

**KINGDOM OF CAMBODIA
NATION RELIGION KING**

THE ARBITRATION COUNCIL

Case: 62/04

Date of award: 9 September 2004

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

Ecent Garment Factory

(Employer party)

AND

Khmer Youth Union of Ecent Garment Factory

(Employee party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Representatives:

- 1- Michael Wang,
- 2- Sok Mann, Administator
- 3- Hak Mao, Administrator
- 4- Long Heang, GMAC Representative; and
- 5- Cheav Tola, Lawyer

Address: Along National Route 4, Phum Ankeo, Khum Kan Taul, Srok Angsnuol, Kandal Province.

Tel: 012 522 266 Fax: N/A

DETAILED INFORMATION OF EMPLOYEE PARTY:

Representatives:

- 1- Nov Titha,
- 2- Seak Sorn
- 3- Kheng Phearom
- 4- Bun Oeun
- 5- Chhaum Sinat
- 6- Vuth Vannak
- 7- Thim Bunthol
- 8- Pheng Sovann

- 9- Seam Sothea
- 10- Long Sophat
- 11- Yun Rithy
- 12- May Vathana
- 13- Chhay Vantha
- 14- Phuong Sophann
- 15- Seang Chanthorn
- 16- Hak Vann
- 17- Lang Suphany
- 18- Thoeun Sokhom
- 19- Vann Sotheary
- 20- Ty Sreyhoeun

Address:

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Tel:

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ISSUES IN DISPUTE:

(In non-conciliation report)

- 1- The workers demand that the company pay the bonus for regular work and daily wages if a doctor certificate is presented.
- 2- The workers demand that the company give the wage rate prior to taking purchasing orders (P.O.) from other companies and give it in three days if the P.O. belongs to this company.
- 3- The workers demand that the company pay the medical check-up fee, of 10,100 riel to the workers.
- 4- The workers request that the company pay 100 percent of wages to the workers if there is no work to do and pay the portion of the wages that the company did not pay for the last three years. Previously, 50 percent of wages were paid if there was no work to do.
- 5- The workers demand that the company pay compensation for annual leave, deducted during the no-work periods, since 2000.
- 6- The workers demand that the company pay for the medicine that they have bought from the company nurse so far.
- 7- The workers demand that the company add US\$0.50 to the current pay rate for all sectors and all scales of the company.
- 8- The workers demand that the company provide annual leave of 18 days for the first, second and third years; 19 days for the fourth, fifth and six years and add one more day [of leave] for every three years of employment.

- 9- The workers demand the company refund the fee for union contributions to the Khmer Youth Union since May.
- 10- The workers demand that the company provide the same benefits to casual workers as regular workers.
- 11- The workers demand that the company dismiss Mr. Hak Mao and Mrs. Sok Mann.
- 12- The workers demand that the company calculate night work in accordance with the Labour Law, i.e. from 10:00 p.m. to 5:00 a.m. at double pay, for the last three years.

During the hearing, the employer and workers raised other issues and asked the Arbitration Council to consider these issues. The employer raised the issues as below:

- 13- The manner in which the employer should deal with the illegal strikes held so far by workers. The employer understands that the strike is illegal.
- 14- The manner in which the employer should deal with workers that do not comply with the Arbitral Award dated 3 August 2004.
- 15- The manner in which the employer should deal with workers threatening to continue striking.
- 16- How should the workers who throw cakes into the company be dealt with.

The workers also raise other issues as follows:

- 17- The workers demand that the company build an apprenticeship centre.
- 18- The workers demand that the company reduce the temperature in the workplace because now it is too hot.
- 19- The workers confirm that the company does take products from abroad and attaches the label "Made in Cambodia" on them. This action offends the Khmer work force.

JURISDICTION OF THE ARBITRATION COUNCIL :

The Arbitration Council derives its power to make this Award from Section IIB of Chapter 12 of the Labour Law (1997); the Prakas on the establishment of the Arbitration Council No. 338, dated 11 December 2002; the Prakas on the Arbitration Council No. 099, dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Nomination of Arbitrators No.103, dated 26 April 2004.

An attempt to conciliate the collective dispute which is the subject of this Award was made as required by Chapter XII Section 2A of the Labour Law. That conciliation hearing was successful in one of three issues, with two unsuccessful issues. The non-conciliation report dated 3 August 2004 was submitted to the Secretariat of the Arbitration Council on 3 August 2004.

COMPOSITION OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:	Mrs. You Suonty
Arbitrator chosen by the worker party:	Mr. Tuon Siphann
Chair arbitrator (chosen by the two arbitrators):	Mr. Men Nymith

HEARING AND EVIDENCE:

Date and place of hearing: 9, 13, 16 and 17 August 2004 at the Secretariat of the Arbitration Council.

Witnesses and Skillful people:

- 1- Phoeun Sokhorn
- 2- Yan Dy
- 3- Ty Sreyhoeun
- 4- Chum Savorn

CASE SUMMARY:

Ecent Company employs a total of 660 workers. On 30 July 2004, around 500 workers went on strike because the employer did not attend a meeting to resolve 18 issues raised by the workers. The Labour Inspectors of the Kandal Province helped resolve the dispute from 30 July 2004 to 2 August 2004. As a result, 6 of the 18 issues were conciliated. The Arbitration Council received the case from MoLVT on 3 August 2004.

The workers affirm that based on Notification 017 dated 18 July 2000, when a worker is absent from work, he/she should receive the bonus for regular work. The employer argues that based on this Announcement, a worker is entitled to this bonus as long as the worker comes to work continuously without any absence during the whole month. Otherwise, he/she will not be entitled to this bonus even though he/she is absent only for one day due to illness.

The workers say that a worker is entitled to this bonus if the worker has a doctor's certificate stating that he/she is sick either from the public hospital or a clinic because all doctors are qualified as proven by the official diploma and these clinics are officially permitted by the competent authority.

During the hearing, the workers withdrew points 7 and 11 from the submitted issues. The employer says that it still raises these four issues to be heard in order to make [these issues] known to the workers. The employer stresses that the Arbitration Council does not need to issue the award on these issues. Therefore, the Arbitration Council will not issue its award on these issues. Moreover, the Arbitration Council will not hear the three issues raised by the workers during the hearing because in the hearing, the worker side agreed that these issues do not relate to the non-conciliation issues contained in the MoLVT's report (please see decision for reasoning).

FINDING OF FACT:

- Having examined the report on the collective dispute reconciliation
- Having listened to employee and employer parties
- Having checked the above documents

We find that:

1st issue:

Regarding the bonus for regular work, at present when a worker gets sick, the employer does not give the bonus of US\$5 for regular work even with a doctor certificate.

Regarding the daily wages and the recognition of the doctor's certificate, if a worker gets sick and provides a doctor's certificate from the public hospital the employer agrees to pay wages. If a worker does not have a doctor's certificate from a public hospital, the company will not give wages. Ty Sreyhoeun, a witness for the worker party during the hearing stated that she asked for permission to see the doctor then got an operation at the Hospital of Kbal Tnal on 30 April 2004. She returned to work on 7 June 2004. The company did not pay her wages during this hospitalized period. The employer will not pay wages during the period unless there is a doctor's certificate from the public hospital. The company does not recognise certificates from clinics.

2nd issue:

P.O. means Purchasing Order, including both products in the factory and unfinished products in order for workers to sew and be paid per dozen. Regarding this kind of sewing, the workers think that the sooner the price is set, the more appropriate and fair amount they can

earn. The workers clarify that with unfinished products such as shirts taken in from other factories, the employer already knows the pay rate per dozen that the supplied companies have given to their workers. Therefore, the employer should inform the workers the rate per day. In regard to sewing unfinished products (to charge per dozen) belonging to this employer, the workers claim that the employer needs only three days to set the rate per dozen.

The workers argued that research on the technical difficulties of each worker should not take more than three days because the employer could do this in respect of a small number of workers and [after that] the employer could set the price. Furthermore, the workers think that they lose their opportunity to bargain in respect of the rate because the employer informs [them of] the rate after [they] have finished the products. The employer says that in regard to the unfinished products of the company or products sourced from outside the factory, the company needs seven days to assess the workers' job before setting the rate. The employer explains that the companies always use different kinds of machines and techniques, and that is why the rate for sewing the unfinished products is different too. In addition, the rate can also be different based on the series and/or model of shirts.

3rd issue:

The number of workers totals 600. All of the workers had paid the fee of 10,100 riel for a medical check-up before starting work at Ecent Garment Factory Co., Ltd. Each worker had their health checked at the Labour Medical Department of the Ministry of Labour and Vocational Training. They paid for themselves then took the medical certificate to Ecent Garment Factory Co., Ltd.

The employer acknowledges that all workers did have their health checked before starting work and paid for the check themselves as confirmed above.

4th Issue:

At present, if there is no task for the workers for three days, the employer still pays them 100 percent of their wages. If there is no task for the workers for more than three days, only 50 percent of wages will be paid to workers. 30 percent or 50 percent of all the workers did not have work to do for periods of between 10 and 15 days a month during 2003. During October 2003, there was no work for the employees for about one month. The workers think that the suspension of the workers due to lack of work is not a suspension of the contracts as provided by the Labour Law, because the employer did not apply the procedure for suspension as set by the Labour Law. Therefore the workers think that the employer has to

pay 100 percent of wages to workers for [periods of suspension during] the last three years where the employer did not have work for them.

The employer says that the company can afford the full wages for periods of only three days if there is no work for employees. The company cannot afford 100 percent of the daily wages if there is no work for more than three days. Furthermore, the company cannot afford the demand for the last three years as claimed by the workers. The strikes held by the workers in the period 2001 - July 2004 caused this inability to pay. Due to these strikes, the employer could not deliver products to the ordering company on time. To meet the market's needs and demand as set out in the Purchasing Order Contract, the employer had to store the product and the employer then had to pay the resulting expenses related to storage. Evidence shows that due to the strike held in May and July 2004, the employer had to pay higher fees to store the products. If there was not a strike, the employer would not have failed to ship the products. So, it was argued, the employer should not be responsible for these expenses. Moreover, due to this strike, the purchaser reduced their order from the employer. These are the reasons why there is no work for the employees, and why then the employer decided to suspend the workers.

5th Issue:

At present the employer requires the workers to take paid annual leave during periods in which there are no jobs for them. The workers argue that, they do not want to take leave during this period because they want to use their leave for special leave and for going to their homelands to meet their family during the Khmer New Year, because normally they need two days for this trip. On the other hand, if the workers do not use all their leave entitlement, the employer will pay the remaining portion.

The employer says that he pays the daily wages for the workers who take annual leave during periods when there is no work. Normally, the employer gives them leave of five days and informs them about it one day in advance. If a worker does not accept, he/she can discuss this with the employer. But so far, no worker has come to discuss this matter with the employer. In regard to special leave, the employer is applying the Prakas of the Ministry of Labour.

6th Issue:

In the time before the commencement of the dispute, a total of six workers had bought medicines from the company's nurse. They ranged in value from 2,500 riel to 5,000 riel. The witness, named Chum Sivone, a worker and sick person, said that she had gone to ask for medicine from the person in charge of the first aid supplies in the weaving section when she

was sick during June 2004, but that person said that there was no more medicine left and told her to ask the company nurse. When she went there, the nurse told her that there was no more free of charge medicine to distribute as before only medicine that was for sale. She could buy the medicine if she wanted to. If not, she should go back to ask for the medicine from the person in the section. She bought the medicine because she had a fever and a headache and she wasn't going to receive medicine from the section. She knew that she should not have bought the medicine and the employer should not have sold them, because the company has an obligation to provide medicine free of charge. Therefore she decided to demand the amount spent on the medicine refunded.

The employer replies that the worker did not ask for medicine from the right person, [named] Leav. If she did, she would have received the medicine. However, the employer says that he will pay back the medicine fee if Sivone has the invoice to prove the price, and if not, she must specify the date and the sort of illness.

Sivone does not have the invoice to prove that she bought the medicine and she does not remember the date either.

7th issue:

The workers withdrew this issue from the case.

8th issue:

In respect of paid annual leave, the company currently gives 18 days annual leave per year. The company has never added one more day for the third year of work. The workers know that based on the Labour Law and an agreement between the workers and employer, the workers are entitled to 19 days for the fourth, fifth and sixth years of employment and 20 days for the seventh, eighth and ninth years of employment, with an additional day for every three years of work. The workers cannot show the agreement between the workers and employer to the Arbitration Council, because they cannot find it and do not remember where they placed it.

The employer says that it did not reach any agreement with the workers about this issue. The employer argues that, based on the Labour Law the workers are entitled to 19 days for every three years but this addition is applied to the fourth year only, not to the other years. In addition, the employer affirms that the company will add one more day for every three years but the workers must agree to forget the working seniority.

9th Issue:

The workers say that during the negotiation process in May 2004, the employer agreed to deduct the union fee of 1,000 riel per person from the wages of workers who are unionized. There is no written document to prove this agreement, but both parties accept that there is such an agreement.

The employer confirms that during the negotiation process, he agreed to deduct the salary for union contribution if the union representatives give a document to prove the composition of the union and an agreement from unionized workers giving the rights to the employer to deduct from their salaries. But the union has not given this kind of document to the employer yet. The union has only provided the list of names of the union members. The list does not have any signatures or finger prints of the concerned workers. This [was provided] to prove that there is not enough support in order for the employer to deduct the union fee as agreed.

10th issue:

In regard to the casual staff, the Arbitration Panel finds that the company employs three kinds of employees: 1- regular workers 2- probationary workers and 3- training workers as apprentices. The company requires a new worker to undergo two months of training then another two months for probation. After probation, the company recruits the worker as a regular worker if acceptable. At present, when a worker is sick or busy and cannot come to work, the company allows him/her to take leave as requested. But the company has never stated the condition that if a worker takes leave for more than half a month, the company will change his/her status as a regular worker to apprentice or probationary worker upon their return to work.

The workers confirm that when they come back to work, they lose their seniority, wages as well as their other benefits.

The employer argues that the workers accept the new jobs themselves before taking leave or upon their return to work.

11th Issue:

The workers argue that the employer has not paid night shift workers in accordance with the Labour Law. The workers demand that the employer pay the night shift workers for the last three years, until 2004, according to the Labour Law.

The employer says that he cannot pay this night shift because ILO, GMAC and the Royal Government are discussing the night work allowance. Therefore during the waiting period for

results, the employer cannot pay the night shift. The second reason is that the employer cannot afford these allowances because the employer has been affected by several strikes during these few years. The third reason is that the employer refers to the conciliation report dated 7 April 2004 in which the workers agreed not to mention the past transgressions of the employer.

12th Issue:

The workers withdraw this issue from the case.

REASONS FOR DECISION:

1st issue:

Does the employer have to pay the regular bonus to the sick workers, according to the Labour Law?

The Arbitration Council finds that, the company has never provided this regular bonus of US\$5, even when there is a certificate from the company's nurse. Moreover, the Arbitration Council does not find any Article in the Labour Law providing for the payment of the regular bonus of US\$5. Article 3 of Notification no.017/00 dated 18 July 2000 of MoSALVy states that, "*an employee working regularly during the working days of each month will receive at least US\$5 a month.*" This notification does not clearly state if a worker on sick leave will receive this bonus.

This notification does not clearly state the number of days the employee must work to be considered to have worked regularly. Moreover, the Arbitration Council has examined the company's Internal Work Rules and did not find any article providing for this regular bonus.

The Arbitration Council has decided two cases in respect of this matter, namely 26/03 - Cambodia Sportswear and 63/04 - Sign Well.

In respect of 26/03 - Cambodia Sportswear, the Arbitration Council found that:

"The benefits the company gives to the workers who are on sick leave are better than the ones stipulated in the Internal Work Rules and the provision in the Labour Law 1997. Regarding the demand for bonus during sick leave, the Arbitration Council finds that it is not reasonable.

Therefore the Arbitration Council decided to deny the demand of paying “the regular bonus” for the workers on sick leave.”

In respect of 63/04 - Sign Well, the Arbitration Council found that:

“Regarding the word Regular Bonus, the Arbitration Council finds that it is a bonus to encourage and praise any worker who has come to work regularly during the whole month, without absence with invalid reason. But the legal principle relating to the regular bonus set out in the Announcement no. 17 of Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation as well as in the Labour Law does not aim at sanctioning the employees who are on sick leaves with permission. The Arbitration Council finds that if the workers lose their entire regular bonus, US\$5, due to sick leave with permission, for any month, it is unfair for the workers because it is not their misconduct, i.e. they cannot come to work regularly because they are sick. Instead, if the employer is required to fully pay the regular bonus for the period of sick leave, it is also unfair for the employer because the employer will lose his interest for the period of sick leave.

Since the Notification no. 17 of Ministry of Social Affairs is not clear about this matter, the Arbitration Council decides, based on equity, the employer can deduct the regular bonus, for each month, in proportion to the number of days that the employees take as sick leave with permission.

Therefore the Arbitration Council orders “the company pays the regular bonus for the workers who are on sick leave with permission in proportion to the number of days that the employees has worked for.”

Moreover, the Arbitration Council finds that this regular bonus must be paid to the workers who have worked for the total number of working days per month. When a worker is sick with a legal certificate from the doctor, the worker is legally permitted to take sick leave and is not required to work, meaning that when a worker legally takes sick leave, the worker is not regarded as not working regularly. So the worker is still entitled to this regular bonus.”

The Arbitration Council follows the reasoning in Sign Well because the decision is fair for both parties. In respect of Cambodia Sportswear, the Arbitration Council notes that its decision is made based on “the actual facts in the case.” Hence, the Arbitration Council decides to apply the decision of Sign Well to this case.

In this context, employees who are on sick leave are entitled to the regular bonus in proportion to the number of days they worked if they have a valid doctor's certificate. But the worker who is absent without a valid doctor certificate is not entitled to this regular bonus.

Legally does the employer have to pay the daily wages for the workers who are on sick leave?

Point 7 of the company's Internal Work Rules mentions sick leave. Point 7 of Article 4 of the Internal Work Rules provides that *"When an employee is sick in factory, the company will give permission to that employee to take leave immediately. But if the employee is sick outside the factory or at home, the sick [person] must come to get examined at the company's clinic. If he/she cannot come, he/she must present a doctor's certificate to the employer. In respect of sick [employees] with [a] doctor's certificate, the company gives 60% of wages only for the second and third month[s]. From fourth to sixth month[s], the company will not pay wages but keep the employee's position. If the employee is sick for more than six months, the company will apply the Labour Law to lay the worker off."*

The Arbitration Council finds that according to these Internal Work Rules, the worker will receive full daily wages if he/she takes sick leave for the first month. If sick for two to three months, the worker is entitled to only 60 percent wages. If an employee is sick for more than three months, the worker does not have the right to demand wages from the company. If an employee is sick for more than six months, the company has the right to lay off the worker.

Ty Srey Noeun was sick, consequently had an operation and stayed at a private clinic at Kbal Thnal since 24 April 2004. She left the clinic on 30 April 2004, but could not return to work until 7 June 2004. She stated that she had a doctor's certificate which she received on 1 August 2004 and presented it to the company as demanded. She provided the certificate late because she was not well enough to return to work yet. She stated during the hearing that when she returned to work, the company did not pay her wages even though she was absent for about two months. She demands her wages during the period she was absent from work. The employer denies ever recognizing doctor's certificates from private clinics, only state hospitals. On the other hand, the company has a suspicion that the certificate was abnormal because the certificate was submitted on 1 August 2004 but dated 30 April 2004.

The Arbitration Council finds that based on the company's past practice, the company does not abide by Article 169 of the Labour Law or the Company's Internal Work Rules. The

company must strictly comply with the Labour Law and the Internal Work Rules as mentioned above and pay damages to the worker for the past period.

Article 120 of the Labour Law sets a three-year time limitation on demands for wages. Article 120 provides that,

“The statute of limitations for filing a lawsuit for the payment of wages is three years from the date the salary was due.

Claims subject to the statute of limitations include: the actual salary, benefits, and all other claims by the worker resulting from the labour contract, including compensation for layoff.”

Therefore, the right to receive past is limited to a three-year maximum period.

What kind of doctor has the right to certify the sickness of a worker, and what does the company legally recognize?

The employer confirms that in order to receive daily wages during sick leave, a worker must present a doctor's certificate from the state hospital. Without this kind of certificate, the company will not pay the wages. The employee side confirms that a worker should get paid during sick leave if he/she has a doctor's certificate from either a private clinic or the state hospital if it is legally permitted.

The Arbitration Council finds that neither the Labour Law nor the company's Internal Work Rules clearly stipulate this requirement. As the Arbitration Council mentions above, Article 4 of the Internal Work Rules talks about the doctor [generally] but does not say clearly if the doctor must be a doctor in a state hospital or a private clinic. Furthermore, the Arbitration Council finds that based on the actual practice in Cambodia, state officers, staff of NGOs and most companies recognize any doctor's certificate issued by hospitals or clinics with legal recognition from the competent authority.

Therefore the Ecent Company has to recognize a doctor's certificate from the clinic with legal recognition.

2nd issue:

In respect of this issue, the employees want a reasonably high wage for their sewing of dozens of products, but knowing that price of a dozen products may increase their wage, the employees asked the employer to inform them about the wage rate as soon as possible.

The Arbitration Council finds that the employees' demands are related to a right provided for by Law, that is, the employer is obliged to notify in advance the wage rate to the employees. Article 112 of the Labour Law stipulates that "The employer must take measures to inform the workers in an appropriate and easily understandable fashion of the terms regarding salary that apply to them... or at all any time that these terms change." This means that when the working conditions, especially when the wage rate of the employees changes, the employer has to ensure that the employees are clear about the wage they are going to get.

The Arbitration Panel finds that in order to adjust the wage, the employer takes into consideration any change in style or any sewing of connecting pieces of the unfinished products. This changes the wage rates that are applied to the employees. Therefore, the employer has to notify the employees about the new wage rate. The main point is the phrase, "notify the employees...about the wage terms...every change in the terms."

The Arbitration Panel has to respond as to when the employer has to notify the employees about the wage terms so that it is in accordance with the applicable law and the principle of equity. Considering the meaning of Article 112, point A of the Labour Law as mentioned above, there is no clear provision about whether or not the employer has to inform the employees about their wage rate within a certain number of days, but the Article means the employer is obliged to inform in advance. As for the number of days the employer needs for the period of notification, the Arbitration Panel needs to consider the practical needs of the employer.

During the hearing, the employer did not provide detailed reasons for his need for the seven-day process. Based on the descriptions provided by the two parties, the Arbitration Panel finds that in order to decide on the wage for the employees who are paid based on products achieved, the employer determines the technical difficulty in respect of the sewing [tasks] of individual workers only by a small sample. This kind of evaluation must not exceed three days. For products brought in from other factories, the employer has to control and evaluate again; therefore, it should take the same time the company needs for in-house production.

3rd issue:

The employer recognises that the 660 employees of the company paid 10,100 riel each for the medical check-up as the employees said. [As the parties agreed] the Arbitration Panel considers that the employees did have a medical check-up and paid the amount of money.

The argument by the employer that the company complied with the Internal Work Rules of the company (Article1, point 5) is not valid for the following reasons:

- a. The Company's Internal Work Rule does not say it is the employees who have to pay for the medical check-up, but just says: "the company recruits its employees...to work in the company, needing to fill the form as below..."
- b. Although the Internal Work Rules state that the employees have to pay for their medical check-up, this requirement is not valid as it violates Article 25 of the Labour Law, which protects the rights of workers as mentioned in Article 247 of the Labour Law.

Article 247, points (a) and (c)(4) of the Labour Law stipulates that the Ministry of Labour should issue a Declaration, stating:

"a. the conditions under which pre-employment, re-employment, periodical, and special physical exams are given; and

c. the conditions under which employers are required to establish and provide at their expense ... 4) the medical exams of workers as stipulated in point a) of this article."

Article 247 and requires the Ministry to issue a clear Prakas, setting out that the employer has to pay for medical expenses related to the recruitment of new workers and the re-hiring of old workers. The Arbitration Panel finds that Article 247 sets out clearly enough and that the employer has to pay for the medical check-up for both new and old workers. What is lacking is the Prakas of the responsible Ministry issued after the promulgation of the Labour Law of 1997. However, there is a joint Prakas no. 09 of the Ministry of Labour and Ministry of Health, issued on 19 January 1994 to fill the gap.

Article 395 of the Labour Law states that all provisions contrary to the present Law are null and void. Even though the joint Prakas no. 09, dated 19 January 1994, was

introduced before the Labour Law of 1997, the Arbitration Panel finds that the Prakas is not contradictory with the Labour Law. to the contrary, it is complementary and appropriate. Therefore, the Arbitration Panel finds that the joint Prakas is not invalidated.

4th issue:

The Arbitration Council finds that when the employer has economic difficulties that block the production process, the employer can postpone the production and work of the employees in the factory. Article 71, point 11 of the Labour Law allows the employer to postpone the production and suspend contracts with the employees for not more than two months. But the Article requires the suspension to be under the supervision of the Labour Inspector. Because of difficulties caused by the employees' strikes leading to the lowered demands of buyers and other losses, the employer suspended contracts with about 30 to 40 percent of the workers for at least three days. But the employer failed to inform the Labour Inspector about the labour contract suspension. Therefore, the suspension does not conform to Article 71, point 11 of the Labour Law.

Article 72 of the Labour Law also mentions that the employer will be exempt from paying wages to workers during the contract suspension. Since the employer did not abide by the legal procedure in respect of contract suspension as mentioned in Article 71, point 11 of the Labour Law, the employer is obliged to pay full wages to the workers during the contract suspension.

Ecent Factory has been on strike [for periods between] 2002 to 2004. Each strike lasted between three and seven days. There were four strikes in 2004. These strikes made the buyers lower their orders. This resulted in not a lot of work for the workers to do as well as a three-day contract suspension. In addition, during the strikes, the employer could not manage to ship the goods ordered by the buyer on time. Instead, the employer had to store the products. The Arbitration Council finds that the employer lost a great deal due to the strikes, which hindered it from paying full wages to the workers during the contract suspension.

But, the decision in relation to rights is based completely on the applicable Labour Law. The Arbitration Council finds that as the employer suspended the contracts and failed to follow the existing procedure as provided for in Article 17, point 11 of the Labour Law by failing to inform the Labour Inspector about the suspension, the employer cannot be exempt from his obligation to pay the employees' wages.

Article 120 of the Labour Law provides the right to employees to demand wages three years after the agreed pay day. Therefore, the employees' demand for the employer to recalculate their wages for the past three years accords with their rights as stipulated in Article 120 of the Labour Law. Therefore the employer has to pay the employees' wages for the past years in accordance with Article 120, counting from September 2001 to August 2004. The Arbitration Council understands the loss the employer is facing, but there is no provision that helps to reduce the employer's burden.

5th issue:

The Labour Law allows the employees annual leave with wages. Article 170 of the Labour Law requires the employer to allow its employees to take leave at Khmer New Year unless there is a different agreement. The Labour Law does not have any other provisions about annual leave. To ensure the production process, the employer has to manage the company's production continuity, avoiding any blockage. Therefore, the employer is obliged to arrange the employees' annual leave, making sure that there is no obstruction to the company's production process. In the case of Ecent Factory, the employer allows its employees to have days off with wages; when there is no employment, they will be informed one day before. If the employees do not agree to the holiday, the employees can talk with the employer. But, the employees did not talk or react. Therefore the Arbitration Council finds that as the employees need some time for commuting to their homeland during the Khmer New Year, the employer has to allow the employees six days off with wages, one day before and one day after the Khmer New Year, one day before and one day after Pchum Ben, and one day before and one day after the Water Festival.

Moreover, if the employees use up their annual leave, the employer has to allow them a special day off as mentioned in Article 171 of Labour Law and Prakas no. 76 of the Ministry of Labour, dated 19 February 1998.

6th issue:

It is a very good compromise that the employer asked for receipt in return for compensation for the costs of medicine. The Arbitration Council finds that the employer cannot pay the employees without any evidence, or otherwise there might be problems such as:

1. Dishonest employees demanding this compensation since they do not need to provide proof through a receipt.
2. Making employees careless and get into bad habits of not asking for receipts when they buy something, as occurred in this case. It is necessary for the employees to cooperate with the employer for their own benefit.

3. According to the facts, the employee named Ny Syvorn knew that she should not buy the medicine, and that the employer should not sell her the medicine since it was the company's obligation [to provide that medicine]. What she did was just a temporary measure, and she thought that she would be compensated by the company later. As this was her plan, she should have asked for her receipt in order to ask for compensation from the company. She did not do that however. This is carelessness on her part. The other five had similar stories to Syvorn.

8th issue:

In relation to paid annual leave, the company allows each employee to have 18 days off annually. The employee party argued that according to Article 166 (4) of the Labour Law, employees are allowed 19 days off when they have been working for three years and are given one more day off with another three years of seniority. The employee party argued that so far the employer and the employees had reached an agreement in writing, but the employees did not have any evidence to prove because they could not find it.

On the contrary, the employer accepted that by law the employees are entitled to one more day off in every three-year period; the addition cannot be applied in the third year only.

The Arbitration Council finds that if the employee party's argument is true, the employer has to abide by Article 166 (1) of the Labour Law that allows the employees the right as follows: *"Unless there are more favorable provisions in collective bargaining agreements or individual labour contracts, all workers are entitled to paid annual leave to be given by the employer at the rate of one and one-half work days of paid leave per month of continuous service."* But, since the employee party could not show any evidence to prove their agreement with their employer, the Arbitration Council does not believe that there is an agreement between the two parties. Moreover, the Article states that: *"the length of paid leave as stated above is increased for seniority at the rate of one day per three years of service."* The Arbitration Council finds that this Article can be interpreted in two ways. First, it can be interpreted as argued by the employee party. Second, it can be interpreted as the employer party mentioned. But, the purpose of the law is for the sake of both employee and employer parties.

Therefore, an interpretation that is objective and appropriate can be accepted and applied to the two parties. The Arbitration Council finds that the interpretations by the two parties should be used because they benefit the two parties. The interpretations encourage the employees to work harder and to work for the company longer, as the longer they work the more benefits they will get. The workers who work longer will have more days off. If they

abandon the work and find a new employer, they will lose the benefits. As for the employer, he benefits from the workers who have high seniority in three ways. First, work experience and fast work. Second, honest work and willingness to work longer. Third, understanding between the employer and the employee. This means that if the employees have been working for three years, they are entitled to 19 days as annual leave in the fourth year, fifth year, and sixth year; when they have been working for another three years, they will be entitled to 20 days of annual leave in the seventh year, eighth year, and the ninth year. This procedure is applied to work in every three-year period.

However, the interpretation by the employer does not encourage the employees to work longer for the employer, and the employer might be disadvantaged because the well-rounded employees leave the company, and instead the employer has to find new employees, spending time and money. The Arbitration Council considers the interpretation of the employees as acceptable.¹

The number of [additional] days shall be calculated when the employees have worked for the company for three years. If an employee has worked for three years, the employer has to allow 19-days leave. If an employee has worked for six years, the employer has to compensate that employee with an additional two days leave and allow a total of 20-days leave.

Does the employer have to give days off or money?

The employees demanded that the employer compensate them with money rather than days off for the past three years, in respect of the days which the employer did not allow them to take off. According to Article 167(4) of the Labour Law, *“Agreement by the employee to defer all or part of his rights to paid leave until the termination of the contract is not considered a renunciation. Deferment of the leave cannot exceed three consecutive years and can only apply to the leave exceeding twelve days per year.”* The Arbitration Council finds that, according to this Article, the employer has to give leave in accordance with the actual seniority of the employees as compensation to the workers who have worked for the company for the past three years. Article 167 (3) of the Labour Law states that, *“Other than this, any agreement providing compensation in place of paid leave is null and void, as is any agreement in which the worker renounces or waives his right to paid annual leave.”* Therefore, the employees cannot demand the employer to compensate in money, but has to apply the leave.

¹ The interpretation is supported by the book: Law on Profession and Labour in Cambodia (Part one) page 198, written by Mrs. Patrisa Baros of the Center for Legal Education of Community, March 2000 publication

9th issue:

The Labour Law and Article 5 of Prakas no. 305 of the Ministry of Labour requires the employer to deduct the workers' wages for the union contribution as long as there is an agreement in writing from the unionized workers.

Even though during the hearing the union party argued that it had submitted its letters to the employer and the employer said that he had not received these letters, the Arbitration Council finds that there is no evidence for the Arbitration Council to consider the arguments of the two parties.

Article 281 of the Labour Law forbids the employer from withholding union dues from the salaries of their workers and to pay the dues for them. During the hearing, the Arbitration Council finds that the employer had taken money from the employees' wages at the end of 2002 and 2004. But at that time, as there were protests against deducting the contribution from the employees' wages, the employer stopped withholding the dues for the union contribution from the employees' wages. The Arbitration Council also finds that the position the employer takes not to deduct the contribution for the union from the employees who were listed in the union's letters without any signatures or fingerprints to the employer is reasonable. The Arbitration Council finds that a list without individual employee's signatures or fingerprints to allow the employer to deduct union fees from the employees' wages cannot be considered as employees' approval to the employer to make the deduction from their wages. Unless there is an agreement in writing from the employees, and the employer takes the contribution from the employees' wages, the deduction of money can be considered as employer interference with the union's work, which the law prohibits. If the union wants the employer to take some contribution from the employees' wages, the union has to submit appropriate and acceptable documents such as a list of workers with signatures or fingerprints and collective or individual letters showing that the employees agreed to have their money taken for the purposes of a contribution to the union. Upon receiving the document, the employer has to take out the contribution and send it to the union monthly. In addition, the union has to inform the employer in writing about the change in the employees' agreement on the taking of the contribution from their wages.

The Arbitration Council finds that since the employer had no right to take the contribution from the employees' wages, as the employer did not receive any documents in writing from the employees, the employer is not entitled to compensate the union for contribution for May 2004 as demanded by the union.

10th issue:

The employee party argued that casual staff working in the company did not get the same benefits as the fulltime employees. The employer party argued that there were no casual workers, but there were some apprentices who did not get the benefits since they [just] started working in the company. When the apprenticeship is finished, those apprentices continue working for another two months as a probation period. When the probation finishes, the workers know how to work and will be promoted to fulltime employees. If they do not, the company will not promote them, and they will be dismissed. The employer argued that the employees have different ID cards: (1) cards for apprentices, (2) cards for probationary workers, and (3) cards for fulltime workers. The employee party argued that when workers asked for sick leave or business leave from half a month on, the company changed their cards from fulltime workers to apprentices when returning to work.

The Arbitration Council finds that the employer implemented the two month training for new workers as [a way] to provide induction. This training taught new workers to be apprentices. But, in order to implement the apprenticeship contract, it is necessary that the employer meet many requirements as provided for in Articles 51 - 64 of the Labour Law and Prakas no. 004, dated 4 January 2000, in which there must be a recognised trainer with expertise, clear percentage, written contracts, tests, regular supervision, reports, and achievement exams. In this regard, the Arbitration Council finds that worker training or training contracts can be applied only to new workers who do not have any work experience in the garment industry. Therefore, the inclusion of workers on leave or the workers who are sick, or any other failure that change them to apprentices, is inappropriate.

Article 68 of the Labour Law allows probation contracts only at the beginning of labour contracts. Unless the contracts are terminated and renewed, the inclusion of workers with high seniority into probation workers is inappropriate. Therefore, the employer has to make one of the following choices: if the workers want to take leave for more than the days allowed for annual holidays or special days off, they must suspend their contracts, and the employer must allow them to return to work when the suspension ends without losing their work seniority or the employer can terminate their contracts and pay compensation.

For sick workers, the Arbitration Council finds that Article 71(3) of the Labour Law requires the employer to allow the workers to suspend their contracts at least six months before the employer terminates their contracts.

12th issue:

Articles 144 and 139 of the Labour Law, and Article 5 of Prakas no.80/99, state that for night work the employer has to pay 200 percent of the normal wage. The Arbitration Council finds that the employer failed to pay wages for the night shift as set out in the Labour Law. Article 120 of the Labour Law gives workers the right to demand their wages within three years after the payment [was due]. Therefore, the employees' demand for the employer to increase the wages for work on the night shift accords with their rights as mentioned in Article 120 of the Labour Law.

The Arbitration Council has also considered the implementation of the right to demand wages by the workers based on the legal provisions in force. As there is no other provision resulting from the findings of the study on wage calculation for night shift work conducted by ILO, GMAC and the Royal Government, the Arbitration Council have decided to take the existing law on wage for night shift work into consideration.

The Arbitration Council finds that the conciliated point, dated 7 April 2004, which says that all the workers agreed to ignore the mistakes the company has made so far, is contrary to Article 13 of the Labour Law. Articles 13 and 119 of the Labour Law invalidates any rules coming from the unilateral decision, the contract, or permission, which are inconsistent with the provisions of the Labour Law or any legal documents to implement the Labour Law. Since these agreed points deprive the workers of their right to demand wages, which is the main cause of this dispute and is the right guaranteed by Article 120 of the Labour Law, this point is invalidated, and the workers have the right to demand that the employer pay the wage for the night shift work for the past three years, from September 2001 to August 2004. Therefore, according to Articles 10, 120, and 144 of the Labour Law, the employer must recalculate the wage for night workers in compliance with Article 144 of the Labour Law and Prakas no. 88/99 of the Ministry of Labour.

17th, 18th, and 19th issues:

The Arbitration Council finds that the above three issues in which the employee party demanded the company open an apprenticeship center, lower the heating in the workplace, and solve the problem that when the company import products from abroad and label them as Cambodia's products, are not related to the issues in the MoLVT report, and are not direct consequences of any issues listed in the Ministry's report. Article 33 of Prakas no. 099, dated 21 April 2004 of the MoSALVY states that *"the power of an arbitration panel to consider a dispute shall be limited to addressing those issues which are contained in the non-conciliation report including issues which are the direct consequences of the dispute but which arise from events subsequent to the date of the report."* Therefore, the Arbitration Council does not have jurisdiction over these issues.

Based on the above fact, legal principles, and evidence, the AC makes its decision as below:

DECIDES :

- 1.1. Order the company to accept any medical certificates from legally recognised public and private hospitals the workers bring with them to prove that they have been sick.
- 1.2. Order the company to give the “regular bonus” to the workers on sick leave and with appropriate certificates in proportion with the working days the workers have performed.
- 1.3. Order the company to pay full daily wages to sick workers who are on one-month leave, and pay 60 percent to workers who take 2 - 3 months leave if the sick workers have appropriate medical certificates from hospitals as mentioned in point 1.1 above.
- 1.4. Order the company to pay daily wages to all the workers who were sick within the past three years in accordance with point 1.3 above. The workers who demand this pay have to inform the employer through the union or by themselves within 30 days of this order coming into force.
2. Order the employer to inform the employees about the sewing wage rate (per dozen) within three days or 72 hours, starting from the time the employer assigns the workers to sew per dozen (both finished and unfinished products imported from outside the company).
3. Order the employer to compensate the cost for medical check-up of 10,100 riel to each worker with a medical check-up certificate by 30 September 2004.
4. Order the employer to pay 100 percent of wages for the period the employer did not have employment for the workers within the past three years, counting from September 2001 to August 2004. The employer has to pay all the workers who are entitled to this payment by 30 September 2004.
5. Reject the workers’ demand for the employer to pay for the annual leave for the past three years. Order the employer to fix a clear work schedule for annual leave for individual workers.
- 6.1. Reject the demand by the six workers for the employer to pay for the medicine they bought in the company’s pharmacy.
- 6.2. Order the company to allocate medicine to each section of the company; effectively notify the names of medicine distributors or medical cabinets in each section so that the workers know; the company must identify clearly the responsibilities of the person in charge of medicine distribution and the physicians for each section and the [head] physician of the company.

- 7.1. Order the company to add one more day to annual leave in every three-year period, that is, 18 days for the first, second and third years; 19 days for the fourth, fifth and sixth years; and 20 days for the seventh, eighth and ninth years.
- 7.2. Order the employer to compensate days to the workers who deserve additional days based on their actual work seniority within the past three years up to the day this order comes into force.
- 8.1. Reject the demand by the employees that the employer withhold salary for the union contribution since May 2004.
- 8.2. Order the employer to take the union contribution from the employees' wages when it receives from the union the list of names with signatures or fingerprints of the union members who agreed to have their wages deducted for the contribution. The union has to inform the employer in writing about any changes in agreement by the workers to have their wages reduced for the union contribution.
- 9.1. Order the employer to use workers as apprentices only when the worker does not have experience in the garment industry.
- 9.2. Order the employer to use workers as probationary workers only when they are new workers.
- 9.3. Order the employer to allow the old workers who have taken sick or business leave and the workers whom the employer used as apprentice or probationary workers to return to work as fulltime workers.
10. Order the employer to recalculate the wages of the night shift workers for the past three years, counting from September 2001 to August 2004 in accordance with the Labour Law.
11. Reject points 17th, 18th and 19th of the workers' demands.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party:

Name: You Sunty

Signed:

Arbitrator chosen by the worker party:

Name: Tuon Siphann

Signed:

Chair of arbitration panel:

Name: Men Nimith

Signed:

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.