KINGDOM OF CAMBODIA

NATION RELIGION KING

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THE ARBITRATION COUNCIL

Case number and name: 70/09-G.W. Enterprise

Date of award: 9 July 2009

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Ouk Ry**

Arbitrator chosen by the worker party: **Liv Sovanna**

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

DISPUTANT PARTIES

Employer party:

Name: **G.W. Enterprise Limited (the employer)**

Address: Damnak Thom Village, Stung Meanchey Commune, Meanchey District, Phnom Penh

Telephone: 012 728 840 Fax: N/A

Representatives:

1. Mr Seng Narin — Administrative Assistant
2. Ms Cheav Sok Nov — Administrative Assistant

Worker party:

Name: **Khmer Youth Federation Trade Union (KYFTU)**

Local Union of KYFTU

Address: Damnak Thom Village, Stung Meanchey Commune, Meanchey District, Phnom Penh

Telephone: 012 940 548 Fax: N/A

Representatives:

1. Mr Sear Son — Coordination Officer of KYFTU
2. Mr Sum Chanthea — Coordination Officer of KYFTU
3. Mr Oul Somath — Coordination Officer of KYFTU

4. Mrs Meas Chanthea	President of the Local Union of KYFTU
5. Mr Puth Sovann	Vice-President of the Local Union of KYFTU
6. Mr Mech Thoeun	Secretary of the Local Union of KYFTU
7. Mr Hing Phath	Committee Member of the Local Union of KYFTU
8. Ms Seth Thida	Committee Member of the Local Union of KYFTU

ISSUES IN DISPUTE

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

1. The workers demand that the employer reimburse fees for medical checks to new and veteran workers, based on actual expenditure for new workers. The employer states that it cannot afford to do so because the Labour Law does not provide clearly that the employer should pay for checks.

2. The workers demand that the employer provide the maternity payment equal to [50% of] 90 days' wages before workers commence maternity leave so that the payments can be used to meet the costs of living and childbirth. However, the employer states that it cannot afford to make the payments because it is facing financial difficulties.

3. The workers demand that the employer pay a meal allowance of 4,000 riel for work on Sundays and public holidays because it is overtime work. The employer states that it cannot provide the allowance demanded because it already pays double wages for work on those days.

4. The workers demand that the employer increase the US$ 5 seniority bonus for workers with more than five years' service in accordance with the Labour Law, with backpay, because Notification No. 017 states that one dollar should be added to the wage annually. The employer counters that it will not pay more than US$ 5 because Notification No. 017 provides that the ceiling amount for the bonus is US$ 5.

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. 076 dated 10 May 2007 (Fifth 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. 421 dated 2 June 2009 was submitted to the Secretariat of the Arbitration Council on 2 June 2009.

HEARING AND SUMMARY OF PROCEDURE

Hearing venue: The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Tonle Bassac Commune, Chamkarmorn District, Phnom Penh

Date of hearing: 16 June 2009 at 2:00 p.m.

Procedural issues:

On 10 May 2009, the Department of Labour Disputes received a complaint from KYFTU outlining the workers' demands for the improvement of working conditions by the employer. Upon receiving the complaint, the Department of Labour Disputes assigned an expert officer to conciliate the labour dispute and the final conciliation session was held on 20 May 2009, resulting in six of the 10 issued being resolved. The four non-conciliated issues were referred to the Arbitration Council on 2 June 2009 via non-conciliation report No. 421 dated 2 June 2009.

Upon receiving the complaint, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the four non-conciliated issues, held on 10 June 2009 at 8:00 a.m. However, the employer sought a postponement of the hearing because it was busy arranging the payment of wages. Thus, the hearing was adjourned until 16 June 2009 at 2:00 p.m.

On the second hearing date, both parties appeared before the Arbitration Council. The Council sought further information on the dispute and conducted a further conciliation of the four non-conciliated issues. However, the issues remained unresolved. The Arbitration Council will consider the remaining issues in dispute based on the evidence and reasons below.

EVIDENCE

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

FACTS

- Having examined the report on collective labour dispute resolution;
- Having listened to the statements of the representatives of the employer and the workers; and
- Having reviewed the additional documents;

The Arbitration Council finds that:

- The employer commenced as G.T. Ltd. in 1998 and changed its name to G.W. Enterprise Ltd. in 2004. It continued under the same management and employs approximately 700 workers.

[Issue 1: The workers demand that the employer reimburse the 10,100 or 12,000 riel spent by new and veteran workers on medical check fees.]

- The employer states that it recruits workers based on written tests. Those who pass the test are allowed to work for three to seven days before having a medical check, the cost of which is borne by the workers themselves.

- The employer adds that the job advertisement requires all workers to possess a certification of fitness in order to commence work. However, because the employer understands that workers face financial difficulties, it allows them to work before the check. The employer emphasises that it cannot afford to reimburse the expenditure as demanded.

- The employer asserts that the Labour Law does not expressly confer responsibility on it for the cost of workers' medical checks. However, if the Labour Law requires the employer to pay, it will comply.

- The workers demand that the employer reimburse the cost of medical checks for both new and veteran workers because it has failed to do so.

- The Arbitration Council ordered the workers to present evidence by 22 June 2009 concerning those workers involved in this demand who are not union members. However, the workers submitted the documents on 23 June 2009, beyond the deadline set. The Arbitration Council will not consider the belatedly submitted evidence.

Issue 2: The workers demand that the employer pay the maternity payment equal to 50% of 90 days' wages and perquisites before the commencement of maternity leave.

- The employer and workers agree that the employer's current practice is to pay 50% of the monthly wage of workers on maternity leave on the 10th of each month, to workers with at least one year of service.

- The employer and workers add that from three to five workers commence maternity leave each month.

- The employer maintains that it has made it easier for female workers to take leave by allowing their friends to collect payments on their behalf if they are unable to do so themselves. The workers do not object to this argument.

- The workers demand on behalf of the female workers that the employer provide the full 90 day payment prior to the commencement of leave so that they can cover the costs of childbirth and because their houses are too far from the factory [to collect their wages].
- The workers add that the Labour Law requires the employer to provide the payments before the commencement of maternity leave.
- The employer asserts that, regarding its practice of making payment on the 10th of each month, it usually pays the workers before this date if it falls on a Sunday or public holiday. However, it cannot afford to pay the 90 day payment before the leave commences because it is having difficulties paying the workers. The employer seeks to retain its current practice of making payments once a month, allowing female workers to authorise a representative to collect payments on their behalf.

Issue 3: The workers demand that the employer provide a meal allowance of 4,000 riel for work on Sundays and public holidays.

- The workers and the employer agree that the employer has in the past allowed workers to work on Sundays and public holidays. However, for the past few months the employer has not had work for the workers on Sundays or holidays due to a shortage of buyers caused by the global financial crisis. Further, the employer does not know when it will have work on Sundays or holidays in the future.
- The two parties agree that work on Sundays or public holidays, as well as overtime work after 4:00 p.m., is performed on a voluntary basis.
- The employer asserts that it generally provides 1,000 riel to workers for overtime work from 4:00 p.m. to 6:00 p.m. However, it cannot afford to provide a meal allowance on Sundays and holidays because it already provides double wages on those days. However, at present the employer has no work for them to do on Sundays and holidays. Thus, it cannot provide the payment demanded by the workers.
- The workers assert that since the employer presently has no work for them to do on Sundays and holidays, their demand for a 4,000 riel meal allowance can be implemented in the future.

Issue 4: The workers demand that the employer increase by US$ 1 the seniority bonus of workers with more than five years' service.

- The workers assert that they have worked for the employer for a long time, some for nearly 10 years. About 20 to 30% of workers have more than five years' service with

the employer, but they receive a seniority bonus of only US$ 5 per month, the same as those with four years' seniority.

- The workers add that the Labour Law calculates the seniority bonus based on the number of years of service the worker has with the employer. If the worker has worked for more than one year, they will receive a bonus of US$ 2 and an additional US$ 1 for each of the second, third and fourth years. However, the Labour Law does not specify a further bonus for workers who have been working for five years or longer.
- The workers demand that the employer provide the bonus as follows:

Year(s) of service	Seniority Bonus Provided	Workers Demand
One year	US$ 2 per month	Agree
Two years	US$ 3 per month	Agree
Three years	US$ 4 per month	Agree
Four years	US$ 5 per month	Agree
Five years +	No raise	An additional US$ 1 annually

- The employer asserts that its practice complies with the Labour Law and Notification No. 017 of the Ministry of Labour and Vocational Training. It also states that it will comply if the law requires it to provide a further US$ 1 to workers who have worked for more than five years.

REASONS FOR DECISION

In this case, the claimant union, the Local Union of KYFTU, represents those workers who are its members. The Arbitration Council will consider the issue as follows:

Article 268 of the Labour Law states:

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

The Arbitration Council is of the view that, based on Article 268, professional organisations enjoy the rights and benefits recognised by the law when they are registered with the Ministry in Charge of Labour.

Clause 5 of *Prakas* No. 305 SKBY dated 22 November 2001 issued by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation states that "[a]ny union established at an enterprise or establishment in compliance with Article 268 of the Labour Law has the right to represent the interests of its members in accordance with the conditions contained in the Labour Law."

In this case, the Arbitration Council finds that the Local Union KYFTU was registered by the Ministry of Labour and Vocational Training on 7 April 2009. Therefore, the union enjoys the rights and benefits recognised by the Labour Law, particularly the right to represent its workers as stipulated in Article 268 of the Labour Law and Clause 5 of *Prakas* No. 305.

Therefore, the Arbitration Council will consider and resolve the demands made on behalf of those workers who are members of the Local Union of KYFTU.

Issue 1: The workers demand that the employer reimburse the 10,100 or 12,000 riel spent by new and veteran workers on medical check fees.

The workers demand that the employer reimburse the cost of medical checks for both new and veteran workers because it has failed to do so previously. The employer maintains that it has recruited workers via written tests. Applicants who pass the test are allowed to work for three to seven days prior to undergoing a medical check, provided that they take responsibility for the check. The Arbitration Council will consider the issue as follows:

Article 247 of the Labour Law (1997) provides:

> The Ministry in Charge of Labour shall issue a *Prakas* to determine:
>
> a) The conditions under which pre-employment, re-employment, periodical, and special physical exams are given;
>
> b) The number, qualifications, and the duties of the medical personnel to be employed;
>
> c) The conditions under which employers are required to establish and provide at their expense:
>
> 1) the infirmary specified in Article 242;
>
> 2) a bandaging room for a work force of 20 to 50 workers;

3) a first aid kit for a work force of fewer than 20 workers, and with particular regard to the infirmary, the number of rooms, the area space, the equipment and their purpose based on the number of workers employed when medical exams are conducted at the enterprise, whether or not the enterprise has an autonomous medical service;

4) the medical exams of workers as stipulated in point a) of this article.

Clause 2(d) of Inter-ministerial *Prakas* No. 1191 on Employment ID, Employment Cards, and Medical Check-up Fees issued by the Ministry of Economy and Finance and the Ministry of Labour and Vocational Training, dated 21 November 2006, provides that "the fee for medical checks which employers shall pay is determined as follows: For each Cambodian worker, it is determined to 12,000 riel."

Based on Article 247(a) and (c) of the Labour Law and Clause 2(d) of the Inter-ministerial *Prakas* No. 1191 on Employment ID, Employment Cards, and Medical Check-up Fees issued by the Ministry of Economy and Finance and the Ministry of Labour and Vocational Training, dated 21 November 2006, the Arbitration Council is of the view that the employer has an obligation to reimburse the cost of the workers' medical checks.

Furthermore, the Arbitration Council notes that in previous arbitral awards it has ordered employers to pay the medical fees incurred by workers *(see Arbitral Awards 02/03-Chu Hsing, reasons for decision, issue 1; 19/04-Kbal Koah (Branch 2), reasons for decision, issue 2; 59/05-Tack Fat, reasons for decision, issue 5; 05/06-W & D, reasons for decision, issue 1; 98/07-Sky Sino, reasons for decision, issue 2; and 52/08-Supreme Garment, reasons for decision, issue 1)*.

In this case, the Arbitration Council applies its previous finding that the employer is obliged to pay the fees incurred by workers for medical checks.

Article 120 of the Labour Law states:

> The statute of limitation for a lawsuit for the payment of wages is three years from the date the wage was due.
>
> Claims subject to the statute of limitation of a lawsuit include the actual wage, perquisites and all other claims of the worker resulting from the labour contract, as well as the indemnity in the event of dismissal.

With respect to Article 120, the claim for medical check fees arises from the employment contract because the requirement to undergo a medical check is a condition of employment. Thus, the statute of limitation for a claim for medical fees in this case is three years.

However, when does the three year statute of limitation being running? In Arbitral Award 93/07-Global Footwear, reasons for decision, issue 2, the Arbitration Council found that if the medical check took place prior to signing the contract or commencing work, the right to make a claim for reimbursement lapses three years from the date of signing the contract or commencing work. However, if the medical check took place after commencing work, the three year period commences on the date that the worker incurred the medical check fees, or if the employer deducted the fee from the worker's wage, the date that the worker received their wage.

According to the facts, the employer has never paid the fees for its workers' medical checks. Thus, the Arbitration Council is of the view that the employer has an obligation to reimburse those workers whose claims fall within the three year limitation period.

Therefore, the Arbitration Council decides to order the employer to reimburse the medical fees incurred by workers who are members of the Local Union of KYFTU and whose claims fall within the three year limitation period, counted from the date of signing the contract or the date the expense was incurred.

Issue 2: The workers demand that the employer pay the maternity payment equal to 50% of 90 days' wages and perquisites before the commencement of maternity leave.

In this case, the workers demand that the employer provide the entire maternity payment, equal to 50% of 90 days' wages, before the workers commence maternity leave.

Article 183 of the Labour Law states:

> During the maternity leave as stipulated in the preceding article, women are entitled to half of their wage, including their perquisites, paid by the employer.
>
> Women fully reserve their rights to other benefits in kind, if any.
>
> Any collective agreement to the contrary shall be null and void.
>
> However, the wage benefits specified in the first paragraph of this article shall be granted only to women having a minimum of one year of uninterrupted service in the enterprise.

The Arbitration Council finds that Article 183 requires the employer to pay half of the wages, including perquisites, of female workers who take maternity leave. However, Article 183 does not stipulate a timeframe for the payment of these wages.

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

Based on Article 115, the Arbitration Council finds that payment of wages shall not be made on holidays. Thus, if payment is due on a day-off, the employer shall pay a day earlier.

In previous arbitral awards, the Arbitration Council has found based on Article 115 of the Labour Law that maternity leave payments must be made before the leave commences *(see Arbitral Awards 57/06-Evergreen, reasons for decision, issue 6 and 97/06 – New Max, reasons for decision, issue 1)*.

In this case the Arbitration Council agrees with the interpretation in previous awards that the maternity payment must be provided before the worker commences the leave. According to the above facts, the employer and workers assert that the employer provides the maternity payment on a monthly basis, rather than prior to the commencement of the leave.

In conclusion. the Arbitration Council orders the employer to provide the maternity leave payment equal to 50% of 90 days' wages prior to the commencement of the leave.

Issue 3: The workers demand that the employer provide a meal allowance of 4,000 riel for work on Sundays and public holidays.

The workers demand that the employer provide a 4,000 riel meal allowance when workers work on Sundays and holidays on the basis that it is overtime work. However, they acknowledge that for the past two or three months, the employer hasn't had work for the workers to do on Sundays or holidays. Thus, the workers demand that the employer provide a 4,000 riel meal allowance in the future when there is work on Sundays and holidays. Thus, it is a prospective demand.

The Arbitration Council has determined that it will not consider prospective demands for the following reason.

In previous cases containing prospective demands, the Arbitration Council has stated that "[t]he Arbitration Council is established to resolve labour disputes, not to deal with problems that have not arisen yet" *(see Arbitral Awards 10/03-Jacqsintex, reasons for decision, issue 2; 14/06-Seng Yung, reasons for decision, issue 2; and 141/08-Bloomtime, reasons for decision, issue 3)*.

In this case, the Arbitration Council agrees with its interpretation in previous awards because no one can foresee prospective events. The reason the workers demand that the employer provide a 4,000 riel meal allowance for work on Sundays and holidays in the future is because they do not know when the employer will have work for them on Sundays or holidays or how many workers will volunteer to work on Sundays or holidays at the employer's request.

Therefore, the Arbitration Council declines to consider the workers' demand that the employer provide a 4,000 riel meal allowance when it has work on Sundays and holidays in the future.

Issue 4: The workers demand that the employer increase by US$ 1 the seniority bonus of workers with more than five years' service.

The employer provides a US$ 2 seniority bonus to workers who have worked for more than one year and an additional US$ 1 for each of the second, third and fourth years of service. When the workers have worked for more than five years, the employer does not provide an additional bonus. The workers demand that the employer increase the seniority bonus by US$ 1 for each year of service above five years.

Point 5 of Notification No. 017 SKBY of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, dated 18 July 2000, states:

> Workers who work at any factory or enterprise for more than one year shall get the following rewards for their service:
>
> 5.1. For seniority of more than one year, the worker shall receive a reward of US$ 2 per month.
>
> 5.2. For seniority of more than two years, the worker shall receive a reward of US$ 3 per month, i.e. US$ 2 for the first year plus US$ 1 for the second year.
>
> 5.3. For seniority of more than three years, the worker shall receive a reward of US$ 4 per month, i.e. US$ 2 for the first year plus US$ 1 for the second year, plus US$ 1 for the third year.
>
> 5.4. For seniority of more than four years, the worker shall receive a reward of US$ 5 per month, i.e. US$ 2 for the first year plus US$ 1 for the second year, plus US$ 1 for the third year plus US$ 1 for the fourth year.

Point 3 of Notification No. 745 KKBV dated 23 October 2006 provides that "[b]enefits to which workers are entitled in accordance with points 3, 4, 5, and 6 of Notification No. 017 SKBY dated 18 July 2000 shall be retained."

Point 5 of Notification No. 017 SKBY stipulates a bonus for the first four years of service, meaning that workers with at least four years' service are entitled to a bonus of US$ 5 per month. No amount is specified for service of five years. This means that workers are not entitled to an additional seniority bonus following five years of service. Thus, the Arbitration Council finds that the Notification does not require the employer to increase the seniority bonus by US$ 1 for each year of service above five years.

No contract, collective agreement, or past practice of the employer provides a basis for the workers' demand. Therefore, the workers' demand that the employer increase the

seniority bonus by US$ 1 for each year of service above five years is beyond what is provided by the law, making this an interests dispute.

In cases involving interests disputes, the Arbitration Council considers whether or not the union holds most representative status (MRS) at the enterprise. The Arbitration Council finds that holding MRS gives a union the legal capacity to negotiate a collective agreement with an employer and gives it legal standing to bring an interests dispute before the Arbitration Council for resolution. In order to gain MRS, a union must be registered and fulfil the other conditions stipulated in Article 277 of the Labour Law (1997).

Furthermore, Article 43 of *Prakas* No. 099 dated 21 April 2004 stipulates:

> 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.

If a union does not hold MRS, it has no legitimate right to make a collective agreement on behalf of all the workers at the factory (see Article 96(2)(b) of the Labour Law and Clause 9, paragraph one of *Prakas* No. 305). This right can only be enjoyed by a registered union that has a majority of workers as members and fulfils the other criteria contained in Article 277 of the Labour Law. In general, the Arbitration Council will refuse to consider an interests dispute if the claimant union does not hold MRS *(see Arbitral Awards 101/08-G D M, reasons for decision, issue 3 and 03/09-Xing Tai, reasons for decision, issue 8(B))*.

Therefore, the Arbitration Council declines to consider the workers' demand that the employer increase the seniority bonus by US$ 1 for each year of service above five years.

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 reimburse the medical fees incurred by workers who are members of the Local Union of KYFTU and whose claims fall within the three year limitation period, counted from the date of signing the contract or the date the expense was incurred.

Issue 2: Order the employer to provide the maternity leave payment equal to 50% of 90 days' wages prior to the commencement of the leave.

Issue 3: Decline to consider the workers' demand that the employer provide a 4,000 riel meal allowance when it has work on Sundays and holidays in the future.

Issue 4: Decline to consider the workers' demand that the employer increase the seniority bonus by US$ 1 for each year of service above five years.

Type of award: non-binding award

This award of the Arbitration Council 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: **Ouk Ry**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....