



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 64/07 – Focus Footwear

Date of Award: 14 August 2007

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Ouk Ry**

Arbitrator chosen by the worker party: **Ven Pov**

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

DISPUTING PARTIES

Employer party:

Name: **Focus Footwear Company**

Address: Toul Sangke Village, Sangkat Toul Sangke, Khan Russei Keo, Phnom Penh

Telephone: 011 886 100 Fax: N/A

Representatives:

1. Ms. Prign Sophoan Deputy Director of the Company
2. Ms. Vann Kunthea The Company's Administrative Manager.

Worker party:

Name: **Khmer Youth Federation Trade Union (KYFTU)**

Address: No. 34, Street 265, Sangkat Toeuk Laak III, Khan Toul Kork, Phnom Penh

Telephone: 012 276 642, 012 796 007 Fax: N/A

Representatives:

1. Mr. Nong Samnang Coordinator of KYFTU;
2. Prum Chanarin Coordinator of KYFTU;
3. Ché Reatrey Coordinator of KYFTU;
4. Heang Lim Hong Coordinator of KYFTU;
5. Mov Sovanna President of Khmer Youth Trade Union at the factory;

6. Thy Ny Vice-President of Khmer Youth Trade Union at the factory;
7. Von Sophon Secretary of Khmer Youth Trade Union at the factory.

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. Members of Khmer Youth Trade Union still demanded that the company convert the labour contracts that exceeded two years with the labour contract of undetermined duration. On the contrary, the company claimed that it practices the six-month labour contracts, in the other word, the company only follows the Labour Law.
2. Members of Khmer Youth Trade Union demanded that the company hold meetings among workers during working hours. The company argued that the company holds meetings prior to working hours, but the company allows workers to leave early too.
3. Representatives from Khmer Youth Trade Union still demanded that the company deduct union dues from wage of workers who are members of Khmer Youth Trade Union. The company claimed that they cannot do as requested by the representatives of Khmer Youth Trade Union because the company has no free staff to do so.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B 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. 076 dated 10 May 2007 (Fifth 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 which took place on 10 July 2007 was unsuccessful, and the non-conciliation report No. 647/07 was submitted to the Secretariat of the Arbitration Council on 11 July 2007.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd.,
Sangkat Tonle Basak, Khan Chamkarmorn, Phnom Penh.

Date of hearing: 24 July 2007 (from 14:00 to 17:00)

Procedural issues:

Having received the complaint from the Khmer Youth Trade Union on 9 May 2007 which demanded that the company improve the working conditions, the Department of Labour Disputes designated its expert official to settle and conciliate the dispute. Six out of a total of nine issues were successfully conciliated on 29 June 2007. The three non-conciliated issues were submitted to the Arbitration Council on 11 July 2007 in the non-conciliated report No. 647/07 issued on 10 July 2007.

Having received the case, both disputing parties were summoned to attend a hearing on 24 July 2007 at 14:00.

Both parties were present at the hearing summoned by the Arbitration Council. The Arbitration Council made a further attempt to conciliate the three remaining issues, and Issue 2 of the three non-conciliated issues was conciliated. Therefore, the Arbitration Council considers only the two remaining non-conciliated issues - Issues 1 and Issue 3 based on the evidence and the fact findings as follows:

EVIDENCE

Witnesses and experts: *names*

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

1. Letter authorizing legal rights of the Company Director dated 24 July 2007 to Ms. Vann Kuthea, the Administrative Manager of Focus Footwear Factory;
2. Internal Work Rules of the Company dated 19 November 2007;
3. Business License registration No. 1449 dated 16 May 1997;
4. Name list of a number of workers who rejected their wage deduction for the union due to Khmer Youth Union;

Provided by the worker party:

1. Receipt of Union Registration dated 19 July 2007;
2. Letter No. 18 dated 10 January 2007 of Khmer Youth Federation Trade Union to the Director of Focus Footwear Company notifying the selection of committee members of Khmer Youth Trade Union at Focus Footwear Company listing the elected candidates as follows: Ms. Mov Sovan, President; Ms. Thy Ny, Vice-President; and Ms. Vann Sophon, Secretary;
3. Name list (without thumbprints and signatures of the representatives of Khmer Youth Trade Union) of members of Khmer Youth Trade Union at Focus

Footwear Company requesting the company to deduct 1,000 riels from their wage as monthly union due to Khmer Youth Trade Union, dated 25 July 2007.

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

1. Report No. 647 dated 10 July 2007 on the collective labour dispute conciliation at Focus Footwear Company;
2. Minute of the collective labour dispute conciliation of Focus Footwear Company dated 29 June 2007.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 281 dated 17 July 2007 to the worker party to attend the hearing;
2. Invitation No. 280 dated 17 July 2007 to the employer party to attend the hearing.

FACTS

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

The Arbitration Council finds that:

Focus Footwear Company started its operation in 1997. The company employs around 1,150 workers in total. Khmer Youth Union at the company claimed in the hearing that out of this number 809 workers are its members.

Issue 1:

- In the hearing, the worker party claimed they demanded that the company convert the over two-year labour contracts with the undetermined duration contracts. The Arbitration Council finds that the demand was stated in the non-conciliated report. However, in the hearing, the worker party made another claim within Issue 1 by demanding that the company provide workers with five percent severance pay when labour contract of each worker expires and be renewed.
- Based on both parties' testimonies, Focus Footwear Company has been practising fixed duration contracts of six months with all workers since 1997.
- Workers have already signed the six-month contracts several times since they started working. Some workers have worked for the company since it started operation, meaning that some workers have already worked for the company from five to eight years. The company did not refute the workers' claim.

- Once the six month contracts expired, the company always signed other new six-month contracts with workers without paying them the five percent severance pay. However, when a worker was dismissed by the company or his or her labour contract terminated, the company paid him or her the five percent severance pay. The company considers that when workers sign another six month contracts it means they were willing to continue working for the company and workers' contracts were not terminated, thus, the company did not need to provide them the five percent severance pay. The worker party did not refute the company's claim.
- The worker party claimed that the employer provided workers the severance pay only when the employer terminated contracts. If workers themselves terminated the contracts, the employer would not provide workers the severance pay. The employer did not refute the claim. Thus, the Arbitration Council finds that the employer provided workers the severance pay only when the employer terminated workers' contracts.

Issue 2

- The workers demanded that the company deduct union due of 1,000 riels per month from of each member of Khmer Youth Trade Union who is willing to have his or her wage deducted.
- On 24 December 2006 in Toul Sangke Village, Sangkat Toul Sangke, Khan Russey Keo, Phnom Penh, Khmer Youth Federation Trade Union held an election to choose Committee Members of Khmer Youth Trade Union at Focus Footwear; as a result, Ms. Mov Sovann was elected as President, Ms. Thy Ny was elected as Vice-President and Ms. Vann Sophon was elected as Secretary.
- On 10 January 2007, Khmer Youth Federation Trade Union notified the company about the elected Committee Members of Khmer Youth Trade Union at the company. The company claimed to have received the Notification on at 02:00 p.m. on 11 January 2007.
- The worker party claimed in the hearing that Khmer Youth Trade Union at the company had requested the company to deduct the union dues. The worker party did not provide the name list of its members who were willing to have 1,000 riels deducted from their wages for union dues.
- The worker party claimed in the hearing that Khmer Youth Trade Union had registered at the Ministry of Labour, Vocational Training and received a receipt dated 19 July 2007. The union has yet received any response from the Ministry regarding the registration.
- The employer party claimed in the hearing that the company could not deduct union dues for the union because the system for paying workers' monthly wages had

already been installed and the company had spent a lot of money for having it installed. Thus, the company finds it very hard to change the system. If the system has to be replaced, the company will spend a lot more money.

REASONS FOR DECISION

Issue 1: The demand that the company convert the six-month labour contract that exceeded two-year to undetermined duration contracts

The company has signed the six-month fixed duration labour contracts since the start of its operation in 1997. The workers requested the company to convert the exceeding two-year contracts to become undetermined labour contracts.

Based on Award 10/03 – Jacqsintex, Issue 1, “Article 76 (2) of the Labour Law provides that, *‘The labour contract signed with consent for a specific duration cannot be for a period longer than two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years.’*”

Article 73 (5) of the Labour Law provides that, *“If the contract has a duration of more than six months, the worker must be informed of the expiration of the contract or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have a duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67.”*

In previous Awards, the Arbitration Council noticed that in paragraph 2 of Article 67, the term “renewal” is not clearly stated, which leads to different understanding and interpretation that “Renewal” refers to “the duration of each renewal” or “Renewal” refers to “Acts of renewal”. The Arbitration Council considers that paragraph 2 of Article 67 of the Labour Law refers to the total duration of all labour contracts by adding the duration of the first contract and duration of all the renewed contracts. (See Awards 10/03 – Jacqsintex, Issue 1 and 36/06 – Mondotex, Issue 2)

Arbitration Council is bound by the Article 312 of the Labour Law to comply with the law.

However, due to the ambiguity of the Labour Law with the term “renewal” in paragraph 2 of Article 67, it is valid that the Arbitration Council considers the context of this Article to fully understand the true meaning of paragraph 2 of Article 67.

The Cambodian Labour Law shows the tendency towards undetermined duration contract as stated in paragraph 7 and 8 of Article 67. The cause of this tendency is because the undetermined duration contract ensures the job security and it is essential for workers as well as employer because long-term job encourages worker’s commitment. Moreover, paragraph 5 of Article 73 states that a fixed duration contract shall become a contract of

undetermined duration, if prior notice of its termination is not given and if its total length exceeds the time limit specified in paragraph 2 of Article 67. The total length stated in paragraph 2 of Article 67 shows that the two-year duration stated in paragraph 2 of Article 67 refers to the maximum total length, but not the duration of each renewal.

Similarly, paragraph 3 of the International Labour Organization (ILO) Guideline No.166 dated 1982 on The Termination of Labour Contract states that a fixed duration contract shall not be used for long-term labour. This guideline also provides that a fixed duration contract shall become an undetermined duration labour contract, if employer renews the contract multiple times in which the total length exceeds two years. Even though this guideline is not binding, it provides a helpful context for the interpretation of Article 67.

Finally, by looking at the history of the Labour Law (1997), we find that the draft of this law was in French and was latter translated into Khmer. Even though the Khmer version of this law was enacted by the National Assembly, paragraph 2 of Article 67 was not precise. Therefore, we may look at the original version in French language to fully understand the Khmer version. In French, paragraph 2 of the Labour Law provides that, "*Le contrat de travail conclu pour durée déterminée ne peut être conclu pour une durée supérieure a deux ans. Il peut être renouvelé une ou plusieurs fois pour autant que le renouvellement n'entraîne pas un dépassement de la durée maximale de deux ans.*"

Thus, it clearly states in French that a fixed duration contract becomes a contract of undetermined duration, if the total length of any renewal of the labour contract exceeds two years.

According to the above base, the Arbitration Council considers that paragraph 2 of Article 67 should be interpreted that a fixed duration contract becomes a contract of undetermined duration once any renewal of the labour contract leads to the total length that exceeds two years.

Therefore, in this case, the Arbitration Council agrees with the interpretation of the previous interpretation of the Arbitration Council that when the total length of all contracts including the duration of the first contract and duration of all renewed contracts exceeds two years, the contract shall become the labour contract of determined duration.

In this case, the Arbitration Council finds that workers have signed six-month labour contracts since they started working at the company until now. Some have worked for 5, 6, 7, or 8 years. Thus, the Arbitration Council considers that labour contracts of these workers exceeded two years.

Therefore, the Arbitration Council decides that the employer shall convert workers' labour contracts of a total length (the duration of the first contract plus the duration of renewed contracts) exceeding two years to undetermined duration labour contracts.

In the hearing, the workers demanded that the employer provide workers the five percent severance pay each time the employer renews worker's contract.

Article 312 (1) of the Labour Law provides that, "*The Council of Arbitration has no duty to examine issues other than those specified in the non-conciliation report or matters, which arise from events subsequent to the report, are the direct consequence of the current dispute.*"

The Arbitration Council considers that the demand for the severance pay was not stated in the non-conciliated report and it was not an issue that arose after the minute, which was the direct consequence of issue 1.

Moreover, the Arbitration Council notices that the worker party may have the chance to be questioned and their demands resolved by the Arbitration Council, if the demands were stated in the non-conciliated report or if the issue, which arose after the minute, is the direct consequence of the dispute.

Therefore, besides Issue 1 which was already considered by the Arbitration Council, the Arbitration Council does not consider the workers' demand that the company provide them the severance pay each time their contracts expired and renewed.

Issue 3: The demand that the company deduct union due of 1,000 riels from each union member who is willing to have their wage deducted

To find out whether or not the workers can demand the company to deduct the union dues for them, the Arbitration Council will consider two areas. Firstly, according to the Labour Law and relevant provisions, should the employer deduct union dues of 1,000 riels from the wage of workers who are union members? Secondly, according to the Labour Law, does Khmer Youth Union have the legal rights to demand that the company deduct union dues from workers who are its members?

1. According to the Labour Law and relevant provisions, should the employer deduct union dues of 1,000 riels from the wage of workers who are union members?

Paragraph 2 of Article 129 of the Labour Law provides that, "*...the worker can authorise deductions of his wage for dues to the trade union to which he belongs. This authorisation must be in writing and can be revoked at any time.*"

Article 281 of the Labour Law provides that, "*All employers are forbidden to deduct union dues from the wage of their workers and to pay the dues for them.*"

The Arbitration Council considers that Article 129 and Article 281 of the Labour Law seem to be contradictory to each other. However, in previous awards, the Arbitration Council decide that the content of Article 281 of the Labour Law was established to protect workers' rights and forbid an employer from using interfering acts influence the union as stated in

Article 280 of the Labour Law. (See Awards 05/03 – Top One, Issue 1; 62/04 – Ecent, Issue 8; 94/04 – Eternity Apparel, Issue 4; 99/06 – AIA, Issue 12; 16/05 – New Point World Trade (Cambodia), Issue 11). The Arbitration Council considers that the Labour Law does not forbid an employer from deducting union dues from workers' wages once the employer is requested in writing to do so. In this case, the employer is obliged to deduct union dues from workers' wages.

In addition to Clause 5 (5) of Prakas No. 305 dated 2001 of the Ministry of Social Affairs, Vocational Training and Youth Rehabilitation states that, *“Any worker who is member of a union, may request in writing 15 days in advance to an employer to deduct union due from his wage to the trade union to which he belongs as stated in Article 129 of the Labour Law.”*

Based on the content of the above-mentioned Law; therefore, the employer is obliged to deduct union dues from the wage of workers who are members of the union as requested in writing 15 days in advance.

2. According to the Labour Law, does Khmer Youth Trade Union have the legal rights to demand that the company deduct union dues from workers who are its members?

Paragraph 4 of Article 5 states that, *“Any trade union established with an enterprise or an establishment is required to provide evidence of its representativeness. The evidence shall meet all the criteria stated in Article 277 of the Labour Law.”*

Paragraph 1(A) of Article 277 provides that, *“The representativeness of a professional organisation or a union of professional organisations is recognised in the framework of geography or profession or, if necessary, by the type for which the union was registered to operate. The representativeness is determined by the following criteria:*

a) be legally registered as provided for in Article 268 above;...”

Article 268 of the Labour Law provides that, *“In order for their professional organisation to enjoy the rights and benefits recognised by this law, the founders of those professional organisations must file their statutes and list of names of those responsible for management and administration, with the Ministry in Charge of Labour for registration. All request for registration shall be appended with the statement of constitution of the organisation.*

If the Ministry in Charge of Labour does not reply within two months after receipt of the registration form, the professional organisation is considered to be all ready registered...”

The Arbitration Council considers that the rights of a professional organisation stated in Article 268 of the Labour Law includes the rights to demand that an employer deduct union due from workers' wages to a trade union with the consent of workers. (See Awards 62/04 –

Ecent Cambodia, Issue 9; 94/04 – Eternal Apparel (Cambodia), Issue 4; and 99/04 – AIA, Issue 12)

Based on the content of Article 268 above, the Arbitration Council considers that the two-month duration after receiving of the registration form is the duration in which the Ministry in charge of Labour may reply whether or not a trade union can be registered or if the Ministry in charge of Labour fails to reply, the trade union is considered to be registered.

In this case, the union held an election on 24 December 2006 and only until 19 July 2007 that the union received the receipt of registration from the Ministry of Labour and Vocational Training. By counting from the date of which Khmer Youth Trade Union at the company received the registration receipt to the hearing date of 24 July 2007, it was only five days. The Arbitration Council considers that the union has yet received a response from the Ministry in charge of Labour regarding its registration and the union has received the registration receipt for only five days not two months to be considered as registered as stated in Article 268 (1) of the Labour Law.

Within this transitional period, the Arbitration Council does not know what the Ministry in charge of Labour will response to the union regarding the registration.

Therefore, the Arbitration Council considers that Khmer Youth Trade Union does not have the right to demand that the company deduct union dues from wages of workers who are its members.

On the other hand, the Arbitration Council also considers that in order for the Arbitration Council to decide on the demand of workers that the company deduct union dues of 1,000 riels from wages of workers who are union members, the union has to provide evidence or documents including name list of its members who agreed to have the company deducted of 1,000 riels from their wage for union dues, but the union provided only the name list of workers, number of order, name, sex, ID, group and unit with no signature from each worker and no signature from union representative(s) which was considered as informal document by the employer.

In conclusion, the Arbitration Council decides that while waiting for the union's registration from the Ministry of Labour and Vocational Training, Khmer Youth Trade Union at Focus Footwear does not have the rights to demand that the company deduct union dues of 1,000 riels from wages of workers who are its members.

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

DECISION AND ORDERS

Issue 1

- Order the employer to sign the labour contracts of undetermined duration in replacement of six-month fixed duration contracts which exceeded two years.
- Order the employer to convert the labour contracts with the total length (the duration of the first contract plus the duration of all renewed contracts) exceeding two years to become the labour contracts of undetermined duration.

Issue 3

- While waiting for the union's registration from the Ministry of Labour and Vocational Training, Khmer Youth Trade Union at Focus Footwear does not have the rights to demand that the company deduct union dues of 1,000 riels from wages of workers who are its members.

Type of Award: Non-Binding Award

This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition to the Minister of Labour through the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Ouk Ry**

Signature:

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: