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**A STUDY OF THE USE OF FIXED-DURATION
CONTRACTS IN THE CAMBODIAN GARMENT INDUSTRY**

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Moa Kärnstrand

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Summary

Fixed-duration contracts, so called FDCs, are frequently used in the Cambodian garment industry. According to recent estimates, some 80 per cent of the country's exporting garment factories employ most of their work force on this type of contract, renewed every second or third month, sometimes for years and years. It is not rare to find factories where the entire workforce is employed on short-term.

Despite international norms and Cambodian law stating exploitation of workers through short-term employment is illegal, the misuse of FDCs continues.

The nature of this form of contract constitutes a basis for violations of workers rights as factory owners have a choice, with little or no consequence, of laying off workers who air their discontent. FDC workers are largely being deprived of their right to leave, sick leave, maternity benefits and seniority benefits. In addition to that, they face severe obstacles to unionizing and union activity. Overall, FDC workers are in a much more vulnerable position than their permanently employed colleagues.

In this report, eight workers from three H&M supplier factories share how these contracts make them constantly fear for their jobs and how the violations of rights, enabled by the contracts, adversely affects their lives and the lives of their colleagues and families.

Workers are able to collectively seek remedy to these violations through the Cambodian Arbitration Council. But the council's awards are not necessarily binding, and factory owners can chose not to implement them.

Very little is done today to restrict the use of FDCs in the supplier factories. However, H&M, the largest buyer of apparel from Cambodia, has initiated a project to restrict this breach of the law and their own rules. But the company has not yet included a prohibition of FDCs into its code of conduct and exercises a low level of transparency in the work on this issue.

Foreword

Against the backdrop of recent years' violent strikes rocking the Cambodian garment industry it is of great interest to take a closer look at the use of short-term employment, in Cambodia known as fixed-duration contracts. These contracts, and the precarious working conditions they create, fuel tense industrial relations. According to one of Cambodia's largest independent unions, C.CAWDU, short-term contract employment has been one of the major factors in the sharp increase in Cambodian factory-level strikes since 2006.¹

Data indicates that factories use fixed-duration contracts in violation of Cambodian Labour Law and that these violations are becoming more and more prevalent. The ILO project Better Factories Cambodia (BFC) reported an increase in factories severely misusing FDCs from 24 per cent of the factories surveyed in 2011 to 33 per cent of factories surveyed in 2013-2014. BFC has also consistently found that, since 2011, nearly a third of all factories in each survey period used FDCs to avoid paying workers their legally stated benefits.²

As will be outlined in the following chapters, the use of FDCs also risks to adversely affecting the struggle towards a living wage for all workers – one of today's most urgent issues for the industry.

In this report Fair Action aims to summarize the current state of the use of fixed-duration contracts in the Cambodian garment sector as well as Swedish clothing company H&M's efforts to deal with the issue, both on a strategic and on an operational level. In the first sections, the background of this issue will be outlined, followed by a summary of local legislation and international norms applicable. Stories of workers have been added to illustrate the serious consequences of the widespread FDC use. We will also offer the brands our recommendations, suggesting reforms that could foster a more sound employment structure in their supplier factories.

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1. Nuon, Serrano, Xhafa, *Women and gender issues in Trade unions in the Cambodian garment industry*, 2011. For strike data, see ILO-BFC, Thirtieth Synthesis Report, 2013 and ILO-BFC, Thirty Second Synthesis Report, 2015.
 2. ILO-BFC, Thirty First Synthesis Report, 2014.

Methodology

This report is a desk study supplemented by worker interviews. Eight workers between the ages of 29 and 45, at three authorized H&M supplier factories in Phnom Penh area, Cambodia, took part in in-depth interviews about their experiences of fixed-duration contracts. Interviews were conducted during May and June 2015 by CLEC³, a Cambodian non-governmental organisation.

We identified factories with existing FDC issues and workers to interview with the assistance of local workers' representatives and organizers. Workers from H&M's strategic suppliers, those with long-term partnerships with H&M including incentives such as joint capacity planning up to five years ahead, were prioritized. Interviews were conducted in the local language Khmer and took place during the workers' spare time, outside factory premises on a location identified as safe by the participants and with no employer representative present.

We decided to focus exclusively on workers in H&M supplier factories due to the company's expansive presence in Cambodia. H&M is the largest buyer of apparel from the country, with 80 supplier factories,⁴ and through their dominance they have a significant influence on the development of working conditions in factories and the process towards a greater respect for workers' rights in the country and in the garment industry as a whole.

Interviewees were informed of the purpose of the interviews and how Fair Action intends to use the information and views presented during the sessions. Factory names and names of workers have been withheld for security reasons. Provided the limited



It is difficult, as a garment worker, to have time to take care of the domestic work. Especially since overtime is often not a free choice. – We always faced termination of our FDC, if we did not work overtime, says worker Kannitha.

number of interviews conducted for this specific report, the result could not be claimed to be quantifiable, but rather contribute to anecdotal evidence.

In addition to workers' testimonies, Fair Action has interviewed representatives of CLEC and Workers Rights Consortium, WRC, as well as conducted informal interviews with a wide range of local and international stakeholders on this matter. We have interviewed H&M⁵ at two occasions about the use of FDCs and company representatives were also given the chance to read relevant parts of the report prior to publishing.

3. CLEC, Community Legal Education Center, is financed by Bread for the World, Diakonia, Open Society Institute, TRAIID and USAID.

4. Fair Action interview with Lars-Åke Bergqvist and Jonah Wigerhäll, July 25, 2015.

5. Lars-Åke Bergqvist, Global code of conduct coordinator and Jonah Wigerhäll, Sustainability country manager for Cambodia and Vietnam.

Background

Garment industry essential to Cambodian economy

The export-oriented garment industry in Cambodia started in the mid-1990s. It has, since then, grown to become one of the most important industry sectors in the country and a pillar to the country's economy, representing almost a third of the GDP.⁶ The industry benefitted largely from the Multi Fibre Agreement, a bilateral trade agreement between garment producing countries and the EU, the United States and Canada from 1995 and onwards. For more than ten years, exports continued to rise. Between 1995 and 2006, the industry grew 40 per cent per year.⁷

In 2014 Cambodian garment exports totalled \$5,75 billion, a moderate growth from 2013 but a significant slowdown compared to 2012, when the sector had picked up momentum after the global economic turnaround.⁸ Employing over 730 000 workers, about 90 per cent of them women, Cambodian garment sector with its 1 200 factories is an important global player in the industry of ready-made garment.⁹ Among brands supplying from the country are, besides H&M, GAP, Marks & Spencer, Levi's and Adidas.¹⁰

In the industry's early days, workers rights were not on top of the agenda. Scandals of sweatshops, where children worked under horrible conditions producing goods for large international brands like Nike, unfolded throughout the 1990s. To address the issues of violations against human and workers' rights, the US incorporated an incentive into their

trade agreement with Cambodia: Import quotas were to be increased annually in exchange for gradual improvement in working conditions in the factories. In 2001, to ensure compliance, a new body within the International Labour Organisation (ILO) was created in Phnom Penh and named Better Factories Cambodia (BFC). BFC was given the task of monitoring factories for compliance with internationally recognized labour standards and Cambodia's labour legislation. The audits were made obligatory for receiving an export license from the Cambodian government, and they still are today.

Following the launch of Better Factories Cambodia, the country was seen as a forerunner on the issue of workers' rights, as BFC reports indicated improvements in factory working conditions and compliance.¹¹ This attracted buyers to the country and contributed to industry growth. The BFC model has since been replicated in other garment producing countries under the name Better Work.

In 2004, the Multi Fibre Agreement was phased out and the suppliers could no longer enjoy the benefits deriving from it. Cambodia was affected heavily by the 2008 global financial crises and as exports plunged, factories began to lay off workers. Today Cambodia's reputation as a socially responsible forerunner has worn thin, following a decrease in factory compliance level.¹² Widespread labour unrest and government violence against workers followed by a criticised ban on protesting, has also contributed to this change.¹³

6. World Bank, Country profile Cambodia, 2015.

7. Dasgupta, Poutiainen and Williams, *From downturn to recovery: Cambodia's garment sector in transition*, 2011.

8. Hul and Zsombor, "Garment Export Growth Slows Markedly in 2014", *The Cambodia Daily*, February 11, 2015.

9. de Carteret, "Registration of garment factories up in the first half", *Phnom Penh Post*, July 7, 2014.

10. CCHR, *Map of garment factories and supply chains*, 2013.

11. BFC, *Thirty First Synthesis Report*, 2014 (chart on page 1).

12. Ibid

13. UN News Center, As violence flares, "UN rights expert urges Cambodia to lift protest ban", July 16, 2014.

Over the last years, Better Factories Cambodia has suffered criticism, as the working conditions in the Cambodian garment industry evidently remain highly inadequate. The critics, among them labour unions and labour rights groups, claim the BFC exercises a poor level of transparency as they stopped disclosing names of non-compliant factories in their reports. The program is also criticised for not putting enough pressure on the buyers.¹⁴

Fixed duration contracts (FDCs)

The form of employing workers on a monthly, daily or even hourly basis is today commonly used to make up a permanent workforce in the Cambodian garment industry, through constant renewal of contracts. Since the phasing-out of global quotas, there has been an increase in the use of these contracts.¹⁵ Also the general length has changed over time, which could be connected to the global financial crises:

– In 2006 FDCs were normally [the length of] 1 year, then it changed to six months, then to three months. We don't see any improvement on the issue, says Tola Moeun, Head of Labour Program at Community Legal Education Center with a long experience of advocacy on workers' rights.

According to a 2009 study, only one out of 60 factories surveyed exclusively used permanent workers, while most of the remaining 59 factories either exclusively used FDCs or since 2005 employ all new workers on FDCs.¹⁶ When Yale Law School investigated this issue in 2011, they found only two factories in the country that had all of their workers on UDCs.¹⁷ A study from 2013, the most recent one conducted, shows that nearly 80 per cent of the factories employ "most or all of their workers of FDCs".¹⁸

– The situation is the same today, says Tola Moeun.

According to Bent Gehrt, South East Asia field director for Workers Rights Consortium, WRC, the share of factories in compliance with the laws regulating FDCs might be as low as ten to 15 per cent.¹⁹

Today, three or six months seem to be the most common length of FDCs.²⁰

What does the law say?

There are two types of employment contracts in Cambodia: Fixed-duration contracts, FDCs, with an end-date and unlimited duration contracts, UDCs, for permanent positions. All workers enjoy equal rights according to the law, except in cases specifically stated.²¹ Article 67 of the Cambodian Labour Law regulates the scope and the use of FDCs and states a time limit for a period of multiple renewals:

*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.*²²

Unlike similar legislation in some of Cambodia's competitor countries,²³ Article 67 does not restrict what kind of work can be performed under an FDC. This is, however, stated earlier in the Labour Law:

Regular workers are those who regularly perform a job on a permanent basis.

Casual workers are those who are contracted to:

- Perform a specific work that shall normally be completed within a short period of time.

14. CCC, CLEC, *Ten years of the Better Factories project*, 2012.

15. Rossi, Luinstra and Pickles, *Towards Better Work: Understanding Labour in Apparel Global Value Chains*, 2014.

16. Arnold and Shih, "A Fair Model of Globalisation? Labour and Global Production in Cambodia", *Journal of Contemporary Asia*, August 2010.

17. Yale Law School, *Tearing Apart at the Seams*, 2011.

18. WRC, Update on *Ongoing Abuse of Temporary Employment Contracts*, 2014.

19. Fair Action interview with Bent Gehrt, August 25, 2015.

20. HRW, *Work faster or get out*, 2015.

21. Cambodian Labour Law, Article 10, 1997.

22. Cambodian Labour Law, Article 67, 1997.

23. See for example Pakistan and Indonesia: Yale Law School, *Tearing apart at the seams*, 2011.

- Perform a work temporarily, intermittently and seasonally.²⁴

The law also states that all violations of the rules connected to FDCs leads to the FDC becoming a UDC.

Despite the formulation in the Labour Law, affected parties have interpreted article 67 differently. In 2003 the Cambodian Arbitration Council, AC, was created and given the task of interpreting the law, resolving labour disputes on a collective level and creating jurisprudence. The Arbitration Council is an institution with quasi-judicial authority, supported by the government, unions and employers and is, contrary to the rest of the Cambodian judicial system, seen as independent and impartial. The AC awards can be binding, if both parties agree on it prior to the verdict. If binding awards are not implemented, it is potentially a criminal offence.

According to the council's interpretation of the law, workers employed on consecutive FDCs for two years have the right to have their contract converted to a UDC. However, factory owners have failed to follow jurisprudence, despite their signing a Memorandum of Understanding²⁵ undertaking to treat all awards as binding.

An FDC worker is less protected by law than a UDC worker is, concerning termination of the employment contract and rights to employment benefits. For an FDC of less than six month, the law states no notice period. For an FDC of six months duration or more, notice has to be given by the employer only ten days before end of the contract, when the contract is not being renewed (15 days for an FDC of one year or more).²⁶ For a UDC worker, the notice period is between seven days and three months and during that period, the worker is allowed two days of paid leave per week to look for a new job.²⁷ In addition, the Labour Law does not re-

quire the employer to justify a decision to not renew an FDC, but for terminating a UDC a justification is required. It is also less expensive to dismiss an FDC worker, as there are fewer financial penalties imposed on wrongfully determining an FDC than a UDC.²⁸

There are three important differences in employment benefits for FDC and UDC workers:

• Maternity leave:

The right to paid maternity leave and the protection against pregnancy discrimination is regulated in the Cambodian constitution:

*A woman shall not lose her job because of pregnancy. Women shall have the right to take maternity leave with full pay and with no loss of seniority or other social benefits.*²⁹

Although these rights are clearly stated, the Cambodian Labour Law contradictory talks about right to maternity leave at half of the take-home wage for 90 days. The law also states that this is a right only for women who have had a minimum of one year of uninterrupted service at the enterprise³⁰

• Paid annual leave:

The right to paid leave is acquired after one year of employment.³¹ However, the law also states that all workers are entitled to annual paid leave of one and a half working days per month of continuous service. These different formulations open up for different interpretations. There are arbitral decisions in favour of the workers, but in spite of that, workers on FDCs have more difficulty securing paid annual leave.³²

24. Cambodian Labour Law, Article 9, 1997.

25. See section 6 of this report.

26. Cambodian Labour Law, Article 73 A, 1997.

27. Cambodian Labour Law, Article 73 B, 1997.

28. Cambodian Labour Law, Article 73, 1997.

29. Cambodian Constitution, Article 46, 1997.

30. Cambodian Labour Law, Article 183, 1997.

31. Cambodian Labour Law, Article 167, 1997.

32. Yale Law School, *Tearing Apart at the Seams*, 2011.

• **Seniority bonus:**

Having been employed for one year, workers get a seniority bonus of a two USD raise in monthly salary. Every year another USD is added, until a maximum of eleven USD is reached. However, workers who never reach the one-year limit will never begin climbing the seniority bonus ladder. The legislation regulating the payment of seniority bonuses does not describe how these bonuses can be paid to FDC workers whose contracts have been renewed for more than one year.³³ Add to this the

difficulties of proving seniority, in cases where workers do not possess an employment card, a copy of their contract or salary slip. In a 2009 study, 64 per cent of the workers interviewed said their employer did not give them a copy of their contract.³⁴ According to H&M's list of supplier compliance levels, available on their website, 15 per cent of their Far East supplier factories today fail in providing all workers employment contracts.³⁵

In addition to the differences in employment benefits presented above, many of the rights that legally do apply to both UDC and FDC workers are seldom equally enjoyed in practice by both categories. Freedom of association, guaranteed by both the constitution and the Labour Law,³⁶ is one example of this, as shown both in recent studies and in Fair Action's interviews. The main cause for these discrepancies is the ease with which employers can lay off FDC workers and the concern it creates for the employee when it comes to exercising his or her rights.

The Cambodian government has not taken a firm stance against illegal use of fixed-duration contracts.³⁷ It has, on the contrary, considered amending the Labour Law to ease restrictions on the use of FDCs, but the suggested changes have not yet been made. Also GMAC, the factory owners' organization, advocates a more relaxed legislation on FDCs and argues that factories, which use FDCs for the majority of their workers, are rare exceptions.³⁸ It has also been claimed that short-term contracts are es-

sential to factories for flexibility in times of economic downturn and to handle seasonal ordering peaks.³⁹ However, when Human Rights Watch examined how orders were placed in factories where workers were mainly employed on FDCs, the extensive use of FDCs was found also in factories with a consistent level of orders throughout the year.⁴⁰

Lastly, Cambodia has a new Trade Union Law in the making. The latest public draft from May 2014 has been described as a step back for workers' rights. IndustriAll and other stakeholders have criticized the draft for infringing freedom of association and for breaching ILO conventions.⁴¹ Among the suggested new regulations is one that gives the government powers to suspend a union if it fails to meet with government's approval.⁴²

International norms

According to the United Nations Guiding Principles on Business and Human Rights (UNGPs), corporations should identify and account for how they address

33. Ministry of Social Affairs, Labour, Vocational Training and Youth, Notification 017/00, July 18, 2000.

34. Nuon, Serrano and Xhafa, *Women and gender issues in Trade unions in the Cambodian garment industry*, 2011.

35. H&M, Supplier compliance levels in detail.

36. Cambodian Constitution, Article 37 and 42, 1997 and Cambodian Labour Law, Article 271 and 279, 1997.

37. HRW, *Work faster or get out*, 2015.

38. Koslovski and Kong, *Workers Face Contract Woes*, *The Phnom Penh Post*, August 11, 2014.

39. Yale Law School, *Tearing Apart at the Seams*, 2011.

40. HRW, *Work faster or get out*, 2015.

41. IndustriAll and ITUC letter to the prime minister of Cambodia, May 18, 2015.

42. LICHADO and CLEC, *Cambodia's Draft Law on Unions of Enterprises*, *Legal Analysis*, September, 2014.

the impacts they have on human rights. They should also prevent and mitigate adverse impact on human rights due to their business activity. This also includes situations where the adverse human rights impact is caused by an entity in the company's supply chain.

While the UNGPs set out the policies and processes companies need to have in place in order to address their impact on human rights, the standards of the International Labour Organization (ILO) and international human rights conventions establish the content of the workers rights that companies need to respect.

Non-discrimination is a crosscutting principle in international human rights law, and is part of all the major human rights conventions.⁴³ Non-discrimination is also the subject of one of ILO's eight Core conventions. These conventions cover the most fundamental workers' rights, according to the ILO. The convention 111 concerning Discrimination in Respect of Employment and Occupation defines discrimination as:

Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

When contract non-renewal is used by the employer as a means to deprive workers of legally mandated and/or internationally recognized human rights based on for example gender or union affiliation, the principle of non-discrimination is violated.

In cases where contract non-renewal is targeted at employees who form or join a union, or who exercise their right to strike, a number of international human rights for workers are impacted. As a minimum, the following rights are at stake:

- The rights to freedom of association and collective bargaining: ILO conventions 87 and 98.
- The rights to freedom of opinion and expression: International Covenant on Civil and Political Rights, article 19.

- The right to freedom of association: International Covenant on Civil and Political Rights, article 22.
- The right to form trade unions and join a trade union and the right to strike: International Covenant on Economic, Social, and Cultural Rights, article 8.

Contract non-renewal may also be used as a means for the employer to avoid providing benefits such as (paid) maternity leave. Discrimination of women due to their gender or reproductive status may infringe, as a minimum, on the following rights:

- The rights of protection of the family and the right to marry: International Covenant on Civil and Political Rights, article 23.
- The right to just and favourable conditions of work: International Covenant on Economic, Social, and Cultural Rights, article 7.
- The right to social security, including social insurance: International Covenant on Economic, Social, and Cultural Rights, article 9.
- The right to a family life: International Covenant on Economic, Social, and Cultural Rights, article 10.

Finally, it is also worth noting that the ILO has specifically regulated the use of fixed-duration contracts for long-term employment in guideline no. 166:

Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.

Guideline no. 166 is a supplement to the ILO convention 158, the Termination of Employment Convention, which has not been ratified by Cambodia and is therefore not legally binding. But as Cambodia is a member of the ILO, the country should strive towards implementing the standards set up by the organization.

43. See for example International Covenant on Economic, Social and Cultural Rights (Article 2) and International Covenant on Civil and Political Rights (Article 2).

H&M Code of conduct

The practice of building a permanent workforce using constantly renewed FDCs is a breach of H&M's code of conduct:

Our general rule is that all our suppliers and other business partners must, in all their activities, follow the national laws in the countries in which they operate.⁴⁴

According to an estimate by the company, one third of their supplier factories in Cambodia today employ a majority of their workers on FDCs.⁴⁵

Short-term employment is not specifically mentioned in H&M's code of conduct. But in the company's supplier guidance, a non-public document to help suppliers interpret the code of conduct, restrictions on FDCs are mentioned briefly:

Short-term contracts may not be used as a measure to deprive workers of social benefits.⁴⁶

No more detail on how the suppliers should interpret and operationalize this obligation is provided.

As a comparison, it is worth noting that the sports brand Nike identifies a production line made up of more than 15 per cent temporary workers as an excessive use of FDCs and states, in its code guidance, that FDCs should

[...] only be used to meet seasonal work or peak season production or to fill short-term vacancies or staffing needs of less than one year"⁴⁷

Fair Action asked Lars-Åke Bergqvist, global code of conduct coordinator at H&M, why the company chose to omit the issue of FDCs in their code. This is due to FDCs being a problem mainly in one specific sourcing country and therefore it is not necessary to mention in the code, he argued.⁴⁸



44. H&M, Code of conduct, 2010.

45. Fair Action interview with Lars-Åke Bergqvist, Global code of conduct coordinator H&M, June 25, 2015.

46. Extract from H&M Supplier guidance through email conversation between Lars-Åke Bergqvist and Fair Action, August 7, 2015 (company not willing to provide document in its entirety).

47. Nike Code Leadership Standard, 2010.

48. Fair Action interview with Lars-Åke Bergqvist, Global code of conduct coordinator H&M, June 25, 2015.

Workers' voices

"If they feel happy, the contract is renewed. If they feel unhappy, the contract is not renewed. We cannot protest"

The pictures painted by workers interviewed for this study bear great similarity to those in previous reports on the issue: FDC workers are treated differently than UDC workers in terms of freedom to exercise rights established by Cambodian Labour Law and international norms. Workers testify to a widespread and continuous fear of not having their contract renewed upon trying to exercise a right, particularly at one of the three H&M supplier factories, where the entire workforce allegedly was employed on FDCs at the time of the interviews.

At another factory, a mass transition from FDCs to UDCs had taken place following union pressure. According to the workers, however, that was only a temporary change of course by the employer. Workers who now reach the two-year limit of short-term employment do not necessarily have their contracts converted to UDCs, which would be in line with the law and the Arbitration Council's interpretation of it.

Job security

– I worked very hard and never took a day off, because I was concerned my contract would not be renewed, says worker Sokny, 44 years old, who recently got dismissed from her position on a fixed-duration contract consecutively renewed over a five-year period.

The built-in lack of job security is the core issue in the widespread use of FDCs and what paves the way for other violations of rights. When employment is constantly renewed, it is also easily terminated.

– I worked very hard and never took a day off, because I was concerned my contract would not be renewed, says worker Sokny, 44 years old, who recently got dismissed from her position on a fixed-duration contract consecutively renewed over a five-year period.

– I was so happy every time the contract was renewed. However, when the contract was one month to come to an end, we started to worry about it, says Sokny.

Making it difficult to plan ahead, the precarious work situation under FDCs also render it impossible for workers to get a stable financial situation for themselves and their families.

According to the secretary general of GMAC,⁴⁹ as well as H&M's Global code of conduct coordinator,⁵⁰ plenty of workers prefer FDCs to UDCs because of the severance payment being paid at the end of each work period. A severance payment is an additional five per cent of the salary allowed FDC workers as a compensation for the absence of seniority bonus scheme connected to this form of employment. Contrary to these claims, workers and unions describe a situation where the type of contract used is never a choice of the worker.⁵¹

– We all want long-term contracts, but we do not protest. We are afraid that we will be sacked, says worker Sophea, 36, employed at a factory where all workers are on two-months FDCs.

49. HRW, *Work faster or get out*, 2015.

50. Fair Action Interview with Lars-Åke Bergqvist, June 25, 2015.

51. Yale Law School, *Tearing apart at the Seams*, 2011.

– As workers, we were not given the option to choose the type of contract when we started the job. The factory managers gave workers fixed-duration contracts, renewable every three months, says worker Chantrea, 32.

Better Factories Cambodia, BFC, had until recently a strict view in their factory audits on the issue of FDC use and marked a factory as non-compliant if any workers had worked for longer than two years without being converted to a UDC. However, starting 2014, BFC relaxed its stance on FDC use and now also accepts factories where workers have signed an agreement to continue on FDCs for longer than two years, as compliant.⁵² This, consequently, increased the numbers of factories marked as compliant with the two-year rule from 67 per cent in BFC's 2013-2014 report to 73 per cent in their 2014-2015 report.⁵³ Worth noting is that this view contradicts the Labour Law, which states that an agreement can never overrule the legislation.⁵⁴

Rare cases where workers seem to voluntarily choose FDCs are likely explained by:

- Desperation as a result of immediate lack of financial means, as the minimum wage in Cambodia is below living wage.⁵⁵ Workers simply need cash sooner rather than later and agreeing to a short-term contract could give them that.
- Fear of a factory closedown, where UDC workers are denied their indemnity accumulated during years of service.
- Poor understanding of the difference between a UDC and an FDC. According to a report from Yale Law School, factory managers even try to lure workers into converting their UDCs to FDCs, using the five per cent severance payment as bait.⁵⁶

– There have been many UDC workers who have been paid and restarted their work as new workers with three months FDC, worker Chantrea tells Fair Action's researchers.

According to Bent Gehrt, WRC, there are also cases where workers have been offered cash settlements by the factories to agree on converting a permanent contract to an FDC:

– It gives workers a rare opportunity to get a large portion of cash in hand. Given that it is impossible for the workers to save any money out of their low wages, it is difficult for them to turn down such an opportunity. While this explains why the workers agree to such conversions, it doesn't make these contract conversion legal. In that sense the conversions of the contracts are just another example of how low wages lead to abuses of the law, he says.

Overtime

Facing the risk of being laid off, FDC workers, in practice, lack the option to decline extra working hours.

– I was not forced to work overtime, but I felt I was forced, as I was afraid the factory would take revenge and not renew my contract [if I didn't], says worker Sokny.

Excessive overtime is a rule rather than an exception in Cambodian garment sector. Despite the Labour Law stating overtime should always be voluntarily and never exceed 12 hours per week, research shows that this is very often not complied with. 94 per cent, almost all, factories monitored by Better Factories Cambodia between May 2013 and April 2014 violated the regulations on exceptional overtime.⁵⁷ One in three factories also exercised involuntary and excessive overtime on Sundays, resulting in a workweek without a legally required day of rest. The share of factories violating this right has increased in recent years.

– Anyone who doesn't work overtime will be fired because the contract is ended. You are not allowed to renew, says worker Sophea, 36 employed at a factory where all workers have FDCs.

– When there are many orders, we work until 10 [in the evening], and sometimes until dawn, says workers Sotear, 32, on an FDC.

52. Fair Action mail conversation with BFC, September 8, 2015.

53. ILO-BFC, *Thirty Second Synthesis Report*, 2015.

54. Cambodian Labour Law, article 13.

55. Asia Floor Wage: *Living wage versus minimum wage*, 2013.

56. Yale Law School, *Tearing apart at the Seams*, 2011.

57. ILO-BFC, *Thirty Second Synthesis Report*, 2015.



Workers interviewed for this study also give examples of actual forced overtime. FDC workers were, unlike those employed on UDCs, prevented from leaving the factory premises by factory management or pro-management (yellow) union representatives.

– The factory is afraid of forcing us UDC workers to work overtime, says Chantrea.

Bent Gehrt, WRC, elaborates:

– Given the widespread use of FDCs in Cambodia, there is no such thing as voluntary overtime today.

Sick leave and health

As many reports indicate, health problems are widespread throughout Cambodian garment sector, many of which can be linked to the use of short-term employment.

– I had to work hard even though I was sick. I used to have bronchitis throughout 2011 and 2012. I didn't ask for sick leave because I was afraid that my contract would not be renewed. I felt I couldn't walk to the factory. I had to ask for a lift by [colleagues on] motorbikes, says 45-year old worker Naly.

In recent years, Cambodian garment factories have seen a significant number of mass fainting. The cause of workers fainting is disputed but dehydration, as a result of workers not drinking enough during the workday, has been presented as one plausible reason.⁵⁸ In addition to this, heat levels are above legal limit in seven out of ten factories.⁵⁹

– I tried very hard to get the job done without going to the restroom. I was afraid that I would get fewer pieces completed and not meet the quota for mini-

58. CCC, CLEC, *Ten years of the Better Factories project*, 2012.

59. ILO-BFC, *Thirty First Synthesis Report*, 2015.

mum wage and that the company would not renew my contract, worker Kannitha says.

Reports show that possibilities to take breaks during the workday are so limited that workers sometimes go an entire day without using the restroom. Human Rights Watch quotes a worker:

Workers are not allowed to go to the toilet. Sometimes they don't even allow us to drink water. And I am scared so I don't take a break. If I take a break then clothes will pile up on my desk. Depending on the design, I will have 30 or 50 pieces of clothing piled on my desk within five minutes. And then the manager will see it and say I am not a fast worker. They will point to the others who have not taken breaks and say: "If they have two hands and two legs and can sit here and work, why can't you?"⁶⁰

A number of health problems can arise as a result of heavy restroom restrictions, like stomach problems, urinary infection and issues connected to reproduction, such as vaginal infections as menstruating workers can't take care of their personal hygiene properly.⁶¹

- Sometimes they [FDC workers] just coin⁶² their bodies and sometimes they faint while working. They do not ask for sick leave because they fear the company will not renew their contract, says worker Mina, 30 years old.

All workers, regardless of their form of employment, have the legal right to paid sick leave although this right is largely inaccessible to FDC workers:

- I didn't ask for sick leave, because I was afraid that my contract would not be renewed, says worker Naly.

FDC workers are also less likely to use their legally mandated right to annual leave of the same reason:

- When we return to work after more than a day's absence due to sickness or other obligations, we are fired, says worker Sophea.

Maternity leave and benefits

By rejecting to renew a pregnant worker's FDC, but employ the same worker on a new contract some months later, factories manage to circumvent legislation and avoid paying salary during maternity leave.

- They [FDC workers] can take three months maternity leave without pay and there is no time for breast-feeding, says worker Sotear.

- The company extends their contract when their existing contract ends. However, if they have been working for less than two years, they won't get the 50 per cent of the allowance, worker Saley says.

A key issue here is how factories calculate the one-year uninterrupted service time that is legally required for a worker to have the right to maternity leave allowance. Factories are not obliged by law to provide paid maternity leave when there has been a break in between FDCs.⁶³

In addition to the denial of maternity benefits, female workers can be subjected to pregnancy pre-screenings before signing a contract, although this is prohibited by law and ILO convention 183 on Maternity Protection.⁶⁴ According to an ILO report from 2013, the Arbitration Council has done little to protect pregnant workers from dismissal or non-renewal of their contracts and put the burden of proof on the workers rather than on the employer.⁶⁵ ILO suggests a clarification of the law:

A clear prohibition of pregnancy discrimination and the shift of the burden of proof to employers, in accordance with the ILO Convention No. 183 would better protect workers. Employers who terminate a pregnant worker should have to demonstrate that the worker's pregnancy was not a factor in the decision by documenting specific complaints against the worker and showing that the worker had been warned that she must address these complaints.⁶⁶

60. HRW, *Work faster or get out*, 2015.

61. House, Mahon and Cavill, Sue (WaterAid), *Menstrual Hygiene Matters*, 2012.

62. Traditional Khmer medicine where the skin is scratched by a coin, inflicting an inner bleeding believed to adjust the body temperature and make the coined person recover from disease.

63. ILO, *Practical Challenges for maternity protection in the Cambodian garment industry*, 2012.

64. Ibid.

65. Ibid.

66. Ibid.

One of the H&M factories from which Fair Action interviewed workers, however, allegedly offers maternity leave for the short-term workers.

Wages and bonuses

Discontented with wage levels, Cambodian garment workers have taken to the streets. In the last couple of years in industry-wide strikes, workers have demanded pay-raises. They refer to a report by a tripartite government-constituted task force, estimating a living wage in Cambodia to fall between \$157 and \$177.⁶⁷ Asia Floor Wage, an alliance of unions and NGOs, has estimated the living wage in Cambodia to about \$300⁶⁸. The minimum wage in Cambodia

– When we return to work after more than a day’s absence due to sickness or other obligations, we are fired, says worker Sophea.

dia is today \$128. Taking into account the fact that people in rural areas of the country to a large extent live off of remittance from relatives working in manufacturing, this issue becomes even more serious.

– After remittance, there was very little left for me. Therefore, I had to get a loan before the next salary, says worker Sokny.

The problem of insufficiently low salaries in the Cambodian garment industry affects both UDC and FDC workers. But a worker employed on short-term is not in a position to demand a rise:

– When I was under the three months FDC, it was difficult to protest or even to become a member of a union, says worker Naly.

With infringed possibility to form a union – the most fundamental element of collective bargaining and to strike – FDC workers are left with few means to peacefully strive for higher salaries.

– Protesting very often is also a reason for termination, says worker Saley.

Furthermore, minimum wage regulations have for years been less well enforced for FDC workers, despite minimum wage applying equally to both categories of employees according to the law.⁶⁹ Since May 2014 BFC has, however, reported an increase in compliance on this issue.⁷⁰

Freedom of association

In an overall hostile environment for trade union activity, FDC workers face additional barriers to unionizing and joining unions, due to the nature of their employment.

– I was demanded [by other workers] to form a union here, but they [factory management] were aware of this and my job was suspended for five months, says worker Sophea, employed on a two months FDC in a factory where all workers are on FDCs.

It is illegal for employers to refuse renewal of a contract because a worker has engaged in union activ-

– Anyone who doesn’t work overtime will be fired because the contract is ended. You are not allowed to renew, says worker Sophea, 36 employed at a factory where all workers have FDCs.

ity.⁷¹ However, anti-union discrimination is difficult to prove.⁷² When Sophea was able to return to work, following assistance from a national union, she was placed in a room where her colleagues were unable to reach her.

– The factory is afraid that the workers will complain to me and ask me to seek a solution for them, she says.

According to a Human Rights Watch series of interviews with independent Cambodian union federations, the increased use of FDCs has made

67. HRW, *Work Faster or Get Out*, 2015.

68. Asia Floor Wage: Living wage versus minimum wage, 2013.

69. ILO-BFC, *Thirty First Synthesis Report*, 2014.

70. ILO-BFC, *Thirty Second Synthesis Report*, 2015.

71. Cambodian Labour Law, Article 279, 1997.

72. Yale Law School, *Tearing Apart at the Seams*, 2011.

it more difficult for them to meet workers and organize within factories. The same report also shows that a significant number of factories investigated by HRW allegedly use non-renewal of FDCs to try to stop workers from union participation and unionizing.⁷³ In factories where the entire workforce is employed on FDCs, this potentially has extensive implications on the right to free association. The percentage of factories in non-compliance with the fundamental right to free association has shown an increase in recent years.⁷⁴ A 2014 BFC report shows that almost a third of the 362s factories surveyed during the period had no unions.⁷⁵

– We are afraid to approach the union. Now there is no workers’ representative, says worker Sokny, recently laid off from her FDC employment. Naturally, this has implications on the workers’ chance to act upon mistreatment and seek redress:

– When there was a problem, no one could assist us in seeking resolution. We had to help ourselves, says Sokny.

According to H&M, 90 per cent of their Cambodian suppliers have union presence.⁷⁶ However, H&M does not routinely investigate whether the union or unions present at the factory are independent or not. Figures from 2013 indicate that only a handful of the Cambodia’s then 63 garment trade union federations were independent and the rest were seen as pro-management and pro-government, so called yellow unions.⁷⁷ Yellow unions not only can stall the improvement of workers rights, they can have an adverse effect on them, actually obstructing improvement.⁷⁸

73. HRW, *Work Faster or Get Out*, 2015.

74. ILO-BFC, *Thirty Second Synthesis Report*, 2015.

75. ILO-BFC, *Thirty First Synthesis Report*, 2014.

76. Fair Action mail conversation with Maritha Lorentzon, Global CoC coordinator, H&M, September 3, 2015.

77. HRW, *Work faster or get out*, 2015.

78. Yale, *Tearing apart at the seams*, 2011 (p. 56)

What has been done so far?

In 2012, a number of actors in the Cambodian garment industry – NGOs, unions and the GMAC – signed a Memorandum of Understanding agreeing on a list of issues to be addressed.⁷⁹ All signatories agreed to participate in a government led working group to investigate the matter of FDC use and to jointly come up with a solution. However, according to Dave Welsh, the former country director of Washington based NGO Solidarity Center who were deeply involved in the work with the MoU, neither the Cambodian government nor GMAC took any measures following the signing.⁸⁰ In the same MoU, GMAC also agreed that their members acknowledge all Arbitration Council awards as binding and act accordingly. This MoU expired in October 2014 and a new one has not been signed.

In February 2015 H&M initiated a project to reduce the use of fixed duration contracts in their supplier factories. The company allegedly mapped the occurrence of FDCs and the instances of illegal use; however, they do not want to disclose any results from the mapping.

In three bullet points, H&M describes their plan:

- Drive industry change through engagement with other brands; Arbitration Council Foundation, GMAC, Ministry of Labour, International Unions and Cambodian Union Federations.

- Demand that by the end of 2015, all factories with workers on FDCs for more than two years should have an action plan in place for conversion to UDCs.
- Support the suppliers in this process by providing assistance to factory management and working together with trade unions and management to ensure a well-functioning dialogue with employees.⁸¹

H&M incorporated checks on the use of FDCs into their supplier factory audit scheme in early 2015.

– If we find more than one worker whose contract has not been converted from an FDC to a UDC after more than two years of service, we mark it as a violation and require the factory management to set up a correction plan, says Lars-Åke Bergqvist, global code of conduct coordinator at H&M.

But by auditing compliance with the two-year rule only, H&M overlooks the other form of illegal FDC use where FDC workers, within these two years, perform non-temporary tasks.

H&M also plans a training program to educate local union representatives and factory management on the advantages of UDC employment, which, according to the company, is not fully understood by workers today. However, as of the date for this report, the company has no plan to incorporate FDC restrictions into their code of conduct.⁸²

79. WRC, *Update on On-going Abuse of Temporary Employment Contracts*, appendix H, 2014

80. Mail conversation between Fair Action and Dave Welsh, June 3, 2015.

81. H&M, *H&M Fair Living Wage Strategy Update Half Year 2015*, 2015.

82. Fair Action interview with Lars-Åke Bergqvist, June 25, 2015.



– We appreciate that H&M makes an effort, but the process must be more transparent and faster than it is today. H&M should make a public statement with their new rules on FDCs, says Tola Moeun, CLEC.

H&M requires their suppliers to follow all Arbitration Council awards, however, the company only forces implementation in cases of violations against their minimum requirements, as for example freedom of association. In other words, AC awards regarding FDC workers who have been hired consecutively for more than two years, and who therefore have the right to UDCs, will be implemented at an H&M factory only upon the decision of factory management.

– They violate Cambodian law as well as our code of conduct, but as it is not a breach of our minimum

requirements, it will not jeopardize the business relationship. It will, however, be logged and appear in our supplier directories, says Jonah Wigerhäll, H&M’s sustainability country manager for Cambodia and Vietnam.

As a consequence, not all unbinding AC awards involving H&M supplier factories during the last years have been implemented,⁸³ although a number of them have, following pressure from unions and workers rights groups.⁸⁴

83. Fair Action interview with Lars-Åke Bergqvist and Jonah Wigerhäll, August 25, 2015.

84. See for example AC awards 105/11 (2011) and 156/11 (2012).

Conclusion:

Fixed-duration contracts - a threat to workers' rights

The widespread use of FDCs in the Cambodian garment sector creates a difficult and precarious situation for the workers employed in it. Workers rights advocates have described the workers as handcuffed: One handcuff being the FDC, which enables the factory owner to exploit the worker and the other being the unreasonably low wage that makes it necessary for him or her to work overtime. This description is still highly adequate. Not only is the use of consecutive FDCs for more than two years illegal and creates an unstable financial situation for the worker and his or her family, it is also intimately linked to a number of violations against human rights and workers rights: deprivation of benefits and suppression of free association. The constant but unspoken threat of contract non-renewal fosters an environment where workers are scared and left with little or no actual possibility to protest against violations or to decline overtime.

The use of fixed-duration contracts is also adversely affecting employment stability and security in the garment sector on an over-all level. This has implications for the buyer and the supplier. Quality and productivity might decline as a result of high labour turnover and limited ability for the workers to become skilled at their job. It is a problem also for Cambodia as a country, highly dependent on its garment exports for the domestic economy. Labour unrest contributes to buyers leaving the country or

reducing their operations there. Cambodia has already seen this happening.

Although it can appear as if workers themselves opt for short-term contracts, it becomes clear when listening to workers stories that this is, in most instances, not the case. For a worker with a constant lack of money, the 5 per cent severance payment⁸⁵ connected to an FDC can seem very attractive. But in reality, workers are being lured, manipulated or forced into accepting short-term contracts by the factory management, supported by corrupted unions. As outlined in this report, both workers and organisations involved in this issue indicate that the use of FDCs has been systematized by factory owners to exploit workers. Many workers are illiterate or have a low level of education, which makes it difficult for them to fully understand the employment contract. The workers are left at the mercy of their employers.

This scheme can be upheld partly due to the weak enforcement of the Labour Law, but also because brands buying from Cambodia are failing to address the situation. While the Cambodian government holds the prime obligation to protect workers, responsibilities also weigh heavily on the buyers in general and on H&M in particular. But very little has been done to date. H&M has initiated some efforts and added a limit to illegal FDCs into their factory audit regime; however, the company's decision to

85. A compensation for the absence of seniority bonus scheme connected to this form of employment.

not add a ban on FDCs for permanent workers into its code of conduct could be criticised. The company claims to have mapped the use of FDCs, but lack in transparency as they refuse to reveal any results of their mapping. H&M also fails to address the other form of illegal FDC use: When the nature of the tasks performed is not of a short-term nature.

Through the trade with factories using FDC workers to illegally make up a permanent workforce, H&M breaches not only the company's own code of conduct, but also Cambodian labour legislation as well as international norms. This is interesting in yet another perspective: In 2013 H&M launched their "Roadmap towards a fair living wage", through which living wage should be reached for all workers at the company's strategic suppliers by 2018. Instead of assessing what a living wage is in their production countries and use that as a benchmark,

H&M relies on local trade unions to negotiate a living wage. However, in factories where workers are afraid to unionize due to threats of being laid off if they do, there will be no union to negotiate wage raises. Therefore FDCs can also be seen as a severe obstacle to the company's work towards a living wage. And, as the company reports, the "Roadmap" has not yet, two years in to the project, resulted in living wage⁸⁶ being paid the workers in the project's role model factory in Cambodia.⁸⁷

A long-term solution for the short-term employed workers is long overdue.

86. H&M reports a monthly take-home average wage excl. overtime in the model factory of USD 216.

87. H&M, *H&M Fair Living Wage Strategy Update Half Year 2015*, 2015.

Recommendations:

Time for the brands to demand permanent workers

In line with the UNGPs, Fair Action calls for the brands to investigate the underlying causes of the violations of labour rights in their supply chain. As buyers, they can largely contribute to a more fair and healthy work environment where workers' rights are recognized.

It is vital that brands now take measures to prevent from FDC misuse in the Cambodian garment industry. Without a strategy for preventing misuse, efforts to promote gender equality and freedom of association in Cambodia will be an empty gesture. A credible strategy should include policy commitments as well as measures to take on a practical level.

We have the following recommendations for companies supplying from Cambodia:

- Identify factories with permanent workforces made up of FDC workers by increasing transparency on the incidence of short-term employment in your supply chain. A first step is to require all factories, sub-contractors included, to report on the composition of their workforce at regular intervals.
- Review your code of conduct and its supplementing documents and include a prohibition on illegal use of short-term or casual employment as stated in the Arbitration Council's interpretation of the Labour Law.
- Add provisions to your code of conduct that limit the use of FDCs to seasonal and temporary workers only.

- Set concrete, measurable and time-bound goals for reducing the prevalence of FDCs in the supply chain.
- Adjust your purchasing practices to facilitate use of UDCs before FDCs by, for example, spreading orders evenly throughout the year.
- Make sure workers on legal FDCs have the same rights as workers on UDCs, particularly concerning living wage and freedom of association.
- Make it easier for workers and local trade unions to take cases of illegal use of FDCs to the Arbitration Council by actively facilitating factory-level unionizing and union activity.
- Put pressure on suppliers to implement awards from the Arbitration Council on issues of FDC misuse or discrimination connected to it.
- Give incentives to suppliers willing to transfer all their non-seasonal and non-temporary FDC workers to UDCs and to suppliers implementing all Arbitration Council awards.
- Put pressure on the Cambodian government to more effectively enforce the Labour Law and declare to the same government your disapproval of any changes to the Labour Law that eases restrictions on short-term employment.
- Cooperate with other brands sourcing from Cambodia to aggregate buying power. Involve NGOs and trade unions in finding solutions to prevent misuse of FDCs.
- Report the outcomes of your undertakings. Affected parties and other stakeholders should be able to hold the company accountable and demand improvements. Transparency is also a way of sharing good practice with industry peers.

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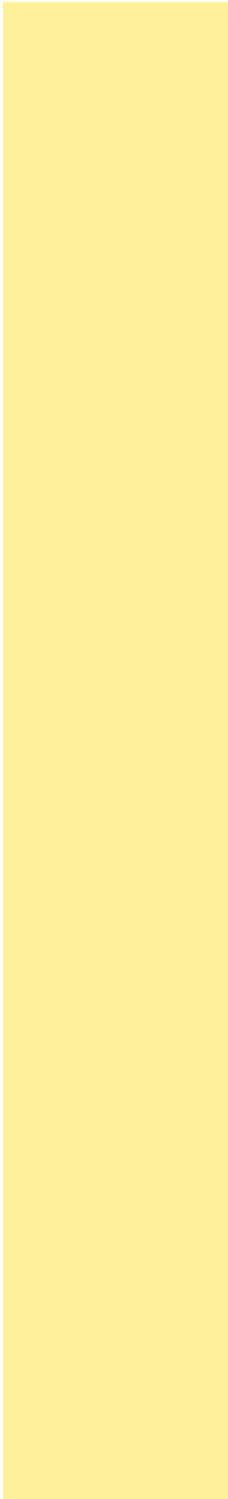




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**FAIR
ACTION**

Ringvägen 80
118 60 Stockholm
info@fairaction.se



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