KINGDOM OF CAMBODIA

NATION RELIGION KING

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THE ARBITRATION COUNCIL

Case number and name: 259/13-Long Lead

Date of award: 3 January 2014

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **You Suonty**

Arbitrator chosen by the worker party: **Liv Sovanna**

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

DISPUTANT PARTIES

Employer party:

Name: **Long Lead (Cambodia) Co., Ltd.**

Address: Chamkar Svay Village, Sethey Commune, Samaki Meanchey, Kompong Chhnang

Telephone: 078 900 783 Fax: N/A

Representatives:

1. Ms Rim Kimhon — Company Advisor
2. Mr Teng Sunmeng — Administrator and Treasurer

Worker party:

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

- Local Union of KYFTU (the union)

Address: Chamkar Svay Village, Sethey Commune, Samaki Meanchey, Kompong Chhnang

Telephone: 088 35 74 726 Fax: N/A

Representatives:

1. Mr Mai Vatana — Vice-President of KYFTU
2. Mr Ngok Sopheak — President of the union
3. Ms Chen Ry — Secretary of the union

ISSUES IN DISPUTE

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

1. The workers demand that the employer maintain a 3,500 riel meal allowance for work performed on Sundays or public holidays. The employer claims it will provide only 2,000 riel.
2. The workers demand that the employer provide a US$10 accommodation and transportation allowance. The employer does not agree to the demand.
3. The workers demand that the employer provide an additional 500 riel payment in lieu of lunch. The employer does not agree to the demand, but it will hold a discussion on the issue in early 2014.
4. The workers demand that the employer implement an agreement dated 13 September 2013 (Point 1 of which states that the employer stops deducting union contribution fee from workers' wages as payment to Cambodian Labour Union).
5. The workers demand that the employer pay back the union contribution fee which had been deducted from their wages as payment to other unions.

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. 155 dated 17 June 2013 (Eleventh 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. 907 dated 22 November 2013 was submitted to the Secretariat of the Arbitration Council on 28 November 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: 16 December 2013 (at 2 p.m.)

Procedural issues:

On 12 November 2013, the Department of Labour Disputes of Kompong Chhnang Province (the department) received a complaint from KYFTU, outlining the workers' demands for the improvement of working conditions. Upon receiving the claim, the department assigned an expert officer to resolve the labour dispute and the last conciliation session was

held on 28 November 2013, resulting in two issues being resolved. The five non-conciliated issues were referred to the Secretariat of the Arbitration Council (SAC) on 28 November 2013.

Upon receipt of the case, the SAC summoned the employer and the workers to a hearing and conciliation of the five non-conciliated issues, held on 16 December 2013 at 2 p.m. Both parties were present.

At the hearing, the Arbitration Council conducted a further conciliation of the five non-conciliated issues, resulting in Issue 3 being withdrawn. The Arbitration Council considers only 4 issues including Issues 1, 2, 4, and 5. The workers agreed to merge Issues 4 and 5 into a single issue.

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 interests disputes. The parties are able to choose non-binding arbitration for interests 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 date of arbitral award issuance from 23 December 2013 to 3 January 2014.

Therefore, the Arbitration Council will consider the issues in dispute in this case based on the evidence and reasons below.

EVIDENCE

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

FACTS

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

The Arbitration Council finds that:

- Long Lead (Cambodia) Co., Ltd. ("Long Lead") is a footwear manufacturer employing 1,691 workers *(according to the non-conciliation report no. 907/13-Long Lead dated 22 November 2013).*
- The union received a certificate of registration from the Ministry of Labour and Vocational Training dated 12 July 2010 and Letter no. 866 dated 9 August 2012 on recognition of union leadership dated 9 August 2012 including: 1) Mr Ngok Sopheak-Union President, 2) Ms Thong Thoeun-Union Vice-President, and 3) Ms Chen Ry-Union Secretary.

Issue 1: The workers demand that the employer maintain a 3,500 riel payment in lieu of lunch for work performed on Sundays or public holidays.

- The employer has provided payment in lieu of lunch from May 2013 to the third week of October, 2013:
    - The employer has provided a 1,500 riel payment in lieu of lunch to workers attending work on regular work days (from Monday to Saturday) and workers who volunteer to work on Sundays and public holidays.
    - Payment in lieu of lunch is not part of overtime meal allowance provided to workers who volunteer to work overtime on regular work~~ing~~ days, Sundays, and public holidays.
    - The employer pays the payment in lieu of lunch once per week.
- The workers clarify their demand that the employer maintain a 1,500 riel payment in lieu of lunch for work performed on Sundays or public holidays provided by the employer from May 2013 to the third week of October 2013.
- The workers argue that:
    - In May 2013, the union and the employer entered into an agreement in which the employer agrees to provide a 1,000 riel payment in lieu of lunch. The workers claim the agreement does not state that the employer agrees to provide a 1,000 riel payment in lieu of lunch to workers who attend work on regular work days (from Monday to Saturday) *(the workers did not submit this agreement to the Arbitration Council).*
    - In May 2013, the employer agreed to provide an additional 500 riel payment in lieu of lunch on top of the existing 1,000 riel. After signing the agreement, the employer has provided a 1,5000 riel payment in lieu of lunch to workers attending work on regular work days, Sundays, and public holidays from May 2013 to the third week of October 2013.
    - During the fourth week of October 2013, the employer stopped providing payment in lieu of lunch without providing notice or holding a meeting with the workers on such a change.

- The employer responds:
    - The employer agrees that it did make an agreement to provide a 1,000 riel payment in lieu of lunch, but the employer does not specify when the agreement was made.
    - It is an accounting and technical error that the payment in lieu of lunch has been provided to workers who volunteer to work on Sundays and holidays from May 2013 to the third week of October 2013.
    - The Company Executive Director signs the payslips of payment in lieu of lunch and overtime meal allowance provided weekly to workers.
    - However, on the fourth week of October 2013, the Company Executive Director found out that there was an accounting and technical error in providing payment in lieu of lunch to workers who volunteer to work on Sundays and public holidays because the employer agrees to provide payment in lieu of lunch only to workers attending work on regular work days.
    - From May 2013 to the third week of October 2013, the Company Executive Director has been busy and has not reviewed the payslips for payment in lieu of lunch before signing. The accounting and technical error was discovered on the fourth week of October.
    - Upon discovering the error, the employer stopped providing the payment in lieu of lunch to workers who volunteer to work on Sundays and public holidays from the fourth week of October.
    - The employer finds that it provides a 2,000 riel payment in lieu of lunch in accordance with Notification no. 041/13 dated 7 March 2011 of the Ministry of Labour and Vocational Training; therefore, the employer shall not provide a 1,500 riel payment in lieu of lunch in addition to overtime meal allowance to workers who volunteer to work on Sundays and public holidays.
    - The workers claim the employer stops providing payment in lieu of lunch to workers who volunteer to work on Sundays and public holidays because the workers who volunteer to work on Sundays and public holidays are provided with an overtime meal allowance and it was an accounting technical error that the payment in lieu of lunch has been provided from May to the third week of October. The workers argue that the employer's claim is just an excuse to justify the cancellation of payment in lieu of lunch for workers who volunteer to work on Sundays and public holidays.
    - The Arbitration Council finds that workers submit an agreement in the conciliation report dated 19 April 2013 in which Point 3 states *"The company*

agrees to provide an additional 500 riel payment in lieu of lunch for workers (which will be implemented from May 2013 onward).

Issue 2: The workers demand that the employer provide a US$10 accommodation and transportation allowance.

- The employer currently provides a US$9 accommodation and transportation allowance. From January 2014 onwards, the employer has provided an additional US$1 accommodation and transportation allowance per month to workers who volunteer to work on Sundays and public holidays.
- The workers clarify their demand that the employer provide a US$10 accommodation and transportation allowance or an additional US$1 accommodation and transportation allowance on top of the existing US$9 allowance to all workers without any additional conditions.
- The workers argue that transportation costs keep rising and neighboring companies provide their workers with a US$10 accommodation and transportation allowance.
- The employer responds that it cannot afford to meet the workers' demand because the purpose of providing an additional US$1 is to motivate workers who volunteer to work overtime on Sundays and public holidays and the employer claims the issue should be discussed in the future in 2014.

Issues 4&5: The workers demand that the employer implement an agreement dated 13 September 2013 (Point 1 of which states that the employer stops deducting union contribution fees from workers' wages as payment to Cambodian Labour Union) and pay back the union contribution fee which had been deducted from their wages as payment to other unions.

- The workers agree to merge the two issues into a single issue. At the hearing, the workers claim the employer has agreed to stop deducting the union contribution fees from the workers' wages as payment to the Cambodian Labour Union from November 2013; therefore, the workers no longer raise this issue.
- Therefore, the remaining issue is that the workers demand that the employer pay back a 1,000 riel union contribution fees per month deducted from workers' wages as payment to the Cambodian Labour Union in September and October 2013.
- The workers submit three separate name lists of workers withdrawing their memberships from the Cambodin Labour Union and request the employer stop deducting the union contribution fee:
    - Name list of 205 workers at Long Lead requesting the Company Director to stop deducting union contribution fee as payment to the Cambodian Labour Union from 26 November 2012 onwards.

    - Name list of 99 workers at Long Lead requesting that the employer stop deducting the union contribution fee as payment to the Cambodian Labour Union from 18 August 2013 and onwards.
    - An unspecified and undated name list and thumbprints of workers *(the Arbitration Council does not consider this name list).*
- The employer does not object to the evidence submitted by the workers above.
- The workers clarify that they request the Arbitration Council to consider only the name list of workers requesting the employer stop deducting union contribution fees as payment to the Cambodian Labour Union from 18 August 2013 onwards.
- The workers do not confirm how many workers among the 99 workers are the union's members. In this case, the Arbitration Council considers for only the union's members who are claimants in this case and whose names are on the list requesting the employer stop deducting union contribution fees as payment to the Cambodian Labour Union from 18 August 2013 onwards.
- The employer claims Issues 4&5 have already been conciliated in the agreement dated 27 November 2013 made between the employer and President of the union. The agreement states:

    > …to resolve the remaining Issues 4&5 from a meeting held on 22/11/2013…the meeting comes to the following conclusion:
    >
    > 1) The verified number of workers who are members of the union is 802 (name list is attached).
    >
    > 2) The company ensures that it will deduct union contribution fees from the above number of workers from November wage payment onwards and avoid double deduction though the number of workers increases or decreases.
    >
    > 3) The parties agree to end these remaining issues based on the agreement made in this meeting *(according to the agreement dated 27 November 2013 between the employer and the President of the union)*.

- The workers claim the agreement is null and void because the agreement is below the requirement of the Labour Law because neither clause in the agreement requires the employer to pay back union contribution fees deducted from workers' wages without the workers' authorisation. Therefore, this agreement violates the law.
- The President of the union who signed on to the agreement claims that before signing on the agreement, he did review it; however, he admits that it is his fault because he failed to thoroughly read Point 3 because at that moment the employer was in a hurry for his trip to a province.
- The workers claim that since the agreement dated 27 November 2013 fails to resolve the issue in which the workers demand that pay back the 1,000 riel union contribution

fee which had been deducted from their wages as payment to the Cambodian Labour Union in September and October, the workers then still raise this issue.

- The workers argue that the employer made a two deductions of union contribution fees from workers' wages as payment to two different unions (the union and the Cambodian Labour Union) though the workers have, on many occasions, submitted membership withdrawal letters to the employer to confirm their membership withdrawal from the Cambodian Labour Union and requesting that the employer stop deducting union contribution fees as payment to the Cambodian Labour Union.
- The workers further claim:
    - In September 2012, the workers submitted the original letter requesting the employer stop deducting union contribution fees from the workers' wages as payment to the Cambodian Labour Union and the membership withdrawal from the Cambodian Labour Union confirmed by their thumbprints to the employer.
    - In August 2013, once again, the workers submitted the original letter requesting the employer stop deducting union contribution fees from the workers' wages as payment to the Cambodian Labour Union and the membership withdrawal from the Cambodian Labour Union. The letter was given to company security guards. The workers request that the Arbitration Council consider only a letter requesting the employer stop deducting union contribution fees from the workers' wages as payment to the Cambodian Labour Union and the membership withdrawal from the Cambodian Labour Union confirmed by their thumbprints in August 2013 in this case *(Index 1 is attached to this case).*
    - On 13 September 2013, the employer signed an agreement with the union in which the employer agreed to stop deducting union contribution fees from workers' wages upon the workers' withdrawal from the Cambodian Labour Union *(according to the non-conciliation report dated 13 September 2013 of the Ministry of Labour and Vocational Training submitted to the Arbitration Council on 18 December 2013).* The agreement was made based on a copy of a letter requesting the employer stop deducting union contribution fees as payment to the Cambodian Labour Union and membership withdrawal letters from the Cambodian Labour Union thumb printed on August 2013.
    - Upon the agreement dated 13 September 2013, the employer still deducts union contribution fees from the workers' wages as payment to the Cambodian Labour Union without the workers' agreement. Therefore, the

employer is under an obligation to pay back that wrongful deduction to workers.

- The employer argues that:
  - The employer has not received an original letter requesting the employer to stop deducting union contribution fee as payment to the Cambodian Labour Union and membership withdrawal letters from the Cambodian Labour Union thumb printed on August 2013. The employer agrees that it has received a copy of these letters.
  - After an agreement dated 13 September 2013, the employer sent a letter to the Ministry of Labour and Vocational Training requesting to stop deducting union contribution fees as payment from workers' wages *(the employer does not submit this particular letter to the Arbitration Council).*
  - In October 2013, the employer held a discussion with the President of Khmer Youth Trade Union and informed the union that the employer would stop deducting union contribution fees and that each union collected union contribution fees on their own. The President of the union requested the employer continue to deduct union contribution fees. After the discussion, the employer claims, they asked the Ministry to withdraw the request letter.
  - Therefore, after the agreement dated 13 September 2013, the employer continues to deduct union contribution fees from wages of workers whose names are listed in two different unions in September and October 2013.

REASONS FOR DECISION

Before considering the demands, the Arbitration Council distinguishes rights dispute and interests dispute.

Paragraph 2, Article 312 of the Labour Law states:

> 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.

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, 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 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 rights disputes and the Arbitration Council legally settles rights disputes.

Any kinds of disputes that are not stipulated in the agreement or collective agreement are interests dispute and the Arbitration Council settles interests disputes based on equity.

Issue 1: The workers demand that the employer maintain a 1,500 riel payment in lieu of lunch provided from May 2013 to the third week of October 2013 to workers who volunteer to work on Sundays or public holidays

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

At the hearing, the workers claim that the payment in lieu of lunch is provided according to an agreement made between the parties in May 2013 in which the employer agrees to provide a 1,000 riel payment in lieu of lunch. During the same month, the employer agreed to provide an additional 500 riel payment in lieu of lunch on top of the existing 1,000 riel already agreed on. The employer agrees that it entered this agreement, but fails to specify the date of the agreement.

According to evidence submitted, the Arbitration Council finds that there is an agreement made between the parties dated 19 April 2013 stating *"The employer agrees to provide an additional 500 riel payment in lieu of lunch from May 2013 onwards."* The workers did not submit the agreement made between the parties in which the employer agrees to pay a 1,000 riel payment in lieu of lunch. The employer agrees that it has made this agreement, but fails to specify the date of the agreement. According to the workers' claims at the hearing, the Arbitration Council finds that the employer made an agreement with the workers to providing a 1,000 riel payment in lieu of lunch. Later, the employer entered another agreement with the workers dated 19 April 2013 to provide an additional 500 riel to workers from May 2013 to the third week of October 2013.

As the issue is the payment in lieu of lunch stipulated in the agreement made between the parties, the issue is a rights dispute.

The Arbitration Council considers whether or not the employer is under an obligation to maintain the 1,500 riel payment in lieu of lunch provided from May 2013 to the third week of October 2013 to workers who volunteer to work on public holidays and Sundays.

At the hearing, the workers claim an agreement in which the employer agrees to provide a 1,000 riel payment in lieu of lunch does not specify that this payment is provided for only regular working days (from Monday to Saturday). Further, the Arbitration Council finds that an agreement dated 19 April 2013 in which the employer agrees to provide an additional 500 riel payment in lieu of lunch does not specify that this payment is provided for only regular working days (from Monday to Saturday).

The Arbitration Council, in this case, finds that if there is a lacuna in the agreement, the agreed upon implementation in the past will be interpreted to fill up the lacuna. In this case, as the days for payment in lieu of lunch are not clearly specified, the Arbitration Council considers how the parties implemented the agreement to provide the payment in lieu of lunch.

The Arbitration Council in this case finds that the principle of ***"Past Practice"*** is a legal technical term from Article 65 of the Labour Law and the principle that enables the Arbitration Council to resolve disputes based on practice in the company.

The principle of ***"Past Practice"*** is supported by Paragraph 2 and 3, Article 65 of the Labour Law.

Paragraph 2, Article 65 of the Labour Law states: *"It 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."*

Paragraph 3 of the same article states *"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."*

In the context of Labour Law, generally past practice is a custom or the practice recognised by the parties and is enforced often. Such practice can be formed without the parties' writing. A practice is recognised by the parties as past practice when such practice is enforced on a regular and consistent basis.

The Arbitration Council, in Case 95/09-Tak Fat, Reasons for Decision, Issue 2 defines ***"Past Practice"*** as a specific form of practice which has long been in place on the same regular basis, accepted, and recognised by the parties.

In previous awards, the Arbitration Council made decisions based on past practice: (1) use of annual leave *(Arbitral Award no. 21/05-Sinomax, Reasons for Decision, Issue 1),* (2) wage calculation *(14/06-Zheng Yong, Issue 1, (3) bonus payment (18/07-Trinunggal Komara, Issue 2)* and (4) meal allowance *(136/07-Phnom Penh Garment, Issue 1)…*

At the same time, the Arbitration Council finds that some customs and practices are not ***"Past Practices"***; for instance, the employer's right to direct and supervise on the production line is not a past practice *(Arbitral Award no. 116/07-Grace Sun, Issue 1)*.

The Arbitration Panel in Case no. 95/09-Tak Fat, Reasons for Decision, Issue 2 held:

> In general, if a practice is past practice, the parties are under an obligation to implement such practice. However, past practice can legitimately be concluded under genuine and specific conditions including the parties' negotiation to end past practice or the circumstance on which the past practice is based has changed. Therefore, the past practice is not necessary or can no longer be enforced.

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

From the findings of fact, the Arbitration Council finds that after an agreement dated 19 April 2013 in which the employer agrees to provide an additional 500 riel payment in lieu of lunch from May 2013 onwards, the employer provided a 1,500 riel payment in lieu of lunch to workers working on Sundays and public holidays from May 2013 to the third week of October 2013.

Opposing the workers' claim, the employer argues that the payment in lieu of lunch provided to workers who volunteer to work on Sundays and public holidays from May 2013 to the third week of October 2013 is an accounting and technical error because the payment in lieu of lunch is supposed to be provided to only workers working on regular work days. Upon the discovery of this error, the employer stopped providing payment in lieu of lunch to workers who work on Sundays and public holidays from the fourth week of October 2013.

The Arbitration Council finds that the employer had provided a 1,500 riel payment in lieu of lunch to workers working on Sundays and public holidays within a period of 6 months from May 2013 to the third week of October 2013. Further, payment in lieu of lunch was paid weekly and before making such payment, the Executive Director signed each payslip.

According to the finds of fact, the employer claims such payment had been made due to accounting and technical error because the employer had been too busy to check the payslips of payment in lieu of lunch before signing. The Arbitration Council finds that the employer's claim has no sufficient ground for the Arbitration Council to believe that such an error occurred. If there was an error, it is highly likely that the employer would become aware of the error within a short period of time, and not take 6 months because the Executive Director had signed the payslips of payment in lieu of lunch weekly.

In the Arbitration Council's jurisprudence, the Arbitration Council finds that *"the party making allegations bears the burden of proof." (see Arbitral Award no. 79/05-Evergreen, 101/08-GDM, Reasons for Decision, Issue 1 & 2, 168/089-Teok Tla Plaza, Issue 2, 115/10-G-Formost, Issue 18, and 148/11-Dai Young)*

In previous awards, the Arbitration Council rejects the party's demand if the party making demand has no evidence to support the demand *(see Arbitral Award no. 63/04-Sun Well, Reasons for Decision, Issue 4, 99/06-South Bay, Issue 5, 33/07-Goldfame, Issue 4, and 51/07-Goldfame, Issue 3)*.

The employer did not submit any evidence to support the claim that a 1,500 riel payment in lieu of lunch provided to workers who volunteer to work on Sundays and public holidays was an accounting and technical error. Therefore, the Arbitration Council finds that the employer has submitted no sufficient evidence for the Arbitration Council to determine that the payment in lieu of lunch provided to workers who volunteer to work on Sundays and public holidays was an accounting and technical error.

In this case, the Arbitration Council finds that a 1,500 riel payment in lieu of lunch provided to workers who volunteer to work on Sundays and public holidays is a specific past practice, instituted for the past 6 months on a regular and consistent basis and accepted by the parties. Every week, the workers expect to receive payment in lieu of lunch and the employer had provided the payment. The Arbitration Council finds that because the employer abruptly stopped providing the payment, the new policy cannot substitute for a past practice.

Because a 1,500 riel payment in lieu of lunch had been provided based on agreement with specific days identified for such payment is not stated while the employer's past practice proves a 1,500 riel payment in lieu of lunch is provided to workers who attend work on Sundays and public holidays, the Arbitration Council finds that such past practice fills the lacuna in the agreement made by the two parties. Therefore, the employer is under an obligation to implement both the agreement and maintain past practice complementing one another.

In conclusion, the Arbitration Council decides to order the employer to keep providing workers who volunteer to work on Sundays and public holidays with a 1,500 riel payment in lieu of lunch provided to such workers from May 2013 to the third week of October 2013.

Issue 2: The workers demand that the employer increase a US$9 accommodation and transportation allowance by $1 to US$10.

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

Point 1 of the Notification no. 230 dated 25 July 2013 of the Ministry of Labour and Vocational Training states: *"Provide a US$7 (seven) accommodation and transportation allowance per month."*

According to the findings of fact, the employer provides workers with a US$9 accommodation and transportation allowance per month. The Arbitration Council finds that the employer has fulfilled its obligation to provide an accommodation and transportation allowance that meets and exceeds the standard in Notification no. 230. Because the workers demand that the employer increase a US$9 accommodation and transportation allowance by US$1 to US$10. The workers' demand exceeds the the requirements of the law.

Further, the Arbitration Council finds there is no provision in the Labour Law, collective agreement, and agreement between the parties or past practice obligating the employer to provide a US$10 accommodation and transportation allowance per month or increase a US$9 accommodation and transportation allowance by US$1. Therefore, the Arbitration Council finds that the issue is an interests dispute.

For interests dispute, the Arbitration Council considers:

Paragraph 2 of Article 96 of the Labour Law 1997 which 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…

Moreover, Clause 9 of the Prakas 305 dated 22 November 2001 states:

The union having most representative status has the right to request the employer to negotiate a collective agreement which applies to all workers represented by that union. In this case, the employer has the obligation to negotiate with the union.

According to Article 96 and Clause 9 of the Prakas above, in interests disputes, generally the Arbitration Council takes the most representative status (MRS) of the union into consideration because it provides unions with the legal right to negotiate a collective agreement with the employer, and the union also has the legal right to bring an interests dispute case to the Arbitration Council for resolution.

Clause 43 of Prakas Number 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 the above Clause 43, an arbitral award which settles an interests dispute takes the place of a collective bargaining agreement. It binds all workers in the company and strips them of their right to strike over interests disputes covered in collective agreements for a one-year period. This agreement applies to other workers who are not the members of the MRS union as well. Hence, the Arbitration Council can only settle interests disputes brought in front of the panel by unions which have MRS in the enterprise or collective unions which have more than half the number of workers as members in the enterprise *(see the Arbitral Award Number 81/04-Evergreen, Reasons for Decision, Issue 4, and Number 98/04-Great Union, Issue 3).*

In 169/11-Fortune Teo, Issue 5, the Arbitration Council declined to consider an interests dispute because the union that brought the case did not have MRS in the factory *(see Arbitral Award no. 02/11-Pou Yuen, Reasons for Decision, Issue 2, and 66/11-In Han Sung, Issue 1).*

In this case, the Arbitration Panel also agrees with the interpretation made in the previous cases.

According to the findings of fact, the union does not hold the most representative status (MRS). Therefore, the Arbitration Council does not meet legal requirement to bring interests dispute to the Arbitration Council.

In conclusion, the Arbitration Council decides to decline to consider the workers' demand that the employer increase a US$9 accommodation and transportation by $1 allowance to US$10.

Issues 4&5: The workers demand that the employer pay back the union contribution fees which had been deducted from their wages as payment to Cambodian Labour Union (CLU).

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

The issue is about the union contribution fee deduction stipulated in Paragraph 2, Article 129 of the Labour Law (1997): *"…the worker can authorise deductions of his wage for dues to the trade union to which he belongs. This authorisation shall be in writing and can be revoked at any time."* Therefore, the Arbitration Council finds that the issue is a rights dispute.

At the hearing, the employer claims Issues 4&5 have already been conciliated according to the agreement dated 27 November 2013 made between the parties in which Point 3 states: *"Agree to end the two remaining non-conciliated issues in the meeting today."* Conversely, the workers argue that the agreement is deemed null and void because the agreement does not meet the required standard under the law because neither clause in this agreement requires the employer to pay back union contribution fees deducted from workers' wages without the workers' authorisation. Therefore, this agreement violates the law.

The Arbitration Council considers whether or not Point 3 of the agreement dated 27 November 2013 made between the parties is valid.

Paragraph 1, Article 13 of the Labour Law (1997) 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.

This Arbitration Panel in Case no. 21/03-Loyal Cambodia held:

> Agreement to deduct such deposits is null and void under Article 13 of the Labor Law because the contents of the agreement do not comply with the Labor Law and as such are against public policy. Therefore, this type of agreement is not in conformity with the Labor Law or the regulations/Prakas to implement this law… In the circumstances of the current case the Arbitration Council will not allow a wage deduction that does not provide any clear benefit to the employee concerned.

Moreover, the Arbitration Panel in the Arbitral Award no. 62/04-Ecent finds that:

> If the union wants the employer to take some contribution from the employees' wages, the union has to submit appropriate and acceptable documents such as a list of workers with signatures or fingerprints and collective or individual letters showing that the employees agreed to have their money taken for the purposes of a contribution to the union. Upon receiving the document, the employer has to take out the contribution and send it to the union monthly.

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

According to the findings of the facts, the Arbitration Council finds that the parties made an agreement dated 27 November 2013 and the agreement states:

> …to resolve the remaining Issues 4&5 from a meeting held on 22/11/2013…the meeting comes to the following conclusion:
>
> 1) The verified number of workers who are members of the union is 802 (name list is attached).
>
> 2) The company ensures that it will deduct union contribution fee from the above number of workers from November wage payment onwards and avoid double deduction though the number of workers increases or decreases.
>
> 3) The parties agree to end these remaining issues based on the agreement made in this meeting *(according to the agreement dated 27 November 2013 between the employer and the President of the union)*.

The Arbitration Council in Case no. 167/11-Hung Wah finds that:

> Clause 2 of the agreement made between Hung Wah (Cambodia) Garment and the union stating that monthly wages paid by the employer once a month is lower than the law or it's not in compliance with Article 13. Therefore, Clause 2 of the collective agreement is not in compliance with the Labour Law or it is not applicable.

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

The Arbitration Council finds that Point 3 of the agreement dated 27 November 2013 blocks the workers from demanding that the employer return the union contribution fees the employer deducted against the will of many workers or forces the workers to abandon their right to demand wages to which they are entitled to because of the employer's failure to implement the letters requesting that the employer stop deducting the union contribution fees as payment to CLU. Therefore, the Arbitration Council finds that this agreement affects the workers' right to demand wages for which they are entitled according to the Labour Law. Therefore, Point 3 of the agreement violates the intent of Article 13 of the Labour Law, so it is deemed null and void and is not applicable to the parties.

In conclusion, the workers still have the right to demand that the employer return the monthly 1,000 riel union contribution fees that is deducted by the employer from their wages for submitting membership withdrawal letters to CLU as payment to CLU in September and October 2013.

The Arbitration Council considers whether or not the employer is under an obligation to return the monthly 1,000 union contribution fees deducted by the employer from wages of workers who submitted membership withdrawal letters to CLU as payment to CLU in September and October 2013.

Article 129 of the Labour Law states:

> Collective agreements authorising any wage deductions other than these cases are null and void.
>
> However, the worker can authorise deductions of his wage for dues to the trade union to which he belongs. This authorisation shall be in writing and can be revoked at any time.

In the previous cases, the Arbitration Council held that the purpose of written authorisation for union contribution fees is to protect each worker from any wage deduction against the workers' will and to prevent the employer from wrongfully deducting from workers' wages. Therefore, a request that the employer deduct a union contribution fee shall be made in writing accurately and explicitly that illustrates the genuine will and intent of each worker whom authorises the employer to deduct a union contribution fee as payment to a union *(see Arbitral Award no. 60/05-Ever Green Apparel and 154/11-B&N, Reasons for Decision, Issue 16)*.

Further, the Arbitration Council of Case no. 13/09-June Textile states:

> To ensure that there is no wage deduction against the workers' will, letters requesting wage deduction shall be made accurate and explicit. Therefore, the workers shall accurately and explicitly express that they are no longer willing to authorise the employer to deduct union contribution fees from their wages. Such expression shall be made through a letter or other valid methods.

In the same case, the Arbitration Council interprets Paragraph 2 of Article 129 that:

> The right to request the union contribution fees is deducted from workers' wages or not is the workers' exclusive right expressed in writing. Therefore, if the employer receives a request letter expressing explicit intent that they no longer authorise the employer to deduct union the contribution fees from their wages, the employer shall not deduct the fees from their wages or keep the deducted portion of their wages *(see Arbitral Award no. 46/10-E Garment, Reasons for Decision, Issue 3, 15/11-Golden Gain Shoes, Issue 3, and 154/11-B&N, Issue 16)*.

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

According to the findings of fact, 99 workers submitted membership withdrawal letters with their printed names, thumb prints, and the specific date expressing that they do not authorise the employer to deduct union the contribution fees from their wages to CLU (a letter requesting the employer to stop deducting the union contribution fees from workers' wages as payment to CLU and CLU membership withdrawal letter supported by workers' thumb prints on August 2013, according to Appendix 1 attached to this case).

At the hearing, the employer claims in October 2013, the President of Khmer Youth Trade Union requested that the employer deduct the union contribution fees from workers' wages for October 2013. The Arbitration Council finds that Union President or union leaders have no right to request the employer to deduct union contribution fees from the members of the union on their behalf unless the workers express their desire in writing requesting the

Union President ask the employer to deduct the union contribution fees from their wages on behalf of the workers.

The Arbitration Council finds that the workers have expressed their desire in writing through an accurate and explicit letter requesting the employer deduct the union contribution fees from wages of 99 workers as payment to CLU since August 2013. However, the employer kept deducting union contribution fees from the wages of 99 workers as payment to CLU until November 2013. The Arbitration Council finds that the employer violates the Labour Law because of this action. Therefore, as the deduction was not done in compliance with Article 129 of the Labour Law, the employer is under an obligation to return the amount of wrongful wage deductions in September and October 2013 to the 99 workers.

In conclusion, the Arbitration Council decides to order the employer to return the 1,000 riel union contribution fees deducted from workers' wages in September and October 2013 as payment to CLU to the 99 workers, who are members of Khmer Youth Trade Union, who submitted CLU membership withdrawal letters and requested the employer stop deducting union contribution fees from their wages as payment to CLU in August 2013 *(Appendix 1 is attached to this arbitral award).*

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

DECISION AND ORDER

Part I. Rights dispute:

Issue 1: Order the employer to keep providing workers attending work on Sundays and public holidays with a 1,500 riel payment in lieu of lunch provided to certain workers from May 2013 to the third week of October 2013.

Issues 4&5: Order the employer to return the 1,000 riel union contribution fees deducted from workers' wages in September and October 2013 as payment to CLU to any of the 99 workers, who are members of Khmer Youth Trade Union, who submitted CLU membership withdrawal letters and requested the employer stop deducting union contribution fees from their wages as payment to CLU in August 2013 *(Appendix 1 is attached to this arbitral award).*

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 3 October 2012.

Part II. Interests dispute:

Issue 2: Decline to consider the workers' demand that the employer increase a US$9 accommodation and transportation allowance by US$1 to US$10.

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: **You Suonty**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....