KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 59/11-Ming Jian

Date of award: 21 June 2011

Dissenting opinion by Arbitrator Koy Neam

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Seng Vuoch Hun**

Arbitrator chosen by the worker party: **Sin Kim Sean**

Chair Arbitrator (chosen by the two Arbitrators): **Koy Neam**

DISPUTANT PARTIES

Employer party:

Name: **Ming Jian (Cambodia) Co., Ltd. (the employer)**

Address: Trapang Thleung Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 012 310 330 Fax: N/A

Representatives:

1. Mr Khlang Dina Administration Staff
2. Mr Tang Tengyong Administration Staff

Worker party:

Name: **Coalition of Cambodian Apparel Worker Democratic Union (C.CAWDU)**

Local Union of C.CAWDU

Address: 2-3G, Street 26 BT, Boeung Tompun Commune, Meanchey District, Phnom Penh

Telephone: 016 342 613 Fax: N/A

Representatives:

1. Mr Sang Yout Dispute Resolution Officer of C.CAWDU
2. Mr Muo Chheang Dispute Resolution Officer of C.CAWDU
3. Mr Nop Samnang President of the Local Union of C.CAWDU
4. Mr Chan Samrith Vice-President of the Local Union of C.CAWDU

5. Mr Chuon Vireak — Activist of the Local Union of C.CAWDU
6. Ms Nop Sokheng — Activist of the Local Union of C.CAWDU

ISSUES IN DISPUTE

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

1. The workers demand that the employer reinstate Chuon Vireak and back pay his wages. The employer refuses to reinstate Chuon Vireak because he was warned once in writing and has been provided with two other letters and one notice.
2. The workers demand that the employer provide full wages when it does not have work for them. The employer states that it will provide only half wages if it does not have work for them.

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 21 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. 497 KB/RK/VK dated 12 May 2011 was submitted to the Secretariat of the Arbitration Council on 18 May 2011.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing: 27 May 2011 at 8:30 a.m.

Procedural issues:

On 25 March 2011, the Department of Labour Disputes received a complaint from C.CAWDU outlining the workers' demands for the improvement of working conditions by the employer. Upon receipt of the claim, the Department of Labour Disputes assigned an expert officer to conciliate the dispute on 28 April 2011. As a result, three of the five issues were resolved. The two non-conciliated issues were referred to the Secretariat of the Arbitration Council on 18 May 2011 via non-conciliation report No. 497 KB/RK/VK dated 12 May 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the two non-conciliated issues, held on 27 May 2011 at 8:30 a.m. Both parties were present at the hearing.

At the hearing, the Arbitration Council conducted a further conciliation of the two non-conciliated issues, but neither was resolved.

As both parties are signatories to the *Memorandum of Understanding On Improving Industrial Relations in the Garment Industry* (MoU), dated 28 September 2010, the Arbitration Council will divide the issues into two types: rights disputes and interests disputes. In accordance with the MoU, both parties have agreed to choose binding arbitration of rights disputes. However, this does not apply to interests disputes. The parties are able to choose non-binding arbitration of interests disputes and can object to an arbitral award on such disputes. In this case, the disputant parties chose binding arbitration of interests disputes. Consequently, any award issued by the Council's on interests dispute will be binding and enforceable immediately upon issuance; that is, neither party has the right to lodge an objection to this award.

Therefore, the Arbitration Council will consider the issues 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:

- Ming Jian (Cambodia) Co., Ltd. commenced operation in 2005. Presently, it employs approximately 590 workers.
- The Local Union of C.CAWDU, the claimant in this case, holds a certificate of registration dated 20 January 2010 and represents 270 workers.

Issue 1: The workers demand that the employer reinstate Chuon Vireak back pay his wages.

- Chuon Vireak commenced work on 21 June 2005 as the group leader in the cutting section. He receives a monthly main wage of US$ 106. He holds an undetermined duration contract.
- In October 2010, the employer assigned him to the additional role of group leader in the ironing section with no additional wages provided. A month later, he requested the employer to change the position title on his ID card to "group leader of the cutting and ironing sections" and to increase his wage by US$ 20. The employer rejected his request.
- On 2 December 2010, four of his group members in the ironing section incorrectly ironed 100 shirts. Chuon Vireak states that on this day he left work at 4:00 p.m. (the conclusion of working hours) for a personal commitment. He further states that the supervisor called him to return to the factory to check the defective shirts.
- On 3 December 2010, the employer dismissed the four workers who had incorrectly ironed 100 shirts. On the same day, the employer also warned Chuon Vireak concerning this issue. Chuon Vireak affixed his thumbprint to a agreement which read:
    1. I will not involve my personal grudges in my work;
    2. I will not damage the factory's products;
    3. I will improve my work performance;
    4. I will respect the management and the Internal Work Rules; and
    5. I will not allow workers to be lazy.
- On 12 December 2010, a member of the administration staff gave US$ 20 of their own money to Chuon Vireak. The administration staff member told him that he would not be given this money next month. He told the administration staff member that he would stop working in the ironing section after he completed his remaining work.
- The employer states that Chuon Vireak's performance has been getting poorer and poorer since December 2010 and since then he has refused to follow the employer's direction.
- Chuon Vireak asserts that the employer had no work in the ironing section in January 2011.
- In February 2011, the employer required him to take one week off.

- In early March, the employer had some work for workers to do in the ironing section.
- Chuon Vireak states that on 9 March 2011 the employer did not allow him to enter the factory for one hour, without providing any reasons. After an intervention by the worker delegates, the employer allowed him to enter the factory.
- Chuon Vireak states that on 10 March 2011 the employer required him to sign an agreement that he would work in the ironing and cutting sections.
- The employer states that he did not do his work when told to do so and that he told his group members to follow him. The workers state that he did his work as usual.
- The employer claims that Chuon Vireak slept during working hours on 13 March 2011. Chuon Vireak refutes this claim.
- On 14 March 2011, the security guards and administration staff members prevented Chuon Vireak from entering the workplace. After this incident, the union made a request for negotiation of this issue with the employer, but it rejected the request.
- The employer argues that it dismissed him because he (1) refused its direction, (2) did not pay enough attention to his work during working hours, (3) incited other workers to stop working, and (4) violated Clause 10 of the Internal Work Rules.

Issue 2: The workers demand that the employer pay full wages when it does not have work for them.

- On 1 March 2011, the Local Union of C.CAWDU entered into an agreement with the employer, requiring the employer to provide 75% of the workers' daily wages when there is only work in either the morning or the afternoon. The two parties did not submit this agreement to the Arbitration Council.
- The events surrounding the lack of work occurred in March and April 2011. The parties did not specify the dates that there was no work, but stated that it was during March and April.
- The workers assert that the employer has provided only 50% of their wages despite the agreement dated 1 March 2011. The employer does not provide 75% of their wages in accordance with the agreement. The employer refutes this assertion, arguing that it is implementing the agreement by providing 75% of their wages when there is no work in the afternoon and 50% when there is no work for a whole day.
- The workers make this demand because the employer has allegedly failed to abide by the agreement dated 1 March 2011. Further, they have spent money traveling to work but the employer has had no work for them.

- The workers state that the employer has also failed to comply with Article 83 by not having enough work for them. They argue that Arbitral Awards 86/06, 107/06, and 119/06 confirm that the workers are entitled to full wages if the legal procedure for work suspensions is not followed. They further contend that Arbitral Award 82/06 confirms that any agreement that provides less than full wages during an illegal work suspension violates Article 13 of the Labour Law and is considered null and void. Thus, the workers demand full wages when the employer suspends their employment contracts.
- The workers clarifed that they do not demand that the employer implement the agreement or pay damages. Rather, they demand that the employer pay full wages when a work suspension is not authorised by the Labour Inspector.
- The employer concedes that it has not requested authorisation from the Labour Inspector to suspend the workers' contracts because the period of work suspension has been too short. As it is a sub-contracting enterprise, it does not know when it will not have work. The employer states that it has provided wages in accordance with the agreement.

REASONS FOR DECISION

Before considering these two issues, the Arbitration Council will consider whether they give rise to rights disputes.

In previous arbitral awards, the Arbitration Council has ruled that a rights dispute is a dispute which has a basis in the law, an agreement [employment contract], or a collective agreement *(see Arbitral Awards 05/11-M & V (Branch 1), reasons for decision, issue 1 and 13/11-Gold Kamvimex, reasons for decision, issues 1 & 2)*.

The Arbitration Council applies this ruling in this case. As these issues concern the reinstatement of Chuon Vireak and the provision of full wages during unauthorised work suspensions, both of which have a basis in the workers' employment contracts and the Labour Law, the Council considers the issues to be rights disputed.

Issue 1: The workers demand that the employer reinstate Chuon Vireak back pay his wages.

The Arbitration Council considers this issue as follows:

Article 74 of the Labour Law states:

> The labour contract of unspecified duration can be terminated at will by one of the contracting parties. This termination shall be subject to the prior notice

made in writing by the party who intends to terminate the contract to the other party.

However, no layoff can be taken without a valid reason relating to the worker's aptitude or behavior, based on the requirements of the operation of the enterprise, establishment or group.

At the hearing, the employer argued that it dismissed Chuon Vireak because he (1) refused its direction, (2) did not pay enough attention to his work during working hours, (3) incited other workers to stop working, and (4) violated Clause 10 of the Internal Work Rules The employer did not mention the date on which incidents (1), (2), and (4) took place.

Clause 10 of the employer's Internal Work Rules dated 14 January 2010 states:

Any worker who has intentionally committed misconduct which is proved by evidence must be disciplined as follows:

Minor misconduct: He or she will be verbally warned and the incident will be recorded in his or her personal file in the first instance. He orshe will be warned in writing in the second instance. In the third instance, he or she will be dismissed.

Medium misconduct: He or she will be warned in writing and the incident will be recorded in his or her personal file in the first instance. He or she will be suspended without pay (for a period not exceeding 7 days) in the second instance. In the third instance, he or she will be dismissed.

Serious misconduct: He or she will be dismissed …

In Arbitral Award 51/08-ASD, the Arbitration Council ruled that "[g]enerally, it is the employer's right to dismiss a worker but the employer must follow the employment contract, its internal work rules, and the Labour Law."

In this case, the employer did not specify whether the four reasons for Chuon Vireak's dismissal are characterised as serious or minor misconduct. The Arbitration Council finds that method of disciplining Chuon Vireak was not in conformity with the Internal Work Rules. The employer was obliged to discipline him in accordance with the Internal Work Rules when it learned of his misconduct. However, the Arbitration Council finds that the employer failed to comply with the Internal Work Rules before his dismissal.

Article 27 of the Labour Law states that "[a]ny disciplinary sanction must be proportional to the seriousness of the misconduct…"

Based on this article, the Arbitration Council has determined that disciplinary measures taken against any worker must be proportional to the seriousness of their misconduct *(see Arbitral Awards 109-Kingsland, reasons for decision, issue 38; 134/08-*

Chevron, reasons for decision, issue 5; and 131/10-Leader's Industrial, reasons for decision, issue 1).

The Arbitration Council considers that, with regard to the four reasons for Chuon Vireak's dismissal, the employer was required to warn him verbally or in writing in accordance with the Internal Work Rules and to determine the seriousness of his misconduct before the dismissal. Thus, the employer's disciplinary action was not proportional to Chuon Vireak's misconduct. Based on Article 74 of the Labour Law, the Arbitration Council considers that the employer had no valid reason relating his aptitude or behaviour to dismiss him.

Clause 34 of *Prakas* No. 099 SKBY dated 21 April 2004 states that [the Arbitration Council has the power to provide remedies including] "A. orders to reinstate dismissed employees to their former or any other appropriate position".

In previous arbitral awards, the Arbitration Council has ruled that an employer must reinstate a worker when their dismissal was not proportional to their misconduct *(see Arbitral Awards 109/07-Kingsland; 134/08-Chevron, reasons for decision, issue 5; and 131/10-Leader's Industrial, reasons for decision, issue 1)*.

The Arbitration Council applies this ruling in this case. Thus, the Arbitration Council orders the employer to reinstate Chuon Vireak and back pay his wages from the date of his dismissal to the date of reinstatement.

Issue 2: The workers demand that the employer pay full wages when it does not have work for them.

The the Arbitration Council considers this issue as follows:

The Arbitration Council considers whether a short-term lack of work is deemed a work suspension and, if so, if the suspension was lawful and whether the workers are entitled to full wages.

1. **Is a short term lack of work a suspension of the employment contract?**

Article 71(11) of the Labour Law provides that a labour contact is suspended

> When the 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 [must] be under the control of the Labour Inspector.

In this case, the employer suspended the workers' contracts due to a material difficulty. As a sub-contracting enterprise, the employer cannot determine the amount of work available. Based on this article, the Arbitration Council considers that the employer's

issue is deemed a material difficulty as stipulated in Article 71(11) of the Labour Law, causing the workers' contracts to be suspended.

2. Did the work suspension comply with the legal procedure?

In previous arbitral awards, the Arbitration Council has interpreted Article 71(11) to mean that in the event of a material difficulty, a work suspension must be reported to the Labour Inspector, who will examine and confirm the work suspension. This means that the Labour Inspector will investigate the situation and confirm whether the work suspension is due to material difficulty *(see Arbitral Awards 51/09-Yung Wah (Branch 1), reasons for decision, issues 1 & 2; 95/09-Tack Fat, reasons for decision, issue 10; and 123/09-Suit Way, reasons for decision, issue 2)*.

According to the facts, the employer and the workers agree that prior work suspensions have not been authorised by the Labour Inspector. Based on the Labour Law and the aforesaid rulings, the Arbitration Council considers that the employer has not followed the legal procedure for suspending the workers' contracts as it has not made a request for authorisation to the Labour Inspector.

3. Are the workers entitled to full wages?

Article 72(1) of the Labour Law states:

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

Based on Articles 71(11) and 72(1) of the Labour Law, the Arbitration Council considers that the employer is not obliged to pay wages to the workers during a work suspension if it has been authorised by the Labour Inspector. Otherwise, the employer must pay full wages to the workers.

According to the facts, the Arbitration Council finds that the employer has suspended the workers' contracts without authorisation from the Labour Inspector. The Council considers that the previous work suspensions have violated the provisions of the law. However, the workers do not make a demand for back pay, but rather they demand that the employer follow the legal procedure when it suspends their contracts in the future.

According to the facts, the employer has not made requests for authorisation to suspend the workers' contracts and has paid only 50% of their wages during the illegal work suspension. Thus, the Arbitration Council considers that the employer's practice is not valid. Although the workers did not specify the dates of any of the previous unauthorised

suspensions, the Arbitration Council assumes that the employer's practice has been consistent in suspending the workers' contracts without authorisation from the Labour Inspector. Hence, the Arbitration Council rules that the employer must make a request for authorisation to suspend the workers' contracts. Otherwise, the employer must pay full wages to the workers.

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.

The Arbitration Council considers that as the agreement between the employer and the workers regarding work suspensions violates Article 13 of the Labour Law, it is null and void.

In conclusion, the Arbitration Council orders the employer to make a request to the Labour Inspector for authorisation to suspend the workers' contracts. Otherwise, it must pay their full wages.

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 Chuon Vireak and back pay his wages from the date of his dismissal to the date of reinstatement.

Issue 2: Order the employer to pay full wages to the workers in cases of unauthorised work suspension.

Type of award: non-binding award

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

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Seng Vuoch Hun**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Sin Kim Sean**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Koy Neam**

Signature: .....

Annex to Arbitral Award 59/11-Ming Jian

Dissenting Opinion

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

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

Based on this clause, I, Arbitrator **Koy Neam**, would like to record my dissent on issue 2 of the Arbitral Award **59/11-Ming Jian**. I would like to explain the reasons for my dissent:

Issue 2: The workers demand that the employer provide 100% wages if work is not available.

Facts:

The workers claimed that the employer provides 50% wages when work is not available in the afternoon or it is not available in both shifts.

The employer disputed the workers' claim, arguing that it paid 70% wages when the work is not available in the afternoon. However, the workers claimed that provided 50% wages when they arrived at the factory but the work is not available. The employer claimed that the work was not available in March and April this year.

The employer claimed that Ming Jian (Cambodia) is a subcontracting enterprise for another enterprise. For this reason, the employer does not know when work is delivered to its enterprise. During this period, the employer did not inform the Labour Inspector because the unavailability of work was unforeseeable and difficult to determine how long it would last.

The workers' demand: When asked about their demand at the hearing, the workers did not claim for the previous loss of another 50% wages due to the unavailability of work. The workers clarified that they demand that the employer provide 100% wages if the employer did not inform them of an unavailability of work. The workers agreed to accept 50% wages if they were informed of the unavailability of work. The workers cited Article 83 of the Labour Law to support their demand. The workers also claimed that they spent 15,000 to 20,000 riel on transportation cost. The workers asserted that the employer did not comply

with the agreement that they reached in the presence of the Labour Inspector. The agreement provides for provision of 75% wages if work is not available in the afternoon.

The employer refused to accommodate the workers' demand. The employer agreed with the workers' claim in relation to the provision of 75% wages. However, the employer claims that the workers agreed to be paid 50% wages if there is no work in both shifts. The employer claimed that it is implementing the agreement. If the workers still maintain their demand, the employer will leave the issue for the Arbitration Council to consider.

Reasons for decision:

An arbitral award in relation to future dispute can only deal with an interests dispute. In respect of rights dispute, an arbitrator can restore the right that was violated in the past. Based on this principle, an arbitrator will analyse the issue in question in order to determine the type of the current issue.

Definition of right dispute: it relates to existing legal rights and other rights arising from an employment contract or a collective agreement.

Definition of interests dispute: it relates to a future benefit and not to an existing right.

Whether the workers' demand (provision of 100% wages when there is no notification on unavailability of work) gives rise to a rights or an interests dispute.

The employer claimed that it paid 75% wages for morning shift work, but the workers claimed that the employer paid 50% wages for that shift. In this case, the workers made a demand for their legal right. The workers claimed that they had to be paid 100% wages if the employer fails to comply with Article 83 of the Labour Law (provision of sufficient work). If there is no notification [of the suspension of the workers' employment contracts to the Labour Inspector], their employment contracts will not be suspended (see Arbitral Awards 86/06, 107/06, 119/06).

The meaning of Article 83 contradicts the workers' claim. Elements of this article are: (1) the workers are piece rate workers (2) the employer has sufficient work but refuses to provide it to piece rate workers. In this case, there is no sufficient work in the factory.

In Arbitral Award 86/06, the workers failed to specify whether they demand that the employer either provide back pay of underpaid wages or provide full wages in the future due to unauthorised suspension of employment contract. However, the arbitral panel ordered the employer to provide 100% wage…due to unauthorised suspension of employment contract…

In Arbitral Award 107/06, the workers demanded that the employer provide back pay of two months' wages. The workers alleged that the employer suspended their contracts in contravention to the legal procedure. The arbitral panel ordered the employer to provide 100% wages for the last two months of work suspension starting from 11 November 2006 and 11 January 2007.

In Arbitral Award 119/06, the workers demanded that the employer provide back pay of 75% wages from September to December 2006 because the employer failed to inform the Labour Inspector of the work suspension. The arbitral panel ordered the employer to provide back pay of 75% wages in accordance with the number of days listed in the annex of this award.

The first award (107/06) is different from the second award (119/06) in terms of scope. While the second award restored the right that was violated in the past, the first award dealt with a dispute which had not occurred yet.

The Arbitration Council derives its power from Clause 34 of *Prakas* on the Arbitration Council. Among eight points of this clause, only one point (G) allows the Council to establish terms for a collective agreement. Apart from this, the arbitral panel can only rule on the dispute that has occurred. Despite this, the arbitral panel can decide on the right and obligation under an employment contract or a collective agreement so that the parties in dispute can restore those rights and obligations, and implement them in the future. However, in this case, there is no agreement stipulating provision of 100% wages when work in unavailable in both shifts.

In conclusion, I consider that the arbitral panel cannot rule on a dispute which has not occurred yet. Therefore, the panel have no jurisdiction on issue 2.

Phnom Penh, 21 June 2011
Signature of Arbitrator

Koy Neam