KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: **66/06 – Gold Lida**

Date of Award: **30 August 2006**

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATOR PANEL

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

Arbitrator chosen by the worker party: **Sin Kim Sean**

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

DISPUTING PARTIES

1- Employer Party

Name : **Gold Lida Garment Co., Ltd. (Gold Lida Company)**

Address : Street 650, Sangkat Chak Angrae Kraom, Khan Meanchey, Phnom Penh

Telephone : 016 689 896 Fax: N/A

Employer Representatives:

1. Ms. Duk Socheata Administrative Manager;
2. Ms. Sok Chanthy Administrative Assistant.

2- Worker party

Name : **Cambodian Apparel Workers' Democratic Union (CAWDU)** in **Gold Lida Factory**

Address : No. 6C, Street 476, Sangkat Tuol Tumpung, Khan Chamkarmon, Phnom Penh

Telephone : 023 210 481, 012 998 906 Fax: N/A

Worker Representatives:

1. Mr. Suon Sayon — President of **CAWDU** in Gold Lida Factory;
2. Mr. Prak Samnang — Vice-President of **CAWDU** in Gold Lida Factory;
3. Mr. Chhuon Monyrom — Secretary of **CAWDU** in Gold Lida Factory;
4. Mr. Oum Visal — Conciliation Officer of **C.CAWDU**.

ISSUES IN DISPUTE

(In the non-conciliation report)

1- The workers demanded that the company reimburse the medical check fee of 10,100 riels. The employer party rejected the demand arguing that the company allowed the workers to go for medical checks without deducting their wages and bonuses. The company claimed that if the company was to pay for the fee, the company would deduct their wages and bonuses on the day the workers went for medical checks.

2- The workers demanded that the company provide them with proper wages during the maternity leave in accordance to the Labour Law. The employer rejected the workers' demand.

3- The workers demanded that the company provide those who work overtime until 9:00 p.m. with a meal allowance of 500 riels per hour. The company rejected the workers' demand.

4- The workers demanded that the company use both attendance record and a card puncher. The employer can use the card puncher always, but the attendance record only for a month.

5- The workers demanded that the company implement the agreement made on 11 November 2005 which states that a worker, who has worked for three months, shall be employed as a regular worker. The employer rejected the workers' demand arguing that the company would check to see if a worker has worked for more than three months, and the company would consider employing him or her as a regular worker.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B (Article 309 to 317) of the Labour Law (1997); the Prakas on the Arbitration Council 099/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of the Arbitration Council 099/06 (Fourth Term).

An attempt was made to conciliate the collective labour dispute that is the subject of this Award, as required by Chapter XII, Section 2(A) of the Labour Law. However, the

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conciliation hearing was unsuccessful, and the non-conciliation report No. 1108 dated 8 August 2006 was submitted to the Secretariat of the Arbitration Council on 8 August 2006.

<u>HEARING AND SUMMARY OF PROCEDURE BEFORE ARBITRATION COUNCIL</u>:

Place of Hearing : **The Arbitration Council**, Phnom Penh Centre, Building A, Sothearos Blvd, Sangkat Tonle Bassac, Khan Chamkarmon, Phnom Penh.

Date of the Hearing : 17 August 2006 (from 02:00 p.m. to 05:30 p.m.)

Procedural Issues:

Having received the complaint from the workers in Gold Lida Factory on 24 July 2006 which demanded that the company implement proper working conditions in accordance with the Labour Law, the Department of Labour Disputes designated its expert official to settle and conciliate the dispute, five out of a total of ten issues were successfully conciliated in the last conciliation session held on 28 July 2006.

On 8 August 2006, the Secretariat of the Arbitration Council received the case and the report on the non-conciliated labour dispute No. 1108 dated 8 August 2006 from the Director of the Department of Labour Disputes.

Having received the case, the Arbitration Council summoned the employer party, the union in the factory and the workers to attend a hearing to settle the five non-conciliated issues on 17 August 2006 at 2:00 p.m. Both parties were present at the hearing summoned by the Arbitration Council. At the hearing, the Arbitration Council made a further attempt to conciliate the non-conciliated issues, one (Issue 4) out of the non-conciliated issues was resolved. Therefore, in this Award, the Arbitration Council considers the four non-conciliated issues based on the evidence and the findings of fact as follows:

<u>EVIDENCE</u>

Witness and experts besides the parties: N/A

<u>Documents, exhibits and other evidence considered by the Arbitration Council</u>

a. Provided by the employer party:

1- Chart of the 13 month salary of five workers on maternity leave in Gold Lida Company;
2- List of workers, who have not been given work to do, from Concept Garment Company;

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3- List of workers who received meal allowance when working overtime;
4- List of workers who received meal allowance without working overtime.

b. Provided by the worker party:

1- Brief report on the case of Cambodian Apparel Workers' Democratic Union in Gold Lida Factory dated 16 August 2006;
2- List of 33 casual workers, who are union members, demanded that the company employ them as regular workers;
3- Agreement dated 8 May 2006 on the conversion of those who have worked for more than three months as regular workers;
4- Conciliatory Agreement between the employer party and the worker party assisted by the Arbitration Council dated 11 November 2005;
5- Letter No. 211 dated 9 March 2006 of the Ministry of Labour and Vocational Training on the recognition of the union leaders and official certificate of registration of Cambodian Apparel Workers' Democratic Union in Gold Lida Factory;
6- Certificate of Registration of Cambodian Apparel Workers' Democratic Union in Gold Lida Factory dated 9 March 2006;
7- Statute of Cambodian Apparel Workers' Democratic Union in Gold Lida Factory dated 9 March 2006.

c. Provided by the Ministry of Labour and Vocational Training:

1- Letter No. 1024 dated 17 August 2006 of the Minister of the Labour and Vocational Training on the collective labour dispute conciliation in Gold Lida Company;
2- Report No. 1108 on the collective labour dispute conciliation in Gold Lida Company of the Director of the Department of Labour Disputes;
3- Minute of the collective labour dispute conciliation in Gold Lida Company dated 28 July 2006.

d. Provided by the Secretariat of the Arbitration Council:

1- Invitation No. 314 dated 11 August 2006 to the worker party to attend the hearing;
2- Invitation No. 315 dated 11 August 2006 to the employer party to attend the hearing.

FACTS

1- Having examined various documents submitted to the Arbitration Council;
2- Having examined the report on the collective labour dispute conciliation;

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3- Having listened to the testimonies from both the employer party and the worker party;

The Arbitration Council finds that:

- Gold Lida Company is currently employing approximately 600 workers.
- Gold Lida Company started its operation in Cambodia in late 1999. The company recruited some new workers and some workers were transferred from Phnom Penh Garment Company, which has been operating since 1995.
- In the documents sent to the Secretariat of the Arbitration Council, there was nothing with the name of Phnom Penh Garment, only The Concept Garment.
- Gold Lida Company acknowledged the seniority status of the workers who were transferred from Phnom Penh Garment Company but neither companies had any contract specifying their obligation regarding the transferred workers.
- In 1999, Gold Lida Company borrowed some cutting workers from Phnom Penh Garment Company and at the end of each month, Gold Lida Company and Phnom Penh Garment Company jointly paid the workers' wages.
- According to the list of contributors in August 2006, Cambodian Apparel Workers' Democratic Union in Gold Lida Company had 250 members.
- At the hearing, the employer accepted that, since the start of its operation, the company has never paid the medical check fee to its workers.
- In principle, before a worker is officially employed, the company always interviews him/her and requires him/her to have a medical check. Based on the positive result of the medical check, the company informs the candidate to come to work as its worker. However, the company refused to pay the medical check fee to the candidate; the company considered that obtaining the medical check before working for the company was the obligation of each worker.
- Each worker spent 10,100 riels of their own money for the medical check.
- So far, Gold Lida has been providing its workers with only 50 percent of the regular wage, 50 percent of the seniority bonus (US$2 per year) and 100 percent of annual leave compensation during maternity leave. The company does not provide its workers with the attendance bonus.
- Practically, because of a previous agreement with the workers (neither parties stated the date), Gold Lida Company has provided those who work overtime with a meal allowance of 1,000 riels. The company has given the meal allowance to its workers since the start of its operation until 2001, even when there was no overtime work. Overtime work may start from 4:00 p.m. to 6:00 p.m. or to 9:00 p.m.

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- For those who were recruited to work for the company from early 2001, the company did not provide them any meal allowance if they did not work overtime.
- According to the conciliatory agreement dated 11 November 2005, the company agreed to officially convert the casual workers to become regular workers. Even though this conciliated agreement does not state it, both parties accepted that casual workers are those who have worked for more than three months and they shall be employed as regular workers.
- According to the name list submitted by the Cambodian Apparel Workers' Democratic Union in Gold Lida Company, 32 casual workers demanded that they be employed as regular workers.

REASONS FOR DECISION

Issue 1:

At the hearing, the worker party asserted that the company has not paid the medical check fee to those who worked for Gold Lida Company, even though they were the workers who have been transferred from Phnom Penh Garment Company since 1999. The worker party asserted that in accordance to the Labour Law, the employer is obliged to pay the medical check fee of the workers.

The employer party claimed that the medical check is the burden of the workers. In principle, the company requires applicants and successful candidates to have a medical check. The decision to employ a worker is based on the compulsory medical check and if the result of the medical check is not satisfactory, the company does not accept the candidate. On the other hand, the workers, who had worked for Phnom Penh Garment Company between 1995 and 1999 before transferring to Gold Lida Company in 1999, should not demand that Gold Lida Company pay them the medical check fee because they were recruited by Phnom Penh Garment Company.

According to Article 247 (C) of the Labour Law and Joint Prakas No. 09 dated 19 January 1994 on the medical check-up for both Cambodians and Expatriates who work in Cambodia, employer is required to pay the medical check fee for the workers. Clause 7 of this Joint Prakas states, "*Owner of the enterprise shall pay the fee of medical check-up for his or her workers.*"

In the previous rulings, the Arbitration Council decided that Joint Prakas No. 09 is still valid, even though this Prakas was issued under the Labour Law (1992) (See Awards 02/03 – Chou Hsing, 53/04 – Kung Hong and 60/04 – United Art).

Moreover, the Arbitration Council considers that Article 247 of the Labour Law provides adequate legal bases for concluding that the employer is obliged to pay the medical check fee for the workers. The content of Article 247 (C) clearly states that once a new

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Prakas is made, it shall require employer to pay the medical check fee for the workers. With this regard, the employer is legally obliged to pay the medical check fee for the workers.

In this case, the workers had already paid for the medical check fee before submitting the result of the medical check to the employer for employment. Having the workers pay for the medical check fee in advance does not allow the employer to be free from the obligation as stated in Clause 7 of the Joint Prakas and Article 247 (C) of the Labour Law.

Based on the previous rulings on the medical check-up fee, the Arbitration Council decided that the employer had to reimburse the medical check fee to the workers (See Awards 02/03 – Chou Hsing, 21/03 – Loyal Cambodia and 19/04 – Kbal Koh)

Moreover, Article 377 of the Labour Law states that those who violate the provisions of Article 247 or violate the Prakas on the Compliance Guide of the Occupational Health Department shall be fined one hundred twenty (120) days to three hundred sixty (360) days of the daily wage and imprisoned from one to five years, or only one of both penalties. This Article confirms that if an employer fails to comply with Article 247, the employer shall be fined in cash and punished in accordance to the Law.

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

Regarding the content of this Article, the workers have the rights to claim for medical check fees from the employer within a period of three years starting from the day the payment was made. Unless the claim was made within the period of three years, the workers would lose their rights to demand.

In this case, the workers claimed for the payment of the medical check-up fee from the company through a lawsuit dated 24 July 2006, which the company submitted to the Department of Labour Disputes. The Arbitration Council considers that the date of the lawsuit can be considered as the legal period of the claim for the medical check-up fee.

Therefore, the Arbitration Council decides that the employer shall pay the medical check fee of 10,100 riels to those who have had the medical check and made his or her own payment, if the payment of their medical check was made within the period of three years before 24 July 2006.

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However, the payment of medical check-up, which was made more than three years starting reversely from 24 July 2006, is regarded as invalid claim, thus the company shall not pay for it.

Issue 2:

So far, the company has provided with 50 percent of the regular wage to those who were on maternity leave in accordance to Article 183 (1) of the Labour Law which states, "*During the maternity leave as stipulated in the preceding article (Article 182), women are entitled to half of their wage, including their perquisites, paid by the employer*". Regarding the calculation of wage during maternity leave, the employer party has provided its female workers with 100 percent of annual leave compensation and 50 percent of seniority bonus. However, the company did not provide the 50 percent of the attendance bonus as demanded by the workers and the employer claimed that only the workers who came to work regularly are entitled to the bonus. Female workers did not come to work so they were not entitled to the bonus during the maternity leave.

On the other hand, the workers demanded that the company calculate the wage during the maternity leave by adding the average wage during the last 12 months with:

- 50 percent of the attendance bonus;
- 100 percent of the seniority increment;
- 100 percent of the annual leave compensation (1 month, 1 day and a half).

The workers made such claim by referring to Article 183 (1 and 4). Paragraph 1 of the Article states that during the maternity leave, women are entitled to half of their wage including their perquisites and Paragraph 4 of the Article states that only women, who have a minimum of one year of uninterrupted service in the enterprise, shall be granted maternity leave pay.

The Arbitration Council considers that Article 183 (4) implies seniority bonus is a perquisite as stated in Article 103. The purpose of this paragraph is to provide women who are on maternity leave with at least half of the benefits that they once received as regular workers.

Moreover, according to Clause 5 of Notification No. 017 dated 18 July 2000, the employer shall pay the seniority bonus to all workers. Clause 5 states, "*Workers, who have been working for more than one year shall receive a seniority bonus of US$2 per month; for more than two years shall receive a seniority increment of US$3 per month; for more than three years shall receive a seniority increment of US$4 per month; and for more than four years shall receive a seniority increment of US$5 per month.*"

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The Arbitration Council finds that this seniority bonus is provided in Article 183 and the employer shall provide female workers on maternity leave with at least half of the seniority bonus.

In this case, Gold Lida Company did not provide and was not willing to provide the female workers on maternity leave with the attendance bonus of US$5 per month claiming that the US$5 was the money given to motivate workers who came to work regularly—everyday; besides the female workers on maternity leave did not come to work, so the company did not have to give them the US$5. At the hearing, the worker party asserted that the workers would have come to work regularly, if they did not deliver the baby.

According to Article 183 of the Labour Law, only women having a minimum of one year of uninterrupted service in the enterprise are still entitled to half of the wage, including the perquisites and the same monthly attendance bonus and annual bonus (seniority bonus) as they used to receive.

The Arbitration Council considers that the attendance bonus is still under the provision of Article 183, which can be defined as perquisites. However, Article 183 does not clearly state what is included as perquisites. The Arbitration Council finds Clause 3 of Notification No. 017 is clear, and provides that a worker who works regularly on the full number of working days within each month shall receive at least US$5 of attendance bonus per month. Moreover, the Arbitration Council considers that their leave is authorized by the Law and the Labour Law states that they shall receive at least half of the wage and benefit they used to receive as a regular worker.

Furthermore, Article 103 (4) of the Labour Law states that wage includes "Bonuses and indemnities". Article 183 (2) states, "*Women fully reserve their rights to other benefits in kind, if any.*" Based on Article 103 and Article 183, the Arbitration Council considers that female workers are entitled to their attendance bonus.

Meanwhile, Article 183 (4) of the Labour Law states that the wage benefits specified in Article 183(1) shall be granted only to women having a minimum of one year of uninterrupted service in the enterprise. Based on the previous rulings on wage and perquisites of female workers on maternity leave, the Arbitration Council has gave its decision in Award 49/04 – Hu Hing dated 27 July 2004: the Arbitration Council found that using the specified one year of uninterrupted service before a female worker on maternity leave as the basis for calculating her attendance bonus was appropriate and fair for both the worker party and the employer party.

Thus, the calculation of monetary payments during maternity leave shall be done by taking the wage and all benefits that workers received during the past 12 months before the

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women worker took maternity leave and divided by 12 to find the average per month and take such average divided by two to determine the 50 percent of wage as stated in Article 183 (1).

Issue 3:

Regarding this issue of the dispute, the worker party demanded that the employer provide them with an additional 1,000 riels for meal allowance for those who work overtime until 9:00 p.m. The worker party claimed that Article 140 of the Labour Law provides only two hours of overtime work per day and Notification No. 017 dated 18 July 2000 states that the meal allowance for the overtime work is 1,000 riels. The workers consider that for an hour of overtime work, a worker is entitled to 500 riels for meal allowance. So, for those who work overtime from 4:00 p.m. to 6:00 p.m., the company shall pay each of them 1,000 riels of meal allowance and if the company asks the workers to work overtime until 9:00 p.m. (two more hours), the workers are entitled to an additional 1,000 riels of meal allowance.

The employer party rejected the demand because the company did not plan to have the workers worked until 9:00 p.m. Moreover, the employer has provided a meal allowance of 1,000 riels to the those who have been recruited since 1999, even though there is no overtime work.

Clause 4 of Notification No. 017 stipulates, "*A worker, who voluntarily works overtime as required by the employer, shall receive a meal allowance of 1,000 riels per day or get a free meal.*"

The Arbitration Council considers that Notification No. 017 clearly states that the meal allowance of 1,000 riels is on the basis of "per day," it does not mean an hour of overtime work is equivalent to 500 riels. Thus, the workers' interpretation of the above-mentioned Notification was incorrect and unacceptable. Moreover, Article 137 and Article 140 of the Labour Law stated that the number of hours worked by workers of either sex is eight hours and cannot exceed ten hours per day. Article 140 of the Labour Law and Prakas 80 dated 1 March 1999 clearly provide for a voluntary principle for overtime work. According to Article 137, Article 139, Article 149 and Prakas No. 80, the Arbitration Council considers that both the employer party and the worker party are obliged to comply with the legal principles and do not have the rights to demand other party to implement contrarily to any provision of the Law.

The Arbitration Council considers that the workers' demand was beyond what the Law provides and the demand is an interests dispute. Regarding interests dispute, the Arbitration Council has always considered that the most representative status of a union provides legal capacity to negotiate a collective bargaining agreement within a factory and

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the legal right to bring a dispute before the Arbitration Council. In this sense, the Arbitration Council finds that Cambodian Apparel Workers' Democratic Union in Gold Lida Factory was legally registered, but it does not yet have the most representative status in accordance with Prakas 305 dated 22 November 2001. Thus, the union has no legal rights to bring any interests dispute before the Arbitration Council for settlement (See Awards 62/06 – Quick Sew, 57/06 – Evergreen, 81/04 - Evergreen and 98/04 – Great Union).

Issue 5:

The workers demanded that the employer implement the agreement dated 11 November 2005, which states that those who have worked for more than three months shall be included as regular workers. According to the workers' claim, even though the agreement was signed by both parties, the employer party did not implement it. It is apparent that 32 casual workers have not been included as regular workers yet even though they have worked in the company for more than three months.

At the hearing, the employer agreed to implement the agreement dated 11 November 2005 by considering casual workers who have worked for three months as regular workers. However, the employer did not agree to include a numbers of casual workers in the list provided by the workers.

The Arbitration Council finds that the agreement dated 11 November 2005 does not specify clearly the duration for a casual worker to be included as regular worker. It just states, "*The employer party agrees to accept causal workers as regular workers by providing them with a fixed duration contract of six months...*"

According to Article 9 of the Labour Law, casual workers are those who are contracted to: perform a specific work that shall normally be completed within a short period of time, and perform a work temporarily, intermittently and seasonally.

In previous awards, the Arbitration Council examined Article 166 (annual leave) and Article 68 (probationary period) in order to determine the meaning of long-term regular work (See Awards 03/03 – Tonga, 53/04 – Kung Hong and 26/04 – Sportswear).

Article 166 (3) states, "....*For jobs that are not performed regularly throughout the year, a worker is considered to have met the condition of continuous service if he works an average of 21 days per month.*" Article 68 states, "*A contract for a probationary period cannot be for longer than the amount of time needed for the employer to judge the professional worth of the worker and for the worker to know concretely the working conditions provided. However, the probationary period cannot last longer than three months for regular employees, two months for specialised workers and one month for non-specialised workers.*"

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Based on previous rulings, the Arbitration Council examined Article 9, Article 166 and Article 168 of the Labour Law which stipulate that even though the employer calls a worker a casual worker or whatever a worker might be called, as long as the worker has worked at least 21 days in average within a period of two consecutive months, he or she is regarded as a regular worker. The principle of having worked for 21 days within a period of two consecutive months is part of the legal jurisprudence of the Arbitration Council (See Awards 57/06 – Evergreen, 55/04 – You Chheng, 69/04 – Common Way and 85/04 – Kang Ning).

In this case, the Arbitration Council refers to the previous interpretation of Law and jurisprudence of the Arbitration Council, which decided to convert casual workers to regular workers after they have worked for 21 days for two consecutive months. Based on the Arbitration Council's first guideline, generally the Arbitration Council has to follow the previous decisions of the Arbitration Council.

According to the above interpretation of Law and jurisprudence, the Arbitration Council finds that the workers' demand that the employer convert casual workers, who have worked for three months, to become regular workers in accordance to the agreement dated 11 November 2005, was not consistent with the principles of the previous rulings of the Arbitration Council. Moreover, Article 13 of the Labour Law states, "*The provisions of this law are of the nature of public order, excepting derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or a convention that do not comply with the provisions of this law or any legal text for its enforcement, are null and void.*

Except for the provisions of this law that cannot be derogated in any way, the nature of public order of this law is not obstructive to the granting of benefits or the rights superior to the benefits and the rights defined in this law, granted workers by a unilateral decision of an employer or a group of employers, by an employment contract, by a collective convention or agreement, or by an arbitral decision."

Based on this Article 13, the Arbitration Council is not empowered to provide benefits and rights below the benefits and rights defined in the Public Order of the Law. Obviously, according the above interpretation of the Arbitration Council, casual workers are entitled to become regular workers after they have been in service for at least 21 days for two consecutive months. Thus, the employer shall convert casual workers, who have worked regularly for 21 days for a month and within a period of two consecutive months, to become regular workers even though the workers only demanded for those who have worked for three months.

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

ORDERS AND DECISIONS

1. Order the employer to reimburse 10,100 riels for the medical check fee to those who have had medical checks and paid by themselves but whom the company has not reimbursed, within the legal period of three years going backwards from 24 July 2006. The payment shall be made at most 15 days after this Award comes into effect.
2. Order the employer to provide the workers on maternity leave with 50 percent of wage and all benefits based on the calculation of: adding of total wage and benefits (subtracting the 100 percent of annual leave wage agreed by the employer) and divided by the 12 months to produce the average wage per month then have a three-month average wage divided by two in order to define the 50 percent of wage that each worker is entitled to.
3. Reject the workers' demand that the company provide those who work overtime until 9:00 p.m. with another 500 riels of meal allowance per hour of overtime work.
4. Order the employer to convert casual workers, who have worked regularly at least for 21 days a month for more than two months, to become regular workers.

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 with the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Ly Tayseng**

Signature: ………………………………………..

Arbitrator chosen by the worker party:

Name: **Sin Kim Sean**

Signature: ………………………………………..

Chair Arbitrator (chosen by the two Arbitrators):

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Name: **Tan Try**

Signature: ………………………………………..

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