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**THE ARBITRATION COUNCIL**

Case number and name: 81/04

Date of Award: 4 October 2004

**ARBITRAL AWARD**

Issued under Article 313 of the Labour Law

**Evergreen Garment Co., Ltd**

(Employer Party)

and

**CCAWDU Union of Evergreen Garment Co., Ltd**

(Worker Party)

**DETAILS OF EMPLOYER PARTY:**

**Representatives:**

- 1- Ms. Chao Sreya, Administrative Manager;
- 2- Mr. Khov Chantha, company lawyer;

**Address:** #289, National Road 5, Russey Keo commune, Russey Keo district, Phnom Penh.

**Telephone:** 855-23-722571/72      **Fax:** 855-23-724078

**DETAILS OF WORKER PARTY:**

**Representative:**

- 1- Ms. Chhan Sokha, CCAWDU Vice President;
- 2- Ms. Sen Peou, factory-based union activist;

**Address:** #289, National Road 5, Russey Keo commune, Russey Keo district, Phnom Penh.

**Telephone:** 023 210 481 or 012 650 013

### **ISSUES IN DISPUTE**

- 1- The worker party demands that the company reinstate worker Om Sinat into the same position in accordance with the agreement of 19 February 2004.
- 2- The worker party demands that the company give equal rights to the two unions in the factory: CCAWDU and Cambodian Independent Worker Free Trade Union (CIWFTU).
- 3- The worker party demands that the company finish paying wages to workers by 4:00 p.m.
- 4- The worker party demands that the company allow monitoring and thread-cutting workers to enter their workstations fifteen minutes earlier.

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

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B<sup>2</sup> of the Labour Law (1997); the Prakas on the Arbitration Council No. 099 of 21 April 2004; and the Prakas on the Appointment of Arbitrators No. 103 of 26 April 2004).

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 successful, and the non-conciliation report number 2375 dated 9 September 2004 was submitted to the Secretariat of the Arbitration Council on 13 September 2004.

### **COMPOSITION OF ARBITRATION PANEL**

Arbitrator chosen by the employer party: Mr. **Mar Samborana**

Arbitrator chosen by the worker party: Mr. **Sin Kimsean**

Chair arbitrator chosen by the two arbitrators: Mr. **Men Nimith**

### **HEARING AND EVIDENCE**

**Place and date of hearing:** Wednesday, 5 September 2004 at 2:30 p.m. at the Secretariat of the Arbitration Council.

**Witnesses and experts:** N/A

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

<sup>2</sup> Article 309 to Article 317 of the Labour Law

## **EVIDENCE CONSIDERED BY THE ARBITRATION COUNCIL**

### **A. Obtained from the employer party:**

- 1- Certificate of business registration of Evergreen Garment at the Ministry of Commerce dated 19 October 1996
- 2- Bylaw of Evergreen company dated 12 March 2004
- 3- Internal work rules of the company registered on 18 February 2004
- 4- Complaint against CCAWDU dated 19 August 2004 from the CIWFTU representatives to the company's Director
- 5- Letter of delegation for Ms. Chao Sreya to resolve the disputes dated 15 September 2004
- 6- Letter asking the company's lawyer for help dated 26 July 2004
- 7- Application form of Ms. Om Sinat dated 5 December 2002
- 8- Certificate of Ms. Om Sinat's health check dated 5 December 2002
- 9- Ms. Om Sinat's labour contract of six months, as a floating worker, dated 20 February 2002
- 10- Ms. Om Sinat's six-month labour contract dated 20 August 2002
- 11- Ms. Om Sinat's six-month labour contract dated 19 February 2003
- 12- Ms. Om Sinat's six-month labour contract dated 20 August 2003
- 13- Ms. Om Sinat's six-month labour contract dated 20 February 2004
- 14- Company's letter of request for the suspension of 282 workers with 50 percent wages per month addressed to the Labour Inspector dated 23 August 2004
- 15- Report on the suspension of 255 workers and the termination of 37 contracts attaching letters stating that 33 workers had received layoff compensation while 4 others had not

### **B. Obtained from the worker party:**

- 1- Letter of resignation from a worker named San Ren dated 31 May 2004
- 2- CCAWDU's letter of request for one-day leave dated 24 January 2004, which was rejected
- 3- CCAWDU's notification of the outcome of negotiations with the company on 19 and 20 February 2004
- 4- Application form for membership by a worker named San Ren dated 25 January 2004

**C. Obtained the Ministry of labour and vocational Training (“MoLVT”):**

- 1- Collective dispute non-conciliation report dated 8 September 2004
- 2- Minutes of collective dispute conciliation dated 20 August 2004
- 3- Minutes of collective dispute conciliation dated 19 February 2004

**D. Both parties agree that: *This award will not be binding.***

**CASE SUMMARY**

Evergreen Garment Co., Ltd is located at #289, National Road 5, Russey Keo commune, Russey Keo district, Phnom Penh and employs a total of 1150 workers. On 23 August 2004, the CCAWDU Union of Evergreen Garment Co., Ltd lodged a complaint with the Labour Inspection Office in Russey Keo district, demanding that the company apply working conditions as stipulated in the Labour Law. After receiving the complaint on 25 August 2005, the Labour Inspector based in Russey Keo district tried to conciliate and resolve the disputes resulting in one of the five issues being successfully conciliated. The four non-conciliation issues are described in the issues above. On 13 September 2004, the Arbitration Council received the non-conciliation report from the MoLVT.

The Secretariat of the Arbitration Council informed the parties to provide forensic evidence and to attend the hearing at the Secretariat of the Arbitration Council on 15 September 2004 at 2:30 PM. On 15 September 2004 at 2:30 PM, the two parties showed up as scheduled and the Arbitration Council proceeded with conciliation and conducted the hearing procedurally.

**FINDING OF FACTS**

- Having reviewed the collective dispute non-conciliation report
- Having listened to the presentation by the worker party as described above and in the hearing minutes
- Having reviewed the documents listed above

**We find that:**

**Issue 1:** The worker party contends that Ms. Om Sinat's labour contract became an undetermined duration contract in February 2004, as Ms. Om Sinat has already entered into five contracts with the employer and each contract lasted 6 months; therefore, in total, Ms. Om Sinat has worked for the company for at least 29 months or 2 years and five months. The worker party added that because Ms. Om Sinat's contract is an undetermined duration contract, the employer party must show that Ms. Om Sinat committed serious misconduct or [that the company had] economic reasons in order to terminate her contract.

The worker party provided the following facts:

- a- Ms. Om Sinat had never been accused by the employer of serious misconduct.
- b- Ms. Om Sinat had never had an agreement with the employer that she would cease working upon the expiration of the two-year contract and the employer party had already renewed Ms. Om Sinat's contract for over two years.
- c- The employer dismissed Ms. Om Sinat in violation of Article 95(4) of the Labour Law, which provides the manner in which the employer can dismiss a worker before [the conclusion of a contract].
- d- The employer dismissed Sinat in violation of Articles 82 and 83 of the Labour Law, which provides certain reasons which allow the employer to dismiss a worker.

In addition to the above arguments, the Arbitration Council found that Ms. Om Sinat and the Director of Evergreen Garment Co., Ltd, Park Pyung Do, signed five labour contracts, each of which lasted for 6 months from the date of signature. Thus, the total duration of Ms. Om Sinat's contracts is 6 months x 5 = 30 months or 2 years and 6 months. The parties signed the last contract on 20 February 2004. The expiration date of that contract fell on 19 August 2004.

Meanwhile, the employer party provided 3 arguments in respect of their reasons for dismissing Ms. Om Sinat: 1 – the employer party dismissed Ms. Om Sinat upon the

expiration of the contract in accordance with the law (two years only) without [including in their] calculations the three-month probationary period; 2 – the worker and employer parties agreed in writing that the contract had a duration of two years; and 3 – the employer's company had experienced some economic difficulty, which was why there was not much work for the workers.

