KINGDOM OF CAMBODIA

NATION RELIGION KING

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THE ARBITRATION COUNCIL

**Case number and name: 76/11-Zongtex**

**Date of Award: 19 July 2011**

# 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: **Liv Sovanna**

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

## DISPUTANT PARTIES

**Employer party:**

Name: **Zongtex Garment Manufacturing Ltd (the employer)**

Address: Toul Pongor Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 012 618 915 Fax: N/A

Representatives:

1. Ms Seng Ycheng Head of Administration
2. Ms Seav Mariya Assistant to the Head of Administration

**Worker party:**

Name: **Rights and Profit Workers Federation of Trade Unions (RPWFTU)**

**Local Union of RPWFTU**

Address: Toul Pongor Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 017 430 312 Fax: N/A

Representatives:

1. Mr Hing Bunthoeun General Secretary of RPWFTU
2. Mr Suos Sokha Chief of Dispute Resolution Unit of RPWFTU
3. Mr Sun Vibol President of the Local Union of RPWFTU
4. Mr Heang Ravy Secretary of the Local Union of RPWFTU

5. Mr Om Samrart Advisor to the Local Union of RPWFTU

## ISSUES IN DISPUTE

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

1. The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of leave taken for personal commitments as well as increasing the attendance bonus to US$ 10. The employer will follow the notification issued by the Ministry of Labour and Vocational Training.
2. The workers demand that the employer pay the meal allowance on a weekly basis. The employer will follow its existing practice.
3. The workers demand that the employer repay them the US$ 4.50 fee deducted for medical checks. The employer says it requires the workers to have medical checks.
4. The workers demand that the employer offer six month fixed duration contracts and refrain from terminating workers' contracts without valid reasons. The employer will follow its existing practice.
5. The workers demand that the employer arrange for a physician to be on standby during overtime work. The employer will ask a physician to work overtime.

## 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. 136 dated 7 June 2011 (Ninth 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. 677 KB/RK/VK dated 24 June 2011 was submitted to the Secretariat of the Arbitration Council on 27 June 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:** 4 July 2011 at 2:00 p.m.

**Procedural issues:**

On 6 June 2011, the Department of Labour Disputes received a complaint from the Local Union of RPWFTU 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 dispute. As a result, seven of the 12 issues were resolved. The five non-conciliated issues were referred to the Secretariat of the Arbitration Council on 27 June 2011, via non-conciliation report No. 677 KB/RK/VK dated 24 June 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 five non-conciliated issues, held on 4 July 2011 at 2:00 p.m.

Both parties were present at the hearing. The Arbitration Council attempted to conciliate the five issues, resulting in issue 5 being fully resolved, issue 1 being partly resolved, in respect of the demand regarding leave for personal commitments, and issue 4 being partly resolved in that the employer agreed to allow the workers to file a complaint in relation to the non-renewal of contracts. The remaining issues are issues 1 (the demand that the employer increase the attendance bonus), 2, 3, and 4 (the demand that the employer offer six month fixed duration contracts).

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. Declaration of the opening of the enterprise, No. 75 dated 7 March 2010.
2. Six-point agreement between the employer and the Union for Cambodian Workers (UCW) and the worker delegates on working conditions, dated 10 November 2010.
3. Brief statement on the labour dispute, dated 1 July 2011.
4. Letter from the employer to the head of the Department of Labour Inspection requesting acknowledgement of its Internal Work Rules, dated 1 February 2010.
5. Internal Work Rules of the employer, No. 015 dated 18 February 2010.

B. Provided by the worker party:

1. Statute of the Local Union of RPWFTU, No. 2145 dated 20 May 2011.

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

1. Report on collective labour dispute resolution at Zongtex Garment Manufacturing Ltd, No. 677 KB/RK/VK dated 24 June 2011.

2. Record of collective labour dispute resolution at Zongtex Garment Manufacturing Ltd, dated 22 June 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to select arbitrators addressed to the employer, No. 433 KB/AK/VK/LKA dated 28 June 2011.
2. Notice to attend the hearing addressed to the employer, No. 434 KB/AK/VK/LKA, dated 29 June 2011.
3. Notice to attend the hearing addressed to the workers, No. 435 KB/AK/VK/LKA, dated 29 June 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:**

- Zongtex Garment Manufacturing Ltd employs a total of 600 workers.
- There are two unions at the factory: the Local Union of RPWFTU and the Union for Cambodian Workers (UCW). UCW possesses a certificate of most representative status (MRS).
- The Local Union of RPWFTU, representing approximately 250 workers, is the claimant in this case.

**Issue 1: The workers demand that the employer increase the attendance bonus to US$ 10 per month.**

- The workers demand that the employer increase the attendance bonus to US$ 10 per month, that is, add US$ 3 to the existing attendance bonus.
- The workers state that the employer's previous practice was to provide workers with a US$ 6 attendance bonus, which was superior to the US$ 5 attendance bonus provided for in Notification No. 017 SKBY dated 18 July 2000. The workers state that the recent Notification No. 041/11 dated 7 March 2011 requires the employer to provide a US$ 7 attendance bonus. As such, the employer provides them with only US$ 7, without the extra US$ 1 that they used to receive when the former notification was in effect.

- The workers demand that the employer provide an additional US$ 3 to reach a total of US$ 10 per month. If the employer cannot afford to accommodate the demand, then it should provide an additional US$ 2 or US$ 1 per month as it did previously.
- The employer refuses to accommodate the workers' demand as it has been providing the US$ 7 attendance bonus in compliance with the new notification.
- The workers make this demand because they have many years of service with the employer; furthermore, the employer used to provide an extra US$ 1.
- The employer still refuses to accommodate the workers' demand.

**Issue 2: The workers demand that the employer pay the overtime meal allowance on a weekly basis.**

- The employer's practice is to pay the overtime meal allowance on the 20$^{th}$ and the 5$^{th}$ of each month, that is, once every two weeks.
- There is only one accountant at the factory, who has many tasks apart from coordinating payment of the overtime meal allowance.
- The employer refuses to pay the overtime meal allowance each week because it employs only one accountant.
- The workers request that the employer employ another accountant to assist with the payment of the overtime meal allowance because there are workers who do not have a sufficient amount of money to buy meals during overtime work.

**Issue 3: The workers demand that the employer repay the US$ 4.50 that it has deducted from workers' wages and the 12,000 riel paid by workers for medical checks.**

- The employer requires workers to have medical checks. Its practice is to either require workers to pay the associated expenses themselves or to arrange for labour physicians to examine the workers at the factory.
- Workers pay 12,000 riel for medical checks at the Occupational Health and Safety Department, whilst workers who have their health checked at the factory have US$ 4.50 (approximately 18,000 riel) deducted from their wages.
- Workers had medical checks during September and October 2010 following the employer's request in August 2010.
- Approximately 200-300 workers had their wages deducted or paid the expenses associated with medical checks.

- The workers make this demand because the employer requires them to have medical checks. Moreover, the employer is liable for expenses for medical checks under *Prakas* of the Ministry of Labour and Vocational Training.
- The employer refuses to accommodate the workers' demand, arguing that workers must have medical checks before commencing work and that other factories do not pay the associated expenses for their workers.

**Issue 4: The workers demand that the employer offer six month fixed duration contracts.**

- The workers state that the employer's practice is to offer workers three month fixed duration contracts upon completion of a two month probationary period, and a further three month contract upon expiration of the initial contract. The employer will offer six month contracts to workers with one year's seniority and good work performance. In summary, the employer's practice is to offer two month probationary contracts and three and six month fixed duration contracts.
- The workers demand that the employer cease to offer three month contracts and instead offer six month contracts upon completion of the probationary period.
- The workers make this demand because three month contracts are short term contracts which allow the employer to terminate their employment without giving them prior notice, while six month contracts require prior notice of expiration. As a result, workers are able to obtain more benefits [under six month contracts] and their job security is enhanced.
- The employer states that it gives seven days' prior notice of expiration of contracts (whether they are three or six month contracts) in order to inform workers of the reasons for non-renewal. The employer argues that its practice corresponds with its production line. Therefore, it refuses to accommodate the workers' demand.
- The workers maintain their demand that the employer offer six month fixed duration contracts upon completion of the two month probationary period.

## REASONS FOR DECISION

**Issue 1: The workers demand that the employer increase the attendance bonus to US$ 10 per month.**

In this case, the employer provides a monthly US$ 7 attendance bonus but the workers demand that the employer provide an additional US$ 3 to reach a total of US$ 10 per month. The Arbitration Council considers whether the employer is obliged to increase the attendance bonus to US$ 10 per month.

Notification No. 041/11 dated 7 March 2011 provides that "workers who attend work regularly in accordance with the number of working days in each month will receive a bonus of at least US$ 7 per month."

According to the facts, the workers used to receive a monthly US$ 6 attendance bonus pursuant to Notification No. 017 dated 18 July 2000, which required employers to provide only US$ 5 per month. The employer now provides a US$ 7 attendance bonus pursuant to the new Notification No. 041/11 dated 7 March 2011. The employer does not provide an additional US$ 1 on top of the US$ 7 despite its previous practice. The workers state that if the employer cannot afford to provide an additional US$ 3, it should increase the allowance by US$ 2 or US$ 1, as it did before.

In this case, the Arbitration Council finds that the employer is providing the US$ 7 attendance bonus in accordance with Notification No. 041/11. The Arbitration Council considers that Notification No. 041/11 requires that the US$ 7 attendance bonus be paid each month, but does not obligate the employer to increase the previous US$ 5 attendance bonus by US$ 2 or by any specified amount. Moreover, there is no agreement or collective agreement between the workers and the employer regarding an increase in the attendance bonus by US$ 1, 2, or 3, thus making this an interests dispute.

With respect to interests disputes, the Arbitration Council considers whether the disputant union has most representative status (MRS). The Arbitration Council considers that having MRS gives a union the legal capacity to negotiate with an employer to establish a collective agreement and gives it legal standing to bring an interests dispute before the Arbitration Council for resolution.

Clause 43 of *Prakas* No. 099 dated 21 April 2004 states:

> An arbitral award which settles an interest dispute takes the place of a collective bargaining agreement and 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.

Based on this provision, the Arbitration Council considers that if it issues an arbitral award to settle an interests dispute, that award will become a one-year collective agreement. Generally, a collective agreement must be applicable to all workers at the enterprise and the right to strike cannot be exercised for the purposes of revising an unexpired collective agreement *(see AA 152/08-Wilson, reasons for decision, issue 2)*.

In order to possess MRS, a union must be registered and fulfil the other conditions stipulated in Article 277 of the Labour Law (1997).

In Arbitral Award 07/06-Dai Young, reasons for decision, issue 3, the Arbitration Council ruled that the "right [to make a collective agreement on behalf of workers] belongs to the registered union with most representative status and which has complied with the other criteria under Article 277 of the Labour Law."

In previous arbitral awards, the Arbitration Council has declined to consider an interests dispute if the union bringing the dispute to the Council does not have MRS *(see AAs 71/09-Hytex, reasons for decision, issue 10 and 84/10-Ming Da Footwear, reasons for decision, issue 3)*.

The Arbitration Council will apply the abovementioned interpretation in this case.

In this case, the Local Union of RPWFTU does not hold an MRS certificate. Therefore, the Council considers that the Local Union of RPWFTU does not have legal standing to bring an interests dispute before the Council for consideration.

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer increase the attendance bonus by US$ 3 to reach a total of US$ 10.

**Issue 2: The workers demand that the employer pay the overtime meal allowance on a weekly basis.**

In this case, the employer pays the overtime meal allowance once every two weeks, that is, on the 20th and 5th of each month. However, the workers demand that the employer pay the allowance on a weekly basis because there are workers who do not have a sufficient amount of money to buy meals during overtime work. The Arbitration Council considers whether the workers are entitled to their demand that the employer pay the overtime meal allowance on a weekly basis.

In previous arbitral awards, the Arbitration Council has ruled that:

> the overtime meal allowance is not part of overtime wages because the allowance is paid in lieu of a meal and it is not a payment gained from overtime work. If the employer does not provide the meal allowance, it is required to provide a free meal. Thus, the provision of the overtime meal allowance is not related to the overtime wages *(see AAs 85/09-Nan Kuang, reasons for decision, issue 10 and 110/09-Berry Apparel, reasons for decision, issue 1)*.

The Arbitration Council will apply the abovementioned interpretation in this case. As the overtime meal allowance is not related to overtime wages, it is not paid as part of the overtime payment.

Point 2 of Notification No. 041 dated 7 March 2011 stipulates that "workers who volunteer to work overtime at the employer's request will receive a 2,000 riel meal allowance per day or be provided with a free meal."

The Arbitration Council considers that the abovementioned notification does not specify a period for payment of the overtime meal allowance. However, the employer must provide a free meal to overtime workers. The provision of a free meal enables workers to work overtime upon the completion of service during normal working hours. Food is an undeniable basic need for all human beings and, further, the employer is obligated to provide it. Moreover, the notification states that if the employer is unable to provide a free meal, it must provide a 2,000 riel meal allowance per day. The Arbitration Council is of the view that the overtime meal allowance must be paid at an appropriate time to ensure that the workers are able to buy meals, whether this be once a day, once a week, or once a month.

In previous arbitral awards, the Arbitration Council has determined that a free meal must be provided for each day of overtime work. Therefore, it is reasonable for the overtime meal allowance to be paid to workers on each day of overtime work *(see AAs 47/07-Chung Fai, reasons for decision, issue 5; 79/07-Terratex, reasons for decision, issue 5; and 85/09-Nan Kuang, reasons for decision, issue 10)*.

The Arbitration Council agrees with the interpretation above. Furthermore, the Council is of the view that the demand for payment of the overtime meal allowance should be granted according to the workers' circumstances. In some circumstances the workers are able to buy a meal during overtime work even though the employer has not paid the allowance. Sometimes the workers are able to buy meals if the allowance is paid once a week or once a month. Thus, the Arbitration Council will consider the issue in light of the workers' circumstances in this case.

According to the facts, the workers demand that the employer pay the overtime meal allowance once a week because they need money to buy meals for each day of overtime work. The employer refuses to accommodate the demand because it employs only one accountant.

The Arbitration Council is of the view that the workers' daily living issues are of paramount importance. The workers would be able to buy meals for each day of overtime work if the employer paid the overtime meal allowance once a week, but they are unable to buy meals every day if the employer pays them once every two weeks. The intention of the law is to provide the overtime meal allowance for each day of overtime work. Thus, the Arbitration Council considers that it is legitimate for the workers to demand that the employer pay the overtime meal allowance once a week.

In conclusion, the Arbitration Council orders the employer to pay the overtime meal allowance on a weekly basis.

**Issue 3: The workers demand that the employer repay the US$ 4.50 that it has deducted from workers' wages and the 12,000 riel paid by workers for medical checks.**

The Arbitration Council considers whether the employer is obliged to pay expenses associated with the workers' medical checks.

Article 247 of the Labour Law (1997) states:

> The Ministry in Charge of Labour shall issue a *Prakas* to determine:
>
> a) the conditions under which pre-employment, re-employment, periodical, and special physical exams are given;…
>
> c) the conditions under which employers are required to establish and provide at their expense:…
>
> 4) the medical exams of workers as stipulated in point a) of this article.

Clause 2(d) of the inter-ministerial *Prakas* No. 1191 dated 21 November 2006 states: "Fees for medical checks which employers shall pay is determined as follows: For each Cambodian worker, it is determined to be 12,000 riel (twelve thousand riel)."

Based on Article 247(a) and (c) and Clause 2(d) of the inter-ministerial *Prakas*, the Arbitration Council considers that the employer is required to pay the expenses associated with the workers' medical checks.

In previous arbitral awards, the Arbitration Council has ordered employers to repay expenses associated with medical checks to workers who have paid the expenses on their own *(see AAs 02/03-Chu Hsing, reasons for decision, issue 1; 19/04-Kbal Koah II, reasons for decision, issue 2; 59/05-Tack Fat, reasons for decision, issue 5; 05/06-W & D, reasons for decision, issue 1; 98/07-Sky Sino, reasons for decision, issue 2; 52/08-Supreme Garment, reasons for decision, issue 1; and 70/09-G.W., reasons for decision, issue 1)*.

In this case, the Arbitration Council agrees with the abovementioned decisions.

Article 120 of the Labour Law states:

> A statute of limitation for a lawsuit for the payment of wages is three years from the date the wage was due.
>
> Claims subject to the statute of limitation of a lawsuit include the actual wage, perquisites and all other claims of the worker resulting from the labour contract, as well as the indemnity in the event of dismissal.

Based on this article, the workers' claim for repayment of medical check expenses relates to the workers' contracts because it is one of the conditions of the labour contracts that workers must have a medical check certificate and the statute of limitation for a lawsuit to reclaim the payment is only three years.

When should the statute of limitation begin? In Arbitral Award 93/07-Global Footwear, issue 2, the Arbitration Council determined that if the worker underwent the medical check before commencing work or signing the contract, the statute of limitation for claiming medical check fees is three years from the date the contract was signed or the date the worker commenced work. If the worker underwent the medical check after commencing work, the three year limitation will start from the date on which the worker paid the medical check fee themselves or, if the employer deducted the fee from their wages, the date on which they received their wages.

According to the findings of fact, 200-300 workers had their wages deducted or paid the medical check fee themselves during September and October 2010. The claim in this case is not beyond the statute of limitation of three years. Therefore, the workers are entitled to demand that the employer repay the US$ 4.50 deducted from wages or the 12,000 riel paid by workers themselves.

In conclusion, the Arbitration Council orders the employer to repay the US$ 4.50 deducted from wages or the 12,000 riel paid by workers themselves.

**Issue 4: The workers demand that the employer offer six month fixed duration contracts.**

The Arbitration Council considers whether the employer is obliged to offer six month fixed duration contracts upon the completion of two month probationary contracts.

Article 65 of the Labour Law states that "[a] labour contract establishes working relations between the worker and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties."

Article 1 of Decree 38 on Contracts and Other Liabilities states that "[a] contract is an agreement between two or more persons to create, change or terminate one or more obligations which bind them."

Article 22 of Decree 38 states "[a] contract is a legally binding agreement between the parties."

In previous arbitral awards, the Arbitration Council has interpreted the above articles as follows:

> Article 65 of the Labour Law places an employment contract under the general provisions of the Civil Code, meaning that the employment contract is of lesser authority than Decree 38 on Contracts and Other Liabilities. Based on Articles 1 and 22 of Decree 38 on Contracts and Other Liabilities, an employment contract can be made so long as there is an agreement between the employer and the worker, and there is not a third party - besides the employer and the worker -

who forces the parties to enter into the employment contract" *(see AAs 131/09-Medcrest, reasons for decision, issue 3; 54/10-USA, reasons for decision, issue 6; and 68/10-USA, reasons for decision, issue 4)*.

Based on the above interpretation, the employer's consent to the demand is required. According to the facts, the employer refuses to accommodate the workers' demand on the basis of the requirements of its production line. The employer offers six month contracts only to workers with one year of service. The Arbitration Council cannot force the employer into a contract without its consent.

In conclusion, the Arbitration Council rejects the workers' demand that the employer offer six month fixed duration contracts upon completion of the two month probationary period.

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

## DECISION AND ORDER

**Issue 1:** Decline to consider the workers' demand that the employer increase the attendance bonus by US$ 3 to reach a total of US$ 10.

**Issue 2:** Order the employer to pay the overtime meal allowance on a weekly basis.

**Issue 3:** Order the employer to repay the US$ 4.50 deducted from wages or the 12,000 riel paid by workers themselves for medical checks.

**Issue 4:** Reject the workers' demand that the employer offer six month fixed duration contracts upon completion of the two month probationary period.

**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: **Liv Sovanna**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....