

**KINGDOM OF CAMBODIA
NATION KING RELIGION**

THE ARBITRATION COUNCIL

Case number and name: 36/06-Mondotex

Date of Award: 29 May 2006

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Mr. Kao Thach**

Arbitrator chosen by the worker party: **Mr. Tuon Siphann**

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

DISPUTING PARTIES

Employer party:

Name: Mondotex Knitting and Garment Factory Ltd.

Address: Lot 1381, National Road 2, Sangkat Chak Angre Krom, Khan Meanchey

Telephone: 023 983 450 / 012 88 33 22

Fax: 023 425 048

Representative:

- | | |
|---------------------|-----------------------------|
| 1. Mr. Jimmy Sum | Directory of the Company |
| 2. Ms. Chey Mom | Chief Administrator |
| 3. Ms. Thai Kagna | Assistant to the Director |
| 4. Ms. Chea Rathana | Administrative Staff Member |
| 5. Mr. Long Heang | Officer of GMAC |

Worker party:

Name: Local Union of Coalition of Cambodian Apparel W.D.U. (C.CAWDU) at Mondotex

Address: 06C, Street 476, Sangkat Tuol Tumpung 1, Khan Chamkarmorn, Phnom Penh

Telephone: 012 282 653

Representative:

- | | |
|-------------------|--|
| 1. Mr. Um Visal | Officer of C.CAWDU |
| 2. Mr. Lim Tuoch | Officer of local union of C.CAWDU at Mondotex |
| 3. Mr. Bol Bun | Vice-President of local union of C.CAWDU at Mondotex |
| 4. Mr. Pin Sokhea | Secretary of local union of C.CAWDU at Mondotex |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

According to the non-conciliation report, the following non-conciliated issues are demands raised by the worker party in this case:

1. The workers demand that they be allowed to take annual leave at any time they prefer.
2. The workers demand that the company transform fixed duration contracts with a total work period of more than two years to undetermined duration contracts.
3. The workers demand that the company retain the attendance bonus for workers who come to work and get ill in the factory.
4. The workers demand that any reprimand given by the company not exceed 10 minutes.
5. The workers demand that the company pay 100 percent of wages to workers during periods of no work.
6. The workers demand that the company retain an attendance bonus of US\$5.00 to 200 workers who went to ask the company about the issue of payment in lieu of annual leave.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B (Article 309 to 317) of the Labour Law (1997); the Prakas on the Arbitration Council 099/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators 099/06 (Fourth 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. 603 dated 2 May 2006 was submitted to the Secretariat of the Arbitration Council on 2 May 2006.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd.
Sangkat Tonle Bassac, Khan Chamkarmorn, Phnom Penh

Date of hearing: 10 May 2006 (8:30 a.m. to 12:15 p.m.)

Procedural issues:

On 5 April 2006, the Department of Labour Disputes received a petition from the worker party seeking that the company improve working conditions in compliance with the Labour Law. Following receipt of the petition, the Department of Labour Disputes assigned its Labour Dispute Settlement Officer to conciliate the dispute. The last conciliation took place on 22 April 2006,

with nine issues conciliated out of fifteen. The six remaining issues were referred to the Arbitration Council on 2 May 2006. Following receipt of the case, the Arbitration Council invited both parties to attend the hearing on 10 May 2006 at 8:00 a.m.

Both parties attended the hearing of the Arbitration Council. The Arbitration Council attempted to further conciliate the six remaining issues referred to it, during which the following three issues were successfully conciliated: Issue 1, Issue 3, and Issue 4. Therefore, in this award the Arbitration Council will only consider the issues which could not be conciliated: Issue 2, Issue 5 and Issue 6 on the basis of evidence and findings of fact 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 collective labour dispute conciliation, dated 22 April 2006
2. Certificate of commercial registration, dated 13 April 2006
3. Articles of Incorporation of Mondotex company, dated 1 September 2000
4. Internal Work Rules of Mondotex company No. 060 SKBY.AK, dated 7 August 2003
5. Minute of collective labour dispute conciliation, dated 29 December 2005
6. Letter No. 2216 KBV/AK, dated 13 August 2004, regarding the interpretation of fixed duration contracts and undetermined duration contracts by Mr. Huot Chanthy, Head of the Department of Labour Inspectorate
7. Standard employment contracts and notifications on expiration of employment contracts
8. Report of meeting on payment in lieu of annual leave and payment of wage
9. Notification of the company on payment in lieu of annual leave, dated 17 February 2006
10. Announcement of the company regarding suspension of work operations during working hours

Provided by the worker party:

1. Summary statement on labour dispute of Mondotex company, dated 8 May 2006
2. Letter dated 22 April 2006 from C.CAWDU to the Director of Mondotex company in relation to some working condition issues at Mondotex company.
3. Certificate of registration of the local union of C.CAWDU at Mondotex company No. 837 KKBV/VK, registered on 24 October 2005
4. Statute of local union of C.CAWDU at Mondotex company, Registration No. 837 KKBV/VK, dated 24 October 2005

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

1. Letter from the Minister of Labour and Vocational Training No. 490 KKBV, dated 9 May 2006, regarding request for the settlement of a collective labour dispute at Mondotex company
2. Report on the settlement of the collective labour dispute at Mondotex No. 603 KKBV/AK/VK, dated 2 May 2006, of Mr. Koy Tepdaravuth, head of Department of Labour Disputes
3. Minute of collective labour dispute conciliation, dated 22 April 2006

Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to the worker party to attend the hearing, No. 175 LKA, dated 3 May 2006
2. Letter of invitation to the employer party to attend the hearing, No. 176 LKA, dated 3 May 2006

FACTS

Mondotex company is located at Tuol Rakar, Village, Sangkat Chak Angre Krom, Khan Mean Chey, Phnom Penh. The company employs approximately 1,200 workers.

- Having examined the report of collective dispute conciliation
- Having listened to the arguments raised by the employer party and the worker party
- Having reviewed additional documents

The Arbitration Council finds that:

Issue 2: the workers demand that the company convert their fixed duration contracts to undetermined duration contracts

- The company had used fixed duration contracts since 2003. Initially, the company renewed the employment contracts with the workers once a year; subsequently, the renewal was every six months or every three months. Approximately 500 workers have contracts whose duration exceeds two years; that is their contracts have been renewed several times and the total work period of which exceeds two years.

- To date, the company terminates the contracts of the workers who have worked for more than two years and pays them five per cent severance pay in accordance with the termination of fixed duration contracts provisions in the Labour Law. For example, in April 2006, the Company terminated Ms. Chum Chhavy, a worker with ID No. 20026, who had worked for the company since 2003, and paid her five per cent severance pay in accordance with the

termination of fixed duration contract provisions in the Labour Law. She did not agree to take the severance pay, asserting that her employment contract was an undetermined duration one because she had worked in the factory for more than two years even though her contract had been renewed every one year or in six-month blocks. Ms. Chum Chavy did not attend the hearing. Both the employer party and the worker party confirmed that this action was a matter of fact.

- The company did not agree to follow the interpretation of the Arbitration Council which provides that fixed duration contracts with a duration of more than two years become undetermined duration contracts. The company refers to a letter No. 2216KBV/AK, dated 13 August 2004 of Mr. Huot Chanthy, former Head of the Department of Labour Inspectorate, which provided a divergent interpretation on the issue. The company requests that discussion be made between the Ministry of Labour and the Arbitration Council on the issue.

Issue 5: Demand for 100 per cent of wage during periods of no work

- The company's practice regarding periods of no work is that it provides the workers with 50 percent of their wages [during these periods]. The workers confirmed that periods of no work at the factory are rare, and at the time this application was lodged, there was not a present issue relating to the company not having any work. The demand of the workers is raised for the future; that is, if the company does not have work for the workers to do in the future, the workers request that the company pay them 100 percent of their wage.

- Clause 12 of the factory's employment contracts read that: in the event that problems occur that cause the company to suspend its production temporarily:
 - o Short-term (less than fifteen days), Party B will not work, and the company will provide 50 percent wages.
 - o Medium-term (from 15 to 52 days), Party B will not work, and the company will provide 25 percent of wages.
 - o Long-term (from 52 days upwards), Party B will not work, and the company will not provide any wages.

Issue 6: Demand for US\$5.00 of attendance bonus on 31 March 2006

- On 31 March 2006, approximately 130 to 200 workers walked to the Administration Officer to ask the company for payment in lieu of annual leave, as they did not receive clear information from the President of the union. The inquiry suspended work for approximately one hour.

- The company considered the conduct of the workers a strike. The workers asserted that it was not a strike.

- The company's practice regarding the attendance bonus is that the company divides US\$5.00 into four (weeks). Therefore, if a strike takes place at any day, the attendance bonus for that week will not be given. In this case, the company deducted one quarter of the US\$5.00 of the attendance bonus of the workers.

REASONS FOR DECISION

Issue 2: The workers demanded the conversion of fixed duration contracts to undetermined duration contracts

In this case, the company employs the workers under fixed duration contracts. Approximately 500 workers, whose contracts are of fixed duration, requested for the conversion of the fixed duration contracts to undetermined duration contracts when the employment relationship exceeds two years.

The decision of the Arbitration Council on this issue is not divergent from its previous awards.

Article 67(2) and Article 73(5) of the Labour Law provide that: Article 67(2), "*A 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.*"

Article 73(5), "*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 deems as a contract of undetermined duration if its total length exceeds the time limit specified in Article 67.*"

The finding of the Arbitration Council regarding Article 67(2) is based on the term “renewal” in the Article which is unclear. The vagueness of the Article results in different views and interpretations. It was argued that “renewal” refers to “the duration of each renewal”, and that was the view by the Head of the Department of Labour Inspections through his letter No. 1230, presented by the employer party to the Arbitration Council.

Another view is that “renewal” refers to the “action of renewal”. In this case, the duration provided under Article 67(2) means that the total duration, which includes the duration of the initial contract and the duration of each renewed contract. Article 312 of the Labour Law obliges the Arbitration Council to comply with the law.

However, because of the vagueness of the Article, it is proper for the Arbitration Council to consider the context of the Article to perceive the actual meaning of Article 67(2).

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.

Finally, looking at the source of the Labour Law of 1997, we find that the law was drafted in French and was then translated into Khmer. Although the Khmer text was adopted by the Parliament, Article 67(2) is still vague. Therefore, the original text in French can be referred to for the purpose of clarifying the Khmer text. The French version of Article 67(2) reads: *“Le contrat de travail conclu pour une durée déterminée ne peut être conclu pour une durée supérieure deux ans. Il peut être renouvelé une ou plusieurs fois pour autant que le renouvellement n’entraîne pas un dépassement de la durée maximale de deux ans.”*

Therefore, the French version clarifies that fixed duration contracts become undetermined duration contracts if any renewal causes the total duration of the employment contract to exceed two years.

At the hearing, the company mentioned that it did not agree to follow the interpretation of the Arbitration Council that fixed duration contracts which are renewed for a period of more than two years become undetermined duration contracts. The employer bases their view on letter No. 2216KBV/AK, dated 13 August 2004 of Mr. Hout Chanthy, who provided an interpretation different from that of the Arbitration Council. The employer requested that a discussion be made between the Ministry of Labour and the Arbitration Council. The Arbitration Council finds that the interpretation of Mr. Huot Chanthy is merely an individual's personal view and does not represent an institution, neither does it carry any legal effect.

On the basis of the reasoning above, the Arbitration Council finds that Article 67(2) should be interpreted to mean fixed duration contracts become undetermined duration contracts when any renewal causes the total duration of the contracts to exceed two years (see 10/03-Jacqsintex).

Issue 5: Demand for 100 per cent wage for periods of no work

In the present case, the workers did not provide any evidence about the issue of having no work. There was not a period of no work when the application was pending. The worker party made this demand for the future. The workers did not present any concrete evidence to support their demand. The Arbitration Council finds that the demand raised by the workers for 100 percent wages during periods of no work concerns their existing rights as provided under the Labour Law. Therefore, the dispute in this case is a rights dispute. In principle, the Arbitration Council does not consider rights disputes which have not taken place yet because it is unclear whether the period of no work will actually take place in the future or not.

The Arbitration Council was established to settle labour disputes, not to settle issues where disputes have not yet taken place. Therefore, the Arbitration Council will not issue a decision with respect to this issue. If the workers wish to have the Arbitration Council hear this issue, the workers must provide clear facts to support their demand (see 10/03-Jacqsintex; 19/06-Xing Hong and 32/06-Top One).

Issue 6: Demand for US\$5.00 of attendance bonus for 31 March 2006

In this case, the Arbitration Council will consider as follows:

1. Did the workers stage a strike?
2. Are the workers entitled to US\$5.00 of attendance bonus?

1. Did the workers stage a strike?

Article 318 of the Labour Law provides that “A strike is a concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining the satisfaction for their demand from the employer as a condition for their return to work.”

In this case, the company considered the conduct of the workers on 31 March 2006 a strike. The workers asserted that it was not a strike. The Arbitration Council finds that to be considered as a strike, the conduct must fall into the definition of Article 318 which sets out three essential elements: (1) there is a group of workers: in this case there were approximately 130 to 200 workers involved, (2) there is a work stoppage: in this case, the workers stopped working for approximately one hour, and (3) [the work stoppage is for the] purpose of obtaining satisfaction for their demand: in this case, the workers were making request for payment in lieu of their annual leave

Based on the above mentioned Article, the Arbitration Council considers the workers’ conduct a strike.

2. Are the workers entitled to US\$5.00 of attendance bonus?

Article 332 of the Labour Law provides that “A strike suspends the labour contract. During a strike, the allowance for work is not provided and the salary is not paid.” However, Article 334 reads that during a strike if the employer recruits new workers for a replacement, the employer must pay the wage to the workers for the duration of the strike. In this case, the employer did not recruit new workers for a replacement.

The Arbitration Council finds that under the Labour Law, the workers are not entitled to wages during a strike (see 04/03-Lida; 03/05-Flying Dragon and 07/05-Coca Cola).

According to its previous decisions, the Arbitration Council has ruled that the workers are entitled to a pro rata attendance bonus if the strike has followed the legal procedure under the Labour Law. Therefore, if the strike followed the legal procedure, the workers are entitled to the attendance bonus. In contrast, if the strike did not follow the legal procedure, the workers are not entitled to any attendance bonus (see 22/04-Raffles Le Royal and 49/05-Ocean).

According to Article 324 of the labour Law, prior to staging a strike, the workers must inform the employer at least seven working days in advance. In this case, the workers did not give any prior notice about the strike to the employer.

Further, Article 333 of the Labour Law prohibits the employer from imposing any punishment to the striking workers, the prohibition is effective only if the strike follows the legal procedure. If the workers did not follow the legal procedure, they cannot hope to obtain the full protection provided under the law. Therefore, the deduction of attendance bonus by the employer cannot be considered as punishment forbidden under Article 333 of the Labour Law in the event that the strike did not follow legal procedure (see 04/03-Lida and 12/05-P&E).

In conclusion, the Arbitration Council finds that the demand for attendance bonus on 31 March 2006 raised by the workers is not founded.

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

DECISION

1. Order the employer to convert fixed duration contracts to undetermined duration contracts for the workers who have worked for more than two years. The employer must convert fixed duration contracts to undetermined duration contracts from the date this award takes effect.
2. Decline to consider the demand raised by the workers that the employer provides 100 percent of wages during a period of no work.
3. Reject the demand raised by the workers that the company provide 100 percent attendance bonus when the workers stopped working for one hour on 31 March 2006.

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 with the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: Mr. Kao Thach

Signature:

Arbitrator chosen by the worker party:

Name: Mr. Tuon Siphann

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: Mr. Kong Phallack

Signature: