



KINGDOM OF CAMBODIA
NATION RELIGION KING

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THE ARBITRATION COUNCIL

Case number and name: 49/11-G-Foremost

Date of Award: 17 June 2011

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Ly Tayseng**

Arbitrator chosen by the worker party: **Ann Vireak**

Chair Arbitrator (chosen by the two Arbitrators): **Nhean So Munin**

DISPUTANT PARTIES

Employer party:

Name: **G-Foremost (Cambodia) Co., Ltd (the employer)**

Address: Tasek Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 012 838 767

Fax: N/A

Representatives:

- | | |
|---------------------|----------------------------|
| 1. Ms Tsai Shu Chin | Head of Accounting Section |
| 2. Ms Vong Chanthy | Administrative Assistant |
| 3. Ms Pen Sreyyan | Administrative Assistant |

Worker party:

Name: **Cambodian Labour Union Federation (CLUF)**

Local Union of CLUF

Address: Tasek Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 012 837 768

Fax: N/A

Representatives:

- | | |
|--------------------|---|
| 1. Mr Khin Sokhan | General Secretary of CLUF |
| 2. Mr Ngeth Ratana | Vice-President of the Local Union of CLUF |
| 3. Ms Nem Sophanna | Treasurer of the Local Union of CLUF |

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ISSUES IN DISPUTE

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

1. The workers demand that if they have no remaining annual leave from the previous year, the employer allow them to take the annual leave accrued in the current year after working six months of the current year. The employer states that its practice is consistent with the law.
2. The workers demand that the employer provide them with severance pay equal to 5% of their wages and payment in lieu of annual leave each time their contracts expire. The employer states that it will provide severance pay equal to 5% of wages and payment in lieu of annual leave when either party terminates the employment contract at will.

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. 444 KB/RK/VK dated 26 April 2011 was submitted to the Secretariat of the Arbitration Council on 26 April 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: 20 May 2011 at 8:30 a.m.

Procedural issues:

On 17 March 2011, the Department of Labour Disputes received a complaint from CLUF outlining an eight-point demand for the improvement of working conditions.

Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to conciliate the labour dispute on 22 March 2011. The last conciliation session was held on 4 April 2011. As a result, six of the eight issues were resolved. The two non-conciliated issues were referred to the Secretariat of the Arbitration Council on 26 April 2011 via non-conciliation report No. 444 KB/RK/VK dated 26 April 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 two non-conciliated issues, to be held on 6 May 2011 at 2:00 p.m. As the employer was busy, the workers agreed to adjourn the hearing until 19 May 2011. Due to the prior engagements of the members of the Arbitral Panel, a new hearing was scheduled for 20 May 2011 at 8:30 a.m.

Both parties were present at this hearing as summoned by the Arbitration Council. The Arbitration Council conducted a further conciliation the two non-conciliated issues but neither was resolved.

The Arbitration Council will consider the issues in dispute based on the 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. Authorisation letter from the director of G-Foremost for Tsai Shu Chin, dated 20 May 2011.
2. Internal Work Rules (dated 2008).

B. Provided by the worker party: N/A

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

1. Report on collective labour dispute resolution at G-Foremost (Cambodia) Co., Ltd, No. 444 KB/RK/VK, dated 26 April 2011.
2. Record of collective labour dispute resolution at G-Foremost (Cambodia) Co., Ltd, dated 4 April 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend the hearing addressed to the employer, No. 316 KB/AK/VK/LKA, dated 9 May 2011.
2. Notice to attend the hearing addressed to the workers, No. 317 KB/AK/VK/LKA, dated 9 May 2011.
3. List of the employer representatives who attended the hearing, dated 20 May 2011.
4. List of the union and worker representatives who attended the hearing, dated 20 May 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:

- G-Foremost (Cambodia) Co., Ltd employs a total of 1,060 workers.
- There are two unions at the factory. The Local Union of CLUF, representing 200 workers, is the claimant in this case. Neither of the unions at the factory holds most representative status (MRS).
- The employer commenced operation several years ago. About one and a half years ago, it offered fixed duration contracts to all its workers. On the hearing date, some of the workers' contracts had been renewed with contracts of over one year's duration. Some workers held contracts with a duration of over six months but less than one year; and others held contracts of less than six months' duration.

Issue 1: The workers demand that the employer allow workers who have exhausted their leave from the previous year to take their annual leave accrued in the subsequent year after six months.

- The employer does not permit workers on fixed duration contracts to use their accrued annual leave until they have worked for a full 12 months. Subject to agreement with the employer, the workers are given payment in lieu of annual leave when they become entitled to take the leave.
- Once the workers have taken or have received payment in lieu of the annual leave accrued in their first year of service, they are required to work for a further 12 months (until the end of the subsequent year of service) before they can use the annual leave accrued during their subsequent year of service.
- Workers are entitled to 18 days of annual leave after one year of service.
- The employer does not allow the workers to take the leave they accrue during the current year of service. If they need to take leave for personal commitments, such as their weddings, the employer grants them leave other than annual leave. Consequently, the employer does not pay their daily wages or the monthly attendance bonus when they take this leave. Approximately 20 workers in the water flowing section, such as Avy, Awon, and others, have in the past been granted leave other than annual leave.

- The workers state that they make this demand on behalf of those workers who have over a year's seniority and have worked for at least six months of the subsequent year.
- The employer states that it does not allow workers with over one year's seniority to take annual leave before completing the subsequent year of service. It asserts that because the workers choose to receive payment in lieu of annual leave accrued in the previous year, they are not allowed to take annual leave during the subsequent year. They must work for a full 12 months before they can use the newly accrued leave.

Issue 2: The workers demand that the employer provide them with a severance payment equal to 5% of their wages as well as payment in lieu of annual leave each time their contracts expire. The employer states that it will provide the workers with a severance payment equal to 5% of their wages and payment in lieu of annual leave when either party terminates the employment contract at will.

- The employer offers successive three month contracts to some workers. On the hearing date, some workers had been working for over a year on successive fixed duration contracts.
- The employer's practice is to provide a severance payment equal to 5% of the worker's wage and payment in lieu of unused annual leave upon contract termination, that is, when the worker ceases working for the employer.
- This case concerns those workers who do not receive the abovementioned payments from the employer because their contracts are renewed upon expiration.
- The workers state that they make this demand because it is easier to calculate payments for short term employment periods than at the end of the employment relationship. Further, the workers argue that the end of the employment relationship is too long for them to wait for the payments.
- The employer refuses to accommodate the demand.

REASONS FOR DECISION

Issue 1: The workers demand that the employer allow workers who have exhausted their leave from the previous year to take their annual leave accrued in the subsequent year after six months.

At the hearing, the workers confirmed to the Arbitration Council that their demand was that the employer allow workers with more than a year's seniority who have exhausted their annual leave accrued in the previous year to take newly accrued annual leave six months into their subsequent year of service.

The demand concerns a legal issue and the facts are not disputed. The Arbitration Council will consider whether or not the workers are entitled to use the annual leave accrued during their subsequent year of service.

The Arbitration Council considers below the provisions of the Labour Law relevant to this issue.

Article 166, paragraph 1 of the Labour Law states:

Unless there are more favourable provisions in collective agreements or individual labour contracts, all workers are entitled to paid annual leave to be given by the employer at the rate of one and a half work days of paid leave per month of continuous service.

Article 167, paragraph 1 of the Labour Law states [in part] that “[t]he right to use paid leave is acquired after one year of service.”

The disputed point is the meaning of the phrase “one year of service” in the article above. The employer understands the phrase “one year of service” to refer to each year of service, rather than the first year only. The workers find the article unclear but argue that they should be entitled to take their unused annual leave.

In Arbitral Award 94/04-Eternity Apparel, issue 2, the Arbitration Council found that “Article 167 of the Labour Law authorises workers to take leave during their second year without waiting until the end of the year. But the number of days [available] is based on the length of the actual work period.”

The Arbitration Council reasoned that:

The employer must allow those workers at the factory with seniority [of over a year] to use their annual leave without any conditions because the Labour Law authorises the workers to take the leave. If a worker has not used all their annual leave, the employer must maintain the unused leave for future years.

In this case, the Arbitration Council agrees with the above interpretation of Article 167 of the Labour Law. That is, the “one year of service” requirement applies to the first year of service only. Workers with seniority of one year are entitled to use their annual leave. Seniority is counted from the commencement of employment and not from the commencement of each year. If the workers do not have seniority of one year (12 months), they do not have the right to use annual leave, even though the law entitles them to accrue it.

The Arbitration Council finds that, according to the facts, the employer’s practice is not to allow workers with seniority of more than one year to take annual leave accrued during the current year of service, requiring them to complete the year first. The Council considers this practice to be an incorrect application of Article 167.

The Arbitration Council finds that Article 167 authorises the workers to use annual leave (in accordance with Article 166, workers are entitled to one and a half days per month of continued service unless the employer agrees to additional days) during their second or subsequent years of service by making a request to the employer at any time in that year. They do not need to wait until the end of the year.

The Arbitration Council considers in this case that workers with seniority of one year, after working for a further six months, are entitled to 1.5 days' leave multiplied by six months, equalling nine days of annual leave. Even if the workers have used up or accepted payment in lieu of the annual leave they accrued in the previous year, they still have the right to request to use their accrued leave at any time during the subsequent year. However, the workers cannot request to take more annual leave than is stipulated in the law, except by agreement with the employer.

Furthermore, based on the above facts, the Arbitration Council notes that the practice of making payment in lieu of annual leave to the workers is inconsistent with the third paragraph of Article 167 of the Labour Law, which provides that "any collective agreement providing compensation in lieu of paid leave, as well as any agreement renouncing or waiving the right to paid annual leave, shall be null and void". Therefore, the practice does not comply with the Labour Law. However, the Arbitration Council will not issue an award on this matter because neither party is disputing the issue.

In conclusion, regarding the first issue in this case, the Arbitration Council orders the employer to recognise the workers' entitlement to annual leave, allowing them to take their unused leave (accrued in accordance with Article 166 of the Labour Law) at their reasonable request, without waiting until they have worked for the entire subsequent year, in compliance with Article 167 of the Labour Law.

Issue 2: The workers demand that the employer provide them with a severance payment equal to 5% of their wages as well as payment in lieu of annual leave each time their contracts expire. The employer states that it will provide the workers with a severance payment equal to 5% of their wages and payment in lieu of annual leave when either party terminates the employment contract at will.

This demand concerns a legal issue and the facts are not disputed. At the hearing, the workers did not cite a specific legal provision to substantiate the demand but simply stated that it was easier to calculate the payments for short employment periods than to calculate them at the end of the employment relationship. They also argued that workers should not have to wait so long for the payments. The employer also failed to cite a specific provision to refute the workers' demand but stated that it would make severance payments only in the case of termination and non-renewal of contracts.

The Arbitration Council considers the issue in the context of relevant articles in the Labour Law below.

A. Demand for severance payment equal to 5% of wages upon expiry of fixed duration contracts:

Paragraph one of Article 73 of the Labour Law states:

A labour contract of specific duration normally terminates at the specified ending date. It can, however, be terminated before the ending date if both parties are in agreement on the condition that this agreement is made in form of writing in the presence of a Labour Inspector and signed by the two parties to the contract.

Paragraph six of Article 73 of the Labour Law states:

At the expiration of the contract, the employer shall provide the worker with the severance pay proportional to both the wages and the length of the contract. The exact amount of the severance pay is set by a collective agreement. If nothing set in such agreement, the severance pay is at least equal to five percent of the wages paid during the length of the contract.

The Arbitration Council considers that there are multiple interpretations of the phrase “at the expiration of the contract” in paragraph six of Article 73:

- (1) A fixed duration contract is renewed upon expiration without terminating the employment relationship; and/or
- (2) A fixed duration contract is not renewed upon expiration, thus the employment relationship is terminated.

The Arbitration Council interprets the phrase “at the expiration of the contract” to mean that the contract has expired without being renewed or has been terminated before the expiry date, thus terminating the employment relationship. If this interpretation is applied to the requirement to provide severance pay in Article 73, “severance pay” is a payment made by an employer to a worker when the employment relationship is terminated at will by either party before the contract’s expiry date, or where a fixed duration contract is not renewed upon expiry.

In Arbitral Award 60/06-New Max Garment, reasons for decision, issue 6, the Arbitration Council found that

workers are entitled to receive severance pay only when a fixed duration contract is terminated, causing the employment relationship to be severed. If a labour contract is renewed upon expiration, it cannot be considered that the employment relationship is severed because benefits continue to accrue under the new labour contract (*see also Arbitral Awards 76/06-South Bay, reasons for*

decision, issue 1; 101/10-Tripos International, reasons for decision, issue 3; and 60/06-New Max Garment, reasons for decision, issue 6).

The Arbitration Council applies the above interpretation in this case. Workers are entitled to severance payments when their fixed duration contracts are terminated because the termination causes the employment relationship to be severed, whether temporarily or permanently. If an employment contract is renewed upon expiry (i.e. the worker signs a new contract before the current contract expires or the contract is tacitly renewed by the parties' failure to signify their intent to terminate the contract on its ending date [see Article 67(8)]) this does not constitute a termination of the employment relationship because the relationship continues and benefits continue to accrue under the renewed contract.

B. Demand for payment in lieu of unused annual leave:

Article 167, paragraph two of the Labour Law provides that “[i]f the contract is terminated or expires before the worker has acquired the right to use his paid-leave, an indemnity calculated on the basis of Article 166 above is granted to the worker.”

In this article, “terminated” and “expires” have different meanings. The Arbitration Council considers that while the word “terminate” refers to the termination of a contract at will by either party, the word “expires” refers to the expiration of a fixed duration contract without renewal by either the parties' intent or by operation of law. A contract is not terminated or expired if it is properly renewed before its expiry date.

Based on Article 167, the Arbitration Council considers that in either of the two cases (contract termination or expiry), workers who have not been able to use their accrued annual leave must receive an indemnity for unused leave on a similar basis to the severance payment. See the above reasoning in relation to severance payments.

Based on the above interpretation of Articles 73 and 167, the Arbitration Council rejects the workers' demand that the employer provide severance pay equal to 5% of the workers' wages as well as payment in lieu of annual leave each time their fixed duration contracts are renewed upon expiration.

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

DECISION AND ORDER

Issue 1: Order the employer to allow the workers to use their annual leave without waiting until they have completed a subsequent year of service.

Issue 2: Reject the workers' demand that the employer provide severance pay equal to 5% of the workers' wages as well as payment in lieu of annual leave each time their fixed duration contracts are renewed upon expiration.

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 MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ly Tayseng**

Signature:

Arbitrator chosen by the worker party:

Name: **Ann Vireak**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Nhean So Munin**

Signature: