KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 71/09-Hytex Apparel

Date of award: 16 July 2009

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Hem Hour Naryth**

Arbitrator chosen by the worker party: **Tuon Siphann**

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

DISPUTANT PARTIES

Employer party:

Name: **Hytex Apparel (Cambodia) Ltd. (the employer)**

Address: Trapang Tuol Village, Kombol Commune, Angsnoul District, Phnom Penh

Telephone: 012 857 327 Fax: N/A

Representatives:

1. Ms Peak Sreyheak — Administration staff
2. Ms Sok Sreyching — Administration staff

Worker party:

Name: **Khmer Youth Trade Union Federation (KYFTU)**

Local Union of KYFTU

Address: Trapang Tuol Village, Kombol Commune, Angsnoul District, Phnom Penh

Telephone: 012 907 902 Fax: N/A

Representatives:

1. Mr Our Phoeun — Federation Official
2. Mr Pich Sokunthea — Federation Official
3. Mr Yoeun Noeun — President of the Local Union of KYFTU
4. Mr Kroeung Vutha — Vice-President of the Local Union of KYFTU
5. Ms Chea Chanthoeun — Secretary of the Local Union of KYFTU

6. Mr Chea Rithy	Worker
7. Mr Oum Sophal	Mechanic

ISSUES IN DISPUTE

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

1. The workers demand that the employer reinstate the mechanics Yoeun Noeun and Kroeung Vutha.
2. The workers demand that the employer convert probationary workers with two months of service to permanent workers. The employer does not agree.
3. The workers demand that the employer pay full wages (including backpay) during periods in which it has no work for them. The employer does not agree.
4. The workers demand that the employer make it easier for them to obtain permission to take leave. The employer does not agree.
5. The workers demand that the employer provide payment in lieu of annual leave. The employer does not agree.
6. The workers demand that when the employer dismisses a worker without providing proper reasons, it pay that worker's wages and other benefits in accordance with the Labour Law. The employer does not agree.
7. The workers demand that the employer provide a sufficient supply of medicine and other medical equipment. The employer does not agree.
8. The workers demand that the employer deduct from the attendance bonus in proportion to the number of days they are absent. The employer does not agree.
9. The workers demand that the employer build a day-care centre and nursing room in the factory. The employer does not agree.
10. The workers demand that the employer provide a monthly US$ 6 allowance to each worker for accommodation or transportation. The employer does not agree.
11. The workers demand that the employer not pressure or take any measures against them when it assigns them to work which is outside of their expertise. The employer does not agree.
12. The workers demand that the employer increase by US$ 5 the wages of workers who are able to use three different types of machines. The employer does not agree.
13. The workers demand that the employer increase the seniority bonus of workers with nine years' service to US$ 10. The employer does not agree.

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. 076 dated 10 May 2007 (Fifth 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. 202 dated 5 June 2009 was submitted to the Secretariat of the Arbitration Council on 9 June 2009.

HEARING AND SUMMARY OF PROCEDURE

Hearing venue: The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Tonle Bassac Commune, Chamkarmorn District, Phnom Penh

Date of hearing: 19 June 2009 at 2:00 p.m.

Procedural issues:

On 5 June 2009, the Department of Labour and Vocational Training of Kandal Province received a complaint from the Local Union of KYFTU outlining the workers' demands for the improvement of working conditions by the employer. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to conciliate the labour dispute and the last conciliation session was held on 5 June 2009. None of the 13 issues were resolved at the session and the non-conciliated issues were referred to the Secretariat of the Arbitration Council on 9 June 2009.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the 13 non-conciliated issues, held on 19 June 2009 at 8:00 a.m. Both parties were present as summoned by the Arbitration Council.

At the hearing, the Arbitration Council conducted a further conciliation of the non-conciliated issues, resulting in issues 2, 4, 7, 8, 9, and 11 being resolved. The Arbitration Council will consider the remaining issues in dispute 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:

- Hytex Garments (Cambodia) Pte. Ltd. employs approximately 200 workers, but following a strike on 5 June 2009 at 7:00 a.m., only 50 workers remain at the factory.
- The Local Union of KYFTU is the claimant in this case. The union claims to have 116 members, but following the strike it only has 32.
- The Local Union of KYFTU does not hold most representative status (MRS).

Issue 1: The workers demand that the employer reinstate Yoeun Noeun and Kroeung Vutha to their positions in the machine section since they are union leaders.

- The workers claim that the union notified the employer, via Head of Administration Khoun Vireak, of the results of the election for union leaders: first, on 25 May 2009, the election of Yoeun Noeun as president, Kroeung Vutha as vice-president, and Chea Rithy as secretary, and second, on 2 June 2009, the replacement of Chea Rithy, who did not qualify for the position of secretary, with Chea Chanthoeun.
- The employer claims that it did not receive the first notification, but it did receive the second one. It argues that it does not recognise the election results because the union leaders are not qualified in accordance with Article 269 of the Labour Law.
- The workers applied for union registration with the Ministry of Labour on 2 June 2009, but the union has not yet been registered officially.
- The workers maintain that the employer's dismissal of Yoeun Noeun and Kroeung Vutha was an act of discrimination against the union.

Case of Yoeun Noeun:

- Yoeun Noeun commenced work as a mechanic on 23 February 2009 on a three month probationary contract which expired on 23 May 2009.
- The employer provided Yoeun Noeun with a new contract as a regular worker, valid for three months from 23 May to 23 August 2009.
- On 4 June 2009, the employer dismissed Yoeun Noeun on the basis that there was no work for him anymore. The employer stated at the hearing that it paid his wages

and benefits until 23 August 2009, even though it terminated his contract before expiry.

- The workers claim that there is still a lot of work in the machine section. There were previously three mechanics, but this was later reduced to two: Yoeun Noeun and a Chinese worker. The employer does not object to this statement.

Case of Kroeung Vutha:

- Kroeung Vutha commenced work as an electrician on 24 November 2008 on a three month probationary contract which expired on 24 February 2009.
- The employer provided Kroeung Vutha with a new contract as a regular worker, valid for six months from 24 February to 26 August 2009.
- On 4 June 2009, the employer dismissed Kroeung Vutha on the basis that there was no more work for him. The employer stated at the hearing that it paid his wages in accordance with the law.

Case of Chea Rithy:

- Chea Rithy commenced work in the brick kiln section on 16 December 2008. His contract was due to expire on 16 June 2009. Chea Rithy was elected union secretary and was dismissed by the employer on 4 June 2009 on the basis that there was no more work for him. However, the workers do not demand his reinstatement because he agreed to resign.

Issue 3: The workers demand that the employer provide full wages on the days it does not have work for them and back pay their wages for the days they were forced to go on leave without pay.

- The employer states that occasionally it does not have enough work for the workers to do, for a period ranging from half a day to three days. The workers are not paid during these periods. In this case, the employer deducts the workers' annual leave for these days, but this does not apply to those workers who do not have available accrued leave. Based on the evidence submitted by the employer, workers with accrued annual leave had their leave deducted for 9, 10, and 11 May 2009. Generally, the employer implemented these work suspensions without submitting a letter to the Ministry of Labour and Vocational Training. The workers do not object to this statement. The employer claims that the workers agreed to the suspension.
- The workers acknowledge that all workers provided thumbprints agreeing to take unpaid leave for the period in which the employer did not have work for them, but demand full back payment of wages even though they agreed to take three days' unpaid leave. They also demand full wages in the future for periods in which the

employer does not have work for them. The workers promised to send a list of all claimants to the Arbitration Council by 24 June 2009. However, the Council is yet to receive the list.

- The workers argue that the employer must pay full wages if it does not have work for them and does not suspend their contracts in accordance with the Labour Law.

Issue 5: The workers demand that the employer provide payment in lieu of unused annual leave.

- Previously, the employer paid cash to workers who did not use all their annual leave. However, since 1 March 2009, the employer has changed its policy and has directed the workers to use their annual leave.
- The workers demand that the employer pay them in cash when they do not exhaust their annual leave, because this was its practice for some time.
- The employer claims that on 1 February 2009, it ordered a supervisor to inform the workers of the change in policy regarding annual leave. Som Sophal stated at the hearing that the supervisor told him about the change, but a worker named Pheang Sreyhak said that she was not aware of the change implemented by the employer.
- The employer states that it will make payments in lieu of unused annual leave when the workers' contracts are terminated. The workers do not dispute this statement.

Issue 6: The workers demand that the employer provide payment in lieu of prior notice when it terminates fixed duration contracts for an unspecified reason.

- The workers clarified at the hearing that they do not demand that the employer pay wages and benefits; rather that it provide payment in lieu of prior notice when it terminates workers' contracts for an unspecified reason. The workers add that the employer terminated the fixed duration contracts of Chea Rithy and Vong Mom without providing payment in lieu of prior notice.
- Chea Rithy commenced work on 16 December 2008. His last three month fixed duration contract was due to expire on 15 May 2009. After work on 15 May 2009, the date his contract was due to expire, the employer notified him of the termination of his contract, offering:
  - unpaid wages;
  - indemnity for dismissal equal to 5% of his wages; and
  - payment in lieu of one month and one and a half days of annual leave.

  Chea Rithy did not accept the offer.

- Vong Mom commenced work in March 2009 on a three month probationary contract, which was due to expire on 15 June 2009. After work on 15 May 2009 when her probationary contract expired [sic], the employer informed her of the termination of her contract and offered to pay her final salary. Vong Mom signed to accept the salary, but later returned the payment to the employer.
- The workers further demand that the employer provide payment in lieu of prior notice on the grounds that it did not notify the workers in advance of the termination of their contracts.
- The employer claims that it paid the workers an indemnity for dismissal in accordance with the Labour Law. Thus, it cannot afford to meet the workers' demand.

Issue 10: The workers demand that the employer provide each worker with a monthly US$ 5 accommodation or transportation allowance.

- The workers demand that the employer provide a US$ 5 allowance for accommodation or transportation because it used to provide the workers with transportation from the workplace to their houses and vice versa.

Issue 12: The workers demand that the employer provide an additional US$ 5 per month to workers skilled in three machines.

- The employer states that it used to provide a monthly US$ 2 allowance to any worker who could use three machines. However, it stopped providing this allowance for one year on the basis of economic hardship caused by the global financial crisis, which involved a decrease in purchase orders. If the employer had more work for the workers to do, it would consider resuming the allowance.
- The workers acknowledge that currently the employer does not have much work for the workers to do. However, they demand that the employer provide an additional US$ 5 per month to workers who can use three machines in a bid to encourage them to work harder.
- The employer maintains that it cannot afford to provide the US$ 5 demanded.

Issue 13: The workers demand that the employer provide an additional seniority bonus of US$ 1 for each year of service from five years onwards.

- The employer provides a seniority bonus in accordance with the number of years of service. If a worker has worked for one year, a US$ 2 bonus is provided, and a further US$ 1 is provided for each of the second, third and fourth years. The workers demand that the employer provide an additional US$ 1 to any worker who has

worked for over five years because the Labour Law does not forbid the employer from providing such a bonus to the workers.

- The workers seek that the employer provide a seniority bonus as follows:

Year(s) of service	Employer's practice	Workers' demand
One year	US$ 2 per month	Agree
Two years	US$ 3 per month	Agree
Three years	US$ 4 per month	Agree
Four years	US$ 5 per month	Agree
Over five years	No increase	US$ 1 for subsequent years

- The employer claims to provide a seniority bonus in accordance with the Labour Law and Notification No. 017 issued by the Ministry of Labour, and states that if the law requires it to add US$ 1 for workers with more than five years' service, it will do so.

REASONS FOR DECISION

Issue 1: The workers demand that the employer reinstate Yoeun Noeun and Kroeung Vutha to their positions in the machine section since they are union leaders.

At the hearing, the union claimed that the dismissals of Yoeun Noeun and Kroeung Vutha were acts of discrimination against the union. The employer responded that it dismissed the two workers because it did not have enough work for them to do. The Arbitration Council will consider: (1) whether the dismissals were acts of union discrimination and (2) whether the dismissals took place in accordance with the law.

(1) Were the dismissals of Yoeun Noeun and Kroeung Vutha acts of union discrimination?

Paragraph one of Article 266 of the Labour Law states:

> Workers and employers have, without distinction whatsoever and prior authorisation, the right to form professional organisations of their own choice for the exclusive purpose of studying, promoting the interests, and protecting the rights, as well as the moral and material interests, both collectively and individually, of the persons covered by the organisation's statutes.

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.

With regard to Articles 12 and 279 of the Labour Law, in previous cases the Arbitration Council has ordered employers to reinstate workers where their dismissal was an act of discrimination against the union. Articles 12 and 279 of the Labour Law forbid employers to base the hiring, punishment, or dismissal of workers on union membership or activities (s*ee Arbitral Awards 28/07-Dae Kwang, reasons for decision, issue 3; 123/07-E Garment, reasons for decision, issue 1; 148/07- Pay Her; and 30/08-E Garment, reasons for decision, issue 1)*.

With regard to allegations of union discrimination, in previous cases the Arbitration Council has held that the workers must provide evidence of the discrimination (s*ee Arbitral Awards 112/06-River Rich, reason for decisions, issue 1; 01/07-Supreme, reasons for decision, issue 1; 148/07-Pay Her, reasons for decision, issue 1; 158/08-M & V, reasons for decision, issue 4; and 40/09-Goldfame, reasons for decision, issue 1)*.

The Arbitration Council will generally consider statements made at the hearing and examine the evidence related to the issue to determine whether discrimination led to the dismissal *(see Arbitral Awards 10/09-New Wide, reasons for decision, issues 1 and 2; 158/08-M & V; and 40/09-Goldfame, reasons for decision, issue 1)*.

In this case, the union notified the employer of the results of the election for union leaders: first, on 25 May 2009, the election of Yoeun Noeun as president, Kroeung Vutha as vice-president, and Chea Rithy as secretary, and second, on 2 June 2009, the replacement of Chea Rithy, who did not qualify for the position of secretary, with Chea Chanthoeun.

Following the notification, on 4 June 2009 the employer dismissed the two workers on the basis that there wasn't enough work for them. The employer provided Yoeun Noeun with 5% of his wages and benefits despite dismissing him before the expiry of his contract. As for Kroeung Vutha, the employer states that it paid him in accordance with Article 73 of the Labour Law. The workers claim that there is still a lot of work to do in the machine section.

Based on the facts presented at the hearing, the Arbitration Council does not find any evidence or argument that other workers were dismissed along with or subsequent to the dismissal of the two workers.

Generally, the Arbitration Council will reject demands that are not supported by sufficient evidence (s*ee Arbitral Awards 101/07-Planet Textile; 10/09-New Wide, reasons for decision, issues 1 and 2; 158/08-M & V; and 40/09-Goldfame, reasons for decision, issue 1)*.

In this case, the Arbitration Council agrees with the interpretation made in previous awards. There is no concrete evidence based on which the Council can conclude that the dismissal of the two workers was an act of discrimination.

2) Were the dismissals of Yoeun Noeun and Kroeung Vutha in accordance with the Labour Law?

Article 293, paragraph one of the Labour Law states:

> The dismissal of a shop steward [workers delegate] or a candidate for shop steward can take place only after authorisation from the Labour Inspector. The same protective measures apply to former shop stewards three months following the end of their terms and to unelected candidates during [the] three months following the proclamation of the results of the ballot. Any reassignment or transfer that would end the shop steward's term is subject to the same procedure.

Clause 3, paragraph three of *Prakas* No. 305 SKBY dated 22 November 2001 states:

> All workers who are candidates for union leadership positions shall receive the same protection from work dismissal as worker delegates [i.e. shop stewards]. This protection begins 45 days prior to the election and ends 45 days after the election if the candidate is not elected. The union shall notify the employer of the worker's candidacy through all reliable means. However, the employer shall only be required to comply with this provision once for each election of union leaders.

Furthermore, Clause 4, paragraph one of *Prakas* No. 305 SKBY states:

> From the time that the application for registration is submitted, all workers who are founding members of a union, as well as those workers who voluntarily join the union during the application period, shall enjoy the same protection as worker delegates. This protection lasts for 30 days from the date of union registration.

Based on paragraph three of Clause 3 and paragraph one of Clause 4 of *Prakas* No. 305 dated 22 November 2001, the Arbitration Council finds that all union leaders, founders, and workers who volunteered to join the union during the application period, receive special protection against dismissal.

In previous awards, the Arbitration Council has interpreted Clauses 3 and 4 of *Prakas* No. 305 dated 22 November 2001 to mean that workers are protected as long as: (1) they

are entitled to receive special protection; (2) the dismissal is made during the period of special protection; and (3) the union used all reliable means to inform the employer of the candidacy of the workers entitled to protection *(see Arbitral Awards 07/06-Dai Young, reasons for decision, issue 1; 09/06-Grand Diamond City, reasons for decision, issue 1; and 148/07-Pay Her)*.

The Arbitration Council finds that the two workers have fulfilled the above three conditions in this case:

The first condition is fulfilled because the Arbitration Council finds that Yoeun Noeun and Kroeung Vutha were candidates for election in accordance with paragraph three of Clause 3 of *Prakas* No. 305 SKBY dated 22 November 2001.

The second condition is fulfilled because the employer dismissed them during the period of special protection. The union submitted a notification of the election on 25 May 2009. The two workers were dismissed on 4 June 2009, during the period in which they were entitled to receive special protection under Clauses 3 and 4 of *Prakas* No. 305 SKBY.

The third condition is also fulfilled because the union notified the employer of the candidates by all reliable means. Based on the statements made by the union at the hearing, the Arbitration Council finds that the union notified the employer via a security guard of the two election results, the first on 25 May 2009 when Yoeun Noeun, Kroeung Vutha, and Chea Rithy were elected president, vice-president, and secretary respectively, and the second on 2 June 2009 when Chea Rithy was replaced by Chea Chanthoeun as secretary. Although the employer claims that it did not receive the first notification, it acknowledges that it did receive the second.

Based on the interpretation above, the Arbitration Council finds that the two workers fulfil the three conditions for receiving special protection from dismissal under paragraph three of Clause 3 and paragraph one of Clause 4 of *Prakas* No. 305 dated 22 November 2001. Thus, the Arbitration Council finds that the employer was required to seek permission from the Labour Inspector before dismissing the workers. The Arbitration Council has not been given evidence that the employer received permission from the Labour Inspector.

Therefore, the Arbitration Council finds that the employer dismissed the two workers in violation of the Labour Law.

Moreover, Clause 34 of *Prakas* No. 099 on the Arbitration Council, dated 21 April 2004, states:

> In matters referred to the arbitration panel, the panel shall have the power and authority to fully remedy any violation of provisions provided in the Labour Law, implementing regulations under the Labour Law, collective bargaining

> agreements or other obligations arising from the professional relationship between employer and employee. Within the limitations of the Labour Law and this *Prakas*, it has the power and authority to provide any civil remedy or relief which it deems just and fair, including: A. orders to reinstate dismissed employees to their former or any other appropriate position;

Thus, the Arbitration Council orders the employer to reinstate the two workers to their respective positions *(see Arbitral Awards 19/04-Kbal Koah (Branch 2), reasons for decision, issue 1; 17/07-Charm Textile, reasons for decision, issue 1; and 148/07-Pay Her)*.

Issue 3: The workers demand that the employer provide full wages on the days it does not have work for them and back pay their wages for the days they were forced to go on leave without pay.

In this case, the workers demand that the employer provide full wages and backpay for the periods in which it has had no work for them to do, even though the workers affixed their thumbprints to an agreement to take unpaid leave. Therefore, the Arbitration Council will consider the issue as follows.

The suspension of labour contracts must be carried out in accordance with Article 71 of the Labour Law, relevantly Article 71(11):

> When an enterprise faces a serious economic or material difficulty or any particularly unusual difficulty, which leads to a suspension of the enterprise operation. This suspension shall not exceed two months and [shall] be under the control of the Labour Inspector.

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.

Based on Article 71(11) of the Labour Law, the employer must notify the Labour Inspector of the suspension, who will examine and verify the situation. This means that the Labour Inspector is tasked with examining the suspension to ensure that the employer satisfies the conditions in Article 71(11), i.e. economic difficulty *(see Arbitral Awards 27/08-Archid, reasons for decision, issue 6; 136/08-Supertex, reasons for decision, issue 2; and 51/09-Yung Wah)*.

In previous awards, the Arbitration Council has determined that if the employer suspended the contracts in accordance with the Labour Law and submitted itself to examination by the Labour Inspector, it is not obliged to provide wages to the workers (see Article 72(1) of the Labour Law). However, if the employer does not comply with the provision

of the Labour Law regarding work suspension, it is obligated to provide 100% of the workers' wages even if there is no work to be done *(see Arbitral Awards 74/07-Global Apparels, reasons for decision, issue 1; 28/08-FineGis, reasons for decision, issues 1 and 2; 53/08-Yung Wah, reasons for decision, issue 1; 136/08-Supertex, reasons for decision, issue 2; and 51/09- Yung Wah)*.

In this case, the Arbitration Council finds that the employer did not have much work for the workers to do for three days, from 9 to 11 May 2009, and each worker affixed their thumbprint to an agreement that those with remaining annual leave would have three days of leave deducted and those without remaining annual leave would not be paid wages for those days. The Arbitration Council finds that despite this agreement the employer was still required to comply with Article 71(11) of the Labour Law when suspending the contracts, i.e., it was required to notify the Labour Inspector so that the suspension could be examined and approved.

Therefore, the Arbitration Council finds that although the workers agreed to take unpaid leave, the agreement could not be valid as it is inconsistent with the Labour Law.

Article 13, paragraph one of the Labour Law states:

> The provisions of this law are of the nature of public order, excepting derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or a convention that do not comply with the provisions of this law or any legal text for its enforcement, are null and void.

Hence, the Arbitration Council finds that the agreement by the workers to take unpaid leave for the three day period that the employer had no work for them to do is null and void.

Moreover, Clause 34 of *Prakas* No. 099 dated 21 April 2004 on the Arbitration Council states:

> In matters referred to the arbitration panel, the panel shall have the power and authority to fully remedy any violation of provisions provided in the Labour Law, implementing regulations under the Labour Law, collective bargaining agreements or other obligations arising from the professional relationship between employer and employee. Within the limitations of the Labour Law and this *Prakas*, it has the power and authority to provide any civil remedy or relief which it deems just and fair…

Therefore, the Arbitration Council orders the employer to immediately cease suspending the workers' contracts in violation of the Labour Law and to ensure that it complies with the provisions of the Labour Law regarding suspension when it has no work for the workers in future.

In conclusion, the Arbitration Council decides to order the employer to back pay 100% of the workers' wages for the three day period in which it had no work for them.

Issue 5: The workers demand that the employer provide payment in lieu of unused annual leave.

In this case, the workers demand that the employer provide payment in lieu of annual leave because this was its previous practice. Thus, the employer considers as follows.

Article 166, paragraph one of the Labour Law states:

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

Article 167, paragraph three of the Labour Law states that "[a]part from this, any collective agreement providing compensation in place of paid leave, as well as any agreement renouncing or waiving the right to paid annual leave, shall be null and void."

In previous awards, the Arbitration Council has found that claims for the employer to provide payment in lieu of annual leave are inconsistent with Article 167, paragraph three of the Labour Law. Thus, the demand is unreasonable and inappropriate *(see Arbitral Awards 45/05-B & N, reasons for decision, issue 1; 94/04-Eternity, reasons for decision, issue 2; 98/07-Sky Sino, reasons for decision, issue 1; and 40/09-Goldfame, reasons for decision, issue 4)*.

The Arbitration Council agrees in this case with its interpretation in previous cases, because the Labour Law forbids the employer from offering payment in lieu of annual leave whilst the workers are still employed, despite any agreement to the contrary. Therefore, the Arbitration Council finds that the employer's previous practice of providing payment in lieu of annual leave is against Article 167 of the Labour Law.

Article 167, paragraph three of the Labour Law provides that "[a]part from this, any collective agreement providing compensation in place of paid leave, as well as any agreement renouncing or waiving the right to paid annual leave, shall be null and void."

In Arbitral Award 08/07-Siu Quinh, the Arbitration Council found that "[t]he right to take annual leave could be converted to remuneration in the case of termination of the worker's contract" *(see Arbitral Award 08/07-Siu Quinh, reasons for decision, issue 1)*.

Moreover, Article 167, paragraph four of the Labour Law provides:

> Acceptance by the worker to defer all or part of his rights to paid leave until the termination of the contract is not considered as renunciation. Deferment of this

> leave cannot exceed three consecutive years and can only apply to leave exceeding twelve working days per year.

This article authorises the workers to retain their accrued annual leave for up to three years. Thus, the employer should encourage its workers to use their annual leave rather than provide them with payment in lieu.

In this case, the Arbitration Council finds that from 1 February 2009, the employer urged the workers to use their annual leave rather than accept payment in lieu. This change in the employer's policy is in accordance with the Labour Law.

Thus, the Arbitration Council decides to reject the workers' demand that the employer provide payment in lieu of unused annual leave.

Issue 6: The workers demand that the employer provide payment in lieu of prior notice when it terminates fixed duration contracts for an unspecified reason.

The workers demand that the employer provide payment in lieu of prior notice because it has terminated contracts for unspecified reasons without prior notice. The employer argues that it paid the workers an indemnity for dismissal in accordance with the Labour Law. Thus, it cannot provide the payments demanded. The Arbitration Council will consider the issue as follows.

Article 73, paragraph five of the Labour Law states:

> If the contract has a duration of more than six months, the worker must be informed of the expiration of the contract or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have a duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67.

Based on this article, the Arbitration Council finds that the Labour Law requires the employer to notify a worker at least ten days prior to the expiration or non-renewal of a fixed duration contract with a duration of over six months. However, the article does not require the employer to notify the workers of the expiry or non-renewal of a contract that has a duration of less than six months *(see Arbitral Award 107/04-Jacqsintex, reasons for decision, issue 4)*.

Arbitral Award 115/07-Whitex states that "[t]he Arbitration Council rejects the workers' demand that the employer give advance notice of the expiry and non-renewal of employment contracts that are less than a six months in duration" *(see Arbitral Award 115/07-Whitex, reasons for decision, issue 2)*.

In this case, the workers did not provide clear cut evidence of the type of employment contract signed with the employer and how many years of service the workers have.

The Arbitration Council ordered the workers to provide documents and evidence related to the claim by 24 June 2009, but they did not do so by the deadline.

In previous awards, the Arbitration Council has generally rejected workers' demands in the absence of sufficient evidence *(see Arbitral Awards 99/06-South Bay, reasons for decision, issue 5; 74/07-Global Apparels, reasons for decision, issue 2; 94/07-Fortune Garment, reasons for decision, issues 6 and 8; and 101/08-G D M, reasons for decision, issues 1 and 2).*

Thus, the Arbitration Council decides to reject the workers' demand that the employer provide payment in lieu of prior notice when it terminates employment contracts for an unspecified reason.

Issue 10: The workers demand that the employer provide each worker with a monthly US$ 5 accommodation or transportation allowance.

The workers demand that the employer provide a monthly US$ 5 allowance for accommodation or transport as it previously provided free transport between the workers' homes and the factory. Thus, the Arbitration Council will consider whether or not the employer is obliged to provide a US$ 5 allowance.

Article 65, paragraphs two and three of the Labour Law state:

> [a labour contract] can be written or verbal. It can be drawn up and signed according to local custom. If it needs registering, this shall be done at no cost.
>
> The verbal contract is considered to be a tacit agreement between the employer and the worker under the conditions laid down by the labour regulations, even if it is not expressly defined.

Based on the above article of the Labour Law, the Arbitration Council finds that a contract can be made verbally, and a verbal contract will be considered an agreement between the employer and workers which binds the two parties.

In previous awards, the Arbitration Council has found that past practice must be clear and consistent for many years in order to become a verbal contract which binds both parties *(see Arbitral Awards 14/06-Seng Yung, reasons for decision, issue 1; 136/07-Phnom Penh Garment; 143/08-Charm Textile, reasons for decision, issue 1; and 48/09-Roo Hsing, reasons for decision, issue 19)*.

In this case, the Arbitration Council finds that the employer is not bound to continuously implement its past practice of transporting the workers to and from the workplace because it was implemented for a short period; less than two months.

On 1 March 2009, the employer notified the workers that on 1 April 2009 it would stop providing them with transport by truck. The Arbitration Council finds that some workers did not protest, but others were disappointed and complained. Significantly, many more were unaware of the issue until 1 June 2009, when the workers approached the union for help and demanded that the employer provide US$ 5 to each worker in lieu of free transportation.

Arbitral Award 48/09-Roo Hsing states:

> The Arbitration Council finds that three months is a long enough period to conclude that the workers have agreed to the alteration of wages for holidays in accordance with the notification dated 15 November 2008. Thus, the Arbitration Council finds that the agreement made behind closed doors without objection is a new agreement that binds the two parties.

The Arbitration Council agrees in this case with the interpretation above. However, the workers are not demanding that the employer provide transportation to and from work, rather that the employer provide an accommodation or transportation allowance of US$ 5 per month. The Arbitration Council finds that there is no other regulation or law requiring the employer to provide a monthly US$ 5 accommodation or transportation allowance. Thus, the Arbitration Council finds that the workers are demanding more than is required by the law, making this an interests dispute.

With regard to interests disputes, the Arbitration Council considers whether the claimant union holds MRS. In this case, the Arbitration Council finds that the Local Union of KYFTU does not hold MRS.

In previous awards, the Arbitration Council has refused to consider interests disputes if the claimant union does not hold MRS *(see Arbitral Awards 84/07-Yung Wah (Branch 2), reasons for decision, issue 1; 143/08-Charm Textile, reasons for decision, issue 2; 152/08-Wilson Garment, reasons for decision, issue 2; and 48/09-Roo Hsing, reasons for decision, issue 2)*.

The Arbitration Council finds that holding MRS gives a union the legal capacity to negotiate a collective bargaining agreement at an enterprise and gives it legal standing to bring an interests dispute before the Arbitration Council for resolution.

Moreover, 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 Clause 43 above, the Arbitration Council finds that if it issues an arbitral award on an interests dispute, that award will become a one year collective agreement. Generally, a collective agreement applies to all workers at an enterprise and there is no right to strike in order to revise the agreement before it has expired *(see Arbitral Award 152/08-Wilson Garment, reasons for decision, issue 2)*.

Therefore, the Arbitration Council has concluded in the past that a union without MRS does not have the a right to bring an interests dispute before it for resolution *(see Arbitral Awards 57/04-Evergreen; 60/04-United Art, reasons for decision, issue 3; 08/07-Siu Quinh, reasons for decision, issue 3; and 48/09-Roo Hsing, reasons for decision, issue 2)*.

Therefore, the Arbitration Council finds that the Local Union of KYFTU does not have the legal right to bring an interests dispute before the Arbitration Council for resolution. This right can only be exercised by a union holding MRS.

Thus, the Arbitration Council declines to consider the workers' demand that the employer provide a monthly US$ 5 allowance for accommodation or transportation.

Issue 12: The workers demand that the employer provide an additional US$ 5 per month to workers skilled in using three machines.

In this case, the workers demand that the employer provide an additional allowance of US$ 5 per month to workers skilled in using three machines, since the employer used to pay an allowance of US$ 2 per month to these workers. However, the workers acknowledge that the employer stopped providing the allowance over a year ago due to economic difficulties trigged by a decrease in purchase orders during the global financial crisis. The workers also acknowledge that no regulation mandates payment of the additional allowance, but demand it in order to encourage the workers to work harder.

The Arbitration Council finds that the workers' demand is above what is provided by the Labour Law, and there is no regulation or agreement which requires the employer to provide the additional monthly allowance of US$ 5 to workers who can use three machines. The Arbitration Council finds that the workers are demanding more than is stipulated in the law, making this an interests dispute.

Therefore, the Arbitration Council declines to consider the workers' demand that the employer provide an additional monthly allowance of US$ 5 to workers skilled on three machines.

Issue 13: The workers demand that the employer provide an additional seniority bonus of US$ 1 for each year of service from five years onwards.

The employer provides a seniority bonus of US$ 2 to workers with over a year's service and a further US$ 1 for each subsequent year up until the fourth year of service. The employer does not increase the bonus for workers with over five years' service. The workers demand that the employer provide an additional US$ 1 for each year of service above five years. Thus, the Arbitration Council will consider the issue as follows:

Point 3 of Notification No. 745 KKBV dated 23 October 2006 provides that "[b]enefits to which workers are entitled in accordance with points 3, 4, 5, and 6 of Notification No. 017 SKBY dated 18 July 2000 shall be retained."

Point 5 of Notification No. 017 SKBY of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, dated 18 July 2000, states:

> Workers who work at any factory or enterprise for more than one year shall get the following rewards for their service:
>
> 5.1. For seniority of more than one year, the worker shall receive a reward of US$ 2 per month.
>
> 5.2. For seniority of more than two years, the worker shall receive a reward of US$ 3 per month, i.e. US$ 2 for the first year plus US$ 1 for the second year.
>
> 5.3. For seniority of more than three years, the worker shall receive a reward of US$ 4 per month, i.e. US$ 2 for the first year plus US$ 1 for the second year, plus US$ 1 for the third year.
>
> 5.4. For seniority of more than four years, the worker shall receive a reward of US$ 5 per month, i.e. US$ 2 for the first year plus US$ 1 for the second year, plus US$ 1 for the third year plus US$ 1 for the fourth year.

The above notification specifies that workers with more than four years' service will be provided with a seniority bonus of US$ 5 per month. It does not stipulate a separate bonus for workers with more than five years' service. The wording in point 5 does not indicate that workers must be provided with an additional seniority bonus if they have worked for more than five years. Thus, the Arbitration Council finds that the notification does not require the employer to provide an additional US$ 1 seniority bonus for each year over five years of service.

Furthermore, the Arbitration Council finds that no other regulation or agreement requires the employer to provide an additional US$ 1 seniority bonus to workers with over five years' service, and there is no agreement or past practice at the enterprise in line with the demand.

Therefore, the demand that the employer provide an additional seniority bonus of US$ 1 to workers who have worked for over five years gives rise to an interests dispute (see reasons for decision, issues 10 and 12 above related to interests disputes).

Thus, the Arbitration Council declines to consider the workers' demand that the employer provide an additional seniority bonus of US$ 1 for each year of service from five years onwards.

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

DECISION AND ORDER

Issue 1: Order the employer to reinstate Yoeun Noeun and Kroeung Vutha to their respective positions in the in the machine section as they are union leaders.

Issue 3: Order the employer to to back pay 100% of the workers' wages for the three day period in which it had no work for them from 9 to 11 May 2009.

Issue 5: Reject the workers' demand that the employer provide payment in lieu of unused annual leave.

Issue 6: Reject the workers' demand that the employer provide payment in lieu of prior notice when it terminates employment contracts for an unspecified reason.

Issue 10: Decline to consider the workers' demand that the employer provide a monthly US$ 5 allowance for accommodation or transportation.

Issue 12: Decline to consider the workers' demand that the employer provide an additional monthly allowance of US$ 5 to workers skilled on three machines.

Issue 13: Decline to consider the workers' demand that the employer provide an additional seniority bonus of US$ 1 for each year of service from five years onwards.

Type of award: non-binding award

This award of the Arbitration Council 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: **Hem Hour Naryth**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....