KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 10/13-Gladpeer Garment

Date of award: 22 February 2013

Dissenting Opinion by Arbitrator Ing Sothy

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Ing Sothy**

Arbitrator chosen by the worker party: **Ven Pov**

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

DISPUTANT PARTIES

Employer party:

Name: **Gladpeer Garment Factory (Cambodia) Ltd.**

Address: Prey Pring Village, Sangkat Chom Chao, Khan Po Sen Chey, Phnom Penh

Telephone: 012 727 301 Fax: N/A

Representatives:

1. Mr. Long Heang	GMAC Representative
2. Ms. Va Chenda	Administrator

Worker party:

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

- Local Union of C.CAWDU (the union)

Address: Prey Pring Village, Sangkat Chom Chao, Khan Po Sen Chey, Phnom Penh

Telephone: 012 988 623 Fax: N/A

Representatives:

1. Ms Meas Vanny	Officer in Charge of Dispute Resolution of C.CAWDU
2. Mr Cheum Kheang	Officer in Charge of Dispute Resolution of C.CAWDU

3. Mr Nget Sokkhom	Vice-President of the union
4. Mr Lak Rithy	Secretary of the union
5. Ms Chea Raksa	Consultant to the union
6. Mr Chim Kosal	The 2nd Consultant to the union
7. Mr So Ratana	Treasurer of the union
8. Ms Phon Channei	Activist of the union
9. Ms Mom Sengeang	Activist of the union
10. Ms Pen Chantha	Activist of the union
11. Ms Chuk Tangoun	Activist of the union
12. Ms Thai Sreymao	Activist 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 set up a second infirmary on the third floor of B building. The employer claims it cannot afford to set up a second infirmary because it has already set up one infirmary on the third floor.
2. The workers demand that the employer provide a 5,000 riel meal allowance for voluntary overtime work performed on Sunday and public holidays. The employer claims it already provides a 2,000 riel meal allowance for overtime work performed on Sunday and during the holidays.
3. The workers demand that the employer provide a 5,000 riel meal allowance for voluntary overtime work performed from 6 p.m. to 9 p.m. The employer claims it already provided a 1,500 riel meal allowance for overtime work performed from 6 p.m. to 9 p.m.
4. The workers demand that the employer incorporate seniority bonus as a component of the base wage. The employer claims it does not incorporate the seniority bonus in the base wage.
5. The workers demand that the employer provide a 4,000 riel payment in lieu of lunch. The employer claims it cannot afford to do so.
6. The workers demand that the employer offer undetermined duration contracts to workers at the conclusion of the probationary period. The employer claims it offers fixed duration contracts to workers who finish the probationary period.
7. The workers demand that the employer triple bonuses currently paid to the team leaders in the cutting section and double bonuses currently paid to fabric organisers.
8. The workers demand that the employer pay attendance bonus in proportion to the number of days of authorised leave that the workers have taken. The employer

claims it pays the attendance bonus from the workers who take authorised leave but not those who take annual and special leave.

9. The workers demand that the employer pay meal allowance to workers once a week. The employer claims that it pays the meal allowance once a month.
10. The workers demand that the employer pay workers minimum wage of US$93 per month. The employer claims that it pays the minimum wage of US$70 per month from March 2013 onwards.
11. The workers demand that the employer reinstate Thai Sreymao and Pai Chenda, the activists of the local union, who were dismissed in the past. The employer claims it will not reinstate either Thai Sreymao or Pai Chenda because they were dismissed in 2000 and were also paid termination compensation in accordance with the Labour Law.
12. The workers demand that the employer maintain wages and the attendance bonus during the time that the workers were on strike. The employer claims that if the workers returned to work on the morning of 15 January 2013, it will maintain the full attendance bonus, but not the wages.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labour Law (1997); the *Prakas* on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same *Prakas*; and the *Prakas* on the Appointment of Arbitrators No. 121 dated 7 June 2012 (Tenth Term).

An attempt was made to conciliate the collective dispute that is the subject of this award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and non-conciliation report No. 062 dated 15 January 2013 was submitted to the Secretariat of the Arbitration Council on 15 January 2013.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing: 28 January 2013 (2 p.m.)

Procedural issues:

On 14 January 2013, the Department of Labour Disputes (the department) received a complaint from C.CAWDU, outlining the workers' demands that the employer improve working conditions. Upon receiving the claim, the department assigned an expert officer to

resolve the labour dispute and the last conciliation session was held on 14 January 2013, resulting in three of fifteen issues being resolved. The twelve non-conciliated issues were referred to the SAC 15 January 2013.

The employer submitted a letter dated 15 January 2013 to the Arbitration Council requesting the Arbitration Council to issue the order that the workers cease to strike. The Arbitration Council issue the order that the workers cease to strike dated 16 January 2013. The SAC summoned the employer and the workers to a pre-hearing session on 18 January 2013. The employer and the workers agreed that the workers ceased to strike and returned to work. The SAC summoned the employer and the workers to a hearing and conciliation of the twelve non-conciliated issues, held on 28 January 2013 at 2 p.m. Both parties were present.

Upon opening the hearing session, the Arbitration Council found that the parties reached agreement before the hearing on Issues 1, 2, 9, 10 and 12. Seven Issues including Issue 3, 4, 5, 6, 7, 8, and 11 remained unresolved. The Arbitration Council conducted a further conciliation of the seven remaining Issues, resulting in two Issues, Issue 3 and 6 being resolved. The workers withdrew Issue 4 and 11 (Issue 11-the demand to reinstate Pai Chenda). Four Issues, Issue 5, 7, 8, and 11 (Issue 11-the demand to reinstate Thai Sreypov) remained unresolved.

The Arbitration Council divided the issues into two types: rights disputes and interests disputes. In this case, the parties are signatories to the Memorandum of Understanding on Improving Industrial Relations in the Garment Industry (MoU), dated 3 October 2012. According to the MoU, both parties have agreed to binding arbitration for rights disputes. However, the MoU does not create binding obligations regarding interest disputes. The parties are able to choose non-binding arbitration for interest disputes, and can object to an arbitral award issued in relation to such disputes. Such an objection will not affect the parties' obligation to implement an award on rights issues in accordance with the MoU. In this case, the parties choose non-binding arbitration for their interests disputes.

The parties agreed to defer the issuance of Arbitral Award from 7 February 2013 to 20 February 2013.

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:

- Gladpeer Garment Factory (Cambodia) Ltd. is a garment factory. According to the collective dispute conciliation report dated 15 January 2013, the company employs 5,500 workers.
- The union is the claimant. This union does not hold the Most Representative Status (MRS).

Issue 3: The workers demand that the employer provide a 5,000 riel meal allowance for voluntary overtime work performed from 6 p.m. to 9 p.m.

- The parties agree that the employer will provide an additional 500 riel meal allowance on top of the existing 3,500 riel allowance, bringing the total meal allowance for workers who voluntarily work overtime from 6 p.m. to 9 p.m. to 4,000 riel.

Issue 5: The workers demand that the employer provide a 4,000 riel payment in lieu of lunch.

- At present, the employer does not and has never provided payment in lieu of lunch. In addition, the workers have also never proposed payment in lieu of lunch.
- The workers argue that:
    - It helps support the workers' livelihood.
    - The cost of living has risen.
    - Other factories provide this kind of payment.
- The employer claims that it cannot afford to meet the demand.
- The parties have no agreement related to this demand.

Issue 6: The workers demand that the employer offer undetermined duration contracts to workers who finish their probationary period.

- The parties agree that the employer offers workers a contract with two-month probationary period. After that, the employer offers the worker an eleven-month contract.

Issue 7: The workers demand that the employer provide a triple bonus to the team leaders in the cutting section and a double bonus to fabric organisers.

- This bonus has been provided to the workers since 2002. The bonus provided to the team leaders in the cutting section and the fabric organisers were as follows:
    - Team leaders in the cutting section:
        - Those who can produce at least 40 lots will receive the bonus.

        - Those who can produce 40 lots per month will receive a bonus of US$8 per month.
        - Those who can produce over the target (40 lots) will receive US$2 for every additional 10 lots that they produce which means they will receive US$8 for 40 lots, US$10 for 50 lots, and US$12 for 60 lots.
    - Fabric organiser:
        - Those who can produce 50 lots per month will receive a bonus of US$5 per month.
        - Those who can produce over the target (50 lots) will receive US$1 for every additional 10 lots that they produce which means they will receive US$5 for 50 lots, US$6 for 60 lots, US$7 for 70 lots.
- The workers demand that the employer increase the bonus for the team leaders of the cutting section and the fabric organisers. The workers demand the employer:
    - Increase the bonus of the team leaders of the cutting section threefold (thereby raising the bonus to US$24 for 40 lots and US$6 for every additional 10 lots they produce).
    - Increase the bonus of the team leaders of the fabric organisers twofold (thereby raising the bonus to US$16 for 50 lots and US$4 for every additional 10 lots they produce).
- The workers argue that:
    - Wages are inadequate to cover the rising cost of living.
    - This bonus is low for the section in comparison to that of the other sections.
- The purpose of the bonus is to motivate team leaders in the cutting section and the fabric organisers to perform their work.
- The employer submitted the statement to the Arbitration Council on 5 February 2013 which reads:
    - The employer cannot afford to meet the demand.
    - The employer has never made any agreements and collective agreements or there is no law or Prakas obligating the employer to increase the bonus for the team leaders of the cutting section, threefold and for the fabric organisers, twofold.

Issue 8: The workers demand that the employer pay attendance bonus in proportion to the number of days of authorised leave taken by the workers.

- The employer provides a US$10 attendance bonus per month and withhold the entire attendance bonus when the workers take authorised leave for personal commitment (e.g. half a day or one day). However, if the workers request the employer to pay

annual leave in substitution of authorised leave for personal commitment taken, the employer does not withhold the attendance bonus.

- The workers demand that the employer pay the attendance bonus in proportion to the number of days of authorised leave for personal commitment taken by workers without taking annual leave and special leave into the matter.
- The workers argue that:
    - The workers get authorisation from the employer when they take leave.
    - The workers relate the demand to Article 103 of the Labour Law and the Arbitral Awards in the previous cases such case 107/06 and 119/09.
- The employer claims that it does not agree to the demand and it maintains the current practice.

Issue 11: The workers demand that the employer reinstate Thai Sreymao and Pai Chenda.

- The workers withdraw the demand for the reinstatement of Pai Chenda but keep the demand for the reinstatement of Thai Sreymao.
- The workers demand that the employer reinstate Thai Sreymao and also provide her back pay from the date of dismissal to the date of reinstatement.
- At the hearing, the workers claimed that Thai Sreymao commenced her work on 17 January 2008. However, on the statement that the workers submitted to the Arbitration Council, Thai Sreymao commenced her work on 17 January 2009. The workers did not provide other evidence such as the labour contract to verify the date of work commencement of Thai Sreymao. The Arbitration Council finds that the statement about the date Thai Sreymao's work commencement is inconsistent. The parties agree with the fact that Thai Sreymao has been on probation for 2 months; then, she was on two eleven-month contracts. The expiration date of the last contract was 31 October 2010. Based on this fact, the Arbitration Council assumes that termination of Thai Sreymao's contract of employment on 31 October 2010 was the non-renewal of the fixed duration contract.
- The employer notified Thai Sreymao about the non-renewal of the contract on 21 October 2010 with the information that the contract would expire. On 31 October 2010, the employer dismissed Thai Sreymao in accordance with the expiration date of the contract by providing payment for outstanding wage, payment in lieu of annual leave, and the five per cent severance pay.
- The workers at Gladpeer Garment elected the union on 18 September 2010 and received the registration no. 2007 dated 08 December 2010.
- The workers claim that the employer did not renew the contract for Thai Sreymao for the following reasons:

- The employer is guilty of union discrimination since Ms Sreymao was elected as a union activist.
- The employer is discriminating against Ms Sreymao because she took part in the national strike from 13 to 16 September 2010. Further, Ms Thai was considered to be the most active one.

- The employer claims:
  - It did not renew the fixed duration contract for Thai Sreymao.
  - It did not discriminate against the union because it was not aware that Thai Sreymao was a union activist.
  - It did not discriminate against Thai Sreymao who took part in the strike because there were many workers on strike causing chaos. It also dismissed many other workers who did not go on strike.
- At the hearing, the workers claim Thai Sreymao protested against the termination and solicited help from the C.CAWDU to demand reinstatement since she was notified about the non-renewal of her contract and continued to protest until the case 10/13-Gladpeer Garment was referred to the Arbitration Council on 15 January 2013. The workers did not submit any evidence about her series of protests.
- Currently, the President, Vice-President, and the Secretary of the local union of the C.CAWDU are still working in the factory as usual.
- The employer claims that if Thai Sreymao wants to return to work, she can reapply in accordance with the recruitment process.

REASONS FOR DECISION

Before considering all of the demand, the Arbitration Council distinguishes rights and interests disputes.

Paragraph 2 of Article 312 of the Labour Law states:

> The Arbitration Council legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council's decisions are in equity for all other disputes."

Clause 43 of the Prakas 099 on the Arbitration Council 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.

Paragraph 2 of Article 312 of the Labour Law and Clause 43 of the Prakas no.099 on the Arbitration Council dated 21 April 2004 states that the Arbitration Council has legal jurisdiction to decide on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council's decisions are in equity for all other disputes. The Arbitration Council concludes that disputes concerning the interpretation and

enforcement of laws or regulations or of a collective agreement are the rights disputes and the Arbitration Council legally settles the rights disputes *(see the Arbitration Award 05/11-M & V (Branch 1), Issue 1&5, 13/11-Gold Kamvimex, Issue 1&2, 14/11-GXG, Issue 4).* Any kinds of disputes that are not stipulated in the agreement or collective agreement are the interests dispute and the Arbitration Council settles the interests dispute based on equity (s*ee the Arbitral Award 31/13-Quint Major Industrial, Issue 4 and 62/11-Ocean Garment, Issue 1).*

Issue 5: The workers demand that the employer provide a 4,000 riel payment in lieu of lunch.

Before considering this issue, the Arbitration Council considers whether the demand gives rise to a rights dispute or an interests dispute.

The Arbitration Council finds that there is no provision in the Labour Law, collective agreement or any other agreement between the parties regarding the allowance to purchase lunch.

In reference to the interpretation to the rights dispute and interests dispute above, the Arbitration Council finds that this is an interests dispute.

Paragraph 2 of Article 96 of the Labour Law 1997 states:

> The collective agreement is a written agreement relating to the provisions provided for in Article 96 - paragraph 1. The collective agreement is signed between:
>
> a) One part: an employer, a group of employers, or one or more organisations representative of employers; and
>
> b) The other part: one or more trade union organisations representative of workers…

Clause 9 of the Prakas no. 305 dated 22 November 2001 states:

> The union having the most representative status (MRS) has the right to request the employer to enter into negotiations on joint convention applied by all workers and employees represented by that union. In this case, the employer is under the obligation to negotiate with the union.

In reference to Article 96 and Clause 9 above, in general, the Arbitration Council always consider the MRS of the union in dispute in the case about the interests dispute because the Arbitration Council finds that the MRS provides legitimate rights to the union to form the collective agreement with the employer and bring in the interest dispute to the Arbitration Council for resolution.

Clause 43 of the Prakas 099 dated 21 April 2004 states:

> An arbitral award which settles an interests 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.

In reference to Clause 43 above, the Arbitral Award regarding an interests dispute, the Arbitration Council takes into account the most representative status (MRS) of the union

in dispute because the Arbitration Council considers that MRS provides the union with legal rights to negotiate collective agreements with the employer, and the union with MRS also has legal rights to bring the interests dispute to the Arbitration Council for resolution.

Clause 43 of the 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.

In reference to the above Clause 43, an arbitral award which settles an interest dispute takes the place of a collective bargaining agreement. It applies to all workers in the company and removes the rights to strike for the demand of future interests dispute from other workers who are not the members of this union. Hence, the Arbitration Council can only settle the interests dispute brought in by the union which has MRS in the enterprise or the collective unions which have more than half of the number of workers as members in the enterprise (*see Arbitral Awards 81/04-Evergreen, Issue 4, and 98/04-Great Union, Issue 3*).

In Arbitral Award 169/11-Fortune Teo, Issue 5, the Arbitration Council declined to consider the interests dispute because the claimant union did not have MRS in the factory (*see Arbitral Awards 02/11-Pou Yuen, Issue 2, and 66/11-In Han Sung, Issue 1*).

The Arbitration Panel in this case also agreed with the interpretation of the Arbitral Panel in the previous cases that only unions with MRS have the legitimate rights to bring the dispute to the Arbitration Council for resolution.

In this case, the Arbitration Council finds that the union does not have MRS. Therefore, the Arbitration Council considers that this union has no legal right to bring an interests dispute to the Arbitration Council for resolution.

In conclusion, the Arbitration Council decides to decline to consider the workers' demand that the employer provide a 4,000 riel allowance to purchase lunch.

Issue 7: The workers demand that the employer triple the bonuses currently paid to the team leaders in the cutting section and double the bonuses currently paid to fabric organisers.

Before considering this issue, the Arbitration Council considers whether the issue gives rise to a rights dispute or an interests dispute.

The Arbitration Council finds that there is no provision in the Labour Law, collective agreement or any other agreement between the parties stipulating the tripling of current bonuses for team leaders in the cutting section or the doubling of current bonuses for fabric organisers.

In reference to the interpretation about the rights and interests dispute above, the Arbitration Council finds that the dispute is therefore an interests dispute (*see the interpretation about the interests disputes in the reasons for decision, Issue 5).*

Therefore, the Arbitration Council declines to consider this demand.

Issue 8: The workers demand that the employer pay the attendance bonus in proportion to the number of days of authorised leave for personal commitment that the workers have taken.

Before considering this issue, the Arbitration Council considers whether the issue gives rise to a rights dispute or an interests dispute.

In the previous cases, the Arbitration Council finds that *"A rights dispute is a dispute concerning entitlements in the law, an employment contract, or a collective agreement." (see Arbitral Award 05/11- M & V (Branch 1), Issue 1 & 5, no. 13/11-Gold Kamvimex, Issue 1 & 2, no. 14/11-GHG, Issue 4)*

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

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

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

The Arbitration Council considers whether the workers have the right to demand that the employer pay the attendance bonus in proportion to the number of days of authorised leave for personal commitment taken.

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

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

The Arbitration Council finds that there are many kinds of bonuses and the amount of the bonus also differs depending on the owners of each enterprise or the company who have the right to direct and supervise for the purpose of motivating their workers and increasing

work effectiveness and productivity. The US$10 of the attendance bonus stipulated in Point 2 of the Notification no. 230 dated 25 July 2012 is not under the rights of the employer to direct and also, it's not the tool and mean for the employer to supervise, but the attendance bonus of US$10 is a bonus stipulated in Point 2 of the Notification no. 230 dated 25 July 2012 with which all garment and footwear sector employers must comply.. This means the employer is under an obligation to provide the attendance bonus of US$10 per month to workers who attend the work regularly in accordance with the number of working days in each month without absence. However, the Arbitration Council finds that Point 2 of the statement of the Labour Advisory Committee dated 11 July 2011 read the employer shall provide the attendance bonus of US$ 10 per month. Point 2 of the Notification no. 230 dated 25 July 2012 states that the workers who attend work regularly in accordance with the number of working days in each month **without absence** will receive a monthly bonus of at least US$10. The Labour Advisory Committee has not interpreted the term **without absence** to mean absence with authorisation or without authorisation or anything else. The Arbitration Council is not able to interpret or assume that the absence here refers to absence with authorisation or without authorisation without taking legal provisions and reasoning into consideration.

The Arbitration Council finds that the term **absence stipulated in the law** includes: absence by taking annual leave, special leave, maternity leave, holidays, and weekly time off. The term absence stipulated in the laws does not require the workers to dock the attendance bonus which means the workers get 100 per cent of the attendance bonus, US$ 10 per month. Absence (authorised leave for personal commitment) is not stipulated in the laws, which leads to the question whether the workers shall receive 100 per cent of the attendance bonus, an attendance bonus in proportion to the number of days of authorised leave accessed or no attendance bonus at all.

The Arbitration Council finds that because of the many types of absence, aforementioned, the Arbitration Council is unable to interpret or assume **absence** in the Notification no. 230 dated 25 July 2012 to be any particular type of absence. The Arbitration Council therefore considers the demand according to each particular case. In this issue, the workers demand that the employer deduct the attendance bonus in proportion to the number of days of authorised leave that the workers have taken.

The Arbitration Council finds that it is the employer's discretion to decide to authorise or not authorise the workers to take leave (for personal commitment) based on the administrative procedures, internal work rules, and the production requirements of each enterprise and workplace. In the case that the employer decides to authorise a worker to take leave, the employer should be aware that production of the company will not be interrupted by the workers' absence. The administrative procedures and the internal work

rules of the enterprise distinguish between authorised leave and unauthorised leave where disciplinary action can be taken against workers who do not comply with relevant leave arrangements. When the workers are authorised to take leave, the leave is taken in accordance with the administrative procedures and internal work rules of the enterprise or workplace. In these instances, workers are not subject to any disciplinary action from the employer.

Workers who take authorised leave for personal commitment are considered to have agreement from the employer that the workers will not receive the wages on the day that they don't come to work. The employer also agrees to permit the workers to take unpaid leave on the agreed upon day(s), not to take any disciplinary actions against the workers, and maintain the job and other benefits once they return to work.

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

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

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

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

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

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

- *Bonus…"*

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

Paragraph 6 of Article 71 of the Labour Law states:

> The labour contract shall be suspended under the following reasons: …
>
> 6. Absence of the worker authorised by the employer, based on laws, collective agreements, or individual agreements…

Paragraph 1 of Article 72 of the Labour Law states:

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

In reference to Paragraph 6 and Paragraph 1 of Article 72 of the Labour Law, The Arbitration Council finds that authorised leave is leave requested by the worker and agreed to by the employer. Therefore, the authorised leave is considered a contract suspension between the employer and the worker and the employer is under no obligation to pay the wages to the worker on the day that they take authorised leave for personal commitment. It also means the employer is under no obligation to provide the attendance bonus to worker on the day that the worker takes authorised leave for personal commitment. Therefore, the employer has no right to withhold the entire attendance bonus from the worker. It only has the right to pay the attendance bonus in proportion to the number of days of authorised leave for personal commitment that the worker has taken.

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

Issue 11: The workers demand that the employer reinstate Thai Sreymao and provide back pay from the date of dismissal to the date of reinstatement.

The Arbitration Council considers whether or not the employer is obligated to reinstate Thai Sreymao and provide back pay from the date of dismissal to the date of reinstatement.

In this case, the workers claim that the non-renewal of the labour contract for Thai Sreymao arose from union discrimination and discrimination against Thai Sreymao for taking part in a strike.

Therefore, to determine whether or not the employer is obliged to reinstate Thai Sreymao and provide back pay from the date of dismissal to the date of reinstatement, the Arbitration Council will consider (1) Does the employer have the right not to renew the fixed duration contract of Thai Sreymao and (2) Has the employer acted discriminately against Thai Sreymao for either her union leadership or strike participation?

(1) Does the employer have the right not to renew Thai Sreymao's fixed duration contract?

Before considering this demand, the Arbitration Council considers whether the issue gives rise to a rights or an interests dispute.

The Arbitration Council finds that the issue is about the non-renewal of the fixed duration contract. Based on the interpretation about rights dispute above, the Arbitration Council finds that the issue is a rights dispute.

Paragraph 1, Article 73 of the Labour Law 1997 states *"A labour contract of specific duration normally terminates at the specified end date."*

In the previous cases, the Arbitration Council interpreted the article that the fixed duration contract automatically terminates at the specified end date. It means obligations on the employer and worker also terminates at this time. Hence, the parties cannot force each other to renew the contract without agreement *(see the Arbitral Award no. 100/07-Hoyear Cambodia, Issue 2, 122/10-Meng Yan Garment, Issue 1, 2, &3, 105/11-Goldfame Enterprises, Issue 1).*

The Arbitration Panel of this case also agrees with the interpretation of the Arbitration Panel in the previous cases that the fixed duration contract automatically terminates at the specified end date. The obligations on the employer and worker also terminate at this point in time. Hence, the parties cannot force each other to renew the contract without agreement.

At the hearing on 28 January 2013, the parties agreed that Thai Sreymao had been on probation for 2 months; then, she received two fixed duration contracts, each signed for the period of eleven months. The expiration date of the very last contract was 31 October 2010. The employer did not renew the contract for Thai Sreymao. In reference to the interpretation of the legal provision and the jurisprudence above, the Arbitration Council finds that the employer is not obligated to renew the expired labour contract for Thai Sreymao.

(2) Has the employer acted discriminately against Thai Sreymao for either her union leadership or strike participation?

Article 12 of the Labour Law states:

> …no employer shall consider on account of membership of workers' union or the exercise of union activities to be the invocation in order to make a decision on discipline or termination of employment contract.
>
> Article 279 of the Labour Law states:
>
> Employers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal.

In the previous arbitral awards, the Arbitration Council finds that the employer is forbidden from discrimination in the renewal or non-renewal of the labour contracts *(see the Arbitral Award no. 10/03-Jacqsintex Industrial Cambodia, Issue 2, no. 155/09-USA, Issue 7, 122/10- Meng Yan, Issue 1, 2, &3).*

In the previous cases of union discrimination, the Arbitration Council ordered the employer to reinstate the workers because the dismissal was found to be on the grounds of discrimination which violated Article 12 and 279 of the Labour Law that forbid the employer from taking into consideration union affiliation or participation in union activities when making decisions concerning disciplinary measures and dismissal (s*ee the Arbitral Award 123/07-E Garment, Issue 1).*

The Arbitration Panel of this case also agrees with the interpretation of the Arbitral Panel in the previous cases.

The workers claimed that the non-renewal of contract for Thai Sreymao arose from union discrimination because Thai Sreymao was a union activist and further discrimination because Thai Sreymao took part, and was an active member of the national strike.

In the previous cases of the allegation of the union discrimination, the Arbitration Council defined that the claimant is under the burden of proof in proving the allegation of union discrimination *(see 93/06-Evergreen, Issue 1, 112/06-River Rich, Issue 1, 01/07-Supreme Garment, Issue 1).*

Concerning the evidence to prove union discrimination, the Arbitration Council usually considers the testimony in the hearing and checks relevant evidence to determine whether or not union discrimination has taken place *(see 03/03-Tong Ga Garment, Issue 10, 10/03-Jacqsintex Industrial Cambodia, Issue 4, 19/04-Kbal Koh, Issue 1, 17/07-Chham Textile, Issue 1).*

The workers did not submit any statements or evidence to the Arbitration Council to prove that Thai Sreymao engaged in any activities that caused union discrimination or statements or evidence that Ms. Sreymao was discriminated against for her strike participation. The workers therefore did not fulfil the burden of proof in proving this allegation. Therefore, the Arbitration Council assumes that the employer did neither discriminate against the union nor against Thai Sreymao in the non-renewal of her contract. Therefore, the employer is under no obligation to reinstate Thai Sreymao or provide any back pay.

Therefore, the Arbitration Council rejects the workers' demand that the employer reinstate Thai Sreymao and provide the back pay from the date of the dismissal to the date of reinstatement.

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

Issue 11: Reject the workers' demand that the employer reinstate Thai Sreymao and provide back pay from the date of the dismissal to the date of reinstatement.

Type of award: binding award

The award of the Arbitration Council in Part I will be final and is enforceable by the parties in accordance with the MoU dated 30 October 2012.

Part II. Interests dispute:

Issue 5: Decline to consider the workers' demand that the employer provide a 4,000 riel payment in lieu of lunch.

Issue 7: Decline to consider the workers' demand that the employer triple bonuses currently paid to the team leaders in the cutting section and double bonuses currently paid to fabric organisers.

Type of award: non-binding award

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

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature: .....

Name: **Ven Pov**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....

Annex to Arbitral Award 10/13 - Gladpeer Garment

Dissenting Opinion

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

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

Based on this clause, I, Arbitrator **Ing Sothy**, would like to record my dissent on issue 6 of the Arbitral Award **10/13 - Gladpeer Garment, Issue 8 in which the Arbitration Council orders the employer to pay attendance bonus in proportion to the number of days of authorised leave for personal commitment taken by the workers .**

I would like to explain the reasons for my dissent:

I**. Definition:**

1. Bonus (noun): something extra given separately from the amount needed to satisfy a requirement; a bonus is given and received; bonus is to be distinguished from gratuity. (Page 970, Line 12 **Chuon Nath** ***Khmer Dictionary***).

2. Gratuity: a nominal payment given to a traditional physician, [or performer of religious rites]. (Page 463, Line 2 **Chuon Nath** ***Khmer Dictionary***).

3. ***primes (n) (Dt. trav.)*** *- sommes versées par l'employeur au normal, soit á titre de salarié en sur du salaire remboursement de frais, soit pour encourager la productivité, tenir compte de certaines difficultés particulières du travail, ou récompenser l'ancienneté.* ***(Livre, Lexique des termes juridiques 12 eme édition Dalloz 1999 page 413)***

II. Analysis:

The word "**Bonus**" means a thing that is given as an incentive with conditions. Therefore, you can accept a bonus only if you fulfill a specific condition […] that has been set.

Generally, when implementing a policy to give a **bonus**, who has the right to set or withdraw any kind of condition? The answer is the bonus owner.

In the labour sector, the bonus owner is **the employer** and the one who shall fulfill the condition to receive the bonus is **the worker.**

Examples:

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

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

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

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

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

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

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

III. Conclusion

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

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

Phnom Penh, 23 January 2013

Signature

Ing Sothy