KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 12/11-Dai Young

Date of award: 25 February 2011

Dissenting opinion by Arbitrator Ing Sothy

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Ing Sothy**

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

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

DISPUTANT PARTIES

Employer party:

Name: **Dai Young Cambodia Co., Ltd. (the employer)**

Address: National Road 5, Russei Keo Commune, Russei Keo District, Phnom Penh

Telephone: 078 885 388 Fax: N/A

Representatives:

1. Mr Preab Lan Head of Administration
2. Mr Chou Chansak Advisor to the employer

Worker party:

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

Local Union of CLUF

Address: National Road 5, Russei Keo Commune, Russei Keo District, Phnom Penh

Telephone: 012 837 768 Fax: N/A

Representatives:

1. Mr Som Oun President of CLUF
2. Mr Khin Sokorn General Secretary of CLUF
3. Mr Hour Pov Assistant at CLUF
4. Mr Heng Sourphea President of the Local Union of CLUF

5. Mr Ho Hem — Vice-President of the Local Union of CLUF
6. Mr Heng Yan — Secretary of the Local Union of CLUF
7. Mr Sun Narin — Accountant of the Local Union of CLUF

ISSUES IN DISPUTE

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

1. The workers demand that the employer provide a sufficient amount of food to those who work overtime until late at night, and arrange for a physician to be on standby at the factory during working hours.
2. The workers demand that the employer make payments in lieu of annual leave in accordance with workers' seniority.
3. The workers demand that the employer pay maternity payment all at once when they take maternity.
4. The workers demand that the employer instruct all group leaders to use appropriate language and to behave properly towards workers, particularly towards probationary workers.
5. The workers demand that the employer provide an additional US$ 10 milk allowance.
6. The workers demand that the employer provide a 3,000 riel meal allowance for every hour of overtime work.
7. The workers demand that the employer provide a 1,000 riel meal allowance for work on public holidays and an additional 1,000 riel meal allowance for work on Sundays.
8. The workers demand that the employer stop increasing weekly piecework production targets.
9. The workers demand that the employer continue the past practice of holding a party twice a year in line with the agenda of the leaders of the Local Union of CLUF.
10. The workers demand that the employer maintain daily wages and perquisites of workers who take sick leave with an official doctor's certificate.
11. The workers demand that the employer deduct union contribution fees of 1,000 riel from workers' wages for the Local Union of CLUF.
12. The workers demand that the employer refrain from discriminating against the Local Union of CLUF.
13. The workers demand that the employer increase the attendance bonus by US$ 10.

14. The workers demand that the employer increase the seniority bonus by US$ 2 for each year over four years' seniority.

15. The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of authorised leave taken.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this award from Chapter XII, Section 2B of the Labour Law (1997); the *Prakas* on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same *Prakas*; and the *Prakas* on the Appointment of Arbitrators No. 136 dated 7 June 2011 (Ninth Term).

An attempt was made to conciliate the collective dispute that is the subject of this award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and non-conciliation report No. 060 KB/RK/VK dated 19 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: First hearing: 28 January 2011 at 8:00 a.m.
Second hearing: 16 February 2011 at 2:00 p.m.

Procedural issues:

On 31 December 2010, the Department of Labour Disputes received a complaint from C.CAWDU outlining the workers' demands for the improvement of working conditions by the employer. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to conciliate the labour dispute and the last conciliation session was held on 13 January 2011. None of the 15 issues were resolved as the employer was absent from the session. The 15 non-conciliated issues were referred to the Secretariat of the Arbitration Council on 20 January 2011 via non-conciliation report No. 060 KB/RK/VK dated 19 January 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation on the 15 non-conciliated issues. The first hearing was held on 28 January 2011 at 8:00 a.m. A second hearing scheduled for 11 February 2011 at 2:00 p.m. was unable to proceed as Arbitrator Liv Sovanna withdrew himself from the case due to urgent commitments and was substituted by reserve Arbitrator

An Nan. Consequently, the second hearing was rescheduled for 16 February 2011 at 2:00 p.m.

Both parties were present at both hearings. The Arbitration Council conducted a further conciliation of the 15 non-conciliated issues, resulting in nine issues being resolved. The remaining issues in dispute are issues 3, 5, 6, 7, 11, and 15.

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 of rights disputes [but 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 MoU.

The Arbitration Council will consider the issues in dispute based on the evidence and reasons below.

EVIDENCE

This section has been omitted in the English version of this arbitral award. For further information regarding evidence, please refer to the Khmer version.

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:

- Dai Young Cambodia Co., Ltd commenced operation in 2003 and employs approximately 950 workers.
- The Local Union of CLUF, which has not been formally registered, is the claimant in this case. The union claims to represent 717 workers. It has received a receipt of acknowledgement of registration from the Department of Labour Disputes, dated 25 January 2011.

- The Arbitration Council was provided with an authorisation letter for the President of the Local Union of CLUF to resolve the issues in dispute, endorsed by 366 workers, on 29 January 2011. The employer did not object to the authorisation letter.

Issue 3: The workers demand that the employer pay maternity payment all at once when they take maternity leave.

- The employer's practice is to pay two months' wages to pregnant workers prior to their taking maternity leave and another one month's wages after they return from leave. This practice has been in place since 2007. The employer states that there is no written agreement in relation to this practice. The workers did not object to the employer's statement.
- The workers state that there are 50 to 60 pregnant workers at the factory.
- The employer states that approximately 20 workers are on maternity leave.
- The workers make this demand because female workers need maternity pay to meet the expenses associated with childbirth. The workers add that previous rulings of the Council have required employers to the entire ninety days' worth of maternity pay prior to workers taking maternity leave.
- The employer maintains its position, arguing that the current practice means that female workers return to work on time. If the employer accommodates the workers' demand, the workers may not return to work on time. Therefore, it refuses to accommodate the workers' demand.
- The workers maintain their demand that the employer pay the total ninety days worth of wages to pregnant workers before they take maternity leave.

Issue 5: The workers demand that the employer provide an additional US$ 10 milk allowance.

- The employer and the workers state that a milk allowance is already in place in lieu of building a day-care centre. The employer states that it leases the factory premises, which are too narrow to build a day-care centre.
- The employer states that since 2007 the workers have agreed to be paid a monthly US$ 4 milk allowance in lieu of building a day-care centre whilst their children are aged between 18 months and 3 years. The employer states that the agreement was made verbally between it and the workers. The workers did not object to the employer' statement.
- The workers make this demand due to the increase in the price of consumer goods. The US$ 4 milk allowance is not enough to supply milk formula.

- The employer refuses to accommodate the workers' demand because it already pays a US$ 4 milk allowance to workers with children aged between 18 months and 3 three years.

Issue 6: The workers demand that the employer provide an additional 3,000 riel meal allowance for each hour of overtime work.

- The workers state that a 1,000 riel meal allowance is paid to workers who work overtime from 4:00 to 6:00 p.m. and an additional 1,500 riel meal allowance is paid to those who work 6:00 to 8:00 p.m. The employer agreed with the workers' statement.
- The workers clarified that they are seeking an additional 3,000 riel meal allowance for each hour of overtime work. Thus, a 7,000 riel meal allowance would be paid for overtime work from 4:00 to 6:00 p.m. and a 7,500 riel meal allowance would be paid for work from 6:00 to 8:00 p.m.
- The workers make this demand because they cannot afford to buy enough to eat and to pay the higher transportation fees at night. If the employer accommodates their demand, the worker will be able to afford to buy enough to eat and may save some money after paying transportation fees.
- The employer refuses to accommodate the workers' demand as it has already spent a large amount of money by paying wages to workers that are above minimum wages.
- The employer and the workers agree that they do not have an agreement in relation to this issue.

Issue 7: The workers demand that the employer provide a 1,000 riel meal allowance for work on public holidays and an additional 1,000 riel meal allowance for work on Sundays.

- The workers state that the employer does not provide a 1,000 riel overtime meal allowance for work on public holidays. Therefore, they demand that a 1,000 riel meal allowance be provided. The workers demand a further 1,000 riel meal allowance for work on Sundays in addition to the 1,000 riel allowance already paid by the employer.
- The workers state that they need a meal allowance to buy meals. Furthermore because public holidays, like Sundays, are weekly days-off the employer should provide a 1,000 riel meal allowance. They demand an additional 1,000 riel meal allowance for work on Sundays so that they can afford to buy meals.
- The employer refuses to accommodate the workers' demand as it has already spent a large amount of money by paying wages to workers that are above normal wages.

- The employer and the workers agree that they have not signed an agreement in relation to this issue.

Issue 11: The workers demand that the employer deduct 1,000 riel from workers' wages to pay union contribution fees to the Local Union of CLUF.

- The workers state that the Local Union of CLUF submitted a request for deductions from wages for union contribution fees along with its members' accurate thumbprints on 20 December 2010.
- The employer refuses to deduct union contribution fees because the Local Union of CLUF has not been registered. The employer states that it will deduct union contribution fees if the Local Union of CLUF submits a request along with the workers' accurate thumbprints and a certificate of registration issued by the Ministry of Labour and Vocational Training.
- The employer and the workers agree that wage deductions for union contribution fees will be made if a certificate of registration is presented with a request for deductions along with the workers' correct thumbprints. The two parties are in dispute regarding the submission of thumbprints. The workers contend that the employer must make deductions from wages for union contribution fees if they submit a request for deductions along with the workers' thumbprints. The employer states that it will accommodate the demand once it has verified the thumbprints.
- The workers are concerned that the employer may use the verification process as a pretext for refusing to deduct union contribution fees.
- The Arbitration Council considers that the issue in dispute is whether the employer is obliged to deduct union contribution fees if the workers submit a request for deductions along with the workers' accurate thumbprints.

Issue 15: The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of authorised leave taken.

- At the hearing, the workers demanded that the attendance bonus be deducted in proportion to the number of days of authorised leave taken.
- The workers state that the employer's practice is to provide a monthly US$ 5 attendance bonus and that the employer deducts US$ 3 from the attendance bonus if workers take on day of authorised leave. If they take two or more days of authorised leave, the employer deducts the full attendance bonus. The employer did not object to the workers' statement.

- The workers make this demand because the deduction of US$ 3 is unconscionable when they take only one day of authorised leave out of the 26 working days. The workers cite the Council's rulings as the basis of their demand, but cannot specify a particular ruling.
- The employer states that its practice of deducting from the attendance bonus has been in place since 2003. The employer contends that because the attendance bonus is conditional, it refuses to accommodate the workers' demand if workers fail to attend work regularly.

REASONS FOR DECISION

The Arbitration Council will consider whether the Local Union of CLUF is entitled to represent the 717 workers it claims are its members.

Article 268 of the Labour Law states:

> In order for their professional organisation to enjoy the rights and benefits recognised by this law, the founders of those professional organisations must file their statutes and list of names of those responsible for management and administration with the Ministry in Charge of Labour for registration. All requests for registration shall be appended with the statement of constitution of the organisation.
>
> If the Ministry in Charge of Labour does not reply within two months after receipt of the registration form, the professional organisation is considered to be already registered.

Based on this article, the Arbitration Council considers that a professional organisation can enjoy the rights and benefits recognised by the Labour Law once it has been registered by the Ministry in Charge of labour.

The Local Union of CLUF is the claimant in this case. According to the facts, the workers submitted an application for registration to the Ministry of Labour and Vocational Training and received a receipt of acknowledgement of the application for registration on 6 December 2010. However, as at the hearing date the Local Union of CLUF had not obtained a certificate of registration from the Ministry of Labour and Vocational Training. Consequently, the Local Union of CLUF is not entitled to the rights and benefits under Article 268 of the Labour Law.

In previous arbitral awards, the Arbitration Council has ruled that the abovementioned rights and benefits include a union's right to represent its members before the Arbitration Council *(see Arbitral Awards 62/06-Quicksew, reasons for decision, issue 2; 30/08-E-*

Garment, reasons for decision, issue 1; 31/08-South Bay, reasons for decision, issue 1; 161/09-Prek Treng and 40/10-Meng Yan).

Based on the foregoing, the Local Union of CLUF does not have legal standing to represent its members in resolving the dispute before the Arbitration Council.

Clause 19 of *Prakas* No. 099 SKBY dated 21 April 2004 states that "[a] party may appear before the arbitration panel in person, be represented by a lawyer...or be represented by any other person expressly authorised in writing by that party."

In this case, the Arbitration Council finds that in a letter dated 29 January 2011, 366 workers have authorised the president of the Local Union of CLUF to resolve the dispute. The employer did not object to the letter.

In accordance with Clause 19, the Arbitration Council will consider the demand of the 366 workers who have authorised the president of the Local Union of CLUF to represent them before the Arbitration Council.

Analysis of rights and interests disputes

Before determining this issue, the Arbitration Council will consider whether the demand gives rise to an interests dispute or a 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 a rights dispute based on the law and an interests dispute 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; and 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 existing entitlements in the law, an employment contract, or a collective agreement.

Issue 3: The workers demand that the employer pay maternity payment all at once when they take maternity leave.

In this case, the workers demand that the employer pay the total ninety days worth of wages to pregnant workers before they take maternity leave. The employer's practice is to pay pregnant workers two months' wages [prior to their taking leave] and another month's wages of when they return from maternity leave.

The Arbitration Council will consider whether the employer is obliged to pay ninety days of wages before female workers take maternity leave.

Article 115, paragraph three of the Labour Law states that "[p]ayment shall not be made on a day-off. If payday falls on such a day-off, the payment of wages shall be made a day earlier."

Based on this article, the Arbitration Council considers that if payday falls on a day-off, payment must be made a day earlier.

In previous arbitral awards, the Arbitration Council has ruled that the maternity payment must be provided to female workers before the commencement of their maternity leave *(see Arbitral Awards 57/06-Evergreen, reasons for decision, issue 6 and 97/06-New Max Garment, reasons for decision, issue 1)*.

The Arbitration Council applies the abovementioned ruling in this case. According to the facts, the employer pays pregnant workers two months' wages before they take maternity leave and pays them another month's wages when they return from maternity leave.

The Arbitration Council considers that the employer's practice is not legitimate and that it must pay female workers three months' wages prior to their taking maternity leave. The Arbitration Council considers that the workers' demand is based on legal benefits for female workers. Based on the aforesaid analysis of rights disputes, the Arbitration Council considers that the issue in dispute is a rights dispute because wage payment during maternity leave is provided for in the Labour Law (1997).

Based on the Labour Law and the aforementioned ruling, the Arbitration Council orders the employer to pay maternity payment all at once when female workers commence maternity leave.

Issue 5: The workers demand that the employer provide an additional US$ 10 milk allowance.

In this case, the workers made a verbal agreement that a monthly US$ 4 milk allowance would be provided to female workers with children aged between 18 months and three years in lieu of building a day-care centre. However, due to an increase in the price of consumer goods, the workers demand that the employer provide an additional US$ 10 milk allowance on top of the existing monthly US$ 4 milk allowance.

The Arbitration Council will consider whether the employer is obliged to provide an additional US$ 10 milk allowance to female workers with children aged between 18 months and three years.

Article 184 of the Labour Law states:

> For one year from the date of child delivery, mothers who breast-feed their children are entitled to one hour per day during working hours to breast-feed their children. This hour may be divided into two periods of thirty minutes each, one during the morning shift and the other during the afternoon shift. The exact time of breast-feeding is to be agreed between the mother and the employer. If there is no agreement, the periods shall be at the midpoint of each work shift.

Article 186 of the Labour Law states:

> Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a day-care centre.
>
> If the company is not able to set up a day-care centre on its premises for children over eighteen months, female workers can place their children in any day-care centre and the charges shall be paid by the employer.

Based on Articles 184 and 186 of the Labour Law, the Arbitration Council considers that female workers who need to breastfeed their children are entitled to a break of one hour per day to breastfeed, the use of a breastfeeding room, and a day-care centre set up by the employer or, if the employer is unable to build a day-care centre, to have the fees for an external day-care centre paid by the employer.

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

> the purpose the requirement in the Labour Law that the employer set up a day-care centre is to enable the mother and child to be close to each other and to provide the child with loving care and natural breastmilk without the use of milk formula during the first six months, in accordance with the policy of the Cambodian government, and to maintain the safety of the children while their mothers are working *(see 77/08-Xing Tai, reasons for decision, issue 3)*.

In this case, the workers demand that the employer provide an additional US$ 10 milk allowance on top of the existing monthly US$ 4 milk allowance. The Arbitration Council considers that the workers' demand has no basis in the provisions of the Labour Law.

Based on the above analysis of interests disputes, the Arbitration Council considers that the issue in dispute is an interests dispute as it has no basis in the Labour Law, an agreement [i.e. employment contract], or a collective agreement.

With respect to interests disputes, the Arbitration Council considers whether the disputant union has most representative status (MRS).

In previous arbitral awards, the Arbitration Council has declined to consider an interests dispute if the union bringing the dispute to the Council does not have MRS *(see Arbitral Awards 81/04-Evergreen, reasons for decision, issue 4; 09/05-Kin Tai, reasons for decision, issue 2; 84/07-Yung Wah (Branch 2), reasons for decision, issue 1; 108/07-8-Star Sportswear, reasons for decision, issue 3; 135/07-Wilson, reasons for decision, issue 1; 14/08-Quicksew, reasons for decision, issue 3; 101/08-GDM, reasons for decision, issue 3; and 42/09-River Rich, reasons for decision, issue 2)*.

The Arbitration Council considers that having MRS gives a union the legal capacity to negotiate with an employer to establish a collective agreement and gives it legal standing to bring an interests dispute before the Arbitration Council for resolution.

The Arbitration Council applies the aforementioned ruling in this case. The Arbitration Council finds that the Local Union of CLUF does not hold a certificate of MRS or a certificate of registration. Therefore, the Local Union of CLUF does not have legal standing to bring an interests dispute to the Council for resolution.

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer provide an additional monthly US$ 10 milk allowance to female workers with children aged between 18 months and three years.

Issue 6: The workers demand that the employer provide a 3,000 riel meal allowance for each hour of overtime work.

The workers stated at the hearing that a 1,000 riel meal allowance is provided for overtime work from 4:00 to 6:00 p.m. and an additional 1,500 riel meal allowance is provided for overtime work from 6:00 to 8:00 p.m. The workers demand that the employer provide a 3,000 riel meal allowance for each hour of overtime work, therefore a 7,000 riel meal allowance for overtime work from 4:00 to 6:00 p.m. and a 7,500 riel allowance for overtime work from 6:00 to 8:00 p.m.

The Arbitration Council will consider whether the employer is obliged to increase the meal allowance.

Point 4 of Notification No. 049/10 KB/SCN from the Ministry of Labour and Vocational Training, dated 9 July 2010, states that "[o]ther benefits to which workers are entitled in accordance with points 3, 4, 5, and 6 of Notification No. 017 SKBY dated 18 July 2000 must be retained and enforceable."

Point 4 of Notification No. 017 dated 18 July 2000 states that "workers who volunteer to work overtime at the employer's request will receive a 1,000 riel meal allowance per day or be provided with a free meal."

The Arbitration Council considers that the aforesaid point 4 states that if workers work overtime at the employer's request, they must receive a 1,000 riel meal allowance each day or a free meal. It does not specify the hours of overtime work *(see Arbitral Award 25/10-High Born)*.

The Arbitration Council applies the abovementioned ruling in this case.

According to the facts, a 1,000 riel meal allowance is provided for overtime work from 4:00 to 6:00 p.m. An additional 1,500 riel meal allowance is provided for overtime work from 6:00 to 8:00 p.m.

The Arbitration Council considers that workers will be paid a 1,000 riel meal allowance in accordance with Notification No. 017. However, the employer provides a meal allowance totalling 2,500 riel for overtime work. This is a practice that the employer and all workers at the factory have agreed to. Therefore, the Arbitration Council considers that the workers' demand is above what is provided by the law, making this an interests dispute (see reasons for decision, issue 5).

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer provide a 3,000 riel meal allowance for each hour of overtime work, i.e. a 7,000 riel meal allowance for overtime work from 4:00 to 6:00 p.m. and a 7,500 riel allowance for overtime work from 6:00 to 8:00 p.m.

Issue 7: The workers demand that the employer provide a 1,000 riel meal allowance for work on public holidays and an additional 1,000 riel meal allowance for work on Sundays.

The workers demand that the employer provide an additional 1,000 riel overtime meal allowance for work on Sundays and a 1,000 riel meal allowance on public holidays.

Point 4 of Notification No. 049/10 KB/SCN from the Ministry of Labour and Vocational Training, dated 9 July 2010, states that "[o]ther benefits to which workers are entitled in accordance with points 3, 4, 5, and 6 of Notification No. 017 SKBY dated 18 July 2000 must be retained and enforceable."

Point 4 of Notification No. 017 dated 18 July 2000 states that "workers who volunteer to work overtime at the employer's request will receive a 1,000 riel meal allowance per day or be provided with a free meal."

Based on this notification, the Arbitration Council considers that workers are entitled to a 1,000 riel meal allowance or a free meal on each day they work overtime *(see Arbitral Awards 66/06-Gold Lida, reasons for decision, issue 3 and 107/08-Seratex, reasons for decision, issue 3)*.

In this case, the Arbitration Council will consider whether when workers voluntarily work on public holidays or on Sundays this is classified as overtime work and if so, what the workers are entitled to.

Cases where workers volunteer to work on public holidays

Article 137 of the Labour Law 1997 states:

> In all establishments of any nature, whether they provide vocational training, or they are of a charitable nature or liberal profession, the number of hours worked by workers of either sex cannot exceed eight hours per day, or 48 hours per week.

Based on this article, the normal working hours of workers must not exceed eight hours per day or 48 hours per week.

The (new) Article 139 of the Labour Law (1997) [amended in 2007] states:

> In cases of special urgency which require workers to work overtime other than the usual working hours, the overtime hours shall be paid at an increased rate of 50% (fifty percent). Working overtime at night between 22:00h to 05:00h or weekly time off shall be additionally paid at an increased rate of 100% (one hundred percent).

Based on this article, the wage rate for work outside of usual working hours is 50%, meaning that 150% of the normal wage is paid for this work.

Article 164 of the Labour Law states:

> In establishments or enterprises where work cannot be interrupted because of the nature of their activities requiring the workers to... work during holidays; those workers shall be entitled to an indemnity in addition to wages for the work performed. The amount of this indemnity to be paid by the employer shall be set by a *Prakas* of the Ministry in Charge of Labour.

Clause 2 of *Prakas* No. 10 dated 4 February 1999 states:

> In special cases when an establishment or enterprise cannot interrupt its activities during holidays promulgated in the *Prakas* of the Ministry of Social

> Affairs, Labour, Vocational Training and Youth Rehabilitation, the owner or director of the establishment or enterprise can come to an arrangement with its workers and employees to work during these holidays.

Clause 4 of the same *Prakas* states that "[e]mployees working on holidays are entitled to remuneration equivalent to that of a normal working day."

In Arbitral Award 109/09-USA, reasons for decision, issue 5, the Arbitration Council ruled that:

> Based on Articles 137, 139, and 164 of the Labour Law and Clauses 2 and 4 of *Prakas* No. 10 dated 4 February 1999, set out above, the Arbitration Council finds that the workers worked the same hours as on a usual day, but the difference is that the workers have a right to take leave without a deduction from their wages. If they work on a holiday, they are entitled to wages equal to those they would receive on a usual day, i.e. one day's wage in addition to the wage the workers receive each month if they attend work regularly. Work on public holidays should not mean that a worker exceeds 48 hours of work per week if the worker works eight hours per day.

In Arbitral Award 115/08-Top One, reasons for decision, issue 4, the Arbitration Council ruled that "work on holidays is not overtime work". The Arbitration Council applies this ruling in this case.

In this case, the workers demand that the employer provide a meal allowance for work on public holidays. As the employer is not obliged by the law to provide a meal allowance for work on public holidays, the demand has no basis in the law, making this an interests dispute (see reasons for decision, issue 5).

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer provide a meal allowance for work on public holidays.

Therefore, the Arbitration Council declines to consider the demand that the employer provide a meal allowance or a free meal when workers volunteer to work on holidays as long as their work does not exceed eight hours, as on a normal working day.

Cases where workers volunteer to work on Sundays

Article 137 of the Labour Law 1997 states:

> In all establishments of any nature, whether they provide vocational training, or they are of a charitable nature or liberal profession, the number of hours worked by workers of either sex cannot exceed eight hours per day, or 48 hours per week.

Based on this article, the normal working hours of workers must not exceed eight hours per day or 48 hours per week.

In this case, the employer requires the workers to work from Monday to Saturday for eight hours per day, equal to 48 hours per week. Sunday is the weekly day-off, and is therefore not a working day. If the employer requests the workers to work on that day and the workers agree with the employer's request, it could lead to the workers working for over 48 hours per week.

In Arbitral Award 114/08-Whitex, reasons for decision, issue 5, the Arbitration Council ruled that:

> normal working hours are eight hours per day or 48 hours per week from Monday to Saturday. The Arbitration Council considers that extra hours worked on normal working days are overtime hours. Thus, [if workers] volunteer to work on a Sunday, it is additional to their normal working days and hours. Thus, the Arbitration Council considers that [if workers] volunteer to work on Sundays it is overtime work *(see Arbitral Award 109/09-USA, reasons for decision, issue 5)*.

The Arbitration Council applies the aforesaid ruling in this case.

Point 4 of Notification No. 017 dated 18 July 2000 states that "workers who volunteer to work overtime at the employer's request will receive a 1,000 riel meal allowance per day or be provided with a free meal."

The Arbitration Council considers that as work on Sundays is overtime work, the workers are entitled to a 1,000 riel overtime meal allowance.

In this case, the employer already provides a 1,000 riel overtime meal allowance to workers. Thus, the workers' demand is above what is provided by the law (see reasons for decision, issue 5).

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer provide an additional 1,000 riel meal allowance for work on Sundays.

Issue 11: The workers demand that the employer deduct 1,000 riel from workers' wages to pay union contribution fees to the Local Union of CLUF.

According to the facts, the workers and the employer agree that when it has been formally registered the Local Union of CLUF will submit a request for the deduction of union contribution fees. The Arbitration Council considers that the issue in dispute is whether the employer is obliged to deduct union contribution fees if the workers submit a request for deductions along with their accurate thumbprints.

Paragraph two of Article 129 of the Labour Law provides that a "worker can authorise deductions of his wage for dues to the trade union to which he belongs. This authorisation must be in writing and can be revoked at any time."

Clause 5 of *Prakas* No. 305 SKBY dated 22 November 2001 issued by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation states:

> Any worker who belongs to a union may make a written request, at least 15 days in advance, that their union dues be withheld from their salary in accordance with Article 129 of the Labour Law, and the employer shall properly comply with such a request.

Based on the article and clause set out above, the employer is required to make deductions for union contribution fees from the wages of union members who agree to the deductions and submit written requests within the period specified in Clause 5; 15 days before payday.

Article 281 of the Labour Law states that "[a]ll employers are forbidden to deduct union dues from the wage of their workers and to pay the dues for them."

The Arbitration Council observes that Articles 129 and 281 of the Labour Law appear contradictory in meaning. However, in previous arbitral awards the Arbitration Council has decided that the purpose of Article 281 of the Labour Law is to protect workers' rights and to prevent the employer from interfering in union affairs and influencing the union, as described in Article 280 of the Labour Law *(see Arbitral Awards 05/03-Top One, reasons for decision, issue 1; 62/04-Ecent, reasons for decision, issue 9; 94/04-Eternity Apparel, reasons for decision, issue 4; 99/06-South Bay, reasons for decision, issue 5; and 16/05-New Point, reasons for decision, issue 11).*

The Arbitration Council considers that the Labour Law does not prohibit the employer from making deductions from workers' wages for union contribution fees if the workers give written authorisation for the employer to do so. In this case, the employer is obliged to make deductions from the workers' wages to pay union contribution fees.

In previous arbitral awards, the Arbitration Council has consistently held that the employer [is obliged] to deduct [union contribution fees] from the wages of workers who are members of a union and have voluntarily made a written request that the employer do so. *(See Arbitral Awards 03/03–Tonga, reasons for decision, issue 9; 60/07–Suit Way, reasons for decision, issue 7; and 61/08–Focus Footwear).*

In the Arbitral Award 62/04–Ecent, the Arbitration Council found that:

> If the union wants the employer to take contributions from the employees' wages, the union has to submit appropriate and acceptable documents such as a list of workers with signatures or fingerprints and collective or individual letters showing that the employees agreed to have their money taken for the purposes of contributing to the union. Upon receiving the documents, the employer must take out the contributions and send them to the union monthly.

In Arbitral Award 60/05–Evergreen, the Arbitration Council considered that:

> The purpose of the requirement for written authorisation to deduct union contribution fees is to protect each worker from any deduction being made against their will and to prevent the employer from making mistakes in the deduction. This is to guarantee that the application is accurate and reflects the workers' wishes.

In the Arbitral Award 06/09-Sang Woo, the Arbitration Council ruled that:

> upon receipt of a request for deductions for union contribution fees made within the period specified in Clause 5 of *Prakas* No. 305 of 2001 from the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, if the employer finds any problems in the documentation such as repeated names, confusing or mismatched ID numbers or groups of workers, names of workers who have resigned or stopped working for the employer, or if the thumbprints are scratched or unclear, the employer has the right to call workers in to clarify their authorisation of deductions for union contribution fees. For those workers who have clearly authorised the deduction, the employer shall [make the deduction] according to the time limit, that is, within the month that the union/workers submit their request.

Based on Article 129 and previous rulings, the employer must make deductions from the workers' wages to pay union contribution fees if workers authorise the employer in writing to do so.

According to the facts, the two parties hold the same position; that if written requests are made by the union members and the union has been formally registered, the employer will make deductions from workers' wages. The workers agree with the employer's stance. According to the facts, the union has not been formally registered. The Arbitration Council cannot know when the union obtains a certificate of registration. Moreover, we do not know whether or not the employer will make the deduction from the workers' wages if the union has been registered. The Arbitration Council is of the view that the workers are concerned that the employer does not fulfil its promise when the union has been registered.

Therefore, the Arbitration Council rules that this issue qualifies as future dispute.

In relation to future dispute, the Arbitration Council cannot find facts and evidence in order to consider this dispute.

In previous arbitral awards, the Arbitration Council has ruled:

> The Arbitration Council was created in order to resolve existing labour disputes and not in order to resolve disputes which have not yet occurred

(see Arbitral Awards 10/03-Jacqsintex, reasons for decision, issue 2; 14/06-Zheng Yong, reasons for decision, issue 2; 42/07-South Bay, reasons for decision, issue 3; 58/07-8 Star Sportwear, reasons for decision, issue 1; 122/07-Genuine, reasons for decision, issue 4; 27/08-Archid, reasons for decision, issue 6; 53/08-Yung Wah 1, reasons for decision, issue 4)

In conclusion, the Arbitration Council declines to consider the workers' demand.

Issue 15: The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of authorised leave taken.

The Arbitration Council considers this issue as follows:

Point 3 of Notification No. 017 dated 18 July 2000, states, "Workers who attend work regularly in accordance with the number of working days in a month will receive a bonus of at least US$ 5."

The workers claim that the employer provides monthly US$ 5 attendance bonus. The workers further claim that the employer deducts US$ 3 from the attendance bonus if they take authorised leave of one day and deduct full attendance bonus if they take authorised leave of more than two days.

Article 103 of the Labour Law states, "Wage includes, in particular:

- actual wage or remuneration;
- overtime payments;
- commissions;
- bonuses and indemnities;
- profit sharing;
- gratuities;…

Based on this article, attendance bonus is a payment in the form of wage.

Article 71 (6) of the Labour Law states, "The labour contract shall be suspended under the following reasons: Absence of the worker authorised by the employer, based on laws, collective agreements, or individual agreements."

Article 72 paragraph 1 of the Labour Law states:

> The suspension of a labour contract affects only the main obligations of the contract, that are, those under which the worker has to work for the employer, and the employer has to pay the worker, unless there are provisions to the contrary that require the employer to pay the worker.

Based on these two articles, the Arbitration Council rules that the contracts of the workers are suspended when they are absent without permission. Thus, the employer is not required to pay wages and the workers are not required to perform service because their absence is not subject to annual leave, special leave, and sick leave. This means that the employer is not obligated to pay wages for the day the workers are absent with permission.

The Arbitration Council determines that the employer is not obligated to provide attendance bonus when the workers are absent with permission. This means that the employer can deduct the attendance bonus in proportion to the number of days the workers are absent with permission (*see Arbitral Awards 57/07-Seratex, reasons for decision, issue 3; 106/07-M&V 3, reasons for decision, issue 2; 107/08-Seratex, reasons for decision, issue 5*).

The Arbitration Council considers this issue to be rights dispute as it has a basis in the law.

In conclusion, the Arbitration Council orders the employer to deduct the attendance bonus in proportion to the number of days the workers are absent with permission.

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

DECISION AND ORDER

Part I. Rights dispute:

Issue 3: Order the employer to pay maternity payment all at once when female workers commence maternity leave.

Issue 11: Decline to consider the workers' demand.

Issue 15: Order the employer to deduct the attendance bonus in proportion to the number of days the workers are absent with permission.

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:

Issue 5: Decline to consider the workers' demand that the employer provide an additional monthly US$ 10 milk allowance to female workers with children aged between 18 months and three years.

Issue 6: Decline to consider the workers' demand that the employer provide a 3,000 riel meal allowance for each hour of overtime work, i.e. a 7,000 riel meal allowance for overtime work from 4:00 to 6:00 p.m. and a 7,500 riel allowance for overtime work from 6:00 to 8:00 p.m.

Issue 7:

- Decline to consider the demand that the employer provide a meal allowance or a free meal when workers volunteer to work on holidays as long as their work does not exceed eight hours, as on a normal working day.

- Decline to consider the workers' demand that the employer provide an additional 1,000 riel meal allowance for work on Sundays.

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 MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature: .....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....

Annex to Arbitral Award 12/11-Dai Young

Dissenting Opinion

Clause 37 of *Prakas* No. 099 SKBY, dated 21 April 2004, issued by the Ministry of Labour and Vocational Training states:

> The arbitral panel shall record its decisions in an award which shall be signed by all three arbitrators. If one of the arbitrators does not agree with the decision of the majority, the dissenting arbitrator may record his dissent as an annex to the award.

Based on this clause, I, Arbitrator **Ing Sothy**, would like to record my dissent on issue 15 of the Arbitral Award **12/11-Dai Young** I would like to explain the reasons for my dissent:

I**. Definition:**

1. Bonus (noun): something extra given separately from the amount needed to satisfy a requirement; a bonus is given and received; bonus is to be distinguished from gratuity. (Page 970, Line 12 **Chuon Nath** ***Khmer Dictionary***).

2. Gratuity: a nominal payment given to a traditional physician, [or performer of religious rites]. (Page 463, Line 2 **Chuon Nath** ***Khmer Dictionary***).

3. ***primes (n) (Dt. trav.)*** *- sommes versées par l'employeur au normal, soit á titre de salarié en sur du salaire remboursement de frais, soit pour encourager la productivité, tenir compte de certaines difficultés particulières du travail, ou récompenser l'ancienneté.* ***(Livre, Lexique des termes juridiques 12 eme édition Dalloz 1999 page 413)***

II. Analysis:

The word "**Bonus**" means a thing that is given as an incentive with conditions. Therefore, you can accept a bonus only if you fulfil a specific condition […] that has been set.

Generally, when implementing a policy to give a **bonus**, who has the right to set or withdraw any kind of condition? The answer is the bonus owner.

In the labour sector, the bonus owner is **the employer** and the one who shall fulfil the condition to receive the bonus is **the worker.**

Examples:

If you count from one to 1000, the bonus owner will give you a bonus of US$ 100 per month. You only count to 900 and you tell the bonus owner that you are exhausted and cannot count to 1000. The bonus owner allows you to stop at 900 and rest. You then request that the bonus owner give you part of the bonus, deducting from the US$ 100 in proportion.

Who has the right to decide whether you should receive a bonus when you have not fulfilled the condition set by the bonus owner? The answer is the bonus owner.

If you attend work eight hours per day you will receive US$ 10.

If you attend work six hours per day you will receive US$ 8.

If you attend work four hours per day you will receive US$ 6.

These are the three conditions. If you fulfil one of them, you will receive a bonus according to the condition you have fulfilled. However, if you take authorised leave for one hour per day, which condition have you fulfilled? Are you entitled to ask for a deduction in proportion to the hours of leave taken? The proportion would [be determined by] dividing 10 by eight and multiplying this number by seven. This equals $US 8.75. The answer is, the one who has the right to make the decision is the bonus owner.

III. Conclusion

In conclusion, Point 3 of Notification No. 017 SKBY dated 18 July 2000, states clearly that “workers who attend work regularly in accordance with the number of working days in each month shall receive a bonus of at least US$ 7 per month.”

It clearly sets out the condition to fulfil in order to obtain a bonus of US$ 7 per month. If the workers fail to fulfil the abovementioned condition by taking leave on any days, then they are not entitled to the bonus. Thus, in order to obtain the bonus, the workers must properly and adequately fulfil the aforesaid condition.

Phnom Penh, 25 February 2011

Signature

Ing Sothy