



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 13/11-Gold Kamvimex

Date of award: 23 February 2011

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Kao Thach**

Arbitrator chosen by the worker party: **An Nan**

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

DISPUTANT PARTIES

Employer party:

Name: **Gold Kamvimex Garment Factory Ltd. (the employer)**

Address: No. 12, Russian Confederation Blvd, Kakap Commune, Dangkor District,
Phnom Penh

Telephone: 012 522 266

Fax: N/A

Representatives:

1. Mr Long Heang Officer of the Garment Manufacturers Association in
Cambodia
2. Mr Chhoy You Head of Administration

Worker party:

Name: **Coalition of Cambodian Apparel Worker Democratic Unions (C.CAWDU)**

Local Union of C.CAWDU

Address: No. 2-3G, St. 26BT, Boeung Tompun Commune, Meanchey District, Phnom Penh

Telephone: 089 960 860

Fax: N/A

Representatives:

1. Mr Muo Chheang Officer of C.CAWDU
2. Mr Teurn Tin President of the Local Union of C.CAWDU
3. Ms Seng Samarng Vice-President of the Local Union of C.CAWDU

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4. Ms Pphem Savuth Treasurer of the Local Union of C.CAWDU
5. Ms Kong Channet Member of the Local Union of C.CAWDU

ISSUES IN DISPUTE

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

1. The workers demand that the employer reinstate Teurn Tin, the President; Pphem Savuth, the Treasurer; Seng Samarng, the Vice-President; and Kong Channet, a member of the Local Union of C.CAWDU, and provide them with back pay from the date of dismissal to the date of reinstatement. The employer refuses to reinstate them, arguing that their labour contracts have expired.
2. The workers allege that the employer has not complied with the working conditions provided for in the Labour Law and discriminated against the Local Union's leaders. The employer states that it has complied with the Labour Law and would not discriminate against the Local Union if it held an election for its leaders and was registered in accordance with the Labour Law.
3. The workers demand that the employer convert fixed duration contracts to undetermined duration contracts. The employer will maintain its existing practice.

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. 082 KB/RK/VK dated 20 January 2011 was submitted to the Secretariat of the Arbitration Council on 20 January 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 Commune, Tuol
 Kork District, Phnom Penh

Date of hearing: 1 February 2011 at 8:00 a.m.

Procedural issues:

On 30 November 2010, the Department of Labour Disputes received a complaint from the Local Union of C.CAWDU outlining the workers' demand that the employer improve working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to conciliate the dispute and the last conciliation session was held on 14 January 2011. None of the three issues were resolved at the session. The three non-conciliated issues were referred to the Secretariat of the Arbitration Council on 20 January 2011, via non-conciliation report No. 082 KB/RK/VK dated 20 January 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 three non-conciliated issues, held on 1 February 2011 at 8:00 a.m. Both parties were present at the hearing. The Arbitration Council attempted to conciliate the three issues, resulting in none of the issues being resolved. The two parties agreed to combine issues 1 and 2, which are related.

As both parties are signatories to the Memorandum of Understanding On Improving Industrial Relations in the Garment Industry (MoU) dated 28 September 2010, the Arbitration Council will divide the issues into two types: rights disputes and interests disputes. In accordance with the MoU, both parties have agreed to choose binding arbitration on rights disputes. [However, this does not apply to interests disputes.] The parties are able to choose non-binding arbitration of interests disputes, and can object to an arbitral award on such disputes.

Such an objection will not affect the parties' obligation to implement an award on rights disputes in accordance with the spirit of the MoU.

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 company director for Long Heang, dated 21 January 2011.
2. Brief statement by the employer on the labour dispute in this case.
3. Certificate of commercial registration of Gold Kamvimex Garment Factory Ltd., No. 3493 PN/CBP dated 8 July 2008.
4. Internal Work Rules of the employer, No. 059 SKBY/RK dated 1 June 2001.

5. Letter from the head of the Department of Labour Disputes to Teurn Tin regarding the application for registration of the Local Union of C.CAWDU, No. 1092 KB/RK/VK dated 3 December 2010.
6. Letter from the employer to the head of the Department of Labour Disputes objecting to the application for registration of the Local Union of C.CAWDU, dated 30 November 2010.
7. Letter from the employer to the head of the Department of Labour Disputes regarding the expiration of the fixed duration contracts of Teurn Tin, Seng Samarng, and Pheam Savuth, dated 18 November 2010.
8. Notification of contract expiration from the company director to Pheam Savuth and Seng Samarng, dated 19 November 2010.
9. Employment contract of Pheam Savuth, effective from 1 September to 30 November 2010.
10. Employment contract of Seng Samarng, effective from 1 September to 30 November 2010.
11. Notification of contract termination from Seng Samarng [to the company director], dated 17 May 2008.
12. Employment contract of Seng Samarng, effective from 11 December 2007 to 10 March 2008.
13. Employment contract of Seng Samarng, effective from 11 March to 10 June 2008.
14. Pay slip for Seng Samarng for June 2008.
15. Letter from the employer to the head of the Department of Labour Disputes objecting to the application for registration of the Local Union of C.CAWDU, dated 5 October 2010.
16. ID card of Kong Chanly.
17. Resignation letter of Kong Chanly, dated 4 October 2010.
18. Letter from Kong Chanly to the president of C.CAWDU regarding his resignation as president of the Local Union of C.CAWDU, dated 4 October 2010.
19. Announcement by Kong Chanly regarding his resignation from his job at the factory and the withdrawal of his membership of the Local Union of C.CAWDU, dated 4 October 2010.
20. List of resignees for November and December 2010, submitted by the employer.
21. List of 10 newly recruited workers, submitted to the employer by the Local Union of C.CAWDU.
22. Employment application form and resume of Man Theoun, Leang Leihorn, Vannak Sokny, and Kong Sros.
23. Resignation letter of Lay Chantra, dated 30 November 2010.

24. Resignation letter of Chem Kong, dated 30 November 2010.
25. Resignation letter of Yuk Chantou, dated 2 December 2010.
26. Resignation letter of Pov Keurn, dated 20 December 2010.
27. Notification of contract expiration from the company director to Krouch Seila, dated 14 December 2010.
28. Letter from C.CAWDU notifying the company director of the election to establish the Local Union of C.CAWDU, No. 145/10 SBK dated 25 September 2010.
29. Letter from C.CAWDU notifying the company director of the election to establish the Local Union of C.CAWDU, No. 150/10 SBK dated 15 October 2010.
30. Letter from the employer to the Secretariat of the Arbitration Council objecting to the brief statement by C.CAWDU on the labour dispute, dated 11 February 2011.

B. Provided by the worker party:

1. Letter from C.CAWDU to the Secretariat of the Arbitration Council regarding its submission of a brief statement about the labour disputes, dated 3 February 2011.
2. ID card of Seng Samarng.
3. List of five workers whose contracts were renewed and 10 newly recruited workers.
4. Hospital discharge form of Bic Sokhan.
5. Dismissal record of the union leaders, dated 19 November 2010.
6. Letter from C.CAWDU notifying the company director of the election to establish the Local Union of C.CAWDU, No. 150/10 SBK dated 15 October 2010.
7. Letter from C.CAWDU notifying the company director of the election to establish the Local Union of C.CAWDU, No. 145/10 SBK dated 22 September 2010.
8. Receipt of acknowledgement of the registration of the Local Union of C.CAWDU, issued by the Department of Labour Disputes, dated 27 October 2010.
9. Letter from the head of the Department of Labour Disputes to Teurn Tin regarding the registration of the Local Union of C.CAWDU, 1092 KB/RK/VK dated 3 December 2010.
10. Letter from C.CAWDU to the Arbitration Council objecting to the brief statement and documents submitted by the employer, No. 15/11 SBK dated 11 February 2011.
11. Certificate of registration of the Local Union of C.CAWDU, dated 24 January 2011.
12. Employment contract of Pheam Savuth, effective from 1 September to 30 November 2010.
13. Employment contract of Seng Samarng, effective from 1 September to 30 November 2010.
14. Employment contract of Teurn Tin, effective from 1 September to 30 November 2010.

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

1. Report on collective labour dispute resolution at Gold Kamvimex Garment Factory Ltd., No. 082 KB/RK/VK, dated 20 January 2011.
2. Minutes of collective labour dispute resolution at Gold Kamvimex Garment Factory Ltd., dated 14 January 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend to the hearing addressed to the employer, No. 073 KB/AK/VK/LKA dated 25 January 2011.
2. Notice to attend the hearing addressed to the workers, No. 074 KB/AK/VK/LKA dated 25 January 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:

- Gold Kamvimex Garment Factory Ltd. employs a total of 575 workers.
- The Local Union of C.CAWDU has been formally registered. The Council finds that, according to the document submitted by the workers to the Arbitration Council on 11 February 2011, the Local Union of C.CAWDU has a certificate of registration, No. 2052 KB/VK dated 24 January 2011. The Local Union of C.CAWDU received the certificate late because the Ministry of Labour and Vocational Training failed to notify it on 24 January 2011.
- The Local Union of C.CAWDU claimed at the hearing that it represents approximately 100 workers. The employer does not recognise the union and claims that it has not been registered.

Issues 1 and 2: The workers demand that the employer reinstate Teurn Tin, Pheam Savuth, Seng Samarng, and Kong Channet and provide them with back pay from the date of dismissal to the date of reinstatement.

- The workers argue that they make this demand because the employer discriminates against the Local Union of C.CAWDU. The employer refutes the claim, arguing that it does not recognise the local union because it has not been registered.

- The Arbitration Council finds that, according to the letter from the head of the Department of Labour Disputes to Teurn Tin, No. 1092 KB/RK/VK dated 3 December 2010, the Department of Labour Disputes received the application for registration of the Local Union of C.CAWDU on 27 October 2010; and the employer objected to the application on 30 November 2010 on the grounds of a discrepancy in the notifications of the outcomes of the first and second elections.
- According to the notification of the election for the establishment of the Local Union, No. 145/10 SBK dated 22 September 2010, of which the security guard Mean Leakhana acknowledged receipt, Teurn Tin, Pheam Savuth, and Seng Samarng were among the six candidates for union leadership positions.
- The employer did not seek approval from the Labour Inspector before dismissing Teurn Tin, Pheam Savuth, Seng Samarng, and Kong Channet.
- At the hearing, the employer submitted a list of newly recruited workers, provided by the Local Union to support its argument, as follows:
 1. Phorn Prurm, ID 297, commenced work on 13 December 2010
 2. You Nean, ID 269, commenced work on 13 December 2010
 3. Dorn Sopheap, ID 267, commenced work on 13 December 2010
 4. Sun Maly, ID 295, commenced work on 13 December 2010
 5. Long Dorn, ID 266, commenced work on 13 December 2010
 6. Sok Pov, ID 393, commenced work on 20 December 2010
 7. York Somali, ID 075, commenced work on 3 January 2011
 8. Khean Lyna, ID 108, commenced work on 3 January 2011
 9. Khun Mean, ID 110, commenced work on 3 January 2011
 10. Thou Rachana, ID 643, commenced work on 25 January 2011
- The employer also submitted a list of 13 resignees for November and December 2010.

Case of Teurn Tin:

- Teurn Tin commenced work on 1 June 2010 on a three month fixed duration contract. The employer subsequently offered him a further three month fixed duration contract, effective from 1 September 2010 to 30 November 2010.
- Teurn Tin received a US\$ 61 main wage, a US\$ 5 attendance bonus, and a US\$ 6.5 meal allowance each month. His average wage was between US\$ 70 to US \$80.
- He stated that on 19 November 2010, the head of administration informed him that his contract had expired and the employer did not intend to renew it.

- He did not receive a severance payment, as he refused to acknowledge receipt of the expiration notification.

Case of Pheam Savuth:

- Pheam Savuth commenced work on 8 September 2009 on a three month fixed duration contract. The employer subsequently offered her four consecutive three month contracts. Her final contract was effective from 1 September 2010 to 30 November 2010.
- Her main wage was US\$ 61. As a piece rate worker, she received an average wage of US\$ 70.
- She stated that on 19 November 2010, the head of administration informed her that her contract had expired and the employer did not intend to renew it.
- She did not receive a severance payment, as she refused to acknowledge receipt of the termination notification.

Case of Seng Samarng:

- Seng Samarng commenced work on 25 March 1998.
- The Arbitration Council finds that, according to the termination notification dated 10 June 2008 submitted by Seng Samarng to the employer, she terminated her contract in June 2008.
- The employer stated that Seng Samarng signed a new three month contract on 1 September 2009, and that the employer offered her consecutive contracts, until her final contract. Her final contract was effective from 1 September 2010 to 30 November 2010.
- She received a US\$ 66 main wage, a US\$ 5 attendance bonus, a US\$ 3 seniority bonus, and a US\$ 6.5 meal allowance each month. Her average wage was between US\$ 80 to US\$ 90.
- She stated that on 19 November 2010, the head of administration informed her that her contract had expired and the employer did not intend to renew it.
- She did not receive a severance payment, as she refused to acknowledge receipt of the expiration notification.

Case of Kong Channet:

- Kong Channet commenced work on 1 June 2010 under a three month fixed duration contract. The employer subsequently offered her a further three month fixed duration contract.

- She received a US\$ 61 main wage, a US\$ 5 attendance bonus, and a US\$ 6.5 meal allowance each month. Her average wage was between US\$ 70 to US\$ 80.
- She stated that on 18 November 2010, the head of administration informed her that her contract had expired and the employer did not intend to renew it.
- She did not receive a severance payment as she refused to acknowledge receipt of the expiration notification.

- The workers allege that the dismissal of Teurn Tin, Seng Samarng, Pheam Savuth, and Kong Channet was the result of union discrimination. The workers provide the following facts:
 - o The union held the election for its leadership on 23 October 2010.
 - o The workers notified the employer of the election on 16 October 2010.
 - o The workers received a receipt of acknowledgement of union registration on 27 October 2010.

Issue 3: The workers demand that the employer convert fixed duration contracts to undetermined duration contracts.

- The workers demand that the employer convert the fixed duration contracts of Teurn Tin, Seng Samarng, Pheam Savuth, and Kong Channet to undetermined duration contracts.
- The Arbitration Council has found the following facts regarding Seng Samarng:
 - o She commenced work in 1998 without a contract.
 - o The employer subsequently offered her a three month contract.
 - o Under that written contract, she worked for the employer from 11 March 2007 to 10 June 2008.
 - o On 17 May 2008, Seng Samarng notified the employer that she did not intend to sign a new contract when her contract expired on 10 June 2008.
 - o She later returned to work for the employer from 1 September 2009 to 30 November 2010.
 - o The Arbitration Council determines that since her return to work in September 2009, the total length of her contracts is one year and two months.
- The Arbitration Council has found the following facts regarding Pheam Savuth, Kong Channet, and Teurn Tin:

- Pheam Savuth worked for the employer from 8 September 2009 to 30 November 2010. The total length of her contracts is one year and two months.
- Kong Channet worked for the employer from 1 June 2010 to 30 November 2010. The total length of her contracts is five months.
- Teurn Tin worked for the employer from 1 June 2010 to 30 November 2010. The total length of his contracts is five months.
- The workers state that the employer's practice is to sign three month contracts with workers. They maintain their demand that the employer convert contracts that are still valid, as well as contracts that are expired and the employer intends to renew, into undetermined duration contracts.
- The workers' reason for making this demand is that a three month period is a very short one, and the employer can terminate their contracts easily. The workers further state that under undetermined duration contracts, the employer can dismiss them only when they commit serious misconduct and, furthermore, they will receive more benefits.
- The employer argues that its practice has been in place since work commenced at the factory, and there has been no previous demand regarding this issue. It further contends that the practice of offering three month contracts is aligned with purchase orders and the production line at the factory. Therefore, it refuses to accommodate the workers' demand.
- The workers maintain their demand that the employer convert their fixed duration contracts to undetermined duration contracts.

REASONS FOR DECISION

Issues 1 and 2: The workers demand that the employer reinstate Teurn Tin, Pheam Savuth, Seng Samarng, and Kong Channet and provide them with back pay from the date of dismissal to the date of reinstatement.

Before determining this issue, the Arbitration Council considers whether the demand gives rise to an interests dispute or rights dispute.

Article 312, paragraph two of the Labour Law (1997) states that “[t]he Council of Arbitration legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council's decisions are in equity for all other disputes”.

In accordance with this provision, the Council will resolve rights disputes based on the law and interests disputes based on equity.

Clause 43 of *Prakas* No. 099 SKBY on the Arbitration Council 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.

In previous arbitral awards, the Arbitration Council has held that an interests dispute is a dispute which has no basis in the law, an agreement, or a collective agreement (see *Arbitral Awards 119/09-SL Garment, reasons for decision, issue 1; 86/10-New Mingda, reasons for decision, issue 2; 02/11-Pou Yuen, reasons for decision, issue 2*).

Based on Article 312, Clause 43, and the abovementioned jurisprudence, the Arbitration Council determines that an interests dispute is a dispute which has no basis in the law, an agreement [i.e. employment contract], or a collective agreement, while a rights dispute is a dispute concerning entitlements in the law, an employment contract, or a collective agreement.

In this case, the workers demand that the employer reinstate Teurn Tin, Pheam Savuth, Seng Samarng, and Kong Channet and provide them with back pay from the date of dismissal to the date of reinstatement, on the grounds of union discrimination. The Arbitration Council considers that the claim relates to a rights dispute because it involves employment termination, which is subject to provisions in the Labour Law.

The workers make this demand on the basis of union discrimination, as the workers involved are union leaders and a union member. The employer argues that the workers' fixed duration contracts have expired, and therefore discrimination is not a factor in the case. The Arbitration Council finds that, according to the facts, the employer terminated their contracts before they expired. Therefore, this claim concerns the premature termination of fixed duration contracts.

The Arbitration Council will consider whether the termination of the contracts of Teurn Tin, Pheam Savuth, Seng Samarng, and Kong Channet was in compliance with the Labour Law.

Article 293 of the Labour Law states that "[t]he dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector".

Clause 4, paragraph one of *Prakas* No. 305 SKBY dated 22 November 2001 states:

From the time that the application for registration is submitted, all workers who are founding members of a union, as well as those workers who voluntarily join

the union during the application period, shall enjoy the same protection as shop stewards. This protection shall last for a period of up to 30 days following the date of registration of the union.

In previous arbitral awards, the Arbitration Council has interpreted the above clause to mean that workers should be protected if:

1) the worker is the type of worker entitled to receive special protection; 2) the dismissal occurs within the special protection period; and 3) the union has notified the employer of the candidates entitled to special protection through all reliable means (*see Arbitral Awards 71/09-Hytex, reasons for decision, issue 1 and 09/10-Chung Hao*).

The Arbitration Council agrees with the interpretation above [as to when a worker will be entitled to receive special protection].

The Arbitration Council considers in this case whether Teurn Tin, Pheam Savuth, Seng Samarng, and Kong Channet satisfy the three conditions for receiving special protection.

First condition: the type of workers entitled to receive special protection

According to the facts, Teurn Tin, Pheam Savuth, Seng Samarng, and Kong Channet are members and founders of the Local Union of C.CAWDU. Based on Clause 4, paragraph one of *Prakas* No. 305 above, these four workers were entitled to special protection during the application period and for 30 days following the date of registration.

Second condition: the dismissal occurs within the special protection period

According to the facts, the Local Union of C.CAWDU submitted an application for registration on 27 October 2010. Thus Teurn Tin, Pheam Savuth, Seng Samarng, and Kong Channet were entitled to special protection from 27 October 2010 until 30 days following the date of registration of the Local Union. The employer dismissed Kong Channet on 18 November 2010, and Teurn Tin, Pheam Savuth, and Seng Samarng on 19 November 2010. The union was registered on 24 January 2011. The Arbitration Council considers that the dismissal of the four workers occurred within in the protection period, hence this condition is fulfilled.

Third condition: the union notified the employer of the candidates entitled to special protection through all reliable means

C.CAWDU notified the employer of the six candidates for union leadership, including Teurn Tin, Pheam Savuth, and Seng Samarng, through the notification of union election No. 140/04 SBK dated 22 September 2010, of which Mean Leakhana acknowledged receipt. On 27 October 2010, the Department of Labour Disputes received the application for registration of the Local Union. The employer objected to the application on 30 November 2010, on the

grounds of a discrepancy in the notifications of the outcomes of the first and the second elections. Consequently, the Arbitration Council considers that the employer has been aware since 22 September 2010 that the three workers above are members and founders of the union. Therefore, this condition is fulfilled with respect to Teurn Tin, Pheam Savuth, and Seng Samarng.

However, the Arbitration Council finds that there is no evidence that the employer was aware of Kong Channet being a member and founder of the union. Therefore, this condition is not fulfilled with respect to Kong Channet.

The Arbitration Council will consider the cases of Teurn Tin, Pheam Savuth, and Seng Samarng, who receive special protection, as follows:

In previous arbitral awards, the Arbitration Council has held that “the union leaders, all workers who are founders of the union, and the workers who volunteer to be members of the union within the application period must receive protection against dismissal” (see *Arbitral Awards 122/09-YVP, reasons for decision, issue 3 and 52/10-Ying Dong, reasons for decision, issue 5*).

Based on Article 293 of the Labour Law, Clause 4 of *Prakas* No. 305 SKBY, and the interpretation above, the Arbitration Council considers that all founder workers or workers who volunteer to be union members within the application period must receive the same protection as worker delegates; before dismissing those workers, the employer must obtain approval from the Labour Inspector.

According to the facts, Teurn Tin, Pheam Savuth, and Seng Samarng are founders of the Local Union of C.CAWDU. Following their application for union registration on 27 October 2010, the employer dismissed them on 19 November 2010 without seeking approval from the Labour Inspector. Since they are founders of the union, approval from the Labour Inspector was required for the dismissal.

In conclusion, the Arbitration Council orders the employer to reinstate Teurn Tin, Pheam Savuth, and Seng Samarng, and provide them with back pay from the date of their dismissal to the date of reinstatement.

The Arbitration Council will consider the case of Kong Channet, to whom special protection does not apply, as follows:

Article 12 of the Labour Law states:

Except for the provisions fully expressing under this law, or in any other legislative text or regulation protecting women and children... no employer shall consider on account of:

...

- membership of workers' union or the exercise of union activities

to be the invocation in order to make a decision on:

...

- discipline or termination of employment contract.

Article 279 of the Labour Law states:

Employers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal.

In previous arbitral awards, with respect to Articles 12 and 279 set out above, the Arbitration Council has ordered employers to reinstate workers on the grounds of union discrimination.

In relation to allegations of union discrimination, in previous arbitral awards the Arbitration Council has held that the worker party has the burden of proof (*see Arbitral Awards 93/06-Evergreen, reasons for decision, issue 1; 112/06-River Rich, reasons for decision, issue 1; and 01/07-Supreme, reasons for decision, issue 1*). Generally, the Arbitration Council considers the arguments of both parties and examines the evidence relevant to the dismissal in order to determine whether or not there is discrimination (*see Arbitral Awards 03/03-Tonga, reasons for decision, issue 10; 10/03-Jacqsintex, reasons for decision, issue 4; 19/04-Kabal Koah, reasons for decision, issue 1; and 17/07-Charm Textile, reasons for decision, issue 1*).

In this case, the Arbitration Council considers that the workers' claim of discrimination lacks sufficient evidence for the Council to consider the case. Therefore, the Arbitration Council rejects the workers' demand.

In conclusion, the Arbitration Council orders the employer to reinstate Teurn Tin, Pheam Savuth, Seng Samarng, and provide them with back pay from the date of their dismissal to the date of reinstatement, and rejects the workers' claim with respect to Kong Channet.

Issue 3: The workers demand that the employer convert fixed duration contracts to undetermined duration contracts.

Before determining this issue, the Arbitration Council will consider whether the demand gives rise to an interests dispute or a rights dispute.

The demand involves conversion from fixed duration contracts to undetermined duration contracts, as stipulated in the Labour Law and Decree 38, thus making it a rights dispute (see the discussion with respect to rights disputes in Issues 1 and 2, above).

In this case, the workers state that the employer's practice is to offer three month contracts to workers. They maintain the demand that the employer convert contracts that are still valid, as well as contracts that are expired and the employer intends to renew, into undetermined duration contracts. However, the employer refuses to accommodate their demand. Hence, the Arbitration Council will consider the case as follows:

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 freely entered into by two or more persons to create, change or terminate one or more obligations which bind them.”

Article 22 of Decree 38 on Contracts and Other Liabilities states that “[a] contract is a legally binding agreement between the parties.”

In previous arbitral awards, the Arbitration Council has held:

In accordance with Article 65 of the Labour Law, a labour contract is subject to Decree 38 on Contracts and Other Liabilities. Based on Articles 1 and 22 above, a contract can be made if there is an agreement between the worker and the employer. No third person besides the parties to the contract can force the parties to sign a labour contract (*see Arbitral Awardss 131/09-Medcrest Textiles, reasons for decision, issue 3 and 54/10-USA, reasons for decision, issue 6*).

The Arbitration Council agrees with the above interpretation. In this case, the employer refuses to accommodate the workers' demand because its practice is aligned with its purchase orders and the production line. The Arbitration Council—as a third party—is unable to order any party to sign a contract.

However, a fixed duration contract can be converted into an undetermined duration contract if the workers can prove that they have over two years of service.

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.

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

In previous arbitral awards, specifically Arbitral Awards 57/06-Evergreen; 10/03-Jacqsintex; and 36/06-Mondotex, the Arbitration Council has interpreted this as meaning that

“fixed duration contracts become undetermined duration contracts if any renewals cause the total duration of the employment contracts to exceed two years”.

The Arbitration Council finds that none of the four workers in this case have over two years of service.

In conclusion, the Arbitration Council rejects the workers’ demand.

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

DECISION AND ORDER

Part I. Rights dispute:

Issues 1 and 2:

- Order the employer to reinstate Teurn Tin, Pheam Savuth, and Seng Samarng and provide them with back pay from the date of their dismissal to the date of reinstatement.
- Reject the workers’ demand that the employer reinstate Kong Channet and provide her with back pay.

Issue 3: Reject the workers’ demand that the employer convert their fixed duration contracts to undetermined duration contracts.

Type of award: binding award

The award of the Arbitration Council in Part I will be final and is enforceable by the parties in accordance with the MoU dated 28 September 2010.

Part II. Interests dispute: N/A

Type of award: non-binding award

The award in Part II 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 period.

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Kao Thach**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: