

KINGDOM OF CAMBODIA
NATION RELIGION KING

THE ARBITRATION COUNCIL

Case: 98/04

Date of award: 30 December 2004

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

Great Union Company

(Employer party)

AND

Cambodian Worker Union

(Employee party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Representatives: 1- Mr. Bat Thoeun Administration Manager
2- Mr. Pen Sitharong Assistant to Administration Manager
3- Mr. Long Heang Representative of the Garment
Manufacturers Association in Cambodia
(GMAC)
4- Mr. Seng Leng Assistant to the Administration Manager
Address: # 646, National Road No.2, Sangkat Chak Angre Krom, Khan Mean
Chey, Phnom Penh.
Tel: 023 219 687 **Fax:** 023 219 687

DETAILED INFORMATION OF EMPLOYEE PARTY:

Representatives: 1- Mr. Chay Sophea Coordination Official of Cambodian
Labourer Union Federation (CLUF)
2- Mr. Suos Ratha President of Union to Great Union
Company
3- Ms. Khorn Sorya Vice President of Union to Great Union
Company
4- Mr. Sreng Narith Coordination Official of CLUF
Address: # 788, Street 474, Sangkat Beng Prolet, Khan Chamkar Morn, Phnom
Penh.
Tel: 012 866 682 **Fax:** N/A

ISSUES IN DISPUTE:

(In non-conciliation report)

- 1- The employees demanded that the company not collect punch-in cards (attendance sheets) when the workers arrive five minutes late a few times (if the workers come late for a total of 30 minutes per month, they will not receive an incentive bonus of US\$5). If the workers come late because of a traffic jam or other actual problems, the incentive bonus of US\$5 should not be deducted. If they come late because of broken means of transportation or traffic jam, the time should not be included in the above 30 minutes. The company disagreed with the suggestion of the workers because the company does not collect the punch-in cards of the workers to erase them.
- 2- The employees demanded that the company reimburse the medical check-up fee for the period of the last three years (the workers paid the fee in the past) for the reason that the payment for the medical check-up is, according to the Labour Law, the obligation of the employer. The employer declined to reimburse this fee for the reason that it is a condition of recruitment.
- 3- The employees demanded the company make fixed duration contracts for a duration of 12 months. If the renewal contract surpasses the duration of two years, the contract will become a contract of undetermined duration. The reason is that the duration of the previous contracts was very short. The company agreed to apply the Labour Law.
- 4- The employees demanded that the company allow pregnant workers to take a rest for one half day every month in order to visit the doctor, and to keep the same daily wage and bonus. The reason being that the pregnant workers can use this money for traveling to visit the doctors. The company disagreed with this suggestion because it seems unfair for other workers who are not pregnant and work full time.
- 5- The employees demanded that the company open the production room 30 minutes before work begins so the workers can avoid the crush of people when checking-in and so the workers have a place to relax after lunch. The company disagreed with this suggestion for reason of preventing materials from being stolen.

JURISDICTION OF THE ARBITRATION COUNCIL :

The Arbitration Council derives its power to make this Award from Section IIB of Chapter 12 of the Labour Law (1997); the Prakas on the establishment of the Arbitration Council 38/02;,

the Prakas on the Arbitration Council 99/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas and the Prakas on the Nomination of Arbitrators 103/04; and 265/04.

An attempt to conciliate the collective dispute that is the subject of this Award was made as required by Chapter XII Section 2A of the Labour Law. That conciliation hearing was successful in seven of twelve issues, with five unsuccessful issues. The non-conciliation report No. 2799 MLVT/LI dated 18 November 2004 was submitted to the Secretariat of the Arbitration Council on 19 November 2004.

COMPOSITION OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:	Mr. Kao Thach
Arbitrator chosen by the worker party:	Mr. Liv Sovanna
Chair arbitrator (chosen by the two arbitrators):	Mr. Kong Phallack

HEARING AND EVIDENCE:

Date and place of hearing:

- First hearing on 9 December 2004 at 2:00 p.m. at the Secretariat of the Arbitration Council.

- Second hearing on 21 December 2004 at 9:00 a.m. at the Secretariat of the Arbitration Council.

Witnesses and experts: None

EVIDENCE THAT WAS CONSIDERED BY THE ARBITRATION PANEL IS AS BELOW:

Provided by the employer party:

- 1- The delegation letter dated 18 December 2004;
- 2- The status of the Great Union company;
- 3- The certificate of the registration in trade and company list, dated 28 December 1999;
- 4- The copy of the employment contract of Vat Sivin, with a specified duration for six months, dated 22 August 2003;
- 5- The copy of the employment contract of Sin Kakda, with a specified duration for one year, dated 22 August 2003;

- 6- The copy of the employment contract of Ean Rany, with a specified duration for six months, dated 19 August 2003;
- 7- The minutes of the conciliation of the collective dispute dated 16 May 2004; and
- 8- The Internal Work Rules of the company.

Provided by the employee party:

- 1- The notification of the Cambodian Labour Union Federation dated 6 September 2004.

Received from the Ministry of Labour and Vocational Training:

- 1- The minutes of the conciliation of the collective dispute dated 5 November 2004; and
- 2- The non-conciliation report of the Ministry of Labour and Vocational Training dated 18 November 2004.

The presentation and testimony provided by representatives of both parties during the hearing.

Both parties decided in the hearing that this award is not binding.

CASE SUMMARY:

Great Union Company is located at building #646, National Road No. 2, Sangkat Chak Angrekrom, Khan Mean Chey, Phnom Penh, and employs 625 workers. On 7 September 2004, the workers filed a complaint to the Office of the Labour Inspector of Khan Mean Chey to demand that the company improve working conditions in respect of 12 issues. After receiving the complaint, the Labour Inspector started to tackle the problems and conciliate between the parties at the factory. The last conciliation was completed on 5 November 2004 and the parties reached agreement on seven of the twelve issues. The representatives of the workers and the employer suggested submitting the unsuccessful issues to the Arbitration Council. The non-conciliation report was submitted to the Arbitration Council on 19 November 2004. After receiving the case, the Arbitration Council summoned both parties to the first hearing on 9 December 2004 at 2:00 p.m. The employer side requested to postpone the hearing because the employer had a mission to oversee and could not participate in the hearing. With the agreement of the workers, the Arbitration Council decided to postpone the hearing to 21 December 2004.

In the second hearing, the Arbitration Council encouraged both parties to continue to conciliate by applying a win-win policy. Finally, both parties reached agreement on three of

the five issues (the first, fourth and fifth issues were successfully conciliated). Therefore, the Arbitration Council considers and heard only the second and third issues.

FINDINGS OF FACT:

- Having examined the non-conciliation report
- Having listened to the representatives of both employer and employee sides
- Having reviewed the above documents

We find that:

The problem of the most representative

There are 625 workers in this factory and the Cambodian Worker Union has about 300 members. This union is not yet the most representative in the factory. On the day of the hearing the union leaders said they would request the status of most representative union. Therefore, the Arbitration Council finds that this union does not have a most representative certificate.

The second issue:

- 1- The company has been operating for four years and has never paid the workers' medical check-up fees. The company affirmed that before being recruited, the workers had to get a medical check-up certificate with the clinic's address. It used to have a verbal contract that the workers agreed to pay the medical check-up fee.
- 2- The workers demanded the company pay the medical check-up fee to the workers who have worked since 2002 and to reimburse the workers who have a medical check-up certificate with a stamp of the Great Union Company because the Labour Law requires the employer to pay the medical check-up fee. The fee is 10,100 riel.

The third issue:

- 1- All workers [are employed pursuant to] fixed duration contracts of six months;
- 2- The employee side demanded the company extend this period to 12 months because the period of six months is too short. The company disagreed with the extension and explained that the company made the fixed duration contract of six months because it wants to control the capacity of workers.
- 3- Before the termination of each contract, the company gave a notice to the workers to sign the renewal contract. The prior notice was ten days before the termination of the contract.

More than half of the workers have continued their [employment on] fixed duration contracts until the total duration [of their employment] is more than two years. Thus, the workers demanded the company consider them as workers [employed pursuant to] undetermined duration contracts.

REASONS FOR DECISION:

THE SECOND ISSUE:

According to Article 247 (c) of the Labour Law of 1997, the employer must pay the medical check-up fee to the employees. Article 247 (c) states, "The conditions under which employers are required to establish and provide at their expense: the medical exam of workers as stipulated in point (a) of this article." Article 247 (a) states, "The ministry in charge of Labour shall issue a Ministerial Decree (Prakas) to determine the conditions under which pre-employment, re-employment, periodical and special physical exams are given." Even though there is no new Prakas issued by the Ministry of Labour, the Arbitration Council finds that Article 247 of the Labour Law gives sufficient legal basis to conclude that the employer has an obligation to pay the medical check-up fee to the employees, including the medical check-up fee for the recruitment of new workers. Article 247 (c) states clearly that the employer will be required to pay the medical check-up fee to the employees when there is a new Prakas.

In addition joint Prakas No. 9/94 on medical check-ups for Cambodian and foreign workers working in Cambodia also requires the employer to pay the medical check-up fee to the employees. In previous arbitral awards, the Arbitration Council based its decision on the Joint Prakas 19/94, which was made under the 1992 Labour Law that has been replaced by the Labour Law of 1997. Article 7 of the Joint Prakas states clearly that the enterprise/company must pay the medical check-up fee to the employees. However, the Arbitration Council has conflicting opinions about whether Prakas 9/94 is still in effect (see 60/04 - United Arts and the dissenting opinion). However, the Arbitration Council notes in this case that Article 247 of the Labour Law of 1997 is a sufficient legal basis to require the employer to pay the medical check-up fee to the employees before accepting them for work (see 64/04 - Mercury Garment).

Based on this interpretation, the employer has a legal obligation to pay the medical check-up fee to his/her employees. In this case, all the workers paid their own medical check-up fees and then brought the medical check-up certificates to the employer in order to meet the conditions to [start] work. So the fact that the employees paid by themselves for the medical check-up fee does not exempt the employer from his/her legal obligation as

stipulated in Article 7 of the Joint Prakas and Article 247 of the Labour Law of 1997. In addition, Article 377 of the Labour Law states, "Those guilty of violating Article 247 or violating the Prakas instructing application of labour health are liable to a fine of one hundred twenty days to three hundred sixty days of the base daily wage and to imprisonment of one to five years, or to only one of the both penalties." This Article identifies that if the employer does not follow Article 247, the employer can be fined or imprisoned.

So the Arbitration Council decides that the employer must pay the medical check-up fee in the amount of 10,100 riel to each worker who has been working for the factory since the beginning of 2002 and the medical check-up certificate must identify the company name as Great Union. [The employer] must also pay those workers who have not yet had medical check-ups in order to allow them to have medical check-ups (see 02/03 - Chou Sing, 21/03 - Loyal Cambodia, 19/04 - Kabal Koh II, 53/04 - Kong Hong, 60/04 - United Arts, 63/04 - and Shine Well, 64/04 - Mercury Garment).

THE THIRD ISSUE:

In respect of this point, the Arbitration Council will consider:

- The period of the fixed duration contracts;
- The status of the most representative union;
- The change from fixed duration contracts to undetermined duration contracts;

1- The length of the specified duration contract

Article 67 (2) of the Labour Law states, "The labour contract signed with consent for a specified duration cannot be for a period longer than two years." According to the substance of this Article, the company can make contracts of fixed duration for any number of months, but the company must not make fixed duration contracts which exceed two years.

In this case, the workers demanded the company change the period of fixed duration contracts from six months to 12 months. The Arbitration Council finds that this demand is beyond the legal obligation of the employer. So it meets the criteria of an interest dispute and is above the law. Regarding the interest dispute, the Arbitration Council will consider the case on the condition that the union is the most representative.

2- The status of the most representative of the union

In order to be entitled to negotiate concerning a Collective Bargaining

Agreement (CBA), the union must be the most representative in the establishment or company. In order to get most representative status, Article 277 of the Labour Law of 1997 states that the union must register and meet other requirements stipulated in this Article.

The Arbitration Council finds that the Cambodian Worker Union in the Great Union Company has not yet been recognized as the most representative union in the company. So the union has no legal right to negotiate a Collective Bargaining Agreement in the name of all the workers in the factory (see Article 96(2)(b)). This right belongs to the registered union that has more members holding valid membership cards than the others and meets the criteria stated in Article 277 of the Labour Law. Therefore, the Arbitration Council finds that the Cambodian Worker Union in the Great Union Company is not yet legally entitled to represent all workers in the settlement of interests disputes in the company.

Article 43 of Prakas 99/04 states, "An arbitral award which settles an interest dispute, and therefore takes the place of a collective bargaining agreement 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." The Cambodian Worker Union in the Great Union Company does not have most representative status in the company, so if the Arbitration Council issued its arbitral award regarding this issue, it would become a Collective Bargaining Agreement that would apply to all workers in the factory and make other workers who are not involved in the two issues lose their rights to conduct the strike on interests disputes in the future; it would also be unfair for other workers (see 04/03 - Lida, 06/04 - Chou Sing, 24/03 - Top One, 61/04 - Best Honor, and 62/04 - Y Sin). In addition, the Arbitration Council has also concluded that a union that does not have most representative status does not have the right to bring an interests dispute to the Arbitration Council (see 31/03 - Hong Wa, 60/04 - United Arts, and 99/04 - AIA).

3- The change of specified duration contract to unspecified duration contract

The second paragraph of Article 67 of the Labour Law of 1997 states, "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." Additionally, the fifth paragraph of Article 73 states, "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. This notice period is extended to fifteen days for contracts that have a duration of more than one year. 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.

In the past, there has been disagreement on Article 67 of the Labour Law. One view was that the renewal refers to a continuation of activity [whereas] others viewed this differently. In this case, the length of time stated in Article 67 paragraph 2 means the total length of time of the contract. Because this Article is not clear, we should consider the context of this Article in order to understand its substance. The Cambodian Labour Law is biased towards contracts of undetermined duration as mentioned in Article 67, paragraphs 7 and 8. There is a bias because the undetermined duration contracts encourage work security that is crucial for the employees and also provide benefits to the employer because working for a long time creates a commitment to work from the employees. Meanwhile, a notice from the International Labour Organization (ILO) 166/1982 paragraph 3 states that a fixed duration contract must not be used for a long time period. This ILO notice also stipulates that a fixed duration contract should become an undetermined duration contract if the employer renews it many times. Even though this notice does not create an obligation, it provides a context by which to interpret Article 67 of the Labour Law of 1997. Looking to the background of the Labour Law, we find that a draft was made of the Labour Law in French and then translated into Khmer. Although the National Assembly adopted the content of the law in Khmer, Article 67 paragraph 2 is not clear. Thus, we can consider the original content in French in order to better understand the Khmer translation. Article 67 paragraph 2 in French states, “Le contrat de travail conclu pour une durée déterminée ne peut être conclu pour une durée supérieure à deux ans. Il peut être renouvelé une ou plusieurs fois pour autant que le renouvellement n’entraîne pas un dépassement de la durée maximale de deux ans.”

So, the French version states clearly that a fixed duration contract becomes an undetermined duration contract if its renewal makes the total length of time of the contract over two years. The last reason, based on Article 73 paragraph 5, refers to the total length of time of the contract, which means the period of two years. In Article 67 paragraph 2, it also means the total period of the labour contract.

In this case the workers demand that the company renew the fixed duration contracts of workers who have worked for the factory for more than two years and change their contracts to those of undetermined duration. Based on the above interpretation, the Arbitration Council finds that a fixed duration contract becomes an undetermined duration contract if any renewal makes the total length of time of the labour contract exceed two years. Thus the workers’ demand is legally correct (see 10/03 - Jacqsintex, No. 02/04 - Hotel Cambodiana, and 81/04 - Ever Green).

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

DECISION

- 1- Order Great Union Company to pay the medical check-up fees equal to 10,100 riel to the employees who began work from the beginning of 2002 and are still currently working in the company. The payment must be complete within seven days of this award coming into effect.
- 2- Refuse to consider the workers' demand that the company must make fixed duration contracts for 12 months each time.
- 3- Order the company to change the workers' contracts, if the workers have fixed duration contracts and have been working for the company for more than two years, with undetermined duration contracts.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: Kao Thach

Signed:

Arbitrator chosen by the worker party:

Name: Liv Sovanna

Signed:

Chair of arbitration panel:

Name: Kong Phallack

Signed:

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