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THE ARBITRATION COUNCIL

KINGDOM OF CAMBODIA

NATION RELIGION KING

Case number and name: 79/07–Terratex

Date of Award: 5 September 2007

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Ing Sothy**

Arbitrator chosen by the worker party: **An Nan**

Chair Arbitrator (chosen by the two Arbitrators): **Kong Phallack**

DISPUTING PARTIES

Employer party:

Name: **Terratex Knitting & Garment Int'l Factory, Ltd.**

Address: National Road No. 2, Sangkat Chak Ang Re Krom, Khan Meanchey, Phnom Penh

Telephone: 012 499 756 Fax: N/A

Representatives:

1. Mr. Sum Siu Ying — General Manager;
2. Ms. Thai Kanha — Administrative Staff;
3. Ms. Tith Makara — Staff;
4. Ms. Mak Kanika — Staff.

Worker party:

Name: **Coalition of Cambodian Apparel Workers Democratic Union (C.CAWDU) and Cambodian Apparel Workers Democratic Union (CAWDU)**

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

Telephone: 012 1 988 623 Fax: N/A

Representatives:

1. Ms. Meas Vanny — Labour Disputes Officer;
2. Mr. Men Vy — Labour Disputes Assistant;

3. Mr. Lon Pov — President of CAWDU;
4. Mr. Suon Chanthoeun — Vice-President of CAWDU;
5. Mr. Chuob Sam Ol — Treasurer of CAWDU.

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. The workers demanded that the company reimburse their medical check fees as stated in the Labour Law. The employer party reimburses the medical check fees in accordance with Prakas No. 1191 dated 21 November 2006.
2. The workers demanded that the company reimburse the fee for medical treatments to a female worker with ID: 10117 who had suffered a work-related accident (to the eye). The employer party refused to pay because the company had already provided her with the treatment fee and other injuries were not work-related injuries; thus the company held no responsibility.
3. The workers demanded that the company not use short-term labour contracts and fixed duration contracts because workers found it difficult to find a new job, and they lost freedom in establishing a union. The employer party did not agree because the company has already complied with the Labour Law.
4. The worker party demanded that the company announce the price for the piece rate three days before giving products to workers to work on. Some products were finished and the price was yet to be announced. The employer party disagreed because the company only implemented the agreement dated 25 April 2006 between the company and worker delegates.
5. The workers demanded that the company pay their meal allowance every Saturday so that they have money to spend during the week. The employer party disagreed because the company has taxation issues.
6. The workers demanded the company pay 2,000 riels of meal allowance for those who work four hours of overtime work for the company. The company could not fulfill the demand because it only implemented the Notification No. 017 dated 18 July 2000.
7. The workers demanded that the company not suspend workers' labour contracts during the year end and that the company follow the Labour Law. The employer party disagreed; it only implemented Article 170 of the Labour Law and an agreement dated 27 June 2007.
8. The workers demanded that the company pay US$15 per month to female workers instead of time for breastfeeding. The employer party disagreed and would implement the agreement dated 24 May 2007.

9. The workers demanded that the company pay wages and other benefits to female workers before their maternity leave. The employer party did not agree and would implement the agreement dated 4 June 2007.
10. The workers demanded that the company establish a daycare center or pay the childcare fee of US$20 per month. The employer party disagreed and would implement the agreement dated 27 June 2007.
11. The workers demanded that the company allow union representatives to participate in discussion among leaders of CAWDU every Saturday. The employer party did not allow this.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B (Article No. 309 to 317) of the Labour 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. 076/07 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 was unsuccessful, and the non-conciliation report No. 828 dated 15 August 2007 was submitted to the Secretariat of the Arbitration Council 15 August 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: 21 August 2007 (from 8:00 a.m. to 12:30 p.m.)

Procedural issues:

On 15 July 2007, the Department of Labour Disputes received a complaint from CAWDU at Terratex Factory demanding the company improve working conditions. Having received the complaint, the Department of Labour Disputes designated its officials to conciliate the disputes and the last session took place on 18 July 2007; as a result, two out of 13 issues were conciliated. The remaining 11 non-conciliated issues were submitted to the Secretariat of the Arbitration Council on 15 August 2007.

Having received the case, the Secretariat of the Arbitration Council summoned the disputing parties to attend a hearing on 21 August 2007 at 8:00 a.m. Both parties were present at the hearing.

The Arbitration Council attempted to conciliate the 11 non-conciliated issues. Issues 2 and 6 were successfully conciliated. Therefore, in this case, the Arbitration Council will consider only Issues 1, 3, 4, 5, 7, 8, 9, 10 and 11 based on the evidence and findings of fact as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Prakas 1173 on Income Tax of the Ministry of Economy and Finance dated 31 December 2003;
2. Minute of the Second-Term Election of Worker Delegates of Terratex Knitting and Garment International Factory Ltd dated 12 June 2004;
3. Minute of Third-Term Election of Worker Delegates No. 233 dated 12 March 2007;
4. Letter certifying union dues deduction agreement;
5. Minute of the collective labour dispute conciliation dated 25 April 2006;
6. Minute of the collective labour dispute conciliation dated 18 July 2007;
7. Certification Letter No. 7020/07 dated 28 March 2007 from Chey Chum Neas Referral Hospital;
8. Certification Letter No. 7020/07 dated 22 March 2007 from Chey Chum Neas Referral Hospital;
9. Notification dated 1 June 2007;
10. Income Tax Calculation Formula dated 5 May 2005;
11. Name list of workers who have taken annual leave;
12. Agreement dated 31 March 2006 between worker delegates and employer on Using Fixed Duration Contracts;
13. Agreement dated 25 April 2006 between worker delegates, employer and Conciliator of the Ministry of Labour on the Period to Announce the Price of Piece Rate and Annual Leave;
14. Agreement dated 22 May 2006 between worker delegates and employer on Overtime Work;
15. Agreement dated 26 March 2007 between worker delegates and employer on Leave During the Period of No Work;

16. Agreement dated 24 May 2007 between worker delegates and employer on the Payment of US$6.25 for Twelve Months Period in replacement of One Hour of Breastfeeding;
17. Agreement dated 4 June 2007 between worker delegates and employer on the Payment for Female Workers who take maternity leaves;
18. Agreement dated 27 June 2007 between worker delegates and employer on the Payment of US$5 for eighteen months period in place of daycare center establishment for children whose ages range from eighteen months to three years old in case workers implement the agreement dated 25 April 2006 and in case of taking the annual leave;
19. Agreement dated 19 July 2007 between worker delegates and employer on the payment of US$120 to Gnav Chanthan who suffered work-related accident.

Provided by the worker party:

1. Labour Contract between Terratex and Huon Yan dated 12 May 2007;
2. Letter requesting C.CAWDU to help resolve the labour disputes;
3. Application No. 628 applying for the registration of CAWDU at Terratex dated 3 July 2007;
4. Notification No. 76/07 of election result of CAWDU at Terratex dated 25 July 2007;
5. Statute of CAWDU at Terratex dated 28 April 2007;
6. Letter rejecting the registration of CAWDU at Terratex;
7. Petition of female workers at Terratex Factory requesting the company to build a daycare center or otherwise pay US$20 for child care fee (18-month-old up);
8. Name list of founders of CAWDU at Terratex dated 28 April 2007;
9. Minute of the CAWDU establishment election at Terratex dated 28 April 2007;
10. Petition of female workers at Terratex requesting the company to allow them one hour for breastfeeding, or otherwise pays US$15 per month for milk (from three-month-old to 18-month-old);
11. Petition of workers demanding Terratex reimburse their medical check fee which they have paid for at the Occupational Hospital between 1997 and 2007.

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

1. Minute of the collective labour dispute conciliation dated 18 July 2007;
2. Report No. 828 on the collective labour dispute conciliation in Terratex Company dated 15 August 2007.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 348 dated 16 August 2007 to the worker party to attend the hearing;
2. Invitation No. 349 dated 16 August 2007 to the employer party to attend the hearing.

FACTS

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

The Arbitration Council finds that:

- Terratex Factory employs approximately 3,035 workers.
- Based on the minute of the collective labour dispute conciliation dated 18 July 2007, 400 out of 3,035 workers are involved in the dispute.
- In the company, there are two registered unions; Free Trade Union of Workers of Kingdom of Cambodia (FTUWKC) and Labour Free Union. CAWDU elected its leaders in April 2007, but the union has not registered because the Ministry rejected the registration of CAWDU based on the Letter No. 822 dated 14 August 2007. The Minister rejected this registration because the President has two different names – Sok Sopov as referred in the Marriage Certificate No. 47/03 and Lun Pov as referred in the Residential Book. Based on Letter No. 822 dated 14 August 2007, the Ministry requested that the union resolve this issue before the Ministry can proceed with the registration.
- Based on the Letter dated 18 January 2007, workers submitted a letter requesting C.CAWDU to help resolve their disputes with the employer. The workers did not request the CAWDU at the factory for help.
- C.CAWDU, the claimant, has approximately 400 members. The company did not reject the presence of the representatives of C.CAWDU and CAWDU in the hearing.
- Leaders of Free Trade Union of Workers of Kingdom of Cambodia, Free Labour Union and unregistered CAWDU have their own representatives in the list of worker delegates.
- Regarding the case, the Arbitration Council finds that there are eight agreements signed by worker delegates and employer, and some with participation from officials of the Ministry of Labour. The agreements are:
    1. Agreement dated 31 March 2006 between worker delegates and employer on Using Fixed Duration Contracts;
    2. Agreement dated 25 April 2006 among worker delegates, employer and Conciliator of the Ministry of Labour on the Period to Announce the Price of Piece Rate and Annual Leave;
    3. Agreement dated 22 May 2006 between worker delegates and employer on Overtime Work;
    4. Agreement dated 26 March 2007 between worker delegates and employer on Leave During the Period of No Work;

5. Agreement dated 24 May 2007 between worker delegates and employer on the Payment of US$6.25 for Twelve Months Period in replacement of One Hour of Breastfeeding;
6. Agreement dated 4 June 2007 between worker delegates and employer on the Payment for Female Workers who take Maternity Leave;
7. Agreement dated 27 June 2007 between worker delegates and employer on the payment of US$5 for eighteen months period in place of daycare center for children whose ages range from eighteen months to three years old in case workers implement the agreement dated 25 April 2006 and in case of taking annual leave;
8. Agreement dated 19 July 2007 between worker delegates and employer on the payment of US$120 to Gnav Chanthan who suffered a work-related accident.

Issue 1: The workers demanded that the company reimburse the medical check fee from 1998 to 2003 to 444 workers

- Workers demanded that the company reimburse the 10,100 riels medical check fees between 1998 and 2003 to 444 workers because they think that Article 247 of the Labour Law does not limit the right to demand for the medical check fee as it is an obligation of the employer. Workers said that Article 120 of the Labour Law is not applicable in this case because this Article states only about the right to demand for wages.
- The employer party did not agree because, based on Article 120 of the Labour Law, the right to make a demand lasts for three years and this is also applicable to the case of medical check fee as it also states about different claims. The worker party does not agree to the interpretation but does not raise any other argument.
- Based on Notification [017] dated 1 June 2007, the company agreed to reimburse medical check fees for workers who have been working from June 2004 in accordance with Article 120 of the Labour Law and agreed to implement Prakas No. 1191 SHV-PrK.CMP, dated 21 November 2006 regarding the tariff on employment cards, employment books, and health services charge. The worker party agreed on this point.
- The union promised to provide the name list of workers who made the demand for the reimbursement of the medical check fee from 1998 to 2003 by Friday, 24 August 2007. However, the union failed to provide the document by the promised date. Based on the evidence received at the hearing, the Arbitration Council finds that there were 388 workers who worked from 1998 to 2003. The Arbitration Council does not

include those workers because the names and dates of medical checks are unclear and some of those workers undertook the medical checks in 2004.

Issue 2: The workers demanded that the company pay the fee for medical treatments to female worker with ID: 10117 who had an eye injury

- The worker party and the employer party clarified that the issue had already been resolved before coming to the Arbitration Council based on the agreement dated 19 July 2007 between worker delegates and employer. The company agreed to pay US$120 to Gnav Chanthan, who suffered the work-related accident.

Issue 3: The workers demanded that the company not use short-term contracts and fixed duration contracts

- The workers demanded that the company not use short-term contracts and fixed duration contracts because they would lose their right to freedom of association and maternity payments, and they find it difficult to find a new job when the contract expires.
- The employer party disagreed; the company stated it followed Article 67 of the Labour Law. The Article provides that there are two types of contracts – fixed duration contracts and undetermined duration contracts. The Labour Law does not determine the specific duration of the fixed duration contract. In practice, if the fixed duration contract renewal exceeds two-years, the contract is converted to an undetermined duration contract. Under the current practice, the company has two types of contracts – fixed duration and undetermined duration contracts. For the fixed duration contract, the duration can be one, two, three or six months according to the type of work and work requirements. The worker party did not refute this fact.
- The company provided an agreement dated 31 March 2006. Clause 4 of the agreement states that, "A newly recruited worker is offered a fixed duration contract."
- Workers agreed that there is such an agreement; however, the workers did not approve of this agreement, but did not explain any reason why.
- Regarding the right to freedom of association, the employer party stated that the company does not discriminate against unions. The worker party did not refute this fact.
- Regarding the maternity payment, the company has provided the payment in accordance with the law. The worker party did not refute this fact.
- The worker party mentioned that there were some 500 workers who demanded that the company sign the fixed duration contract of one year. The employer party disagreed.
- The worker party promised to provide the name list of workers who demanded that the company not use short-term and fixed duration contracts by Friday, 24 August

2007. The union provided some documents as promised, but the Arbitration Council did not receive the mentioned name list of workers who demanded that the company should not use short-term and [ ]-specified duration contract.

Issue 4: The workers demanded that the company announce the price of piece rate three-day after working on each item

- Workers in Ironing Unit demanded that the company announce the piece rate price three days before they start working on each type of item because when counting pieces, workers find it difficult to protest against the piece rate price.
- The employer disagreed. It would implement the agreement dated 25 April 2006, which states that, "*The company announces the price of the piece rate:*

  a) within five days for all Units;

  b) within nine days for the Weaving Unit.

  The above numbers of days are working days. Announcement shall be made at 9:00"
- The employer said that the company has never made it difficult for workers to protest against the price of the piece rate even when the workers had finished the work. The worker party did not provide any evidence to reject this allegation.
- The employer mentioned that about 70 to 80 percent of the workers earn more or equal to the minimum wage; and if workers cannot earn up to that level, the company subsidizes their wages. The worker party did not refute this claim.
- The worker party promised to provide the name list of workers who demanded that the company announce the price of the piece rate three days before they start working on each item, by Friday, 24 August 2007. The union provided some documents but the Arbitration Council did not receive the mentioned name list.

Issue 5: The workers demanded that the company pay their meal allowance every Saturday

- The worker party demanded that the company pay their meal allowance every Saturday so that they have money to spend during the week.
- The employer party disagreed because the other two unions also disagreed. If all workers agree to get paid every Saturday, the company will do it, but they have to discuss this with the other two unions.
- The employer states that based on Prakas No. 1173 on Income Tax, if the workers get paid weekly; they are obliged to pay tax.
- Clause 3.1(2) states that, "*as stated in Article 48 of C.S.P, benefits provided by the employer directly or through the third party to individuals shall bear value added tax. Benefits include: … b. Food …*"

- Clause 3.3(2) states that, *"as stated in Article 48 of C.S.P the amount of value added tax is the total amount of all benefits include all kinds of taxes and value added tax. In order to calculate the amount of value added tax for any month, the employer shall divide the total amount of all benefits provided to individuals by 0.80.*"
- The worker party did not refute the employer's claim, but still demanded that the employer pay the meal allowance every Saturday.
- Under the current practice, the company pays the meal allowance together with the monthly wages. Most workers do not pay taxes because their wages do not reach the amount that is subject to tax.

<u>Issue 6: The workers demanded that the company pay 2,000 riels of meal allowance for those who work four hours of overtime work</u>

- The worker and employer parties agreed that overtime work shall comply with the law and voluntary principles.

<u>Issue 7: The workers demanded that the company not arrange their annual leave during the period of no work</u>

- Workers demanded that the company should not [make them] use their annual leave during periods of no work because during the period of no work, workers are entitled to 50 percent of wages.
- The employer party disagreed and said the company would follow Article 170 of the Labour Law and the agreement dated 25 April 2006, agreement dated 26 March 2007 and agreement dated 27 June 2007. Workers did not refute to what raised by the employer but continued to demand that the company should not arrange their annual leave to be taken during periods of no work.
- Article 170 of the Labour Law provides that, "*In principle, annual leave is normally given for the Khmer New Year unless there is a different agreement between the employer and the worker. In this case, the employer must inform the Labor Inspector of this arrangement.*

  In every case of the paid annual leave exceeding fifteen days, employers have the right to grant the remaining days off at another time of the year, except for the leave for children and apprentices less than eighteen years of age."
- Point 2 of the agreement dated 25 April 2006 states that, "*For annual leave, the company and work representatives agree to follow the previous practice. Workers who wish to take leave will be provided at least half day leave.*"
- Agreement dated 26 March 2007 states that, "*Regarding the period of no work, the worker party agreed to follow the arrangement of the company.*"

THIS IS AN UNOFFICIAL ENGLISH TRANSLATION OF THE AUTHORITATIVE KHMER ORIGINAL.

- Point 3 of the agreement dated 27 March 2007 states that, "*The annual leave shall follow the previous practice. Workers have the right to take leave and the company has the right to arrange the annual leave of workers (however, the leave must be at least half day that means either whole morning or whole afternoon).*"
- Under the current practice, the company arranges the annual leave during the Khmer New Year, Pchum Ben, periods of less work, and when workers need to take leave. The worker party did not refute what raised by the employer.

Issue 8: The workers demanded that the company provide US$15 of milk allowance in place of breastfeeding time

- The worker party demanded that the company provide US$15 per month of milk allowance to female workers in place of their breastfeeding time. The employer party disagreed and said it would follow the agreement dated 24 May 2007, in which the company agreed to pay US$6.5 per month for a period of 12-month.
- Point 3 of agreement dated 24 May 2007 states that, "*Regarding the breastfeeding and daycare center, the worker representative requested for US$6.5 per month for a period of 12-month; the employer party had no objection and this agreement shall be implemented from June 2007.*"
- The employer claimed in the hearing that the US$6.5 in the agreement applies to only breastfeeding but not to a daycare center even though the agreement states both. The workers and employer party signed another agreement on 27 June 2007 regarding the daycare center. The worker party did not refute what raised by the employer.
- Clause 5 of the agreement dated 27 June 2007 states that, "*regarding the establishment of the daycare center, the union representative requested the company to provide US$5 per month in place of establishing a daycare center and daycare services and the employer party agreed. The fee in place of the establishment of a daycare center and daycare services is provided to workers [with children whose ages are] from 18 months-old and 3 years-old, for a period of 18 months only.*"

Issue 9: The workers demanded that the company pay all wages and other benefits to female workers who take maternity leave

- The worker party demanded that the company pay all wages and other benefits to female workers who take maternity leave. The employer party did not agree because it said it would implement the agreement dated 4 June 2007.
- Clause 4 of the agreement dated 4 June 2007 states that, "*Regarding the maternity leave, the company will provide worker with two-month wages, the third month wage*

will be paid when worker return to work on the same day as other workers (worker must apply for the wage one week in advance)."

- The worker party did not agree with this agreement, but did not provide any reason.

Issue 10: The workers demanded that the company either establish a day care center or provide US$20 milk allowance per month

- Workers demanded that the company either establish a daycare center or provide workers with US$30 per month. The employer party did not agree and would implement the agreement dated 27 June 2007 in which the company agreed to provide US$5 per month for a period of 18 months for children between 18 months-old and 3 years-old.
- Clause 5 of the agreement dated 27 June 2007 states that, "*regarding the establishment of the daycare center, the union representative requested the company to provide US$5 per month in placet of the establishment of daycare center and daycare service and the employer party agreed. The fee to replace the establishment of daycare center and daycare service is provided to workers [with children whose ages are] from 18 months-old and 3 years-old, for a period of 18 months only.*"
- Workers did not agree to implement this agreement because US$5 is too little. The worker party has to pay US$20 per month for daycare services, but has no receipt to prove that. The employer party said that the company would implement the agreement dated 27 June 2007.

Issue 11: The workers demanded that the company allow union to participate in the discussion among leaders of CAWDU every Saturday

- Workers demanded that the company allow the union to take part in the discussions among leaders of CAWDU every Saturday. The employer party disagreed because the company already provides two hours per week for worker representatives.
- The worker party did not provide any evidence to support this claim.

REASONS FOR DECISION

Worker representatives in this case

The Arbitration Council will consider whether or not C.CAWDU or CAWDU is the representative of workers in this case.

Clause 19 of Prakas 099 dated 21 April 2004 on the Arbitration Council states that, "*A party may appear before the arbitration panel in person, be represented by a lawyer who is a*

member of the Bar Association of the Kingdom of Cambodia, or be represented by any other person expressly authorized in writing by that party."

Based on this Prakas, the Arbitration Council considers that disputing parties may appear by themselves or be represented by a lawyer or by any other person authorized in writing by the parties.

Based on the above facts, the Arbitration Council finds that workers had asked C.CAWDU to help resolve their disputes with the employer, but the workers did not ask for help from CAWDU, and Ms. Meas Vanny, representative of C.CAWDU, attended the hearing. Furthermore, the company does not object the presence of the representatives of union federation and local union.

Therefore, the Arbitration Council considers that C.CAWDU, the claimant, is represented by Ms. Meas Vanny. Thus, the Arbitration Council can consider all the demands as follows:

Issue 1: The workers demanded that the company reimburse the medical check fee from 1998 to 2003 to 444 workers

In this case, the workers demanded that the company reimburse the 10,100 riels medical check fee between 1998 and 2003 to 444 workers. In the hearing the worker and employer party agreed that the medical check fee is the responsibility of the employer and Article 247 of the Labour Law also provides that the employer shall pay for the medical check fee of workers; therefore, the employer is obliged to reimburse the medical check fee to workers.

Workers claimed that Article 120 of the Labour Law, regarding claims for wages, does not apply to this case because this Article is about the right to wage claims and a medical check fee is not the wage. The employer party disagreed arguing that according to Article 120 of the Labour Law, the lapse of the demand is three years and this Article also applies to medical check fees because it [also] references other benefits. Thus, the Arbitration Council will consider as follows:

Article 120 of the Labour Law stipulates that, "*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 labor contract, as well as the indemnity in the event of dismissal."

In previous cases, the Arbitration Council interpreted that the 10,100 riels medical check fee is *a benefit of worker arising from the labour contract* and explained that the lapse

of the claim for the medical check fee is three years. (See Award 05/06 – W & D, Issue 1 and 47/07 – Chung Fai, Issue 1)

In this case, the Arbitration Council also agrees with the previous interpretation. Therefore, the Arbitration Council considers that the workers' [ ] demand for reimbursement of the medical check fees between 1998 and 2003 would exceed the three year [limitation] as stated in Article 120. That means the workers no longer have the right to claim for this fee. Therefore, the Arbitration Council rejects this demand.

Issue 3: The workers demanded that the company not use short-term contracts and fixed duration contracts

In this case, the workers demanded that the company not use short-term contracts and fixed duration contracts because they would lose their freedom of association, their maternity payment, and there would be difficulties in find a new job when the contract expires. The employer disagreed and would implement Article 67 of the Labour Law. The Arbitration Council considers the following:

1. Are workers entitled to demand the company not to use the short-term contract?
2. Are workers entitled to demand the company not to use the fixed duration contract?

1. Are workers entitled to demand the company not to use the short-term contract?

Article 65 of the Labour Law provides that, "*A labor contract establishes working relations between the worker and the employer. It is subject to common law and can be made in a form that is agreed upon by the contracting parties.*"

Based on this Article, the Arbitration Council considers that a labour contract is an agreement between the worker and the employer and is subject to common law.

In this case, the Arbitration Council finds that common law is provided in Decree No. 38 on Labour Contract and Responsibility outside the Contract.

Article 22 of Decree No. 38 on Labour Contract and Responsibility outside the Contract states that, "*Contract is the law of contract parties. The contract may be changed or terminated, if parties agree. Contract shall be implemented with honesty and at parties' wills.*"

Based on this Article, the Arbitration Council considers that no party to the contract may force the other party to accept the contract's format, type, or content to which they do not agree. Such act would enable the other party to nullify the contract, or the contract shall be nullified by the law. Thus, when signing the contract, a party may propose the format, type and the content of the contract and the other party also has the right to accept or not accept that format, type, and content of that contract. That means a contract exists only if

contracting parties agree; and in the case of labour contracts, this means only if there is agreement between the worker and employer party.

In this case, the worker party requested the company not to use short-term fixed duration labour contracts because workers would lose their freedom of association, maternity payment, and it would be difficult to find a new job. The employer party disagreed arguing that the employer has already followed Article 67 of the Labour Law because this Article does not state how long the fixed duration contract should be. Under the current practice, if the renewal of the fixed duration contract exceeds two years, the company converts it to an undetermined duration contract. The company is currently using two types of contracts: fixed duration and undetermined duration contracts.

Regarding the statements of both parties, the Arbitration Council considers that the statement of the employer is reasonable and consistent with the intention of the law, and this interpretation also complies with Article 67 of the Labour Law which states that the fixed duration contract shall not exceed two-years; therefore, the contracting party may sign the fixed duration contract for any length as long as it does not exceed two years.

The statement of the workers is not reasonable because the worker party mentioned about the loss of freedom of association and maternity payment, and difficulty in finding a new job, but they did not provide any evidence to prove the loss of freedom of association and maternity payment because of the short-term fixed duration contract. Moreover, the employer said in the hearing that the company did not discriminate against union and provided maternity payment in accordance with the law. The Arbitration Council considers that the claim of the worker party has no legal basis.

Therefore, the Arbitration Council rejects the demand of the worker party that the company not use short-term labour contracts.

2. Are workers entitled to demand the company not to use the fixed duration contract?

As interpreted above, labour contract is an agreement between the worker and the employer and is subject to common law. That means no party may force the other party to accept the format, type, or content of the contract to which they disagree. Moreover, the employer party also said that the company is using two types of contract: *fixed duration contracts* and *undetermined duration contracts* according to the need of the company and the skills of workers. In the hearing, the worker party neither refuted this claim nor provided concrete evidence to prove that the company does not apply the contract to all workers.

Therefore, the Arbitration Council rejects the demand of the workers that the company not use fixed duration contract.

Issue 4: The workers demanded that the company announce the price of piece rate three days after working on each item

Article 112 of the Labour Law provides that, "*The employer must take measures to inform the workers in a precise and easily comprehensible fashion of:*

a) The terms regarding wage that apply to the workers before they are assigned to a job or at any time that these terms change.

b) The items that make up their wage for every pay period when there is a change to the items."

The Arbitration Council considers that Article 112 (a) does not clearly state the timing of the wage notification.

In case 62/04 – Ecent (Issue 2), the Arbitration Council interpreted Article 112 (a) of the Labour Law as meaning that*, "Article 112 (a) does not clearly states when the employer should notify the price of the piece rate to workers, but it clearly means that the employer is obliged to notify workers. Regarding the time that the employer needs to notify the workers, the Arbitration Council should consider the actual need of the employer."*

Therefore, in this case, the Arbitration Council also considers that the Labour Law requires the company to notify workers the price of the piece rate that they will work on.

Based on the previous Awards, the Arbitration Council considers that the price of the piece rate should be announced between three to seven days after each item has been tested depending on the complexity of each item. (See Award 62/04 – Ecent, Issue 2 and 05/06 – W&D, Issue 1)

In this case, the workers in the Ironing Unit demanded that company announce the price of piece rate within three days because it would be difficult to protest against the price. The employer disagreed and would follow the agreement dated 25 April 2007, which states that, "*The company announces the price of piece rate:*

a) within five days for all Units;

b) within nine days for Weaving Unit.

The above numbers of days are working day. Announcement shall be made at 9:00"

Based on the above interpretation, the Arbitration Council considers that the demand of workers is valid because it follows the previous Arbitral Awards that required the employer to notify workers the price of piece rate between three and seven days after each item has been tested. Clause A of the agreement is also valid because the company has notified workers the price of piece rate within five days that means between three and seven days after each item has been tested. However, Clause B of the agreement does not apply to this case, because workers in Weaving Unit did not make a claim.

However, the Arbitration Council considers that the agreement dated 25 April 2007 is more authoritative than the workers' claim because it is an obligation of the parties of the

contract or the agreement. Clause A of the agreement, which states that price of piece rate shall be notified within five days, does not violate the law nor provides fewer benefits than the law; it is within the law. In this case, the previous jurisprudence of the Arbitration Council required the employer to notify workers the price of piece rate between three and seven days after each item has been tested. Moreover, the employer party said in the hearing that more than 70 to 80 percent of workers received more than the minimum wage and the workers did not provide any evidence to refute this claim.

In conclusion, the Arbitration Council rejects the demand of workers that the employer notify workers the price of piece rate within three days.

Issue 5: The workers demanded that the company pay their meal allowance every Saturday

Clause 4 of Notification 017 dated 18 July 2000 states that, "*Workers who voluntarily work overtime upon request from the employer shall receive a meal allowance of 1,000 riels per day or receive one free meal.*"

Based on this Notification, the Arbitration Council considers that the employer is obliged to provide one free meal to workers who perform overtime work. The provision of one meal is the provision of energy to workers to work overtime because meal is the daily need of human being and that the employer must provide.

"Although the employer cannot provide a meal when workers work overtime, Notification 017 dated 18 July 2000 requires the employer to provide 1,000 riels per day in place of the free meal.

The Arbitration Council considers that this Notification does not state the time of payment of the meal allowance. However, the provision of a free meal shall be made every day that the overtime is performed; therefore, the Arbitration Council considers that it is valid that the meal allowance is paid to workers everyday." (See Arbitral Award 47/07 – Chung Fai, Issue 5)

In contrast, the workers in this case demanded that the company pay their meal allowance every Saturday not everyday. The Arbitration Council considers that the [demand for] payment of the meal allowance every Saturday means the employer and the workers will spend only one time a week to make the payment and receive the payment. However, if the employer does not pay every Saturday, the employer will have to pay the meal allowance every day that the overtime work is performed and the workers will be paid every time they perform overtime work. Therefore, the Arbitration Council considers that to pay workers every Saturday does not require as much time from both parties as to pay everyday.

In this case, the company disagreed because the other two unions did not agree. If the workers agreed to be paid every week, the company would agree, but they have to

discuss with the other two unions. Moreover, the employer said that if workers get paid weekly, they will have to pay tax based on Prakas 1173 SHV.PD.PrK on Income Tax.

The Arbitration Council notes that the claim of the employer is valid because it will be difficult for the company to use two systems in one factory; however, the workers are entitled to their meal allowance.

Regarding the claim of the employer that if the workers get paid every Saturday, they will have to pay the *value added tax;* the Arbitration Council considers this case as follows:

Clause 3.1 (2) of Prakas 1173 SHV.PD.PrK on Income Tax states that, "*as stated in Article 48 of C.S.P, benefits provided by the employer directly or through the third party to individuals shall bear value added tax. Benefits include: … b. Food …*"

Clause 3.3 (2) states that, "*as stated in Article 48 of C.S.P the amount of value added tax is the total amount of all benefits include all kinds of taxes and value added tax. In order to calculate the amount of value added tax for any month, the employer shall divide the total amount of all benefits provided to individuals by 0.80.*"

Based on this Prakas, the Arbitration Council considers that Prakas No. 1173 SHV.PD.PrK on Income Tax provides for the obligation of Value Added Tax; while the demand of workers that the company pay their meal allowance every Saturday is a demand related to the right stated in the Labour Law especially Notification No. 017 dated 18 July 2000. Therefore, the Arbitration Council considers that Prakas 1173 SHV.PD.PrK on Income Tax does not apply to the demand to be paid every Saturday because in this case the workers did not demand the employer to pay the Value Added Tax.

To sum up, the Arbitration Council considers that the claim of the employer cannot release the employer from the obligation to pay the meal allowance every Saturday. Therefore, the Arbitration Council orders the employer to pay workers the meal allowance every Saturday.

Issue 7: The workers demanded that the company not arrange their annual leave during the period of no work

Article 170 of the Labour Law provides that, "*In principle, annual leave is normally given for the Khmer New Year unless there is a different agreement between the employer and the worker. In this case, the employer must inform the Labor Inspector of this arrangement.*

In every case of the paid annual leave exceeding fifteen days, employers have the right to grant the remaining days off at another time of the year, except for the leave for children and apprentices less than eighteen years of age."

The Arbitration Council considers that the content of Article 170 states two principle types of annual leave: annual leave during the Khmer New Year and annual leave based on

an agreement between the worker and the employer. In the second case, the employer is required to notify the Labour Inspector prior to the agreement.

In this case, the employer party claimed in the hearing that the company has implemented Article 170 of the Labour Law by arranging for workers to take annual leave during the Khmer New Year, Pchum Ben, during periods of less work to perform, and when workers need to take leave. The company signed an agreement with the workers regarding the annual leave dated 25 April 2007, and agreement dated 26 March 2007, and an agreement dated 27 June 2007 as found in the fact finding above. However, the worker party did not agree to implement these agreements and demanded that the company not arrange their annual leave during the period of no work to do, because during this period workers are entitled to 50 percent of wages.

The Arbitration Council considers whether or not the employer party has the right to arrange the annual leave during the period of no work.

In previous cases, the Arbitration Council interpreted that if the workers agree to take annual leave as arranged by the employer without any complaint, that means the workers agree with the annual leave arrangement by the employer. (See Award 62/04 – Ecent, Issue 5)

In this case, the workers and the employer agreed in an agreement dated 25 April 2007, in which Point 2 states that, "*For annual leave, the company and work representatives agreed to <u>follow the previous practice</u>. Worker who wishes to take leave will be provided at least half day leave.*"

Point 3 of the agreement dated 27 June 2007 states that, "*The annual leave shall <u>follow the previous practice. Workers have the right to take leave and the company has the right to arrange the annual leave of workers</u> (however, the leave must be at least half day that means either whole morning or whole afternoon).*"

According to the content of the two agreements, the Arbitration Council considers that the company and the worker party agreed to follow *<u>the previous practice</u>* and the agreements also allow workers to take a half day leave. However, in the hearing neither party explained how *<u>the previous practice</u>* is implemented. Therefore, based on the statement of the company in the hearing, the Arbitration Council considers that the term *<u>the previous practice</u>* means that "the employer arranges the annual leave for workers *<u>during the Khmer New Year, Pchum Ben, during period of less work to perform, and when workers need to take leave</u>*," because in the hearing the worker party did not refute this claim.

The agreement dated 26 March 2007 states that, "Regarding the leave during the period of no work, the worker party agrees with the arrangement by the company."

The Arbitration Council considers that this agreement provides the employer the right to arrange the annual leave during the period of no work. However, this agreement does not

state which "<u>*leave:*</u> whether it is annual leave, special leave, or maternity leave, etc." In the hearing, the employer claimed that the agreement applies the annual leave and the worker party did not refute the claim of the employer, but they rejected to implement the agreement. The Arbitration Council considers that the objection to implement the agreement they signed is not an appropriate act because the contracting party is obliged to respect the agreement they signed.

Therefore, the Arbitration Council rejects the demand of workers that the company not arrange their annual leave during the period of no work.

<u>Issue 8: The workers demanded that the company provide US$15 of milk allowance in place of the breastfeeding break</u>

Article 184 of the Labour Law stipulates that, "*For one year from the date of child delivery, mothers who breast-feed their children are entitled to one hour per day during working hours to breast-feed their children. This hour may be divided into two periods of thirty minutes each, one during the morning shift and the other during the afternoon shift. The exact time of breast-feeding is to be agreed between the mother and the employer. If there is no agreement, the periods shall be at the midpoint of each work shift.*"

Article 186 of the Labour Law states that, "*Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and daycare center.*"w

Based on Article 186 of the Labour Law, managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and daycare center. Moreover, Article 187 provides that, "*A Prakas (ministerial order) of the Ministry in Charge of Labor shall determine the conditions for setting up hygienic environment and supervising these nursing rooms and daycare centers.*" Therefore, the Arbitration Council considers that the employer has the obligation to set up a nursing room under the inspection of the Ministry in charge of Labour. However, the Labour Law does not require the employer to provide milk or payment in replacement of the establishment of the nursing room. (See Arbitral Awards 63/04 – Shine Well and 68/04 – City New)

Furthermore, the policy of the government encourages the mothers to breastfeed the babies with natural milk rather than using powder milk, and the previous Arbitral Award also mentioned the encouragement of breastfeeding natural milk. (See Awards 83/04 – June Textile, Issue 1 and 24/06 – Fortune, Issue 3)

Therefore, the Arbitration Council considers that the demand is not valid and does not follow the policy of the government and the previous awards.

In this case, the employer party agreed to follow the agreement dated 24 May 2007 by providing US$6.5 for a period of 12 months.

- Point 3 of the agreement dated 24 May 2007 states that, "*Regarding the breastfeeding and day care center, the worker representative requested for US$6.5 per month for a period of 12 months; the employer party had no objection and this agreement shall be implemented from June 2007.*"

The Arbitration Council considers that the agreement neither complies with the intention of Article 186 nor the public policy of the government. The demand of workers that the company provide US$15 in place of the breastfeeding time is not valid either.

Therefore, the Arbitration Council rejects the demand that the company provide milk fee in replacement of the breastfeeding time.

Issue 9: The workers demanded that the company pay all wages and other benefits to female workers who take maternity leave

Workers demanded that the company pay three-month wages for the maternity leave.

Article 183 of the Labour Law stipulates that, "*During the maternity leave as stipulated in the preceding article, women are entitled to half of their wage, including their perquisites, paid by the employer.*

Women fully reserve their rights to other benefits in kind, if any.

Any collective agreement to the contrary shall be null and void.

However, the wage benefits specified in the first paragraph of this article shall be granted only to women having a minimum of one year of uninterrupted service in the enterprise."

The Arbitration Council considers that this Article does not provide the guideline related to the timing of when the employer shall pay the worker.

Moreover, the Arbitration Council notices that Article 115 (3) provides that, "*Payment shall not be made on a day-off. If payday falls on such a day-off, the payment of wages shall be made a day earlier.*"

Based on Article 115, the Arbitration Council considers that the payment shall not be made on the day-off; if payday falls on such a day-off, the employer shall pay a day earlier.

Moreover, the Arbitration Council finds that in the previous Awards, the Arbitration Council considered that the payment for the maternity leave shall be paid before the workers start their maternity leave based on Article 115 above. (See Awards 57/06 – Evergreen, Issue 6 and 97/06 – New Max, Issue 1)

In this case, the Arbitration Council also agrees with the previous interpretation because the workers are entitled to the maternity payment before they start the maternity leave.

However, in this case the employer party said in the hearing that the company did not agree to pay the maternity payment to workers before they start their maternity leave because the company signed an agreement with the worker delegates on 4 June 2007, which states that, "*Regarding the maternity leave, the company will provide worker with two-month wages, the third month wage will be paid when worker return work at the same day as other workers (worker must apply for the wage one week in advance).*"

Based on the above interpretation, the Arbitration Council considers that the agreement makes the workers who are on maternity leave lose their entitlement to 50 percent of three-month wage for maternity leave. Therefore, the Arbitration Council considers that the agreement provides fewer benefits than the law provides.

Article 13 (1) of the Labour Law stipulates that, "*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.*"

Based on this Article, the Arbitration Council considers that the agreement dated 4 June 2007 is null and void. Therefore, in order to be consistent with the previous Awards, the Arbitration Council orders the employer to pay workers who are maternity leave before the leave starts.

Issue 10: The workers demanded that the company either establish a daycare center or provide US$20 milk allowance per month

Article 186 of the Labour Law stipulates that, *Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and daycare center.*

If the company is not able to set up a crèche on its premises for children over eighteen months of age, female workers can place their children in any day care center and the charges shall be paid by the employer."

Paragraph 2 of Article 186 above means that for children aged from eighteen months, the company shall set up a daycare center; however, if the company is not able to set up a daycare center, the company shall pay the fee for daycare. This Article does not state the amount that the employer has to pay for the daycare, that means it depends on the actual price in the invoice that the worker provides to the employer.

THIS IS AN UNOFFICIAL ENGLISH TRANSLATION OF THE AUTHORITATIVE KHMER ORIGINAL.

In this case, the company party disagreed with the demand saying that it would follow the agreement dated 27 June 2007, which the company agreed to provide US$5 for a period of 18-months from the time a child is 18 months until s/he is 3 years old.

- Point 5 of the agreement dated 27 June 2007 states that, "*regarding the establishment of the day care center, the union representative requested the company to provide US$5 per month in replacement of the establishment of day care center and day care service and the employer party agreed. The fee in replacement of the establishment of day care center and day care service is provided to workers when their children are aged from 18 months old to 3 years old which equals to exactly 18 months.*"

The Arbitration Council considers that Article 186 does not clearly state the amount of money for the daycare service. In contrast, the agreement between the workers and the company states the amount for the daycare service; it seems that the agreement clarifies the ambiguity of Article 186. The Arbitration Council considers that the agreement is valid and is not contrasting to the intention of the law.

Therefore, the Arbitration Council rejects the demand of workers that the company pay US$20 for the daycare fee.

Issue 11: The workers demanded that the company allow union to participate in the discussion between leaders of CAWDU every Saturday

In this case, the workers demanded that the company allow the union to take part in the discussion between leaders of CAWDU every Saturday. The Arbitration Council considers that [the basis for] this demand is not stated in the Labour Law or any provision related to the Labour Law. Therefore, this demand is an interest dispute.

Generally, regarding the interest dispute, the Arbitration Council always considers the most representative status of the disputing union. Based on the finding of the Arbitration Council, the union does not have the most representative status. The Arbitration Council considers that the most representative status provides legal capacity to negotiate the collective bargaining agreement in an enterprise and the legal right to bring an interest dispute before the Arbitration Council for resolution. In order to receive the most representative status, Article 277 of the Labour Law states that the union must be registered and meet other requirements as stated in this Article.

Therefore, the union does not have the right to negotiate the collective bargaining agreement on behalf of the workers in the factory. (See Article 96 (2B) and Clause 9 (1) of Prakas No. 305). This right belongs to the registered union that has the most members and meets the other criteria as stated in Article 277 of the Labour Law. Therefore, in order to be consistent with the previous cases, the Arbitration Council considers that the union does not

have sufficient legal qualification to represent all workers in the enterprise to resolve the collective labour dispute.

Moreover, Clause 43 of Prakas 099 dated 21 April 2004 states that, "*An arbitral award which settles an interest dispute takes the place of a collective bargaining agreement and shall remain in effect for one year from the date on which it becomes final unless the parties agree to make a new collective bargaining agreement replacing the award.*"

Previously, the Arbitration Council considered that if the Arbitration Council issues an Award on this issue, it will become the collective bargaining agreement that will apply to all workers in the enterprise making other workers lose their right to strike on interest dispute in the future and creating unfairness for other workers. (See Awards 57/04 – Evergreen; 60/04 – United Art, Issue 3; 08/07 – Xiao Kinh, Issue 3; 33/07 – Gold Fame, Issue 2; and 51/07 – Gold Fame, Issue 4)

Furthermore, the Arbitration Council also concluded that union without the most representative status does not have the right to bring an interest dispute before the Arbitration Council for resolution. (See Awards 57/04 – Evergreen; 60/04 – United Art, Issue 3; and 08/07 – Xiao Kinh, Issue 3)

In this case, CAWDU has not been registered. Therefore, the Arbitration Council declines to consider the demand of the workers.

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

DECISIONS AND ORDERS

Issue 1: Reject the demand of workers that the company reimburse the medical check fee of 10,100 riels between 1998 and 2003.

Issue 3:

A. Reject the demand of workers that the company not use short-term labour contracts.

B. Reject the demand of workers that the company not use fixed duration labour contracts.

Issue 4:

A. Reject the demand of workers that the company notify the price of the piece rate within three days.

B. Order the employer to notify workers the price of the piece rate within five days as stated in Clause A of the agreement dated 25 April 2007.

Issue 5: Order the employer to pay the meal allowance to workers every Saturday.

Issue 7: Reject the demand of workers that the company not arrange their annual leave during the period of no work.

Issue 8:

A. Reject the demand of workers that the company pay US$15 payment per month in place of the breastfeeding time.

B. Order the employer to allow female workers to breastfeed their babies one working hour per day.

Issue 9: Order the employer to pay the maternity wage (50 percent of three-months wage) to workers who take maternity leave before the leave starts.

Issue 10: Reject the demand of workers that the company provide US$20 per month for child care service.

Issue 11: Decline to consider the demand of workers that the company allow the union to participate in the discussion between the CAWDU union leaders every Saturday.

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: **Ing Sothy**

Signature: ....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: ....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: ....