KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 98/13-Ming Fu Garment

Date of award: 10 June 2013

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Seng Vuoch Hun**

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

Chair Arbitrator (chosen by the two Arbitrators): **Men Nimmith**

DISPUTANT PARTIES

Employer party:

Name: **Ming Fu Garment (Cambodia) Co., Ltd.**

Address: Mol Village, Dangkor Commune, Dangkor District, Phnom Penh

Telephone: 011 707 778 Fax: N/A

Representatives: Absent

Worker party:

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

- Local Union of Ming Fu Garment (Cambodia) Co., Ltd. (the union)

Address: House no. 2-3 G, Street 26 BT, Beung Tompun Commune, Meanchey District, Phnom Penh

Telephone: 012 504 154 Fax: N/A

Representatives:

1. Mr Seang Yot Dispute Resolution Officer of C.CAWDU
2. Mr Sot Siem Dispute Resolution Officer of C.CAWDU

ISSUES IN DISPUTE

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

1. The workers demand that the employer pay attendance bonus in proportion to the number of days of authorised leave taken by the workers. The employer claims it will comply with Ministry notification.
2. The workers demand that the employer provide a 4,000 riel overtime meal allowance for work performed on holidays and Sundays. The employer claims it has never provided overtime work on holidays and Sundays.

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. 121 dated 7 June 2012 (Tenth 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. 553 dated 9 May 2013 was submitted to the Secretariat of the Arbitration Council on 9 May 2013.

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: 27 May 2013 at 8:30 a.m.

Procedural issues:

On 2 May 2013, the Department of Labour Disputes (the department) received a complaint from the local union, outlining the workers' demands for the improvement of working conditions. Upon receiving the claim, the department assigned an expert officer to resolve the labour dispute and the last conciliation session was held on 2 May 2013, resulting in fifteen of seventeen issues being resolved. The two non-conciliated issues were referred to the Secretariat of the Arbitration Council (SAC) on 9 May 2013 via a non-conciliation report no. 553.

Upon receipt of the case, the SAC summoned the employer and the workers to a hearing and conciliation of the two non-conciliated issues, held on 27 May 2013. The workers were present, as summoned by the Arbitration Council, but the employer was absent.

At the hearing, the Arbitration Council conducted a further conciliation of the remaining non-conciliated issues. The workers withdraw the demand in point two. Therefore, there is only one non-conciliated issue, Issue 1.

The Arbitration Council divided the issues into two types: rights disputes and interests disputes. In this case, the parties are signatories to the Memorandum of Understanding on Improving Industrial Relations in the Garment Industry (MoU), dated 3 October 2012. According to the MoU, both parties have agreed to binding arbitration for rights disputes. However, the MoU does not create binding obligations regarding interest disputes. The parties are able to choose non-binding arbitration for interest disputes, and can object to an arbitral award issued in relation to such disputes. Such an objection will not affect the parties' obligation to implement an award on rights issues in accordance with the MoU.

In this case, the employer was absent from the hearing and there was no agreement between the parties on the type of award to be made for interests dispute; therefore, the award regarding the interests dispute is non-binding.

Therefore, the Arbitration Council will consider 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:

- Ming Fu Garment (Cambodia) Co., Ltd. (Ming Fu) is a garment manufacturer. According to the non-conciliation report dated 9 May 2013, the company employs a total of 130 workers.
- The union is the claimant in this case. The union received registration no. 2823 dated 15 March 2013.
- At the hearing held on 27 May 2013, the workers claim the company employs approximately 200 workers. The employer is absent from the hearing and fails to raise an objection or provide counter evidence to the Arbitration Council. The Arbitration Council accepts the workers' claim about the number of workers as valid.

- The workers submit authorisation letter from workers at Ming Fu which states, *"… We, the workers at Ming Fu, authorise the President of the Coalition of Cambodian Apparel Workers Democratic Unions (C.CAWDU) to resolve the dispute for us both in and outside the court system until the legal procedure has been gone through from 15 December 2012…"* This letter is enclosed with thumbprints of 149 workers.

Issue 1: The workers demand that the employer pay attendance bonus in proportion to the number of days of authorised leave taken by the workers.

- At the hearing, the workers demanded that the employer:
    - Reduce the attendance bonus in proportion to the number of days of authorised leave that the workers take.
    - Maintain the attendance bonus when the workers take special leave.
- The workers claim that the employer provided a US$15 attendance bonus per month to each worker and the employer withholds this bonus when the workers took leave, regardless of whether it is authorised or unauthorised annual leave or special leave. In short, the employer withheld the attendance bonus when the workers take any leave.
- The workers claim the demand above does not include the use of paid annual leave and attending work late.
- The workers argue that:
    - The workers take authorised leave for personal commitments or sick leave.
    - Paying attendance bonus in proportion to the number of days of authorised leave taken and maintaining the attendance bonus when the workers take special leave maintains the principles of equity and fairness.
    - In reference to Article 103 of the Labour Law, attendance bonus is also a sort of wages.
    - The Arbitral Award no. 71/13-JRB ordered the employer to pay attendance bonus in proportion to the number of days of authorised leave taken by the workers. The Arbitration Council finds that the award mentioned above is no.83/13-JRB dated 23 May 2013.

Issue 2: The workers demand that the employer provide a 4,000 riel overtime meal allowance for overtime work performed on holidays and Sundays.

- At the hearing held on 27 May 2013, the workers withdraw the demand. Therefore, the Arbitration Council does not consider this issue.

REASONS FOR DECISION

Before considering the workers' demand, the Arbitration Council considers:

1) Whether the Arbitration Council can proceed in the absence of the employer

Clause 21 of Prakas no. 099 dated 21 April 2004 on the Arbitration Council states that:

> In the case that one of the parties, although duly invited, fails to appear before the arbitration panel without showing good cause, the arbitration panel may proceed in the absence of that party or may terminate the arbitral proceedings by means of an award.

Based on Clause 21 of Prakas no. 099 dated 21 April 2004 above as the previous cases in which the invited party fail to appear before the Arbitration Panel, the Arbitration Panel will proceed in the absent of that party *(see Arbitral Awards no. 53/04-Kuong Hong, no. 63/04-Shine Well, no. 148/07-Pay Her, no. 99/09-Kingsland, no. 173/11-Zhen Yun and no. 34/12-XIN CHANG XIN).*

The Arbitration Panel in this case agrees with the interpretation in the previous cases.

In this case, the SAC summoned the employer and the workers to the hearing but only the workers appeared before the Arbitration Panel. The employer neither attends the hearing nor inform the Arbitration Panel of the reason for its absence. Therefore, the Arbitration Panel proceeds in the absence of the employer. The Arbitration Panel accepted the workers' claim because there is no competing claim or evidence submitted by the employer.

2) Interpreting rights disputes and interests disputes:

Article 312, paragraph two of the Labour Law states that:

> The 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.

Clause 43 of Prakas 099 on the Arbitration Council dated 21 April 2004 states that:

> An arbitral award which settles an interests 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 Article 312, paragraph two of the Labour Law and Clause 43 of the Prakas no.099 on the Arbitration Council states that the Arbitration Council has legal jurisdiction to decide dispute 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. The Arbitration Council concludes that disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement are rights disputes and the Arbitration Council has the jurisdiction to settle the rights disputes. Any kinds of disputes that are not stipulated in the agreement or collective agreement are interests disputes and the Arbitration Council settles interests disputes based on equity.

Issue 1: The workers demand that the employer pay the attendance bonus in proportion to the number of days of authorised leave taken by the workers and maintain the attendance bonus when they take special leave.

Before considering the demand, the Arbitration Council considers whether the demand gives rise to a rights or an interests dispute.

Point 2 of Notification no. 230 of the Ministry of Labour and Vocational Training dated 25 July 2012 states that "*Workers who attend work regularly in accordance with the number of working days in each month without absence will receive a monthly bonus of at least US$ 10."*

As the demand in this issue is about the attendance bonus stipulated in the above notification, the Arbitration Council finds that this is a rights dispute.

The Arbitration Council considers whether or not the workers have the right to demand that the employer pay attendance bonus in proportion to the number of days of authorised leave taken by the workers and maintain the attendance bonus when they take special leave.

In instances where the workers take authorised leave

The Arbitration Council issued the Arbitral Award which ordered the employer to reduce the attendance bonus in proportion to the number of days of authorised leave that the workers have taken based on the interpretation of Point 1 of the Notification no. 041 dated 7 March 2011 which states that "*Workers who attend work regularly in accordance with the number of working days in each month without absence will receive a monthly bonus of at least US$7." (see the Arbitral Award no. 112/11-Yung Wah 1, Issue 3, 136/11-Cambo handsome (Branch 1), Issue 1, and 154/11-B & N, Issue 7 (2)).* However, this notification was substituted by Notification no. 230 dated 25 July 2012, Point 2 which states that "*Workers who attend work regularly in accordance with the number of working days in each month without absence will receive a monthly bonus of at least US$10."*

Point 2 of the Notification no. 230 dated 25 July 2012 increased the attendance bonus to US$10 per month and added the term "**without absence"** which was enforced from 1 September 2012 onwards.

The Arbitration Council finds that there are many kinds of bonuses and the amount of the bonus also differs depending on the owners of each enterprise or company, who has the right to direct and supervise for the purpose of motivating their workers and increasing work effectiveness and productivity. Payment of the US$10 attendance bonus stipulated in Point 2 of the Notification no. 230 dated 25 July 2012 is not under the direction of the employer, nor is it a tool or means for the employer to supervise the workers, rather the attendance bonus of US$10 is a bonus stipulated in Point 2 of the Notification no. 230 dated 25 July 2012 with which all garment and footwear sector employers must comply. This means the employer is under an obligation to provide the attendance bonus of US$10 per month to workers who attend work regularly in accordance with the number of working days in each month without absence. However, the Arbitration Council finds that at Point 2 of the statement of the Labour

Advisory Committee dated 11 July 2011 the employer shall provide an attendance bonus of US$10 per month. Point 2 of Notification no. 230 dated 25 July 2012 states that workers who attend work regularly in accordance with the number of working days in each month **without absence** will receive a monthly bonus of at least US$10. The Labour Advisory Committee has not interpreted the term **without absence**. The Arbitration Council is not able to interpret or assume that the absence here refers to absence with authorisation or without authorisation without taking legal provisions and reasoning into consideration.

The Arbitration Council finds that the term "absence" stipulated in the law includes absence in the taking of: annual leave, special leave, maternity leave, holidays, and weekly time off. The term "absence" stipulated in the law does not require the employers to dock workers' attendance bonuses, which means the workers are permitted to receive 100 per cent of the attendance bonus or US$10 per month. Absence (authorised leave for personal commitment) is not stipulated in the law, which leads to the question of whether the workers shall receive 100 per cent of the attendance bonus, payment of the attendance bonus in proportion to the number of days of authorised leave taken or no attendance bonus at all.

The Arbitration Council finds that because of the many types of absence the Arbitration Council cannot interpret or assume "absence" in the Notification no. 230 dated 25 July 2012 to be any particular type of absence. The Arbitration Council therefore considers the demand according to each particular case. In this issue, the workers demand that the employer reduce the attendance bonus in proportion to the number of days of authorised leave that the workers have taken.

The Arbitration Council finds that it is the discretion of the employer to decide whether or not to authorise the workers to take leave (for personal commitment) based on administrative procedures, internal work rules, and the production requirements of each enterprise and workplace. In instances where the employer decides to authorise a worker to take leave, the employer should know that the company's work production will not be interrupted by the workers' absence. The administrative procedures and the internal work rules of the enterprise distinguish between authorised leave and unauthorised leave where disciplinary action can be taken against workers who do not comply with relevant leave arrangements. When the workers are authorised to take leave, the leave is taken in accordance with the administrative procedures and internal work rules of the enterprise or workplace. In these instances, workers are not subject to any disciplinary action from the employer.

Workers who take authorised leave for personal commitments are considered to have the employer's agreement and there is an understanding that the workers will not receive wages for any day that they don't attend work. The employer also agrees to permit workers

to take unpaid leave on the agreed-upon day(s), not to take any disciplinary actions against the workers, and maintain the job and other benefits once they return to work.

The Arbitration Council finds that when the employer authorises the workers to take leave, the employer cannot regard it as being absent for the purposes of taking disciplinary action.

The Arbitration Council finds that the phrase "**attend work regularly in accordance with the number of working days in each month"** in Notification no. 230 dated 25 July 2012 refers to the number of days in each month that the employer requires the workers to attend work or the workers are under an obligation to provide service to the employer. According to the law and the current practice of enterprises and establishments in Cambodia, the term **"working days in each month"** can be:

1) Full working days of each month (where there are no holidays or other national events determined by the law. In this case, the number of working days is 26 days per month, subject to company policy).
2) Some working days of each month (where there are no holidays or other national events determined by the law. In this case, the number of working days is less than (1) or just 21-22 days per month depending on the number of holidays, other national events determined by the law and subject to company policy).
3) Some working days of each month (where there is authorisation from the employer which means the number of working days of the month is less than (1) or (2), subject to company practice and the number of days of authorised leave that the workers take).

Therefore, if the workers have been working in accordance with the number of days that they are obliged to attend each month and take authorised leave, the workers are considered to have attended work regularly. The term **"working days in each month"** in such cases does not include holidays determined by law or authorised leave.

The Arbitration Council finds that if the employer is ordered to pay full wages to workers taking unpaid authorised leave, it's not fair to the employer as the workers have not provided their services to the employer.

Article 103 of the Labour Law said, "*Wages are: …*

- *Bonus…"*

The Arbitration Council finds that the attendance bonus stipulated in the Notification 230 dated 25 July 2012 is a bonus provided by the employer. Therefore, the attendance bonus is considered part of a worker's wage.

Paragraph 6 of Article 71 of the Labour Law states that:

The labour contract shall be suspended under the following reasons: …

6. Absence of the worker authorised by the employer, based on laws, collective agreements, or individual agreements…"

Paragraph 1 of Article 72 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…

In reference to Paragraph 6 and Paragraph 1 of Article 72 of the Labour Law, The Arbitration Council finds that authorised leave is leave requested by the worker and agreed to by the employer. Therefore, the authorised leave is considered a suspension of the contract between the employer and the worker and the employer is under no obligation to pay the workers' wages for the day that they take authorised leave for personal commitment. It also means the employer is under no obligation to provide the attendance bonus to the worker on the day that the worker takes authorised leave for personal commitment. Therefore, the employer has no right to withhold the entire attendance bonus from the worker. It only has the right to reduce the attendance bonus in proportion to the number of days of authorised leave for personal commitment that the worker has taken.

Based on the reasons and interpretation above, the Arbitration Council orders the employer to reduce the attendance bonus in proportion to the number of days of authorised leave for personal commitment that the workers take.

<u>In the case that the workers take special leave</u>

Article 171 of the Labour Law (1997) states:

The employer has the right to grant his worker special leave during the event directly affecting the worker's immediate family.

If the worker has not yet taken his annual leave, the employer can deduct the special leave from the worker's annual leave.

If the worker has taken all his annual leave, the employer cannot deduct the special leave from the worker's annual leave for the next year.

Hours lost during the special leave can be made up under the conditions set by a Prakas of the Ministry in Charge of Labour.

Article 166 of the Labour Law (1997) states *"…all workers are entitled to paid annual leave to be given by the employer…"*

Clause 1 of Prakas 267 dated 11 October 2001 on Special Leave states:

Employers of enterprises and establishments set forth in article 1 of labor law have the right to allow their workmen and employees to have special leave with salary having a duration not exceeding seven days a year on the occasion the workmen or employees have to do their own business or on the occasion of events directly affecting the families of those workmen and employees such as :

- Their personal wedding,

- Their wives' delivery,
- Their children's marriage,
- Their husbands', wives', children's, fathers' or mothers' illness or death.

Clause 2 of the Prakas no.267 dated 11 October 2001 on Special Leave states: Employers may deduct the special leave from the annual leave of employees, if the workmen or employees have not yet used up all their annual leave or demand from the workmen or employees to make up work if they already have all their annual leave.

According to the articles of the Labour Law and Prakas no. 267/01 mentioned above, the Arbitration Council finds that:

1) Special leave is used only for any important events which directly affect the workers or their family.
2) The number of days of Special leave can be deducted from the workers' remaining annual leave. In instances where workers do not have or have already used up annual leave, the article and Prakas permits them to take special leave by making up their work in accordance with the length of special leave taken.
3) All workers are entitled to receive paid annual leave and an attendance bonus. Therefore, workers taking annual leave should not affect their wages and attendance bonus. In instances where the employer deducts special leave from the workers' annual leave, the annual leave is taken as a substitute for special leave. Therefore, their taking special leave does not affect the wages and attendance bonus to which they are entitled.
4) In instances where workers don't have or have already used up their annual leave, the Article 171 of the Labour Law and this Prakas also permit them to take special leave by making up their work in accordance with the length of the special leave taken. The Arbitration Council finds that as special leave is for any important events which directly affect workers or their family, the workers can take special leave first and make up their work later. Therefore, the workers will receive their wages and attendance bonus for the day they take leave because they will make up their work in accordance with length of the special leave taken.

In this case, the employer may withhold attendance bonus when the workers take special leave.

Therefore, the Arbitration Council decides to order the employer to maintain the attendance bonus of workers who take special leave.

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 1: - Order the employer to pay attendance bonus in proportion to the number of days of authorised leave taken by the workers.

- Order the employer to maintain attendance bonus of workers who take special leave.

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 3 October 2012.

Part II. Interests dispute: N/A

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

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Seng Vuoch Hun**

Signature: .....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Men Nimmith**

Signature: .....