



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល
THE ARBITRATION COUNCIL

Case number and name: 40/11-Yang Guang

Date of Award: 20 April 2011

Dissenting opinion: Ing Sothy

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL 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**

DISPUTANT PARTIES

Employer party:

Name: **Yang Guang (Cambodia) Garment Pte., Ltd (the employer)**

Address: Damnak Thom Village, Stung Meanchey Commune, Meanchey District, Phnom
Penh

Telephone: 097 643 0808

Fax: N/A

Representatives:

1. Mr Top Sitha Assistant to the Director of the employer
2. Mr Phou Limteang Head of Administration

Worker party:

Name: **National Independent Federation Textile Union of Cambodia (NIFTUC)**

Local Union of NIFTUC

Address: Damnak Thom Village, Stung Meanchey Commune, Meanchey District, Phnom
Penh

Telephone: 012 655 849

Fax: N/A

Representatives:

1. Mr Nak Nuon General Secretary of NIFTUC

- | | | |
|----|----------------|---------------------------------------|
| 2. | Mr Huy Sambath | Officer of NIFTUC |
| 3. | Mr Sorn Sophat | Activist of the Local Union of NIFTUC |
| 4. | Mr Rin Sopheak | Activist of the Local Union of NIFTUC |
| 5. | Mr Yim Yen | Activist of the Local Union of NIFTUC |
| 6. | Ms Min Theoun | Activist of the Local Union of NIFTUC |
| 7. | Ms Leng Nang | Activist of the Local Union of NIFTUC |

ISSUES IN DISPUTE

(From the Non-Conciliation Report of the Ministry of Labour and Vocational Training)

1. The workers demand that the employer reinstate Mom Tangseng, Seth Choeun, Soy Putha, and Long Vann, all leaders and activists of the local union, on the grounds of union discrimination. The workers claim that their contracts were terminated following the submission of a certificate of union registration to the employer. The employer refuses to reinstate them because it has already terminated their contracts and says it was unaware of the union leadership.
2. The workers demand that the employer refrain from deducting [union contribution fees of] 1,000 riels from their wages if they do not agree [to the deduction], and demand that the employer repay the deducted wages. The employer states that it has deducted 1,000 riels from the wages of workers whose names appear on the list of members submitted by the Local Union of NIFTUC. The employer further states that it will not make the deductions without being provided with the list of members.
3. The workers demand that the employer set up a canteen because the workers do not have a place to eat meals. The employer is considering the demand, asserting that the space is too narrow [for a canteen].
4. The workers demand that the employer arrange for a physician to be at the factory, as well as medicines for first aid. The employer is setting up an infirmary 150 metres away from the factory.
5. The workers demand that the employer provide a cupboard to store their shoes and other items. The employer will consider the demand.
6. The workers demand that the employer convert fixed duration contracts to undetermined duration contracts on the basis that their total length exceeds two years. The employer refuses to accommodate the demand as it is complying with the Article 73 of the Labour Law.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this award from Chapter XII, Section 2B of the Labour Law (1997); the *Prakas* on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same *Prakas*; and the *Prakas* on the Appointment of Arbitrators No. 133 dated 9 June 2010 (Eighth Term).

An attempt was made to conciliate the collective dispute that is the subject of this award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and non-conciliation report No. 311 KB/RK/VK dated 18 March 2011 was submitted to the Secretariat of the Arbitration Council on 18 March 2011.

HEARING AND SUMMARY OF PROCEDURE

Hearing venue: The Arbitration Council, No. 72 Street 592, Corner of Street 327 (Opposite Indra Devi High School), Boeung Kak II Quarter, Tuol Kork District, Phnom Penh

Date of hearing: 23 March 2011 at 4:00 p.m.

Procedural issues:

On 16 March 2011, the Department of Labour Disputes received a complaint from the Local Union of NIFTUC outlining the workers' demands for the improvement of working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to conciliate the 13 issues. As a result, seven of the 13 issues were conciliated. The six non-conciliated issues were referred to the Secretariat of the Arbitration Council on 18 March 2011 via non-conciliation report No. 311 KB/RK/VK dated 18 March 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the six non-conciliated issues, held on 23 March 2011 at 4:00 p.m.

Both parties were present at the hearing. The Arbitration Council conducted a further conciliation of the six issues, resulting in issues 1, 3, 4, and 5 being resolved and issue 2 being partly resolved. The remaining issues in dispute are issues 2 and 6.

Normally, parties who appear before the Arbitration Council have the right to choose between a binding or non-binding award, regardless of whether the issues give rise to interests or rights disputes. However, in the Memorandum of Understanding On Improving Industrial Relations in the Garment Industry (MoU) signed by the Garment Manufacturers Association in Cambodia (GMAC) and six leading union confederations on 28 September 2010, the signatories agreed to submit rights disputes to binding arbitration. The signatories are still able to choose either binding or non-binding awards on interests disputes.

As both parties are signatories to the MoU dated 28 September 2010, they are bound to select binding arbitration of rights disputes. However, they are not bound to select binding arbitration of interests disputes. Any objection by the parties to an award on interests disputes will not affect their obligation to implement an award on rights disputes in accordance with the spirit of the MoU.

The Arbitration Council will consider the remaining issues in dispute based on evidence and reasons below.

EVIDENCE

Witnesses and Experts: N/A

Documents, Exhibits, and other evidence considered by the Arbitration Council:

A. Provided by the employer party:

1. Letter from the employer authorising Top Sitha to represent it, dated 23 March 2011.
2. Resignation letters of Seth Choeun, Soy Putha, Long Vann, and Mom Tangseng, dated 19 March 2011.

B. Provided by the worker party:

1. Complaints against the employer by factory workers, submitted to the President of NIFTUC, dated 16 March 2011.
2. Certificate of registration of the Local Union of NIFTUC, dated 1 March 2011.
3. Letter with thumbprints of workers alleging that on 10 March 2011 the employer coerced them to affix their thumbprints to a promise not to participate in strike action, threatening to withhold their wages and expel them from the factory if they refused.
4. List of names of workers with over two years' service demanding that the employer convert their contracts to undetermined duration contracts, dated 24 March 2011.

C. Provided by the Ministry of Labour and Vocational Training:

1. Report on collective labour dispute resolution at Yang Guang (Cambodia) Garment Pte., Ltd, No. 311 KB/RK/VK, dated 18 March 2011.
2. Record of collective labour dispute resolution at Yang Guang (Cambodia) Garment Pte., Ltd, dated 17 March 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend the hearing addressed to the employer, No. 227 KB/AK/VK/LKA, dated 21 March 2011.
2. Notice to attend the hearing addressed to the workers, No. 228 KB/AK/VK/LKA, dated 21 March 2011.

FACTS

- Having examined the report on collective labour dispute resolution;

- Having listened to the statements of the representatives of the employer and the workers; and
- Having reviewed the additional documents;

The Arbitration Council finds that:

- Yang Guang (Cambodia) Garment Pte., Ltd, located in Damnak Thom Village, Stung Meanchey Commune, Meanchey District, Phnom Penh, employs over 600 workers.
- The Local Union of NIFTUC, representing approximately 600 workers, is the claimant in this case.

Issue 2: The workers demand that the employer refrain from deducting [union contribution fees of] 1,000 riels from workers' wages if they do not agree [to the deduction], and demand that the employer repay previously deducted wages.

- The Local Union of NIFTUC has requested that the employer deduct union contribution fees from the wages of the 600 workers.
- The Local Union of NIFTUC also demands that the employer pay back previously deducted union contribution fees for different unions to the 600 workers because they have not agreed to the deductions.
- The Local Union of NIFTUC has submitted to the employer a list of names of members who have agreed to deductions from their wages. The employer is checking the list and has not yet deducted union contribution fees for the Local Union of NIFTUC from the workers' wages.
- The employer previously deducted union contribution fees from the wages of workers whose names did not appear on the list of names submitted to it. The employer did not receive any complaints from the workers about these deductions.
- The evidence and the arguments of the employer and the workers do not specify the date on which the employer began making unauthorised deductions.
- Leng Nang, a worker, states that she commenced work in 2010 and did not authorise the employer to deduct union contribution fees from her wages. She acknowledges that she did not complain, although she was made aware of the deduction by payroll.

Issue 6: The workers demand that the employer convert fixed duration contracts to undetermined duration contracts on the basis that their total length exceeds two years.

- There are two types of contracts at the factory: fixed and undetermined duration contracts.

- 20 workers hold undetermined duration contracts and approximately 600 workers hold fixed duration contracts.
- Approximately 30% to 40% of the workers holding fixed duration contracts have over two years of service.
- Previously, the employer's practice was to offer successive six month contracts and not provide severance pay upon expiration of each contract. However, in October 2010 the employer began paying severance pay equal to 5% of the workers' wages upon expiration of each contract.
- The workers submitted a list of names of 17 workers with over two years of service as at 29 March 2011. Although the Arbitration Council ordered the employer to submit a written objection to the list of names by 31 March 2011, it failed to do so.
- The list of names is as follows:

No	Name	ID Number	Commencement date
1	Teuy Kimtheur	531	2005
2	Song Kunthea	593	2009
3	Mut Sophal	321	2009
4	Am Oun	635	2008
5	Kong Deap	91	2008
6	Kiv Touch	654	April 2009
7	Yan Dany	702	2007
8	Reoung Buntheoun	814	March 2008
9	Vong Somaly	638	2008
10	Peoun Thim	77	2004
11	Chreoun Phorn	554	2007
12	Seth Thy	173	2007
13	Kor Chamnan	02	2006
14	An Saang	No ID Number	2009
15	Sreyroath	506	2009
16	Sreyya	510	2009
17	Sreyroath	253	2009

REASONS FOR DECISION

Issue 2: The workers demand that the employer refrain from deducting [union contribution fees of] 1,000 riels from workers' wages if they do not agree [to the deduction], and demand that the employer repay previously deducted wages.

Paragraph 2 of Article 129 of the Labour Law provides that a “worker can authorise deductions of his wage for dues to the trade union to which he belongs. This authorisation must be in writing and can be revoked at any time”.

Clause 5 of *Prakas* No. 305 SKBY dated 22 November 2001 issued by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation states:

Any worker who belongs to a union may make a written request, at least 15 days in advance, that his/her union dues be withheld from his/her salary in accordance with Article 129 of the Labour Law, and the employer shall properly comply with such a request.

In previous Arbitral Awards, the Arbitration Council has interpreted the article and clause above to mean that although workers can authorise employers to deduct union contribution fees from their wages, such authorisation must be in writing. Employers must deduct and forward to unions the union contribution fees if workers authorise the deduction (*see AAs 03/03-Tonga, reasons for decision, issue 9; 05/03-Top One Garment, reasons for decision, issue 1; and 16/05-New Point, reasons for decision, Issue 11*).

In Arbitral Award 62/04-Ecent, the Arbitration Council held that:

If the union wants the employer to take contributions from the employees' wages, the union must submit appropriate and acceptable documents such as a list of workers with signatures or fingerprints and collective or individual letters showing that the employees agree to have their money taken for the purposes of a contribution to the union. Upon receiving the document, the employer must deduct the contributions and send them to the union each month. In addition, the union must inform the employer in writing of any change in the employees' agreement regarding the deduction of contributions from their wages (*see also AA 60/05-Evegreen, reasons for decision, issue 1*).

The Arbitration Council will apply the above interpretation in this case. According to the facts, the employer acknowledges receipt of a request by the Local Union of NIFTUC to deduct union contribution fees. Based on this fact, the Arbitration Council orders the employer to deduct union contribution fees from the workers' wages in accordance with the list of names submitted by the Local Union of NIFTUC, in which the workers authorise the deduction.

According to the facts, the workers also demand that the employer repay unauthorised deductions. The Arbitration Council finds that the demand and evidence do not specify the date of the deductions to be repaid. At the hearing, the workers acknowledged that they failed to complain although they were aware of the deductions. The Arbitration Council considers that the workers' evidence is inconclusive and therefore there is not sufficient evidence for the Council to order the employer to repay the deducted wages to the workers.

In previous Arbitral Awards, the Arbitration Council has held that the claimant has the burden of proof (see AAs 79/05-Evergreen; 77/08-Xing Tai, reasons for decision, issue 1; 101/08-GDM, reasons for decision, issues 1 & 2; and 108/08-Hugo, reasons for decision, issue 4).

The Arbitration Council agrees with the rulings in the abovementioned cases. In conclusion, the Arbitration Council rejects the workers' demand that the employer repay wages previously deducted without authorisation for union contribution fees.

Issue 6: The workers demand that the employer convert fixed duration contracts to undetermined duration contracts on the basis that their total length exceeds two years.

Article 67(2) of the Labour Law 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.

Paragraph 5 of Article 73 of the Labour Law 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 Arbitral Awards 36/06-Mondotex, issue 2 and 57/06-Evergreen, issue 3, the Arbitration Council interpreted Article 67(2) to mean that:

A fixed duration contract will become an undetermined duration contract if the renewal of the contract makes the total term of the initial contract and the renewal more than two years.

In previous Arbitral Awards, the Arbitration Council has ordered the employer to convert fixed duration contracts to undetermined duration contracts where the workers have

over two years of service (see AA 10/03-Jacqsintex, reasons for decision, issue 1 and 36/06-Mondotex, reasons for decision, issue 2).

In this case, the 17 workers hold successively renewed six month contracts with a total length of over two years. The employer failed to object to the list of names of the 17 workers. Therefore, the Arbitration Council orders the employer to convert the contracts of those 17 workers to undetermined duration contracts.

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

DECISION AND ORDER

Issue 2:

- Order the employer to deduct union contribution fees from the workers' wages in accordance with the list of names submitted by the Local Union of NIFTUC, in which the workers authorise the deduction.
- Reject the workers' demand that the employer repay wages previously deducted without authorisation for union contribution fees

Issue 6: Order the employer to convert the contracts of the 17 workers to undetermined duration contracts.

Type of award: Non-binding award

This award will become binding eight days after the date of its notification unless one of the parties lodges a written opposition with the Minister of Labour through the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF THE MEMBERS OF THE ARBITRAL 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:

Annex to Arbitral Award 40/11-Yang Guang

Dissenting Opinion by Arbitrator Ing Sothy

Clause 37 of *Prakas* No. 099 SKBY, dated 21 April 2004, issued by the Ministry of Labour and Vocational Training states:

The arbitral panel shall record its decisions in an award which shall be signed by all three arbitrators. If one of the arbitrators does not agree with the decision of the majority, the dissenting arbitrator may record his dissent as an annex to the award.

Based on this clause, I, Arbitrator **Ing Sothy**, would like to record my dissent on issue 6 of the Arbitral Award **40/11-Yang Guang**. I would like to explain the reasons for my dissent:

Issue 6: The workers demand that the employer convert fixed duration contracts to undetermined duration contracts on the basis that their total length exceeds two years.

The employer has the right to select any kind of contract, of fixed or undetermined duration, for the workers. In this case, the employer signed fixed duration contracts with the workers. After those contracts expired, the employer provided them with a severance payment equal to 5% of their wages in accordance with Article 73, paragraph 6 of the Labour Law. Moreover, the length of the contract renewal did not exceed two years.

Thus, I consider that the contracts are still fixed duration contracts even after they are renewed. If the length of the contract renewal exceeds two years, then it will become an undetermined duration contract. When the workers' [undetermined duration] contracts are terminated, the employer must pay termination payments once again. Thus, the employer loses two things: 1. 5% of the worker's wages as a severance payment, and 2. The severance payment paid to the workers when the workers' contracts are terminated.

If the workers are given severance payments and we order the workers to repay the employer 5% of their wages, equal to the severance payment, but the workers are unable to do so, then what kind of contracts are they holding? And how does the employer settle the employment benefits with the workers?

Thus, I consider that the employer is obliged to pay severance payments to the workers equal to 5% of their wages. After the expiration of their first contracts, the employer signs new contracts with the workers and pays severance payments under the subsequent contracts. Therefore, even if the contracts are renewed many times, they are still fixed duration contracts.

However, if each time a fixed duration contract expires the employer does not provide workers with 5% of their wages as a severance payment, and the total length of the contract exceeds two years, then that contract will become an undetermined duration contract.

In conclusion, I am of the view that the Arbitration Council should not order the employer to convert the fixed duration contracts to undetermined duration contracts.

Article 67, paragraph 2 states:

The labor 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.

Interpretation of the law on fixed duration contracts:

- The parties are able to sign a contract but the total length must not exceed two years.
- The parties are able to renew the contract, as long as the renewal does not surpass two years. After the renewed contract expires, the employer must make a severance payment to the worker in accordance with Article 73 of the Labour Law.
- The parties are able to renew the contract as long as the renewal does not surpass two years.

Hence, each renewal must not surpass two years and after the contract expires the employer must make severance payments to the workers in accordance with Article 73 of the Labour Law.

Do not misinterpret the phrase *renewal must not surpass two years*.

Phnom Penh, 20 April 2011

Signature of Arbitrator

Ing Sothy