

**KINGDOM OF CAMBODIA**

**NATION RELIGION KING**



**ក្រុមប្រឹក្សាពន្ធដំណាច**

**THE ARBITRATION COUNCIL**

**Case number and name: 93/06 – Evergreen Garment**

**Date of Award: 17 November 2006**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRATOR PANEL**

Arbitrator chosen by the employer party:

**OUK RY**

Arbitrator chosen by the worker party:

**LIV SOVANNA**

Chair Arbitrator (chosen by the two Arbitrators):

**PEN BUNCHHEA**

#### **DISPUTING PARTIES**

##### **1- Employer Party**

Name: **Evergreen Garment Co. Ltd**

Address: National Road No. 5, Sangkat Tuol Sangkae, Khan Russey Keo, Phnom Penh

Telephone : 023 722 371, 011 876 956 Fax: 023 724 078

Employer Representatives:

- |                       |                         |
|-----------------------|-------------------------|
| 1. Mr. Park Chan Won  | Company Director;       |
| 2. Mr. Ly Sopheap     | General Manager;        |
| 3. Mr. Duok Siratha   | Administration Manager; |
| 4. Mr. Long Sokmarith | Assistant.              |

##### **2- Worker party**

Name: **Cambodian Apparel Worker Democratic Union in Evergreen Garment (CAWDU)**

Address: #6C, Street 476, Sangkat Tuol Tum Pung I, Khan Chamkarmon, Phnom Penh

Telephone: 023 210 481, 012 998 906 Fax: N/A

Worker Representatives:

- |                  |                         |
|------------------|-------------------------|
| 1. Ms. Lim Thida | C.CAWDU Labour Officer; |
|------------------|-------------------------|

2. Mr. Chum Cham	C.CAWDU Labour Officer;
3. Ms. Sok Savet	President of CAWDU in Evergreen Factory;
4. Ms. Meach Hean	Vice President of CAWDU in Evergreen Factory;
5. Ms. Sok Savoeun	Union Activist;
6. Mr. Khim Borin	Union Activist.

### **ISSUES IN DISPUTE**

(In the non-conciliation report)

- 1- The workers demanded the reinstatement of workers, Koy Chamroeun, Sok Savoeun and Ou Sreyneam, because the company discriminated against and oppressed C.CAWDU's activists and the section Supervisors, Manager and Interpreter (Sam Ang) threatened workers not to join the union otherwise the company would terminate their labour contracts. The section Supervisors, Manager and Interpreter targeted any everyday misconduct and the union considers it as an oppression and discrimination which is against the Labour Law, Prakas 305, Constitutional Law and ILO Treaty No. 87 of 1998. The employer party cannot reinstate Koy Chamroeun and Sok Savoeun because their labour contracts were fixed duration contracts (expired). The company claimed that there was no discrimination against any worker and that recently the company also terminated the fixed duration contracts of five workers, three of whom were members of Cambodia Federation of Independent Trade Union (CFITU) in Evergreen Factory. Four among the five workers had already agreed to receive severance pay as provided by the law and the other was Koy Chamroeun, a member of CFITU. Regarding Mrs. Oum Sreyneam, the company did not dismiss her. The company did not depress any C.CAWDU member;
- 2- The workers demanded that the company stop terminating the labour contracts of workers who do not commit any misconduct as stated in Article 83 of the Labour Law or the previous agreement.

### **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. 1499, dated 12*

October 2006 was submitted to the Secretariat of the Arbitration Council on 12 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 Pre-Hearing Meeting** : 18 October 2006 (from 2:00 p.m. to 5:00 p.m.)

**Date of the Hearing** : 26 October 2006 (from 8:00 a.m. to 11:30 a.m.)

#### **Procedural Issues:**

On 28 September 2006 the Department of Labour Disputes received complaints from the CFITU in Evergreen Factory demanding that the company implement proper working condition in accordance with the Labour Law. Having received the complaints, the Director of the Department of Labour Disputes designated his expert officials to resolve and conciliate the disputes and the final conciliation meeting was on 31 September 2006 but both parties did not agree on the two issues demanded by the workers. The two non-conciliation issues were submitted to the Arbitration Council on 12 October 2006. Having received the case, both disputing parties were summoned by the Arbitration Council to attend a hearing on 26 October 2006 at 8:00 a.m.

Both parties were present at the hearing. The Arbitration Council sought further details related to the disputes and made a further attempt to conciliate, which did not yield a successful resolution. However, in Issue 1, the worker party claimed that they demanded for only the reinstatement of Ms. Sok Savoeun but not Mr. Koy Chamroeun and Mrs. Ou Sreyneam; therefore, the Arbitration Council considers the issues 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- Labour contract of Ms. Sok Savoeun, dated 13 March 2002 and 13 September 2003;
- 2- Agreement between the worker party and the employer party of Evergreen Garment, dated 20 October 2006;

- 3- Letter from the Director of Evergreen Garment authorizing Mr. Ly Sopheap [to act on behalf of the employer at the hearing], dated 18 October 2006;
- 4- Notification Letter on the termination of Ms. Sok Savoeun's labour contract from Evergreen Garment, dated 12 September 2006;
- 5- Minute of the collective labour dispute conciliation, dated 31 August 2006;
- 6- Letter No. 192/06, dated 18 September 2006 to President of C.CAWDU explaining the termination of Sok Savoeun and Koy Chamroeun's labour contracts;
- 7- Letter No. 073, dated 14 August 2006 of the Director General of the General Department of Labour and Vocational Training to President of C.CAWDU on the termination of fixed duration contracts;
- 8- Minute of the collective labour dispute conciliation, dated 12 October 2006;
- 9- Minute of the collective labour dispute conciliation, dated 12 October 2006;
- 10- Payment receipt of Sok Savoeun, dated 21 September 2006;
- 11- Report of Lina on the work of Sok Savoeun to the Director of Evergreen;
- 12- Letter No. 329/06, dated 29 September 2006 of the Director of Evergreen Garment to the Director of the Department of Labour Disputes on the request to meet with C.CAWDU;
- 13- Letter dated, 17 October 2006 of the Director of Evergreen Garment to the President of the Committee of Strike and Demonstration Resolution on the report of unlawful strike of some workers at Evergreen Garment;
- 14- Evergreen Company's Internal Work Rule No. 090, dated 18 February 2004.

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

- 1- Letter No. 181/06, dated 18 October 2006 from C.CAWDU to the Arbitration Council explaining the dispute with the Evergreen factory;
- 2- Letter No. 179/06, dated 16 October 2006 from C.CAWDU to the Arbitration Council on the objection against the submission of Evergreen Garment case to the Arbitration Council;
- 3- Minute of the collective labour dispute conciliation, dated 31 August 2006;
- 4- Letter No. 170/06, dated 15 September 2006 from C.CAWDU to the Director of Evergreen Company on the explanation of the termination of labour contract;
- 5- Letter, dated 27 September 2006 from CFITU to the Director of Evergreen Company on the notification of strike;
- 6- Minute of the collective labour dispute conciliation, dated 12 October 2006;

- 7- Letter No. 118/06, dated 27 June 2006 from Evergreen Garment to the President of C.CAWDU on the request for the delay of the discussion to 5 July 2006 at 2:00 p.m. at the Department of Labour Disputes;
- 8- Letter No. 127/06, dated 30 June 2006 from C.CAWDU to the Director of the Department of Labour Disputes complaining against the Director of Evergreen Company for not respecting the Labour Law and previous agreements;
- 9- Minute of the collective labour dispute conciliation, dated 12 July 2006;
- 10- Arbitral Award 57/06 – Evergreen Garment, dated 18 August 2006;
- 11- Letter, dated 29 August 2006 from C.CAWDU to the Director of Evergreen on the notification of strike.

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

- 1- Report No. 1438 of the Minister of Labour and Vocational Training on the request for collective labour dispute settlement in Evergreen Garment, dated 19 October 2006;
- 2- Report No. 1499 of Mr. Koy Tepdaravuth, Director of the Department of Labour Disputes on the collective labour dispute settlement in Evergreen Company, dated 12 October 2006;
- 3- Minute of the collective labour dispute settlement, dated 4 October 2006.

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

- 1- Letter No. 428, dated 13 October 2006 from the Secretariat of the Arbitration Council to President of Union in Evergreen Company on the selection of the Arbitrators;
- 2- Minute of the Arbitrator from the employee list selected by lot;
- 3- Invitation No. 433, dated 17 October 2006 to the worker party to provide information;
- 4- Invitation No. 434, dated 17 October 2006 to the employer party to provide information;
- 5- Order No. 024, dated 16 October 2006;
- 6- Order No. 025, dated 19 October 2006.

## **FINDING OF FACTS**

Evergreen Garment Company is located at Building 298, National Road No. 5, Sangkat Russey Keo, Khan Russey Keo, Phnom Penh and employs approximately 850 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:**

**Issue 1:**

- The worker party demanded the reinstatement of Ms. Sok Savoeun, but the employer party said the termination of Ms. Sok Savoeun was the termination of fixed duration contract [at its expiry date];
- Ms. Sok Savoeun started working for the company on 22 May 2000;
- In 2001, the company signed a new six-month fixed duration contract with Ms. Sok Savoeun;
- The company renewed Ms. Sok Savoeun's labour contract every six months until 12 October 2006 when the company informed her about the termination of her labour contract;
- The Arbitration Council finds that the total duration of the Ms. Sok Savoeun's employment relationship is almost five years starting from the time she signed the [first] labour contract as a regular worker with Evergreen Company;
- On 20 September 2006, the company dismissed Ms. Sok Savoeun;
- At the hearing, Ms. Sok Savoeun claimed that she only wants to be reinstated.

**Issue 2:**

Concerning the termination of fixed duration contracts, the union party filed a complaint to the Labour Inspector. The Labour Inspector conciliated as stated in the minute of the collective labour dispute conciliation as follows:

- On 19 February 2004, both parties agreed upon the issue in the conciliation minute that, "*Both parties agreed to keep fixed duration contracts for those who have worked for two years, but when the company wants to terminate any worker, the company shall apply Article 83 of the Labour Law and the Internal Work Rules recognized by the Ministry of Social Affairs*";
- On 12 July 2006, both parties agreed on Issue 2 in the minute of the conciliation minute that, "*The Company agrees to implement the previous agreement.*" However, in the conciliation minute both parties disagreed on issue 3 that, "*The workers demanded that those who have worked for two years shall be considered as employed pursuant to an undetermined duration contracts. The company disagreed arguing that it implements letter No. 2540, dated 30 September 2004 of the Department of Labour Inspection*";
- On 20 July 2006, the Ministry submitted a non-conciliation report to the Arbitration Council through case 57/06 which consisted of six issues. In Issue 3, the workers

demanded that those who have worked for two years shall be considered as undetermined duration contract workers. However, the company rejected this, arguing that it implements letter No. 2540, dated 30 September 2004 of the Department of Labour Inspection;

- On 18 August 2006, the Arbitration Council issued Arbitral Award 57/06 – Evergreen;
- On 24 August 2006, the company lodged an objection against Arbitral Award 57/06 – Evergreen;
- On 31 August 2006, the parties agreed upon Issue 7 in the conciliation minute that, *“Both parties agreed to sign one year fixed duration contracts. During the period of the contract, the company has the right to dismiss any worker who commits misconduct in accordance with Article 83 and the company’s Internal Work Rules recognized by the Department of Labour Inspection. The company will sign a one year contract with workers who finish the previous six-month contract.”* Issue 8 writes, *“The Arbitral Award 57/06 shall replace all previous agreements”*;
- On 16 October 2006, C.CAWDU lodged an objection against the submission of case 93/06 of Evergreen to the Arbitration Council via letter No. 179/06;
- On 27 September 2006, CFITU informed the company about the strike;
- At the hearing, the worker party claimed that the workers demanded the company to continue the fixed duration contracts for those who have worked for two years. When the company wants to terminate any worker’s labour contract, the company shall apply Article 83 of the Labour Law and the company’s Internal Work Rules recognized by the Ministry of Social Affairs;
- At the hearing, the employer party claimed that the company agreed to sign the one-year fixed duration contracts as previously agreed. However, during the period of the contract, the company has the right to dismiss any worker who commits misconduct in accordance with Article 83 of the Labour Law and its Internal Work Rules recognized by the Department of Labour Inspection. Whether the one-year contract is extended or not is at the company’s discretion.

## **REASONS FOR DECISION**

### **Issue 1:**

At the hearing, the worker party claimed that the company notified the termination of Ms. Sok Savoeun’s contract because of discrimination against and oppression of the union. The employer party argued that the termination of Ms. Sok Savoeun’s contract was done because her labour contract is a fixed duration contract (expired).

Therefore, the Arbitration Council will consider each claim as follows:

- 1- Was the dismissal of Ms. Sok Savoeun an act of discrimination against and oppression of the union?
- 2- Did the termination of the fixed duration contract of Ms. Sok Savoeun follow the procedures of the Labour Law?

**1- Was the Dismissal of Ms. Sok Savoeun an act of discrimination and depression against the union?**

Article 12 of the Labour Law provides, “*Except for the provisions fully expressing under this law, or in any other legislative text or regulation protecting women and children, as well as provisions relating to the entry and stay of foreigners, no employer shall consider on account of:*

- ...
- *membership of workers' union or the exercise of union activities;*

*To be the invocation in order to make a decision on:*

- ...
- *discipline or termination of employment contract.”*

Article 279 of the Labour Law provides, “*Employers are forbidden 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.*”

Based on previous Arbitral Awards, the Arbitration Council decides that the workers, who claimed to be discriminated against because of their memberships in the union, are the party that need to present evidence to support their claims (see *Arbitral Award 50/05 – Fortune*).

The Arbitral Award also decides that if there is no evidence to prove that the employer knows those workers are union members, the claims will not be considered (see *Arbitral Award 50/05 – Fortune*).

In this case, the worker party did not provide clear evidence to prove that the employer had terminated Ms. Sok Savoeun’s contract because of discrimination against the union. The worker party only claimed that Ms. Sok Savoeun is a union activist who helped to collect union membership fees and had never received any warning from the company. Therefore, the Arbitration Council considers that the employer terminated Ms. Sok Savoeun’s contract not because of union discrimination [but for some other reason].

**2- Did the termination of the fixed duration contract of Ms. Sok Savoeun follow the procedures of the Labour Law?**

**a. Ms. Sok Savoeun’s type of contract**

Article 67 (2) of the Labour Law provides, “*The labour contract signed with consent for a specific duration cannot be for a period longer than two years....*” Furthermore, paragraph 7 of the same Article provides, “*A contract of a fixed duration must be in writing. ...*”

Article 73 (1) of the Labour Law provides, “*A labour contract of specific duration normally terminates at the specified ending date. ...*” Based on this Article, fixed duration contracts cannot be longer than two years. Article 67 (2) also provides, “*... It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years. ...*” In this case, the company stressed that the company did not terminate Ms. Sok Savoeun’s contract but rather, did not renew her six-month fixed duration contract. However, based on the facts and previous Arbitral Awards such as Arbitral Awards 57/06 – Evergreen Garment, 10/03 – Jacqsintex and 36/06 – Mondotex, the Arbitration Council considers that Article 67(2) of the Labour Law means that a fixed duration contract becomes an undetermined duration contract when the total length of the first labour contract plus the renewed contracts is more than two years. In this case, the Arbitration Council concurs with the interpretation of the Arbitration Council in the previous cases.

Therefore, the Arbitration Council considers that Ms. Sok Savoeun’s labour contract is an undetermined duration contract because in the above findings of fact, the Arbitration Council finds that the total length of Ms. Sok Savoeun’s employment relationship is almost five years starting from the day the company signed a labour contract with her. This period clearly exceeds two years.

#### **b. Termination procedure of Ms. Sok Savoeun’s contract**

Article 74 of the Labour Law provides, “*The labour contract of unspecified duration can be terminated at will by one of the contracting parties. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party. However, no layoff can be taken without a valid reason relating to the worker's aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or group.*”

Based on Article 74 of the Labour Law, the employer is entitled to legally terminate its workers, but this Article requires that the employer meet some requirements to do so. These include:

1. Written prior notice to the other party, if the company wants to terminate the contract.

2. Termination can be done only with a valid reason relating to the worker's aptitude or behaviour, or based on the requirements of the operation of the enterprise, establishment or group (see *Arbitral Award 64/05 – Jian Wei*).

In this case, the company notified the termination – the discontinuance of the contract [to the employee] on 12 September 2006. The company dismissed Ms. Sok Savoeun on 20 September 2006. Therefore, the first requirement is fulfilled. However, the employer did not provide any evidence to prove that the company had a valid reason relating to the aptitude or behaviour of Ms. Sok Savoeun or the requirements of the operation of the enterprise, establishment or group. Therefore, the second requirement has not been fulfilled.

In addition, Article 83 of the Labour Law provides, "*The following are considered to be serious offenses:*

a- ...

b- *On the part of the worker:*

1. *Stealing, misappropriation, embezzlement;*
2. *Fraudulent acts committed at the time of signing (presentation of false documentation) or during employment (sabotage, refusal to comply with the terms of the employment contract, divulging professional confidentiality).*
3. *Serious infractions of disciplinary, safety, and health regulations.*
4. *Threat, abusive language or assault against the employer or other workers.*
5. *Inciting other workers to commit serious offenses.*
6. *Political propaganda, activities or demonstrations in the establishment."*

Clause 10 of the Internal Work Rules dated 18 February 2004 discusses misconduct (small, medium and serious) and states that:

*Small misconduct:* - *A worker who does not obey the Internal Work Rules shall be verbally warned by the leader of the company;*

- *A worker who chats during working hours shall be warned by the Section Supervisor.*

*Medium misconduct:* - *Written warning for:*

- A worker who commits misconduct and who has already been warned and still repeats it;
- A worker who creates a dispute that leads to fighting;
- A worker who does not obey the orders of the Team Leader, Section Supervisor or Person in charge.

*Serious misconduct:* - In case of serious misconduct, dismissal shall apply to:

- Stealing, misappropriation or embezzlement;
- Fraudulent acts committed at the time of signing (presentation of false documentation) or during employment (sabotage, refusal to comply with the terms of the employment contract, divulging professional confidentiality);
- Serious infractions of disciplinary, safety, and health regulations;
- Political propaganda, activities or demonstrations in the establishment.

In case of emergency, the company will refer the case to the authorities to resolve in accordance with the Law.

At the hearing, the company claimed that Ms. Sok Savoeun did not commit any serious misconduct as stated in Article 83 of the Labour Law and the company's Internal Work Rules, but the company terminated her because of the expiration of her labour contract. The company only mentioned that Ms. Sok Savoeun was orally warned by the team leader of frequently going to the toilet and talking too much, not obeying instructions and working hours and causing low production compared to other sections, but the company has never warned Ms. Sok Savoeun.

Therefore, the Arbitration Council considers that the employer did not have a valid reason to terminate Ms. Sok Savoeun.

Clause 34 of Prakas 099 dated 21 April 2004 on the Arbitration Council provides, "*In matters referred to the Arbitration Council, the Arbitration Council shall have the power and authority to fully remedy any violation of the provisions in the Labour Law, implementing regulations under the Labour Law, collective bargaining agreements or other obligations arising from the professional relationship between the employer and the employees. Within the limitations of the Labour Law and this Prakas, it has the power and authority to provide any civil remedy or relief which it deems just and fair, including:*

- A. *Orders to reinstate dismissed employees to their former or any other appropriate position;*
- B. *Orders to the immediate payment of back pay;*
- C. *Orders to cease immediately any industrial action which is being conducted by a party to the dispute;*
- D. *Orders to cease immediately any other illegal or prohibited conduct, including but not limited to retaliation;*
- E. *Orders to bargain;*
- F. *Orders following a settlement under Article 30 of this Prakas;*
- G. *The establishment of terms for a collective bargaining agreement;*
- H. *Such other relief as is appropriate.*

In conclusion, because the Arbitration Council considers that the termination of Ms. Sok Savoeun's contract did not comply with the Labour Law, the Arbitration Council orders the employer to reinstate Ms. Sok Savoeun.

**Issue 2:**

Both parties agreed on the conciliation minute three times; **First**, both parties agreed on the issue of the conciliation minute on 19 February 2004 that, "*Both parties agree to maintain fixed duration contracts for workers who have worked for two years and the company will apply Article 83 of the Labour Law and the company's Internal Work Rules recognized by the Ministry of Social Affairs, if it wants to dismiss any worker.*" **Second**, both parties agreed on the issue of the conciliation minute that, "*The Company agrees to implement the agreement previously signed.*" However, both parties did not agree on issue 3, which stated that, "*The workers demand that any worker who has worked for two years shall be considered as an undetermined duration contract worker. The company disagreed and it will comply with the letter No. 2540 of the Department of Labour Inspection, dated 30 September 2004.*" **Third**, both parties agreed on Issue 7 of the conciliation minute that, "*Both parties agreed to sign fixed duration contracts every year. During the period of the contract the company has the right to dismiss any worker who commits misconduct in accordance with Article 83 and the company's Internal Work Rules recognized by the Department of Labour Inspection. The company shall renew the labour contracts every year of the workers who have finished their six-month contracts.*" And Issue 7 states that, "*The Arbitral Award 57/06 shall replace all agreements.*" Both parties interpret [these agreements] differently. The worker party agreed to sign fixed duration contracts every year and the company has to

apply Article 83 of the Labour Law and the company's Internal Work Rules recognized by the Ministry of Social Affairs, if it wants to dismiss any worker as stated in the agreement dated 19 February 2004 which states that, "*Both parties agreed to maintain fixed duration contracts for workers who have worked for two years and the company has to apply Article 83 of the Labour Law and the company's Internal Work Rules recognized by the Ministry of Social Affairs, if it wants to dismiss any worker.*" While the employer party did agree on 31 August 2006 to sign fixed duration contracts every year and apply Article 83 of the Labour Law and the company's Internal Work Rules recognized by the Ministry of Social Affairs, if it wants to dismiss any worker, none of the clauses in the above agreement state that the employer must renew the fixed duration contracts. Based on the content of the above agreement, the Arbitration Council considers that during the period of the one-year contract the company cannot terminate this one-year contract unless the worker commits misconduct as stated in Article 83 of the Labour Law and the company's Internal Work Rules. However, when the one-year fixed duration contract expires, the company has the right to either renew or not as provided in Article 73 (1) of the Labour Law, "*A labour contract of specific duration normally terminates at the specified ending date. ...*"

Article 1 of Decree No. 38 states, "*A contract is an agreement between two individuals or more in order to create, amend or end an obligation or more related to them.*" Based on the Article of this Decree, a labour contract can be extended but the extension of the contract depends upon both parties' consent. One party cannot force the other party to extend the contract. Therefore, the above-mentioned Article and Decree provide an adequate legal bases for the employer to decide whether or not to extend the contract.

Therefore, the Arbitration Council considers that the right to extend the one-year fixed duration contract or not applies only to workers whose total length of contract is not more than two years as provided in Article 67(2), "*The labour contract signed with consent for a specific duration cannot be for a period longer than two years*".

For those whose total length of contract is more than two years, which the Arbitration Council has interpreted as an undetermined duration contract (see the interpretation in issue 1 relating to the termination of undetermined duration contracts), the company has to apply Article 74 and 83 and the company's Internal Work Rules, if the company wants to terminate a contract that is more than two years old.

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

### **ORDER AND DECISION**

#### **Issue 1:**

Order the employer to reinstate Ms. Sok Savoeun and provide wages and other benefits that Ms. Sok Savoeun should have received [if not for the termination] from the date the Arbitral Award comes into effect.

**Issue 2:**

Reject the workers' demand requiring that the company not terminate fixed duration contracts that have not exceeded 2 years unless the workers commit serious misconduct as stated in Article 83 of the Labour Law and the previous agreement. However, for those whose labour contracts exceed two years, the company must apply Article 74, 83 and the company's Internal Work Rules, if the company wants to end those labour contracts.

**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 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: **LIV SOVANNA**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **PEN BUNCHHEA**

Signature: .....

## ANNEX

### DISSENT OF ARBITRATOR OUK RY (Issued under Article 313 of the Labour Law)

Article 37 (Annex 2) of the Prakas on the Arbitration Council provides, “the Arbitration Council shall record its decisions in an Award which shall be signed by three Arbitrators. If one of the Arbitrators does not agree with the majority, the dissenting Arbitrator may record his or her dissent as an annex to the Award. Arbitrator **Ouk Ry** therefore makes this interpretation and decision in opposition to that of the other two Arbitrators and such a decision is recorded as an annex to the Arbitration Council’s Award for case 93/06.

#### Reasons for the Arbitrator’s dissent:

##### Issue 1: Fixed duration contract between the employer and the workers

Based on the facts in this case, the workers signed fixed duration contracts with the employer. None of the workers signed undetermined duration contracts. For example, Ms. Sok Savoeun’s contract was a fixed duration contract. Therefore, the contract has a fixed duration and will end on the date of its expiration, if it is not renewed and it will automatically end in cases where there is proper notification from the employer party.

In order to make this dissent easy to read, I refer to the content of my dissent in case 02/04 between Cambodiana Hotel and its workers:

**“Article 67 (2) of the Labour Law provides, ‘The labour contract signed with 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.’** The words **“It can be renewed one or more times”** means that a fixed duration contract can be renewed with the same or different clauses as the previous labour contract which has expired, so the renewal of a contract is like making it for the first time the renewal can be repeated as many times as you like. The words **‘as long as the renewal does not surpass the maximum duration of two years’** means a renewed contract cannot contravene the limits of the law, that is to say it cannot extend beyond two years at a time. The new contract takes effect from the day the parties sign it to the day it expires. The new and the previous contracts should be distinguished because if the term is to be counted continuously, the National Assembly would write: **‘the contract can be renewed one or more time as long as the period of the renewal, together with that of the previous contract does not exceed the maximum duration of two years.’** To clearly understand the intention of the National Assembly, we should look at Article 67(8) which provides, **‘when a contract signed for a fixed period of or less than two years, tacitly and quietly continues after the end of the fixed period, the contract becomes a labour**

**contract of undetermined duration.'** Therefore, if a contract of two years in duration (as is in the fact of our case) does not implicitly and quietly continue, the contract remains a specified duration contract. This expressly clarifies that when a determined duration contract is renewed, the duration set out in the expired contract is not be added to that of the old one which has already expired, but rather the time should be reset to the beginning.

In addition, if we take a look at Article 73 (1) of the 1997 Labour Law, '**a labour contract of specific duration normally terminates at the specified ending date.'** '**Terminates**' is used to indicate that there is nothing left. Therefore, a restart is a new beginning where the period provided for in the expired contract is not counted with that of a new one.

Furthermore, Article 73 (5) of the 1997 Labour Law provides, '**if the contract has a duration of more than six-months, the worker must be informed of the expiration of the contract or of its non-renewal ten days in advance. ... if there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67.'**

According to Award 10/03 dated 23 October 2003, a contract that is renewed for a duration of more than two years becomes a contract of unspecified duration. The Arbitration Council made the decision based on the International Labour Organization (ILO) recommendation dated 18 July 2003 that a contract of specific duration becomes that of unspecified duration if the employment relation between the employer and the employees surpasses a length of two years. The recommendation was made in accordance to Article 73 (5) of the 1997 Labour Law, the 1997 draft of Labour Law in French and 1982 ILO Recommendation 166 on Dismissal. If we take a close look at Article 73 (5) of the Labour Law, it is aimed at the renewal where the employer fails to inform, in which case the previous contract may be considered not to have expired; that is why the length of the initial contract is counted together with that of the renewed one. Regarding the history of the 1997 Labour Law, was it in fact drafted in French? Because it exists both in Khmer and English and these two languages match more with each other than the one in French. Therefore, if this interpretation goes against paragraph 3 of 1982 ILO Recommendation 166 on Dismissal, we cannot interpret the Article 67 (2) counting requires the duration of the original contract and that of the renewed one, unless the law is clear than it is. Therefore, if the National Assembly does not want to go against the intention of the ILO Recommendation, it should amend Article 67 (2) of the 1997 Labour Law."

The above interpretation seems to prevent the workers from working longer in the enterprise because some employers practice fixed duration contracts. However, when the employer wants to dismiss a union activist or a worker whom the employer does not like, the employer just waits for the short term contract of that worker to be expired and dismisses him

or her. This act is legitimate, but it does not provide protection to the worker. Nonetheless, we cannot interpret the law in a different way from the National Assembly. If the law is unjust, the National Assembly should amend it as soon as possible.

**SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:**

Arbitrator chosen by the worker party:

Name: **OUK RY**

Signature: .....