company has no work for them to do;
11. Letter No. A026-2-08, dated 26 February 2008, by the Company Director regarding authorization to Mr. Oeurn Sam Ol.

Provided by the worker party:

1. Letter No. 183 KB/AK/VK, by the chief of Department of Labour Disputes regarding request for recognition of the new union leaders, dated 08 February 2008;
2. Minutes of collective dispute conciliation of the Company, dated 05 February 2008.

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

1. Report of collective labour dispute conciliation at Archid Garment factory Cambodia Limited, No. 232 KB/AK/VK, dated 14 February 2008;
2. Minutes of collective labour dispute conciliation, dated 05 February 2008.

Provided by the Secretariat of the Arbitration Council:

1. Invitation letter No. 140 KB/AK/VK/LKA dated 20 February 2008 to invite the employer party to attend the hearing.
2. Invitation letter No. 141 KB/AK/VK/LKA dated 20 February 2008 to invite the worker party to attend the hearing.

FACTS

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

The Arbitration Council finds that:

- Archid Garment Factory Cambodia Limited employs a total number of 930 workers.

- The Khmer Youth Trade Union has 377 members. The union does not have most representative status.

Issue 6: The workers demand that the Company pay them full wages when it has no work for them to do.

- In the hearing, the worker party demanded that, in the future when the company has no work for the workers to do, the Company pay them full wages; but does not demand that the Company reimburse them for the past times when the Company paid them only half wages.
- The workers add that they do not make this demand if the Company has no work for them to do for a short period and follows the legal procedures to suspend their [employment] contract; but if the Company does not suspend their employment [contracts], they demand that the Company pay them full wages.
- In the hearing, the Company states that [in the past] it did not have work for workers to do for a short time (from two to three days) and only for one of two groups. In such cases, in the past the Company paid them half wages but the Company did not follow the procedure to suspend the [workers'] employment [contracts] when it does not have work for the [workers] to do.
- The Company adds that when there is no work the Company tells the workers that if the workers stay in the Company then the Company will ask the [workers] to do other work such as cleaning lamps, chairs, tables and their workplace and the Company will pay them full wages but for any workers who ask to go home the Company will pay them half wages. The Company does not know when it will have no work for the workers to do in the future.

Issue 8: The workers demand that workers whose fixed duration contracts have been renewed many times and the duration exceeds two years be converted to undetermined duration contracts.

The Company party does not agree to the demand but will provide six months fixed duration contracts even though the total sum of the duration of workers' contracts is more than two years.

- In the past, the Company made employment contracts with workers by leaving the end date blank and without writing down the termination date of the employment contract (which means it is a fixed duration contract). However, from October 2005 the Company changed to fixed duration contracts of only two months (probationary worker), then after workers had passed the stage of a probationary worker, three months contracts, and then six months contracts which are

continually renewed for the same period. At the expiration of each [fixed duration] contract, the Company provides notice according to the law.

- In the hearing, the Company party stated that about 30% of workers have been employed on continual fixed duration contracts for a period exceeding two years.

REASONS FOR DECISION

Issue 6: The workers demand that the Company pay them full wages when it has no work for them to do.

In principle, according to the Labour Law, [workers'] labour contracts should be suspended in accordance with the legal procedures set out in Article 71(11) for the following reasons:

“1. When the enterprise faces a serious economic or material difficulty or an particularly unusual difficulty, which leads to a suspension of the enterprise operation for not more than two months.

2. This suspension is subject to review by the Labour Inspector.”

In addition, Article 71(1) of the Labour Law states: *“The suspension of a labour 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...”*

According to this, the company should notify the Labour Inspector and the Labour Inspector should conduct a review and give comments on the suspension of the labour contract. The Article means that the Labour Inspector has a responsibility to review and give comments in relation to the labour contract suspension at the Company to determine whether [the suspension] is because of economic difficulties at the Company.

The Arbitration Council considers that the Labour Law allows the Company to suspend [workers'] labour contracts but in order to do this the Company has to notify the Labour Inspector about the reasons for and duration of the suspension.

If the Company follows the legal procedures to suspend [workers'] labour contracts and the Labour Inspector conducts a review, the Company is not obliged to pay wages to workers (see Article 72(1) of the Labour Law). However, if the Company does not follow the legal procedures mentioned above, the Company has an obligation to pay full wages to workers even it does not have work for the workers to do (see Arbitral Awards 21/03-Loyal, Issue 8; 01/04-New Point; 46/04-M&A, Issue 1; 60/06-New Max, Issue 2; 74/07-Global Apparel, Issue 1).

In this case, based on the above findings of fact, in the past the Company did not suspend workers' labour contracts when it did not have work for the workers to do for a short period. This means that the Company did not notify the Labour Inspector regarding the

suspension of employment. To the contrary, at that time, the Company agreed with the workers that when the Company did not have work for the workers to do, the Company would pay them half wages.

In the current demand, the workers demand that if, in the future, the Company does not have work for them to do for a short period of time the Company has to pay them full wages and they will not accept half wages as they did in the past.

The Arbitration Council considers that if the Company does not follow [the proper] labour contract suspension procedures set out in Article 71(11) when it does not have work for the workers to do, it has an obligation to pay full wages because the suspension is not in accordance with the law.

