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**THE ARBITRATION COUNCIL**

Case number: 60/04

Date of Award: August 16, 2004

**ARBITRAL AWARD**

Issued under Article 313 of the Labour Law

**United Arts Garment Company**

(Employer Party)

**AND**

**Workers and Coalition of Cambodian Apparel W.D.U (C.CAWDU)**

(Worker Party)

**Details of employer party :**

Address: Kbal Domrey Village, Ka Kab quarter, Dang Kau District, Phnom Penh.

Telephone: (855-23) 890 168      Fax: (855-23) 890 168

Representative: Som Vichea, Administration manager

**Details of worker party :**

Address: Kbal Domrey Village, Ka Kab quarter, Dang Kau District, Phnom Penh.

Telephone: (855-12) 261 139

Representative: Mach Sophea, Union president, Mr. Chin Kosal, Secretary for the company, Mr. Mas Seam Financial official for the company.

### **Issue in disputes**

- 1- The workers demand that the company pay the full basic wage when the company does not have work. The company offered only 50% to the workers when work is not available and that the company would comply with the labor contract.
- 2- The workers demand that the company reimburse their medical check costs of 10100 riels for each worker. The company agreed to reimburse those workers whom the company required to have their health checked after working for the company, but not for the workers who went to check their health before starting work for the company.
- 3- The workers demand that the company increase wages by US\$5 each month for workers in the hygiene and box packing sections. The company will arrange an incentive management system for all worker sections who are competent.

### **JURISDICTION<sup>1</sup> OF THE ARBITRATION COUNCIL**

The Arbitration Council derives its power to make this Award from Section II B<sup>2</sup> Chapter 12 of the Labor Law (1997), the Prakas on the Arbitration Council (no. 338 of 11 December 2002), and the Arbitration Council Procedural Rules, which form an Annex to the same Prakas.

An attempt to conciliate the collective dispute which is the subject of this Award was made as required by Chapter XII Section 2A of the Labor Law. That conciliation hearing was unsuccessful and non-conciliation report dated 13 January 2004 was submitted to the Secretariat of the Arbitration Council on 15 January 2004.

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<sup>1</sup> Jurisdiction means judicial power.

<sup>2</sup> From Articles 309 to 317 of the Labor Law

#### **COMPOSITION OF THE ARBITRATION PANEL**

Arbitrator chosen by the employer party:	<b>Kao Thach</b>
Arbitrator chosen by the worker party:	<b>Sin Kim Sean</b>
Chair arbitrator (chosen by the two arbitrators):	<b>Ang Eng Thong</b>

#### **HEARING AND EVIDENCE**

**Date and place of hearing:** 6 August 2004 at 14h:00 at the Secretariat of the Arbitration Council.

**Witnesses and experts:** N/A

#### **DOCUMENTS CONSIDERED BY THE ARBITRATION COUNCIL AS FOLLOWS:**

- Internal work rules of the United Arts Garment Factory;
- List of name of the workers who refuse to get medical check payment;
- Registration certificate of Coalition of Cambodian Apparel W.D.U;
- Complaint from Coalition of Cambodian Apparel W.D.U of the United Arts;
- Member cards of union workers;
- Minute of labor dispute conciliation;
- Tariff of attendant bonus offered to hygiene and package sections;
- Minute on the arbitration hearing between the employer and employees at the United Arts Company; and
- Conciliation agreement between the employer and Khmer Youth Union of the United Arts.

## **Case Summary**

The United Arts Company is located at Kbal Domrey Village, Ka Kab quarter, Dang Kau District, Phnom Penh. The company employs 1068 workers. On June 21, 2004 workers filed a complaint demanding the employer resolve 9 issues in dispute. The Labor Inspection Department in Dang Kau ordered conciliations to settle the disputes. The first conciliation was held on June 21, 2004 and the second and last conciliation were held on July 13, 2004. The parties resolved 6 of the issues, but 3 issues were not successfully conciliated. This case was initially sent to the Arbitration Council and resolved in accordance with the agreement between Khmer Youth Union and the employer as following:

- 1- The employer agreed to reimburse 75% of medical check cost in the amount of 10100 riels to each worker who went to get a medical check (except the workers who were already reimbursed). The employer will pay all amounts to each worker by August 15, 2004. Further, the employer agreed that she/he would not review worker names that are duplicate.
- 2- The employer agreed to pay full wages to the workers when the company does not have tasks for the workers to perform. In case the company suspended employees, the company would comply with the Labor Law. The calculation for full wages while there were no jobs will start from July 14, 2004. The employer agreed to offer each employee an extra US\$ 10 (ten dollars) payment for legal termination of their labor contract in June and July 2004. The company will pay for this payment on July 19, 2004.
- 3- The workers agreed not to demand for back pay.

However, the case was sent by Coalition of Cambodian Apparel W.D.U back to the Secretariat of the Arbitration Council. The reason offered by the C.CAWDU for returning the case was that

they did not know about the settlement and further the previous agreement did not apply to their members.

After this case was sent to the Secretariat of the Arbitration Council the Arbitration Council invited the parties back to ask why they had sent the case a second time and to encourage the parties to discuss the agreement. As a result, the workers and the employer promised that they would attempt to negotiate with each other in order to reach the agreement, but up to the hearing date both parties have not reached an agreement.

**At the hearing:**

The workers alleged that when the company does not have enough work; the employer always decreased employees' basic wages by 50%. The union representative argued that this decrease did not comply with the Labor Law because suspension from lack of work was not under the labor inspector, so the employer is obligated to pay full wages to the workers.

The workers said that while the medical check is an obligation which set up by the law, the expenditure for this medical check payment should be the duty of the employer because the employees must spend time for the medical check, pay for their own transportation, as well as lose their bonus because of their absences from work. Because of such losses, the workers asked the employer to pay for all their expenditures.

The employees confirmed that the hygiene and packing sections have workers who have worked for the factory since 1996 and there are 10 workers from each section. The workers from both sections have received only US\$45 a month as compared to other sections where workers receive more than US\$45. In addition, workers in both the hygiene and packing sections did not receive overtime assignments as other sections did. Thus, the union asked the employer to consider increasing wages for the hygiene and packing workers.

The employer alleged that in the past the company paid 50% of minimum wage to the workers when the company did not have enough work for them to do. This practice was set up in the internal work rules of the company and was an attempt by the company to help the workers by offering them 50% of their minimum wages even when the business of the company did not run smoothly. The company representative said that from now on the company would comply accurately with the law by suspending employees when there is not enough work to perform. The company also stated it would pay 50% of minimum wages to workers who are under fixed duration contracts; and the company would offer all benefits to the workers who are under unspecified duration contracts.

The employer further stated that the company would pay for 75% of the medical check cost to all workers because the company had asked the workers to have their health checked before starting work at the factory, even though at that time the workers had asked to start work first because they did not have enough money to pay for such medical visits but would do so after getting their wages. The employer stated that it was the workers' obligation to pay for medical check cost, but agreed to pay 75% for the workers only in order to help them.

The employer alleged that the workers who work in the hygiene and packing sections do not pay attention to their tasks and the hygiene section did not always have enough tasks to perform. But now the company has plans to offer allowance for the workers who perform their jobs well.

At the hearing both parties did not agree on all issues. After listening to the debate by both parties and asking questions, the arbitrators decide to release their arbitral award.

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**FINDINGS OF FACT:**

After having reviewed the non-conciliation report sent by the Ministry of Labor;  
After having reviewing the documents from both parties; and  
After having heard the presentation and having shown the evidence of both parties in the hearing.

**The AC finds that:**

*Issue 1:*

The United Arts Company has some employees on fixed duration contracts that mention in clause 7 that "if there is some problem leading the company to temporarily suspend its operation, at this time, the party "B-workers" will be released from work and the company will pay 50% of their wages." There are also employees who have undetermined duration contracts; but who started work with fixed duration contracts until they have undetermined duration contracts.

*Issue 2:*

The employees have already paid for their medical check costs and the United Arts has agreed to reimburse employees 75% of the total expenditure amount of 10100riels (75% of 10100 riels equal to 7500 riels). Some workers did not agree on 75% of the total amount because they wanted the company to comply with the Labor Law.

*Issue 3:*

The employees in the hygiene and packing sections received the minimum wage of \$45 per month and also receive their seniority bonus. The demand in this issue is presented by a union that does not have the most representative status. The union admitted at the hearing that it does not have most representative status in the factory yet.

**Reasons for decision:**

*Issue 1:*

According to the Notification 017 of the MoSALVY, the minimum wage is \$45 per month that must be paid every month by the employer, and according to Article 104 of the Labour Law "The wage must be at least equal to the guaranteed minimum wage; that is, it must ensure every worker of a decent standard of living compatible with human dignity." However when the company has an economic or material difficulty, the employer is entitled to suspend the contract under the supervision of the Labour Inspectorate. If the employer does not suspend the employment contract in accordance with Article 71(11) the company has an obligation to pay full wages to the workers. Article 71(7) of the Labour Law provides for "Temporary layoff of a worker for valid reasons in accordance with internal regulations," but the Internal Work Rules of this factory do not state anything about temporary layoffs. As stated in Hun Loyal Cambodia #21/03 dated December 8, 2003 and M & A Cambodia Garment # 46/04 dated July 5, 2004, the employer is required to pay full wages if the suspension is not in accordance with the Article 71 (11) of the Labour Law.

According to the fixed duration contracts between the employees and the employers of the United Arts factory, when the employment contract is suspended the employee will receive 50% of their wages, so this practice should also apply to the workers who have undetermined duration contracts. This reasoning is based on principles of equity and, in particular, because these employees used to be under fixed duration contracts with the same working conditions then after 1 year they became workers under undetermined duration contracts but with no written contract to specify working conditions. Therefore, the conditions in fixed duration contracts still apply to employees on undetermined duration contracts; and further, the employees are still entitled to receive 50% of wages, the same as fixed term employees, when

suspensions occur in accordance with Article 71(11) of the Labor Law and with New Point Two # 01/04 dated February 2, 2004.

*Issue 2:*

According to:

- (1) the award in Chou Sing (02/03) dated May 21, 2003;
- (2) the award in Loyal Cambodia (21/03) dated December 8, 2003;
- (3) the award in Kbal Koh II (19/04) dated May 5, 2004;
- (4) the award in Kong Hong (53/04) dated July 26, 2004;
- (5) Article 247 (C-4) of the Labor Law 1997 and joint Prakas N0.9 of 1994, providing that the conditions under which employers are required to establish and provide at their expense include the medical exams of workers as stipulated in point A of Article 247;
- (6) Joint Prakas No. 09/MoSALVA dated January 19, 1994 on Cambodians and Foreigners who come to work in Cambodia and requiring the employer to pay for the medical examinations. Clause 7 of the joint Prakas states "The cost of the employee's medical examination shall be paid by owner of the enterprise."  
  
This means that the employer has an obligation to pay for medical checks of the employees. In this case the employees have already paid for the medical checks themselves and taken the receipt to the employer so that the employer can take the result. The fact that the employee has paid already does not free the employer from his/her obligations in clause 7 of the above joint Prakas and Article 247 (C-4) of the Labor Law 1997; and
- (7) Article 25 of the Decree 38D, on contracts and liability dated October 28, 1988, the limitation period is five years.

The Arbitration Council also notes that, as stated in the arbitral award of Chou Sing, the joint Prakas # 09/MoSALVA dated January 19, 1994 on the medical examination for Cambodians and Foreigners who come to work in Cambodia is still effective because this joint Prakas 09/1994 does not contradict any provisions of the Labor Law 1997. Thus this Prakas is not abrogated by Article 95 of the Labor Law. Therefore the Arbitration Council finds that the employer must reimburse workers for the medical examination cost in the amount of 10100 riels to each worker. However, see also annex "A" the dissent of the arbitrator chosen by the employer related to joint Prakas number 09/MoSALVA dated January 19, 2004.

*Issue 3:*

The employees in the hygiene and packing sections received a basic wage at the minimum standard wages and also seniority pay in accordance with the Notification No. 17/00 and Article 104 of the Labor Law. The demand for an increase by US\$5 over the current wage in this third issue is an interests dispute not rights dispute. The Arbitration Council does not take consideration on this issue claimed by the union which does not have the most representative status in the factory. According to Article 43 of the Prakas number 99/2004:

*"An arbitral award which settles an interest dispute takes the place of a collective bargaining agreement and shall remain in effect one year from the date on which it becomes final unless the parties agree to make a new collective bargaining agreement replacing the award".*

If this award becomes a collective bargaining agreement, it will have a consequence to the workers and the employer. The workers cannot conduct a strike related to other interests for a period of one year.

The Arbitration Council finds that the C.CAWDU of the United Arts Garment Factory does not yet have the most representative status in the factory. Thus the union does not have a legal right to draw up the collective bargaining agreement on behalf of all workers in the factory. This right belongs to the union that registers and has the most members and meets all other requirements mentioned in Article 277 of the Labor Law. Accordingly the Arbitration Council finds that C.CAWDU has not met the requirements according to the law to represent the workers. See the arbitral award Hong Wa number 31/03 dated February 2, 2004. Thus the Arbitration Council refuses to take consideration on the issue of increasing by US\$5 the salary for hygiene and packing workers.

Based on the facts, legal principle, evidence and the above reasoning, the Arbitration Council decides as follows:

**Decides:**

- 1- The employer must pay the full wage to workers even when there is no job to be performed, except if there is a legal suspension of the labor contract under Article 71 of the Labor Law. The employer must provide 50% of the wage to all workers when there is a suspension of the labor contract under Article 71 (11) of the Labor Law.
- 2- The employer must reimburse the medical examination cost in the amount of 10100 riels for each worker after this award comes into effect.

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

Arbitrator chosen by the employer party:

Name: **Kao Thach**

Signature:

Arbitrator chosen by the employee party:

Name: **Sin Kim Sean**

Signature:

Chair of Arbitration Panel:

Name: **Ang Eng Thong**

Signature:

*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.*

*This Award is immediately binding upon the parties if parties have agreed as such in writing before the notification of the Award, or if parties are bound to comply with a collective bargaining agreement stipulating that no opposition to the Award may be lodged.*

## **Annexure "A"**

### **Dissent**

Phnom Penh August 16, 2004

In the United Arts case, I agree with the decision in the award. This decision is consistent with the law. However, I do not agree with the reasons for the decision that are based on Joint Prakas 09 of 1994 on Medical Examination for Cambodians and Foreigners who come to work in Cambodia because I find that this Prakas cannot apply to the current situation any more and, in particular, to this case. This is because the Prakas was made under the 1992 Labor Law which has been replaced by the 1997 Labor Law so that the 1992 Labor Law is abrogated even though the 1997 Labour Law does not contain any provision that states that the Labour Law 1992 is abrogated. According to legal principles there are two types of abrogation:

First, specific abrogation - this means that that the provisions of the new law state clearly that the previous law is abrogated by the new law.

Second, implied abrogation this means that in the new law there is no provision that the previous law must be considered as having been abrogated but if there is a new law that replaces the previous law, this means that the previous law must not be applied any more.

In this case, I find that the 1992 Labor Law has already been abrogated and therefore, in my view, it is clear that the 1994 Prakas must also have been abrogated because the power to make the Prakas in the 1992 law has expired already so there is no basis for this Prakas to remain in effect. However, the reasons for decision in relation to Article 247 (d) (4) of the 1997 Labor Law, in relation to medical checks, are sufficient to show that the employer must pay the

medical checks for workers to be employed in their company. Article 247 (d) (4) states that *"the conditions under which employers are required to establish and provide at their expense is the medical exams of workers as stipulated in point A of this article"*.

**Arbitrator chosen by the employer**

**Signed**

**Kao Thach**