

KINGDOM OF CAMBODIA

NATION RELIGION KING



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THE ARBITRATION COUNCIL

Case number and name: 92/06 – Roo Hsing

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:

AN NAN

Chair Arbitrator (chosen by the two Arbitrators):

KONG PHALLACK

DISPUTING PARTIES

1- Employer Party

Name : **Roo Hsing Garment Limited**

Address : Tuol Sangkae Village, Sangkat Tuol Sangkae, Khan Russey Keo,
Phnom Penh

Telephone : 012 830 901, 012 862 523 Fax: N/A

Employer Representatives:

- | | |
|------------------------|-----------------------|
| 1. Mr. Chu Chan Sak | Communications staff; |
| 2. Mr. Kisong Chandara | Administrative staff. |

2- Worker party

Name : **Cambodian Labour Union Federation (CLUF) and CLUF in Roo Hsing Company**

Address : No. 30C, Street 371, Sangkat Toeuk Thla, Khan Russey Keo, Phnom Penh

Telephone : 023 883 085, 012 866 682, 012 915 417 Fax: N/A

Worker Representatives:

- | | |
|--------------------|---|
| 1. Mr. Khin Sokhan | Cambodian Labour Union Federation Official; |
|--------------------|---|

2. Mr. Ream Vichet	Cambodian Labour Union Federation Official;
3. Mr. Yen Han	President of CLUF in Roo Hsing Company;
4. Mr. Nhil Puthea	Vice President of CLUF in Roo Hsing Company;
5. Mr. Oum Bunnim	Secretary General of CLUF in Roo Hsing Company;
6. Mr. Dy Sophea	Treasurer of CLUF in Roo Hsing Company;
7. Mr. Chan Sokny	Advisor of CLUF in Roo Hsing Company;
8. Mr. Ven Yat	Assistant of CLUF in Roo Hsing Company;
9. Mr. Sin Sarun	Assistant of CLUF in Roo Hsing Company;
10. Mr. You Rithy	Assistant of CLUF in Roo Hsing Company.

ISSUES IN DISPUTE

(In the non-conciliation report)

- 1- The workers demand that the company reimburse the medical check-up fee of 10,100 riel to each worker. The employer party disagrees, arguing that it implements Clause 1 of the company's Internal Work Rules;
- 2- The workers demand that the company pay piece-rate workers wages during national holidays. The employer party [asserts that it] cannot provide wages during national holidays; however, if workers come to work, the company will pay them twice the minimum wage plus the piece rate they perform.

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 No. 1161 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 : 20 October 2006 (from 8:00 a.m. to 11:00 a.m.)

Procedural Issues:

On 7 September 2006, the Department of Labour Disputes received a complaint from Cambodian Labour Union Federation (CLUF) demanding that the company improve working conditions in accordance with the law. Having received the complaint, the Department of Labour Disputes designated its expert official to conciliate the disputes and nine out of 11 issues were successfully conciliated. The two non-conciliated issues were submitted to the Arbitration Council on 11 October 2006.

Having received the case, the Arbitration Council summoned the employer party and CLUF and the workers to attend a hearing on 20 October 2006 at 8:30 a.m. Both parties were present at the hearing as summoned by the Arbitration Council.

At the hearing, the Arbitration Council made a further attempt to conciliate, but two issues remain unresolved. Therefore, in this case, the Arbitration Council considers the two unresolved issues 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- List of workers who agreed to receive an annual bonus instead of the medical check-up reimbursement.
- b.** Provided by the worker party:
 - 1- Notification No. 1628 dated 10 September 2006 of CLUF to the General Manager of Roo Hsing Company on the election of leaders of CLUF in Roo Hsing Factory;
 - 2- Receipt of registration application of CLUF in Roo Hsing Factory dated 3 October 2006.
- c.** Provided by the Ministry of Labour and Vocational Training:
 - 1- Report No. 1477 dated 10 October 2006 of the Department of Labour Disputes on the collective labour dispute conciliation in Roo Hsing Garment Limited;
 - 2- Minute of the collective labour dispute conciliation in Roo Hsing Garment Limited dated 2 October 2006.
- d.** Provided by the Secretariat of the Arbitration Council:
 - 1- Invitation No. 426 dated 13 October 2006 to the employer party to attend the hearing;

- 2- Invitation No. 427 dated 13 October 2006 to the worker party to attend the hearing.

FINDINGS OF FACT

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

The Arbitration Council finds that:

- Roo Hsing Garment Limited is located in Tuol Sangkae Village, Sangkat Tuol Sangkae, Khan Russey Keo, Phnom Penh and employs approximately 4,400 workers;
- The company has one union, the Cambodian Labour Union Federation (CLUF). CLUF applied for a certificate of registration on 3 October 2006.

Issue 1:

- CLUF demanded that the company reimburse the medical check fee of 10,100 riel to each worker claiming that this is an obligation on the employer as provided by Prakas 09 and Article 247 of the Labour Law;
- The company rejected the demand arguing that it is one of the conditions of the job application as stated in Clause 1 of the company's Internal Work Rules. Prakas 09 states only "Employee" but not "Worker". In this case, the ones who demanded the reimbursement were workers, not employees, thus, the company would not reimburse this amount to the workers. Article 247 of the Labour Law is parallel to Clause 1 of the company's Internal Work Rules;
- The employer explained that the word "Worker" refers to unskilled staff while the word "Employee" refers to those who work in the office or skilled staff. The union party argued that both terms are the same because an employee is also staff of the company.
- The union did not provide the Arbitration Council with a list of workers who demand to be reimbursed, although it promised to do so on 27 October 2006;
- Most of the workers went for a medical check-up after passing the test and paid the fee by themselves. Few of the workers had their medical check-up in the factory and the company deducted 10,100 riel from their wage. Seven of the eight workers who were present at the hearing, went for a medical check-up by themselves and one of them had a medical check-up in the factory;
- Yen Horn, a worker, paid a 10,100 riel fee himself, for a medical check-up in 2004;
- Dy Sophea, a worker, paid a 10,100 riel fee himself, for a medical check-up in 1998;
- You Rithy, a worker, paid a 10,100 riel fee himself, for a medical check-up in 2003;
- Chan Sokny, a worker, paid a 10,100 riel fee himself, for a medical check-up in 2002;

- Nhil Puthea, a worker, paid a 10,100 riel fee himself, for a medical check-up in 2004;
- Ven Yat, a worker, paid a 10,100 riel fee himself, for a medical check-up in 2001;
- Oum Bunnim, a worker, had a medical check-up in the factory in 1998 and the employer deducted 10,100 riels from his wage;
- The employer provided a list of workers who agreed not to demand the reimbursement of 10,100 riel;
- The union did not provide a list of workers who demanded the reimbursement of 10,100 riel.

Issue 2:

- The workers demanded that the company provide US\$1.73 to piece-rate workers during national holidays when they do not come to work in accordance with the Labour Law and the Prakas of the Ministry in charge of Labour on paid leave;
- The employer party would not pay piece-rate workers during national holidays but would pay them according to the minimum wage. The company did not pay them because it calculated the wage by providing twice minimum wage and adding the pieces the workers have completed;
- The employer party agreed that the Prakas issued annually by the Ministry in charge of Labour is applicable to all workers;
- There are around 100 piece-rate workers working in the Ironing, Cutting, Button Sewing and Packing Section; the union promised to provide [the Arbitration Council] with a list of workers;
- The four workers in the Cutting Section, who were present at the hearing, did not go to work on holidays and they were not paid;
- Neither workplace policies nor Internal Work Rules discuss wages during holidays for piece-rate workers.

REASONS FOR DECISION

Issue 1:

Regarding the medical check-up fee of 10,100 riel, at the hearing the employer party mentioned Prakas 09 dated 19 January 1994 on medical check-ups for Cambodian nationals and foreigners who work in the Kingdom of Cambodia which requires that the employer be responsible for the medical check-up fees of “**Employees**” but not “**Workers**” and also discussed the differences between the word “**Worker**” and “**Employee**”. The Arbitration Council will consider this issue as follows:

Article 3 of the Labour Law provides, “*Workers, in the sense of this law, are every person of all sex and nationality, who has signed an employment contract in return for remuneration, under the direction and management of another person, whether that person*

is a natural person or legal entity, public or private. To clearly determine the characteristics of a worker, one shall not take into account of neither the jurisdictional status of the employer nor that of the worker, as well as the amount of remuneration.”

Article 5 of the Labour Law provides, *“Employees or helpers are those who are contracted to assist any person in return for remuneration, but who do not perform manual labour fully or who do so incidentally.”*

Based on the above Articles, the Arbitration Council considers that the Cambodian Labour Law does not differentiate between the word **“Worker”** and **“Employee”** but it does differentiate between the word **“Worker Employee”** and **“Employee”**. The Labour Law explains the word “Employee” as *“those who are contracted to assist any person in return for remuneration, but who do not perform manual labour fully or who do so incidentally.”* While the word “Worker Employee” refers to *“every person of all sex and nationality, who has signed an employment contract in return for remuneration, under the direction and management of another person, whether that person is a natural person or legal entity, public or private.”*

Therefore, the Arbitration Council considers that the word “Worker Employee” and the word “Employee” refer to those who work for any person in return for remuneration. The word “Worker Employee” has a broad meaning, which covers both those who perform manual labour and those who do not. On the other hand, the word “Employee” is someone who does not perform manual labour.

However, Clause 3 of Prakas 09 dated 19 January 1994 on the medical check-up for Cambodian nationals and foreigners who work in the Kingdom of Cambodia provides, *“Before starting to work, Cambodian nationals and foreigners have to have a medical check-up at the Department of Occupational Health located at building 482, National Road 2, Sangkat Chak Angrae Kroam, Khan Meanchey, Phnom Penh.”*

Clause 5 of this Prakas [09] provides, *“Medical check-ups can be more specialised according to the actual profession.”*

Clause 7 of this Prakas [09] provides, *“The owner of the enterprise shall pay for the medical check-up for his or her employee as provided in Clause 5 on a case by case basis.”*

Based on Clause 7 of Prakas No. 09 dated 19 January 1994 on the medical check-up for Cambodian nationals and foreigners who work in the Kingdom of Cambodia, the Arbitration Council considers that the Clause uses the word “Employee” but not “Worker Employee” or “Worker”. Therefore, whether or not the employer is obliged to pay the medical check-up fee of his or her worker employee, the Arbitration Council will consider as follows:

In case 23/06 - Max Pearl, the Arbitration Council stressed, *"In previous cases, the Arbitration Council referred to the Prakas No. 09 dated 19 January 1994, which was issued under the Labour Law 1992, the basic law replaced by the Labour Law 1997 (see Arbitral Awards 02/03 – Chu Sing, 21/03 – Loyal, 19/04 – Kbal Koh II and 53/04 – Kong Hung). Clause 7 of Prakas [09] clearly states, 'The Enterprise or company shall pay the medical check-up fee for the workers.'* However, the Arbitration Council has an opinion contrary to the Prakas 09 on whether or not the Prakas still has the legal enforceable power (see Award 60/40 – United Arts and the Dissent attached as Annex). However, the Arbitration Council notes that Article 247 of the Labour Law 1997 has enough legal basis to require that the employer pay the medical check-up fee for workers before accepting them to work (see Arbitral Awards 64/04 – Mercury Garment, 98/04 – Great Union, 106/04 – South Way, 05/05 – GHG and 05/06 – W & D).

Therefore, in this case the Arbitration Council concurs with the interpretation of the Arbitrators in previous cases, who considered that Article 247(c) of the Labour Law provides enough legal basis to conclude that the employer has an obligation to pay for the workers' medical check-up fee (see Arbitral Awards 63/04 – Shine Well, 64/04 – Mercury, 78/06 – AIA, 98/04 – Great Union, 106/04 – South Way and 107/04 – Jacqsintex).

Based on the previous cases concerning the medical check-up fee issue, the Arbitration Council finds that the employer party shall pay the expenses and reimburse the costs to the workers in accordance with Arbitral Awards 02/03 – *Chu Sing* decided on 21 May 2003, Award 21/03 – *Loyal Cambodia* decided on 8 December 2003, Award 19/04 – *Kbal Koh II* decided on 21 May 2003, Award 53/04 – *Kong Hung* decided on 26 July 2004, Award 60/04 – *United Arts* decided on 16 August 2004 and Award 63/04 – *Shine Well* decided on 24 August 2004.

Therefore, the Arbitration Council will also order the employer to reimburse the medical check-up fee of 10,100 riels to any worker who demands the reimbursement. However, in this case some workers had their medical check-up in 1998, some in 2001, some in 2002, 2003, 2004 and some in 2005. Some workers paid themselves and some had deductions made to their wages. Therefore, the Arbitration Council will consider whether or not the employer shall pay them at all.

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."*

In Award 68/04 – *City New*, the Arbitration Council stressed, *"Article 120 of the Labour Law determines that the lapse in a workers' lawsuit for payment of wages is three years*

counting from the pay date. Based on this, the workers have the right to file a lawsuit demanding wages that the employer deducted in order to pay the medical check-up fee within three years counting from the date of deduction and if workers do not demand within the said three years, the workers lose the right to demand the wages that the employer deducted.”

Similarly in Award 66/06 – Gold Lida, the Arbitration Council stressed, *“Based on this, the workers have the right to file a lawsuit demanding wages that the employer deducted to pay the medical check-up fee within three years counting from the deduction date; not pursuing such a demand within three years, means that the right to demand these wages will be lost.”*

Therefore, the Arbitration Council considers that the right to demand that the employer reimburse the medical check-up fee is valid only for three years. Therefore, only workers, who have had a medical check-up since 7 September 2003, have the right to demand reimbursement from the employer.

In conclusion, the employer shall pay the medical check-up fee of 10,100 riel to any worker who has demanded that the employer reimburse the medical check-up fee since 7 September 2003 onwards.

Issue 2:

Article 163 of the Labour Law provides, *“Workers paid by the hour, the day, or by the amount produced shall be entitled to an indemnity equal to the wage lost as a result of holidays as defined in Article 161. This indemnity shall be paid by the employer.”*

Clause 2 of Prakas 017/00 provides, *“... Regular workers shall receive a minimum of US\$45 per month. For workers who receive wages according to piece rate, they shall receive wages according to the actual result completed. If the work output is more than US\$45, the workers shall receive that surplus amount. However, if the work output is less than US\$45, the employer shall add an amount to make the amount up to US\$45 per month.”* Therefore, the daily average wage is US\$1.73. In this case, workers demanded that the company provide US\$1.73 to piece-rate workers during national holidays when they do not come to work.

Therefore, how much should the employer pay the workers? The Arbitration Council will consider the case as follows:

In this case, the Arbitration Council considers that piece-rate workers can receive less or more than US\$1.73 according to their skills and experience.

Article 312 of the Labour Law provides, *“The Council of Arbitration has no duty to examine issues other than those specified in the non-conciliation report or matters, which*

arise from events subsequent to the report, are the direct consequence of the current dispute.

The Council of Arbitration legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council's decisions are in equity for all other disputes... Therefore, based on the principle of equity, the Arbitration Council considers that the employer shall provide at least US\$1.73 to piece-rate workers because the employer also provides this wage to regular workers. Furthermore, the Arbitration Council considers that the decision to calculate US\$1.73 wage is clear as it is determined in Prakas No. 017 on the US\$45 per month of minimum wage.

In conclusion, the Arbitration Council considers that the employer has to pay US\$1.73 to piece-rate workers during the national holidays that they do not come to work.

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

ORDERS AND DECISIONS

- Order the employer to reimburse 10,100 riel to workers who have had medical check-up on or after 7 September 2003, within 15 days from the date this Award comes into effect;
- Order the employer to pay US\$1.73 wages to piece-rate workers during national holidays that they do not work.

TYPE OF AWARD: BINDING AWARD

This Award shall be implemented immediately after the date of its notification.

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: