



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអង្គជំនុំជម្រះ

THE ARBITRATION COUNCIL

Case number and name: 249/13-F.Y. Cambodia Fashion Limited

Date of award: 20 December 2013

Dissenting Opinion: Arbitrator Ing Sothy

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

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

Arbitrator chosen by the worker party: **Ann Vireak**

Chair Arbitrator (chosen by the two Arbitrators): **Sok Mathoeung**

DISPUTANT PARTIES

Employer party:

Name: **F.Y. Cambodia Fashion Limited**

Address: Building no. 696, Toul Rokar 3, National Road no. 2, Sangkat Chak Angre Krom,
Khan Meanchey

Telephone: 016 333 059

Fax: N/A

Representatives:

- | | |
|---------------------|-----------------|
| 1. Mr Kep Kompheak | General Manager |
| 2. Mr So Somara | Administrator |
| 3. Mr Cheat Khemara | GMAC Officer |

Worker party:

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

Address: House no. 16A, Street no. 360, Sangkat Boeung Keng Kong 3, Khan Chamkar
Morn, Phnom Penh

Telephone: 017 55 24 52

Fax: N/A

Representatives:

- | | |
|--------------------|-----------------------------------|
| 1. Mr Khem Chamnan | Under-Secretary General of FTUWKC |
| 2. Mr Ry Sithneth | member of FTUWKC |

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3. Mr Moeun Sara	member of FTUWKC
4. Ms Preap Sreynoeun	worker
5. Ms Sorn Sithy	worker
6. Ms Man Sros	worker
7. Ms Pol Phat	worker
8. Ms Chea Sreymol	worker

ISSUES IN DISPUTE

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

- The workers demand that the employer pay attendance bonus in proportion to the number of days of authorised leave that they take. The employer claims it will comply with the Labour Law and maintain the current practice.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this award from Chapter XII, Section 2B of the Labour Law (1997); the *Prakas* on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same *Prakas*; and the *Prakas* on the Appointment of Arbitrators No. 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 non-conciliation report No. 1435 dated 13 November 2013 was submitted to the Secretariat of the Arbitration Council (SAC) on 13 November 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: 3 December 2013 (at 8:30 a.m.)

Procedural issues:

On 6 November 2013, the Department of Labour Disputes (the department) received a complaint from F.Y. Cambodia Fashion Limited, 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 3 December 2013, but it was not resolved. The one non-conciliated issues were referred to the Secretariat of the Arbitration Council on 13 November 2013.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the one non-conciliated issues, held on 3 December 2013 a 8:30 a.m. Both parties were present.

At the hearing, the Arbitration Council conducted a further conciliation of the one non-conciliated issue, but it remained unresolved. In this case, FTUWKC and F.Y. Cambodia Fashion Limited is signatories to a Memorandum of Understanding dated 3 October 2013 (MoU); however, FTUWKC does not have its local union at the company. Therefore, though FTUWKC attended the hearing and received authorisation letter from 89 workers (names of workers attending the hearing were also listed in the authorisation letter), such attendance cannot be interpreted as workers are signatory to the MoU. The parties choose binding award for rights dispute.

The parties agreed to defer the date of award issuance from 9 December 2013 to 20 December 2013.

Therefore, the Arbitration Council will consider the one issue 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:

- F.Y. Cambodia Fashion Limited (F.Y.) is a garment manufacturer registered under no. Inv 293 E/1997 dated 17 January 1997 and employs approximately 120 workers.
- FTWKC is a clamant in this case. This union received an authorisation letter dated 5 November 2013 from 89 workers to resolve the disputing issue in this case. The employer did not object to the name list and thumbprints. Therefore, the Arbitration Council will consider this case for only 89 workers.

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

- The workers clarify their demand that the employer pay attendance bonus in proportion to the number of days of authorised leave taken by them when they use all their annual leave
- The company's practice:
 - The employer provides a US\$10 attendance bonus on a monthly basis. If the workers take one day of authorised leave (excluding annual leave and sick leave), the employer withholds the whole attendance bonus.
 - If a worker takes annual leave, the employer will maintain the worker's attendance bonus.
 - If a worker takes sick leave, then the employer will pay the attendance bonus in proportion to the number of days of sick leave taken that month.
- The workers claim that authorised leave for personal commitments includes: doing errands at home, relative or friend engagement, attending to personal business, harvesting or participating in ceremonies.
- The employer claims Point 1, Annex "B" of internal work rule dated 1 April 2003 states "*a US\$5 attendance bonus per month is provided (if attendance is 100 per cent).*" This particular internal work rule was approved by Ministry of Labour and Vocational Training on 21 April 2003.
- The workers claim the internal work rule does not belong to the company because:
 - The Address mentioned in the approved internal work rule was at Khan Chamkar Morn, however, the company is located in Khan Mean Chey.
 - The working hours stipulated in the internal work rule are: 7:30 a.m. to 11:30 a.m. in the morning and 1 p.m. to 5 p.m. in the afternoon. In practice, the company held the morning session from 7:30 a.m. to 11:30 a.m. and the afternoon session from 12:30 p.m. to 4:30 p.m.
- The employer claims:
 - Though the addresses are different, the company still uses the same work rule.
 - The employer had modified working hours; however, the modification had not been made in the internal work rule.
 - The employer had posted the internal work rules on the company premises for all workers to view.
- The workers agree that the internal work rules had been posted on the company premises.
- The workers claim that payment of attendance bonus is made based on the number of days of authorised leave for personal commitment taken by the workers and was made in Arbitral Award no. 230/12-M & V.

- The employer claims that if there was a law for payment of attendance bonus to be made in proportion to the number of days of authorised leave taken by the workers, then the employer would comply with it.

REASONS FOR DECISION

Before considering all of the demands, the Arbitration Council distinguishes rights and interests disputes.

Paragraph 2 of Article 312 of the Labour Law states: *“The Arbitration Council 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 the 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.

Paragraph 2 of Article 312 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 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. 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 jurisdiction to settle the rights disputes. A dispute that is not stipulated in the agreement or collective agreement is an interests dispute and the Arbitration Council settles interests disputes based on equity.

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

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

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

In practice, the employer withholds the whole attendance bonus when the workers take one day of authorised leave (excluding annual leave or sick leave).

The Arbitration Council will consider whether the workers have the right to demand that the employer reduce attendance bonus in proportion to the number of days of authorised

leave that the workers take for (sickness or death of their parents, their in-laws, or their relatives).

The Arbitration Council issued an arbitral award which ordered the employer to pay 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, “*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 has been enforced from 1 September 2012 onwards.

The Arbitration Council finds that there are many kinds of bonuses. Also, the amount of a bonus differs depending on the owners of the 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. It's not a method for the employer to supervise, as the attendance bonus of US\$10 is 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 in Point 2 of the statement of the Labour Advisory Committee dated 11 July 2011 states 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 law” does not require the employer to dock the

attendance bonus which means the workers receive full attendance bonus, US\$10 per month. Absence (authorised leave for personal commitment) is not stipulated in the laws, which leads to the determination of whether the workers shall receive full 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 aforementioned absences, 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 on a case-by-case basis. 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 the 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 or pressure from the employer.

In this case, Point 1, Annex “B” of internal work rules dated 1 April 2003 states “*a US\$5 attendance bonus per month is provided (if attendance is 100 per cent)*”.

The Arbitration Council notices that though in Annex B of the internal work rule, only a US\$5 attendance bonus is listed and the employer actually provides workers with a US\$10 attendance bonus in accordance with Notification no. 230. The Arbitration Council finds that terms and conditions attached to attendance bonus stated in the internal work rules are not clear. Also, the employer does not practice in accordance with the internal work rule such as when the workers take annual leave, the employer maintains their attendance bonus and when the workers take sick leave, the employer pays attendance bonus pro rata.

Further, the Arbitration Council finds that workers who take authorised leave for personal commitments are considered to have permission from the employer that the workers will not receive the wages for the day(s) that they don’t attend 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 maintains the job and other benefits for the workers once they return to work.

The Arbitration Council finds that in the case that the employer authorises the workers to take leave, it is not an absence 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 month 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 worker take)

Therefore, workers who attend work on the number of days that they are obliged to perform in 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 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 is not fair for the employer because the workers have not completed any work for the employer.

Article 103 of the Labour Law states: “*Wages are: ...*

- *Bonuses...*”

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 wages.

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 the worker takes authorised leave for a 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.

In this case, the Arbitration Council finds that when the workers still have remaining annual leave; the workers shall use such annual leave and refrain from requesting authorised leave for personal commitments.

Based on the reasons and interpretation above, the Arbitration Council orders the employer to pay a monthly US\$10 attendance bonus in proportion to the number of days of authorised leave taken by the workers.

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: Order the employer to pay a monthly US\$10 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 agreement made between the parties on 3 December 2013

Part II. Interests dispute: N/A

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **Ann Vireak**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Sok Mathoeung**

Signature:

Dissenting Opinion

Clause 37 of *Prakas* No. 099 SKBY, 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, Arbitrator **Ing Sothy**, would like to record my dissent on issue 6 of the Arbitral Award **249/13-F.Y. Cambodia Fashion Limited**. I would like to explain the reasons for my dissent:

I. Definition:

1. Bonus (noun): something extra given separately from the amount needed to satisfy a requirement; a bonus is given and received; bonus is to be distinguished from gratuity. (Page 970, Line 12 **Chuon Nath Khmer Dictionary**).

2. Gratuity: a nominal payment given to a traditional physician, [or performer of religious rites]. (Page 463, Line 2 **Chuon Nath Khmer Dictionary**).

3. primes (n) (Dt. trav.) - *sommes versées par l'employeur au normal, soit à titre de salarié en sur du salaire remboursement de frais, soit pour encourager la productivité, tenir compte de certaines difficultés particulières du travail, ou récompenser l'ancienneté.* (**Livre, Lexique des termes juridiques 12^{eme} édition Dalloz 1999 page 413**)

II. Analysis:

The word "**Bonus**" means a thing that is given as an incentive with conditions. Therefore, you can accept a bonus only if you fulfil a specific condition [...] that has been set.

Generally, when implementing a policy to give a **bonus**, who has the right to set or withdraw any kind of condition? The answer is the bonus owner.

In the labour sector, the bonus owner is **the employer** and the one who shall fulfil the condition to receive the bonus is **the worker**.

Examples:

If you count from one to 1000, the bonus owner will give you a bonus of US\$100 per month. You only count to 900 and you tell the bonus owner that you are exhausted and

cannot count to 1000. The bonus owner allows you to stop at 900 and rest. You then request that the bonus owner give you part of the bonus, deducting from the US\$100 in proportion.

Who has the right to decide whether you should receive a bonus when you have not fulfilled the condition set by the bonus owner? The answer is the bonus owner.

If you attend work eight hours per day you will receive US\$10.

If you attend work six hours per day you will receive US\$8.

If you attend work four hours per day you will receive US\$6.

These are the three conditions. If you fulfill one of them, you will receive a bonus according to the condition you have fulfilled. However, if you take authorised leave for one hour per day, which condition have you fulfilled? Are you entitled to ask for a deduction in proportion to the hours of leave taken? The proportion would [be determined by] dividing 10 by eight and multiplying this number by seven. This equals US\$8.75. The answer is, the one who has the right to make the decision is the bonus owner.

III. Conclusion

In conclusion, Point 2 of *Notification* no. 230, dated 25 July 2012 states: “*Workers who attend work regularly in accordance with the number of working days in each month without absence shall receive a bonus of at least US\$10 per month.*”

It clearly sets out the condition to fulfill in order to obtain a bonus of US\$10 per month. If the workers fail to fulfill the abovementioned condition by taking leave on any days, then they are not entitled to the bonus. Thus, in order to obtain the bonus, the workers must properly and adequately fulfill the aforesaid condition.

Phnom Penh, 20 December 2013

Signature

Ing Sothy