

**KINGDOM OF CAMBODIA**

**NATION RELIGION KING**



**ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល**

**THE ARBITRATION COUNCIL**

**Case number and name: 91/06 - Hoyear**

**Date of Award: 8 November 2006**

**ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

**ARBITRATOR PANEL**

Arbitrator chosen by the employer party:

**ING SOTHY**

Arbitrator chosen by the worker party:

**ANN VIREAK**

Chair Arbitrator (chosen by the two Arbitrators):

**PEN BUNCHHEA**

**DISPUTING PARTIES**

**1- Employer Party**

Name : **Hoyear (Cambodia) Garment Ltd.**

Address : No. 223A, National Road 2, Sangkat Chak Angrae Leu, Khan Meanchey,  
Phnom Penh

Telephone : 023 996 683

Fax: 023 996 767

Employer Representative:

1. Mr. Morn Moniroath

Administration Manager.

**2- Worker party**

Name : **Khmer Youth Free Trade Union (KYFTU) at Hoyear Factory**

Address : Ta Korng Village, Sangkat Chak Angrae Leu, Khan Meanchey, Phnom Penh

Telephone : 012 942 206

Fax: N/A

Worker Representatives:

1. Ms. San Sonan

President of KYFTU at Hoyear Factory;

2. Mr. Ly Kim An

Official of KYFTU;

3. Mr. Son Piseth

Official of KYFTU;

4. Mr. Peun Sam Oeun      Official of KYFTU;  
5. Mr. Touch Seng Leap      Official of KYFTU.

### **ISSUES IN DISPUTE**

(In the non-conciliation report)

Based on the non-conciliation report, the non-conciliated issues below are the demands of the workers in this case:

- 1- The workers demanded that the company reimburse their 10,100 riel medical check-up fee to workers who have had the check-up and have paid for themselves and for those who will have the check-up in the future because it is the burden of the employer according to the Labour Law. The employer party disagreed with the demand arguing that other companies have not yet implemented this provision and that this company will only agree to implement this, if other companies do so;
- 2- The workers demanded 100 percent wages when there is no work to do because the workers still have to come and have their cards punched and the company asks them to wait at the workplace. The employer party disagreed with the demand arguing that they can pay only 50 percent of the wage because it is the practice used by other factories in Cambodia and the company does not ask the workers to stay all day; the workers can go home after having their cards punched;
- 3- The workers demanded that the company compensate for their 2005 annual leave, which the company asked them to use when there was no work to do. The employer party disagreed with this demand arguing that the practice was agreed to by the workers.

### **JURISDICTION OF THE ARBITRATION COUNCIL**

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

*An attempt was made to conciliate the collective labour dispute that is the subject of this Award, as required by Chapter XII, Section 2(A) of the Labour Law. However, the conciliation hearing was unsuccessful, and the non-conciliation report 1482 dated 10 October 2006 was submitted to the Secretariat of the Arbitration Council on 11 October 2006.*

### **HEARING AND SUMMARY OF PROCEDURE BEFORE ARBITRATION COUNCIL:**

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

**Date of the Hearing** : 23 October 2006 (from 2:00 p.m. to 5:00 p.m.)

**Procedural Issues:**

On 18 September 2006 the Department of Labour Disputes received complaints from the workers demanding that the company properly respect working conditions as provided by the Labour Law. Having received the case, the Department of Labour Disputes designated its expert officials to settle and conciliate the disputes several times and finally on 5 October 2006 the officials conciliated two out of the five issues in dispute. The three non-conciliated issues were submitted to the Arbitration Council on 5 October 2006. Having received the case, both parties were summoned to a hearing on 23 October 2006 at 2:00 p.m.

Both parties were present at the hearing. The Arbitration Council tried to elicit more information related to the disputes and made a further attempt to conciliate the non-conciliated issues where two out of the three issues were successfully conciliated. Therefore, the Arbitration Council considers only the first issue in dispute based on the evidence and the findings of fact as follows:

**EVIDENCE**

**Witness and experts besides parties: N/A**

**Documents, exhibits and other evidence considered by the Arbitration Council**

**a. Provided by the employer party:**

- 1- Business Registration License No. 3229, dated 6 September 2005;
- 2- Company's registered Internal Work Rules No. 105, dated 12 September 2005;
- 3- Sample of a Labour Contract of Hoyear Company;
- 4- Sample of a Probation Contract of Hoyear Company;
- 5- Letter authorizing Mr. Morn Moniroath, Administrative Manager to settle the collective labour dispute in Hoyear Factory, dated 5 October 2006.

**b. Provided by the worker party:**

- 1- List of names with thumb prints of workers in Hoyear Factory demanding that the company reimburse the medical check fee of 10,100 riel to those workers who were asked to have a medical check-up;
- 2- Registration License No. 1005 of KYFTU in Hoyear Factory, dated 5 September 2006;
- 3- Statutes No. 1005 of KYFTU in Hoyear Factory, dated 5 September 2006.

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

- 1- Report No. 1482 on the collective labour dispute at Hoyear company issued by Mr. Koy Tepdaravuth, Director of Department of Labour Disputes, dated 10 October 2006;
- 2- Minute of the collective labour dispute, dated 5 October 2006.

**d. Provided by the Secretariat of the Arbitration Council:**

- 1- Invitation No. 430 to the worker party to attend the hearing, dated 17 October 2006;
- 2- Invitation No. 429 to the employer party to attend the hearing, dated 17 October 2006.

**FINDINGS OF FACT**

Hoyear Company is located at No. 1223A, National Road No. 2, Sangkat Chak Angrae Leu, Khan Meanchey of Phnom Penh and employs approximately 856 workers.

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

**The Arbitration Council finds that:**

- Hoyear Company started its operation on 1 August 2005 and currently employs approximately 856 workers;
- The worker party represents 125 workers whose names are in the list attached as Annex 1 to this Award;
- When applying for a job at the company, a worker is required to have an identification card, family record, photograph, etc. When a worker passes the interview, the company requires the worker to have a medical check-up before employing the worker;
- Clause 5 of the Company's employment contract states that all expenses required by the job application including the expenses related to the certified family record, medical check fee and employment book are to be paid by party B – the worker party;
- The workers demanded that the company reimburse the medical check fee arguing that it is the law and that some companies reimburse the fee to their workers;
- However, the employer party claimed that the company cannot reimburse the fee because in the job application, the company requires the worker applicant to have a medical certificate. Furthermore, if most of the companies practice reimbursement, the employer party will also practice it;

- Since the start of its operation, the company has never reimbursed any medical check fee to any worker;
- On 1 November 2006, the employer party informed the Arbitration Council of their objection to the names of eight workers who demanded reimbursement via letter HY020/2006.

### **REASONS FOR ORDER**

The workers demanded that the company reimburse the medical check fee to those who were recruited to work and were required to have the medical check-up.

Article 247 of the Labour Law provides that the employer party shall pay for the medical check fee for its workers. The Article further provides that the Ministry in Charge of Labour shall issue a Prakas to determine: **a)** the conditions under which pre-employment, re-employment, periodical and special physical check-ups are given; **c)** the conditions under which employers are required to establish and provide at their expense: the medical check-up of workers as stipulated in point a) of this article.

Even though there is no such Prakas, the Arbitration Council considers that Article 247 of the Labour Law (1997) provides adequate legal basis to conclude that the employer party is obliged to pay the workers' medical check fee after the company finishes its test and recruitment and requires the workers to have a medical check-up; and that this includes the medical check-up fee upon recruitment of new workers (*see Arbitral Award 64/06 - Mercury, 98/04 - Great Union, 106/04 - South Bay, 05/05 - GHG and 05/06 - W&D*). Article 247 **(c)** clearly states that when a new Prakas is issued, it will require the employer to pay for the workers' medical check-up (*see Arbitral Award 60/04 - United Arts*).

Clause 7 of the Collective Notification 09/94, which was created with reference to the Labour Law (1992), clearly states that the enterprise or company shall pay the medical check fee of newly recruited workers. The Labour Law (1992) was replaced by the Labour Law (1997), which also requires a Prakas with similar content to the one that followed the Labour Law (1992).

In previous Arbitral Awards, the Arbitration Council has had different opinions on the effectiveness of the Collective Notification 09/94. In some cases, the Arbitration Council has considered that the Prakas can be implemented (*see Arbitral Award 02/03 - Chu Sing, 21/03 - Loyal, 19/04 - Kbal Koh II and 53/04 - Kong Hong*). However, in some cases, the Arbitration Council has a different opinion on whether the Prakas has the legal power to be enforced (*see Arbitral Award 60/04 - United Arts and Dissent attached as an Annex to that Arbitral Award*).

In most of the previous Arbitral Awards, the Arbitration Council has noted that Article 247 of the Labour Law (1997) provides an adequate legal basis to require the employer to pay for a worker's medical check-up fee before recruiting him or her (*see Arbitral Award 64/04 - Mercury Garment, 98/04 - Great Union, 106/04 - South Way, 05/05 - GHG and 05/06 - W&D*).

In regards to this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in the above cases. Although in this case, the employer provided evidence proving that the workers signed the labour contract agreeing to pay for their own expenses including the medical check-up fee, the Arbitration Council considers that the contract, which requires the workers to pay for the medical check-up fee themselves, cannot allow the employer to avoid its legal obligations as stated in Article 247(c) of the Labour Law (1997). Therefore, the employer is bound by the law to pay for the workers' medical check-up fee. Article 13 (1) of the Labour Law provides, "*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.*"

On the other hand, regarding the case after the company completes its recruitment process; only workers who are recruited are required to go for medical check-up and pay for the fee themselves.

Therefore, the Arbitration Council considers that the employer is obliged to reimburse the medical check fee of 10,100 riel to the 154 workers whose names are on the list provided by the worker party to the Arbitration Council.

Regarding the [employer's] objection against the names of eight workers among the 154 who demanded the reimbursement, the Arbitration Council required the employer to provide evidence to support the objection, but the employer failed to provide this evidence to the Arbitration Council. Therefore, the Arbitration Council will consider whether or not the eight workers are entitled to the demand.

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

The Arbitration Council considers that the medical check-up is one of the employment contract requirements. Thus, the eight workers that the company objected to are still covered by the three-year time period under Article 120 (*see Arbitral Award 05/06 - W&D*).

Based on the above Article, the Arbitration Council considers that the workers have the right to demand for the reimbursement of their medical check-up fee within three years from the date the workers went for the medical check-up.

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

**DECISION**

Order Hoyear Company to reimburse the medical check fee of 10,100 riel to each of the 154 workers in the list within 30 days from the date the Arbitral Award comes into effect. The eight workers, who were the subject of an objection by the company, have the right to lodge a complaint demanding the reimbursement of the medical check fee if the medical check up was within the last three years.

**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 objection 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: **ING SOTHY**

Signature: .....

Arbitrator chosen by the worker party:

Name: **ANN VIREAK**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **PEN BUNCHHEA**

Signature: .....