KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 35/13- Nex-t Apparel

Date of award: 25 March 2013

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: **Tuon Siphann**

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

DISPUTANT PARTIES

Employer party:

Name: **Nex-t Apparel (Cambodia) Co., Ltd.**

Address: Mal Village, Sangkat Dangkor, Khan Dangkor, Phnom Penh

Telephone: 012 385 705 Fax: N/A

Representatives attending the first hearing:

1. Ms Chea Sovan Chansambath Head of Administration Department
2. Mr Ho Sopheak Administrative Assistant
3. Mr Ly Kim Ann Administrative Assistant

Representatives attending the second hearing:

1. Ms Chea Sovan Chansambath Head of Administration Department
2. Mr Ho Sopheak Administrative Assistant

Worker party:

Name: **- Coalition of Cambodian Apparel Workers Democratic Unions (C.CAWDU)**

- Local Union of C.CAWDU (the union)

Address: #2.3G, Street 26 BT, Thnort Jum Village, Sangkat Boeung Tumpun, Khan Mean Chey, Phnom Penh

Telephone: 012 504 154 Fax: N/A

Representatives attending the first hearing:

1. Mr Seang Yot C. CAWDU Dispute Resolution Officer
2. Mr He Thearoth President of the union
3. Ms Kim Samuntha Vice-President of the union
4. Mr He Meng Heng Secretary of the union
5. Mr Or Chanthy Union activist
6. Ms Mao Sokunthea Union activist

Representatives attending the second hearing:

1. Mr Seang Yot C. CAWDU Dispute Resolution Officer
2. Mr He Thearoth President of the union
3. Ms Kim Samuntha Vice-President of the union
4. Mr Or Chanthy Union activist
5. Ms Mao Sokunthea Union activist
6. Ms Mun Chanthoeun Treasurer of the union

ISSUES IN DISPUTE

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

1. The workers demand that the employer reinstate He Thearoth-Union President and Or Chanty-Union Activist maintain their positions and benefits and provide back pay from the date of termination until the date of reinstatement.
2. The workers demand that the employer pay the attendance bonus in proportion to the number of days of authorised leave taken.
3. The workers demand that the employer pay workers the portion of their accommodation and transportation allowances withheld by the employer in November 2012.
4. The workers demand that the employer pay pregnant workers the fifty per cent of their ninety days' worth of wages prior to the commencement of their maternity leave.
5. The workers demand that the employer arrange for the placement of music speakers in the workplace.
6. The workers demand that the employer supply sufficient medicines to workers and institute a process for the request of medicines.
7. The workers demand that the employer arrange enough bottles of clean drinking water.

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. 121 dated 7 June 2012 (Tenth 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. 165 dated 5 February 2013 was submitted to the Secretariat of the Arbitration Council on 6 February 2013.

HEARING AND SUMMARY OF PROCEDURE

Hearing venue: The Arbitration Council, No. 72, Street 592, Corner of Street 327 (Opposite Indra Devi High School) Boeung Kak II Commune, Tuol Kork District, Phnom Penh

Date of hearing: - 15 February 2013 (at 2 p.m.)
- 26 February 2013 (at 2 p.m.)

Procedural issues:

On 20 December 2012, the Department of Labour Disputes (the department) received a complaint from C.CAWDU, outlining the workers' demands for the improvement of working conditions. Upon receiving the claim, the department assigned an expert officer to resolve the labour dispute and the last conciliation session was held on 30 December 2012, with none of the seven issues resolved. The seven non-conciliated issues were referred to the Secretariat of the Arbitration Council (SAC) on 6 February 2013 via a non-conciliation report no. 165 dated 31 January 2013.

Upon receipt of the case, the SAC summoned the employer and the workers to a hearing and conciliation of the seven non-conciliated issues, held on 15 February 2013 at 2 p.m. (the first hearing) and 26 February 2013 at 2 p.m. (the second hearing). Both parties were present.

At the hearing, the Arbitration Council conducted a further conciliation of the seven non-conciliated issues, resulting in three issues (Issues 5, 6, and 7) being resolved. Four issues (Issues 1, 2, 3, and 4) remained unresolved.

In this case, C.CAWDU and Nex-t Apparel (Cambodia) are signatories to the Memorandum of Understanding on Improving Industrial Relations in the Garment Industry dated 3 October 2012 (MoU), but the union is not a professional organization in terms of registration as it has not yet been formally registered. Therefore, C.CAWDU's agreement to

represent the workers in the case cannot be interpreted as the parties being signatories to the MoU.

The parties agree to defer the Arbitral Award issuance from 28 February 2013 to 25 March 2013.

Therefore, the Arbitration Council will consider 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:

- Nex-t Apparel (Cambodia) Co., Ltd. is a garment manufacturer employing 980 workers.
- C.CAWDU is not a lawful local union because the union just received its receipt of registration on 23 October 2012. The Arbitration Council finds that there are 223 workers who have solicited help from C.CAWDU to represent them in dispute resolution before the Arbitration Council.

Issue 1: The workers demand that the employer reinstate Mr He Thearoth-Union President and Mr Or Chanty-Union Activist, maintain their positions and benefits, and provide back pay from the date of termination until the date of reinstatement.

- Mr He Thearoth:
  - Mr He Thearoth has worked for the company since 1 September 2011 and the employer terminated his contract on 30 October 2012.
  - The last 3-month employment contract offered to Mr He Thearoth was valid from 1 September 2012 to 30 October 2012. It was a mechanics position. Mr He Thearoth received US$200 in wages and a US$80 skill bonus per month; he has received the average sum of US$350 to 400 per month.
  - The workers claim:
    - Mr He Thearoth's dismissal is union discrimination because he has never had any dispute with the employer. After establishing the union,

he was elected to be the President (the election was held on 4 October 2012).

- On 6 October 2012, the President and representative from the Administration Department of the company told Mr He Thearoth that a local union already existed, and he should resign from being the President of the union. Mr He Thearoth did not agree to resign.
- On 8 October 2012, the President and representative from the administration department spoke to him again and told him that his wage would be increased if he would leave the union. However, Mr He Thearoth was told that if he refused to do so, his US$80 skill bonus per month would be withheld.
- The employer rejects the claim and contends that he advised Mr He Thearoth on the non-renewal of his employment contract because of his performance.
- Later, the employer transferred Mr He Thearoth from the position of mobile mechanic to the position of mechanic on the prototype team. This was the first time Mr He Thearoth had held that position. However, Mr He Thearoth had previously assigned his seven team members work on the prototype team.

- The employer claims:
  - On 8 October 2012, the employer threatened to terminate Mr He Thearoth's employment contract. Mr He Thearoth responded with, "Let's do it".
  - On 30 October 2012, Mr He Thearoth's three-month contract expired. The employer decided not to renew his contract because of his work performance, not union discrimination.
  - On 6 December 2012, Mr He Thearoth signed to receive US$ 483 termination compensation.
  - Mr He Thearoth agrees that he did receive the termination compensation on 6 December 2012.
  - The employer submitted the evidence to the Arbitration Council on 1 March 2013. The employer claims that it did not renew Mr He Thearoth's employment contract because:
    1. On 2 August 2012, a member of team 4 said *"I call mechanic Roth because he is not in team 4. Roth replied that he will come if he is treated with a glass of milk mixed with coffee."*

2. On 8 August 2012, the leader of team L13 reported to administration that *"Today I call mechanic He Thearoth to fix machine in my team, but it's hard to reach him."*
3. On 26 August 2011, Sok Sineth, ID: 0442 reported to the administration department that *"I called mechanic Roth to fix machine in team 7. He did not show up and responded that he was not a mechanic."*
4. On 6 September 2012, He Thearoth did not follow the supervisor's instructions, and the employer deemd this unacceptable conduct;
5. On 16 September 2012, there was a complaint from a member of team 5 that *"I called mechanic Roth to fix our machine; he did not show up, and I saw him sit and chitchat."*

- Mr Or Chanty

  - Mr Or Chanty commenced his job as a mechanic on 9 July 2012. Subsequently, Mr Or Chanty signed a three-month contract and the job commenced on 9 September 2012 and expired on 9 December 2012. He received US$140 wages (a US$120 base wage and US$20 skill bonus) per month.
  - Mr Or Chanty was elected to union activist on 4 October 2012.
  - The employer dismissed Mr Or Chanty on 8 November 2012.
  - The employer claims that on 8 November 2012 at 4 p.m., Pheak, an Administrative Assistant, invited Mr Or Chanty to meet up with the President of the company, at the office. He was informed that he was dismissed for serious misconduct stipulated at Article 83 of the Labour Law. The employer contends that: firstly, on 3 November 2012, Mr Or Chanty incited workers in the sewing line to go on strike to demand the reinstatement of Mr He Thearoth. Secondly, on 7 November 2012, Mr Or Chanty threatened Pheak, an Administrative Assistant, who was posting a letter on the walls about lawful strike and illawful strike. At that time, Mr Or Chanty questioned Pheak by asking him, *"Who wrote this letter? If [you] don't say who wrote this letter, [you] will be in trouble."* The employer adds that based on the two reasons above, it dismissed Mr Or Chanty for serious misconduct as stipulated by Article 83 of the Labour Law.
  - The workers respond that on 3 November 2012, after working hours, at the canteen, Mr Or Chanty talked to workers who are union members of the union about their rights and freedoms to demand the reinstatement of Mr He Thearoth.

On 7 November 2012, Mr Or Chanty asked to see a letter which was about to be posted on the wall by an Administrative Assistant. The workers claim Mr Or Chanty's dismissal is union discrimination because Mr Or Chanty was elected as a union activist on 4 October 2012.

- Mr Or Chanty received his US$267 outstanding wages on 6 December 2012. However, he has yet to receive his wages for December 2012.
- The employer claims that it only paid his wages before 7 November 2012 because he has committed serious misconduct.

➢ Information about the establishment of the union

- The workers claim that on 2 October 2012, the union notified the employer about the candidates for the union leadership election which would be held on 4 October 2012. Notification was performed through providing the letter of notification to guards who read it, but did not sign it, and returned it to the union.
- On 4 October 2012, the union organised an election in which 30 workers participated. Mr He Thearith was elected President, Mr Ly Sikariya Vice President, Mr He Meng Heng Secretary, Mr Seang Saradeth Treasurer, Ms Yu Sreyoun First Consultant, Ms Jin Cheun Second Consultant, and Mr Or Chanty union activist.
- On 4 October 2012 at 3 p.m., C.CAWDU officer notified the employer about the results of the election through guards. The guards read the letter of notification and returned it to the officer. On 5 October 2012, C.CAWDU mailed the letter of notification via the post. The workers claim that the worker at the post office confirmed that the employer failed to receive the letter of notification.
- On 23 October 2012, the union applied for union registration at the Ministry of Labour and Vocational Training.
- On 23 October 2012, the union received receipt of registration from the Ministry of Labour and Vocational Traning, but the union had still not received the certificate of registration from the Ministry as at the date of the hearing. The employer objected to the candidacy for the position of union leadership via a letter dated 9 January 2013.
- The employer contends that it did not receive the letter of notification about the election results and union leaderships 4 October 2012. It claims that it did not receive the letter sent through the post either. The employer claims it was not aware of the union leadership until there was a strike on 13 November

2012. It claims that it then realised Mr He Thearoth was President and Mr Or Chanty was a Union Activist.

- The workers claim that on 23 December 2012, Mr He Thearoth and Or Chanty submitted a letter of resignation and that both of them were forced to provide a thumbprint on the letter by a group of unfamiliar men. The group was later found to consist of: Bun Ton, Jan Sung, and Chea Phea. Mr He Thearoth and Or Chanty knew only Bun Ton. Mr He Thearoth claims that he saw Mr Bun Ton intervene in the strike of 13 November 2012.
- The employer responded that it was not aware of Mr He Thearoth's and Or Chanty's letter of resignation dated 23 December 2012. It did not know where it came from or who made it. A staff member from the administration department received the letter through workers in the sewing team, but it did not know who specifically sent the letter. A staff member from the administration department brought the letter to the President of the company but he said *"he did not know where the letter came from."*
- On 1 March 2013, the employer submitted evidence to the Arbitration Council:
    - A staff member from the administration department notified Mr He Thearoth about the termination of his employment contract on 8 October 2012.
    - In the schedule of wage payments for October 2012, Mr Or Chanty received US$229.31 in wages for October and US$82.43 in wages for November.
    - In the schedule of wage payment for October 2012, Mr He Thearith received a US$483.65 termination compensation payment comprising: payment in lieu of the remaining four days of annual leave, the five percent severance pay, and compensation in lieu of seven-day prior notice.
    - On 16 January 2013, the department notified Mr He Thearoth about union's failure to register because of the employer's objection to the union leaderships via a letter dated 9 January 2013.
- On 5 March 2013, the employer submitted an objection letter dated 4 March 2013 to the Arbitration Council. The first point of the letter reads *"…moreover, Mr He Meng Heng was also elected union secretary as mentioned in C.CAWDU's letter submitted to the Arbitration Council, and the employer did not dismiss him. This reflects that the employer does not act discriminately against the union…"*

- On 26 February 2013, the workers submitted evidence to the Arbitration Council:
    - EMS receipt for the letter mailed on 4 October 2012 at 9:05 a.m. from C.CAWDU to Nex-t.
- The Arbitration Council finds that the workers submitted the EMS receipt to the Arbitration Council to support their claim. Based on the receipt, the Arbitration Council finds that C.CAWDU had sent a letter of notification to Nex-t on 4 October 2012 at 9:05 a.m. This evidence is in contradiction to the workers' claim that on 4 October 2012 at 3 p.m., C.CAWDU notified the employer about the election results through the guards but the guards did not receive or signed the letter; then, C.CAWDU mailed the election results to the employer on 5 October 2012.

Issue 2: The workers demand that the employer pay the attendance bonus in proportion to the number of days of authorised leave for personal commitment taken by the workers.

- The employer provides a US$15 attendance bonus per month and it has its own methods to reduce the attendance bonus when the workers take leave for personal commitments:
    - The employer reduces the attendance bonus by US$3 when the workers take a one or half-day leave for personal commitment.
    - The employer reduces the attendance bonus by US$5 when the workers take a two-day leave for personal commitment.
    - The employer reduces the attendance bonus by US$8 when the workers take a three-day leave for personal commitment.
    - The employer withholds the attendance bonus when the workers take four days leave or more for personal commitments.
- The workers claim:
    - As they take authorised leave for personal commitments, the employer should reduce the attendance bonus in proportion to the number of days of authorised leave that the workers take.
    - Other companies pay the attendance pro rata, such as SL1, SL2, Gold Fame, Top World, and Great Honor.
    - In compliance with equitable principles, when workers take one day's leave, the employer docks one day's wage, and the same should apply to the provision of the attendance bonus.
    - Arbitral Award no. 82/06 dated 20 October 2006, 86/06 dated 14 November 2006, 107 dated 6 December 2006, and 119/06 dated 31 January 2007 orders the

employer to pay the attendance bonus in proportion to the number of days of authorised leave for personal commitments that the workers take.

- The employer contends that the attendance bonus is provided to workers who attend every working day in a month. The employer claims the workers should not receive the attendance bonus when they take authorised or unauthorised leave.

Issue 3: The workers demand that the employer pay the accommodation and transportation allowance that it withheld for November 2012.

- The workers request the employer pay back a US$3.5 accommodation and transportation allowance for November 2012 in addition to the other US$3.5 paid by the employer in the same month.
- Approximately 700 workers were on strike at Nex-t Apparel (Cambodia) from13 November to 2012 to 6 December 2012.
- Point 6 of the Agreement between the employer and workers dated 6 December 2012 states *"the company agree to maintain 50 (fifty) percent of the workers' wages (including transportation allowance and a US$10 attendance bonus) during strike."*
- The workers claim that Point 8 of the agreement dated 6 December 2012 clearly refers to the accommodation and transportation allowance during strike, and that the employer should pay a US$7 accommodation and transportation allowance, but it pays only US$3.5.
- The employer responds that the agreement clearly states that the workers receive only 50 (fifty) per cent of the accommodation and transportation allowance during the strike period. It adds that the agreement indicates the amount the workers receive such as the US$10 attendance bonus. Usually, the employer pays a US$15 attendance bonus monthly to workers.
- On 1 March 2013, the workers submitted as evidence a list of 415 workers who demand the employer pay back the US$3.5 accommodation and transportation allowance for November 2012.

Issue 4: The workers demand that the employer pay fifty per cent of the ninety days' worth of wages owing to pregnant workers prior to the commencement of their maternity leave.

- The employer pays pregnant workers fifty per cent of their maternity wages once a month.
- The workers claim:
  - The workers on maternity leave cannot afford to purchase medicine and other items during delivery and hospital stay.

- Their homes are far from the company so it is hard for them to come and receive their wages once a month. Moreover, they are forced to spend money on transportation as well.
- The employer permits their relatives or colleagues to come and receive the monthly wages on behalf of the workers on maternity leave. However, the workers do not trust their relatives or colleagues because there is a concern that they may borrow their wages.

- The employer contends that it pays fifty per cent of wages once per month to workers on maternity leave because it permits the workers on maternity leave to authorise their relatives or colleagues to come and receive the wages on their behalf. The employer claims it will maintain the current practice.

Issue 5: The workers demand that the employer arrange speakers at workplace.

- At the hearing, the parties agree that the employer will arrange speakers and play songs for workers for half an hour to an hour during their breaks. Therefore, the Arbitration Council will not consider this issue.

Issue 6: The workers demand that the employer maintain enough medicines and institute a process for the request of medicines.

- At the hearing, the parties agree that the employer will distribute request forms to each section head for the workers to request medicine. Therefore, the Arbitration Council will not consider the issue.

Issue 7: The workers demand that the employer arrange enough clean drinking water bottles.

- At the hearing, the parties agree that the employer will arrange a place for the drinking water to ensure that it is clean and does not smell. The workers are requested to help keep it clean as well. Therefore, the Arbitration Council will not consider the issue.

REASONS FOR DECISION

Issue 1: The workers demand that the employer reinstate Mr He Thearoth-Union President and Mr Or Chanty-Union Activist, maintain their positions and benefits, and provide back pay from termination up to the date of reinstatement.

In this case, the workers claim that termination of Mr He Thearoth's and Mr Or Chanty's employment contract is union discrimination because Mr He Thearoth is the President of the union and Mr Or Chanty is an activist for the union. The employer contends that it did not renew Mr He Thearith's expired contract and that Mr Or Chanty's contract was terminated for serious misconduct. Neither case relates to union discrimination.

Therefore, the Arbitration Council considers whether 1) the employment contract termination relates to union discrimination. 2) the termination was undertaken in accordance with the Labour Law.

1). Does Mr He Thearoth's and Or Chanty's termination relate to union discrimination?

Article 12 of the Labour Law states *"…no employer shall consider on account of… membership of workers' union or the exercise of union activities to be the invocation in order to make a decision on…discipline or termination of employment contract."*

Article 279 of the Labour Law states *"Employers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal."*

In previous awards, the Arbitration Council interprets that *"In general, the Arbitration Council determines that the party making allegations bear the burden of proof before the Arbitration Council." (see Arbitral Award no. 148/07-Pay Her, 34/11-Lim Line International, Reasons for Decision, Issue 7, and 155/11-Ying Dong Shoes, Issue 1)*

Concerning evidence proving union discriminations, in general, the Arbitration Council considers oral evidence provided at the hearing and verifies it to determine whether or not union discrimination took place (*see Arbitral Award no. 148/07-Pay Her).*

The Arbitration Council in this case agrees with the interpretation made in previous cases.

In this case, at the hearing, the workers claim the union held an election on 4 October 2012 and that at 3 p.m. a C.CAWDU officer notified the employer about the election results through the guards. However, the workers claim that the guards just read and returned the letter to C.CAWDU officer. On 5 October 2012, C.CAWDU mailed the notification letter to the employer. The Arbitration Council enquired as to the names of the guards, and whether there was anything to prove their identities, such as ID cards, name tags or an EMS receipt. The workers responded that they did not know the guards' names and that they would submit the EMS receipt to the Arbitration Council later.

On 26 February 2013, the workers submitted the EMS receipt to the Arbitration Council to support their claim. According to the EMS receipt, the Arbitration Council finds that C.CAWDU mailed the notification letter to Nex-t on 4 October 2012 at 9:05 a.m. This evidence is inconsistent with the workers' claim. Therefore, the Arbitration Council finds that the workers have failed to provide accurate and specific facts to prove that the employer received the notification letter about union establishment and election results (as mentioned

in the fact finding section).The employer maintained its objection to the claim that it invited Mr He Thearoth to the office and made suggestions about resigning, as alleged by the workers. The employer claims that it just invited him to let him know the reasons for the non-renewal of his employment contract, which was based on the outcome of his performance appraisal.

Moreover, on 5 March 2013, the employer submitted an objection letter dated 4 March 2013 to the Arbitration Council which objects to Issue 1 *"…moreover, Mr He Meng Heng was also elected the union secretary as mentioned in C.CAWDU's letter submitted to the Arbitration Council, and the employer did not dismiss him. This reflects that the employer does not act discriminately against the union…"*

In reference to the facts and reasons above, the Arbitration Council finds that the workers did not have enough evidence to prove the allegations that the employer acted discriminately against the union by not renewing the fixed duration contracts of Mr He Thearoth and Mr Or Chanty.

2) Did the employer terminate Mr He Thearoth and Mr Or Chanty's contracts of employment in accordance with the law?

(A) Mr He Thearoth's termination:

Paragraph 1, Article 73 states *"A labour contract of specific duration normally terminates at the specified ending date…"*

Paragraph 6, Article 73 of the Labour Law states:

> At the expiration of the contract, the employer shall provide the worker with the severance pay proportional to both the wages and the length of the contract. The exact amount of the severance pay is set by a collective agreement. If nothing is set in such agreement, the severance pay is at least equal to five percent of the wages paid during the length of the contract.

According to Paragraph 1, Article 73 of the Labour Law above, fixed duration contracts end at the specific expiration date.

Mr He Thearoth was on a three-month contract starting from 1 August 2012 to 30 October 2012. The employer terminated his employment contract on 30 October 2012 by notifying him about the non-renewal of his fixed employment contract on 8 October 2012. On 6 December 2012, Mr He Thearoth received a US$483.65 termination compensation package including 4 days wages, the five percent severance pay, and compensation in lieu of notification.

In this case, The Arbitration Council finds that the employer notified Mr He Thearoth about the non-renewal of his contract on 8 October 2012. Moreover, Mr He Thearoth signed to receive the termination compensation on 6 December 2012. The employer also paid him the five percent severance pay in accordance with the Labour Law. Therefore, the Arbitration

Council finds that the employment relationship between Mr He Thearoth and the employer was terminated.

Therefore, the Arbitration Council decides to reject the workers' demand that the employer reinstate Mr He Thearoth and maintain his position and benefits and provide him back pay from the date of termination until the date of reinstatement.

(B) The employer alleges Mr Or Chanty committed serious misconduct.

Mr Or Chanty was on a three-month contract starting from 9 September 2012 to 9 December 2012. The employer claims Mr Or Chanty was dismissed on 8 November 2012 without any justification.

The employer alleges that Mr Or Chanty committed several acts of serious misconduct on 3 November 2012. He incited workers in the sewing line to strike for the reinstatement of Mr He Thearoth. Moreover, he threatened an administrative assistant on 7 November 2012. Based on the two reasons above and according to the Labour Law, the employer alleges Mr Or Chanty committed serious misconduct.

Therefore, the Arbitration Council considers whether Mr Or Chanty committed serious misconduct according to Article 83 of the Labour Law.

Article 83 of the Labour Law states *"The following are considered to be serious offences:*

…

A. On the part of the workers

…

4. Abusive language, threat, violence or assault;

5. Incite other workers to commit serious misconduct;

…"

The employer alleges Mr Or Chanty incited workers in the sewing line to strike for the reinstatement of Mr He Thearoth:

The Arbitration Council in Case no. 20/05-Fortune Garment, Reasons for Decision, Issue 2, interpreted Article 83(B)(5) above as:

> The following are considered to be serious offenses:…Inciting other workers to commit serious offenses;" this shall not apply to inciting or calling workers to go on strike even if the strike did not follow the proper legal procedures unless the employer has evidence to prove that Mr. Sok Vy incited workers to use violence during the strike."

In this case, the Arbitration Panel agrees with the interpretation in the previous cases that though the strike was not staged in accordance with legal procedures, it's not serious misconduct and the employer does not have any evidence to prove that Mr Or Chanty incited workers to stage a violent strike.

The Arbitration Council finds that workers are granted the right to strike by the Labour Law and the Constitution of the Kingdom of Cambodia. Neither a lawful nor an unlawful strike constitutes serious misconduct, and neither can be used as grounds to dismiss workers.

Moreover, Paragraph 2, Article 332 states *"The worker shall be reinstated in his/her job at the end of the strike."*

Article 333 of the Labour Law states *"The employer is prohibited from imposing any sanction on a worker because of his/her participation in a strike." Such sanction shall be nullified and the employer shall be punishable by a fine in the amount set in Article 369 of Chapter XVI."*

The Arbitral Award no. 01/06-Goldtex Hing Shing, Reasons for Decision, Issue 7 states *"Dismissing workers on the ground of strike participation is against the law."*

In this case, the employer alleges Mr Or Chanty committed serious misconduct because on 3 November 2012, Mr Or Chanty incited workers in the sewing line to stage a strike to demand the reinstatement of Mr He Thearoth. This allegation contravenes Articles 332 and 333 of the Labour Law, and jurisprudence of the Arbitration Council. Therefore, the Arbitration Council decides that Mr Or Chanty's dismissal on the grounds that he committed serious misconduct by inciting workers in the sewing line to stage a strike is unjustified.

The employer alleges Mr Or Chanty of threatening Mr Pheak, the Administrative Assistant:

The employer claims that on 7 November 2012, Mr Pheak, the Administrative Assistant, posted a letter about lawful and unlawful strike. At that time, Mr Or Chanty asked him *"Who wrote this letter? If [you] don't tell (me), [you] will be in trouble."* In contrast to the employer, the workers claim that on 7 November 2012 Mr Or Chanty requested to read the letter which was about to be posted by Mr Pheak and he did not threatened as alleged by the employer.

Concerning the allegation, the employer just claims that Mr Or Chanty threated Mr Pheak, but fails to provide specific evidence to the Arbitration Council. Therefore, the Arbitration Council finds that there is nothing to prove that Mr Or Chanty threatened Mr Pheak as alleged.

In conclusion, the Arbitration Council finds that the employer's dismissal of Mr Or Chanty on the grounds of committed serious misconduct is not lawful or justified.

When the employer dismisses him without complying with the Labour Law, what benefits shall Mr Or Chanty receive?

1) Damages

Mr Or Chanty was on a three-month contract starting from 9 September 2012 to 9 December 2012.

Paragraph 1, Article 73 of the Labour Law states:

> A labour contract of specific duration normally terminates at the specified ending date. It can, however, be terminated before the ending date if both parties are in agreement on the condition that this agreement is made in form of writing in the presence of a Labour Inspector and signed by the two parties to the contract.

Paragraph 3, Article 73 of the Labour Law states:

> The premature termination of the contract by the will of the employer alone for reasons other than those mentioned in paragraphs 1 and 2 of this article entitles the worker to damages in an amount at least equal to the remuneration he would have received until the termination of the contract.

The Arbitration Panel in this case finds that, in accordance with the above article, the employer shall pay damages to Mr Or chanty equal to the amount he would have received until the contract expired. According to the fact-finding, Mr Or chanty received his last wages in the amount of US$267 on 6 December 2012. However, the employer has not paid him his wages for December 2012. Therefore, the Arbitration Council finds that the employer shall pay damages to Mr Or chanty equal to the amount he would have received until the contract expires.

2) The five per cent severance pay

Paragraph 1, Article 73 of the Labour Law states *"A labour contract of specific duration normally terminates at the specified ending date."*

Paragraph 6, Article 73 of the Labour Law states:

> At the expiration of the contract, the employer shall provide the workers with the severance pay proportional to both the wages and the length of the contract. The exact amount of the severance pay is set by a collective agreement. If nothing is set in such agreement, the severance pay is at least equal to five percent of the wages paid during the length of the contract.

According to Paragraph 1, Article 73 of the Labour Law above the fixed employment contract ends at its expiration date.

According to the findings of the facts, the employer dismissed Or Chanty before the expiration date of his employment contract. The Arbitration Panel finds that Mr Or Chanty's most recent three month employment contract commenced on 9 September to 9 December 2012, so the employer shall provide a five percent severance pay to Mr Or chanty.

In conclusion, the Arbitration Council rejects the workers' demand that the employer reinstate Mr Or Chanty, maintain his positions and benefits, and provide back pay until the date of reinstatement. However, the Arbitration Council orders the employer to pay: 1)

damages which are equal to the wages that Mr Or Chanty would have received until the expiration of his employment contract; and 2) severance pay which is equal to five percent of his wages.

Issue 2: The workers demand that the employer pay the attendance bonus in proportion to the number of days of authorised leave for personal commitment taken by workers.

The employer provides a US$15 attendance bonus per month. The employer reduces attendance bonus when the workers take authorised leave for personal commitments:

- The employer reduces the attendance bonus by US$3 when the workers take one or half a day's leave for personal commitment.
- The employer reduces the attendance bonus by US$3 when the workers take two day's leave for a personal commitment.
- The employer reduces the attendance bonus by US$8 when the workers take three day's leave for a personal commitment.
- The employer withholds the attendance bonus when the workers take four or more day's leave for personal commitments.

Therefore, the Arbitration Council will consider whether the workers are entitled to demand the employer to reduce the attendance bonus in proportion to the number of days of authorised leave for personal commitment.

Concerning the demand, the Arbitration Council has previously ordered the employer to reduce the attendance bonus in proportion to the number of days of authorised leave that the workers take. The Arbitration Council's interpretation is based on Point 1 of Notification no. 041 dated 7 March 2011 stating that: "***Workers*** *who attend work regularly in accordance with the number of working days in each month without absence will receive a monthly bonus of at least US$ 7."* (see Arbitral Award no. 112/11-Yung Wah 1, Reasons for Decision, Issue 3, 136/11-Cambo Handsome (Branch 1), Issue 1, and 154/11-B & N, Issue 7 (2))

However, the above notification was superseded by Notification no. 230 of the Ministry of Labour and Vocational Training dated 25 July 2012 in which Point 2 states "*Workers who attend work regularly in accordance with the number of working days in each month without absence will receive a monthly bonus of at least US$ 10."*

According to Point 2 of the Notification no. 230 dated 25 July 2012, attendance bonus is increased to US$ 10 per month and the term "***without absence****"* is added in. This notification came into effect on 1 September 2012.

As the demand in this issue is about the attendance bonus stipulated in the above Notification, the Arbitration Council finds that this is a rights dispute.

The current practice of the employer is to withhold the entire attendance bonus of US$10 per month if a worker takes authorised leave for a personal commitment.

The Arbitration Council will consider whether or not the workers have the right to demand that the employer reduce the attendance bonus in proportion to the number of days of authorised leave for personal commitment that the workers have taken.

The Arbitration Council issued the Arbitral Award which ordered the employer to reduce the attendance bonus in proportion to the number of days of authorised leave that the workers have taken based on the interpretation of Point 1 of the Notification no. 041 dated 7 March 2011 which states, "*Workers who attend work regularly in accordance with the number of working days in each month without absence will receive a monthly bonus of at least US$ 7." (see the Arbitral Award no. 112/11-Yung Wah 1, Issue 3, 136/11-Cambo handsome (Branch 1), Issue 1, and 154/11-B & N, Issue 7 (2)).* However, this notification was substituted by the Notification no. 230 dated 25 July 2012, Point 2 which states, "*Workers who attend work regularly in accordance with the number of working days in each month without absence will receive a monthly bonus of at least US$10."*

Point 2 of the Notification no. 230 dated 25 July 2012 increased the attendance bonus to US$10 per month and added the term "***without absence"*** which was enforced from 1 September 2012 onwards.

The Arbitration Council finds that there are many kinds of bonuses and the amount of the bonus differs depending on the owners of each enterprise or the company, who have the right to direct and supervise operations for the purpose of motivating their workers and increasing work effectiveness and productivity. The US$10 attendance bonus stipulated in Point 2 of the Notification no. 230 dated 25 July 2012 is not under the rights of the employer to direct and also, it is not a tool or means for the employer to supervise, rather the US$10 attendance bonus is a bonus stipulated at Point 2 of Notification no. 230 dated 25 July 2012, with which all garment and footwear sector employers must comply. This means the employer is under an obligation to provide the attendance bonus of US$10 per month to workers who attend work regularly in accordance with the number of working days in each month without absence. However, the Arbitration Council finds that in Point 2 of the statement of the Labour Advisory Committee dated 11 July 2011 said that the employer shall provide the attendance bonus of US$10 per month. Point 2 of the Notification no. 230 dated 25 July 2012 states that the workers who attend work regularly in accordance with the number of working days in each month **without absence** will receive a monthly bonus of at least US$10. The Labour Advisory Committee has not interpreted the term **without absence** to mean absence with or without authorisation. The Arbitration Council is not able to interpret or assume that the absence here refers to absence with authorisation or without authorisation without taking legal provisions and reasoning into consideration.

The Arbitration Council finds that the term **absence stipulated in the law** includes: absence by taking annual leave, special leave, maternity leave, holidays, and weekly time

off. The term absence stipulated in the law does not require the workers to dock the attendance bonus, which means the workers get one hundred per cent of the attendance bonus, US$ 10 per month. Absence (authorised leave for personal commitment) is not stipulated in the law, which leads to the question whether the workers shall receive one hundred per cent of the attendance bonus, an attendance bonus in proportion to the number of days of authorised leave accessed or no attendance bonus at all.

The Arbitration Council finds that because of the many types of absence, aforementioned, the Arbitration Council cannot interpret or assume **absence** in the *Notification* no. 230 dated 25 July 2012 to be any particular type of absence. The Arbitration Council therefore considers the demand according to each particular case. In this issue, the workers demand that the employer deduct the attendance bonus in proportion to the number of days of authorised leave that the workers have taken.

The Arbitration Council finds that it is at the discretion of the employer whether to authorise leave (for personal commitment) or not, based on the administrative procedures, internal rules, and the production requirements of each enterprise and workplace. Where the employer decides to authorise a worker's leave, the employer should know that the company's production will not be interrupted by the worker's absence. The administrative procedures and the internal rules of the enterprise distinguish between authorised and unauthorised leave, and disciplinary action can be taken against workers who do not comply with relevant leave arrangements. When the workers are authorised to take leave, the leave is taken in accordance with the administrative procedures and internal rules of the enterprise or workplace. In these instances, workers are not subject to any disciplinary action from the employer.

Workers who take authorised leave for personal commitments are considered to have the employer's agreement and understand that they will not receive wages on the day they are absent. The employer also agrees to permit workers to take unpaid leave on the agreed-upon day(s), not to take any disciplinary actions against the workers, and maintain the wages and benefits of workers once they return to work.

The Arbitration Council finds that where the employer authorises workers to take leave, the employer cannot regard it as being absent for the purpose of taking disciplinary action.

The Arbitration Council finds that the phrase "**attend work regularly in accordance with the number of working days in each month"** in the Notification no. 230 dated 25 July 2012 refers to the number of days in each month that the employer requires the workers to attend work or the workers are under an obligation to provide service to the employer. Under the current practices of enterprises and establishments in Cambodia, according to the law, the term **"working days in each month"** can be:

1) Full working days of each month (where there is no holiday and other national events determined by law which means the number of working days is 26 days per month subject to company policy).
2) Some working days each month (where there is holiday or other national event determined by law which means the number of working days is less than (1) or just 21-22 days per month depending on the number of holidays and other national events determined by laws and subject to company policy).
3) Some working days of each month (where there is authorisation from the employer which means the number of working days of the month is less than (1) or (2), subject to the company's practice and the number of days of authorised leave that the workers take).

Therefore, if the workers have been working each month in accordance with the number of days that they are obliged to perform and take authorised leave, they are considered to have attended work regularly. The term **"working days in each month"** in such cases does not include holidays determined by the law or authorised leave.

The Arbitration Council finds that if the employer is ordered to pay full wages to workers taking unpaid authorised leave, it's unfair as the workers do not perform work for the employer.

Article 103 of the Labour Law said, "*Wages are: …*

- *Bonus…"*

The Arbitration Council finds that the attendance bonus stipulated in the Notification 230 dated 25 July 2012 is the bonus provided by the employer. Therefore, the attendance bonus is considered as part of a worker's wage.

Paragraph 6 of Article 71 of the Labour Law states, *"The labour contract shall be suspended under the following reasons: …*

6. Absence of the worker authorised by the employer, based on laws, collective agreements, or individual agreements…"

Paragraph 1 of Article 72 of the Labour Law states:

The suspension of a labour contract affects only the main obligations of the contract, that are, those under which the worker has to work for the employer, and the employer has to pay the worker, unless there are provisions to the contrary that require the employer to pay the worker…

In reference to Paragraph 6 and Paragraph 1 of Article 72 of the Labour Law, The Arbitration Council finds that authorised leave is leave requested by the worker and agreed to by the employer. Therefore, the authorised leave is considered a contract suspension between the employer and the worker, and the employer is under no obligation to pay wages to the worker on the day that they take the authorised leave for personal commitment. It also

means the employer is under no obligation to provide the attendance bonus to worker on the day that the worker takes authorised leave for personal commitment. Therefore, the employer has no right to withhold the entire attendance bonus from the worker. It only has the right to reduce the attendance bonus in proportion to the number of days of authorised leave for personal commitment that the worker has taken.

Based on the reasons and interpretation above, the Arbitration Council orders the employer to reduce the attendance bonus in proportion to the number of days of authorised leave for personal commitment that the workers take.

Issue 3: The workers demand that the employer pay the remaining $3.50 of the accommodation and transportation bonus for the month of November 2012.

The workers demand the employer pay the remaining US$ 3.50 of the accommodation and transportation allowance for November 2012 because the employer paid only US$ 3.50. 700 workers went on strike at Nex-t Apparel (Cambodia) from 13 November 2012 to 6 December 2012.

Article 332 of the Labour Law states *"A strike suspends the labour contract. During a strike, the allowance for work is not provided and the salary is not paid.*

The worker shall be reinstated in his job at the end of the strike."

According to the facts and Article 332 of the Labour Law above, the Arbitration Council finds that the workers were on strike from 13 November 2012 to 6 December 2012, so the employer was not obligated to pay wages and benefits to those striking workers. It means that while the workers were on strike they were not entitled to wages and benefits. The employer is not obligated to pay the accommodation and transportation allowance to workers on strike.

However, on 6 December 2012, the employer and the workers made an agreement which states at Point 8 *"the employer agrees to maintain 50 percent of wages (including transportation allowance and a US$ 10 attendance bonus) to workers during strike."*

Concerning the above agreement, the parties think and interpret Point 8 of the agreement differently. The workers think the employer pays a US$7 accommodation and transportation allowance to those on strike. However, the employer pays only US$ 3.50 of accommodation and transportation allowance. The employer claims this clause clearly states that the workers are entitled to only fifty per cent of the accommodation and transportation allowance, which is equal to US$3.50 during the month that they are on strike.

Article 65 of the Labour Law states *"A labour contract establishes working relations between the worker and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties."*

Article 664 of Civil Code promulgated in 2007 also defines the employment contracts: *"A contract of employment is formed by the promises of one party to perform services under employment, and another party to pay wages."*

Article 65 of the Labour Law defines that the employment contract falls under the general rules for forming a contract and the Civil Code. Therefore, the parties to a contract have the right to make an agreement of their own will.

The Arbitration Council finds that firstly, though the law releases the employer from its obligation to pay wages to workers, the employer agreed to pay fifty per cent of wages to workers on strike. Secondly, if the workers attend work as usual, the employer pays a US$ 15 attendance bonus per month. In this case, the parties agree that the employer pay a US$ 10 attendance bonus to workers on strike. Thirdly, the employer pays fifty per cent of the accommodation and transportation allowance which is equal to US$3.50 to workers on strike. The question is whether the payment of 50 percent of the accommodation and transportation allowance is in line with Point 8 of the agreement made on 6 December 2012.

The Arbitration Council finds that the different understanding and interpretation is caused by the term "including accommodation and transportation allowance" which is written in the brackets. The wording in the brackets does not specify the amount to be paid. The Arbitration Council finds that the wording can be understood as fifty per cent of the accommodation and transportation allowance. Similarly, in the agreement made on 6 December 2012, the parties agree that the employer pay only fifty per cent of wages.

Therefore, the Arbitration Council decides to reject the workers' demand that the employer pay the remainder of the accommodation and transportation bonus for the period of November 2012.

Issue 4: The workers demand that the employer pay pregnant workers fifty per cent of ninety days' worth of wages, prior to the commencement of their maternity leave.

The Arbitration Council considers whether the workers who take maternity leave are entitled to receive 50 percent of 90 days wages before commencing their leave.

Paragraph 1, Article 182 of the Labour Law states *"In all enterprises covered by Article 1 of this law, women shall be entitled to a maternity leave of ninety days."*

Article 183 of the Labour Law states:

> During the maternity leave as stipulated in the preceding article, women are entitled to half of their wage, including their perquisites, paid by the employer.
>
> …
>
> However, the wage benefits specified in the first paragraph of this article shall be granted only to women having a minimum of one year of uninterrupted service in the enterprise.

According to Article 182 and 183 of the Labour law above, the Arbitration Council finds that the employer is under an obligation to pay half the wages and perquisites to workers who are entitled to ninety day's maternity leave.

The employer currently pays pregnant workers a maternity payment equal to 50 percent of their wages and perquisites once a month.

Paragraph 3, Article 115 of the Labour Law states *"Payment shall not be made on a day-off. If payday falls on such a day-off, the payment of wages shall made a day earlier."*

Article 103 of the Labour Law states:

Wage includes, in particular:

- actual wage or remuneration;
- overtime payments;
- commissions;

…

- amount of money paid by the employer to the workers during disability and maternity leave

According to Article 115 and 103 of the Labour Law, the Arbitration Council finds that the provision of Article 115 above is applicable to the 90-day maternity payment to workers.

The Arbitration Council finds that workers who take maternity leave are entitled to receive the 90-day maternity payment prior to their commencement of taking leave.

In conclusion, the Arbitration Council orders the employer to pay pregnant workers 50 percent of ninety days of wages prior to their commencement of their 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:

- Reject the workers' demand that the employer reinstate Mr He Thearith, maintain his position and benefits, and provide back pay from the date of termination until the date of reinstatement.
- Reject the workers' demand that the employer reinstate Mr Or Chanty, maintain his position and benefits, and provide back pay until the date of reinstatement. The Arbitration Council orders the employer to provide Mr Or Chanty:
    1) Damages equal to the amount in wages that Mr Or Chanty would have received at the expiration of the contract of employment.
    2) The five per cent severance pay

Issue 2: Order the employer to pay attendance bonus in proportion to the number of days of authorised leave for personal commitment taken by the workers.

Issue 3: Reject the workers' demand that the employer pay the US$3.5 accommodation and transportation allowance for November 2012.

Issue 4: Order the employer to pay fifty per cent of ninety days' worth of wages to pregnant workers' wages, prior to the commencement of their maternity leave.

Type of award: non-binding award

The award will become binding eight days after the date of notification of the parties 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: **Ing Sothy**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....

Annex to Arbitral Award 35/13- Nex-t Apparel

Dissenting Opinion

Clause 37 of Prakas No. 099, dated 21 April 2004, issued by the Ministry of Labour and Vocational Training states:

> The arbitral panel shall record its decisions in an award which shall be signed by all three arbitrators. If one of the arbitrators does not agree with the decision of the majority, the dissenting arbitrator may record his dissent as an annex to the award.

Based on this clause, I, Arbitrator **Ing Sothy**, would like to record my dissent on issue 6 of the Arbitral Award **35/13- Nex-t Apparel, Issue 2 in which the Arbitration Council orders the employer to pay attendance bonus in proportion to the number of days of authorised leave for personal commitment taken by the workers.**

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 fulfill 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 fulfill the condition to receive the bonus is **the worker.**

Examples:

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

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

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

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

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

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

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

III. Conclusion

In conclusion, Point 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 fulfill in order to obtain a bonus of US$7 per month. If the workers fail to fulfill the abovementioned condition by taking leave on any days, then they are not entitled to the bonus. Thus, in order to obtain the bonus, the workers must properly and adequately fulfill the aforesaid condition.

Phnom Penh, 23 January 2013

Signature

Ing Sothy