

**KINGDOM OF CAMBODIA  
NATION KING RELIGION**

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**THE ARBITRATION COUNCIL**

**Case number and name: 60/06-New Max**

**Date of Award: 31 August 2006**

**ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

**ARBITRATION PANEL**

Arbitrator chosen by the employer party: **You Suonty**

Arbitrator chosen by the worker party: **Huon Chundy**

Chair Arbitrator (chosen by the two Arbitrators): **Tan Try**

**DISPUTING PARTIES**

**Employer party:**

Name: **New Max Garment Co. Ltd. (New Max Company)**

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

Telephone: 023 890 250/ 012 816 616 Fax: 023 890 185

Representative:

1. Mr. Chhing Leangchea Director of the company
2. Mr. Dang Lot Head of Administration

**Worker party:**

Name: **Khmer Youth Trade Union of New Max Factory**

Address: #04, Street 265, Sangkat Toeuk Laak, Khann Tuol Kork, Phnom Penh

Telephone: 011 975 670/ 012 882 870

E-mail Address: kyftu\_union@everyday.com.kh

Representative:

1. Mr. Pen Sophal Head of Khmer Youth Trade Union of New Max Factory
2. Mr. Hing Bunthoeun Officer of Khmer Youth Federation Trade Union
3. Mr. Hang Sochaily Officer of Khmer Youth Federation Trade Union
4. Mr. Sea Sorn Officer of Khmer Youth Federation Trade Union

## ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. Workers demand the company to deduct the 1,000 riel contribution fee from workers who are members of Khmer Youth Trade Union. The company party cannot deduct the contribution fee immediately but will do so when the unions send registration certificates with proper clarification documents from the members to the company.

2. Workers demand the company to provide full pay during the time when there is no work. The company provides 50% when it has no work temporarily.

3. Workers demand the company to maintain bonuses for workers who come to work late once in a while. The company does not agree to the demand of the workers.

4. Workers demand 2,500 riel meal allowance when workers work overtime from 4:00 p.m. to 9:00 p.m. The company does not agree to the demand of the workers.

5. Workers demand the company to follow the past practice for the overtime work on Wednesday and Saturday. The company does not agree to the demand of the workers.

6. Workers demand the company to provide the 5 percent severance pay for fixed duration contracts each time the contract expires. The company cannot provide as demanded because the company does not terminate the labour contract but the company will provide the 5 percent of the fixed duration contract when the company terminates the contract or the workers do not continue the contract.

## JURISDICTION OF THE ARBITRATION COUNCIL

*The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B (Articles 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 (Four 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 not successful, and the non-conciliation report No. 1025 K.K.B.V/AK/VK dated 20 July 2006 was submitted to the Secretariat of the Arbitration Council on the same date.*

## HEARING AND SUMMARY OF PROCEDURE

**Place of hearing:** The Arbitration Council, Phnom Penh Center Building "A", Sothearos Blvd,  
Sangkat Tonle Basac, Khan Chamkamorn, Phnom Penh

**Date of hearing:**

- 11 August 2006 (2:00 p.m. to 5:30 p.m.)

- 22 August 2006 (8:00 a.m. to 12:30 p.m.)

**Procedural issues:**

On 04 July 2006, the Department of Labour Disputes received a petition from workers demanding that the company improves working conditions in conformity with the Labour Law. Following the receipt of the case, the Department designated its labour dispute settlement officer to conciliate this dispute consecutively. The last conciliation was held on 18 July 2006. Thirteen issues out of nineteen issues were successfully conciliated and other six were not.

On 27 July 2006, the Arbitration Council received the case and report about non-conciliated case No. 1055 K.K.B.V/AK/VK dated 27 July 2006 by the chief of Labour Dispute Department. After receiving the case, the Secretariat of the Arbitration Council summoned the employer party and the union at the factory and workers to attend the hearing and to conciliate on the 6 non-conciliated issues on 11 August 2006 at 2:00 p.m. and on 22 August 2006 at 8:30 a.m. Both parties were present at the hearing as invited by the Arbitration Council. On the hearing day, the Arbitration Council attempted further conciliation. As a result, 2 issues (Issue Nos. 1 and 4) were conciliated and 4 issues remain.

Therefore, in this Award, the Arbitration Council will consider the 4 non-conciliated issues on the basis of the evidence and the 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:**

- Certificate of commercial registration (No. 1983 PN.NTK) dated 26 August 2005 by the Ministry of Commerce about registration and recognition of the legal personality of New Max Garment Co. Limited.
- Statute and memorandum of New Max Garment Co. Limited for commercial registration on 15 August 2005.
- Internal Work Rules of New Max Garment Co. Limited, registered on 27 April 2005.

**Provided by the worker party:**

- Slip of request for registration of Khmer Youth Trade Union of New Max Company, dated 27 June 2006 by the Ministry of Labour and Vocational Training.
- Notification about election of leaders of the union to the director of New Max Company dated 14 June 2006.

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

- Letter of request to resolve a collective dispute at New Max Company, No. 940 K.K.B.V. dated 03 August 2006 by the Minister of Labour and Vocational Training.
- Letter no: 1054 K.K.B.V./AK/VK dated 27 July 2006 by the Chief of Labour Dispute Department to the Minister regarding report on collective dispute resolution at New Max Company.
- Minute of collective dispute conciliation at New Max Company dated 03 April 2006.

Provided by the Secretariat of the Arbitration Council:

- Letter of invitation to the worker party to attend the hearing, No. 294 LKA dated 01 August 2006.
- Letter of invitation to the worker party to attend the hearing, No. 295 LKA dated 01 August 2006.

**FACTS**

- After having examined documents submitted to the Arbitration Council
- After having examined the report of collective labour dispute conciliation
- After having listened to statements of the employee party and the employer party

**The Arbitration Council finds that:**

- New Max Company is located in Damnak Thom Village, Sangkat Steung Meanchey, Khann Mean Chey, Phnom Penh. It employs approximately 1,000 workers.

- New Max Company produces mainly Polo brand shirts and T-shirts.

- In the hearing the employer acknowledged that New Max factory faces production pause for one or three days (the longest is 7 days) in a month.

- The pause affects sections of production but does not affect the assembly line of the whole factory.

- Both parties recognize that, so far, workers at the ironing section of building 1 are usually most-affected by the pause, which affects approximately 20 workers in each section.

- The pause of the production line in sections may be caused by among the following reasons:

- The client may require the garment's model sample to be altered many times so that New Max Company has to resend the model to the client for agreement before starting to produce the garment. When the client is late in replying to the company, it often causes interruptions to the daily production plan of the company.
- Sometimes, the production on the assembly line of a section gets stuck and cannot be finished on time which causes delays to other related sections.

- Sometimes, material ordered by the company for the production assembly line does not arrive on the set time which affects the company's production process.
- In the past, when the company needed to provide finished products to customers urgently, it took the products of the ironing section in building 1 to building 2 because they can do it faster.
- Regarding the past practice, New Max Company provides 50 percent of the basic wage to workers who have no work for the period of the production pause in the work sections. The company does not deduct any other benefit from workers.
- The company party claimed in the hearing that each time when there is pause of the production assembly line in any section, the company does not notify the worker representatives or the Labour Inspector of the Ministry of Labour and Vocational Training because the pause is of a short period and it is not the suspension of activities of the whole enterprise.
- There is no agreement about payments during work suspension.
- The company provides US\$5 per month to workers who come to work regularly during each month.
- In the hearing, the worker party accepts that it is true that so far there are some workers who come to work late. However, the company has never punished the workers by any means such as deducting the regular attendance bonus from them.
- However, in the hearing, the employer mentioned that since the initiation of this dispute, the company will deduct the regular attendance bonus from any worker who comes to work late without proper reasons.
- In the hearing, both parties accepted that in the past the company did not require workers to work overtime on Wednesday and Saturday. The company started to require workers to work overtime on Wednesday and Saturday in May 2006.
- In acknowledgement of the [workers'] agreement and readiness to perform overtime work as requested by the company, the company provides US\$5 as a cooperation bonus per month to each worker.
- Before May 2006, workers would receive this cooperation bonus if they agreed to work overtime every day except Wednesday and Saturday. But from now on, workers cannot have this bonus unless they agree to work overtime everyday including Wednesday and Saturday.
- The employer party claims that workers will lose the right to receive this cooperation bonus under the following conditions:
  - Workers reject to perform overtime work requested by the employer, unless there are reasons such as sickness.
  - Workers refuse a work transfer to other sections assigned by the company where the company believes that the workers have the ability to work in that new place.

- Workers arrange for union meetings at the workplace without prior notification to the company.
  - If the workers are absent from the workplace without providing proper reason to the company. (In the past, workers would lose their cooperation bonus if they were absent 3 times without a proper reason.)
- The company has signed six months labour contract with workers and renews this contract many times.
- The company provides a 5 percent severance bonus to workers only when the fixed duration contract has ended or is not renewed.

### **REASONS FOR DECISION**

**Issue 2:** In this issue, workers demand the company to provide full wages to workers when the company does not have work. As a practice of New Max Company, workers receive 50% of their basic wage for the days of no work caused by a pause of the production assembly line in a work section. The Arbitration Council refers to paragraphs 7 and 11 of Article 71 of the Labour Law which state:

“The Labour Contract shall be suspended under the following reasons:

...

7. Temporary layoff of a worker for valid reasons in accordance with internal regulations.

11. When the enterprise faces a serious economic or material difficulty or any particularly unusual difficulty, which leads to a suspension of the enterprise operation. This suspension shall not exceed two months and be under the control of the Labour Inspector. ..”

The Arbitration Council reviewed the Internal Work Rules of New Max Company but found no point stating about reasonable reasons which allows the company to suspend workers temporarily. Therefore, the Arbitration Council will continue to look at the content of paragraph 11 of Article 71. In the hearing the Arbitration Council found that the pause of production assembly line in sections may be caused by one of the following reasons:

- The client may require the garment’s model sample to be altered many times so that New Max Company has to resend the model to the client for agreement before starting to produce the garment. When the client is late in replying to the company, it often causes interruptions to the daily production plan of the company.
- Sometimes, the production on the assembly line of a section gets stuck and cannot be finished on time which causes delays to other related sections.
- Sometimes, material ordered by the company for the production assembly line does not arrive on the set time which affects the company’s production process.

Based on the above mentioned reasons, the Arbitration Council considers that New Max Company faces special difficulty which leads to suspension of activities in sections in the factory. Thus, paragraph 11 of Article 71 allows New Max Company to suspend workers in conformity with the above mentioned conditions.

The Arbitration Council finds, according to the testimony of the parties, that the suspension of production activities does not affect the whole factory but primarily affects the ironing section in building 1. The effect may last from one to three days or one week in some months. Regarding this point, the worker party argues that the company should consult with and let the workers know in advance and must inform the labour inspector because, as the suspension of work is up to 3 days or even 7 days, it is proper that the employers should do this. If the company does not follow the procedures for suspending the production activities, workers demand full basic wages, not 50%.

With regard to this claim, the Arbitration Council makes a division into three parts: 1) the obligation of the workers and the company, 2) the company's obligation in providing notification, and 3) control of the labour inspector.

For the obligation of the workers and the company, Article 72 of the Labour Law states:

"1. The suspension of a labour contract affects only the main obligations of the contract, that are those under which the worker has to work for the employer, and the employer has to pay the worker, unless there are provisions to the contrary that requires the employer to pay the worker. ..."

In conformity with the content of Article 72, the Arbitration Council made its decision in case No. 21/03-Loyal that: "...If in the future the company does comply with Article 71 of the Labor Law in suspending the employment contract this will mean that:

- (a) the employee does not have to go to work; and
- (b) the employer does not have to pay the employee wages (in accordance with Article 72 of the Labor Law)..."

For the obligation of the company to provide prior notification to workers, the Arbitration Council finds that the provision of Article 71 and 72 as well as other provisions of the Labour Law do not state that it is the employer's obligation to notify workers each time there is pause of production assembly. Based on this principle, the Arbitration Council considers that the employer is not obliged to give advanced notification to workers because no provision requires this. However, the Arbitration Council thinks that the company should give prior notification to workers to assist the good cooperation in industrial relationship.

For the requirement that suspension of the production activity be under control of the labour inspector, the Arbitration Council finds that it is a necessary legal condition clearly stated in point 11 of Article 71 and the company has an obligation to follow this. According to this Article, the employer has to notify and consult with the labour inspector regarding any

suspension of production to avoid any practice that may seriously affect the rights and benefits of workers. In addition, the Arbitration Council finds that the case of the company giving products to the ironing section in building 2 because it is faster than the section in building 1 (so that the company is able to provide finished product to the client on-time) is one example of the necessity of the legal condition of paragraph 11 of Article 71 because it affects the benefit of workers in the ironing section in building 1.

The Arbitration Council finds that the failure to do this will lead to a violation of the provision of the necessary legal condition which is stated in paragraph 11 of Article 71 which results in the workers being entitled to receive in full their basic wage from the company. In this case, New Max Company did not follow the legal procedure stated in paragraph 11 of Article 71.

However, in the hearing, the Arbitration Council found that the workers did not make any demand or show any evidence of the occurrence of prejudice. The worker party only requests the Arbitration Council to decide on the issue in dispute which is a future-based demand. Although this is a demand about the future, this case is different from previous cases regarding future-based demands because the facts in this case already occurred in the past. However, because the worker party does not make any demand for benefits they lost in the past, the Arbitration Council will not decide on this interest dispute; the Arbitration Council will consider [the dispute] if the pause of the production assembly line by the employer in the past and the 50% wage received by the workers during the pause of production activity is legally correct.

**Issue 3:** Workers demand the company to retain the bonus for workers who come to work late once in a while. Workers raised various reasons which required them come to work late such as traffic jams or family business in the morning. Regarding some of the reasons, the employer stated that the company will not cut the regular attendance bonus for the lateness because of traffic accidents, one's child being sick, or when there is heavy rain so a worker cannot come to work on time. For reasons other than this, the employer party does not agree with the workers' demand because the reasons for being late raised by the workers are not reasonable or believable. The employer continues that besides those particular reasons, workers should not come to work late, rather in order to maintain discipline and good process of production assembly line they must respect the working hours.

Regarding such demand from the workers, the Arbitration Council found in the hearing that the company provides US\$5 bonus per month to workers to come to work regularly each month. And it is true that so far there are workers who do not come to work on time. However, the employer party has never used any sanctions such as deducting the regular attendance bonus from any worker who comes to work late. Although in the past the employer has never deducted the regular attendance bonus, in the hearing the employer stated clearly that from the

day of this dispute onward the company will cut the regular attendance bonus from workers who come to work late without proper reasons. Therefore, even though it did not happen in the past, according to the employer's claim in the hearing, the Arbitration Council foresees that it will happen from the day of this dispute onward.

Point 3 of Notification No. 017 dated 18 July 2000 stated that workers who work *regularly* during the working days in each month receive at least a US\$5 bonus per month. The Notification does not mention how to calculate the regularity. Article 4 of the Internal Work Rules states that workers have to work 8 hours per day, 48 hours per week, according to the following schedule:

- In the morning begin at 7:00 a.m. and finish at 11:00 a.m.
- In the afternoon begin at 12:00 p.m. and finish at 4:00 p.m.

The Internal Work Rules do not state that being late to work causes a loss of the bonus. But the employer can determine the time that workers who come to work late still can receive the bonus. Because this dispute is not provided for in the law or in the Internal Work Rules, it is an interests dispute.

The Arbitration Council finds that the Khmer Youth Trade Union at New Max company does not have the most representative status. In the previous cases, the Arbitration Council has determined that settlement of interests disputes can lead to a collective bargaining agreement. In addition, if the Arbitration Council resolves this dispute now, the Award issued by the Arbitration Council will take the place of a collective bargaining agreement in accordance to Article 43 of the Prakas about the Arbitration Council No. 099 SKBY year 2004. Therefore, the Arbitration Council cannot issue an Award relating to interest dispute as long as the parties do not have the right to make a collective bargaining agreement.

To show that a worker union has the right to negotiate for a collective bargaining agreement, the union has to have the most representative status in the enterprise or company where it operates. In order to have the most representative status, Article 277 of the Labour Law states that the union has to register and follow other conditions mentioned in the Article.

The Arbitration Council finds that Khmer Youth Trade Union at New Max Company is not recognised as having of the most representative status. Therefore, the union has no legal rights to make collective bargaining agreement on behalf of all workers in the factory. This right belongs to the registered union which has the most members and has fulfilled other criteria stipulated in Article 277 of the Labour Law. Thus, the Arbitration Council considers that Khmer Youth Trade Union of New Max Company has not met the legal conditions to represent workers to settle a dispute of the collective interests of all workers in this company. (See Arbitral Award 31/06-Hong Wa, 60/04-United Art, and 96/04-Sportex).

Therefore, the Arbitration Council decides to decline to consider this issue.

**Issue 5:** Workers demand the company to follow the past practice for the overtime work on Wednesday and Saturday. The company does not agree to the demand of the workers.

Article 137 of the Labour Law (1997) states, "In all establishments of any nature, whether they provide vocational training, or they are of a charitable nature or liberal profession, the number of hours worked by workers of either sex cannot exceed eight hours per day, or 48 hours per week." Article 138 of the Labour Law states, "The work schedule is set by each enterprise for different jobs based on the nature of their activities and organisation of work." In addition, the employer can request workers to work overtime (Article 139 of the Labour Law and Prakas 80/1999)

The Arbitration Council understands that based on the contents of Article 137 and 139 of the Labour Law and Prakas 80/1999, the employer has the right to arrange the work schedule which s/he thinks appropriate to ensure that products are ready for export on time and appropriate to her/his business activities. However, this work schedule must be in conformity with the Labour Law and other relevant Prakas.

Article 4 of Prakas 80/1999 reads, "An arrangement for overtime work shall be on a voluntary basis which means the owner or manager of an establishment shall not coerce or discipline the workers or employees who are not willing to work overtime."

As mentioned above, as a general rule the employer provides US\$5 per month as a cooperation bonus.

The employer party claims that workers will lose the right to receive this cooperation bonus under the following conditions:

- Workers reject to perform overtime work requested by the employer, unless there are reasons such as sickness.
- Workers refuse a work transfer to other sections assigned by the company where the company believes that the workers have the ability to work in that new place.
- Workers arrange for union meetings at the workplace without prior notification to the company.
- If the workers are absent from the workplace without providing proper reason to the company.

Since May 2006, the company changed its rules regarding overtime work. As shown above, the company did not require workers to work overtime on Wednesday and Saturday. But from May 2006, the company started to require that workers should work overtime on Wednesday and Saturday to receive this cooperation bonus.

In previous cases, the Arbitration Council has determined that the employer is lawfully empowered to determine policy of the workplace. (See Arbitral Award 28/04-Hotel Raffles Grand Angkor).

In case No 24/05-Wearwel, the Arbitration Council considered: "The Arbitration Council finds that, from previous cases, Article 2 of the Labour Law states that an enterprise employs "a group of people working together... under the management and supervision of the employer." Under this meaning the Arbitration Council finds that the employer has the right and authority to manage and to lead human resources in the company as long as that management and leadership is according to law. Thus, this Article gives the employer the right and authority to direct and lead human resources in the company so long as the management and leadership are in accordance with the law.

The Arbitration Council finds that the Labour Law (1997) does not require nor prohibit incentive bonuses; thus, an incentive bonus is superior to the level of benefit required by law. Furthermore, Article 13 of the Labour Law states that the employer may "grant benefits or rights superior to the benefits and the rights defined in this law, granted to the workers by a unilateral decision of an employer or a group of employers, by an employment contract, by a collective convention or agreement, or by an Arbitral Award." This means that the employer, through a unilateral decision, can arrange to have a policy which provides other bonuses which are not set out in the Labour Law, in order to encourage workers to try to increase their productivity and use short timeframes."

The Arbitration Council finds that the Internal Work Rules do not mention a cooperation bonus; thus, this dispute is related to [the parties'] interests. Because the Khmer Youth Trade Union does not have the most representative status, the Arbitration Council declines to consider this issue. (Please see the reason for decision in Issue No. 3.)

**Issue 6:** Workers demand the company to provide the 5 percent severance pay of fixed duration contracts at the expiration of each contract. The company cannot provide as demanded because the company does not end the labour contract but the company will provide the 5 percent severance pay of the fixed duration contract when the company terminates the contract or the workers do not continue the contract.

Article 73 of the Labour Law 1997, paragraph 1 states: "A labour contract of specific duration normally terminates at the specified ending date. It can, however, be terminated before the ending date if both parties are in agreement on the condition that this agreement is made in form of writing in the presence of a Labour Inspector and signed by the two parties to the contract."

Article 73 also mentions that "At the expiration of the contract, the employer shall pay the worker with the severance pay proportional to both wages and the length of the contract. The exact amount of the severance pay is set by a collective agreement. If nothing is set in such agreement, the severance pay is at least equal to five percent of the wages paid during the length of the contract."

The Arbitration Council understands that the content of this Article can be interpreted in many ways. There is ambiguity in the point that states, “at the expiration of the contract” because it is unclear if this sentence refers to the termination of the contract of each worker or the end of the employment relationship. However, the Arbitration Council understands that this Article refers to “**severance pay to terminate the contract.**” The severance to terminate the contract can be interpreted as the severance which should be paid when the employment relationship is terminated or the end of the employment relationship.

Therefore, the Arbitration Council considers that workers are entitled to receive the severance pay only when the fixed duration contract is terminated which causes the employment relationship to be severed. If a labour contract is renewed at the end of a contract, it cannot be considered that the employment relation is severed because the employment relationship still continues and other benefits must be continued along with the new labour contract as well.

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

**DECISION**

- Issue 2: Order the employer to follow Article 71, paragraph 11, by informing the labour inspector in advance before suspending production activity of any section. If the employer does not follow the regulation stated in this Article, the employer has to provide full wages to workers during the pause of the production activity.
- Issue 3: Reject the demand of the workers demanding the company to keep the bonus for workers who come to work late once a while.
- Issue 5: Reject the demand of the workers demanding the company to keep the past practice regarding overtime work on Wednesday and Saturday.
- Issue 6: Reject the demand of the workers demanding the employer to pay the severance payment of 5% at the end of each fixed duration contract when the contract is renewed.

**Type of Award: Binding**

This award is enforceable from the date of award notification to the parties.

**SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:**

Arbitrator chosen by the employer party:

Name: **You Suonty**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Huon Chundy**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Tan Try**

Signature: .....