However, in this case the worker party does not claim for back pay of wages for the past times when the company suspended their employment but demands that the Company pay full wages when the Company does not have work for them to do in the future. In the hearing, the worker party and the employer party agreed that from 2008 until now, the Company has always had work for the workers to do. The Arbitration Council considers that for a future dispute the Arbitration Council cannot find specific facts and evidence in relation to the workers demand as a basis for consideration.

Regarding the future demand, in case 10/03-Jacqsintex, the Arbitration Council held that *“the Arbitration Council was established to resolve labour dispute, but not to settle future problems which has not yet occurred.”*

In this case, the Arbitration Council agrees with the above interpretation of the Arbitration Panel because no one can predict about an event in the future: whether it will happen, where and when it will happen, who are the workers affected by the problem, who is making the demand, which group and section they are in, how many of them, how many days that the Company did not have work for them to do, etc. (See Arbitral Awards 64/04-City New, Issue 4; 36/06-Mondotex, Issue 5; 58/07-8 Stars Sportswear, Issue 1).

However, in relation to the above interpretation the Arbitration Council finds that in the past the Company did not follow the legal procedures to suspend workers' employment. Clause 34 of Prakas 099 SKBY, dated 21 April 2004 regarding the Arbitration Council states, *“Within the limitations of the Labor Law and this Prakas, the Arbitration Council has the power and authority to provide any civil remedy or relief which it deems just and fair, including: orders to cease immediately any other illegal or prohibited conduct...”*

Therefore, in this case the Arbitration Council decides to order the Company to stop this practice immediately and ensure that, in the future, any labour contract suspension is in accordance with legal procedures under the Labour Law.

Issue 8: The workers demand that workers whose fixed duration contracts have been renewed many times and the duration exceeds two years be converted to undetermined duration contracts.

In relation to this demand, the worker party considers that when workers enter into continual [fixed duration] contracts and the total duration of their contracts or employment relationship is over two years the Company should convert the workers' contract to an undetermined duration contract. The Company, on the other hand, thinks that even though the total duration of the workers' employment contract exceeds two years, the Company can continue to use fixed duration contracts of six months.

Therefore, the Arbitration Council will consider this issue as follows:

Article 67(2) of the Labour Law states, *"The labour contract signed with one 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."*

Article 73(5) of the Labour Law states, *"If the contract has a duration of more than six months, the worker must be informed of the expiration of the contract or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have a duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67."*

In case 36/06-Mondotex, Issue 2 and 57/06-Evergreen, Issue 3, the Arbitration Council interpreted Article 67(2) to mean that a fixed duration contract will become an undetermined duration contract when total length of the contract renewals exceed two years. To this, the Arbitration Council notes:

"The Labour Law of Cambodia has a preference towards undetermined duration contracts, as provided under Article 67(7) and (8). The rationale for this tendency is that undetermined duration contracts promote job security, which is vital to both workers and employers because long-term employment encourages workers to be committed to their work. Moreover, Article 73(5) of the Labour Law provides that fixed duration contracts become undetermined duration contracts if no prior notice about termination is given and if the total duration exceeds the term specified in Article 67(2). The reference to the total duration as stipulated in Article 67(2) refers to Article 67(2), which provides support to the arguments that the two-year duration stated in Article 67(2) refers to the total maximum duration and does not direct to the duration of each renewal.

Further, paragraph 3 of the recommendation of the International Labour Organization, No. 166 of 1982, regarding the termination of employment contracts states that fixed duration

contracts shall not be used for long-term employment contract purposes. The recommendation of the International Labour Organization also states that fixed duration contracts should become undetermined duration contracts if the employer renews the contract many times. Although the recommendation is not binding, it acts as a beneficial aid for the interpretation of Article 67.”

In the hearing, the Company states that even though the total duration of workers' employment contract exceeds two years the Company will continue to use 6 month fixed duration contracts. The Arbitration Council considers that the employer's position does not have a legal basis and there are no specific reasons provided [for their position]. The Arbitration Council considers that the interpretation of Article 67(2) of the Labour Law as stated above, means that a fixed duration contract becomes an undetermined duration contract if the total length of the contract renewals exceed two years. (See Arbitral Awards 36/06-Mondotex, Issue 2 and 57/06-Evergreen, Issue 3).

In general, the Arbitration Council will follow a previous Arbitral Award if it is reasonable. In this case, the Arbitration Council agrees with the interpretation of the Arbitration Panel in the previous Arbitral Awards. Therefore, the Arbitration Council decides that the employer should convert any worker, whose contract has been renewed many times and the total length of the renewals exceed two years, from a fixed duration contract to an undetermined duration contract.

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

DECISION

Issue 6:

Order the employer to stop [its practice] of unlawful labour contract suspension immediately and ensure that, in the future, any labour contract suspension is in accordance with [the proper] legal procedures under the Labour Law.

Issue 8:

Order the employer to convert any worker, whose contract has been renewed many times and the total length of the renewals exceed two years, from a fixed duration contract to an undetermined duration contract.

Type of Award: binding award

This Award is immediately binding upon the parties after the notification of the award because the two parties agreed to choose this type of award on 27 February 2008.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: