



**KINGDOM OF CAMBODIA**

**NATION RELIGION KING**

**ក្រុមប្រឹក្សាសវនកម្មជាតិ**

**THE ARBITRATION COUNCIL**

**Case number and name: 70/11-Goldfame**

**Date of Award: 13 July 2011**

**Dissenting opinion by: 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: **Tuon Siphann**

Chair Arbitrator (chosen by the two Arbitrators): **Run Saray**

#### **DISPUTANT PARTIES**

##### **Employer party:**

Name: **Goldfame Enterprises (Int'l) Knitters Ltd (the employer)**

Address: #13, Group 1, Kampong Pring Khum Sithbo Village, S'ang District, Kandal  
Province

Telephone: 016 787 616

Fax: N/A

Representatives:

- |                     |   |
|---------------------|---|
| 1. Mr Hom Phea      | Lawyer  |
| 2. Mr Try Sovryiyak | Representative of the employer                                  |
| 3. Mr Huot Sokchea  | Legal Officer   |
| 4. Mr Chet Khemara  | Officer of the Garment Manufacturers Association in<br>Cambodia |

##### **Worker party:**

Name: **Voice Khmer Youth Union Federation (VKYUF)**

**Local Union of VKYUF**

Address: Kampong Pring Khum Sithbo Village, S'ang District, Kandal Province

Telephone: 012 713 065

Fax: N/A

Representatives:

1. Mr An Sakhan	General secretary of VKYUF
2. Mr Ly Thy	Officer of VKYUF
3. Mr Soy Pich	President of the Local Union of VKYUF
4. Mr Yan Vannak	Vice-President of the Local Union of VKYUF
5. Ms Touch Simon	Secretary of the Local Union of VKYUF
6. Mr Dan Savit	Member of the committee of the Local Union of VKYUF

### **ISSUES IN DISPUTE**

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

1. The workers demand that the employer convert the fixed duration contracts of workers with over two years of service to undetermined duration contracts. The employer says it will follow the Labour Law.
2. The workers demand that the employer rectify underpayments of the seniority bonus dating back to March 2011. The employer says it will follow the Notification issued by the Ministry of Labour and Vocational Training.

### **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. 163/11 KB/RK/VK dated 3 June 2011 was submitted to the Secretariat of the Arbitration Council on 13 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:** 22 June 2011 at 2:00 p.m.

#### **Procedural issues:**

On 30 May 2011, the Department of Labour Disputes received a complaint from the VKYUF outlining the workers' demands that the employer improve working conditions.

Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to resolve the dispute and the last conciliation session was held on 30 May 2011. As a result, five of the seven issues were conciliated. The two non-conciliated issues were referred to the Secretariat of the Arbitration Council on 13 June 2011 via non-conciliation report No. 163/11 KB/RK/VK dated 3 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 two non-conciliated issues, held on 22 June 2011 at 2:00 p.m.

Both parties were present at the hearing. The workers challenged Arbitrator Ing Sothy, as he had acted as a lawyer for Forever Million Footwear and therefore the workers suspected that he might act as a lawyer for the employer as well. However, the employer confirmed that Hom Phea was its lawyer, and not Ing Sothy. Because the workers failed to prove that Ing Sothy had an interest in the employer, the Arbitral Panel decided to continue the process with Ing Sothy remaining a member of the panel. The Arbitration Council attempted to further conciliate the two non-conciliated issues, but neither issue was resolved.

The Arbitration Council will consider the issues in dispute based on evidence and reasoning as follows.

## **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 employer to its lawyer Hom Phea, dated 21 June 2011.
2. Certificate of commercial registration, No. 4921 PN/CBP dated 25 October 2010.
3. Internal Work Rules of the employer, No. 058 SKBY dated 12 September 2011.
4. Statute of the employer, dated 4 September 2006.
5. Letter from the Minister for Commerce to Chan Gkwang, Director of the employer regarding a request to modify and deposit the employer's new statute, No. 4921 PN/CBP dated 25 October 2010.
6. Brief statement by Hom Phea on the collective labour dispute in case 70/11, No. 031 KHP/11 dated 28 June 2011.
7. Letter from the Head of the Department of Labour Inspection to the Director of Lotus Textile Garment (Cambodia) Ltd explaining the law on fixed duration contracts, No. 897 KKBV/RGK/RK.
8. Payroll information for dismissed workers in the Automatic Weaving Section.

9. Written fixed duration contract, dismissal notification, and agreement to terminate the written fixed duration contract of Veng Sopheak.
10. Written fixed duration contracts, dismissal notifications, and agreements to terminate the written fixed duration contracts of Hin Sreydeth, Prum Kimsan, Him Leap, and Peang Ty.

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

1. Letter from VKYUF to the Director of the employer, requesting a meeting to settle the workers' demands, No. 614/11 SSSYX dated 24 March 2011.
2. Letter from the workers to the President of VKYUF, requesting intervention to improve working conditions, dated 17 March 2011.
3. Certificate of registration of the Local Union of VKYUF, dated 29 April 2010.

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

1. Report on collective labour dispute resolution at Goldfame Enterprises (Int'l) Knitters Ltd, No. 163/11 KB/RK/VK, dated 3 June 2011.
2. Record of collective labour dispute resolution at Goldfame Enterprises (Int'l) Knitters Ltd, dated 30 May 2011.

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

1. Notice to attend to the hearing addressed to the employer, No. 393 KB/AK/VK/LKA dated 15 June 2011.
2. Notice to attend to the hearing addressed to the workers, No. 394 KB/AK/VK/LKA dated 15 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:**

- Goldfame Enterprises (Int'l) Knitters Ltd (Goldfame) employs a total of 6,000 workers.
- There are four unions at the factory: the Local Union of VKYUF; the Local Union of C.CAWDU (Coalition of Cambodian Apparel Workers Democratic Unions); the Local Union of CLUF (Cambodian Labour Union Federation); and the Local Union of FUS (Federation Union Solidarity).
- The Local Union of VKYUF, the claimant in this case, represents 285 workers. It does not hold most representative status.

**Issue 1: The workers demand that the employer convert the fixed duration contracts of workers who have over two years of service to undetermined duration contracts.**

- The workers clarified that the demand for conversion of fixed duration contracts to undetermined duration contracts is for all workers, including non-members of the Local Union of VKYUF, on the grounds that the demand gives rise to a rights dispute.
- Goldfame produces winter coats and commenced operation in 1997. The employer states that each year from January to May there is not much work for the workers. In early 2007, the employer began using fixed duration contracts to deal with the increase in purchase orders from May to December of each year.
- The employer employs 65% of its workers on undetermined duration contracts and the other 35% on fixed duration contracts. About 10% of the workers employed on fixed duration contracts have over two years' service.
- The employer's practice is to use fixed duration contracts of one, six, eight, and 10 months and to notify the workers upon expiration of the contracts. Upon expiration of each contract, the employer provides payment in lieu of unused annual leave and severance pay equal to 5% of the workers' wages.
- In cases of contract renewal, the employer either immediately renews the workers' contracts upon expiration, or in some cases it offers new contracts one week, one month, or four months after expiration.
- The employer states that the frequency of contract renewal depends upon production needs, which is why some contracts are renewed immediately whilst others are renewed one week, one month, or four months following their expiration. The employer further states that after returning to work the workers are allowed to work in their previous sections, to receive their previous wages, and to hold their former positions. However, the employer changes their ID Numbers and signs new employment contracts with them.
- The workers make this demand on the grounds of Article 67 of the Labour Law, stating that if the total length of fixed duration contracts exceeds two years, the contracts will become undetermined duration contracts. They argue that the employer's practice makes them lose benefits such as seniority bonuses and future retirement payments under the social security scheme.
- The employer refutes the workers' claim, arguing that its practice has no impact on the workers' seniority bonuses and that it has made contributions to the social security scheme for workers holding both fixed and undetermined duration contracts.

- The employer offers an alternative interpretation of Articles 67 and 73 of the Labour Law. It says that according to Article 73, fixed duration contracts will become undetermined duration contracts if the employer fails to give prior notice to the workers. If prior notice is given, Article 73, paragraph 5 is inapplicable in relation to Article 67(2), which stipulates that fixed duration contracts of over two years' duration will become undetermined duration contracts. In any event, according to the explanation provided by the Department of Labour Inspection, fixed duration contracts may be renewed an unlimited number of times as long as each renewal does not exceed two years.

**Issue 2: The workers demand that the employer rectify underpayments of the seniority bonus dating back to March 2011.**

- With respect to the seniority bonus, the employer's practice is to provide US\$ 8 per month to the workers in compliance with an agreement made with the Local Union of C.CAWDU, dated 20 February 2010.
- The employer provides the seniority bonus to workers with up to eight years' service in accordance with Notification No. 041/11 dated 7 March 2011. However, the employer does not pay workers with nine years or more of service in accordance with the notification; it pays these workers only US\$ 8.
- The workers demand that the employer implement Notification No. 041/11 dated 7 March 2011 and, accordingly, pay US\$ 9, 10, and 11 per month to workers with service of nine, 10, and 11 years respectively. They also demand that the employer back pay the underpaid seniority bonus to workers with nine years or more of service in accordance with Notification No. 041/11, effective from March 2011.
- The workers state that any agreement or collective agreement inconsistent with Notification No. 041/11 above must be abrogated.
- The employer refuses to accommodate the workers' demand.

**REASONS FOR DECISION**

Because the Local Union of VKYUF makes its demands for all workers, the Arbitration Council will consider the claim as follows:

Clause 19 of *Prakas* No. 99 SKBY dated 21 April 2004 states: "A party may appear before the arbitration panel in person, be represented [by a lawyer]...or be represented by any other person expressly authorised in writing by that party."

According to this clause, disputant parties may appear before the arbitration panel in person, be represented by a lawyer who is a member of the Bar Association of the Kingdom

of Cambodia, or be represented by any other person expressly authorised in writing by that party (see AAs 122/10-Meng Yan and 01/11-Pou Yuen, *Reasons for Decision, Issue 1*).

According to the facts, non-members of the Local Union of VKYUF were absent from the hearing and the Local Union of VKYUF failed to submit their authorisation letters to the Council. Therefore, the Arbitration Council considers the demand applicable only to members of the Local Union of VKYUF.

**Issue 1: The workers demand that the employer convert the fixed duration contracts of workers who have over two years of service to undetermined duration contracts.**

Article 67(2) of the Labour Law 1997 states:

The labour contract signed with one 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.

Any violation of this rule leads the contract to become a labour contract of undetermined duration.

Article 73, paragraph 5 of the Labour Law 1997 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.

Moreover, in previous Arbitral Awards the Arbitration Council has ruled that fixed duration contracts will become undetermined duration contracts when contract renewals lead the total period of the contract to exceed two years (see AAs 10/03-Jacqsintex, *Reasons for Decision, Issue 1*; 36/06-Mondotex, *Reasons for Decision, Issue 2*; 57/06-Evergreen, *Reasons for Decision, Issue 3*; 155/09-USA, *Reasons for Decision, Issue 9*; 70/10-Manhattan; and 17/11-JRB, *Reasons for Decision, Issue 3*).

Further, in the significant Arbitral Award 10/03-Jacqsintex, *Reasons for Decision, Issue 1*, the Council found that:

The Cambodian labour law has a bias toward contracts of undetermined duration as expressed in Art. 67(7) & (8). The reason for this bias comes from the fact that undetermined duration contracts lead to increased employment security which is important for workers and which is in the interests of the employer as well because long term employment leads to increased commitment to their work from employees.

The Arbitration Council agrees with the interpretation above.

According to the facts, the employer provides a severance payment and payment in lieu of unused annual leave upon expiration of fixed duration contracts. The employer either renews the contracts immediately upon expiration or in some cases reemploys the workers after one week, one month, or four months, depending on production needs.

The Arbitration Council considers that the fact that the employer immediately needs workers for the production line indicates that it does not just need them for occasional increases in production. Therefore, workers' contracts immediately renewed by the employer with a total length exceeding two years will become undetermined duration contracts.

The Arbitration Council considers that in cases where the employer does not reemploy workers immediately, due to production needs decreasing, but reemploys them after one week, one month or four months when production increases, it is able to use fixed duration contracts even if the workers' service exceeds two years. In any event, the Council finds that upon expiration of the contracts, the employer pays the workers seniority payments based on their length of service as well as outstanding wages. The Arbitration Council considers that the employer arranges contracts with workers depending on its production needs, rather than with the intention of evading its legal obligations.

Equally, the Arbitration Council will order the employer to stop its practice if it maliciously prevents the workers' fixed duration contracts from becoming undetermined duration contracts by waiting for a period of time to elapse before signing a new contract.

The Arbitration Council considers that the employer provides benefits to workers holding fixed duration contracts, paying the seniority bonus based on accumulated seniority since the worker's commencement date and making contributions to the national social security fund, the same benefits provided to workers on undetermined duration contracts.

In conclusion, the Arbitration Council orders the employer to convert to undetermined duration contracts the fixed duration contracts of members of the Local Union of VKYUF with over two years' service if the contracts are immediately renewed upon expiration. The Arbitration Council rejects the workers' demand that the employer convert fixed duration contracts which are renewed by the employer one week, one month, or four months after their expiry due to changes in production needs, given that the employer is not maliciously evading its legal obligation to convert the contracts to undetermined duration contracts.

**Issue 2: The workers demand that the employer rectify underpayments of the seniority bonus dating back to March 2011.**

The Arbitration Council considers the issue as follows:



Point 3 of Notification No. 041/11 KB/SCN dated 7 March 2011 states:

1. Workers who have worked at any factory, enterprise, and establishment, for more than one year shall receive a seniority bonus as follows:

Seniority (in years)	1	2	3	4	5	6	7	8	9	10	11
Amount of money received (in dollars)	0	2	3	4	5	6	7	8	9	10	11

2. Workers who have seniority in accordance with the years mentioned above shall receive a seniority bonus based on the year of seniority (as mentioned in the table above) except for workers who have worked for more than 11 years who shall receive a seniority bonus of US\$ 11 per month.

Based on this notification, the workers are entitled to receive a seniority bonus in accordance with each year of service from their second year onwards. From nine to 11 years of seniority, workers must receive US\$ 9, US\$ 10, and US\$ 11 respectively.

Article 13, paragraph 1 of the Labour Law states:

The provisions of this law are of the nature of public order, excepting derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or a convention that do not comply with the provisions of this law or any legal text for its enforcement, are null and void.

Based on this article, the Arbitration Council considers that any agreement providing benefits which are less than those provided under the Labour Law and labour regulations is null and void (*see AAs 115/08-Top One, Reasons for Decision, Issue 2; 109/09-USA, Reasons for Decision, Issue 4; 10/10-NagaWorld, Reasons for Decision, Issue 3; 78/10-NagaWorld, Reasons for Decision, Issue 3*).

According to the facts, the employer has paid a seniority bonus of only US\$ 8 to workers even though they have over nine years' service on the basis of the agreement made between the employer and the Local Union of C.CAWDU on 20 February 2010. The Arbitration Council considers that the employer's practice is not in compliance with Notification No. 041/11 above and that the abovementioned agreement, which is contrary to the Notification, is null and void.

Notification No. 041/11 KB/SCN dated 7 March 2011 states that the "provision of these benefits stipulated in points 1, 2, and 3 of this notification shall be effective from 1 March 2011."

The Arbitration Council considers that the employer must pay a seniority bonus to those workers who have over nine years' service in accordance with Notification No. 041/11 dated 7 March 2011.

In conclusion, the Arbitration Council orders the employer to pay a seniority bonus of US\$ 9 to workers having service of nine years, US\$ 10 to workers having service of 10 years, and US\$ 11 to workers having service of 11 years, and to back pay the underpaid seniority bonus dating back to 1 March 2011.

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 convert to undetermined duration contracts the fixed duration contracts of members of the Local Union of VKYUF with over two years' service if the contracts are immediately renewed upon expiration.
- Reject the workers' demand that the employer convert to undetermined duration contracts the fixed duration contracts of members of the Local Union of VKYUF who are paid in accordance with the law upon expiration and later reemployed after a period of time, leading their period of service from their commencement date to exceed two years.

**Issue 2:** Order the employer to pay a seniority bonus of US\$ 9 to workers having service of nine years, US\$ 10 to workers having service of 10 years, and US\$ 11 to workers having service of 11 years, and to back pay the underpaid seniority bonus dating back to 1 March 2011.

**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: **Ing Sothy**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Run Saray**

Signature: .....

## **Annex to Arbitral Award 70/11-Goldfame Enterprises (Int'l) Knitters Ltd**

### **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 **70/11-Goldfame**. I would like to explain the reasons for my dissent:

#### **Issue 1: The workers demand that the employer convert the fixed duration contracts of workers who have over two years of service to undetermined duration contracts.**

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, 13 July 2011

**Signature of Arbitrator**

**Ing Sothy**