In respect of the employer party's three arguments, first, the Arbitration Council finds that the employer party did terminate Ms. Om Sinat's labour contract upon the expiration date of 19 August 2004, but the period since the first contract until the expiration of the last contract was not only 2 years and 3 months as argued by the employer. As explained above, the total [contract] duration was 30 months.

Second, the Arbitration Council found that the written agreement that the labour contract between the two parties should last for two years is not valid, because their labour contract has already lasted for two-and-a-half years. And third, the Arbitration Council also found that while the employer party told the Arbitration Council that the company had experienced economic difficulties, they failed to provide clear evidence of such economic difficulty.

**Issue 2:** There are two unions in the Evergreen factory: the Cambodian Independent Worker Free Trade Union (CIWFTU) and CCAWDU Union of Evergreen Garment Co., Ltd. CIWFTU was established and started its activities at Evergreen factory before CCAWDU. CIWFTU has approximately 850 members and possesses most representative status in the factory, while CCAWDU has some 350 members. Some workers belong to both CIWFTU and CCAWDU as they have agreed to pay dues to both unions. CCAWDU local union representatives argue that the company discriminates and is biased toward CIWFTU, as their union [CCAWDU] is always demanding things for the workers; therefore, the company is not very satisfied and does not want to negotiate with their union at all. The employer party denied this allegation, arguing that the company does not benefit from such alleged union discrimination - i.e. from preferring one union and hating the other. The company always meets and talks with any union representative that raises a request with the company albeit that the company knows that the union with most representative status for negotiations is CIWFTU.

The company suspended 282 workers from three production lines by a letter to the Ministry in charge of Labour dated 23 August 2004. Of those suspended workers, some were CCAWDU members and others were CIWFTU. CCAWDU claimed that the majority of those suspended were their members because the company does not like their union. The company rejected this allegation by CCAWDU, saying that the suspension was carried out due to [normal] suspension procedures and the required technical production of the remaining goods. The workers in the 13 lines were suspended, owing to the fact that there were no goods provided for them to work on. This is the reason why the company was forced to temporarily suspend the operation of the 13 lines. This does not have anything to do with union discrimination. Besides, CIWFTU representatives are also complaining that the company suspended their members.

**Issue 3:** The two parties agreed that the company would prepare payment for all workers by 4:30 p.m. at the latest. In case the company has to pay them at a later time than this, the company will give the employees prior written notice including clear reasons.

**Issue 4:** Workers at Evergreen Garment demand the employer allow them to enter the workplace 15 minutes earlier after lunch, which means entering the premises at 11:35 a.m. and resuming work at 11:50 a.m. Workers at Evergreen Garment break for lunch at 10:50 a.m., return to work at 11:50 a.m. and leave the company for their households at 4:00 p.m. The demand of workers to enter the workplace 15 minutes earlier is because they intend to relax at their workstations which are cooler than in the premises outside their workstations. Relaxing in the workstations is cooler, making the workers relax more comfortably and therefore giving them more energy before resuming work at noon. Waiting for their working hours to resume within the company's compound, outside their workstations, workers usually have to take shelter under the company's sheds while eating meals and these do not [provide shelter from the] heat or rain. Workers in this factory have a one-hour break for lunch in groups, each of which consists of approximately 200 workers.

The employer cannot allow workers to rest at their workstations because while resting at the workstations, the workers would use the clothes they are sewing at their workstations as their pillows, which could stain the clothes. Some workers would even

smoke and throw the cigarette butt [onto the floor] only to cause the clothes to catch fire. In February 2004, there was an accident involving a worker who grabbed some clothes to use as a pillow only to have scissors hidden in the clothes fall into his eye. As a result, the company had to compensate the worker for causing injury to himself in the workplace during his/her personal break.

## **REASONS FOR DECISION**

### ***Issue 1:***

Based on the above facts, the Arbitration Council finds that the most significant evidence in respect of this issue is the above-mentioned five contracts because it shows clearly the total duration of all the labour contracts, that is, 2 years and 6 months. According to 10/03 - Jacquesintex (which interprets Article 67(2) to mean that a fixed duration contract will become an undetermined duration contract when any renewal causes the labour contract to exceed two years in duration), the Arbitration Council considers that the contract in this case was an undetermined duration contract before the employer party terminated the contract.

For this reason, if there is any attempt to terminate the contract, the employer must provide at least one of the following reasons:

- 1- according to Article 74, a reason in relation to the worker's aptitude or behaviour;
- 2- serious misconduct (Article 82-83) or;
- 3- act of God (Article 82).

In contrast, the employer (concluding that Ms. Om Sinat's contract was a fixed duration contract) did not give any of the three reasons above or any other reasons as set forth in the Labour Law. Based on the above facts, the employer only told the Arbitration Council that the company experienced difficulties, due to fewer orders, or [other] economic issues but failed to provide clear evidence about these claimed economic issues.

The two main reasons raised by the employer in respect of dismissing Ms. Om Sinat are: 1- the employer dismissed her at the time the contract expired and 2- Ms. Om Sinat had agreed with the employer that her contract was a fixed duration contract. The Arbitration

Council found that the first of the employer's reasons is rejected by the above facts showing that Ms. Om Sinat's contract is an undetermined duration contract. The second reason is rejected by the fact that the two parties made a fifth contract of six months, the duration of which equals that of the previous contracts; this caused the total duration of the contracts to go beyond two years without even including the probation in the calculation. Therefore, the Arbitration Council finds that the employer did not have a proper basis upon which to terminate Ms. Om Sinat's contract.

Based on only the law and the hearing alone, the Arbitration Council would order the employer to reinstate Ms. Om Sinat giving her full wages, and order the employer to comply with Article 95 and other relevant Articles of the Labour Law when the employer wants to terminate Ms. Om Sinat's contract. However, the Arbitration Council is aware and acknowledges that Evergreen Garment suspended the contracts of 282 workers due to a lack of orders. The suspension of so many labour contracts serves as a driving force for the Arbitration Council to believe that it will be very difficult for the company to find a job for Ms. Om Sinat. Based on the particular facts and the principles of equity (the employer cannot afford to offer Ms. Om Sinat a job), the Arbitration Council decides that the employer should include Ms. Om Sinat as a suspended worker.

**Issue 2:** CCAWDU representatives demand that the company give equal rights to CIWFTU and CCAWDU. This means the Arbitration Council must find whether or not there is discrimination. Does CCAWDU have fewer rights and freedoms than it should be given by the law? Does CCAWDU really have fewer rights and freedoms in employment in comparison to CIWFTU?

Article 12 of the Labour Law 1997 provides for non-discrimination, prohibiting the employer from considering race, colour, sex, creed, religion, political opinion, birth, social origin, membership of workers' union or the exercise of union activities in making a decision on hiring, defining and assigning of work, vocational training, advancement, promotion, remuneration, granting of social benefits or discipline or termination of an employment contract. Distinctions, rejections or acceptances based on qualifications required for a specific job will not be considered as discrimination.

Similarly, Article 279 of the Labour Law, which deals with the protection of union freedoms, stipulates that employers are prohibited to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal.

In this case, CCAWDU representatives did not give any clear evidence about any workers or any particular activity that was an act of discrimination by the employer in his/her decision making. At the hearing, the union representatives brought up Ms. Om Sinat's dismissal and the suspension of workers in the 13 lines as an act of the employer's discrimination and bias. But the employer denied this allegation, testifying that Ms. Om Sinat's dismissal and the suspension of workers in the 13 lines were due to the economic issue of not having orders from the factory's customers. For Ms. Om Sinat, the company decided not to renew the contract the company had with her because the company did not have any more work for her, just as those workers in the 13 lines [did not have work], not because she was a CCAWDU member. In respect of the suspension of the workers in the 13 lines, the reason was the same – the company decided to suspend all the workers in the 13 lines, including both CCAWDU and CIWFTU members. The company had already notified the MoLTV's Labour Inspector of the suspension, as is required by the legal procedures, and gave 50 percent wages to workers for the duration of the suspension. The Arbitration Council finds that the company exercised its rights and the management of its business in compliance with the law, terminating contracts and suspending workers as its production dropped.

At the hearing, in regard to the issue of union rights and freedom, CCAWDU representatives did not show clear, specific evidence that CCAWDU workers have fewer rights and freedoms than the law [provides] and [in comparison to] CIWFTU of Evergreen Garment Co., Ltd. At the hearing, the company representatives testified that the company always equally respected the rights and freedoms of the two unions as to negotiations and demands. In the past, CCAWDU's demands were not granted by the employer, because the union did not follow the correct administrative procedures and internal work rules.

For instance, annual leave which was once requested by CCAW DU and rejected by the company, was rejected because that worker did not submit the form two days in advance in accordance with the company's administrative procedures. Following the administrative procedures is a common [requirement], not just for a particular union. Therefore, the Arbitration Council finds that the complaint regarding the issue of CCAW DU rights and freedoms in Evergreen Garment has no clear basis.

Therefore, the Arbitration Council decides not to consider the complaint in respect of discrimination and CCAW DU rights and freedoms.

**Issue 3:** Both parties arrived at an agreement on this non-conciliation issue in the hearing before the Arbitration Council.

**Issue 4:** The demand for permission to enter the workplace and rest 15 minutes before resuming work at noon concerns 15 minutes outside working hours (workers' personal time) which does not come under working conditions or legal obligations of the employer of Evergreen Garment Co., Ltd.

The Arbitration Council finds that preparing for workers to have a resting place which is cool and clean will be positive for both parties. Workers will perform their work effectively and qualitatively when they have a happy, appropriate place to have their breaks. This can lead to good health and strength; meanwhile, the employer can also benefit as the products increase in both quantity and quality. However, the workers did not raise any arguments that they are entitled by law to enter their workstations before working hours resume. Therefore, this means that this issue is an interests dispute. The Arbitration Council has the power to hear interests disputes, but the Arbitration Council will decide an interests dispute only if the complainant union has the right to negotiate a collective bargaining agreement with the employer. The reasons for this decision will be as follows:

According to Article 43 of Prakas 099 of 2004, *"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"* If this award becomes a collective bargaining agreement, it will have consequences on both the workers and

the employer. Workers may not go on strike about other interests issues within one year [of the arbitral award being made]. The Arbitration Council found that CCAWDU of Evergreen Garment Co., Ltd, with only 350 members, is not regarded as having representative status in the factory while CIWFTU of Evergreen Garment Co., Ltd has up to 850 members. Therefore, CCAWDU does not have the right, under the law, to make a collective bargaining agreement in the name of the workers of the whole factory. This right belongs to the union that registers with the most members and satisfies other requirements as set out in Article 277 of the Labour Law. Thus, the Arbitration Council finds that CCAWDU has not yet been lawfully recognised to represent workers in resolving collective labour disputes concerning all workers in the factory (See 31/03-Hong Wah; 60/04-United Art). Hence, the Arbitration Council declines to consider the worker party's demand to enter the workstations and rest 15 minutes earlier [than present].

Based on the foregoing facts, evidence and law, the Arbitration Council decides as follows:

#### **DECISION**

- 1- Order the company to reinstate Ms. Om Sinat, including her on the list of workers whose contracts have been suspended and pay 50 percent wages to Ms. Om Sinat, as from the date it was decided by the company that her contract was not going to be renewed.
- 2- Reject the complaint as regards discrimination and rights and freedoms of CCAWDU based in Evergreen factory.
- 3- Order the company to pay wages to workers within working hours and finish by 4:30 p.m. at the latest, as from the date this award takes effect. In case the employer pays wages to workers later than this, the employer must give written prior notice with clear reasons (based on the agreement).
- 4- Decline to consider the demand to enter the workstations and rest 15 minutes earlier made by the monitoring and thread-cutting workers at Evergreen Garment Co., Ltd.

**Signatures of Members of the arbitration panel:**

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Sin Kimsean**

Signature: .....

Chair of arbitration panel:

Name: **Men Nimith**

Signature: .....

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

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