



KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាសវនកម្មជាតិ

THE ARBITRATION COUNCIL

Case number and name: 87/08 – W & D

Date of Award: 04 August 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

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

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

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

DISPUTING PARTIES

Employer party:

Name: **W & D (Cambodia) Co., Ltd.**

Address: Russey Village, Stoeng Meanchey District, Khan Meanchey, Phnom Penh

Telephone: 012 522 255 / 012 822 868 Fax: N/A

Representatives:

1. Ms. Meas Sareth Administration Manager
2. Mr. Cheat Khemra Representative of the company

Worker party:

Name: **Free Trade Union of Workers of Kingdom of Cambodia (FTUWKC) at W & D Cambodia Factory**

Address: #28B, St. 222, Boeung Raing District, Khan Daun Penh, Phnom Penh

Telephone: 012 929 174 / 016 525 735 Fax: N/A

Representatives:

1. Mr. Fa Saly Officer of FTUWKC [union federation]
2. Mr. Sol Kimsan Officer of FTUWKC [union federation]
3. Mr. Rath Phalla President of FTUWKC at W & D factory

4. Mr. Loeun Sinchanthy	Vice-president of FTUWKC at W & D Factory
5. Mr. Teang Veasna	Secretary of FTUWKC
6. An Sreyopv	Head of sewing group
7. Chou Sopha	Head of sewing group
8. Vo Tida	Head of sewing group
9. Soeun Simorn	Vice-head of sewing group
10. Neang Srey Oun	Worker
11. Mr. Ket Sokheng	Worker
12. Sem Dina	Worker
13. Chim Bona	Worker
14. Mr. Phan Sovan	Worker
15. Mr. Hoeun Sideth	Worker
16. Mr. Pov Sary	Worker
17. Mork Vanna	Worker
18. Chen Mareth	Worker
19. Korn Sreynath	Worker
20. Seng Saveth	Worker
21. Men Touch	Worker
22. Chan Pov	Worker
23. Mr. Sao Pisith	Worker
24. Mr. Keo Sokphen	Worker

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

The workers demand that the company pay them 5 percent of the standard severance pay because the company used fixed duration contracts but it has never paid proper severance. The company states that it cannot pay this to the workers but will follow Article 73, paragraph 5 and Article 67, point 2 of the Labor Law.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labor Law (1997); the Prakas on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators No. 076 dated 10 May 2007 (Fifth Term).

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

unsuccessful, and the non-conciliation report No. 743 KB/AK/VK, dated 11 July 2008, was submitted to the Secretariat of the Arbitration Council on 14 July 2008.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing: 21 July 2008 from 2:00 p.m. to 5:30 p.m.

Procedural issues:

On 5 June 2008, the Department of Labour Dispute received a complaint by workers in W & D Company demanding that the company improve factory working conditions. The Department of Labor Dispute then assigned an officer to resolve the dispute and the last conciliation was held on 20 June 2008 with a [conciliation result of 5 of 6 issues]. The single non-conciliation issue was referred to the Arbitration Council on 14 July 2008 through the non-conciliation report No. 743 KB/AK/VK dated 11 July 2008.

After this case was received, the Secretariat of the Arbitration Council summoned the employer and worker parties to the hearing and conciliation on the one non-conciliation issue on 21 July 2008 at 2:00 p.m.

Both parties were present as invited by the Arbitration Council. The Arbitration Council tried to ask for more information related to the dispute and attempted to further conciliate the dispute on the one non-conciliation issue but was not able to achieve receive a conciliated result. Therefore, the Arbitration Council will consider and settle this dispute based on 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. Letter to authorize Mr. Cheat Khemara and Ms. Meas Sareth to represent the company to resolve all disputes related to the company, dated 18 July 2008.
2. Certificate of commercial registration of W & D Company, dated 3 June 2008.
3. Internal Work Rules of W & D Company, dated 1 June 2004.
4. Statute of W & D Company, dated 19 November 1997.
5. Letter of clarification by the company, dated 18 July 2008.
6. Employment contract between W & D Company and the workers.

Provided by the worker party:

1. Certificate of union registration of FTUWKC at W & D Company, dated 21 April 2008.
2. Letter by leaders of FTUWKC at W & D Company to Mr. Chea Muny, president of FTUWKC [union federation] regarding the request for intervention and solution on some working conditions in the factory, dated 14 July 2008. (Thumbprints attached)
3. Letter by leaders of FTUWKC at W & D Company to Mr. Chea Muny, president of FTUWKC [union federation] regarding the request for intervention and solution on some working conditions in the factory, dated 20 May 2008. (Thumbprints attached)
4. Agreement between the employer and worker union regarding resolution of collective labour dispute at W & D Company in case 05/06, dated 2 February 2006.

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

1. Report No. 743 KB/AK/VK, dated 11 July 2008 on the collective labour dispute settlement at W & D Company.
2. Minutes of the collective labour dispute resolution at W & D Company, dated 20 June 2008.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 440 KB/AK/VK/LKA dated 15 July 2008 to invite the worker party to attend the hearing.
2. Invitation No. 439 KB/AK/VK/LKA dated 15 July 2008 to invite the employer party to attend the hearing.

FACTS

- Having reviewed the report of collective labour dispute conciliation
- Having listened to statement by the worker party and the employer party
- Having examined additional documents.

The Arbitration Council finds that:

- W & D Company started its operation in 1998 and is employing approximately 1,450 workers; approximately 1,390 of them are demanding the company to pay 5 percent of their severance pay.
- FTUWKC at W & D Company is the complainant in this case. The union has approximately 100 members.
- In the hearing the company stated that it has consistently made one-year fixed duration contracts with all workers since 1998. Generally, the company notifies the workers about the expiration and renewal of contract on 1 February of each year. The workers did not object to this claim.

- From 2007 to 2008, the employer did not notify the workers about the expiration of their contract and the contract was renewed implicitly until now. The workers agreed to the employer' claim.
- In the hearing the worker party stated that they demand that the company pay the five percent severance pay for their fixed duration contract from 1998 to 2006. The workers explained that from 1998 to 2006 their employment contracts were fixed duration contract. However, the employer did not agree to pay them the five percent severance pay, even though they made this request to the company at each expiration of their contract. The workers claim that they made this demand verbally without making a written request. The workers referred to the Arbitration Council's decision in case 05/06-W & D in support of their claim that they had requested five percent severance pay.
- The company party stated that it could not provide the five percent severance pay to the workers because, according to the Labour Law, the workers' employment contract had become an undetermined duration contract. In addition, the Labour Law does not require the employer to provide the five percent severance pay at the end of each fixed duration contract if the fixed duration contract is renewed. The employer party referred to Article 73 of the Labour Law and to previous Arbitral Awards.

REASONS FOR DECISION

The workers demanded that the company pay the five percent severance pay for their one year fixed duration contract from 1998 to 2006, since at each expiry of their contract, the company always notified them in accordance with the Labour Law. The company party, however, claimed that it could not pay this to the workers because their employment contract had become an undetermined duration contract. It implicitly renewed the contract, making the total period of the workers' employment with the company more than 2 years.

The Arbitration Council will consider whether the workers are entitled to the 5 percent severance pay according to the Labour Law when their employment contract is renewed.

Article 67, paragraph 2, of the Labour Law stated, "*The labour contract signed with one consent for a specific duration cannot be for a period longer than two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years,*

Any violation of this rule leads the contract to become a labour contract of undetermined duration".

In Arbitral Awards 57/06-Evergreen Garment, 10/03-Jacqsintex and 36/06-Mondotex, the Arbitration Council found that "**Article 67(2) should be interpreted such that *fixed duration contracts are converted into undetermined duration contracts* where a**

renewal causes the total length of the employment contract to exceed two years.” (See Arbitral Awards 10/03-Jacqsintex, issue 1; 36/06-Mondotex, issue 2 and 57/06-Evergreen Garment, issue 3)

In this case, the Arbitration Council agrees with the interpretation in the previous Arbitral Awards. Based on the findings of fact as described above, the workers were employed on one year fixed duration contracts that had been continuously renewed between 1998 until 2008. This made the total duration of their employment contract with the company greater than two years; thus making their employment contract an undetermined duration contract; it was no longer a fixed duration contract. Therefore, the entire employment contract **“since the commencement of employment”** has become an undetermined duration contract counted from the first date the contract was signed. In addition, all workers had continued to work for the company until now, which means that so far their contract has always been renewed.

Article 73, paragraph 6, of the Labour Law states that **“at the expiration of the contract, the employer shall provide the worker with the severance pay proportional to both the wages and the length of the contract. The exact amount of the severance pay is set by the collective agreement. If nothing is set in such agreement, the severance pay is at least equal to 5 percent of the wage paid during the length of the contract”**. The term **“at the expiration of the contract”** means that when a fixed duration contract is expired, the employer must pay the workers five percent of their regular severance pay if they decide not to renew their contract. However, if the workers do decide to renew their contract, they are not entitled to demand the company to pay them the five percent severance pay.

In this case, the workers’ employment contract is not terminated because their fixed duration contracts were renewed until they each became an undetermined duration contract, under which they are now working for the company. Thus, the workers are not entitled to get the five percent severance pay from their fixed duration contract.

Arbitral Award 60/06-New Max Garment, issue 6, states that *“therefore, the Arbitration Council considers that workers are entitled to receive the severance pay only when the fixed duration contract is terminated which causes the employment relationship to be severed. If a labour contract is renewed at the end of a contract, it cannot be considered that the employment relation is severed because the employment relationship still continues and other benefits must be continued along with the new labour contract as well. (See Arbitral Award 60/06-New Max Garment, issue 6)*

In Arbitral Award 76/06-South Bay, the Arbitration Council interpreted that *“the employer is not obligated to provide the five percent severance pay at the expiration of each fixed duration labour contract, if the employment relationship continues to exist. The workers can receive the five percent severance pay at the expiration of each fixed duration labour*

contract and when the employment relationship is terminated. If a labour contract is renewed at its expiration, the employment relationship would not be considered as terminated because the employment relationship continues to exist and other benefits are still provided when the next labour contract is renewed” (See Arbitral Award 76/06-South Bay, issue 1)

In this case, the Arbitration Council agrees with previous interpretations of the Arbitration Council, stating that the workers are entitled to severance pay at the expiration of a fixed duration contract that leads to the termination of the employment relationship.

Therefore, because the employment contract of the workers in this case is an undermined duration contract and the contract has not been terminated (*see Arbitral Awards 131/07-Focus Footwear, issue 1*), the workers are not entitled to the five percent severance pay provided at the termination of fixed duration contract.

The Arbitration Council considers that in order to avoid complications for the workers as well as for company, the employer should consider clearly putting an undetermined duration contract in writing for the workers.

Based on the above interpretation, the Arbitration Council decides to reject the workers’ demand for the company to provide five percent severance pay.

Based on the above findings of fact, legal principle, and reasoning provided above, the Arbitration Council make it decision as follows:

DECISION AND ORDER

- Reject the workers’ demand for the company to pay them the 5 percent severance pay.

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 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: **Ouk Ry**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: