

**KINGDOM OF CAMBODIA
NATION KING RELIGION**

THE ARBITRATION COUNCIL

Case number and name: 57/06- Evergreen

Date of Award: 18 August 2006

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Ly Tayseng**

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

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

DISPUTING PARTIES

Employer party:

Name: **Evergreen Garment Co. LTD**

Address: # 289, National Road No. 5, Russey Keo, Phnom Penh

Telephone: 011 876 956 Fax: 023 724 074

Representative:

- | | |
|--------------------|------------------------------|
| 1. Park Chan Won | Director of Company |
| 2. Mr. Ly Sopheap | General Manager |
| 3. Mr. Oum Samnang | Interpreter, Korean Language |

Worker party:

Name: **CCAWDU and Local Independent Garment Labour Union at Evergreen Garment Factory**

Address: #6 C, Street 476, Tuol Tompoung 1, Chamkarmorn, Phnom Penh

Telephone: 023 210 481 Fax: 023 210 481

Representative:

- | | |
|--------------------|--|
| 1. Mr. Chom Cham | Trainer at CCAWDU |
| 2. Ms. Meas Vanny | Staff of CCAWDU |
| 3. Ms. Sok Savet | Head of Independent Garment Labour Union |
| 4. Ms. In Sotheary | Activist of the union |
| 5. Mr. Tuy Sopheap | Worker at Evergreen Garment Factory |
| 6. Mr. Tim Nivorth | Activist of the union |

ISSUES IN DISPUTE

1. Workers demand that the company pays US\$ 45 wage for floating workers or casual workers, and if they work for more than two months, they should be added as 'permanent' workers. The company does not agree to provide US\$ 45 to floating workers or casual workers and even if they work for more than two months, they cannot be added as 'permanent' workers.

2. Workers demand the company to reinstate Ms. In Sotheary and if not, the company has to pay indemnity as stated by the Labour Law and US\$ 500 compensation. The company cannot reinstate her and agrees to pay all indemnity as stated by the law, but the company cannot pay the other compensation.

3. Workers demand the company to change fixed duration contracts for workers who work more than two years to be undetermined duration contracts. The company follows the letter from the Department of Inspectorate No. 2540 issued on 30 September 2004.

4. Workers demand the company to pay the medical check fee of 10,100 riel. The company does not agree but it will pay only from July 2005.

5. The Independent Garment Labour Union at Evergreen Factory demands the company to deduct the union contribution fee from members for the union at the Evergreen Factory. The company does not agree but will follow its normal practice.

6. Workers who take maternity leave demand the 50% wage, before [child] delivery. The company does not agree but will follow what it has practiced, i.e., the company will pay the entire wage after the delivery when the workers are back to work.

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 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. 099 dated 11 May 2006 (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 was unsuccessful, and the non-conciliation report No. 1027 dated 20 July 2006 was submitted to the Arbitration Council on 20 July 2006.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing:

- First hearing: 27 July 2006 (From 8:00 a.m. to 12:30 p.m.)
- Second hearing: 4 August 2006 (From 8:00 a.m. to 10:00 a.m.)

Procedural issues:

On 31 March 2006, the Department of Labour Disputes received a complaint demanding the company to improve working conditions to be in conformity with the Labour Law. Having received the complaint, the Department of Labour Disputes designated its labour dispute settlement officer to conciliate the issue at the Department of Labour Disputes. As a result, 6 issues out of 12 were conciliated. Six non-conciliated issues were referred to the Arbitration Council on 20 July 2006.

Following the receipt of the case, the Arbitration Council invited the employee party and the employer to attend hearings on 27 July 2006 at 8:00 a.m. and on 4 August 2006 at 8:00 a.m. Both parties attended both hearings. During the hearings, the Arbitration Council attempted to further conciliate the 6 non-conciliated issues but was not successful on any issue.

Therefore, in this Award, the Arbitration Council will consider the issues based on the evidence and findings of fact as follows:

EVIDENCE**Witnesses from the employer party:**

1. Ms. Soun Thavy Assistant to the head of group
2. Mr. Oum Sam Ang Interpreter

Documents, Exhibits and other evidence considered by the Arbitration Council**Provided by the employer party:**

1. Authorizing letter from the director of the company to authorize Mr. Ly Sopheap and Horl Sina to do the settlement at the Arbitration Council dated 26 July 2006.
2. Certificate No. 2611 dated October 2006 about the commercial and company registration.
3. Collective dispute conciliation minute dated 12 July 2006
4. Letter No. 127/06 dated 30 June 2006 by the CCAWDU to the head of the Department of Labour Dispute to complain about the director of evergreen company of not following the labour law and the old agreement.

5. Letter No. 2540 dated 30 September 2004 by the head of the Department of Labour Inspectorate to the director of Evergreen Company about clarification of fixed duration labour contract and undetermined labour contract.
6. Minute of collective labour dispute dated 30 June 2006.
7. Internal work rules of the company registration number 018 dated 25 August 2004.
8. Summary statement of Evergreen Garment Company
9. Sample of probation contract
10. Sample of entrepreneur probation contract
11. Sample of floating worker contract
12. Sample of six month work contract

Provided by the worker party:

1. Summary statement about activities of Independent Garment Labourer at Evergreen Factory of CCAWDU dated on 02 August 2006.
2. Certificate of registration of the Independent Garment Labourer at Evergreen Factory No. 520 dated 17 November 2003
3. Statute of the Independent Garment Labourer at Evergreen Factory
4. Minute about the inquiry of Tan Sopheak on 22 September 2004
5. Minute of the meeting which the head of group summoned for a meeting on 30 August 2004
6. Sheet of calculation of money for labourer Horn Sothon
7. Application form for membership of CCAWDU
8. Resignation letter from the CCAWDU of labourer San Ren
9. Letter by the Independent Garment Labourer at Evergreen to the director of Evergreen Company about request to take one day leave.

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

1. Letter No. 910 KKBV dated 31 July 2006 regarding the request for the settlement of a collective labour dispute at Evergreen Garment Factory by the Minister of the Ministry of Labour and Vocational Training.
2. Report No. 1027 KKBV/AK/VK dated 10 July 2006 by the Head of the Department of Labour Disputes
3. Minute of the collective labour dispute settlement dated 10 July 2006

Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to the worker party to attend the hearing No. 278 LKA, dated 24 July 2006

2. Letter of invitation to the employer party to attend the hearing No. 277 LKA, dated 24 July 2006

FACTS

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

The Arbitration Council finds that:

Evergreen Garment Company is located in house number 289, Sangkat Russey Keo, Khann Russey Keo, Phnom Penh and employs approximately 850 employees. This company has two unions, the Cambodian Independent Union of the Evergreen Factory and the Independent Garment Labour at Evergreen Garment Factory. The Independent Garment Labour at Evergreen Garment Factory is the union in this case in dispute. It has approximately 200 members in total and does not have the most representative status. The Cambodian Independent Union has the most representative status.

Issue 1: Workers demand that the company pay US\$ 45 wage for floating workers or casual workers, and if they work for more than two months, they should be added as 'permanent' workers.

- The company agrees to provide US\$ 45 per month for floating workers (or casual workers) in conformity with the Labour Law.
- For the using to words 'floating workers' or 'casual workers', the workers and the employer agreed that they mean the same thing, i.e., the floating workers. Therefore, the Arbitration Council will use only the term 'floating workers' in this Award.
- The company employs approximately 174 floating workers, among these workers, some of them have been working for more than two months. The working time of the floating workers is 8 hours a day, from Monday to Saturday and 26 days per month on average like the working hours of the regular workers.

Issue 2: Workers demand the company to reinstate Ms. In Sotheary

- Ms. In Sotheary started working in the sewing section on 6 December 2006, receiving between US\$60 to 70 per month on average. Her contract is a six-month fixed duration contract.
- The primary reason for the dispute arose on 21 June 2006 when the manager told Ms. Soun Thavy, assistant to the head of group, to call Ms. In Sotheary to the office; the manager said that she went to the toilet too many times during working hours.
- In the hearing Ms. In Sotheary claimed that Ms. Soun Thavy dragged her hand to go into the room but she pushed Thavy's hand away. She continued that she was very ashamed

- as the dragging of her hand was done in front of other workers. In the hearing, Ms. Soun Thavy stated that she did grab the hand of Ms. In Sotheary but her hand was pushed away immediately. Ms. Soun Thavy said that she did not drag Ms. In Sotheary's hand.
- In the hearing, the employer party mentioned that the company terminated Ms. Sotheary on 21 June 2006 without prior notification because she shouted and pointed at the manager's face. This is an act of contempt which the company considers a serious misconduct according to Article 83-[B]-4 of the Labour Law. In response, Ms. Sotheary said she did not insult the manager. She just spoke loudly and pointed at the toilet which was in the direction of where the manager sat, that is, she did not intend to point at the manager's face.
 - Mr. Sam An, an interpreter of English language to the manager, came as a witness to this dispute. He claimed that Ms. Sotheary did shout at the manager when the manager asked her why she went to the toilet so often. He saw Ms. Sotheary's pointing was at the manager's face because at that time she pointed low, meaning not toward the toilet.
 - Ms. Sotheary responded to the witness that she did not shout but just spoke loudly and she did not point to the manager's face but to the toilet. She mentioned that she did not have any evidence or witness to support her claim about the incident at the manager's room.
 - The Arbitration Council asked Mr. Sam An if Ms. Sotheary traded insults. Mr. Sam An said that she did not. But he considered the language and gesture of Ms. Sotheary at that time as an act of contempt in the context of Khmer morality and civility.
 - The Arbitration Council considers that Ms. Sotheary did speak with very loud voice but this is not contempt, it is only an improper act in the Khmer society.
 - The company requested that this point be withdrawn from the Arbitration Council's decision because Ms. Sotheary's case is an individual dispute according to Article 300 of the Labour Law. But the union party considers this case as a collective dispute according to Article 302 of the Labour Law because Ms. Sotheary is a member of the union.

Issue 3: Workers demand the company to change fixed duration contracts for workers who work more than two years to be undetermined duration contract.

- Labour contracts of around 60% to 70% of workers, equal to approximately 850 workers, have been renewed many times and the total amount of working time is more than two years. Each labour contract has a six month duration. Each time a contract expires, the company asks the worker for a thumbprint to continue another six month contract by giving seven days prior notification through the head of the section.

- Workers do not receive 5% severance pay; and there is no holiday when renewing each contract. For the 5%, the employer mentioned that it is to be given to workers when they leave the factory.
- The employer does not agree to change fixed duration contracts to undetermined duration contracts even though the workers have been working for more than two years and referred to letter No. 2540 dated 30 September 2004 by the head of the Department of Labour Inspectorate to the director of Evergreen Garment Factory about clarification of fixed duration contracts and undetermined duration contracts. Workers replied that the letter was not an official letter and it was not in conformity with the content of the Labour Law or the Arbitration Council had decided on this matter already.

Issue 4: Workers demand the company to pay back medical check fees of 10,100 riel.

- Workers had medical check and paid by themselves the fee 10,100 riel. Some workers had medical check before starting their work and some had it after the work commencement.
- The employer agrees to pay back the medical check fee to workers who have medical check after commencing work from 2005 because the present employer bought the company from the previous owner in November 2004.
- The employee party and the employer parties did not show any specific list of the number of workers who had paid for medical check by themselves.

Issue 5: The Independent Garment Labour Union at Evergreen Factory demands the company to deduct the union contribution fee from members for the union.

- The Independent Garment Labourer Union at Evergreen Factory demands the company to deduct the union contribution fee from members for the union.
- The Independent Garment Labour Union at Evergreen Factory is one of the two unions at the Evergreen Factory. This union is recognized by the Ministry of Social Affairs, Labour, and Youth Rehabilitation by the registration No. 520 issued on 17 November 2003.
- The Independent Garment Labour Union at Evergreen Factory requested the company to deduct the union member contribution fee two times already. The first time was in 2004 and the second time was on 24 June 2006. But so far the union has never provided a list of members and their thumbprint to the company because it waited for negotiations with and an agreement from the company.

- So far the company has never deducted the union contribution fee for any union. Mr. Horl Sina, administrator of the company, stated in the hearing that he received the request letters but had not decided what to do yet because he was waiting for conciliation by the Ministry of Labour and Vocational training to finish first. On 12 July 2006, a conciliation was held by the labour dispute conciliation officer of the Ministry of Labour and Vocational Training but the conciliation was unsuccessful.

Issue 6: Workers demand the company to pay the 50% wage before maternity leave.

- Women workers who take maternity leave demand the company to pay the 50% wage which workers are legally entitled to receive before taking maternity leave. This means [the entire amount] of the wage to be received.
- In practice, the company always allows a representative of the woman who takes maternity leave to obtain the wage when coming back to work. If a woman worker takes maternity leave before the month's payday, she can authorize a certain person to obtain her wage for that month. Normally the company closes the payroll on 20th and pays the wage to workers on 27th of each month.
- The employee party and the employer party state that there are around 750 to 800 women workers in the company and, on average, about 5 or 6 workers take maternity leave each month. The worker party mentioned in the hearing that if the employer cannot pay 100% of wages in advance, they demand only two months in advance. Responding to this point, the employer agrees to pay only 50% in advance.

REASONS FOR DECISION

Issue 1: Workers demand that the company pays US\$ 45 wage for floating workers, and if they work for more than two months, they should be added as 'permanent' workers.

In the hearing, the employer agreed to provide US\$ 45 to floating workers. Therefore, the Arbitration Council does not consider this point, i.e., only the issue of adding floating workers as permanent workers is considered.

Based on case No. 23/0[5]-Jung Min, the Arbitration Council found that *"Article 9 of the Labour Law 1997 states, "... Casual workers are those who are contracted to perform a specific work that shall normally be completed within a short period of time or perform a 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).

In this case, workers work 8 hours a day and 26 days a month for two consecutive months. Based on the above mentioned jurisprudence, the previous Arbitrators have interpreted and decided that those workers are considered regular workers. Therefore, the Arbitration Council will order the company to add the floating workers who have worked for more than two months as regular workers.

Issue 2: Workers demand the company to reinstate Ms. In Sotheary

The employer requests [the dismissal] of Issue No. 2 considering it to be an individual dispute based on Article 300 of the Labour Law. The employee party considers this issue a collective dispute based on Article 302 of the Labour Law. The Arbitration Council considers this case as follows:

In principle, the Labour Inspector and Minister of the Ministry of Labour have responsibility to consider which case is an individual dispute and which one is a collective dispute before referring it to the Arbitration Council. Therefore, normally the Arbitration Council abides by the decision of the labour inspector and the minister of the Ministry of Labour, if there is no clear objection. (see cases No. 10/03-Jaqsintex, No. 07/05-Coca Cola, No. 41/04-Micasa, and 02/04-Cambodiana).

Based on Article 302 of the Labour Law, in order to be called a collective labour dispute, there must be three conditions of the collective labour dispute as stated in Article 302.

The three conditions are:

- A. dispute between a certain number of workers and one or more employer.

- B. the issue of the dispute relates to working condition, the exercise of the recognized rights of professional organisation, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers
- C. the dispute can jeopardize the effective operation of the enterprise or social peace (see case No. 20/05-fortune).

The case of termination of Ms. Sotheary satisfies condition A because this case was filed by the union which represents group of workers, though it involves only one person, Ms. Sotheary. Condition B is satisfied as this dispute relates to working relation between worker and employer. Yet, condition C is not satisfied because the worker party does not provides enough evidence to show that this dispute can jeopardize the effective operation of the enterprise or social peace (see case No. 20/05-fortune).

Based on the above interpretation, the Arbitration Council considers that this dispute is individual dispute which the Arbitration Council has no jurisdiction on this dispute issue. In conformity with Chapter XII section B of the Labour Law, the Arbitration Council has no jurisdiction to decide individual dispute. Therefore, the Arbitration Council does not consider this case.

Issue 3: Workers demand the company to change fixed duration contract for workers who work more than two years to be undetermined duration contract.

Regarding this issue, the decision of the Arbitration Council is not different from the previous cases.

Article 67, paragraph 2 and Article 73, paragraph 5 of the Labour Law state:

“Article 67-2: The Labour Law 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 deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67.”

In case No. 10/03-Jaqsintex and case No. 36/06-Mondotex, the Arbitration Council noted that, *“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 Department of Labour Inspectorate 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, including the duration of the initial contract and the duration of 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 tendency towards undetermined duration contracts, as provided under Article 67(7) (8). The rationale for this tendency is that undetermined duration contracts promote the job security, which is vital to the workers and the employers because long-term employment encourages the workers to be committed to their work. Moreover, Article 73(5) of the Labour Law provides that fixed duration contracts becomes 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 (ILO), No. 166 of 1982, regarding the termination of employment contracts states that fixed duration contracts shall not be used for long-term employment contracts. 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 offers a context beneficial for the interpretation of Article 67.

In the hearing, the employer did not agree to follow the previous interpretation of the Arbitration Council regarding the fixed duration contracts which after a total duration of two years renewal will become undetermined duration contracts. The Company based its claim on the letter No. 2540 dated 30 September 2004 by the head of the Department of Labour Inspectorate, Mr. Huot Chanthy) to the director of Evergreen Garment Company to clarify [their interpretation of] fixed duration contract and undetermined duration contracts which is of contradictory interpretation to the Arbitration Council's. [The Company] requests a discussion between the Ministry of Labour and the Arbitration Council on this issue.

The Arbitration Council found that the interpretation of Mr. Huot Chanthy is of a personal perspective which does not represent the institution, has no legal characteristic, and does not provide clear reasoning. The Arbitration Council considers that the interpretation of the 2nd

paragraph of Article 67 of the Labour Law means that the fixed duration contract will become an undetermined duration contract if the renewal of the contract makes the total term of the initial contract and the renewal more than two years. (See Awards 10/03-Jaqsintex, and 36/06-Mondotex).

Generally, the Arbitration Council follows the previous Awards if they are reasonable. In this case, the Arbitration Council found that the Arbitrators of Jaqsintex gave a very reasonable explanation. Therefore, to be in conformity to the previous Awards, the Arbitration Council considers that the employer has to change from fixed duration labour contracts to undetermined duration contracts for workers who have been working for more than two years.

Issue 4: Workers demand the company to pay back to medical check fee, 10,100 riel.

Article 247 (c) of the Labour Law 1997 provides that the employer is responsible to pay for the medical check fee of the workers; and Article 247 of the Labour Law also states that the Ministry in charge of Labour shall issue a *Prakas* to determine: (A) the conditions under which pre-employment, re-employment, periodical and special physical exams are given; (C) the conditions under which employers are required to establish and provide at their expense: the medical exams of workers as stipulated in point A of the article.

Although there is no *Prakas* about the above mentioned issue, the Arbitration Council considers that Article 247 of the Labour Law 1997 provides sufficient legal basis to conclude that employer has an obligation to pay for medical check fees for workers including the medical check fee when recruiting new workers (see Awards 64/04-Mercury Garment, 98/04-Great Union, 106/04-Suit Way, 05/05-GHG, and 05/06-W&D). Article 247(c) mentions clearly that when new *Prakas* is issued, it will require the employer to pay for medical check fees to workers (see Award 60/04-United Art).

In previous Awards, the Arbitration Council referred to joint *Prakas* No. 009 issued on 19 January 1994 which was made under the Labour Law 1992, a law replaced by the Labour Law 1997 (see Awards 02/03-Chou Sing, 21/03-Loyal, 19/04-Kbal Koh II, 53/04-Kong Hong). Article 7 of this *Prakas* states clearly that the enterprise or company has to pay for the medical check fee for workers. However, the Arbitration Council has different views about whether *Prakas* No. 009 still has legal effect or not (see Award 60/04-United Art and the dissenting view attached as an annex).

In many Awards by the Arbitration Council, the Arbitration Council notices that Article 247 of the Labour Law 1997 provides enough legal ground to require the employer to pay for medical check fee of the employee before accepting the worker to work (see Awards 64/04-Mercury Garment, 98/04-Great Union, 106/04-Suit Way, 05/05-GHG, and 05/06-W&D).

Therefore, in this case the Arbitration Council agrees with the Arbitrators' interpretation in the previous cases. Thus, the employer has legal obligation to pay the medical check fee to the workers.

The Arbitration Council considers that the employer has obligation to pay back medical check fee which each worker spent 10,100 riel.

However, in the hearing the employer mentioned that the factory was bought from the former owner and the sales contract does not mention this obligation. Therefore, the employer cannot make back payments to the worker but only agrees to compensate them from 2005 onward.

Article 87 of the Labour Law states: "If a change occurs in the legal status of the employer, particularly by succession or inheritance, sale, merger or transfer of fun to form a company, all labour contracts in effect on the day of the change remain binding between the new employer and the workers of the former enterprise."

In this case, the Arbitration Council found that there was change of the legal status of the former employer by selling Evergreen Factory to the new employer. According to Article 87 of the Labour Law mentioned above, the Arbitration Council found that the selling of the company by the former employer to the new employer in 2004 does not affect the labour contracts in effect between the new employer and the workers in the workers of the former enterprise. Therefore, the employer has responsibility to pay for the medical check fee to workers incase it has not yet paid earlier.

In addition, in the hearing, the workers mentioned that they demand the company to pay for medical check fees from the day the factory started operation in 1999.

Article 120 of the Labour Law states, "The statute of limitation of a lawsuit for the payment of wages is three years from the date the wage was due. Claims subject to the statute of limitation of a lawsuit include the actual wage, perquisites and all other claims of the worker resulting from the labour contract, as well as the indemnity in the event of dismissal."

The Arbitration Council has found that medical check is one of the conditions of the labour contract. Therefore, the demand for payback of the medical check fee has to be covered by the three year statute of limitation under Article 120 mentioned above (see Award 05/06-W&D).

Based on the above mentioned Article, the Arbitration Council considers that the workers have right to claim this money only within the last three years.

Issue 5: The Independent Garment Labour Union at Evergreen Factory demands the company to deduct the union contribution fee from members for the union.

Should the company deduct the union contribution fee from members for the Independent Garment Labour Union at Evergreen Factory?

In the statement of the employer party, the company claims that it has no obligation to deduct this contribution fee for the workers because, in doing this, the employer would require human resources and it takes time; there can be problems in deducting the money which may result in confusion or loss of money, etc.

Article 281 of the Labour Law states: "All employers are forbidden to deduct union dues from the wage of their workers and to pay the dues for them." According to Article 281, the Arbitration Council understands the Labour Law to strictly prohibit the employer from deducting wage of workers to pay for union contribution and does not allow the employer to pay this contribution fee on behalf of workers who are members of the union. Therefore, based on this Article, the employer should not and cannot cut wage of workers to pay for union contribution fee.

On the other hand, Article 129 of the Labour Law, paragraph 2, states, "However, the worker can authorize deductions of his wage for dues to the trade union to which he belongs. This authorization must be in writing and can be revoked at any time." The Arbitration Council understands that, according to this Article, the employer can deduct the wages of workers to pay for the union contribution fee in case there is an agreement and permission in writing from workers. However, this Article does not bind the employer with the obligation to make the deduction as desired by the workers.

Article 5(4) of Prakas 305/01 states, "Any worker who belongs to a union may request in writing at least 15 days in advance that her/his union dues be withheld from her/his salary, in accordance with Article 129 of the Labor Law, and the employer shall properly comply with such requests." Based on Article 5 of this Prakas, the Arbitration Council considers that the employer is not obligated to deduct the wage from workers to pay for union contribution fee except when the employer receives written requests to do this from members of the union and the request must be submitted to the employer at least 15 days in advance. This means that if the employer received written requests to deduct the wage to pay for union contribution fees from members of a union and the request letter is submitted 15 days in advance, the employer is bound to [perform] the obligation. This Article requires that the employer has to follow the workers request if they have fulfilled two conditions: 1) make the request in writing and 2) submit the request to the employer at least 15 days in advance. The Arbitration Council considers that the written request must list names of members of the union whose wage will be deducted for the contribution fee and it must provide a clear confirmation that those workers are genuine owners of the request, for example providing actual id numbers, thumbprints or signatures, etc.

Based on the findings of fact, the worker party submitted to the employer the request to deduct the union contribution fee twice already but never attached the exact number, no name list, and no thumbprints or signatures because the employee party and the employer parties agreed that they would discuss this matter when there is a representative of the Ministry of Labour in attendance. Hence, the Arbitration Council considered that by law the worker party has not fully fulfilled its duty of binding the obligation to the employer party. However, because there was an agreement that the two parties would talk and the Arbitration Council finds that in order for the two parties to resolve this matter and be reconciled and in order for the employer party to legally deduct the wages of workers to pay for the union contribution fee, the employee party has to fulfill its obligation of making a written request at least 15 in advance according to Article 129 of the Labour Law and Article 5 of Prakas No. 305/01. (See also Awards 03/03, 05/03, 62/04, 94/04, 99/04, 16/05, 60/05, 62/05, and 19/06).

Issue 6: Women workers who take maternity leave demand the company to pay in advance all of the 50% wage and other perquisites for the duration of the 90 days of maternity leave.

Article 182 of the Labour Law provides, "In all enterprises covered by Article 1 of this law, women shall be entitled to a maternity leave of ninety days."

Based on the fact, the Arbitration Council found that the company allows woman workers who have worked for at least one year so far to take 90 days for maternity leave. The Arbitration Council found that such practice of 90 days maternity leave is in conformity with Article 182.

Article 183, paragraph 1 states *during the maternity leave as stipulated in the preceding article, women are entitled to half of their wage, including their perquisites, paid by the employer.* In the fact finding, the Arbitration Council found that the company provides 50% of their wage including perquisites. The Arbitration Council also considers that this is in conformity to Article 183 of the Law.

Article 116 of the Labour Law, paragraph 1 and 2 mentions that *Labourer's wages shall be paid at least two times per month, at a maximum of sixteen-day intervals. Employees' wage must be paid at least once per month.*

In the fact finding, the Arbitration Council found that the company gives the maternity leave payment to woman workers when they come back to work, that is after 3 months of their leave; and in case they come back to work after the company closes the payroll book on 20th, they have to wait until the next month to receive the payment. The Arbitration Council considers that the delay from three to four months is not in conformity to Article 116 of this Law.

In addition, paragraph 3 of Article 115 of the Labour Law provides, “*Payment shall not be made on a day-off. If payday falls on such a day-off, the payment of wages shall be made a day earlier.*”

In the hearing the Arbitration Council found that workers demand for payment in advance because they have to pay more expenses than usual such as for medical fees, health-care and so on. The employer states that payment in advance is not possible for the fear that workers may not come back to work, and it will lose the interest. The Arbitration Council found that according to Article 182, woman workers are legally entitled to 90 days leave. If they go to work normally, they will receive the monthly wage on the 27th of each month. But the payday determined by the company falls on dates when the woman workers take maternity leave for 90 days. **Therefore**, according to Article 115, the Arbitration Council considers that women workers are entitled to receive 50% pay including perquisites for the 90 days of maternity leave before the leave starts. The Arbitration council also considers that the employer’s statement is a personal worry which may or may not be true but is not a legal reason which can help the employer to avoid executing its legal duties.

The Arbitration Council would like to note that in case No. 94/04 the Arbitration Council found that the workers’ demand to have the company pays woman workers who take maternity leave before the leave was an interest dispute. However, in this case No. 57/06, the Arbitration Council does not agree with the previous interpretation and finds that the earlier consideration was not in conformity with Article 115 and Article 116 of the Labour Law and the previous decision is not the rule the Arbitration Council must follow.

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

DECISION

1. Order the employer to add floating workers who have worked for more than two months to be permanent workers.
2. Decline to consider the demand of the workers to reinstate Ms. In Sotheary.
3. Order the employer to change from the fixed duration contracts to undetermined duration contracts for workers who have been working for more than two years. The employer has to start preparing to change the labour contract of workers from the day this Award comes into effect.
4. Order the employer to reimburse the medical check fee amount of 10,100 riel. This medical check fee must be paid back to workers who have had the medical check and paid for it by themselves within three years to the date this Award comes into effect.

5. Order the employer to cut the union contribution fee from workers' wages after receiving written requests from members of the union at least 15 days in advance and pay this fee to the union within one week at most after each wage payment.
6. Order the employer to arrange in advance 100% of half of the wage including perquisites for woman workers who take three month maternity leave.

Type of Award: non binding awards

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: **Ly Tayseng**

Signature:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: