KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 37/11-ASD

Date of award: 22 April 2011

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): **Ang Eng Thong**

DISPUTANT PARTIES

Employer party:

Name: **ASD (Cambodia) Co., Ltd. (the employer)**

Address: Odem Village, Kantork Commune, Dankor District, Phnom Penh

Telephone: 089 904 895 Fax: N/A

Representatives:

1. Ms Touch Samphas — Head of accounting section
2. Mr Bic Sampheach — Administration officer

Worker party:

Name: **National Independent Federation Textile Union of Cambodia (NIFTUC)**

Local Union of NIFTUC

Address: Odem Village, Kantork Commune, Dankor District, Phnom Penh

Telephone: 012 655 849 Fax: N/A

Representatives:

1. Mr Nak Noun — General secretary of NIFTUC
2. Ms Suon Sokhunthea — President of the Local Union of NIFTUC
3. Ms Touch Sitha — Worker delegate
4. Ms Meak Kongkea — Female worker

ISSUES IN DISPUTE

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

1. The workers demand that the employer implement the agreement dated 8 October 2008 made at the Arbitration Council, by offering a permanent contract to those with more than two months of service, and provide back pay to them dating back to October 2010. The employer argues that it is following the existing practice, that is, the contracts of those with more than three months of service will be converted into those of permanent workers.
2. The workers demand that the employer allow them to use annual leave upon request or provide them with a payment in lieu of annual leave. The employer argues that it is following the existing practice.
3. The workers demand that the employer abide by the agreement to open gates for safe leaving and entering of the factory. The employer argues that it is following the existing practice.
4. The workers demand that the employer abide by the agreement to set up a cooling system. The employer refuses to accommodate this demand.
5. The workers demand that the employer implement the previous agreement by arranging to have two physicians to be on stand-by during working hours. The employer claims that it has already implemented that agreement.
6. The workers demand that the employer provide a termination payment in accordance with the Labour Law to the dismissed worker, Meak Kongkea. The employer claims that it did not dismiss her. She resigned from work. The employer has provided her with a payment equal to one and a half month's wages.
7. The workers demand that the employer consult the union prior to issuing any internal rules or regulations. The employer argues that it is unnecessary to consult the union on this issue.
8. The workers demand that the employer allow them to take annual leave for a personal commitment. The employer states that it has a schedule for the workers to take leave.
9. The workers demand that the employer properly install sewing machines in order to allow more space around their workstations during working hours. The employer will discuss this issue with the management.

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. 136 dated 7 June 2011 (Ninth 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. 288 KB/RK/VK dated 14 March 2011 was submitted to the Secretariat of the Arbitration Council on 15 March 2011.

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: 24 March 2011 at 8:30 a.m.

Procedural issues:

On 10 February 2011, the Department of Labour Disputes received a complaint from NIFTUC outlining the workers' demands that the employer improve working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert labour officer to resolve the labour dispute. The last conciliation session was held on 7 March 2011, resulting in the resolution of three issues. The nine non-conciliated issues were referred to the Secretariat of the Arbitration Council on 15 March 2011 via non-conciliation report No. 288 KB/RK/VK dated 14 March 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the nine non-conciliated issues. The hearing was held on 24 March 2011 at 8:30 a.m. with both parties present. The Arbitration Council conducted a further conciliation of the nine non-conciliated issues, resulting in three issues being resolved. Issues 1, 4, 5, 6, 7, and 8 remained unresolved.

Normally, parties who appear before the Arbitration Council have the right to choose between a binding or non-binding award, regardless of whether the issues give rise to interests or rights disputes. However, in the Memorandum of Understanding On Improving Industrial Relations in the Garment Industry (MoU) signed by the Garment Manufacturers Association in Cambodia (GMAC) and six leading union confederations on 28 September 2010, the signatories agreed to submit rights disputes to binding arbitration. The signatories are still able to choose either binding or non-binding awards on interests disputes.

As the parties are signatories to the MoU dated 28 September 2010, they are bound to select binding arbitration of rights disputes. However, they are not bound to select binding arbitration of interests disputes. Any objection by the parties to an award on interests

disputes will not affect their obligation to implement an award on rights disputes in accordance with the MoU.

The Arbitration Council considers 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:

- ASD (Cambodia) Co., Ltd employs a total of 790 workers.
- The Local Union of NIFTUC is the claimant in this case.

Issue 1: The workers demand that the employer implement the agreement dated 8 October 2008 made at the Arbitration Council, by offering a permanent contract to those with more than two months of service, and provide back pay to them dating back to October 2010.

- Point 1 of the agreement dated 8 April 2008 reads “The employer will offer a permanent contract to a competent worker with two months of service.”
- After the agreement took effect, the employer offers the workers two-month probationary contracts and then renews them as permanent contracts.
- Since early October 2010, the employer has changed its practice by offering a three-month probationary contract. During the probationary period, the workers receive monthly wages of US$ 56.
- Since October 2010 until the hearing date, the employer has recruited approximately 100 new workers. The employer offered them three-month probationary contracts. After the completion of the probationary period, the employer renewed their contracts as permanent contracts.
- The employer argues that it changed its practice in order to comply with a Notification issued by the Ministry of Labour.
- Point 2 of Notification No. 049 dated 9 July 2010 issued by the Ministry of Labour and Vocational Training, states:

> A minimum wage of US$ 56 will be provided to probationary workers employed for one to three months in the textile, garment, and footwear production sectors; that is, the current minimum wage of US$ 45 plus additional wages of US$ 5 and the living allowance of US$ 6. After completion of the probationary period, the workers will receive a minimum wage of US$ 61 per month; that is, a minimum wage of US$ 50 plus additional wages of US$ 5 and the living allowance of US$ 6.

- According to the document submitted by the workers on 4 April 2011, there are 52 workers the employer has offered probationary contracts to. The employer has made an objection to seven workers, namely (1) Pheam Saphon, (2) Mom Sreyneath, (3) Bron Chanthy, (4) Loy Im, (5) Bom Theam, (6) Chol Chhun, and (7) Yut La. Therefore, there are only 45 claimant workers.

Issue 4: The workers demand that the employer abide by the agreement to set up a cooling system.

- The workers claim that the temperature at the workplace is very hot. As a result, the workers are unable to concentrate on their work and they often go to the toilet [to splash water on themselves].
- The employer admits that the temperature is a little hot at the workplace; the employer is considering setting up a cooling system on the roof of the workplace. However, after realising the huge expense of it, the employer decided not to proceed with its plan.
- Point 1 of the agreement dated 14 July 2010 stipulated in the non-conciliation report reads “the employer agrees to set up a cooling system from the date of conciliation.” [This agreement is referred to the latter pages of the non-conciliation report, which was not translated and extracted above.]

Issue 5: The workers demand that the employer implement the previous agreement by arranging to have two physicians to be on stand-by during working hours.

- There is only one nurse for approximately 790 workers after another nurse quit the job on 1 November 2010.
- The workers make this demand because the Labour Law requires two nurses for more than 700 workers. The workers claim that there is no nurse on standby when the sole nurse takes a sick worker to a hospital.
- The employer claims that it cannot afford to hire another nurse, but it is seeking to employ a physician.
- Point 6 of the agreement dated 14 July 2010 stipulated in the non-conciliation report reads “the employer has already arranged two nurses to be on standby. However, the employer seeks more time to consider hiring a physician.”

Issue 6: The workers demand that the employer provide a termination payment to Meak Kongkea.

- The workers demand that the employer provide a termination payment in accordance with Article 90 of the Labour Law. The workers claim that the employer has pushed her into resignation. The employer refuses to accommodate this demand because Meak Kongkea has resigned from work of her own accord.
- Meak Kongkea holds an undetermined duration contract. As of the date of her resignation, she has two years and eight months of service.
- Meak Kongkea was a nurse in the factory. She received monthly wages of US$ 130, a monthly meal allowance of US$ 16.67, and a monthly seniority bonus of US$ 3.
- [The employer claims] Meak Kongkea resigned from work on 1 November 2010.
- Meak Kongkea took maternity leave from 10 March 2010 to 11 June 2010. Upon return from maternity leave, the employer transferred her to the administration office. She was left with nothing to do in the administration office for 10 hours daily. This situation lasted for two months. During this period, the employer stopped providing Meak Kongkea with transportation to work. The employer did not inform her of the change.
- Then the employer required her to sit at the canteen, in which sometimes she could smell soy sauce and fish sauce leftover after meals. Meak Kongkea claims that the employer did not allow her to turn on the light and fans. She could not withstand it to sit in the canteen. After the experience as an administration officer and sitting in the canteen for three months, Meak Kongkea finally decided to resign.
- The employer admits to this version of events and argues that it was because she did not submit her maternity leave form. She just called to inform the employer before taking leave. Without informing the employer, she was late on her first day of work after returning from maternity leave. Additionally, she took a consecutive leave of absence, i.e. two days off in a week. In some instances, she took unauthorised leave.
- The workers argue that Meak Kongkea did not submit a maternity leave form because she went into labour on that day. She took a consecutive leave of absence because her son was sick and she had to obtain land title. The workers claim that Meak Kongkea submitted a leave form to take leave for an urgent commitment, but the employer refused her the leave. She only took half a day off.
- The workers claim that the employer did not pay Meak Kongkea for the period she was at the administration office and the canteen. She received only half of her three months' wages at her resignation.
- The employer admits that it has treated Meak Kongkea unfairly, but argues that it was caused by her frequent leave of absence.

- Meak Kongkea's complaint, dated 10 November 2010 and submitted by the workers to the Arbitration Council on 28 March 2011, reads:

> …the Director pushed me into resigning on 1 November 2010 and did not provide me with benefits in accordance with the Labour Law as follows:
>
> 1. Monthly payment of US$ 6 in lieu of setting up a day-care centre from 10 June 2010 to the date of my resignation;
> 2. Daily expense of 8,000 riel on transportation after the revocation of transportation benefit;
> 3. The other half of my three months' wages; and
> 4. Other benefits provided for in the Labour Law, resulting from constructive dismissal, such as indemnity for dismissal…

- At the hearing, the workers made an additional demand in relation to payment in lieu of annual leave of one and a half day and a claim for unpaid wages if 10 days before the commencement of Meak Kongkea's maternity leave.

Issue 7: The workers demand that the employer seek consultation and consent from the Local Union of NIFTUC prior to modifying previous practices.

- The workers clarify their demand. They demand that the employer seek consultation and consent from the Local Union of NIFTUC prior to modifying an agreement, the Internal Work Rules, and transferring any workers.
- The employer agrees to seek consultation and consent from the Local Union of NIFTUC before modifying an agreement and the Internal Work Rules. The employer, however, refuses to accommodate their demand in relation to transferring workers.

Issue 8: The workers demand that the employer allow them to take annual leave for a personal commitment.

- The employer's practice is to allow the workers to take paid annual leave unless they take special leave. If they take leave other than special leave or they have exhausted their special leave, then the employer will deduct their daily wages and other benefits.
- The employer's practice is to provide payment in lieu of unused annual leave in October of the subsequent year.
- The workers demand that the employer allow them to take annual leave rather than special leave on the basis of the Labour Law. The workers do not cite any article to support this demand. The employer refuses to accommodate this demand as it is a long-standing company practice.

REASONS FOR DECISION

Issue 1: The workers demand that the employer implement the agreement dated 8 October 2008 made at the Arbitration Council, by offering a permanent contract to those with more than two months of service, and provide back pay to them dating back to October 2010.

Before considering this issue, the Arbitration Council determines whether or not the issue gives rise to a rights dispute.

In previous arbitral awards, the Arbitration Council has ruled that "a rights dispute is a dispute concerning entitlements in the law, an agreement or a collective agreement" (*see Arbitral Award 05/11-M&V 1, reasons for decision, issue 1 and 5; 13/11-Gold Kamvimex, reasons for decision, issue 1 and 2; 14/11-GHG, reasons for decision, issue 4*).

The Arbitration Council applies these rulings in this case. The Arbitration Council considers this issue to be a rights dispute as it has a basis in the Labour Law.

Article 68 paragraph 1 of the Labour Law states:

> A contract for a probationary period cannot be for longer than the amount of time needed for the employer to judge the professional worth of the worker and for the worker to know concretely the working conditions provided. However, the probationary period cannot last longer than three months for regular employees, two months for specialised workers and one month for non-specialised workers.

Based on this article, there are three types of workers with different probationary periods, i.e. no longer than three months for regular employees, two months for specialised workers, and one month for non-specialised workers.

In previous arbitral awards, the Arbitration Council has ruled that the workers and the employer cannot have a probationary contract longer than three months. Most of the workers at the garment factory are specialised workers. Thus, their probationary contracts cannot last longer than two months (*see Arbitral Awards 27/03-Standard, reasons for decision, issue 1; 69/04-Commence Way, reasons for decision, issue 1; 53/06-Hong Mey, reasons for decision, issue 1; 62/06-Quicksew, reasons for decision, issue 1; 37/07-JRB, reasons for decision, issue 1*).

In this case, the employer recruited 45 workers in October 2010 and offered them probationary contracts of three months before renewing them as permanent contracts. During this period, they received monthly wages of US$ 56. The Arbitration Council rules that

the employer's requirement for specialised workers to undertake a three-month probationary period is contradictory with Article 68 of the Labour Law.

Point 1 of the agreement dated 8 April 2008 reads "The employer will offer a permanent contract to a competent worker with two months of service."

The Arbitration Council determines that this agreement remains effective and legally enforceable.

In relation to the employer's claim of a three-month probationary period supported by Notification No. 049, the Arbitration Council decides it as follows:

Point 2 of Notification No. 049 dated 9 July 2010 issued by the Ministry of Labour and Vocational Training states:

> A minimum wage of US$ 56 will be provided to probationary workers employed for one to three months in the textile, garment, and footwear production sectors; that is, the current minimum wage of US$ 45 plus additional wages of US$ 5 and the living allowance of US$ 6. After completion of the probationary period, the workers will receive a minimum wage of US$ 61 per month; that is, a minimum wage of US$ 50 plus additional wages of US$ 5 and the living allowance of US$ 6.

The Arbitration Council considers that the phrase "probationary workers employed for one to three months" is ambiguous as to which period is for each type of workers. Based on the above mentioned interpretation, a probationary period can last from one to three months depending on the type of worker. Based on the same interpretation, most of the workers at garment factories are specialised workers who must have only two-month probationary contracts. Thus, the Arbitration Council orders the employer to offer the 45 claimants workers permanent contracts.

In Arbitral Award 55/04-Yu Chheng, reasons for decision, issue 2, and 03/03-Tong Ga, reasons for decision, issue 2, the Arbitration Council has ruled:

> There is no case in which a labour contract in the probation period can last longer than three months. Any worker who completes the probation period and still continues working must be converted to a regular worker and provided with a fixed or unfixed duration contract with a full wage rate as stated in the Law.

Based on these rulings, since the workers' statuses have been converted to those of permanent workers after the two-month probationary period, they must receive wages of permanent workers.

Point 2 of Notification No. 049 dated 9 July 2010 issued by the Ministry of Labour and Vocational Training, states:

> …After completion of the probationary period, the workers will receive a minimum wage of US$ 61 per month; that is, a minimum wage of US$ 50 plus additional wages of US$ 5 and the living allowance of US$ 6.

Based on this notification, minimum wages after the probationary period for permanent workers are US$ 61. Therefore, the employer must provide back pay of US$ 5 [a month] to the 45 claimant workers.

In order to be consistent with the agreement and the law, the Arbitration Council orders the employer to offer those with more than two months of service permanent contracts and provide back pay of US$ 5 to the 45 claimant workers whom the employer required to undertake a probationary period of three months which is beyond the legal period.

Issue 4: The workers demand that the employer abide by the agreement to set up a cooling system.

Before considering this issue, the Arbitration Council turns its mind to whether or not the issue gives rise to a rights dispute.

The Arbitration Council determines this issue to be a rights dispute as it has a basis in the Labour Law and the agreement between the employer and the workers (*see reasons for decision, issue 1 regarding a rights dispute*).

The workers demand that the employer set up a cooling system on the roof of the building or find other means to reduce the heat in the workplace. The workers claim that temperature is intense particularly in the afternoon. They make this demand on the basis of the agreement with the employer. The employer claims that it cannot afford to accommodate this demand. The Arbitration Council considers whether the employer is obligated to reduce the heat in the workplace.

Article 229 of the Labour Law states:

> All establishments and work places must always be kept clean and must maintain standards of hygiene and sanitation or generally must maintain the working conditions necessary for the health of the workers.

Clause 1 of *Prakas* No. 147 dated 11 June 2002 issued by the Ministry of Social Affairs, Labour, vocational Training and Youth Rehabilitation, states:

> Employers of enterprises and establishments stated in Article 1 of the Labour Law must arrange in whatever way to make the heat in the workplace to be an acceptable level…

Clause 3 of the same *Prakas* states:

> In case the temperature in the workplace increases to a very high level that affects the health or causes difficulties to the workers' work, the employer has to find all means to cool down the workplace by installing fans, air-exhaust machine, or air-conditioner.

In previous arbitral awards, the Arbitration Council has ruled that the employer must find any means to make the heat in the workplace to be an acceptable level (*see Arbitral Awards 94/04-Eternity Apparel, reasons for decision, issue 7, and 143/09-Sinophea, reasons for decision, issue 6*).

The Arbitration Council applies these rulings in this case. According to the facts, the workers and the employer agree that the temperature is hot at the workplace. Thus, the Arbitration Council rules that the employer must take measures to reduce the intense heat in the workplace.

In order to be consistent with the agreement, the Arbitration Council orders the employer to set up a cooling system on the roof of the building or find any other means to reduce the temperature in the factory.

Issue 5: The workers demand that the employer implement the previous agreement by arranging to have two physicians to be on stand-by during working hours.

Before considering this issue, the Arbitration Council determines whether or not the issue gives rise to a rights dispute.

The Arbitration Council considers this issue to be a rights dispute since it has a basis in the Labour Law, the ministerial *Prakas*, and the agreement (*see reasons for decision, issue 1 regarding a rights dispute*).

The Arbitration Council considers this case as follows:

Article 1 of the Labour Law states:

> This law governs relations between employers and workers resulting from employment contracts to be performed within the territory of the Kingdom of Cambodia, regardless of where the contract was made and what the nationality and residences of the contracted parties are.

Article 238 of the Labour Law states: "Enterprises and establishments covered by Article 1 of this law must provide the primary health care to their workers."

Clause 3 of *Prakas* No. 330 dated 6 December 2000 determines the number and quality of health personnel in an enterprise. The number and quality of health personnel is determined in accordance with the number of workers in an enterprise and establishment as follows:

Number of employees at the enterprise	Number of nurses (male or female)	Number of physicians	Minimum number of hours that medical personnel must be present in each eight hour shift
50 - 300	One on standby	One physician or junior physician	Two hours
301 - 600	One on standby	One physician	Two hours
601 - 900	Two on standby	One physician	Three hours
901 - 1400	Two on standby	One physician	Four hours
1401 - 2000	Two on standby	One physician	Six hours
Over 2000	Three on standby	One physician	Eight hours

> When overtime work takes place at an enterprise or establishment, the infirmary shall have nurses and physicians on standby during that time.

Point 6 of the agreement dated 14 July 2010 stipulated in the non-conciliation report reads "the employer has already arranged two nurses to be on standby. However, the employer seeks more time to consider hiring a physician."

Based on this clause, the Arbitration Council determines that the employer is obligated to arrange two nurses and one physician on standby and a first aid toolkit [stipulated in the annex of this *Prakas*] if the employer employs 601-900 workers. In this case, the employer hires only one nurse for 790 workers. In order to be consistent with the above mentioned *Prakas,* the employer must hire another nurse to be on standby during working hours.

In conclusion, the Arbitration Council orders the employer to arrange another nurse to be on standby during working hours.

Issue 6: The workers demand that the employer provide a termination payment to Meak Kongkea.

Before considering this issue, the Arbitration Council turns its mind to whether or not the issue gives rise to a rights dispute.

The Arbitration Council determines this issue to be a rights dispute as it has a basis in the Labour Law (*see reasons for decision, issue 1 regarding a rights dispute*).

The Arbitration Council considers this issue as follows:

Article 90 paragraph 1 of the Labour Law states:

> Indemnity for dismissal must be granted to the worker and, if applicable, he can also claim damages even though the contract was not terminated by the employer, but the latter, through his evil actions, pushed the worker into ending the contract himself…

In previous arbitral awards, the Arbitration Council has ruled:

> …if the company pushes workers by negative behaviour to resign from work (Article 90 of the Labour Law); in such cases the employees have the right to claim for termination compensation… (*see Arbitral Award 09/05-Kin Tai, reasons for decision, issue 1*).

Based on this article and ruling, the Arbitration Council rules that an indemnity for dismissal must be paid to the workers and they can also claim for damages, though their contracts are terminated by the employer, if the employer is found to have pushed them into terminating their contracts.

According to the facts, the employer did not provide work to her at the administration office and the canteen. The employer did not inform Meak Kongkea of the transfer. The employer did not pay her wages and stopped providing her transportation. This situation lasted for three months.

The Arbitration Council considers that the employer should not have taken such action towards her despite her frequent leave of absence. The employer should take disciplinary action against her in accordance with the Internal Work Rules. The employer also admits that it has treated her unfairly. Thus, the Arbitration Council determines that Meak Kongkea's resignation is a result of the employer's evil action. Her resignation is deemed to be constructive dismissal.

Therefore, the employer must pay an indemnity for dismissal and damages in accordance with Article 90 of the Labour Law.

Indemnity for dismissal

Article 89 of the Labour Law states:

> If the labour contract is terminated by the employer alone, except in the case of a serious offence by the worker, the employer is required to give the dismissed worker, in addition to the prior notice stipulated in the present Section, the indemnity for dismissal as explained below:
>
> · Seven days of wage and fringe benefits if the worker's length of continuous service at the enterprise is between six and twelve months.
>
> · If the worker has more than twelve months of service, an indemnity for dismissal will be equal to fifteen days of wage and fringe benefits for each year of service. The maximum of indemnity cannot exceed six months of wage and fringe benefits. If the worker's length of service is longer than one year, time fractions of service of six months or more shall be counted as an entire year.
>
> The worker is also entitled to this indemnity if he is laid off for reasons of health.

In this case, Meak Kongkea has two years and eight months of service. Thus, she will receive 15 days' wages and perquisites per year of service, that is, 15 days' wages multiplied by three plus 45 days' perquisites.

Damages

Article 91 of the Labour Law states:

> …These damages are not the same as the compensation in lieu of prior notice or the dismissal indemnity.
>
> The worker, however, can request to be given a lump sum equal to the dismissal indemnity. In this case, he is relieved of the obligation to provide proof of damage incurred.

Since Meak Kongkea does not specify an amount of indemnity and damages, she will receive damages equal to indemnity for dismissal in accordance with Article 89 of the Labour Law.

Monthly US$ 6 payment in lieu of setting up a day-care centre from 10 June 2010 to 1 November 2010

In this case, the employer did not provide Meak Kongkea a monthly US$ 6 payment in lieu of setting up a day-care centre from 10 June 2010 to 1 November 2010. Therefore, the Arbitration Council orders the employer to provide Meak Kongkea a monthly US$ 6 payment in lieu of setting up a day-care centre from 10 June 2010 to 1 November 2010.

Transportation cost for a period of three months in which Meak Kongkea spent 8,000 riel on transportation daily because the employer stopped providing her with transportation

Since the employer has no proper reason to stop providing her transportation, the Arbitration Council orders the employer to pay her the transportation expenses.

The other half of three months' wages and claim for unpaid 10 days' wages prior to Meak Kongkea's maternity leave

Article 102 of the Labour Law states:

> For the purposes of this law, the term "wage", irrespective of what the determination or the method of calculation is, means the remuneration for the employment or service that is convertible in cash or set by agreement or by the national legislation, and that shall be given to a worker by an employer, by virtue of a written or verbal contract of employment or service, either for work already done or to be done or for services already rendered or to be rendered.

This article requires the employer to pay wages to the workers according to their contract. This means that the employer must pay wages to the workers during the time of employment.

Therefore, the Arbitration Council orders the employer to pay Meak Kongkea wages worth one and a half months and 10 days [which should have been paid] prior to her maternity leave.

Payment in lieu of one and a half days of annual leave

Article 167 of the Labour Law states:

> If the contract is terminated or expires before the worker has acquired the right to use his paid-leave, an indemnity calculated on the basis of Article 166 above is granted to the worker.

This article means that the workers are entitled to a payment in lieu of annual leave at the termination or expiration of their contracts (*see Arbitral Awards 153/08-Hytex, reasons for decision, issue 4 and 34/09-Suntex*).

According to the facts, Meak Kongkea demands provision of a payment in lieu of annual leave of one and a half days. Thus, the Arbitration Council orders the employer to provide Meak Kongkea a payment in lieu of annual leave of one and a half days.

Issue 7: The workers demand that the employer seek consultation and consent from the Local Union of NIFTUC prior to modifying previous practices.

Before considering this issue, the Arbitration Council determines whether or not the issue gives rise to a rights dispute.

The Arbitration Council considers this issue to be a rights dispute as it concerns management prerogative which has a basis in terms of the Labour Law (*see reasons for decision, issue 1 regarding a rights dispute*).

Article 2 of the Labour Law states:

> All natural persons or legal entities, public or private, are considered to be employers who constitute an enterprise, in the sense of this law, provided that they employ one or more workers, even discontinuously…etc., under the supervision and direction of the employer.

In previous arbitral awards, the Arbitration Council has interpreted this article to mean that the employer has the right to supervise and direct its company as long as it is done lawfully and reasonably (*see Arbitral Awards 08/09-Global Apparel; 61/09-Cintri; 169/09-PCCL, reasons for decision, issue 1*).

The Arbitration Council applies these ruling in this case.

According to the facts, the workers do not specify any transfer of workers for the Council to consider whether or not it is lawful and reasonable. Therefore, the Arbitration Council rejects the workers' demand due to insufficient evidence.

In conclusion, the Arbitration Council rejects the workers' demand that the employer seek consultation and consent from the Local Union of NIFTUC prior to modifying previous practices.

Issue 8: The workers demand that the employer allow them to take annual leave for a personal commitment.

Before considering this issue, the Arbitration Council turns its mind to whether or not it gives rise to a rights dispute.

The Arbitration Council considers this issue to be a rights dispute as it has a basis in the Labour Law (*see reasons for decision, issue 1 regarding a rights dispute*).

Article 166 of the Labour Law states:

> Unless there are more favourable provisions in collective agreements or individual labour contracts, all workers are entitled to paid annual leave to be given by the employer at the rate of one and a half work days of paid leave per month of continuous service.

The Arbitration Council rules that this article grants the workers to take one and a half days of paid annual leave in a month.

Article 171 of the Labour Law states:

> The employer has the right to grant his worker special leave during the event directly affecting the worker's immediate family.
>
> If the worker has not yet taken his annual leave, the employer can deduct the special leave from the worker's annual leave.
>
> If the worker has taken all his annual leave, the employer cannot deduct the special leave from the worker's annual leave for the next year.
>
> Hours lost during the special leave can be made up under the conditions set by a Prakas of the Ministry in Charge of Labour.

Based on this article, the employer has the right to allow the workers to take special leave by deducting the leave from their paid annual leave.

In this case, the Arbitration Council finds that the employer's practice is proper.

According to the facts, the workers demand that the employer allow them to take annual leave for a personal commitment.

Article 170 of the Labour Law states:

> In principle, annual leave is normally given for the Khmer New Year unless there is a different agreement between the employer and the worker. In this case, the employer must inform the Labour Inspector of this arrangement…

In previous arbitral awards, the Arbitration Council has ruled:

> According to the purpose of this article, the Arbitration Council finds that workers are allowed to use their annual leave on the occasion of Khmer New Year. However, Article 170 does not prohibit workers from using their annual leave on other occasions; that is, workers may use their annual leave anytime depending on agreements made between workers and the employer and the employer is obligated to give notice about such an agreement to the Labour Inspector.

According to the facts, annual leave can be taken for the Khmer New Year and by the agreement between the employer and the workers. The employer has the right to deduct the workers' annual leave if they take special leave authorised by the employer.

Annual leave taken for other purposes other than for the Khmer New Year must entail an agreement between the employer and the workers.

Therefore, the workers' demand is contradictory to the Labour Law.

Article 167 of the Labour Law states:

> Apart from this, any collective agreement providing compensation in place of paid leave, as well as any agreement renouncing or waiving the right to paid annual leave, shall be null and void.

According to the facts, the employer does not allow the workers to take annual leave for a personal commitment and provides payment in lieu of unused annual leave.

The Arbitration Council determines that the employer's practice in terms of the provision of payment in lieu of annual leave is contradictory to Article 167 of the Labour Law. Thus, the employer and the workers must hold a discussion on the use of annual leave.

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

DECISION AND ORDER

Part I. Rights dispute:

Issue 1: Order the employer to offer those with more than two months of service permanent contracts and provide back pay of US$ 5 [a month] to the 45 claimant workers whom the employer required to undertake probationary period of three months.

Issue 4: Order the employer to set up a cooling system on the roof of the building or find any other means to reduce the intense temperature in the factory.

Issue 5: Order the employer to arrange another nurse to be on standby during working hours.

Issue 6: Order the employer to provide Meak Kongkea a termination payment as follows:

- Indemnity for dismissal in accordance with Articles 90 and 89 of the Labour Law;
- Damages in accordance with Articles 90 and 91 of the Labour Law;
- Monthly US$ 6 payment in lieu of setting up a day care centre from 10 June to 1 November 2010;
- Payment for her expenses on transportation during the period that the employer stop providing her transportation;
- Another half of one and a half months' wages and 10 days' wages prior to her maternity leave; and
- Payment in lieu of annual leave of one and a half day.

Issue 7: Reject the workers' demand that the employer seek consultation and consent from the Local Union of NIFTUC prior to modifying previous practices.

Issue 8:

- Reject the workers' demand that the employer allow them to take annual leave for a personal commitment.
- Order the employer and the workers to hold a discussion on the use of annual leave

Type of award: binding award

The award of the Arbitration Council in Part I will be final and is enforceable by the parties in accordance with the MoU dated 28 September 2010.

Part II. Interests dispute: N/A

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: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Ang Eng Thong**

Signature: .....