



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល
THE ARBITRATION COUNCIL

Case number and name: 50/12-New Archid

Date of award: 25 April 2012

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: **Tuon Siphann**

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

DISPUTANT PARTIES

Employer party:

Name: **New Archid Garment Factory Limited**

Address: Trapeang Phum village, Peuk Commune, Angsnoul District, Kandal Province

Telephone: 012 990 405

Fax: N/A

Representatives:

- | | |
|-------------------|--------------------------|
| 1. Mr Ing Bunlong | Head of administration |
| 2. Mr Om Sopheap | Administration assistant |

Worker party:

Name: **Khmer Workers Pride Federation Union (KWPFU)**

Local Union of KWPFU

Address: Trapeang Phum village, Peuk Commune, Angsnoul District, Kandal Province

Telephone: 092 902 569

Fax: N/A

Representatives:

- | | |
|--------------------|--|
| 1. Mr Nov Titha | President of KWPFU |
| 2. Mr But Mara | Officer of KWPFU |
| 3. Ms Hem Sotheany | President of the Local Union of KWPFU |
| 4. Ms Man Thea | Vice-president of the Local Union of KWPFU |
| 5. Ms Pon Saman | Member of the Local Union's committee |

ISSUES IN DISPUTE

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

1. The workers demand that the employer refrain from discriminating against the union and from pushing the union's members into resigning. The employer denies the allegations of union discrimination.
2. The workers demand that the employer open all the doors during working hours to allow air flow, in order to avoid regular fainting. The employer refuses to accommodate this demand.
3. The workers demand that the employer widen the front gate to 15 metres in length in order to make it easy for them to enter and leave the factory. The employer refuses to accommodate the demand.
4. The workers demand that the employer increase the size of the canteen and provide additional chairs for them sit on while having lunch. The employer refuses to accommodate this demand.
5. The workers demand that the employer refrain from transporting goods and other materials to other enterprises for outsourcing, namely Nan Tay, Hai You, Sindy, Chong Hor, Sun Ray, and Ming Ta. The employer refuses to accommodate this demand.
6. The workers demand that the employer provide two or three hot and cold water dispensers in each building.
7. The workers demand that the employer provide a transportation allowance to those who come to work from Kompong Speu province by taxi, as it provides to those from Phnom Penh. The employer refuses to accommodate this demand.
8. The workers demand that the employer provide a free meal when the employer requests that they work overtime from 11:00 p.m. The employer refuses to accommodate this demand.
9. The workers demand that the employer refrain from deducting the union contribution fee from their wages upon their request. The employer refuses to accommodate this demand.
10. The workers demand that the employer provide the assistants to the group leaders a monthly US\$ 10 bonus.
11. The workers demand that the employer immediately rectify underpaid wages.
12. The workers demand that the employer set an amount of sewing work that is proportionate to their working hours. The employer refuses to accommodate this demand.

13. The workers demand that the employer take legal action against Arong, the head of Building B. The workers allege that he used inappropriate language towards them and interfered in union activities in violation of the provisions of the Labour Law. The employer refuses to accommodate this demand.

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. 192/12 dated 29 February 2012 was submitted to the Secretariat of the Arbitration Council on 1 March 2012.

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: 21 March 2012 at 2:00 p.m.

Procedural issues:

On 16 January 2012, the Department of Labour Disputes of Kandal Province ('the department') received a complaint from KWPFU dated 13 January 2012 outlining the workers' demands that the employer improve working conditions. Upon receiving the claim, the department assigned an expert officer to resolve the labour dispute. The last conciliation session was held on 23 February 2012, resulting in the resolution of five of the 18 issues. The 13 non-conciliated issues were referred to the Secretariat of the Arbitration Council on 1 March 2012 via non-conciliation report 192/12 dated 29 February 2012.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the 13 non-conciliated issues. The hearing was held on 21 March 2012 at 2:00 p.m. with both parties present.

At the hearing, the Arbitration Council conducted a further conciliation of the 13 non-conciliated issues, resulting in issues 2, 3, 4, 5, 6, and 13 being resolved and issue 1 being withdrawn by the workers. Issues 7, 8, 9, 10, 11, and 12 remained unresolved.

In this case, both parties chose non-binding arbitration.

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:

- New Archid Garment Factory Limited operates a garment factory and employs approximately 3,400 workers.
- Registered on 16 January 2012 and representing 200 workers, the Local Union of KWPFU is the claimant in this case. The union does not hold a certificate of most representative status (MRS).

Issue 7: The workers demand that the employer provide a transportation allowance to those who come to work from Kompong Speu province by taxi, as it provides to those from Phnom Penh.

- The workers make this demand because their monthly base wage of US\$ 61 is not sufficient to meet their daily expenses due to the increased price of consumer goods, as well as the cost of transportation and rent. The workers contend that other factories have provided a transportation allowance to all their workers.
- The workers further contend that the employer has arranged taxis for approximately 100 workers who live in Phnom Penh. Thus, this provision is unfair.
- The employer stated that it cannot afford to accommodate this demand. The employer further states that the taxis were provided to the Phnom Penh staff as the benefit was stipulated in their employment contracts. Moreover, the taxis were provided as an encouragement to staff who previously worked for the employer at its previous location.

Issue 8: The workers demand that the employer provide a free meal when the employer requests that they work overtime from 11:00 p.m.

- The workers state that a 2,000 riel meal allowance is provided for overtime work from 4:00 p.m. to 6:00 p.m. and another 2,500 riel meal allowance is provided for overtime work performed between 6:00 p.m. to 6:00 a.m. They demand an additional free meal because there are no shops nearby the factory after 11:00 p.m.
- The employer states that late night overtime work occurred occasionally when there was a large amount of urgent work to be completed. The workers are allowed to take the next day off if they continue to work overtime until very late in the morning. In addition, they are provided with an overtime meal allowance.

Issue 9: The workers demand that the employer refrain from deducting the union contribution fee from their wages upon request.

- At the hearing, the workers demanded that the employer refrain from deducting the union contribution fee from their wages if they had provided a letter to the employer revoking their deduction requests.
- The workers state that 177 workers (according to the list of names dated 24 February 2012) have sent a letter with their thumbprints requesting the employer cease deducting their wages to pay union contribution fees because they were not members of any union.
- The employer states that its practice requires the worker to submit a request in person if they want the employer to stop deducting their wages for a union contribution fee. Rather, the workers submitted a written request with their thumbprints to the Local Union of KWPFU. Given this consequence, the employer continued to deduct their wages.

Issue 10: The workers demand that the employer provide a monthly US\$ 10 bonus to the assistants to the group leaders.

- At the hearing, the workers demanded that the employer provide a monthly US\$ 10 bonus to the assistants to the group leaders in Building B. The workers stated that there is one assistant in each group.
- They make this demand because the assistants have multiple responsibilities including organising clothes and fabric, recruiting additional sewers due to a shortage of sewers, and occasionally taking over the role of the group leaders during their absence. The assistants receive US\$ 61 which is the same base wages as the sewers. The employer refuses to accommodate this demand as a bonus is provided to workers depending on the outcome of a performance evaluation in each group.

Issue 11: The workers demand that the employer immediately rectify underpaid wages.

- At the hearing, the workers demanded that the employer rectify their wages on the pay day.

- The employer's practice is to make the wage payments on the 8th day of every month. The employer's standard practice is to prepare a wage sheet two days prior to pay day, and will provide the workers with pay slips at 10:30 a.m. Wage payments are made at 2:30 p.m.
- The workers contend that underpaid wages should be rectified before the following month.
- The employer states that monthly wage payments require the signature of the Director who comes to the factory from abroad once a month. For this reason, the wages cannot be rectified until next month. The employer has a standard practice paying the workers.

Issue 12: The workers demand that the employer sets an amount of sewing work that is proportionate to their working hours.

- At the hearing, the workers demanded that the employer set an amount of sewing work that is proportionate to their working hours.
- The employer's practice is to provide a bonus of 1,000 riel to those workers who achieve a production target in the allotted time. There are 32 workers in each group. Any groups that cannot reach a production target by 4:00 p.m. will be provided a meal allowance as such:
 1. A 2,000 riel meal allowance will be provided from 4:00 p.m. to 6:00 p.m. and another 500 riel meal allowance will be provided from 6:00 p.m. to 8:00 p.m. and;
 2. Overtime work will be paid from 4:00 p.m. to 8:00 p.m.
- The workers contend that the employer kept increasing the production targets until they were unachievable within the time allowed. For instance, on the first day, the employer set a target of 1,200 shirts for piece no. AC 52 92 93 to be completed in 10 hours, between 7:00 a.m. and 6:00 p.m. (with a break of one hour). On the first day, the workers completed the shirts by 5:00 p.m. and got paid as if they had worked until 6:00 p.m. On the second day, the employer increased the number of shirts to 1,300 to be completed within the same time as on the first day. The workers completed the shirts by 5:00 p.m. and received the same payment as they were provided on the first day. The next day the employer increased the number of shirts to be completed within the same time frame to 2,200. The workers could not achieve the target of 2,200 shirts within the allotted time frame. As such, the workers demanded that the employer decrease the target amount by 50 shirts. The employer agreed to decrease the target amount by only 20 or 30 shirts.
- The employer states that the number of shirts is set depending on the style of the shirts, after receiving the results of an evaluation that is assigned by buyers to an IE group comprising eight persons, and undertaken by the standard sewing group

consisting of approximately 40 workers. They study the bases for establishing the production target and set the timeframe in which the workers must achieve the target. The employer could not recall the number of shirts left incomplete by the workers.

- The workers state that overtime work is voluntary.

REASONS FOR DECISION

Issue 7: The workers demand that the employer provide a transportation allowance to those employees who travel to work by taxi from Kompong Speu as the employer provides a transportation allowance to those from travel to work by taxi from Phnom Penh.

The workers make this demand due to the increased cost of transportation. The employer states that it is bound by the agreement it made with the workers living in Phnom Penh to hire taxis for them and that the benefit is provided as an encouragement to staff who worked for the employer at its previous location.

The Arbitration Council finds that the demand is not supported by the Labour Law, an agreement between the workers and employer, or a collective agreement. Therefore, the Council determines that the demand concerns a benefit which is above the requirements of the Labour Law; therefore making it an interests dispute.

With respect to interests disputes, the Arbitration Council considers whether the disputant union has most representative status (MRS). In previous arbitral awards, the Arbitration Council has declined to consider an interests dispute if the union bringing the dispute to the Council does not have MRS (*see Arbitral Awards 02/11-Pou Yuen, reasons for decision, issue 2 and 66/11-In Han Sung, reasons for decision, issue 1*).

The Arbitration Council considers that having MRS gives a union the legal capacity to negotiate with an employer to establish a collective agreement and gives it legal standing to bring an interests dispute before the Arbitration Council for resolution.

In order to possess MRS, a union must be registered and fulfil the other conditions stipulated in Article 277 of the Labour Law 1997.

Clause 43 of *Prakas* No. 099 dated 21 April 2004 states:

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.

Based on this provision, the Arbitration Council considers that if it issues an arbitral award to settle an interests dispute, the award will become a one-year collective agreement. Generally, a collective agreement must be applicable to all workers at the enterprise and the right to strike cannot be exercised for the purposes of revising an unexpired collective agreement (see *Arbitral Award 152/08-Wilson, reasons for decision, issue 2*).

In this case, the Arbitration Council finds that the Local Union of KWPFU represents 200 of approximately 3,400 workers and does not hold a certificate of MRS. Therefore, the Council rules that the union does not have legal standing to represent the workers in the settlement of a dispute concerning the collective interests of all workers in the factory.

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer provide a transportation allowance to the workers who travel to work from Kompong Speu province by taxi, as it provides to those from Phnom Penh.

Issue 8: The workers demand that the employer provide them with a free meal when the employer requests that they work overtime from 11:00 p.m onwards.

The Arbitration Council considers whether the employer is obligated to provide a free meal at 11:00 p.m. if the workers work overtime from 6:00 p.m. to 6:00 a.m.

The Arbitration Council finds that there is no provision in the Labour Law, an agreement with the workers, or a collective agreement requiring the employer to accommodate this demand. Thus, the Council considers this demand to be an interests dispute (see reasons for decision, issue 7 regarding an interests dispute).

In conclusion, the Arbitration Council declines the workers' demand that the employer provide a free meal at 11:00 p.m. when they work overtime from 6:00 p.m. to 6:00 a.m.

Issue 9: The workers demand that the employer refrain deducting the union contribution fee from their wages upon request.

In this case, the workers have requested the employer cease deducting the union contribution fee from their wages. Thus, the Arbitration Council considers whether the employer is obligated to cease deducting the union contribution fee from the workers' wages when they have submitted a letter requesting such cessation.

Article 129 paragraph 2 of the Labour Law states:

However, the worker can authorise deductions of his wage for dues to the trade union to which he belongs. This authorisation must be in writing and can be revoked at any time.

In Arbitral Award 91/07-JK, reasons for decision, issue 1, the Arbitration Council interpreted Article 129 paragraph 2 to mean:

The Article requires the employer to deduct union contribution fees from workers' wages in cases where there is a request in writing from the workers who are members of a union. However, this Article also grants a right to the workers to revoke it at any time in case workers no longer want the company to deduct union contribution fees from their wages.

In this case, the employer's practice is to require the workers to submit their requests in person. The Arbitration Council determines that the employer's practice contravenes Article 129 of the Labour Law. According to the evidence dated 24 February 2012 submitted by the workers, the Arbitration Council finds that 177 workers have made a request to the local branch of the KWPFU that the deduction be ceased.

Therefore, the Arbitration Council orders that the employer refrain from deducting the union contribution fee from the wages of the 177 workers who have made the request of the employer.

Issue 10: The workers demand that the employer provide the assistants to the group leaders a monthly US\$ 10 bonus.

The workers demand that the employer provide the assistants to the group leaders in Building B a monthly US\$ 10 bonus. The Arbitration Council considers whether the employer is obliged to accommodate this demand.

The Arbitration Council finds that the employer provides the assistants a monthly wage of US\$ 61. The employer has not previously provided the assistants to the group leaders such a bonus. The Council finds that there is no provision of the Labour Law, an agreement, or a collective agreement requiring the employer to provide the demanded bonus to the assistants, thus making the demand an interests dispute (see reasons for decision, issue 7 regarding an interests dispute).

Therefore, the Arbitration Council declines to consider the workers' demand that the employer provide the assistants to the group leaders a monthly US\$ 10 bonus.

Issue 11: The workers demand that the employer immediately rectify underpaid wages.

The Arbitration Council considers whether the employer is obligated to rectify the workers' wages on pay day.

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.

Based on this article, the employer is obliged to provide remuneration agreed upon with the workers in the employment contracts.

In Arbitral Award 31/12-B&N, reasons for decision, issue 4 (b), the Arbitration Council interpreted Article 102 to mean that, "wage is remuneration for the workers' service and the employer is obliged to pay it in full, commensurate with the service performed, on the 10th of each month."

According to the facts, the employer's practice is to make wage payments on the 8th day of every month. The employer will have prepared a wage sheet two days prior to pay day and will provide pay slips to the workers at 10:30 a.m. The wage payment will be made at 2:30 p.m.

The Arbitration Council determines that the period (from 10:30 a.m. to 2:30 p.m.) is allows the employer sufficient time to rectify the workers' wages.

The employer states that the monthly wage payment requires the Director's signature, who comes from abroad to the factory once a month. For this reason, a rectification could not be made until the following month. The employer employs particular processes in making wage payments to the workers.

The Arbitration Council considers that the employer should have appropriate measures in place, such as a small budget, to rectify the underpayment of workers' wages since the employer is required by Article 102 to provide full wages.

Therefore, the Arbitration Council orders the employer to rectify the underpayment of workers' wages on pay day.

Issue 12: The workers demand that the employer set an amount of sewing work that is in proportion to their working hours.

In this case, the workers claim that the production target is not proportional to their working hours because the employer keeps increasing the target until it is unachievable within the time period allowed. The employer argues that the amount of work and the allotted time for completion are set by the IE group assigned by the buyers and the standard sewing group, and are based on the workplace evaluation results. The Arbitration Council considers whether or not the amount of work and the allotted time for completion, as set by the employer, is proper and reasonable.

Article 2 paragraph 2 of the Labour Law states:

Every enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in a factory, workshop, work site, etc., under the supervision and direction of the employer.

In previous arbitral awards, the Arbitration Council has ruled that an employer has the right to direct and supervise its enterprise as long as it is done in a lawful and reasonable manner (*see Arbitral Awards 54/07-Yung Wah 1, reasons for decision, issue 9; 116/07-Grace Sun, reasons for decision, issue 2; 47/08-Grand Tex, reasons for decision, issue 2; 53/09-Tack Fat, reasons for decision, issue 2*).

The aforesaid rights also include the right to set a production target or an incentive bonus. In Arbitral Award 10/03-Jacqsintex, reasons for decision, issue 3, the Arbitration Council ruled:

Given that changes in production are a normal part of the garment industry in Cambodia employers will generally have significant discretion to set incentive bonuses depending on the circumstances. Thus the setting of production targets for incentive bonuses and the variation of these targets will not generally constitute a breach of the employment contract.

The Arbitration Council applies this ruling in this case.

The workers contend that the amount of work set by the employer is unachievable. As a result, they are not eligible for the 1,000 riel bonus.

In previous arbitral awards, the Arbitration Council has ruled that the claimants have the burden of proof (see *Arbitral Award 29/05-Kang Ning, reasons for decision, issue 6*).

In this case, the workers did not provide evidence in relation to why they and other groups could not achieve the production target. That is to say, the workers failed to prove that the employer had set them an improper amount of work.

Therefore, the Arbitration Council rules that the workers have not provided sufficient evidence to prove that the increased production target and the allotted time set by the employer are improper and unreasonable.

In conclusion, the Arbitration Council rejects the workers' demand that the employer set amount of sewing work in proportion to the working hours.

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

DECISION AND ORDER

Issue 7:

Decline to consider the workers' demand that the employer provide a transportation allowance to the workers who come to work from Kompong Speu province by taxi, as it provides to those from Phnom Penh.

Issue 8:

Decline the workers' demand that the employer provide a free meal at 11:00 p.m. when they work overtime from 6:00 p.m. to 6:00 a.m.

Issue 9:

Order the employer to refrain from deducting the union contribution fee from the wages of the 177 workers who are the subject of the request.

Issue 10:

Decline to consider the workers' demand that the employer provide the assistants to the group leaders a monthly US\$ 10 bonus.

Issue 11:

Order the employer to rectify the workers' wages on pay day.

Issue 12:

Reject the workers' demand that the employer set an amount of sewing work in proportion to their working hours.

Type of award: non-binding award

The award 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: **Tuon Siphann**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: