

KINGDOM OF CAMBODIA

NATION RELIGION KING



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THE ARBITRATION COUNCIL

Case number and name: 56/06 – Boric
Date of Award: 9 August 2006

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATOR PANEL

Arbitrator chosen by the employer party: **KAO THACH**
Arbitrator chosen by the worker party: **HUON CHUNDY**
Chair Arbitrator (chosen by the two Arbitrators): **KONG PHALLACK**

DISPUTING PARTIES

1- Employer Party

Name : **Boric Garment (Cambodia)**
Address : Prey Boeung Village, Kantok Commune, Angk Snuol District, Kandal
Province

Telephone : 012 868 178 Fax: N/A

Employer Representatives:

- 1. Mr. Ng Yuen Kwan Director;
- 2. Mr. Do Ri Pin Secretary;
- 3. Ms. Wu Le Fang General manager;
- 4. Mr. Bun Heng Administrator.

2- Worker party

Name : **Union Federation for Promoting Khmer Workers' Livelihood (UFPKWL)
and Union for Promoting Khmer Workers' Livelihood (UPKWL) in Boric
Factory (Por Fin)**

Address : No. 233, Street 56, Sangkat Tuol Svay Prey II, Khan Chamkarmon,
Phnom Penh

Telephone : 012 282 531 Fax: N/A

Worker Representatives:

1. Mr. Liv Thavy Vice-President of **UFPKWL**;
2. Mr. Mom Bonna Treasurer of **UFPKWL**;
3. Ms. Phoeung Sampos President of **UPKWL** in Por Fin Factory (Boric);
4. Ms. Khut Srey Saan Vice-President of **UPKWL** in Por Fin Factory (Boric).

ISSUES IN DISPUTE

(In the non-conciliation report)

1. The workers demanded the company to sign at least 6-month fixed duration contracts. The employer rejected [the demand] but would resume signing only three-month fixed duration contracts.
2. The workers demanded the company to deduct US\$2 for a one-day leave, US\$3 for a two-day leave and all (US\$5) for a three-day leave from their attendance bonus. The employer rejected [the demand] because the company applies the Ministry's Notification No. 017, dated 17 July 2000;
3. The workers demanded the employer to provide them compensation instead of annual leave. The employer rejected [the demand] but would prepare a schedule of annual leave so that the workers could take their annual leave in accordance with the Labour Law.

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 the Arbitration Council 099/06 (Fourth Term).

An attempt was made to conciliate the collective labour dispute that is the subject of this Award, as required by Chapter XII, Section 2(A) of the Labour Law. However, the conciliation hearing was unsuccessful, and the non-conciliation report No. 110, dated 19 July 2006 was submitted to the Secretariat of the Arbitration Council on 20 July 2006.

HEARING AND SUMMARY OF PROCEDURE BEFORE ARBITRATION COUNCIL:

Place of Hearing : **The Arbitration Council**, Phnom Penh Centre, Building A,
Sothearos Blvd, Sangkat Tonle Bassac, Khan Chamkarmon,
Phnom Penh.

Date of the Hearing : 26 July 2006 (from 8:00 a.m. to 11:30 a.m.)

Procedural Issues:

On 14 July 2006, the Provincial Department of Labour and Vocational Training of Kandal Province conciliated a collective labour dispute of six issues forwarded to the Department by the **Union Federation for Promoting Khmer Workers' Livelihood (UFPKWL)**. Having received the complaint from the workers, the Provincial Department of Labour and Vocational Training of Kandal Province designated its expert official to settle and conciliate the dispute; three out of a total of six issues were successfully conciliated. The non-conciliated issues were submitted to the Arbitration Council on 20 July 2006.

Having received the case, the Arbitration Council summoned both the employer party and the worker party to attend a hearing on 26 July 2006 at 8:00 a.m. Both parties were present at the hearing held at the Arbitration Council. The Arbitration Council made a further attempt to conciliate the three unresolved issues, but none of the issues was resolved. Therefore, the Arbitration Council considers the unresolved issue based on the evidence and the fact findings as follows:

EVIDENCE

Witness and experts besides the parties: N/A

Documents, exhibits and other evidence considered by the Arbitration Council

a. Provided by the employer party:

- 1- The company's registered Internal Work Rules No. 004/06, dated 21 February 2006 issued by Mr. Thol Neang, the Director of the Provincial Department of Labour and Vocational Training of Kandal Province;
- 2- Certificate No. 558, dated 9 March 2006 on the registration in the Commercial Favour System;
- 3- Sample of a fixed duration contract of Boric Garment Factory;
- 4- Minute of the collective labour dispute conciliation, dated 14 July 2006.

b. Provided by the worker party:

- 1- Registration certificate No. 941, dated 31 May 2006 of Union for Promoting Khmer Workers' Livelihood (**UPKWL**) at Boric Garment Factory;
- 2- Minute of the collective labour dispute conciliation, dated 14 July 2006;
- 3- List of 439 members of the **UPKWL**.

c. Provided by the Ministry of Labour and Vocational Training:

- 1- Report No. 110, dated 19 July 2006 on the collective labour dispute conciliation at Boric Factory of Mr. Thol Neang, Director of the Provincial Department of Labour and Vocational Training of Kandal Province;
- 2- Minute of the collective labour dispute conciliation, dated 14 July 2006.

d. Provided by the Secretariat of the Arbitration Council:

- 1- Invitation No. 272, dated 24 July 2006 to the worker party to attend the hearing;
- 2- Invitation No. 273, dated 24 July 2006 to the employer party to attend the hearing.

FACTS

- Having examined the report on the collective labour dispute conciliation;
- Having listened to the testimonies from both the employer party and the worker party;
- Having reviewed other supplementary documents;

The Arbitration Council finds that:

Boric Garment Cambodia, located in Prey Boeung Village, Kantok Commune, Angk Snuol District of Kandal Province, and employs approximately 500 workers. Union for Promoting Khmer Workers' Livelihood (**UPKWL**) is the only union in the factory which consists of approximately 400 members but it does not have the most representative status because it has not yet applied for the most representative status.

Issue 1: The workers demanded the factory to sign fixed duration contracts

- The factory started its operation on 17 June 2005. Around 176 workers have been working more than a year and they all signed six month fixed duration contracts;
- The factory hired 86 probationary workers for the duration of 40 days. After a strike staged by the workers on 18 May 2006, the employer agreed with the workers to fully employ the 86 workers and an agreement was made on 20 May 2006. The agreement did not state that the factory would sign a six-month fixed duration contracts; thus, the factory decided to sign three-month contracts with those workers. The workers disagreed and requested the factory to sign six month fixed duration contracts. At the hearing, the workers claimed that the reason behind the workers' demand was that the duration of three months was too short and they would be vulnerable to dismissal from the factory and they would receive less benefits once they were dismissed. The factory claimed that they could not sign six month fixed duration contracts with the workers because they were concerned that the workers would cause problems within the factory again because they just went on strike and they did not abide by the factory's Internal Work Rules and the company's requests.

Issue 2: The workers demanded the employer to deduct US\$2 for a one-day leave, US\$3 for a two-day leave and all (US\$5) for a three-day leave from their attendance bonus.

- When taking leave with permission or a sick leave authorized by the factory, the workers demand the company to deduct US\$2 for a one-day leave, US\$3 for a two-day leave and all (US\$5) for a three-day leave from their attendance bonus. The employer rejected the demand because the factory applies the Ministry's Notification No. 017/00;
- No agreements provide for the deduction of attendance bonus within the factory;
- Clause 5 of the factory's Internal Work Rules states that, "*The Company will provide a monthly attendance bonus of US\$5 to workers who have full attendance within the month.*"

Issue 3: The workers demanded the company to provide them compensation instead of annual leave.

- The total duration of annual leave of the factory is 18 days per year. Around 176 workers have been working more than one year. The company pledged to prepare the annual leave schedule for the workers in August 2006. Up until the hearing date, around 20 workers received the annual leave, but since there is much work in the factory, the employer asked those who do not have much personal commitments not to take their annual leave yet. However, for those who had personal commitments, the factory allowed them to take their annual leave. The workers argued that the employer's claim was not true but they did not provide any evidence;
- The workers rejected [the employer's position] and they demanded the factory to provide them compensation in lieu of annual leave because most workers need money more than annual leave;
- In 2005, some workers were asked to take their annual leave when the company has no work for them to do.

REASONS FOR DECISION

Issue 1: The workers demanded the factory to sign fixed duration contracts

In this case, the workers demanded the employer to sign six-month fixed duration contracts. The employer rejected the demand and has decided to sign only three-month fixed duration contracts.

Article 65 of the Labour Law states, "*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 upon by the contracting parties.*

It can be written or verbal. It can be drawn up and signed according to local custom. If it needs registering, this shall be done at no cost.

The verbal contract is considered to be a tacit agreement between the employer and the worker under the conditions laid down by the labour regulations, even if it is not expressly defined.”

