



KINGDOM OF CAMBODIA
NATION RELIGION KING

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THE ARBITRATION COUNCIL

Case number and name: 42/12-Inkyung

Date of award: 20 March 2012

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: **An Nan**

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

DISPUTANT PARTIES

Employer party:

Name: **Inkyung Wondang Apparel Co., Ltd. (the employer)**

Address: Chamka Oulek Village, Kakab Commune, Pursenchey District, Phnom Penh

Telephone: 012 904 051

Fax: N/A

Representatives: Absent

Worker party:

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

Local Union of CFLU (the union)

Address: Chamka Oulek Village, Kakab Commune, Pursenchey District, Phnom Penh

Telephone: 077 550 979

Fax: N/A

Representatives:

- | | |
|----------------------|------------------------------------|
| 1. Mr Em Dyna | Dispute resolution officer of CFLU |
| 2. Mr Khen Namhor | Dispute resolution officer of CFLU |
| 3. Ms Nheng Ry | President of the union |
| 4. Ms Chea Nim | First vice-president of the union |
| 5. Mr Som Rong | First vice-president of the union |
| 6. Mr Ninh Chamroeun | Second vice-president 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 maintain wages and attendance bonuses when they take sick leave and supply a proper doctor's certificate.
2. The workers demand that the employer provide a 2,000 riel meal allowance when they work overtime on Sundays.
3. The workers demand that the employer allow them to resign from work.
4. The workers demand that the employer allow them to take leave for a personal commitment.
5. The workers demand that the employer refrain from forcing the workers to work overtime.
6. The workers demand that the employer pay monthly wages by 4:00 p.m. In case of delay in the payment of the wages, the workers demand that the employer pay for the delay.
7. The workers demand that the employer refrain from scheduling overtime work on pay day.
8. The workers demand that the employer re-establish the day care centre and provide toys in accordance with the Labour Law.
9. The workers demand that the employer instruct the supervisors and some group leaders not to verbally abuse them.
10. The workers demand that the employer provide a termination payment to workers who are dismissed without valid reason.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labour Law (1997); the *Prakas* on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same *Prakas*; and the *Prakas* on the Appointment of Arbitrators No. 136 dated 7 June 2011 (Ninth Term).

An attempt was made to conciliate the collective dispute that is the subject of this award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and non-conciliation report No. 200 KB/RK/VK dated 23 February 2012 was submitted to the Secretariat of the Arbitration Council on 24 May 2012.

HEARING AND SUMMARY OF PROCEDURE

Hearing venue: The Arbitration Council, No. 72, Street 592, Corner of Street 327 (Opposite

Indra Devi High School), Boeung Kak II Commune, Tuol Kork District,
Phnom Penh

Date of hearing: 7 March 2012 at 8:30 a.m.

Procedural issues:

On 17 January 2012, the Department of Labour Disputes of Kampong Chhnang received complaint No. 009 SSPK dated 16 January 2012 from CLFU, outlining the workers' demands that the employer improve working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert labour officer to resolve the labour dispute. The last conciliation session was held on 13 February 2012. None of the issues were resolved. The 10 non-conciliated issues were referred to the Secretariat of the Arbitration Council on 24 February 2012 via non-conciliation report No. 200 KB/RK/VK dated 23 February 2012.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the 10 non-conciliated issues. The hearing was held on 7 March 2012 at 8:30 a.m. The employer was absent due to a prior engagement. In this case, the workers requested the Arbitration Council to proceed with the hearing in absentia.

The Arbitration Council conducted a further conciliation of the 10 non-conciliated issues. The workers agreed to withdraw issues 3, 8, and 10. Issues 1, 2, 4, 5, 6, 7, and 9 remained unresolved.

Since the employer was absent, the award cannot be binding.

The Arbitration Council considers the issues in dispute in this case based on the evidence and reasons below.

EVIDENCE

This section has been omitted in the English version of this arbitral award. For further information regarding evidence, please refer to the Khmer version.

FACTS

- Having examined the report on collective labour dispute resolution;
- Having listened to the statements of the representatives of the employer and the workers; and
- Having reviewed the additional documents.

The Arbitration Council finds that:

- Inkyung Wondang Apparel Co., Ltd. operates a garment factory and employs 1,400 workers.
- The Local Union of CFLU (the union) is the claimant in this case and was present at the hearing. The union represents 428 workers and does not hold most representative status (MRS).
- The employer was absent at the hearing. However, on 9 March 2012 the employer submitted evidence and documents in relation to its practice. Thus, the Arbitration Council will consider the evidence and documents submitted.
- The workers have made no objection to the evidence or documents submitted by the employer.

Issue 1: The workers demand that the employer maintain their wages and attendance bonuses when they take sick leave with a proper doctor's certificate.

- The workers claim that the employer has reduced their daily wages and US\$ 7 attendance bonuses although they take authorised sick leave and receive a proper doctor's certificate.
- No legal basis has been presented to support this demand.
- According to the employer's evidence and document submitted, the employer maintains the workers' daily wages and deducts their attendance bonuses in proportion to the number of their working days. In cases of work-related accidents, the employer maintains full wages and benefits. This practice has been in place for over two years.
- Clause 6 of the Internal Work Rules states that the employer will allow the workers to take a day off if they are sick. In this case, the workers must notify the employer and supply a certificate issued by a qualified doctor. The employer has claimed that it will not provide wages if the workers take unauthorised leave.

Issue 2: The workers demand that the employer provide a 2,000 riel meal allowance when they work overtime on Sundays.

- The workers claim that the employer does not provide a 2,000 riel meal allowance when they elect to work on Sundays. The workers further claim that overtime work on Sundays does not occur frequently.
- The workers make this demand because Sunday is a weekly day-off and the employer is required to provide a 2,000 riel meal allowance in accordance with a *Prakas* issued by the Ministry of Labour and Vocational Training.
- According to the employer's evidence and documents submitted, the employer provides a total overtime payment of US\$ 5.50 per worker, of which US\$ 0.82 meal allowance is provided, equivalent to 3,200 riel according to the rate US\$ 1/4,000 riel. This practice has been in place for approximately one year.

Issue 4: The workers demand that the employer allow them to take leave for a personal commitment.

- The workers claim that the employer rebukes them when they make a request for leave due to a personal commitment. Thus, the workers find it very difficult to make a leave request.
- In this case, the workers did not specify any circumstances that compel them to take leave for a personal commitment. Rather, they maintain their demand that the employer allow them to take leave.
- According to the employer's evidence and documents submitted, the employer claims that it is not difficult to take leave. The workers have to go through their supervisors, heads of sections, and the head of production. If their superiors do not sign off on their leave request, they can go directly to the head of administration for permission.
- According to the Internal Work Rules, the workers are required to submit a leave form one day before taking leave for a personal commitment.

Issues 5 and 7: The workers demand that the employer refrain from forcing them to work overtime.

- Work hours run from 7:00 a.m. to 11:00 a.m. and 12:00 p.m. to 4:00 p.m. Overtime work occurs between 4:00 p.m. to 6:00 p.m. and 6:30 p.m. to 8:30 p.m.
- The workers claim that the employer rebukes them if they choose not to work overtime. Thus, they demand that the employer refrain from forcing them to work overtime.
- According to the employer's evidence and the documents it has submitted, the factory has a clear policy on overtime work. Those who choose to work overtime have to sign the employer request form. Moreover, major buyers prohibit forced labour. In doing so, the major buyers send auditors to carefully check the working conditions in the factory.
- According to the employer's submitted evidence, the Arbitration Council finds that those who opt to do overtime work must agree by signing the employer's request form.

Issue 6: The workers demand that the employer pay the workers their monthly wages by 4:00 p.m. In case of delay in the payment of the wages, the workers demand that the employer pay for the delay.

- At the hearing, the workers clarified this demand. They demanded that the employer pay wages during working hours. The workers claim that the employer pays wages at 4:00 p.m. which is the time that they leave for home. It takes the employer 15 to 20

minutes to pay wages to all workers. As a result, some workers arrive home late from work.

- According to the employer's evidence and submitted documents, pay day is scheduled to be made on the 10th of every month. In some months, the employer makes an early wage payment, i.e. on the 6th, 7th, 8th, 9th etc. The employer claims that wage payments are made at 3:30 p.m. and finished by 4:00 p.m.

Issue 9: The workers demand that the employer instruct the supervisors and some group leaders not to verbally abuse them.

- The workers claim that Yun, the leader in group 15, verbally abused them when he was not satisfied with their work quality. The abuse included expressions such as, "You slacker!" and "You are blind!"
- According to the employer's evidence and submitted documents, the employer claims that it does not tolerate such inappropriate behaviour in the workplace.

REASONS FOR DECISION

The employer was absent at the hearing. Before turning to this issue, the Arbitration Council considers whether the panel can proceed with the hearing in absentia.

Clause 21 of *Prakas* 099 dated 21 April 2004 states:

In the case that one of the parties, although duly invited, fails to appear before the arbitration panel without showing good cause, the arbitration panel may proceed in the absence of that party or may terminate the arbitral proceedings by means of an award.

Based on this clause in previous arbitral awards, when one of the parties was duly invited but failed to appear before the Arbitration Council without proper reasons, the Council proceeded with the hearing in the absence of that party (*see Arbitral Awards 148/07-Pay Her and 99/09-Kingsland*).

In this case, the claimant union was present at the hearing. However, the employer was absent without showing proper reasons.

Therefore, the Arbitration Council will proceed with the hearing in the absence of the employer based on the evidence and arguments of the workers.

In this case, the employer submitted documentation in relation to its practice and the Internal Work Rules.

Clause 25 of Prakas No. 099 on the Arbitration Council states, "The arbitration panel shall be free to determine the admissibility, relevance, materiality and weight of evidence as well as the allocation of the burden of proof."

Based on this clause, the Arbitration Council decides to consider the evidence submitted by the employer.

Issue 1: The workers demand that the employer maintain their wages and attendance bonuses when they take sick leave and supply a proper doctor's certificate.

According to the facts presented by the workers, and the employer's evidence, the Arbitration Council finds that the employer did not deduct the workers' wages for authorised sick leave taken with a proper doctor's certificate. Therefore, the Arbitration Council determines that the employer has accommodated the workers' demand in relation to the maintenance of wages. The employer's practice is to deduct the attendance bonus in proportion to the number of days of sick leave taken. Thus, the Arbitration Council considers whether the workers are entitled to full attendance bonus when they take sick leave.

Case of attendance bonus

Point 1 of Notification No. 041/11 dated 7 March 2011 states, "Workers who attend work regularly in accordance with the number of working days in a month will receive a bonus of at least US\$ 7."

Article 103 of the Labour Law states, "Wage includes, in particular:...gratuities..."

The Arbitration Council determines that attendance bonus provided for in Notification No. 041 qualifies as gratuities. Thus, attendance bonus is a payment in the form of wages.

Article 71 paragraph 3 of the Labour Law states:

The labour contract shall be suspended under the following reasons:...3. The absence of the worker for illness certified by a qualified doctor. This absence is limited to six months, but can, however, be extended until there is a replacement.

Article 72 paragraph 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.

Based on these articles, the Arbitration Council considers that the absence of the workers for illness certified by a qualified doctor leads to the suspension of employment contract. Thus, the workers are not required to perform labour services for the employer and the employer is not obligated to pay out wages to the worker unless there are provisions to the contrary. This means that the employer is not obligated to provide an attendance bonus for the days the workers are absent. However, the employer does not have the right to deduct the full attendance bonus; it can only deduct it proportionately.

In previous arbitral awards, the Arbitration Council has ordered the employer to deduct the attendance bonus in proportion to the number of days of sick leave taken with a proper doctor's certificate (*see Arbitral Awards 62/07-Hong Mei, reasons for decision, issue 11; 10/12-Chung Fai, reasons for decision, issue 20*).

The Arbitration Council applies these rulings in this case. In this case, the employer has complied with the Council's previous rulings. However, according to the demand mentioned above, the workers demand that the employer maintain their attendance bonus when they take sick leave. Based on the aforesaid rulings, the Arbitration Council determines that this demand is more than what is required by the law, thus making it an interests dispute.

In principle, the Arbitration Council declines to consider an interests dispute if the claimant union does not hold most representative status (MRS) (*see Arbitral Awards 42/09-River Rich Textile, reasons for decision, issue 2; 62/10-Zhong Yov, reasons for decision, issue 9*).

The Arbitration Council considers that having MRS gives a union the legal capacity to negotiate with an employer to establish a collective agreement and gives it legal standing to bring an interests dispute before the Arbitration Council for resolution. In order to possess MRS, a union must be registered and fulfill the other conditions stipulated in Article 277 of the Labour Law 1997.

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

An arbitral award which settles an interest dispute takes the place of a collective bargaining agreement and shall remain in effect for one year from the date on which it becomes final unless the parties agree to make a new collective bargaining agreement replacing the award.

Based on this provision, the Arbitration Council considers that if it issues an arbitral award to settle an interests dispute, the award will form a one-year collective agreement.

Generally, a collective agreement must be applicable to all workers at the enterprise, and the right to strike cannot be exercised for the purposes of revising an unexpired collective agreement (see AA 152/08-Wilson, reasons for decision, issue 2).

According to the facts, the union represents 428 workers of 1,400 workers. The union does not possess a certificate of MRS.

In conclusion, the Arbitration Council orders the employer to continue its practice of maintaining wages when the workers take sick leave with a proper doctor's certificate. The Council declines to consider the workers' demand that the employer maintain full attendance bonus when they take authorised sick leave.

Issue 2: The workers demand that the employer provide a 2,000 riel meal allowance when they work overtime on Sundays.

The Arbitration Council considers whether the employer is obligated to provide a 2,000 meal allowance for overtime work on Sundays.

Point 2 of Notification No. 041/11 dated 7 March 2011 issued by the Ministry of Labour and Vocational Training, state, "Workers who choose to work overtime at the employer's request will receive either a daily 2,000 riel meal allowance or a free meal."

Based on this notification, the employer is required to provide either a daily 2,000 riel meal allowance or a free meal to workers who opt to work overtime at the employer's request.

According to evidence and statements of the employer, the Arbitration Council finds that the employer has paid a total payment of US\$ 5, of which US\$ 0.82 is paid for meal allowance which is equivalent to 3,200 riel under the rate of US\$ 1/4,000 riel. This practice has been in place for one year. The Arbitration Council finds that the provision of 3,200 riel meal allowance is more than what is required by the said notification. Therefore, the Arbitration Council orders the employer to maintain the practice of providing a US\$ 0.82 (3,200 riel) meal allowance to those who choose to work overtime on Sundays.

Issue 4: The workers demand that the employer allow them to take authorised leave for a personal commitment.

In this case, the workers demand that the employer allow them to take authorised leave for a personal commitment.

Article 2 paragraph 2 of the Labour Law states:

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

In previous arbitral awards, the Arbitration Council has ruled that the employer has the right to direct and supervise its enterprise as long as it is done lawfully and reasonably (see *Arbitral Awards 37/07-JRB, reasons for decision, issue 3; 99/09-Kingsland, reasons for decision, issue 4*).

The Arbitration Council applies these ruling in this case.

According to statements and the Internal Work Rules submitted by the employer, the workers are required to submit a leave form one day before taking leave. Moreover, the workers have to go through their supervisors, heads of sections, and the head of production before such leave will be granted. If their superiors do not sign their leave request form, they can go directly to the head of administration for permission. In this case, the Arbitration Council determines that in taking leave, the workers must follow the procedure set out by the employer because leave permission is subject to management prerogatives, which rely on operational requirements. However, the Arbitration Council rules that it is unreasonable not to allow the workers to take leave if there are sufficient workers to fill in the assembly line.

In conclusion, the Arbitration Council orders the employer to continue to facilitate the workers' leave request for a personal commitment.

Issues 5 and 7: The workers demand that the employer refrain from forcing them to work overtime.

The Arbitration Council considers this issue as follows:

Clause 4 of *Prakas* No. 80 dated 1 March 1999 issued by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, states:

An arrangement for overtime work shall be based on a willingness which means the owner or manager of an establishment shall not coerce or discipline the workers or employees who are not willing to work overtime.

Based on this clause, the employer must not coerce or discipline those who have not chosen to work overtime (see *Arbitral Awards 118/07-Ja Ding, reasons for decision, issue 2; 107/08-Seratex, issue 1*).

The Arbitration Council applies these rulings in this case.

According to the facts, the workers claim that the employer did not follow the rule in which overtime work is only to be performed on a voluntary basis. For instance, the employer rebukes them when they choose not to work overtime. According to the employer's evidence and submitted documents, the factory has a clear policy of overtime work. Those who choose to work overtime have to sign on the employer's request for overtime work. Moreover, major buyers prohibit forced labour and send auditors to carefully check the working conditions in the factories with which they contract.

Having carefully examined evidence submitted by the employer, the Arbitration Council finds that the workers' signature is required before they can begin overtime work. The Arbitration Council rules that overtime work must be on a voluntary basis. As such, if the workers find that the employer does coerce them to work overtime, the workers can file a complaint against the employer.

As outlined above, the Arbitration Council finds that the employer has complied with the said *Prakas* and the workers have not presented the identity of any workers allegedly coerced into working overtime.

In conclusion, the Arbitration Council orders the employer to maintain the practice in which the workers can choose to work overtime.

Issue 6: The workers demand that the employer pay their monthly wages by 4:00 p.m. In the event of a delay in the payment of the wages, the workers demand that the employer pay for the delay.

The Arbitration Council considers whether the employer is obligated to pay wages during working hours.

Article 115 paragraph 3 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 be made a day earlier."

In previous arbitral awards, the Arbitration Council has ruled that, "payment of wages shall be made on the day when the workers work and the **day** when the workers work refers to the duration within working hours (*see Arbitral Award 143/08-Charm Textile, reasons for decision, issue 5*)."

The Arbitration Council applies this ruling in this case.

Article 137 of the Labour Law states, "...the number of hours worked by workers of either sex cannot exceed eight hours per day, or 48 hours per week."

Based on Articles 115 and 137 of the Labour Law, the Arbitration Council rules that the employer must pay wages to the workers during working hours.

According to the statements of the employer, wages are paid on the 10th every month. During some months, the employer makes early wage payments, i.e. on the 6th, 7th, 8th, 9th etc. The employer claims that wage payments are made at 3:30 p.m. and finished at 4:00 p.m. In this case, the workers have not objected to the employer's evidence. Therefore, the Arbitration Council determines that the employer has fulfilled its obligation under the Labour Law.

In conclusion, the Arbitration Council orders the employer to maintain its practice of providing wages to the workers during working hours.

Issue 9: The workers demand that the employer instruct the supervisor of group 15 not to verbally abuse them.

The workers demand that the employer instruct the supervisor of group 15 not to verbally abuse them. The Arbitration Council considers whether the employer is obligated to accommodate this demand.

The Arbitration Council rules that the employer has the right to supervise and direct its enterprise as long as it is done lawfully and reasonably (see reasons for decision regarding issue 4).

According to the employer's statements it will not allow its staff members to verbally abuse any workers. In this case, the workers claim that the supervisor of group 15 verbally abused them.

According to the facts, the workers claim that the supervisor of group 15 directed abusive language towards them when he was not satisfied with their work quality. The workers want that supervisor to educate them instead. The employer was absent at the hearing. As such, the Arbitration Council is unable to hear the employer's response to the workers' claim. The Arbitration Council is of the view that it is not appropriate that the supervisor rebuked the workers due to a slight mistake. The employer should take disciplinary action against the workers rather than allowing the supervisor to use abusive language. The employer should prevent such inappropriate behaviour.

In conclusion, the Arbitration Council orders the employer to instruct the supervisor of group 15 not to use abusive language towards the workers.

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

DECISION AND ORDER

Part I. Rights dispute:

Issue 1:

- Order the employer to continue its practice of maintaining wages when the workers take authorised sick leave and present a proper doctor's certificate.
- Decline to consider the workers' demand that the employer maintain their full attendance bonuses when they take authorised sick leave.

Issue 2: Order the employer to maintain the practice of providing a US\$ 0.82 (3,200 riel) meal allowance to those who choose to work overtime on Sundays.

Issue 4: Order the employer to continue to facilitate the workers' personal leave requests.

Issue 5 and 7: Order the employer to maintain the practice of allowing the workers to choose whether to work overtime.

Issue 6: Order the employer to maintain the practice of providing wages to the workers during working hours.

Issue 9: Order the employer to instruct the supervisor of group 15 not to verbally abuse the workers.

Type of award: non-binding award

The award will become binding eight days after the date of its notification unless one of the parties lodges a written opposition with the Minister of Labour through the Secretariat of the Arbitration Council within this period.

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: