

**KINGDOM OF CAMBODIA
NATION RELIGION KING**

THE ARBITRATION COUNCIL

Case: 53/04

Date of award: 26 July 2004

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

Kong Hong Company

(Employer party)

AND

Khmer Youth Union in Kong Hong 3 Company and Khmer Youth Union Federation

(Employee party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Representatives: 1- Ms. Sok Tuoch

Address: National Road No. 5, Phum Beung Salang, Sangkat Tuol Sangke,
Khan Reussey Keo, Phnom Penh.

Tel: 012 537 781 Fax: N/A

DETAILED INFORMATION OF EMPLOYEE PARTY:

Representatives:	1- Mr. Duch Vandeth	President of Khmer Youth Union in Kong Hong 3
	2- Mr. Meng Sotheara	Vice President of Khmer Youth Union in Kong Hong 3
	3- Ms. Koy Heng	Secretary of the union
	4- Mr. Nov Va	Committee of the union
	5- Mr. May Vathana	Official of Khmer Youth Union Federation
	6- Mr. Chhay Vantha	Official of Khmer Youth Union Federation

Address: National Road No 5, Phum Beung Salang, Sangkat Tuol Sangke,
Khan Reussey Keo, Phnom Penh.

Tel: 011 622 963 Fax: N/A

ISSUES IN DISPUTE:

(In non-conciliation report)

- 1- The employees demanded the company provide the same benefits to floating and casual workers as to regular workers.
- 2- The employees demanded the company not apply annual leave when the company has no work for them to do.
- 3- The employees demanded the company reimburse 10,100 riel to each worker for the payment of the medical check-up service charge.
- 4- The employees demanded the company set up a baby care center with a nurse inside the factory as required by the Labour Law.
- 5- The employees demanded the company give them double pay when they work at night time from 10:00 pm to 5:00 am.

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 establishment of the Arbitration Council No. 338, dated 11 December 2002; 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 Nomination of Arbitrators No.103, dated 26 April 2004.

An attempt to conciliate the collective dispute that is the subject of this Award was made as required by Chapter XII Section 2A of the Labour Law. That conciliation hearing was succeeded three issues over eight issues and there were five unsuccessful issues. The non-conciliation report dated 30 June 2004 was submitted to the Secretariat of the Arbitration Council on 30 June 2004.

COMPOSITION OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party:	Mr. Mar Sambona
Arbitrator chosen by the worker party:	Mr. An Nan
Chair arbitrator (chosen by the two arbitrators):	Mr. Kong Phallack

HEARING AND EVIDENCE:

Date and place of hearing: Tuesday 13 July 2004 at 2:30 pm at the Secretariat of the Arbitration Council.

Witnesses and Experts: None

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

Provided by the employer party: None

Provided by the employee party:

- 1- The certificate of the union's registration No. 592 dated 29 April 2004;
- 2- The sample of the employment contract of irregular workers of Kong Hong factory.

Received from the Ministry of Social Affairs, Labour and Vocational Training, and Youth

Rehabilitation (MoSALVY):

- 1- The non-conciliation report of MoSALVY dated 30 June 2004;
- 2- The minute of the conciliation of the collective labour dispute;
- 1- The letter of MoSALVY No. 894 dated 7 July 2004.

The presentation and testimony answers provided by the representatives of both parties during the hearing.

CASE SUMMARY:

Kong Hong Company is located in Village (Phum) Beung Salang, National Road No. 5, Sangkat Tuol Sangke, Khan Reussey Keo, Phnom Penh and employs 430 workers. On 17 April 2004, the Labour Inspection Office of Khan Reussey Keo received a complaint from the employees requesting the company reimburse each worker 10,100 riels for the payment of the medical check-up service charge and to follow working conditions in compliance with the Labour Law. After receiving the complaint, the Labour Inspection Office of Khan Reussey Keo went to conciliate and resolve all the problems. During the last conciliation on 17 June 2004, both parties reached agreement on three of the eight issues. The five unsuccessful issues are:

- 1- The employees demanded the company provide the same benefits to floating and casual workers as to regular workers.
- 2- The employees demanded the company not apply annual leave when the company has no work for them to do.
- 3- The employees demanded the company reimburse 10,100 riel to each worker for the payment of the medical check-up service charge.
- 4- The employees demanded the company set up a day-care center with nurse inside the factory as required by the Labour Law.

- 5- The employees demanded the company give them double pay when they work at night from 10:00 pm to 5:00 am.

The employer did not agree with the demand of the employees. On 13 April 2004 at 14:30 pm, the Arbitration Council conducted a hearing on this case no. 53/04 at the Secretariat of the Arbitration Council. On 1 July 2004, the Secretariat of the Arbitration Council issued a letter concerning the Arbitration Panel selection on 5 July 2004. The employer party received this letter on 2 July 2004, but it refused to come to select its arbitrator. On 5 July 2004, the Secretariat of the Arbitration Council selected the arbitrator for the employer party by lot procedure as mentioned by Article 13 of the Prakas on the Arbitration Council No. 099, dated 21 April 2004 and clause 3.1 C of the procedure of the Arbitration Council. After selecting the three members of the Arbitration Panel, the Secretariat summoned both parties to a hearing on 13 July 2004 at 2:30 pm at the Secretariat of the Arbitration Council. On 13 July 2004, the employer party did not join the hearing and did not provide any acceptable reason. According to Article 21 of the Prakas on the Arbitration Council, if any party who has been invited is not present before the Arbitration Council and is not able to provide any valid reason, the Arbitration Panel can either continue or finish its process by issuing its award. Similar to case no. 03/03 of Tonga Co., Ltd., the Arbitration Council decided to continue the hearing without the presence of the employer party in order to arbitrate the submitted case.

FINDINGS OF FACT:

- Having examined the non-conciliation report
- Having listened to the representatives of both employer and employee sides
- Having reviewed the above documents

We find that:

1-About 50 to 60 casual workers have short-term employment contracts of two months and each of them is paid 800 riels per day. They have not received any benefits such as incentive bonuses, basic wage, overtime wages, and meal fees as the regular workers do. Some workers are still labeled casual workers even though they have extended their employment contract up to two years.

2-When there is no work to do, the company asks workers to take leave by deducting the number of days from annual leave. Sometimes the company deducted a half-day or one day. The company has never scheduled annual leave for its workers. The workers asked the company to make a schedule for them to take annual leave and not to deduct the annual leave when there is no work for them to do because they still come to the workplace even though there is no work to do.

3-Most of regular workers have paid 10,100 riels for the medical check-up. They are required to take the receipt to the company's administrator who will later obtain the result from the Occupational Health Department of the Ministry of Labour. About 250 workers have already taken the medical check-up and paid by themselves. The company has never paid the workers for the medical check-up.

4-There are about 300 female workers working in the factory. There is not yet a day-care center or a caretaker inside the factory. The workers previously negotiated with the employer on this matter and the employer suggested providing the workers USD\$5 per month instead of the construction of a day-care center, but the workers disagreed with this suggestion. The workers would agree if the company agreed to provide USD\$12 to the female workers who have babies instead of the construction of a day-care center and caretaker.

5-In the factory, there are workers working at night, but they never receive double pay as mentioned in the Labour Law. Therefore, the workers request the company provide double pay for the work at night from 10:00 pm to 5:00 am in compliance with the Labour Law.

REASONS FOR DECISION:

1st issue:

Article 9 of the Labour Law states, "In accordance with the stability of employment, it is distinguished (i) regular workers; [and] (ii) casual workers, who are engaged to perform an unstable job. Regular workers are those who regularly perform a job on a permanent basis. Casual workers are those who are contracted to (a) perform a specific work that shall normally be completed within a short period of time and (b) perform a work temporarily, intermittently and seasonally." According to the sample employment contracts of Kong Hong Laundry Company, the contract for floating workers is a casual worker contract.

Article 10 of the Labour Law states, "Casual workers are subject to the same rules and obligations and enjoy the same rights as regular workers, except for the clauses stipulated separately." Under this Article, casual workers have the same rights and obligations as regular workers, such as incentive bonuses, basis wages, overtime wages, meal fees, indemnity for dismissal, public holidays, etc.

Article 13 of the Labour Law on the Public Order states, "All rules resulting from a unilateral decision, a contract or a convention that do not comply with the provision of this law or any legal text for its enforcement, are null and void." In complying with this Article, the above Article 10 must conform to all provisions of the Labour Law. The employer cannot make any clauses or contracts that would result in workers losing their rights [or providing] benefits and rights inferior to those defined in this Labour Law. The last sentence Article 1 of the

company's sample contract submitted to the Arbitration Council states that the workers are entitled to the wages determined by the company and up to the actual outputs. The employer should specify clearly in the employment contract the wage that each worker would get in each month in order to know whether this wage conforms to the condition of a minimum wage. The employer in the employment contract should determine clearly if the wages are monthly, daily or hourly, or wages paid by the quantity of products (piecework rate). If the wage is paid according to the quantity of piecework, the employer should provide the table of piecework rate to the workers in the beginning of each month. Article 2 of the company's sample casual employment contract states that the workers agree to resign from work without any claim of compensation, except for their monthly salaries, when their employment contracts expire. The Arbitration Council finds that Article 2 of the contract is in contrast to paragraph 6 of Article 73 of the Labour Law, which states, "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." In this case, Article 2 of the casual employment contract is not in compliance with Article 13 of the Labour Law. Article 3 of the same contract states that the workers may voluntarily work overtime as required by the company. This Article 3 conforms to Article 139 of the Labour Law, which requires the workers work overtime for exceptional and urgent jobs, but they have the right to receive overtime wages and 1000 riels in respect of meal fees as mentioned in the Notification of the Ministry of Social Affairs and Labour N0. 017 dated 18 July 2000. Similar to case No. 26/04 of Sport Wear Company, the Arbitration Council finds that the casual workers of Kong Hong Company have the same rights as regular workers, including incentive bonuses, basic wages, overtime wages, 1000 riels of meal fees for overtime work, public holidays, indemnity for dismissal, etc., in compliance with Article 10 of the Labour Law.

Even though the Labour Law does not mention the duration of casual employment contracts, the Law clearly addresses regular workers (see Article 9 of the Labour Law). The maximum usage of probationary duration of specialized workers mentioned in Article 68 of the Labour Law is the principle guideline leading the Arbitration Council to find that garment factory workers should not be employed for two full months as casual workers. Paragraph 3 of Article 166 of the Labour Law states, "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." Therefore, the casual worker who has worked for the company at least 21 days per month [for more than] two months would be considered a regular worker (see case no. 26/04-Sport Wear Company).

2nd issue:

Article 170 of the Labour Law states, "In principle, annual leave is normally given for the Khmer New Year unless there is a different agreement between the employer and the

worker. In this case, the employer must inform the Labour Inspector of this arrangement. In every case of paid annual leave exceeding fifteen days, employers have the right to grant the remaining days off at another time of the year, except for the leave for children and apprentices less than eighteen years of age.” This means that the annual leave is in principle granted to workers during the Khmer New Year, which can last for at least 15 days. In this case, the employer can arrange a maximum two or three remaining days for the workers to take leave at any time of the same year. However, if the employer wants to shift annual leave, which lasts for at least 15 days, during the Khmer New Year to another time in the same year, the employer must make an agreement with the workers to change this period and give notice of the agreement to the Labour Inspector prior to the practice of the annual leave. Therefore, the employer has no right to make a unilateral decision on the workers’ annual leave lasting for at least 15 days, except if there is an agreement with the workers in advance and the employer has an obligation to give notice of the agreement. The employer has the right to arrange annual leave for the workers without obtaining their agreement and giving notice to the Labour Inspector when it lasts for only two or three days.

However, paragraph 2 and 3 of Article 171 of the Labour Law states, “If the worker has not yet taken his annual leave, the employer can deduct the special leave [(the event that causes direct effect to the family of the worker)] from the worker’s annual leave. If the worker has taken all his annual leave, the employer cannot deduct the special leave from the worker’s annual leave for the next year.” This means that the employer can deduct only the special leave from the annual leave of the worker on the condition that he has not yet taken all of his annual leave. Therefore, the Arbitration Council finds that the employer cannot deduct from the annual leave the duration that the company has no work for the workers to perform. The employer must make a clear annual leave schedule for each worker. If the schedule is not during the Khmer New Year, the employer must discuss and obtain agreement from the worker in advance, and inform the Labour Inspector prior to the practice.

3rd issue:

With reference to:

- 1- The awards of case no. 02/03 of Chou Sing dated 21 May 2003, no. 21/03 of Loyal Cambodia dated 8 December 2003, no. 19/04 of Kbal Koh 2 dated 5 May 2004;
- 2- The third paragraph of Article 247 of the Labour Law; and
- 3- The Joint Prakas No. 09 dated 19 January 1994 on the medical check-up of Khmer and foreigner workers working in Cambodia. This Joint Prakas requires the employer to pay the fee of its employees’ medical check-up. Article 7 of this Joint Prakas states that the owner of the enterprise must pay the medical check-up fee of its employees as mentioned in Article 5 of the Prakas. This means that the

employer is legally required to pay its employees' medical check-up. In this case, most of the workers paid the medical check-up fee by themselves, and then gave the receipt to the employer who in turn obtained the result from the Occupational Health Department of the Ministry of Labour. This activity will not release the employer from the obligations mentioned in Article 7 of the above Joint Prakas and paragraph 3 of Article 247 of the Labour Law. According to Article 25 of the Decree No. 38 dated 28 October 1988 on contractual and non-contractual responsibility, the duration of a contract lasts for five years. The Arbitration Council herein notes that the Joint Prakas No. 09 dated 19 January 1994 on the medical check-up of Khmer and foreigner workers working in Cambodia is still enforceable as stated in the award of the Chou Sing case because it does not contrast with any provision of the Labour Law in 1997. So this Prakas is not abrogated in accordance with Article 395 of the Labour Law.

The Arbitration Council finds that the employer must reimburse 10,100 riels for the medical check-up to the employees who have already received the medical check-up and paid for it by themselves after July 1999.

4th issue:

Article 186 of the Labour Law states, "Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a day-care center. If the company is not able to set up a day-care center on its premises for children over eighteen months of age, female workers can place their children in any day-care center and the charges shall be paid by the employer."

Additionally, Article 187 of the Labour Law states, "A Prakas [(ministerial order)] of the Ministry in Charge of Labour shall determine the conditions for setting up hygienic environments and supervising these nursing room and day-care center[s]" In this case, Kong Hong Company employs about 300 female workers. Therefore, the Arbitration Council thinks that the employer is obliged to set up a nursing room and day-care center under the control of the Ministry of Social Affairs and Labour or to pay the charges as covered by the invoices that the female workers received from other day-care centers outside the factory.

5th issue:

The Ministry's Circular No. 024 MoSALVY dated 19 October 1999 concerning the wage for night-time work states that the night-time workers working between 10:00 pm and 5:00 am will receive double pay for day-time work. Article 139 of the Labour Law supports this Circular. Therefore, the Arbitration Council thinks that the workers working between 10:00 pm and 5:00 am must receive double pay.

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

DECISION

- 1- The employer must:
 - grant the floating or casual workers the same basic wage and other benefits such as incentive bonuses, overtime wages, 1000 riel for meal fees for overtime work, the right to take leave, and severance pay just like regular workers.
 - convert to regular workers, those casual workers who have worked for the company for at least 21 days per month over two months.
- 2- The employer must not deduct from annual leave periods of time that the company has no work for the workers. The employer must make a clear annual leave schedule for all workers.
- 3- The employer must reimburse 10,100 riel for medical check-ups to the employees who have already received the medical check-up and paid for it themselves. The reimbursement should be done seven days after this award enters into effect.
- 4- The employer must set up a nursing room and day-care center under the control of the Ministry of Social Affairs and Labour or pay the charges as indicated by the invoice that the female workers received from other day-care centers outside the factory. The employer must carry out this decision in the first week of September 2004.
- 5- The employer must provide double the day-time pay to the workers working at night-time between 10:00 pm and 5:00 am. The employer must carry out this decision immediately after this award enters into effect.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party:

Name: Mar Samborana

Signed:

Arbitrator chosen by the worker party:

Name: An Nan

Signed:

Chair of arbitration panel:

Name: Kong Phallack

Signed:

This Award will become binding after eight 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.