Article 66 of the Labour Law provides, *“Everyone can be hired for a specific work on the basis of time, either for a fixed duration or for an undetermined duration.”*

Based on Article 67, which can be related to Article 73 (4) and Article 92 in the case of dispute:

1. *A labour contract signed with consent for a specific duration must contain a precise finishing date.*

2. *The labour contract signed with 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.

Base on the above Articles, the Arbitration Council considers that a labour contract establishes working relations between the worker and the employer and can be made in a form that is agreed upon by the contracting parties as long as it complies with the conditions of the Labour Law. A labour contract is subject to common law. None of the contracting parties can force the other party to sign a contract or to accept any conditions that could not be accepted by the other party. Any contracts made under duress can be voided by the law or by the other contracting party.

Article 6 of Decree No. 38 dated 28 October 1988 states, *“...a contract is deemed voidable when:*

- *it is not resulting from a free or real agreement;*
- *....”*

Additionally, Article 7 of Decree No. 38 states, *“[a]n agreement that is the result of mistake, duress, or fraud is not a valid agreement.”*

Regarding the case, the probationary workers demanded the employer to sign six-month fixed duration contracts. The Arbitration Council finds that the workers cannot force the employer to accept their conditions. By forcing the employer to accept their conditions, in this case it does not become a real agreement. An agreement made up by such duress shall be considered as null by the above-mentioned Article 7 of the Decree No. 38 dated 28

October 1988. The workers are entitled to negotiate with the employer on the conditions of the contracts but not to force the employer to agree upon the demanded conditions.

In this case, the workers have an option not to renew the contract, if they are not happy with the factory's work conditions. Only by doing this, are the principles of contract complied with. In conclusion, the Arbitration Council considers that the workers' demand within this case does not comply with what is stated in Decree No. 38, collective bargaining agreement and legal provisions. Therefore, it is an interests demand (See *Award 42/05 – Yong Hwa, 53/05 – Finegis*).

Regarding interests disputes, in *Award 07/06 – Dai Young*, the Arbitration Council affirmed, *“Generally, for an interest dispute, the Arbitration Council always considers the most representative status of the union which is a disputing party. The Arbitration Council finds that the said union does not yet have most representative status. The Arbitration Council has consistently determined that a union’s most representative status provides legal capacity to negotiate a collective bargaining agreement within a factory and the legal right to bring a dispute before the Arbitration Council. In order to receive the most representative status, Article 277 of the Labour Law provides that a union must be registered and meet all requirements stated in that Article.*

Thus, the union has no legal rights to sign any collective bargaining agreement on behalf of all workers within the factory (See Article 96 (2B) and Clause 9 (1) of Prakas 305). This right belongs to the registered union that has the majority members and meets all the requirements as stipulated in Article 277 of the Labour Law. Therefore, to be consistent with previous rulings, the Arbitration Council determines that the union does not possess adequate legal rights to represent workers to settle any collective interests disputes for all workers in the factory.

Furthermore, Clause 43 of Prakas 099/04 on the Arbitration Council states, “Arbitral Award that resolves interests disputes will take the place of a collective bargaining agreement for one year starting from the date that the Award comes into effect unless parties negotiate new collective bargaining agreement to replace the Award.”

*In the previous Awards, the Arbitration Council found that if the Arbitration Council issues an Award on such issues, it will become a collective bargaining agreement that applies to all workers in the company and it will make other workers lose their right to strike when there are interests disputes in the future; it will cause unfairness to other workers” (See *Award 04/03 - Lida, 06/04 - Chu Sing, 24/03 - Top One, 61/04 - Best Honour, 62/04 – Ecent and 09/05 - Kin Tai*). Additionally, the Arbitration Council has consistently concluded in prior decisions that a union that does not have the most representative status does not have a*

legal right to bring an interests dispute before the Arbitration Council for settlement (See Award 31/03 - Hong Wah, 60/04 - United Art and 99/04 - AIA)."

Regarding the case, the union does not yet have the most representative status for the Arbitration Council to consider their interests demand. Therefore, the Arbitration Council declines to consider the workers' demand.

Issue 2: The workers demanded the company to deduct US\$2 for a one-day leave, US\$3 for a two-day leave and all (US\$5) for a three-day leave from their attendance bonus

In this case, for an authorized or sick leave permitted by the company, the workers demanded the company to deduct US\$2 for a one-day leave, US\$3 for a two-day leave and all (US\$5) for a three-day leave from their attendance bonus. The company rejected the demand arguing that the company applies the Ministry's Notification No. 017, dated 17 August 2000.

Regarding attendance bonus, in case 63/04 – Shine Well, the Arbitration Council as determined that *"Based on the meaning of the attendance bonus, the Arbitration Council considers that it is a bonus for motivating those who come to work regularly for a full month without taking any inappropriate leave. However, the principle of the provision on attendance bonus stated in Notification No. 017 of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation as well as of the Labour Law were not intended as disciplinary action against workers who takes sick leave with proper authorization. The Arbitration Council finds that if a worker loses the US\$5 attendance bonus because he or she takes authorized sick leave during any month, it is unfair to the worker because it is not his or her fault at all that he or she could not come to work regularly. On the contrary, if the employer is required to provide attendance bonus to a worker for his or her absence during sick leave, it is unfair to the employer because the employer loses his or her benefit during the worker's sick leave.*

Because the Notification No. 017 does not clearly provide for the issue, the Arbitration Council decides to come up with an equitable solution by having the employer deduct the attendance bonus in proportion to the number of days the worker is on the authorized sick leave within each month.

Thus, the Arbitration Council considers that the company shall provide the attendance bonus to the workers in proportion to the number of days they are on the authorized sick leave within the month."

Therefore, the Arbitration Council decides to order the company to provide "the attendance bonus" to the workers who are on authorized sick leave in proportion to the number of days that the workers have worked within each month.[]

Moreover, the Arbitration Council considers that the attendance bonus shall be given to the workers after they have worked all required days within each month. When a worker is sick and he or she has proper medical certificate, the worker shall be permitted to take leave and not required to come to work. It means that once a worker takes leave because of sickness, by the Law the worker is not considered as not coming to work regularly. Therefore, a worker is still entitled to receive the attendance bonus when he or she is sick.

In case 62/04 – Ecent, the Arbitration Council confirmed that *“the Arbitration Council is satisfied with the reasons for decision in Shine Well case because this decision is fair to both the employer and the worker party. On the other hand, the Arbitration Council notices that the decision in Cambodia Sportswear case was made only upon “the facts of the case”. Therefore, the Arbitration Council applies the reasons for decision in Shine Well case for the Ecent case.”*

In this case, the Arbitration Council considers that the attendance bonus stated in the company’s Internal Work Rules is not consistent with the interpretation of the Ministry’s Notification No. 017, dated 17 August 2000 by the Arbitration Council in the previous Awards (See Award 63/04 – Shine Well and 62/04 – Ecent).

Therefore, the Arbitration Council considers that those workers who either take an authorized leave or a sick leave permitted by the company are entitled to receive the attendance bonus in proportion to the number of days that he or she performs his or her work. Thus, the employer shall not deduct the whole attendance bonus of the workers.

Issue 3: The workers demanded the employer to provide them compensation instead of annual leave.

In this case, the company promised to organize the annual leave for the workers in August 2006, but the workers did not agree. They demanded the company to provide them compensation instead of annual leave.

Article 167 of the Labour Law states, *“The right to use paid leave is acquired after one year of service.*

If the contract is terminated or expires before the worker has acquired the right to use his paid-leave, an indemnity calculated on the basis of Article 166 above is granted to the worker.

Apart from this, any collective agreement providing compensation in lieu of paid leave, as well as any agreement renouncing or waiving the right to paid annual leave, shall be null and void.

Acceptance by the worker to defer all or part of his rights to paid leave until the termination of the contract is not considered as renunciation. Deferment of this leave cannot

exceed three consecutive years and can only apply to leave exceeding twelve working days per year.”

Based on the above article, the Arbitration Council finds that the Labour Law does not allow any collective bargaining agreement to provide compensation in lieu of annual leave, nor any agreement on the rejection or request not to use annual leave. Moreover, the employer agreed to organize an annual leave schedule so that those who have worked for the company for more than one year could take their annual leave in August 2006. Therefore, the workers’ demand is not legally appropriate because it does not comply with Article 167 of the Labour Law. With this regard, the Arbitration Council decides to reject the workers’ demand.

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

ORDERS AND DECISIONS

1. Decline to consider the demand of the workers that the company sign six-month fixed duration contracts.
2. Order the employer to deduct the workers’ attendance bonus in proportion to the number of days the workers take authorized leave.
3. Reject the demand of the workers that the company provide them compensation instead of annual leave.

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 objection 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: **KAO THACH**

Signature:

Arbitrator chosen by the worker party:

Name: **HUON CHUNDY**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **KONG PHALLACK**

Signature: