KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 260/13-Long Lead

Date of award: 13 January 2014

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: **Liv Sovanna**

Chair Arbitrator (chosen by the two Arbitrators): **Ang Eng Thong**

DISPUTANT PARTIES

Employer party:

Name: **Long Lead (Cambodia) Co., Ltd.**

Address: Chamkar Svay Village, Sethei Commune, Samaki Mean Chey District, Kompong Chhnang

Telephone: 012 900 783 Fax: N/A

Representatives:

1. Mr Rim Kimhorn — Company Advisor
2. Mr Teng Sunmeng — Administrative and Finance Assistant

Worker party:

Name: **- Free Trade Union of Workers of Kingdom of Cambodia (FTUWKC)**

- Local Union of FTWKC (the union)

Address: Chamkar Svay Village, Sethei Commune, Samaki Mean Chey District, Kompong Chhnang

Telephone: 012 93 54 96 Fax: N/A

Representatives:

1. Mr Ry Sithineth — staff member of FTUWKC
2. Ms Oun Dina — staff member of FTUWKC

ISSUES IN DISPUTE

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

1. The workers demand that the employer pay back the lost overtime meal allowance for work performed on Sundays and public holidays.
2. The workers demand that the employer provide an additional 500 riel payment in lieu of lunch.

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. 155 dated 17 June 2013 (Eleventh 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 a non-conciliation report No. 934 dated 28 November 2013 was submitted to the Secretariat of the Arbitration Council on 2 December 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: 20 December 2013 (at 8:30 a.m.)

Procedural issues:

On 13 November 2013, the Department of Labour Disputes of Kompong Chhnang (the department) received a complaint from FTUWKC, outlining the workers' demands for the improvement of the working conditions. Upon receiving the claim, the department assigned an expert officer to resolve the labour dispute through conciliation. The last conciliation session was held on 28 November 2013, and seven of nine issues were resolved in this session. The remaining two non-conciliated issues were referred to the Secretariat of the Arbitration Council (SAC) on 2 December 2013.

Upon receipt of the case, an Arbitration Panel was formed on 4 December 2013. The SAC summoned the employer and the workers to a hearing and conciliation of the two non-conciliated issues, held on 20 December 2013 at 2:00 p.m. Both parties were present.

In this case, Long Lead (Cambodia) Co., Ltd. is a member of the Garment Manufacturers Association in Cambodia (GMAC), a signatory to the Memorandum of

Understanding on Promoting Industrial Relations in Garment Manufacturing dated 3 October 2012 (MoU). FTUWKC is also a signatory to this MoU.

FTUWKC received receipt of the union's registration with the Ministry of Labour and Vocational Training (MLVT) on 16 October 2013. At the hearing, the workers claim the MLVT required the union to change the photographs of the union leaders that are attached to the union registration application. To accommodate the MLVT's requirement, FTUWKC changed the photos and reapplied for registration with the MLVT on 25 November 2013. In this case, the Arbitration Council finds that the union is not yet a professional organisation in accordance with the Labour Law because it has not yet registered with the MLVT.

In this case, although FTUWK and the union are signatories to the MoU, the union at the time of the dispute, was not a professional organization as defined by the Labour Law because the Union was not officially registered. There, FTUWKC and the Union cannot be signatories of the MoU, because only registered unions have the ability to sign the MoU, regardless of if officers of the FTUWKC attended. Therefore, the arbitral award of this case is non-binding.

The parties agreed to defer the date of the issuance of this arbitral award from 25 December 2013 to 13 January 2014.

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:

- Long Lead (Cambodia) Co., Ltd. ("Long Lead") is a footwear manufacturer registered to no. Inv. 1499 E/2009 dated 14 September 2009. The company employs approximately 1,691 workers *(according to the non-conciliation report no. 934-Long Lead dated 28 November 2013).*

- At the hearing, the workers introduce a letter that named a list of 132 workers at Long Lead whom authorised the leaders of FTUWKC to resolve [a] labour dispute at Long Lead. The workers claim the 132 workers whose names are listed in the letter, dated 4 November 2013, authorised the elected union leaders and the leaders of FTUWKC through the authorization letter. However, the authorisation letter did not list the names and numbers of the workers that are required for making an authorisation. The Arbitration Council requested the workers to resubmit the authorisation letter accurately with their names, numbers, and specific identity; however, the workers failed to meet this request.
- During the hearing, the employer confirms that it recognises the representation of FTUWKC through the authorisation letter with the names of 132 workers that the workers introduced by the workers at the hearing. Therefore, FTUWKC is the claimant in this case.

Issue 1: The workers demand that the employer back pay the lost overtime meal allowance for work performed on Sundays and public holidays.

- The employer's practice in relation to payment in lieu of lunch is:
    - The employer provided a 1,500 riel payment in lieu of lunch to workers who had attended work on regular working days (from Monday to Saturday) and to workers who had attended work on Sunday and public holidays from May to October 2013.
    - In November 2013, the employer stopped providing a 1,500 riel payment in lieu of lunch to workers who had attended work on Sundays and public holidays.
    - The payment in lieu of lunch is not part of the overtime meal allowance paid to workers who attend overtime work on regular working days, Sundays, and public holidays.
    - The employer makes the payment in lieu lunch on a weekly basis.
- During the hearing, the workers specified that their demand was for the employer to provide back pay for a 1,500 riel payment in lieu of lunch for workers who had attended work on Sundays or public holidays from May 2013.
- The workers claim the employer provided a 1,500 riel payment in lieu of lunch to workers who had attended work on Sundays and public holidays from May 2013 to October 2013. However, the workers claim the employer stopped providing a 1,500 riel payment in lieu of lunch to workers who had attended work on Sundays and public holidays without providing prior notice or holding any meetings on the change and without the workers' agreement. Therefore, the worker's claim, the employer

should be under an obligation to provide a 1,500 riel payment in lieu of lunch to workers who had attended work on Sundays and public holidays.

- The employer maintains that:
    - The employer had provided a 1,500 riel payment in lieu of lunch to workers who had attended work on Sundays and public holidays from May 2013 to October 2013; however, it claims it was an accounting error.
    - The provision of a 1,500 riel payment in lieu of lunch is based on two agreements made between the employer and the union: 1) a conciliation report, dated 8 January 2013, in which the employer agreed to provide a 1,000 riel payment in lieu of lunch to the workers and 2) an agreement, dated 19 April 2013, in which the employer agreed to provide an additional 500 riel payment in lieu of lunch to the workers starting in May of 2013.
    - In the agreement, dated 19 April 2013 above, the Executive Director of Long Lead submitted a document written in Chinese, dated 1 May 2013, to the employer's Accounting Department. Because the document was written in Chinese, the Accounting Department wrongly applied the formula for calculating the payment in lieu of lunch to all workers who had attended work on Sundays and public holidays, and this resulted in the wrong payment. The payment awarded is different value from the amount of the payment stated in the document written in Chinese approved by the Executive Director of Long Lead, which is to provide a 1,500 riel payment in lieu of lunch to workers who had attended work on regular working days *(according to the employer's statement submitted to the Arbitration Council on 26 December 2013)*.
    - The Executive Director of Long Lead signs the payslips for payment in lieu of lunch and overtime meal allowance on a weekly basis.
    - In October 2013, the Executive Director of Long Lead discovered the accounting error when signing the payslips for the payment in lieu of lunch for workers who had attended work on Sundays and public holidays. The employer stopped providing the payment at this point in time.
    - From May 2013 to October 2013, the employer argues the Executive Director was too busy to review payslips before signing them.
    - The employer has provided notice to union leaders about the stop of the payment in lieu of lunch to workers attending work on Sundays and public holidays; however, the employer has not provided notice to the workers.

Issue 2: The workers demand that the employer provide an additional 500 riel payment in lieu of lunch.

- The employer provides a 1,500 riel payment in lieu of lunch on a daily basis to the workers.
- The workers clarify their demand that the employer provide an additional 500 riel of payment in lieu of lunch on top of the existing 1,500 riel payment in lieu of lunch, totaling 2,000 riel per day.
- The workers argue that 1) the price of consumable goods continues to increase because of inflation and the workers cannot afford to purchase nutritious lunch; 2) the additional payment in lieu of lunch enables the workers to purchase a nutritious lunch; 3) a nutritious lunch helps to reduce the rate of workers' fainting at work.
- The employer claims it currently cannot afford to pay for the increase demanded, however, the employer claims they will consider the demand in early 2014.

REASONS FOR DECISION

Issue 1: The workers demand that the employer continues to provide a 1,500 riel payment in lieu of lunch, which was provided from May 2013 to the third week of October 2013 to the workers who attend work on Sundays or public holidays.

At the hearing, the employer claims a 1,500 riel payment in lieu of lunch was provided based on two agreements made between the employer and the union: 1) a conciliation report, dated 8 January 2013, in which the employer agreed to provide a 1,000 riel payment in lieu of lunch to the workers and 2) an agreement dated 19 April 2013, in which the employer agreed to provide an additional 500 riel payment in lieu of lunch to the workers starting in May 2013.

The Arbitration Council finds that according to the agreement, the employer provided a 1,500 riel payment in lieu of lunch to workers who had attended work on Sundays and public holidays from May to October 2013.

The Arbitration Council considers if the employer is under an obligation to continue to provide a 1,500 riel payment in lieu of lunch, which was provided from May 2013 to October 2013.to workers who attend work on Sundays and public holidays

In this case, the Arbitration Council finds that the principle of ***"Past Practice"*** is the technical legal term and principle that enables the Arbitration Council to resolve disputes based on the practice of the employer.

The principle of ***"Past Practice"*** is supported by Paragraph 2 and 3 of Article 65 of the Labour Law.

Paragraph 2 of Article 65 of the Labour Law states: *"It can be written or verbal. It can be drawn up and signed according to local custom. If it needs registering, this shall be done at no cost."*

Paragraph 3 of the same article states: *"The verbal contract is considered to be a tacit agreement between the employer and the worker under the conditions laid down by the labour regulations, even if it is not expressly defined."*

According to the Labour Law, ***"Past Practice"*** is custom or the practice recognised by the parties and the practice has been enforced often. A ***"Past Practice"*** can be formed without the parties' writing. A practice is formed and recognised as a "past practice" when a practice is enforced on a consistent and regular basis.

The Arbitration Panel in Case 95/09-Tak Fat, Reasons for Decision, Issue 2 defines ***"Past Practice"*** as a specific form of practice which has been in place on a consistent and regular basis, and is accepted, and recognised by the parties.

In previous awards, the Arbitration Council made decisions based on ***"Past Practice"***: (1) the use of annual leave *(see Arbitral Award no. 21/05-Sinomax, Reasons for Decision, Issue 1);* (2) wage calculations *(see Arbitral Award no. see Arbitral Award no.14/06-Zheng Yong, Issue 1;* (3) bonus payments *(see Arbitral Award no. 18/07-Trinunggal Komara, Issue 2);* and (4) meal allowances *(see Arbitral Award no. 136/07-Phnom Penh Garment, Issue 1)…*

At the same time, the Arbitration Council finds that some practices are not ***"Past Practice."*** For instance, the employer's practice regarding the production line is the employer's right to manage and supervise *(see Arbitral Award no. 116/07-Grace Sun, Issue 1)*.

> The Arbitration Panel in Case no. 95/09-Tak Fat, Reasons for Decision, Issue 2 held:
>
> In general, if a practice is past practice, the parties are under an obligation to implement such practice. However, past practice can legitimately be concluded under genuine and specific conditions including the parties' negotiation to end past practice or the circumstance on which the past practice is based has changed. Therefore, the past practice is not necessary or can no longer be enforced.

In this case, the Arbitration Panel agrees with the interpretation made in previous cases about past practice.

According to the findings of fact, a 1,500 riel payment in lieu of lunch provided to workers who had attended work on Sundays and public holidays from May 2013 to October 2013 is an accounting and technical error. The Accounting Department wrongly applied the formula for calculating the payment in lieu of lunch, which led to the wrong distribution to all workers who had attended work on Sundays and public holidays. The Executive Director of Long Lead is in charge of signing payslips of payment in lieu of lunch and overtime meal allowance on a weekly basis. In late October 2013, the Executive Director of Long Lead discovered the accounting error with respect to the payment in lieu of lunch to workers who had attended work on Sundays and public holidays. Upon this discovery, the employer

stopped providing the payment in lieu of lunch. From May 2013 to October 2013, the employer says the Executive Director was too busy to review payslips before signing them.

The Arbitration Council finds that the employer provided a 1,500 riel payment in lieu of lunch to workers who had attended work on Sundays and public holidays within a period of 6 months from May 2013 to the third week of October 2013. Further, payment in lieu of lunch had been paid weekly and before making the payments, the Executive Director of Long Lead signed each payslip. The Arbitration Council finds that if the accounting error did exist, it was highly likely that the employer became aware of the error within a short period of time, and not 6 six months after because the Executive Director of Long Lead signed on payslips of payment in lieu of lunch on a weekly basis.

In Jurisprudence, the Arbitration Council finds that *"the party making allegations bears the burden of proof." (see Arbitral Award no. 79/05-Evergreen, 101/08-GDM, Reasons for Decision, Issue 1 & 2, 168/089-Teok Tla Plaza, Issue 2, 115/10-G-Formost, Issue 18, and 148/11-Dai Young).*

In previous awards, the Arbitration Council rejects the parties' demand if the parties making the demand have no evidence to support their demand *(see Arbitral Award no. 63/04-Sun Well, Reasons for Decision, Issue 4, 99/06-South Bay, Issue 5, 33/07-Goldfame, Issue 4, and 51/07-Goldfame, Issue 3)*.

Up to the deadline for the submission of evidence, the employer had not submitted any evidence to support its claim that a 1,500 riel payment in lieu of lunch provided to workers who had attended work on Sundays and public holidays was an accounting and technical error. Therefore, the Arbitration Council finds that the employer has no sufficient evidence for the Arbitration Council to conclude that payment in lieu of lunch, which was provided to workers who had attended work on Sundays and public holidays was an accounting and technical error.

In this case, the Arbitration Council finds that a 1,500 riel payment in lieu of lunch, which was provided to workers who had attended work on Sundays and public holidays is a specific past practice, which existed for 6 months on the consistent and regular basis and was accepted by the parties. Every week, the workers expected to receive payment in lieu of lunch and the employer provided the payment. The Arbitration Council finds that the facts that the employer abruptly stopped providing the payment cannot be taken as new practice substituting for a past practice.

As paying a 1,500 riel payment in lieu of lunch is a past practice, the employer is under an obligation to maintain the practice.

In conclusion, the Arbitration Council decides to order the employer to continue to provide a 1,500 riel payment in lieu of lunch, which was provided from May, 2013 to the third week of October, 2013 to the workers who attend work on Sundays and public holidays.

Issue 2: The workers demand that the employer provide an additional 500 riel payment in lieu of lunch on top of the existing 1,500 riel payment in lieu of lunch, totaling 2,000 riel per day.

The Arbitration Council considers if the employer is under an obligation to provide an additional 500 riel payment in lieu of lunch on top of the existing 1,500 riel payment in lieu of lunch, totaling 2,000 riel.

According to the findings of fact, the employer provides a 1,500 riel payment in lieu of lunch per day to the workers. The workers argue that 1) the price of consumable goods continues to increase because of inflation, and the workers cannot afford to purchase nutritious lunch; 2) the additional payment in lieu of lunch enables the workers to purchase a nutritious lunch; and 3) a nutritious lunch helps reduce the rate of workers' fainting at work.

The Arbitration Council finds that there is no provision in the Labour Law, in a collective agreement between the parties, in the agreement between the parties, in the internal work rules or in any past practices obligating the employer to provide an additional 500 riel payment in lieu of lunch on top of the existing 1,500 riel payment in lieu of lunch, equaling 2,000 riel per day. Therefore, the Arbitration Council finds that the issue is an interests dispute.

For an interests dispute, the Arbitration Council considers:

Paragraph 2 of Article 96 of the Labour Law 1997, which states:

> The collective agreement is a written agreement relating to the provisions provided for in Article 96 - paragraph 1. The collective agreement is signed between:
>
> a) One part: an employer, a group of employers, or one or more organisations representative of employers; and
>
> b) The other part: one or more trade union organisations representative of workers…

Moreover, Clause 9 of Prakas 305, dated 22 November 2001, states:

> The union having most representative status has the right to request the employer to negotiate a collective agreement which applies to all workers represented by that union. In this case, the employer has the obligation to negotiate with the union.

According to Article 96 and Clause 9 of the Prakas quoted above, in interests disputes, the Arbitration Council generally takes the most representative status (MRS) of the union into consideration because it provides unions with the legal right to negotiate a collective agreement with the employer, and the union also has the legal right to bring an interests dispute to the Arbitration Council for resolution.

Clause 43 of Prakas Number 099, dated 21 April 2004, states:

> 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.

In reference to the above Clause 43 of the Prakas, an arbitral award which settles an interests dispute takes the place of a collective bargaining agreement. It binds all workers in the company and strips them of their right to strike over interests disputes covered in a collective agreement for a one-year period. This agreement applies also to workers who are not the members of the MRS union. Hence, the Arbitration Council can only settle interests disputes brought by unions that have MRS in the enterprise or collective unions that have more than half the number of workers as members in the enterprise *(see the Arbitral Award Number 81/04-Evergreen, Reasons for Decision, Issue 4, and Number 98/04-Great Union, Issue 3).*

In 169/11-Fortune Teo, Issue 5, the Arbitration Council declines to consider an interests dispute because the union that brought the case did not have MRS in the factory *(see Arbitral Award no. 02/11-Pou Yuen, Reasons for Decision, Issue 2, and 66/11-In Han Sung, Issue 1).*

In this case, the Arbitration Panel agrees with the interpretation made in the previous cases.

FTUWKC, claimant in this case under the authorisation from 132 workers does not meet the legal requirement to bring interests disputes to the Arbitration Council for consideration.

Therefore, the Arbitration Council decides to decline to consider the workers' demand that the employer provide an additional 500 riel payment in lieu of lunch on top of the existing 1,500 riel payment in lieu of lunch, totaling 2,000 riel per day.

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

DECISION AND ORDER

Issue 1: Order the employer to continue to provide workers who attend work on Sundays and public holidays with a 1,500 riel payment in lieu of lunch, which was provided to the workers from May 2013 to the third week of October 2013.

Issue 2: Decline to consider the workers' demand that the employer provide an additional 500 riel payment in lieu of lunch on top of an existing 1,500 riel payment in lieu of lunch, totaling 2,000 riel per day.

Type of award: non-binding award

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

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Seng Vuoch Hun**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Ang Eng Thong**

Signature: .....