



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាធរកាត់សាលា

THE ARBITRATION COUNCIL

Case number and name: 83/13-JRB

Date of award: 23 May 2013

Dissenting Opinion by Arbitrator Kong Phallack

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): **Kong Phallack**

DISPUTANT PARTIES

Employer party:

Name: **JRB Action Textile & Clothing Ltd.**

Address: Building C, Vattanak Industrial Park, Chom Chao Commune, Porsenchey District,
Phnom Penh

Telephone: 012 864 018

Fax: N/A

Representatives:

1. Mr Bun Leangtech

Head of Administration Department

2. Ms Lor Socheata

Administrative Assistant

Worker party:

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

- **Local Union of C.CAWDU (the union)**

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

Telephone: 012 504 154

Fax: N/A

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Representatives:

- | | |
|--------------------|---------------------------------------|
| 1. Mr Seang Yout | Dispute Resolution Officer of C.CAWDU |
| 2. Mr Chan Meas | President of the union |
| 3. Ms Seang Man | Vice-President of the union |
| 4. Ms Yin Navy | Secretary of the union |
| 5. Mr Pich Sokheng | Treasurer of the union |

ISSUES IN DISPUTE

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

1. The workers demand that the employer use the average sum of wages as the basis for calculation of payment in lieu of remaining annual leave (in the case that the workers still have remaining annual leave). The employer claims it uses minimum wages as the basis for calculating payment in lieu of remaining annual leave.
2. The workers demand that the employer pay the attendance bonus in proportion to the number of days of authorised leave taken by the workers. The employer claims it does not agree to the demand. The employer claims it will follow the current practice.
3. The workers demand that the employer provide a 5,000 riel payment in lieu of lunch and a 1,500 riel payment in lieu of dessert per day. The employer claims it cannot afford to meet the demand since it is dealing with the increase in minimum wage for workers required by the Ministry of Labour and Vocational Training.

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. 462 dated 11 April 2013 was submitted to the Secretariat of the Arbitration Council on 19 April 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: 7 May 2013 at 8:30 a.m.

Procedural issues:

On 6 June 2013, the Department of Labour Disputes (the department) received complaint no. 024/13 dated 4 March 2013 from the 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 5 April 2013, resulting in three of six issues being resolved. The three non-conciliated issues were referred to the Secretariat of the Arbitration Council (SAC) on 19 April 2013.

Upon receipt of the case, the Secretariat of the Arbitration Council (SAC) summoned the employer and the workers to a hearing and conciliation of the three non-conciliated issues, held on 7 May 2013 at 8:30 a.m. Both parties were present. At the hearing, the Arbitration Council conducted a further conciliation of the three non-conciliated issues, resulting in Issue 1 being resolved. The workers decide to withdraw Issue 3.

Therefore, the Arbitration Council considers the issues in dispute in this case based on the evidence and reasons below.

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 interests disputes. The parties are able to choose non-binding arbitration for interests 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 parties choose non-binding arbitration for their interests disputes.

Both parties agree to defer the date of award issuance from 17 May 2013 to 23 May 2013.

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:

- JRB Action Textile & Clothing Ltd. is a garment manufacturer. It employs 900 workers.
- The union received the certificate of registration no. 1945 dated 8 September 2010 is the claimant in this case. The union has 300 members.

Issue 2: The workers demand that the employer pay the attendance bonus in proportion to the number of days of authorised leave taken by the workers.

The employer provides a monthly US\$15 attendance bonus to the workers. In the case that the workers take authorised leave, the employer will reduce the workers' attendance bonus as below:

- If the workers take one-day leave, the employer will reduce the attendance bonus by US\$5 to a total of US\$10.
 - If the workers take two days leave, the employer will reduce the attendance bonus by US\$10 to a total of US\$5.
 - If the workers take two days and a half leave, the employer will withhold the entire US\$15 attendance bonus.
- The workers claim the employer pays the attendance bonus in proportion to the number of days of authorised leave that the workers take for sickness or death of their relatives. The demand has nothing to do with annual and special leave.
 - The workers claim Ms Yin Navy took two-day leave for the death of her mother-in-law. In this case, the employer reduced up to US\$10 of her attendance bonus. Then Ms Yin Navy took another two-day leave in the same month for the seven-day ceremony, the employer withheld her attendance bonus.
 - The employer claims it will maintain current practice because it is afraid that more workers will take leave if the current practice is changed to reflect the demand.

REASONS FOR DECISION

Issue 2: The workers demand that the employer pay the attendance bonus in proportion to the number of days of authorised leave taken by the workers.

Firstly, the Arbitration Council considers whether the issue gives rise to a rights dispute or an interests dispute.

In this case, the Arbitration Council finds that *“Rights disputes are the disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement.”* (see the Arbitral Awards no. 05/11-M & V1), Issue 1 and 5, no.13/11-Gold Kamvimex, Issue 1 and 2, no.14/11-GHG Cambodia, Issue 4)

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

Point 2 of the notification no. 230 from the Ministry of Labour and Vocational Training dated 25 July 2012 states, “*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.*”

Since the demand is in relation to the provision of attendance bonus stated in the above notification, the Arbitration Council finds that the dispute is a rights dispute.

In the findings of the facts, the employer provides a monthly US\$15 attendance bonus to the workers. In the case that the workers take authorised leave, the employer will reduce the workers’ attendance bonus as below:

- If the workers take one-day leave, the employer will reduce the attendance bonus by US\$5 to a total of US\$10.
- If the workers take two days leave, the employer will reduce the attendance bonus by US\$10 to a total of US\$5.
- If the workers take two days and a half leave, the employer will withhold the entire US\$15 attendance bonus.

The Arbitration Council considers whether the workers have right to demand that the employer pay attendance bonus in proportion to the number of days of authorised leave taken by the workers for (sickness or death of their parents-in-law or relatives).

The Arbitration Council issued the arbitral award which ordered the employer to pay the attendance bonus in proportion to the number of days of authorised leave taken by the workers based on the interpretation of Point 1 of the Notification no. 041 dated 7 March 2011 which states, “*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 the Notification no. 230 dated 25 July 2012, Point 2 which states “*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 the company who have the right to direct and supervise for the purpose of motivating their workers and increasing work effectiveness and productivity. The US\$ 10 of the attendance bonus stipulated in *Point 2* of the *Notification* no. 230 dated 25 July 2012 is not under the rights of the employer to direct and also, it’s not the tool and means for the employer to supervise, but 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 the work regularly in accordance with the number of working days in each month without absence. However, the Arbitration Council finds that in Point 2 of the statement of the Labour Advisory Committee dated 11 July 2011 said that the employer shall provide the attendance bonus of US\$10 per month. Point 2 of the Notification no. 230 dated 25 July 2012 states that the 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** to mean absence with authorisation or without authorisation or anything else. 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 by taking annual leave, special leave, maternity leave, holidays, and weekly time off. The term absence stipulated in the laws does not require the workers to dock the attendance bonus which means the workers get 100 per cent of the attendance bonus, US\$ 10 per month. Absence (authorised leave for personal commitment) is not stipulated in the laws, which leads to the question whether the workers shall receive 100 per cent of the attendance bonus, an attendance bonus in proportion to the number of days of authorised leave accessed or no attendance bonus at all.

The Arbitration Council finds that because of the many types of absence, aforementioned, 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 deduct 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 to authorise or not authorise the workers to take leave (for personal commitment) based on the administrative procedures, internal rules, and the production requirements of each enterprise and workplace. In the case that the employer decides to authorise a worker to take leave, the employer should know that production of the company will not be interrupted by the workers' absence. The administrative procedures and the internal 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 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 commitment are considered to have agreement from the employer that the workers will not receive the wages on the day that they don't come to work. The employer also agrees to permit the 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 in the case that the employer authorises the workers to take leave, the employer cannot regard it as being absent for the purpose 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 the Notification no. 230 dated 25 July 2012 refers to the number of days in each months that the employer requires the workers to attend work or the workers are under obligation to provide service to the employer. In the current practice of the enterprises and establishments in Cambodia, according to the law, the term “**working days in each month**” can be:

- 1) Full working days of each month (in the case that there is no holiday and other national events determined by laws which means the number of working days is 26 days per month subject to company policy).
- 2) Some working days of each month (in the case that there is holiday and other national events determined by law which means the number of working days is less than (1) or just 21-22 days per month depending on the number of holidays and other national events determined by laws and subject to company policy).
- 3) Some working days of each month (in the case that there is authorisation from the employer which means the number of working days of the month is less than (1) or (2), subject to the 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 perform in each month and takes 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 laws and 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 for the employer because the workers do not come to perform work for 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 the bonus provided by the employer. Therefore, the attendance bonus is considered as part of a worker's wage.

Paragraph 6 of Article 71 of the Labour Law states *"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 of Article 71 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 contract suspension between the employer and the worker and the employer is under no obligation to pay the wages to the worker on 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 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.

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

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: N/A

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: **Kong Phallack**

Signature:

Dissenting Opinion

Clause 37 of *Prakas* No. 099, 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, **Kong Phallack**-the Chair Arbitrator, would like to record my dissent to the Arbitral Award **83/13-JRB**. I would like to explain the reasons for my dissent:

1. According to the findings of fact, the workers demand that the employer pays the attendance bonus in proportion to the number of days of authorised leave that the workers take for sickness or death of their relatives.
2. Unpaid authorised leave mentioned above is an unpaid leave for personal commitment which is not an obligation under the contracts of employment, the Labour Law or other provisions which concerns the workers' leave entitlement.
3. Based on Notification no. 230 dated 25 July 2012, I find that attendance bonus provided to workers has conditions attached. Such conditions are clearly stated: attend work regularly in accordance with the number of working days in each month without absence. If the workers are not able to fulfill such a condition the employer has the right to withhold the attendance bonus.
4. I find that authorising leave and providing attendance bonus are two separate practices. Authorising unpaid leave for personal commitment is at the employer's discretion and such decision is made according to administrative procedures, internal work rules, and enterprises or establishments' production lines which are the employer's right to direct and supervise. It is worth noting that administrative procedures and internal work rules for requesting leave are designed to maintain worker discipline and order, or to ensure appropriate labour force for enterprises or establishments' production line operations. Further, 'authorised leave' and 'unauthorised leave' are distinguishable for the purpose of taking action against workers who violate administrative procedures and internal work rules. However, providing the attendance bonus is the employer's legal obligation when the workers fulfill the conditions set forth in Point 2 of the Notification no. 230 dated 25 July 2012. Therefore, unpaid authorised leave is not related to an obligation under the contracts, the Labour Law, or any other provision, which concerns the workers' leave

entitlement. Therefore, authorisation of unpaid leave does not indicate that the employer agrees that the workers will still fulfill the conditions and are entitled to receive the attendance bonus. Therefore, I find that the workers are not entitled to receive pro rata payment of the attendance bonus when they take authorised leave for personal commitment which is not related to an obligation under the contract, the Labour Law, or other provisions which concerns the workers' leave entitlement.

5. Further, in Arbitral Award no. 181/12-New Orea, Reasons for Decision, Issue 3, the Arbitration Council found that:

Attendance bonus set forth in Notification no. 230/12 is a bonus provided by the employer to workers with condition attached. According to the substance of this notification, the condition is to attend work regularly in accordance with the number of working days in each month without absence. If the workers fail to meet the condition, the employer has right to withhold such attendance bonus.

Therefore, I, Kong Phallack-Chair Arbitrator, agree with the interpretation made by the Arbitration Panel in this case. I find that the for workers who take unpaid authorised leave, also fail to attend work regularly according to the number of working days in each month and are absent during those working days. The workers are entitled to receive attendance bonus only when they take authorised leave pursuant to the Labour Law, other provisions, contracts of employment, collective agreement, or agreement. Taking authorised leave as mentioned above is not related to an obligation under the contracts, Labour Law, or other provisions which concerns the workers' leave entitlement and the employer is under an obligation to provide attendance bonus.

6. Further, in this case, according to the findings of fact, the workers take unpaid authorised leave, the employer will reduce the workers' attendance bonus as below:
 - If the workers take one day's leave, the employer will reduce the attendance bonus by US\$5 to a total of US\$10.
 - If the workers take two days' leave, the employer will reduce the attendance bonus by US\$10 to a total of US\$5.
 - If the workers take two and a half days' leave, the employer will withhold the entire US\$15 attendance bonus.

The Arbitration Council finds that the employer's practice is therefore better than the law and is applicable. Therefore, the employer is not under an obligation to pay the attendance bonus in proportion to the number of days of unpaid authorised leave taken.

7. In previous arbitral awards, the Arbitration Council ordered the employer to pay the attendance bonus in proportion to the number of days of authorised leave taken (see *Arbitral Award no. 112/11-Yong Wah I, Reasons for Decision, Issue 3*, *136/11-Cambo Handsome (Branch 1), Reasons for Decision, Issue 1*, *154/11-B & N, Issue 7 (2)*), Notification no. 041/11 dated 7 March 2011 was nullified and superseded by Notification no. 230 dated 25 July 2012 entering into effect on and from 1 September 2012. The differences between Notification no. 041/11 dated 7 March 2011 and Notification no. 230 dated 25 July 2012 are: US\$10 per month and **“without absence”**. The term **“without absence”** is not stipulated in Notification no. 041 dated 7 March 2011. In general, the Arbitration Council will comply with the decisions and jurisprudence of the previous Arbitration Panels except where there is a new legal basis or the Arbitration Panel has good reason to deviate from previous decisions. In this case, as the Notification no. 230 dated 25 July 2012 contains the new term **“without absence”**, the Arbitration Panel in this case has a new legal basis from which to deviate in relation to the attendance bonus. However, the Arbitration Panel in this case still complies with the decisions and jurisprudence of the previous Arbitration Panels even though the former has a new legal basis from which to deviate in relation to previous decisions concerning the attendance bonus.

In conclusion, the Arbitration Panel in this case should have decided to reject the workers' demand that the employer pay the attendance bonus in proportion to the number of days of unpaid authorised leave taken by the workers because such leave is not an obligation under the contracts, the Labour Law, or any other provisions which concerns the workers' leave entitlement.

Therefore, the Arbitration Panel should order the employer to continue its current practice, which is better than the law. The employer pays attendance bonus to workers taking unpaid authorised leave as follows:

- If the workers take one-day leave, the employer will reduce the attendance bonus by US\$5 to a total of US\$10.
- If the workers take two days leave, the employer will reduce the attendance bonus by US\$10 to a total of US\$5.
- If the workers take two days and a half leave, the employer will withhold the entire US\$15 attendance bonus.

Phnom Penh, 23 May 2013

Signature

Arbitrator **Kong Phallack**