KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 62/11-Ocean Garment

Date of Award: 8 July 2011

Dissenting opinion by 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: **Liv Sovanna**

Chair Arbitrator (chosen by the two Arbitrators): **Kong Phallack**

DISPUTANT PARTIES

Employer party:

Name: **Ocean Garment Co., Ltd (the employer)**

Address: Prey Tea Village, Choam Chao Commune, Dangkor District, Phnom Penh

Telephone: 012 355 935 Fax: N/A

Representatives:

1. Mr Mamona Rasid Director of Ocean Garment Co., Ltd
2. Mr Ybadol Islam Head of Accounting
3. Mr Rafikol Islam Head of Human Resources
4. Mr Lay Sokchea Head of Administration
5. Mr Chuon Vichaka Administrative Assistant

Worker party:

Name: **Cambodian Labour Union Federation (CLUF)**

The Local Union of CLUF

Address: No. 30C, Borey Solar, Street 371, Teouk Tla Commune, Sen Sok District, Phnom Penh

Telephone: 011 685 826 Fax: N/A

Representatives:

1.	Mr Kin Sokorn	General Secretary of CLUF
2.	Mr Seng Menghong	Officer of CLUF
3.	Mr Earm Lyhao	President of the Local Union of CLUF
4.	Ms Om Sophy	Vice-President of the Local Union of CLUF
5.	Mr Kong Chormchaiya	Treasurer of the Local Union of CLUF
6.	Mr Chem Visal	Advisor to the Local Union of CLUF

ISSUES IN DISPUTE

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

1. The workers demand that the employer provide them with an accommodation and transportation allowance of US$ 10 per month. The employer states that it is unable to provide the allowance demanded by the workers and asserts that it has rented cars to transport them home.

2. The workers demand that the employer pay pregnant workers [maternity leave payments consisting of] 50% of their wages (based on their average wages during the previous 12 months) prior to their taking maternity leave. The employer states that it will provide the workers with 50% of their wages and perquisites in accordance with the Labour Law, but will not include overtime payments in the calculation.

3. The workers demand that the employer calculate annual leave payments based on the workers' average wages during the previous 12 months. The employer states that it will calculate the payments based on the workers' main wages.

4. The union demands that the employer deduct union contribution fees from the wages of workers who are members of the union. The employer states that it will deduct union contribution fees if the union provides it with sufficient documentation and there is no objection to the deduction by the Coalition Union of Movement of Khmer Workers.

5. The workers demand that the employer increase the existing attendance bonus by US$ 2. The employer states that it is unable to agree to the demand, and that it will follow Notification No. 041/11 KB/SCN dated 7 March 2011.

6. The workers demand that the employer provide an allowance of US$ 15 per month for three years for milk formula, in lieu of building a day-care centre. The employer states that it has provided the workers with US$ 10 per month for milk formula since March 2011.

7. The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of leave taken for personal commitments. The employer states that it cannot agree to the demand and that it will follow Notification No. 041/11 KB/SCN dated 7 March 2011.

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. 133 dated 9 June 2010 (Eighth 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. 563 KB/RK/VK dated 31 May 2011 was submitted to the Secretariat of the Arbitration Council on 2 June 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 Quarter, Tuol Kork District, Phnom Penh

Date of hearing: 15 June 2011 at 2:00 p.m.

Procedural issues:

On 25 April 2011, the Department of Labour Disputes received a complaint from CLUF, No. 3199/11 SSKK, outlining the workers' demands for the improvement of working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to resolve the labour dispute and the last conciliation session was held on 20 May 2011. As a result, one of the eight issues was conciliated. The seven non-conciliated issues were referred to the Secretariat of the Arbitration Council on 2 June 2011, via non-conciliation report No. 563 KB/RK/VK dated 31 May 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 seven non-conciliated issues, held on 15 June 2011 at 2:00 p.m. Both parties were present at the hearing. The Arbitration Council conducted a further conciliation of the seven non-conciliated issues, resulting in issue three being resolved and issue four being withdrawn. Five issues remain unresolved.

As both parties are signatories to the Memorandum of Understanding On Improving Industrial Relations in the Garment Industry (MoU), dated 28 September 2010, the Arbitration

Council will divide the issues into two types: rights disputes and interests disputes. In accordance with the MoU, the parties are unable to object to binding arbitration of rights disputes. However, this does not apply to interests disputes. The parties are able to choose non-binding arbitration of interests disputes, and can object to an arbitral award on such disputes.

Such an objection by the parties will not affect their obligation to implement an award on rights disputes in accordance with the spirit of the MoU.

The Arbitration Council will consider the five remaining issues in dispute [issues one, two, five, six, and seven] based on evidence and reasoning as follows.

EVIDENCE

Witnesses and Experts: N/A

Documents, Exhibits, and other evidence considered by the Arbitration Council:

A. Provided by the employer party:

1. Brief statement on the labour dispute, dated 14 June 2011.
2. Agreement between the director of Ocean Garment and leaders of the Coalition Union of Movement of Khmer Workers (CUMW), dated 23 March 2011.
3. Letter from the director of Ocean Garment to the head of the Department of Labour Disputes regarding disputes at the factory, dated 25 February 2011.
4. Letter from CUMW on behalf of Earm Lyhao, Om Sophy, and Khen Vern regarding the withdrawal of case 312/11 SSKK.
5. Agreement between the workers and the employer, dated 25 February 2011.
6. Maternity health book of Peoung Chan Horn.
7. Leave permission for Peoung Chan Horn, dated 26 April 2011.
8. Leave permission for Choun Srey Mom, dated 22 March 2011.
9. Maternity health book of Choun Srey Mom.
10. Letter from Him Srey Mom to the director of Ocean Garment requesting a wage deduction of 1,000 riels for union contribution fees and leave for personal commitments, dated 2 March 2011.
11. Letter from Yong Phal to the director of Ocean Garment requesting a wage deduction of 1,000 riels for union contribution fees and leave for personal commitments, dated 9 March 2011.
12. Letter from Sar Mony to the director of Ocean Garment requesting a wage deduction of 1,000 riels for union contribution fees and leave for personal commitments, dated 9 March 2011.

13. Letter from Khem Sreyra to the director of Ocean Garment requesting a wage deduction of 1,000 riels for union contribution fees and leave for personal commitments, dated 28 March 2011.
14. Letter from CUMW to the director of Ocean Garment objecting to the deduction of wages from members of CUMW for union contribution fees for CLUF, No. 11/11 SSCK dated 16 March 2011.
15. Minutes of a meeting regarding wage deductions from members of CLUF and CUMW, dated 24 January 2011.
16. Notification No. 041/11 KB/SCN dated 7 March 2011, issued by the Ministry of Labour and Vocational Training, regarding the provision of other benefits to workers in the textile and footwear sector.
17. Letter from the Local Union of CLUF to the head of the Department of Labour Disputes requesting resolution of workplace issues at the Ocean Garment factory, No. 3195/11 SSKK dated 21 April 2011.
18. Letter from the workers to Som Oun, President of CLUF, requesting resolution of workplace issues at the Ocean Garment factory, dated 19 April 2011.
19. Letter from the Department of Labour Disputes inviting the director of Ocean Garment to attend an information session on working conditions, No. 290 KB/RK/VK dated 5 May 2011.
20. Letter from the Department of Labour Disputes inviting the director of Ocean Garment to attend the conciliation session, No. 310 KB/RK/VK dated 10 May 2011.
21. Record of an enquiry for information from the employer's representatives regarding the workers' demands for the improvement of working conditions, dated 10 May 2011.
22. Letter from the Local Union of CLUF to the director of Ocean Garment requesting the deduction of union contribution fees of 1,000 riel per month from the wages of 339 workers, No. 3073/10 SSKK dated 19 November 2010.
23. Statute and Internal Work Rules of Ocean Garment Co., Ltd, dated 31 January 2000.
24. Letter confirming the legality of the Local Union of CLUF, No. 228 KB dated 24 November 2010.
25. Letter from the Department of Labour Disputes to the president of the Local Union of CLUF regarding the union's request for recognition of its new leaders, No. 456 KB/RK/VK dated 27 April 2011.
26. Internal Work Rules of the employer, No. 120 SKBY/RK dated 7 March 2002.
27. Letter from CLUF to the head of the Department of Labour Disputes requesting resolution of workplace issues at the Ocean Garment factory, No. 3123/11 SSKK dated 24 January 2011.

28. Letter from the workers to Som Oun, President of CLUF, requesting resolution of workplace issues at the Ocean Garment factory, dated 23 January 2011.

B. Provided by the worker party:

1. Certificate of registration of the Local Union of CLUF, dated 24 November 2010.
2. Letter confirming the legality of the Local Union of CLUF, No. 228 KB dated 24 November 2010.
3. Letter from the Department of Labour Disputes to the president of the Local Union of CLUF regarding the union's request for recognition of its new leaders, No. 456 KB/RK/VK dated 27 April 2011.

C. Provided by the Ministry of Labour and Vocational Training:

1. Report on collective labour dispute resolution at Ocean Garment Co., Ltd, No. 563 KB/RK/VK, dated 31 May 2011.
2. Record of collective labour dispute resolution at Ocean Garment Co., Ltd, dated 20 May 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend the hearing addressed to the employer, No. 368 KB/AK/VK/LKA dated 7 June 2011.
2. Notice to attend the hearing addressed to the workers, No. 369 KB/AK/VK/LKA dated 7 June 2011.
3. Agreement on a binding award on rights disputes, dated 15 June 2011.

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:

- Ocean Garment Co., Ltd (Ocean) is a garment manufacturing company.
- 2,700 workers are employed by Ocean.
- The Local Union of CLUF, the claimant in this case, represents 429 workers. It does not hold most representative status (MRS).

Issue 1: The workers demand that the employer provide them with an accommodation and transportation allowance of US$ 10 per month.

- In March 2004, the employer relocated from its location near the Russian Hospital to a new location in Choam Chao Commune. To retain its workers, the employer

entered into an agreement with them in which it undertook to hire cars to transport the workers from the previous location to the new one. As at the hearing date, the employer had maintained this practice.

- When recruiting workers at the new location, the employer did not promise to provide the new workers with an accommodation or living allowance.
- The workers make this demand on behalf of new workers who do not receive the transportation benefit, including those who rent a house nearby as well as those who live a long way from the factory.
- The workers state that approximately 90% of the workers live near the factory and the rest live a long way from the factory. The workers say they don't understand why pre-existing workers receive transportation benefits whilst the new workers do not, since they all work in the same factory. Moreover, they argue that in light of the employer's increased profits following an increase in the price of consumer goods, the employer should accommodate the demand.
- The employer states that it cannot agree to the demand because it is having difficulties securing buyers and because its primary obligation is to increase wages and other benefits for workers.

Issue 2: The workers demand that the employer pay pregnant workers 50% of their wages (based on their average wages during the previous 12 months) prior to their taking maternity leave.

- The workers clarified that their demand is for the inclusion of overtime payments in the employer's calculation of their wages during maternity leave.
- The employer pays 90 days of wages at 50% of the full rate, including perquisites, to workers taking maternity leave. This is calculated by taking the total wages and perquisites earned in the 12 months prior to the worker taking leave, dividing this figure by 12 to determine the average monthly wage, then taking 50% of this figure and multiplying it by three to determine the payment for 90 days [i.e. three months] of maternity leave. Overtime payments are excluded from the calculation because, the employer asserts, overtime payments are not included in wages.
- On the hearing date, six workers were on maternity leave.
- The workers demand that the employer include overtime payments in the calculation of wages during maternity leave, on the basis that Article 103 of the Labour Law (1997) includes overtime payments as a component of wages.

Issue 4: The union demands that the employer deduct union contribution fees from the wages of workers who are members of the union.

- At the hearing, the employer agreed to deduct union contribution fees for the Local Union of CLUF after it is provided with sufficient and authentic documents from the workers, such as a letters requesting the employer to stop deducting union contribution fees for their former union and/or requesting the employer to deduct union contribution fees for their current union. As the employer agreed to the union's demand, the Arbitration Council will not consider this issue.

Issue 5: The workers demand that the employer increase the existing attendance bonus by US$ 2.

- Notification No. 017 SKBY dated 18 July 2000 [abrogated in 2011] states that "workers who attend work regularly in accordance with the number of working days in each month shall receive a bonus of at least US$ 5 per month." In this case, the employer paid an attendance bonus of US$ 7 per month to the workers, which amounted to US$ 2 more than required by the notification of the Ministry of Labour and Vocational Training.
- Notification No. 017 SKBY dated 18 July 2000 was abrogated by Notification No. 041/11 KB/SCN dated 7 March 2011. The latter notification entitles workers to a US$ 7 attendance bonus.
- The employer was already paying the workers a US$ 7 attendance bonus.
- The workers make this demand because the most recent notification provides for a US$ 7 attendance bonus, which is an increase of US$ 2 from the US$ 5 bonus provided for in the previous notification.
- The employer argues that it is complying with the current notification and therefore it will not provide an additional monthly bonus of US$ 2 to the workers. The employer insists that it will maintain the US$ 7 attendance bonus in accordance with Notification No. 041/11 KB/SCN.

Issue 6: The workers demand that the employer pay female workers an allowance of US$ 15 per month for three years for milk formula, in lieu of building a day-care centre.

- There is no day-care centre at the Ocean factory. The employer's practice is to pay a monthly allowance of US$ 10 for milk formula to female workers who have children aged from 18 months to three years, in lieu of building a day-care centre.
- The employer and the workers made an agreement on 25 February 2011 that the employer would pay the workers US$ 8 per month for milk formula in lieu of building a day-care centre. The employer later made an undated agreement with CUMW that it

would provide the workers with a monthly payment of US$ 10 in lieu of building a day-care centre.

- The workers make the demand in this case because the price of consumer goods has increased. The workers further state that when they made a request for US$ 10 [for milk formula], the employer rejected their request but it accepted a request made by a different union.

Issue 7: The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of leave taken for personal commitments.

- The employer's practice is not to deduct from the workers' wages or attendance bonuses when they take sick leave, special leave, or annual leave.
- The employer grants leave to the workers for urgent personal commitments, which is separate from sick leave, special leave, and annual leave. If the workers choose to use annual leave instead of this leave for urgent personal commitments, they maintain their attendance bonus. Conversely, when workers choose to use leave for urgent personal commitments, the employer deducts the full attendance bonus.
- The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of leave taken when they take leave for urgent personal commitments instead of annual leave,.
- When the workers refer to leave for "urgent personal commitments", they are referring to leave taken for the purposes of attending a wedding or other ceremonies of their friends and relatives.

REASONS FOR DECISION

Issue 1: The workers demand that the employer provide them with an accommodation and transportation allowance of US$ 10 per month.

Before considering this demand, the Arbitration Council must determine whether it gives rise to a rights dispute or an interests dispute.

In previous arbitral awards, the Arbitration Council has held that "a rights dispute concerns entitlements in the law, an agreement, or a collective agreement" *(see Arbitral Awards 05/11-M&V 1, reasons for decision, issues 1 and 5; 13/11-Gold Kamvimex, reasons for decision, issues 1 and 2; 14/11-GHG, reasons for decision, issue 4; and 37/11-ASD, reasons for decision, issue 1)*.

The Arbitration Council finds that whilst, according to the facts, the employer has a transportation agreement with pre-existing workers who volunteered to work at the new location, there is no agreement requiring the employer to pay an accommodation or

transportation allowance to workers recruited at the new location. Moreover, there is no law or regulation which stipulates such an obligation. Therefore, the demand gives rise to an interests dispute.

Generally, with regard to interests disputes the Arbitration Council considers whether the disputant union has MRS. 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.

Clause 43 of *Prakas* No. 099 SKBY 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 clause, the Arbitration Council holds that if it issues an award on an interests dispute, that award will become a one year collective agreement. In general, a collective agreement applies to all workers at an enterprise and the right to strike cannot be exercised to review the agreement before it has expired *(see Arbitral Award 152/08-Wilson, reasons for decision, issue 2).*

Article 277 of the Labour Law (1997) sets out the criteria for determining the representativeness of a union, including that it be legally registered.

In Arbitral Award 07/06-Dai Young, reasons for decision, issue 3, the Arbitration Council ruled that "[t]his right [to negotiate a collective agreement on behalf of workers] belongs to the registered union with most representative status and which has complied with the other criteria under Article 277 of the Labour Law".

Generally, the Arbitration Council will decline to consider an interests dispute if the claimant union does not hold MRS *(see Arbitral Awards 71/09-Hytex, reasons for decision, issue 10 and 84/10-Ming Da Footwear, reasons for decision, issue 3)*.

The Arbitration Council applies the above interpretation in this case.

In this case, the Local Union of CLUF is unable to bring an interests dispute to the Council because it does not hold MRS.

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer provide an accommodation and transportation allowance of US$ 10.

Issue 2: The workers demand that the employer pay pregnant workers 50% of their wages (based on their average wages during the previous 12 months) prior to their taking maternity leave.

Before considering this demand, the Arbitration Council must determine whether it gives rise to a rights dispute or an interests dispute.

In previous arbitral awards, the Arbitration Council has held that "a rights dispute concerns entitlements in the law, an agreement, or a collective agreement" *(see Arbitral Awards 05/11-M&V 1, reasons for decision, issues 1 and 5; 13/11-Gold Kamvimex, reasons for decision, issues 1 and 2; 14/11-GHG, reasons for decision, issue 4; and 37/11-ASD, reasons for decision, issue 1)*.

The demand that the employer include overtime payments when calculating payments for maternity leave has a basis in the law, thus giving rise to a rights dispute.

The Arbitration Council considers whether or not overtime payments are a component of wage.

Article 182, paragraph 1 of the Labour Law (1997) states that "[i]n all enterprises covered by Article 1 of this law, women shall be entitled to a maternity leave of ninety days".

Article 183 of the same law states that "[d]uring the maternity leave as stipulated in the preceding article, women are entitled to half of their wage, including their perquisites, paid by the employer". This article provides that the employer must pay workers on maternity leave half of their wages and perquisites, but fails to specify the components of wages and perquisites. Thus, the Arbitration Council will look at other articles to assist its interpretation of Article 183.

Article 103 of the Labour Law states:

> Wage includes, in particular:
> - actual wage or remuneration;
> - overtime payments;
> - commissions;
> - bonuses and indemnities;
> - profit sharing;
> - gratuities;
> - the value of benefits in kind;
> - family allowance in excess of the legally prescribed amount;
> - holiday pay or compensatory holiday pay; and
> - amount of money paid by the employer to the workers during disability and maternity leave.

Article 103 includes overtime payments as a component of wage. Therefore, workers on 90 days' maternity leave must be paid 50% of their wages and perquisites, with overtime payments included in the calculation *(see also Arbitral Award 33/07-Goldfame, reasons for decision, issue 7)*.

In previous arbitral awards, the Arbitration Council has determined the method of calculating maternity payments as follows: take the total wage earned in the 12 months prior to the worker taking leave and divide this figure by 12 to determine the average monthly wage, then take 50% of the average monthly wage and multiply it by three to determine the payment for 90 days [i.e. three months] of maternity leave *(see Arbitral Awards 68/04-City New, reasons for decision, issue 4 and 18/06-GHG, reasons for decision, issue 3)*.

The Arbitration Council applies the above interpretation in this case. Therefore, the Arbitration Council holds that workers on maternity leave must be paid 50% of their wages, including overtime payments, if they have at least one year's service. The payment must be calculated by taking the wages earned during the previous 12 months (including any overtime payments) dividing this figure by 12 to determine the average monthly wage, then taking 50% of the average monthly wage and multiplying it by three to determine the payment for 90 days [i.e. three months] of maternity leave.

In conclusion, the employer must include overtime payments in wages and perquisites when calculating maternity leave payments.

Issue 5: The workers demand that the employer increase the existing attendance bonus by US$ 2.

Before considering this demand, the Arbitration Council must determine whether it gives rise to a rights dispute or an interests dispute.

In previous arbitral awards, the Arbitration Council has held that "a rights dispute concerns entitlements in the law, an agreement, or a collective agreement" *(see Arbitral Awards 05/11-M&V 1, reasons for decision, issues 1 and 5; 13/11-Gold Kamvimex, reasons for decision, issues 1 and 2; 14/11-GHG, reasons for decision, issue 4; and 37/11-ASD, reasons for decision, issue 1)*.

According to the facts, the employer paid the workers US$ 7 even though the notification of the Ministry of Labour and Vocational Training required it to pay only US$ 5. Notification No. 041/11 KB/SCN dated 7 March 2011 states that "workers who attend work regularly in accordance with the number of working days of each month shall receive a bonus of at least US$ 7 per month". The employer was already complying with this requirement, so it did not increase the attendance bonus.

In this case, the Arbitration Council considers that the employer pays a monthly US$ 7 attendance bonus to workers who attend work regularly, in accordance with Notification No. 041/11, and therefore it is not required to provide an additional US$ 2 to the workers. The Arbitration Council considers that although the more recent notification requires the employer to provide an additional US$ 2 [compared with the previous notification], the failure to provide an additional US$ 2 does not violate the law because it simply requires that the employer provide a US$ 7 attendance bonus. Moreover, there is no agreement or collective agreement between the employer and the workers requiring the employer to increase the existing bonus by US$ 2, thus making this an interests dispute (see reasoning in issue 1 regarding interests disputes).

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer increase the existing attendance bonus by US$ 2 per month.

Issue 6: The workers demand that the employer pay female workers an allowance of US$ 15 per month for three years for milk formula, in lieu of building a day-care centre.

Before considering this demand, the Arbitration Council must determine whether it gives rise to a rights dispute or an interests dispute.

In previous arbitral awards, the Arbitration Council has held that "a rights dispute concerns entitlements in the law, an agreement, or a collective agreement" *(see Arbitral Awards 05/11-M&V 1, reasons for decision, issues 1 and 5; 13/11-Gold Kamvimex, reasons for decision, issues 1 and 2; 14/11-GHG, reasons for decision, issue 4; and 37/11-ASD, reasons for decision, issue 1)*.

The workers' demand in this case, that the employer provide an allowance for milk formula in lieu of building a day-care centre, has a basis in the law, thus giving rise to a rights dispute.

The Arbitration Council considers the issue below.

On 25 February 2011, the employer and the Local Union of CLUF signed an agreement providing that a monthly US$ 8 allowance for milk formula would be provided to female workers in lieu of building a day-care centre. The employer then made another agreement with another union [CUMW], providing that a monthly US$ 10 allowance for milk formula would be provided to female workers.

Article 186 of the Labour Law states:

> Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a day-care centre.

> If the company is not able to set up a day-care centre on its premises for children over eighteen months of age, female workers can place their children in any day-care centre and the charges shall be paid by the employer.

Based on this article, the employer is obliged to set up a day-care centre for children over the age of 18 months. In this case, the employer is unable to do so, therefore the workers can choose any day-care centre to place their children in and the charges must be paid by the employer. The Arbitration Council considers that the purpose of having a day-care centre is to ensure that the workers' children are being taken care of while the workers are working. This ensures that female workers can concentrate on their work without having to worry about their children's wellbeing. The Arbitration Council considers that the law requires the employer to take measures to ensure the workers' children are cared for, either by setting up a day-care centre or paying child care fees for female workers who place their children in external day-care centres.

However, the Arbitration Council finds that there is no obligation on the employer to assist in raising the children of female workers by paying for milk formula. The Arbitration Council is of the view that it is not the intent of the law to require the employer to provide milk formula in lieu of building a day-care centre.

In conclusion, the Arbitration Council rejects the workers' demand that the employer increase the allowance for milk formula from US$ 10 to US$ 15 per month and orders the employer to either set up a day-care centre for children over the age of 18 months or pay child care fees for workers who place their children in external day-care centres, upon presentation of receipts.

Issue 7: The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of leave taken for personal commitments.

Before considering this demand, the Arbitration Council must determine whether it gives rise to a rights dispute or an interests dispute.

In previous arbitral awards, the Arbitration Council has held that "a rights dispute concerns entitlements in the law, an agreement, or a collective agreement" *(see Arbitral Awards 05/11-M&V 1, reasons for decision, issues 1 and 5; 13/11-Gold Kamvimex, reasons for decision, issues 1 and 2; 14/11-GHG, reasons for decision, issue 4; and 37/11-ASD, reasons for decision, issue 1)*.

The workers' demand in this case, that the employer pay part of the attendance bonus, has a basis in the law, thus giving rise to a rights dispute.

The Arbitration Council will consider the issue as follows:

Article 103 of the Labour Law states:

Wage includes, in particular:

- actual wage or remuneration;
- overtime payments;
- commissions;
- bonuses and indemnities;
- profit sharing;
- gratuities;
- the value of benefits in kind;
- family allowance in excess of the legally prescribed amount;
- holiday pay or compensatory holiday pay; and
- amount of money paid by the employer to the workers during disability and maternity leave.

Article 71(6) of the Labour Law provides that a labour contract will be suspended by reason of "[a]bsence of the worker authorised by the employer, based on laws, collective agreements, or individual agreements."

Article 72(1) 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.

Notification No. 041/11 KB/SCN dated 7 March 2011 provides that "workers who attend work regularly in accordance with the number of working days in each month shall receive a bonus of at least US$ 7 per month".

The Arbitration Council notes that this notification does not contain any reference to authorised absence of the worker. Thus, the Arbitration Council has considered in previous arbitral awards that an ambiguity exists in both Notification No. 041/11 KB/SCN and Notification No. 017 SKBY dated 18 July 2000, which states that "workers who attend work regularly in accordance with the number of working days in each month shall receive a bonus of at least US$ 5 per month."

In this case the Arbitration Council agrees with the above interpretation and notes that the most recent notification also fails to define "regularly in accordance with the number of working days" for the purposes of determining the workers' eligibility for the bonus.

In previous arbitral awards, the Arbitration Council has held that the employer must pay the attendance bonus in proportion to the number of days of authorised leave taken by workers. Because the leave is authorised, workers should not lose the full attendance bonus *(see Arbitral Awards 57/07-Seratex, reasons for decision, issue 3; 106/07-M & V (Branch 3),*

reasons for decision, issue 3; 128/08-Wei Hua, reasons for decision, issue 2; and 31/11-Quint Major, reasons for decision, issue 3).

According to the abovementioned Articles 71 and 72, workers' contracts are suspended when they take authorised leave. They do not perform work for the employer and the employer is not required to pay their wages. Therefore, in cases of authorised leave workers will not receive wages.

According to the facts, the employer allows the workers to take leave for personal commitments but it deducts their wages and monthly attendance bonus unless they use their annual leave for this purpose. The Arbitration Council considers in this case that the attendance bonus is part of the workers' wages. Thus, the employer is not required to pay the attendance bonus to workers for days on which they take authorised leave. This means that the employer is able to deduct from the attendance bonus in proportion to the number of days of authorised leave taken if workers take leave [for personal commitments] which is not annual leave.

In conclusion, the Arbitration Council orders the employer to deduct from the attendance bonus in proportion to the number of days of authorised leave taken for personal commitments. This does not apply to annual leave, sick leave, or special leave.

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

DECISION AND ORDER

Part II. Rights dispute:

Issue 2: Order the employer to include overtime payments in wages and perquisites when calculating maternity leave payments.

Issue 6:

- Reject the workers' demand that the employer increase the allowance for milk formula from US$ 10 to US$ 15 per month.
- Order the employer to either set up a day-care centre for children over the age of 18 months or pay child care fees for workers who place their children in external day-care centres, upon presentation of receipts.

Issue 7: Order the employer to deduct from the attendance bonus in proportion to the number of days of authorised leave taken for personal commitments. This does not apply to annual leave, sick leave, or special 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 Garment Industry's Memorandum of Understanding, dated 28 September 2010.

Part II. Interests dispute:

Issue 1: Decline to consider the workers' demand that the employer provide an accommodation and transportation allowance of US$ 10.

Issue 5: Decline to consider the workers' demand that the employer increase the existing attendance bonus by US$ 2 per month.

Type of award: non-binding award

The award of the Arbitration Council 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 time period.

SIGNATURES OF MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....

Annex to Arbitral Award 62/11-Ocean Garment

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 7 of the Arbitral Award **62/11-Ocean Garment**. 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 á 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 fulfil 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 3 of Notification No. 041/11 KB/SCN, dated 7 March 2011, which abrogates Notification No. 017 SKBY dated 18 July 2000, states clearly that “workers who attend work regularly in accordance with the number of working days in each month shall receive a bonus of at least US$ 7 per month.”

It clearly sets out the condition to fulfil in order to obtain a bonus of US$ 7 per month. If the workers fail to fulfil 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 fulfil the aforesaid condition.

Phnom Penh, 8 July 2011

Signature

Ing Sothy