



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 39/11-M&V (Branch 1)

Date of award: 11 April 2011

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

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

Arbitrator chosen by the worker party: **Tuon Siphann**

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

DISPUTANT PARTIES

Employer party:

Name: **M&V International Manufacturing Ltd. (Branch 1) (the employer)**

Address: National Road 2, Chak Angre Krom Commune, Meanchey District, Phnom Penh

Telephone: 016 707 046

Fax: N/A

Representatives:

- | | |
|------------------|------------------------|
| 1. Mr Yin Nak | Head of administration |
| 2. Mr Chum Bosan | Administration staff |
| 3. Mr You Uy | Interpreter |

Worker party:

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

Local Union of VKYUF

Address: Prektalong Village, Chak Angre Krom Commune, Meanchey District, Phnom Penh

Telephone: 012 581 213

Fax: N/A

Representatives:

- | | |
|-------------------|---------------------------------------|
| 1. Mr An Sakhan | General secretary of VKYUF |
| 2. Mr Tith Vannak | Coordination officer of VKYUF |
| 3. Ms Chan Sophan | Coordination officer of VKYUF |
| 4. Mr Bo Kimsri | President of the Local Union of VKYUF |

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| 5. Ms Heng Sothea | Vice-president of the Local Union of VKYUF |
| 6. Ms Kuy Kheang | Secretary of the Local Union of VKYUF |

ISSUES IN DISPUTE

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

1. The workers demand that the employer pay the 19 workers in the stitching section monthly wages, whom it did not provide work to from 15 November 2010 to 31 January 2011. The employer refuses to pay monthly wages to the 19 workers due to the following reasons:
 - A. They went on strike from 15 November 2010 to 31 January 2011.
 - B. The employer gave work to them, but they refused to do it.
 - C. Only 25 of 45 workers in the stitching section did not comply with the employer's work arrangement; two workers on strike returned to work on 1 January 2011, and five other workers on strike returned to work on 4 January 2011, except for the 19 workers who remained on strike.
 - D. The 19 workers withdrew their complaint to the Arbitration Council in case 134/10 . However, they turned to strike instead.
 - E. On 15 December 2010, the 19 workers took the same case to the Ministry of Labour and Vocational Training. On 5 January 2011, the Ministry unsuccessfully conciliated the case and referred it to the Arbitration Council.
 - F. On 18 January 2011, the Arbitration Council issued an interim order to the parties, but the workers did not abide by the order. Thus, the Arbitration Council issued Arbitral Award No. 09/11 dated 21 January 2011 to close the case. This indicates that the 19 workers did not intend to resolve this dispute before the Arbitration Council and had a bad intention of breaching the employer's disciplinary regulations and causing disruption to the production.
2. The workers demand that the employer calculate payment in lieu of annual leave on the basis of their average wages over the last 12 months. The employer refuses to accommodate this demand on the basis of the existing practice.
3. The workers demand that the employer provide a monthly US\$ 6 payment as either accommodation or transportation allowance. The employer states that it does not have a policy to provide that allowance to them.
4. The workers demand that the employer refrain from discriminating against those with many years of seniority (e.g. the employer did not provide them with work). The employer claims that it provides a sufficient amount of work (both easy and difficult tasks) to the workers in the stitching section. The employer further claims

that senior workers choose to work on easy tasks, leaving difficult tasks for the casual workers.

5. The workers demand that the employer provide hourly wages, calculated on the basis of total wages, to the female piece rate workers who are allowed to take a break of one hour to breastfeed their children. The employer refuses to accommodate this demand on the basis of the existing practice.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labour Law (1997); the *Prakas* on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same *Prakas*; and the *Prakas* on the Appointment of Arbitrators No. 133 dated 9 June 2010 (Eighth Term).

An attempt was made to conciliate the collective dispute that is the subject of this award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and non-conciliation report No. 297 KB/RK/VK dated 15 March 2011 was submitted to the Secretariat of the Arbitration Council on 17 March 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: 25 March 2011 at 8:00 a.m.

Procedural issues:

On 18 February 2011, the Department of Labour Disputes received complaint No. 566/11 dated 7 January 2011 from VKYUF, outlining the workers' demands that the employer improve working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to resolve the labour dispute. The last conciliation session was held on 7 March 2011, resulting in the resolution of 20 issues. The five non-conciliated issues were referred to the Secretariat of the Arbitration Council on 17 March 2011 via non-conciliation report No. 297 KB/RK dated 15 March 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the five non-conciliated issues. The hearing was held on 25 March 2011 at 8:00 a.m. with both parties present.

The Arbitration Council conducted a further conciliation of the five non-conciliated issues, but they remained unresolved. The Arbitration Council considers the issues in dispute in this case 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:

- M&V International Manufacturing Ltd. (Branch 1) commenced its operation in 1993. Presently, it employs a total of 294 workers.
- There are four unions in the factory: Local Union of Coalition of Cambodian Apparel Worker Democratic Unions (C.CAWDU), Industrial Union, Independent Union, and Local Union of VKYUF. None of them hold a certificate of most representative status (MRS).
- The Local Union of VKYUF (the union) is the claimant in this case. The workers claim that the union represents 65 workers and has recently made a request to the employer to deduct a union contribution fee from its members' wages.
- The employer claims that it is not sure about the number of the union members.

Issues 1 and 4: The workers demand that the employer provide wages from 15 November 2010 to 30 January 2011 to the 19 senior workers in the stitching section, and that the employer refrain from discriminating against the 19 senior workers.

- The workers argue that issue 4 is relevant to issue 1. The Arbitration Council finds that issue 4 involving discrimination against senior workers is the cause leading to issue 1. For this reason, the Arbitration Council decides to combine issues 1 and 4.

Incident of 15 November 2010

- The 19 workers are piece rate workers in the stitching section.
- On 15 November 2010, the employer assigned the workers the work on purchase numbers 108-102 with a payment of US\$ 0.10 per piece. The workers demanded that the employer increase the payment to US\$ 0.15. Due to there being no

agreement reached, the workers refused to work on all pieces of purchase numbers 108 and 102. However, they had completed two pieces.

- On the same day, without being assigned by the employer, the workers completed 10 pieces of purchase number 108-087, nine pieces of purchase number 108-091, 13 pieces of purchase number 108-090, one piece of purchase number 108-077, and two pieces of purchase number 108-099.
- On this day, the workers worked the full day, but they did not work on the purchase orders as assigned by the employer.
- The employer refused to pay them for work on 15 November 2010, arguing that the workers did not work on its assignment.

Incident from 16 November to 6 December 2010

- On 16 November 2010, the employer assigned the workers only work on the same purchase numbers 108-102. The workers remained insistent on their demand for an increase of payment for that purchase number. As a result, they stopped working on that purchase number for it to be completed by other workers.

Incident from 6 December 2010 to 30 January 2011

- On 6 December 2010, purchase number 108-102 was completed by other workers. The employer held a meeting to arrange work on the new purchase number.
- The workers refused to work on the new purchase number and demanded that the employer provide wages from 15 November to 5 December 2010.
- The employer refused to accommodate this demand. As a consequence, the workers did not work until 30 January 2011.
- The employer refused to pay the 19 workers their wages because they were on strike. The employer also refused to pay them for their completed pieces on 15 November 2010 because they did not work on the assignment.
- The workers argue that they performed work on 15 November 2010. Thus, the employer must pay them for their work. The workers further argue that they were not on strike. They attended work, but the employer did not provide work on the other undisputed purchase number.

Issue 2: The workers demand that the employer calculate payment in lieu of annual leave on the basis of their average wages over the last 12 months.

- The employer's practice is to provide payment in lieu of annual leave. The payment will be provided at the beginning of every April.
- The employer calculates that payment on the basis of the workers' main wage.
- The workers make this demand because they are piece rate workers.

Issue 3: The workers demand that the employer provide a monthly US\$ 6 payment as either an accommodation or a transportation allowance.

- The employer does not provide either an accommodation or a transportation allowance.
- The workers make this demand because they receive low wages and they do not have sufficient work as piece rate workers.
- There are four unions in the factory: Local Union of C.CAWDU, Industrial Union, Independent Union, and Local Union of VKYUF (the union). The union represents 65 of 294 workers in the factory. None of them hold a certificate of MRS.

Issue 5: The workers demand that the employer calculate payment for a breast-feeding break on the basis of the average wages earned by piece rate workers.

- The employer's practice is to allow female workers to take a paid break of one hour daily to breastfeed their children.
- The employer calculates a payment for the break on the basis of the workers' main wage.
- The workers make this demand because they are piece rate workers.

REASONS FOR DECISION

Issues 1 and 4: The workers demand that the employer provide wages from 15 November 2010 to 30 January 2011 to the 19 senior workers in the stitching section, and that the employer refrain from discriminating against the 19 senior workers.

According to the facts, the workers demand wages from 15 November 2010 to 30 January 2011.

Incident of 15 November 2010

According to the facts, the workers worked the full day. They completed pieces of a different purchase number [to that was assigned by the employer].

Article 102 of the Labour Law states:

For the purposes of this law, the term "wage", irrespective of what the determination or the method of calculation is, means the remuneration for the employment or service that is convertible in cash or set by agreement or by the national legislation, and that shall be given to a worker by an employer, by virtue of a written or verbal contract of employment or service, either for work already done or to be done or for services already rendered or to be rendered.

Based on this article, the employer must pay wages to the workers in accordance with their employment contract. This means that the employer must provide the workers with wages during the employment period.

According to the facts, the employer refused to pay the workers because they did not work on their assignment. However, in fact, the workers can only work if they are assigned with certain purchase numbers. When the workers worked on different purchase numbers, the employer did not prevent them from working on those numbers, and even allowed them to work the full day.

The Arbitration Council rules that based on Article 102, the workers must receive wages for the pieces completed on 15 November 2010. If the employer in fact did not want the workers to work on different purchase numbers, it should have prevented them from taking pieces on 16 November and on the other days. For this reason, the employer cannot refuse to pay wages for the products completed by the workers.

Incident from 16 November 2010 to 30 January 2011

According to the facts, the workers attended work from 16 November to 6 December 2010, but the employer did not provide them with work. The employer insisted that they work on the same purchase number 108-102 in dispute. As a consequence, the workers did not work on it. The workers also refused to work on that purchase number unless the employer pays them for the completed pieces on 15 November 2010.

Article 2 paragraph 2 of the Labour Law states:

Every enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in factory, workshop, work site, etc., under the supervision and direction of the employer.

In previous arbitral awards, the Arbitration Council has interpreted this article to mean that the employer has the right to supervise and direct its enterprise as long as it is done lawfully and reasonably (*see Arbitral Awards 62/06-Quicksew, reasons for decision, issue 5; 108/06-Trinunggal, reasons for decision, reasons for decision, issue 1; 33/07-Goldfame, reasons for decision, issue 3; 106/07-M&V (Branch 3), reasons for decision, issue 3; 84/08-Trinunggal, reasons for decision, issue 1; 141/08-Bloom Time, reasons for decision, issue 1*).

In this case, the Arbitration Council determines that work assignment is subject to the employer's prerogative. According to the facts, the employer required the workers to work on purchase number 108-102 before other purchase numbers. This assignment is reasonable

and lawful. The Arbitration Council finds that there is no discrimination against the senior workers with regard to the employer's direction.

Article 69 paragraph 1 of the Labour Law states:

Within the framework of his contract, the worker shall perform all of his professional activities for the enterprise. Primarily, he must do the work for which he is hired, and perform it by himself with due care and attention.

In this case, the workers did not work on the assignment set by the employer.

The Arbitration Council finds that the demand involving the piece rate was not an obstacle to the work on purchase number 108-102. The Council determines that the workers must work on the assignment set by the employer.

The workers refused to work from 6 December 2010 to 30 January 2011 on the purchase number 108-102 unless the employer paid them for the previously completed pieces. The Arbitration Council considers this issue as follows:

Article 318 of the Labour Law states:

A strike is a concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining the satisfaction for their demand from the employer as a condition of their return to work.

In previous arbitral awards, the Arbitration Council has interpreted this article to mean that a strike comprises three main components: (1) a group of workers, (2) work stoppage, and (3) a demand for a solution (*see Arbitral Awards 36/06-Mondotex, reasons for decision, issue 6; 125/09-Wincam Corporation, issue 1*).

According to the facts, the workers stopped working to make a demand for the piece rate and wages. Thus, their work stoppages are deemed as strikes.

Article 332 paragraph 1 of the Labour Law states, "A strike suspends the labour contract. During a strike, the allowance for work is not provided and the salary is not paid."

The Arbitration Council rules that the workers are not entitled to wages for the work stoppages from 16 November 2010 to 30 January 2011.

In conclusion, the Arbitration Council rejects the workers' demand that the employer provide wages from 16 November 2010 to 30 January 2011.

Issue 2: The workers demand that the employer calculate payment in lieu of annual leave on the basis of their average wages over the last 12 months.

In this case, the workers demand that the employer calculate payment in lieu of unused annual leave on the basis of their average wages over the last 12 months. The Arbitration Council considers this demand as follows:

Article 168 of the Labour Law states:

Before the worker departs on leave, the employer must pay him an allowance that is at least equal to the average wage, bonuses, benefits, and indemnities, including the value of benefits in kind, but excluding reimbursement for expenses, that the worker earned during the twelve months preceding the date of departure on leave. This allowance shall in no case be less than the allowance that the worker would have received had he actually worked.

Based on this article, the employer must calculate payment in lieu of annual leave on the basis of the workers' average actual wages, bonus, allowance, and benefits in kind the workers earned over the last 12 months upon termination of their contract. In previous arbitral awards, the Arbitration Council has ordered the employer to calculate payment in lieu of annual leave by taking total wages earned by the workers over the last 12 months to divide by 12 to determine average monthly wages, and then take this figure to divide by 26 to determine average daily wages which is the basis of payment in lieu of annual leave (see *Arbitral Award 27/04-MS, reason for decisions, issue 3; 94/07-Fortune Garment, reasons for decision, issue 2*).

In this case, the employer provides payment in lieu of unused annual leave on a yearly basis during their employment period with the employer. This payment is calculated as follows: monthly wages divided by 26 and multiplied by the number of days of unused annual leave. The Arbitration Council considers this issue as follows:

Article 167 paragraph 3 of the Labour Law states:

Apart from this, any collective agreement providing compensation in place of paid leave, as well as any agreement renouncing or waiving the right to paid annual leave, shall be null and void.

This article forbids payment in lieu of annual leave during the workers' employment. Thus, the Arbitration Council rules that the employer's current practice of providing payment in lieu of annual leave is contradictory with Article 167.

In previous arbitral awards, the Arbitration Council has ruled:

As far as the demand for payment instead of annual leave is concerned, the Arbitration Council determines that it is contradictory to the provisions of the 1997 Labour Law. Paragraph 3 of Article 167...Therefore, the Arbitration Council determines that this demand is not appropriate (*see Arbitral Awards 45/05-B&N, reasons for decision, issue 1; 94/04-Eternity, reasons for decision, issue 2*).

Article 167 paragraph 4 of the Labour Law states:

Acceptance by the worker to defer all or part of his rights to paid leave until the termination of the contract is not considered as renunciation. Deferment of this leave cannot exceed three consecutive years and can only apply to leave exceeding twelve working days per year.

This article entitles the workers to use annual leave in subsequent years within three consecutive years. Hence, the employer must encourage the workers to take annual leave, rather than provide them payment in lieu of annual leave.

In conclusion, the Arbitration Council rejects the workers' demand that the employer provide payment in lieu of unused annual leave during the employment period with the employer, and orders the employer to allow the workers to take annual leave of each year in accordance with the law.

Issue 3: The workers demand that the employer provide a monthly US\$ 6 payment as either an accommodation or a transportation allowance.

The Arbitration Council finds that this issue does not have a basis in terms of the Labour Law, an agreement requiring the employer to provide a monthly US\$ 6 payment as either an accommodation or a transportation allowance. Therefore, the Arbitration Council considers this issue to be an interests dispute.

With respect to interests disputes, the Arbitration Council considers whether the disputant union has most representative status (MRS). In this case, the Arbitration Council finds that the Local Union of VKYUF does not hold MRS.

The Arbitration Council decides 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. In order to possess MRS, a union must be registered and fulfill the other conditions stipulated in Article 277 of the Labour Law 1997.

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

An arbitral award which settles an interest dispute takes the place of a collective bargaining agreement and shall remain in effect for one year from the date on which it becomes final unless the parties agree to make a new collective bargaining agreement replacing the award.

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

In previous Arbitral Awards, the Arbitration Council has ruled that the non-MRS union does not have legal standing to bring a dispute before the Council for resolution (*see Arbitral Awards 48/09-Roo Hsing, reasons for decision, issue 2; 24/10-Reliable, reasons for decision, issue 5*).

In this case, the Local Union of VKYUF does not hold an MRS certificate. Therefore, the Council considers that the Local Union of WFUF does not have legal standing to bring an interests dispute before the Council for resolution. Only an MRS union is entitled to do so.

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer provide them a monthly US\$ 6 payment as either an accommodation or a transportation allowance.

Issue 5: The workers demand that the employer calculate payment for a breast-feeding break on the basis of the average wages earned by piece rate workers.

According to the facts, the employer's practice is to calculate payment for a breast-feeding break on the basis of main wages. The employer grants female workers one hour off to breastfeed their children daily. The Arbitration Council considers whether the workers are entitled to an average of their wages for a breast-feeding break.

Points 2 and 3 of Notification No. 046 dated 9 July 2010, state:

2. A minimum wage of US\$ 56 will be provided to probationary workers employed for one to three months in the textile, garment, and footwear production sectors; that is, the current minimum wage of US\$ 45 plus additional wages of US\$ 5 and the living allowance of US\$ 6. After completion of the probationary period, the workers will receive a minimum

wage of US\$ 61 per month; that is, a minimum wage of US\$ 50 plus additional wages of US\$ 5 and the living allowance of US\$ 6.

3. Piece rate workers will receive wages in accordance with actual production. If they earn more than the minimum wage set forth in Point 2, they shall receive the surplus. If not, the employer shall increase the wage of probationary workers to US\$ 56 per month and the wage of regular workers to US\$ 61 per month.

Based on this notification, piece rate workers are entitled to a wage of not less than US\$ 61 per month but if they can produce more than this, they are entitled to receive more payment.

In Arbitral Award 23/08-M&V 1, the Arbitration Council ruled:

[i]n order to calculate the daily minimum wage of piece rate workers we should examine the amount of wages the workers received in a month and the number of their working days. This means that we should take the amount of wages the workers earned in a month **(S)** and divide this by the number of their working days **(N)** excluding the number of paid holidays **(M)**.

The Arbitration Council applies this ruling in this case. The Arbitration Council considers this issue as follows:

Article 163 of the Labour Law states:

Workers paid by the hour, the day, or by the amount produced shall be entitled to an indemnity equal to the wage lost as a result of holidays as defined in Article 161. This indemnity shall be paid by the employer.

In Arbitral Award 82/06-M&V 3, the Arbitration Council ruled:

[t]his Article confirms the wage [that should be paid to] piece rate workers who do not work on public holidays. Even when the piece rate worker does not work on holidays, the employer is obliged to pay them an indemnity equivalent to the wage lost as a result of the holiday(s).

Based on the abovementioned article and ruling, although the workers do not work on public holidays, they are still paid for those days. Thus, the Arbitration Council determines that public holidays qualify as working days as the employer must continue to pay the workers on public holidays.

Therefore, the Arbitration Council rules that to calculate average daily wages of the piece rate workers, the employer must divide monthly total wages by the number of working days plus public holidays.

In this case, the workers demand that the employer calculate payment for a breast-feeding break of one hour on the basis of the average wages of piece rate workers.

The Arbitration Council rules that to calculate hourly wages of piece rate workers, the employer must divide average daily wages by the number of working hours.

In conclusion, the Arbitration Council orders the employer to calculate payment for a breast-feeding break of piece rate workers by dividing average daily wages with the number of work hours. #

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

DECISION AND ORDER

Issues 1 and 4:

- Order the employer to provide the 19 workers their wages for the pieces they completed on 15 November 2010. The payment must be made on the next pay day after this award becomes final.
- Reject the workers' demand that the employer provide wages from 16 November 2010 to 30 January 2011.

Issue 2:

- Reject the workers' demand that the employer provide payment in lieu of unused annual leave during the employment period with the employer.
- Order the employer to allow the workers to take annual leave of each year in accordance with the law.

Issue 3:

- Decline to consider the workers' demand that the employer provide them a monthly US\$ 6 payment as either an accommodation or a transportation allowance.

Issue 5:

- Order the employer to calculate payment for a breast-feeding break to piece rate workers by dividing average daily wages with the number of work hours.

Type of award: non-binding award

The award will become binding eight days after the date of its notification unless one of the parties lodges a written opposition with the Minister of Labour through the Secretariat of the Arbitration Council within this period.

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: