



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល
THE ARBITRATION COUNCIL

Case number and name: 75/11-Quint Major Industrial

Date of Award: 22 July 2011

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

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

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

Chair Arbitrator (chosen by the two Arbitrators): **Tan Try**

DISPUTANT PARTIES

Employer party:

Name: **Quint Major Industrial Co., Ltd (the employer)**

Address: Tror Yeoung Village, Perk Commune, Angsnoul District, Kandal Province

Telephone: 016 915 886

Fax: N/A

Representatives:

1. Mr Peter Pan Head of Human Resources
2. Mr Tan Limhong Administration

Worker party:

Name: **Khmer Workers Power Federation Union (KWPFU)**

Local Union of KWPFU

Address: #2G, Borey Kammarkor Village, Bek Chan Commune, Angsnoul District, Kandal
Province

Telephone: 092 957 472

Fax: N/A

Representatives:

- 1 Mr Chhey Sovan President of KWPFU
- 2 Mr Lor Sopheak General Secretary of KWPFU
- 3 Mr Un Dara Advisor to KWPFU

- | | | |
|---|----------------|---------------------------------------|
| 4 | Mr Neoun Khom | President of the Local Union of KWPFU |
| 5 | Mr Chhem Vibol | Secretary of the Local Union of KWPFU |

ISSUES IN DISPUTE

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

1. The workers demand that when the employer substitutes normal working days for public holidays and Sundays, it first discuss the substitution with the worker delegates and the Local Union of KWPFU, and notify the workers one week in advance.
2. The workers demand that the employer deduct from the (US\$ 7) attendance bonus in proportion when the workers take one, two, three, four, or even five days off. The workers state that this issue has already been settled by an arbitral award.
3. The workers demand that the employer not deduct the attendance bonus or other benefits when they take special leave, such as for marriage, for when their children or parents are sick, and for other personal commitments. The workers state that the employer and the workers reached an agreement about this issue before the Arbitration Council.
4. The workers demand that the employer allow workers who are more than one month pregnant to punch in their cards 10 minutes late without a deduction in benefits such as attendance bonus, etc.
5. The workers demand that the employer either grant workers who have just given birth a one hour break for breastfeeding, i.e. half an hour in the morning, and another half hour in the afternoon, until the child is 18 months old, or provide a payment of US\$ 15 per month for milk formula.
6. The workers demand that the employer reintroduce technical examinations for the purposes of increasing the skill bonus according to each worker's skill. The employer used to have the examination, but not for all workers, and later stopped it.

JURISDICTION OF THE ARBITRATION COUNCIL

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

An attempt was made to conciliate the collective dispute that is the subject of this award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was

unsuccessful, and the non-conciliation report No. 259/11 KB/RK/VK dated 21 June 2011 was submitted to the Secretariat of the Arbitration Council on 23 June 2011.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing: 5 July 2011 at 2:00 p.m.

Procedural issues:

On 14 June 2011, the provincial Department of Labour Disputes of Kandal received a complaint comprised of six demands from the Local Union of KWPFU for the employer to improve working conditions. The employer did not attend the conciliation session, claiming that the six demands had been resolved by the Arbitration Council. Given this, the provincial Department referred the demands to the Arbitration Council. The Secretariat of the Arbitration Council received the demands on 23 June 2011 via the non-conciliation report dated 21 June 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the six non-conciliated issues, held on 5 July 2011 at 2:00 p.m., resulting in issues 2 and 3 being withdrawn by the workers.

In the Memorandum of Understanding On Improving Industrial Relations in the Garment Industry (MoU), dated 28 September 2010, signed by six confederation unions and the Garment Manufacturers Association in Cambodia (GMAC), the signatories agree to submit their rights disputes to binding arbitration. For interests disputes, the parties can choose a binding or non-binding award at the arbitral hearing.

The MoU reads:

If either party finds, through the monitoring mechanism described herein, that violations of the MoU by either party make it impossible to implement, then the parties may choose to declare the MoU null and void.

At the hearing, the workers argued that KWPFU has withdrawn its membership from the Cambodian Confederation of Trade Unions, a signatory to the MoU. Thus, the Arbitration Council has no basis to make a binding award on rights disputes in this case. As a result, this award will be non-binding. The Arbitration Council will consider the remaining issues in dispute [issues one, four, five, and six] based on evidence and reasoning as follows.

EVIDENCE

Witnesses and Experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council:

A. Provided by the employer party:

1. Record of workers' technical skill.
2. Record of workers' technical skill in each building.
3. Record of technical skill of Yem Keoneang.
4. Photographs of entrance gates in buildings.
5. Information sheets of An Phalla, Meoun Sophal, and Nan Choury.
6. Letter from the employer to the Minister for Labour and Vocational Training, objecting to an arbitral award, dated 6 April 2011.
7. Internal Work Rules of the employer, No. 033/07 KBV/KN, dated 10 May 2007.

B. Provided by the worker party:

1. Registration certificate of the Local Union of KWPFU, No. 1985 KB/VK dated 24 November 2010.
2. Report of employment risk of Long Sreytin, dated 16 February 2011.
3. Record of labour disputes between the employer and the Local Union of KWPFU, dated 14 June 2011.
4. Letter from the employer to the Head of the provincial Department of Labour and Vocational Training, requesting it not to deal with any complaints from the Local Union of KWPFU, dated 13 June 2011.
5. Arbitral Award 39/09-Quint Major, dated 21 April 2009.

C. Provided by the Ministry of Labour and Vocational Training:

1. Report on collective labour dispute resolution at Quint Major Industrial Co., Ltd., No. 259/11 KB/RK/VK, dated 21 June 2011.
2. Record of collective labour dispute resolution at Quint Major Industrial Co., Ltd, dated 14 June 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend the hearing addressed to the employer, No. 429 KB/AK/VK/LKA dated 27 June 2011.
2. Notice to attend the hearing addressed to the workers, No. 430 KB/AK/VK/LKA dated 27 June 2011.

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:

- Quint Major Industrial Co., Ltd. employs a total of 3,900 workers.
- The Local Union of KFPWFU, representing 360 workers, is the claimant.
- Although the union previously held most representative status (MRS), it has now expired.
- At the hearing, the workers questioned the authority of the employer's representatives, arguing that the representatives needed authorisation from the employer to appear before the Council. The employer's representatives stated that they would later submit an authorisation letter to the Council. The Arbitration Council ordered them to submit the authorisation letter by 8 July 2011. However, they failed to submit the letter to the Council by the due date.

Issue 1: The workers demand that when the employer substitutes normal working days for public holidays and Sundays, it first discuss the substitution with the worker delegates and the Local Union of KWPFU and notify the workers one week in advance.

- At the hearing, the workers stated that they demand that the employer inform them one week in advance, and not that the employer consult them about the substitution.
- The employer's practice is to substitute normal working days for public holidays or weekly days-off in order for the workers to have consecutive days of leave. The employer may require the workers to work on public holidays or on weekly days-off, allowing them to take leave on normal working days instead.
- The workers make this demand because the employer usually informs them only one day in advance when they are required to work on public holidays or weekly days-off. This creates transportation difficulties because they need to take a charged car with workers from other workplaces. If the other workplaces are closed on public holidays or weekly days-off, the workers are unable to find a car to travel to work in. The workers argue that if the employer informs them in advance, they will be able to find other means of transportation.
- The workers further contend that when they work on public holidays or weekly days-off, they should receive higher wages than they receive for working on normal working days. Currently, the workers receive the same wage as on normal working days. Moreover, if any workers fail to come to work on public holidays, the employer deducts their wages and benefits.

Issue 4: The workers demand that the employer allow workers who are more than one month pregnant to punch in their cards 10 minutes late without losing the attendance bonus.

- There are approximately 60 pregnant workers at the factory.
- There are three buildings at the factory, each of which is equipped with three card-reading machines and has two exit and entrance gates three metres long. The employer has 3,900 workers. Approximately 1,000 workers enter through each gate.
- The women workers start working at 7:00 a.m. and the employer opens the gates at 6:30 a.m.
- The employer provides a US\$ 5 attendance bonus in addition to the US\$ 7 attendance bonus stipulated by law. To be eligible to obtain the additional attendance bonus, the workers are required to come to work regularly and on time. If they come late, they are not eligible to receive the additional attendance bonus.
- The workers demand that the employer refrain from deducting the additional attendance bonus of pregnant workers when they come to work 10 minutes late. The workers make this demand because they are concerned that women endanger their pregnancies whilst attempting to move through the crowd in order to avoid lateness and the resulting loss of the attendance bonus.
- Based on the report of employment risk, the Arbitration Council finds that Long Sreytin, a pregnant worker, was hit when trying to move through a crowd in Building five of the factory on 14 February 2011 at 6:45 p.m.

Issue 5: The workers demand that the employer either allow women workers who have given birth to take a daily one hour break for breastfeeding until their children are 18 months old or provide them with US\$ 15 per month to buy milk formula.

- At the hearing, the workers stated that since the employer, in accordance with the Labour Law, grants workers a daily one hour breastfeeding break for one year from the child's birth, they demand that the employer either extend this period to 18 months from the child's birth or pay a monthly US\$ 15 allowance for milk formula.
- The workers make this demand because some children need to be breastfed beyond a one year period.

Issue 6: The workers demand that the employer reintroduce technical examinations for all workers for the purpose of increasing the skill bonus.

- At the hearing, the workers stated that the employer began conducting weekly technical examinations on 23 October 2008, but stopped the examinations in September 2009.
- When asked by the Council, the workers stated that while the employer has an agreement with other unions regarding technical examinations, it does not have any agreement with them.
- At the hearing, the Arbitration Council ordered the workers to submit an agreement entered into by the employer and another union and evidence regarding the demand. However, they failed to submit this by the due date.

REASONS FOR DECISION

Before turning to the issues, the Arbitration Council will consider the standing of the employer's representatives.

Although Peter Pan and Tan Limhong, the employer's representatives, were present at the hearing, they did not have an authorisation letter from the employer's Director. They were requested by the Council to submit the letter after the hearing but they failed to do so.

Clause 19 of *Prakas* No. 099 SKBY, dated 21 April 2004, states: "A party may appear before the arbitration panel in person... or be represented by any other person expressly authorised in writing by that party."

The Arbitration Council interprets the phrase "**expressly authorised in writing**" to mean that disputant parties can be represented by other persons before the Arbitration Council only if those persons are expressly authorised in writing (*see AAs 161/09-Prek Treng and 43/10-Ming Jian*).

In this case, Peter Pan and Tan Limhong were present at the hearing but they did not have an authorisation letter from the Director of the company. At the hearing, they stated that they would submit the letter later but failed to do so by the due date.

The Arbitration Council holds that, in accordance with clause 19 above, Peter Pan and Tan Limhong had no legal standing to represent the employer before the Arbitration Council, on the grounds that they were not authorised by the employer. Therefore, although the employer's representatives were present at the hearing, the Arbitration Council will not take their arguments into consideration. The Council will make the following decision in the absence of the employer.

Issue 1: The workers demand that when the employer substitutes normal working days for public holidays and Sundays, it first discuss the substitution with the worker delegates and the Local Union of KWPFU and notify the workers one week in advance.

The Arbitration Council will consider whether the employer is obligated to notify the workers one week in advance of the substitution of public holidays or Sundays with normal working days.

Article 147 of the Labour Law states: "Weekly time off shall last for a minimum of twenty-four consecutive hours. All workers shall be given in principle a day off on Sunday."

Clause 1 of *Prakas* No. 010 SKBY on payment for work on paid holidays, dated 4 February 1999, issued by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, states:

Owners or directors of establishments and enterprises covered by article 1 of Labor Law shall allow their employees to have paid holidays on the holidays determined each year by declaration of the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation (MOSALVY).

Clause 2 states:

In special cases when an establishment or enterprise cannot interrupt its activities during the special holidays, as promulgated in a declaration of MOSALVY, the owners or directors of an establishment or enterprise can request its employees to work on those days.

Clause 3 states: "Work on holidays shall be voluntary on the part of employees."

Based on these clauses, the Arbitration Council is of the view that the employer must allow the workers to take leave on public holidays (clause 1); however, if the employer requires the workers to work on public holidays, it must ask them on a voluntary basis (clauses 2 and 3).

The Arbitration Council finds that the reason for the demand is that the employer currently notifies the workers only one day in advance before requiring them to work on public holidays. Further, some workers cannot find a car to travel to work in because they usually take a charged car with workers from different workplaces located near the factory, who do not work on public holidays. The workers claim that if the employer notifies them as demanded, they will be able to find other means of transportation.

The Arbitration Council finds that the demand for advance notification of substitution is appropriate given the circumstances. Any substitution must arise from an agreement between the two parties (the employer and the workers) based on their circumstances.

Moreover, the two parties are aware of the public holidays in each year through annual *Prakas* issued by the Ministry of Labour and Vocational Training, which gives them enough time to notify one another of any substitution. However, a period of notification is not stipulated in any law or public order because it is the right of the parties to a contract to determine this period. Despite this, the Arbitration Council notes that the determination of an appropriate period of notification is necessary to facilitate the workers' cooperation and participation in the substitution.

The Arbitration Council finds that *Prakas* No. 010 above does not obligate the employer to notify the workers or their representatives one week in advance. It merely states that the employer can request the workers to work on public holidays.

In conclusion, the Arbitration Council rejects the workers' demand.

Issue 4: The workers demand that the employer allow workers who are more than one month pregnant to punch in their cards 10 minutes late without losing the attendance bonus.

The Arbitration Council will consider the demand to allow workers who are more than one month pregnant to punch in 10 minutes late without deducting the attendance bonus.

Article 2 of the Labour Law states:

All natural persons or legal entities...are considered to be employers who constitute an enterprise, within the meaning of this law, provided that they employ one or more workers, even discontinuously.

Every enterprise may consist of several establishments, each employing a group of people working together... under the supervision and direction of the employer.

Based on this article, in previous Arbitral Awards the Arbitration Council has held that 'the employer has the right to direct and to supervise human resources in the company as long as it is done lawfully and reasonably' (see *AA 116/07-Grace Sun, Reasons for Decision, Issue 2*).

In Arbitral Award 81/08-Global Apparel, Issue 4, the Arbitration Council ruled that the right to direct and supervise the company also includes the right to set an attendance bonus (see also *AA 65/11-Sae Han, Reasons for Decision, Issue 1*).

According to the facts, the employer provides a US\$ 5 attendance bonus in addition to the US\$ 7 attendance bonus stipulated in the law. To be eligible to obtain the additional US\$ 5 attendance bonus, the workers are required to attend work on time and not be absent; otherwise they are not eligible. In this case, pregnant workers demand that the employer allow them to come to work 10 minutes late without deducting the attendance bonus.

The Arbitration Council considers that the employer provides the attendance bonus as a reward for employees on the condition that they come to work regularly; if they have not fulfilled this condition, they are not eligible to receive the attendance bonus. However, in this case, the Arbitration Council finds that the employer's condition cannot be applied to pregnant workers because pregnancy is a natural factor causing them to be incapable of fulfilling the condition to be eligible to receive the attendance bonus. As a result, to be at work on time to avoid losing the US\$ 5 attendance bonus, without an appropriate measure in place to prevent accidents, they must struggle through the crowd to punch in their cards.

According to the facts, pregnant workers are afraid to move through the crowd because it could affect their health and that of their unborn children. The employer does not authorise pregnant workers to come work late.

Article 229 of the Labour Law states:

All establishments and work places must always be kept clean and must maintain standards of hygiene and sanitation or generally must maintain the working conditions necessary for the health of the workers.

Based on this article, the employer is obligated to protect the workers' health and maintain standards of hygiene at the workplace.

In previous Arbitral Awards, the claimant has had the burden of proof (*see AAs 163/09-Tack Fat, Reasons for Decision, Issue 2; 168/09-Teok Tla Plaza II, Reasons for Decision, Issue 2; 115/10-G-Foremost, Reasons for Decision, Issue 18*).

The workers have submitted evidence that Long Sreytin was hit when she entered a gate to punch in her card. The Arbitration Council finds that this evidence, the report of employment risk with a signature of acknowledgement by the employer, has the necessary quality to be considered. Further, the Arbitration Council finds that the employer has 3,900 workers and that there are three factory buildings, each of which is equipped with three card-reading machines and has two exit/entrance gates. Approximately 1,000 workers work in each building. The Arbitration Council calculates that based on the total number of workers (3,900 workers), the 30 minute period that the employer opens the gates for the workers (the gates are opened for the workers at 6:30 a.m. and the working hours start at 7:00 a.m.), and the total number of nine card-reading machines in the three buildings, approximately 14 or 15 workers punch in each minute. In such a short period, the Arbitration Council believes that there will be unavoidable hard pushing through the crowd, because each worker will race to enter the workplace on time in order to avoid losing their attendance bonus.

In conclusion, in order to ensure security and safety for workers, particularly for pregnant workers, the employer must allow pregnant workers to punch in 10 minutes late

without deducting the US\$ 5 attendance bonus, unless the employer takes appropriate measures to prevent possible accidents.

Issue 5: The workers demand that the employer either allow women workers who have given birth to take a daily one hour break for breastfeeding until their children are 18 months old or provide them with US\$ 15 per month to buy milk formula.

The Arbitration Council considers this case as follows:

Article 184 of the Labour Law 1997 states: "For one year from the date of child delivery, mothers who breast-feed their children are entitled to one hour per day during working hours to breast-feed their children."

Based on this article, the Arbitration Council considers that the Labour Law entitles women workers to one hour per day to breastfeed their children during working hours, for a period of one year from the date of child delivery.

In this case, the Arbitration Council finds that the demand has no basis in the Labour Law or any agreement, thus making it an interests dispute.

With respect to interests disputes, the Arbitration Council considers whether the union that is a disputant party holds MRS. In this case, the Arbitration Council finds that the Local Union of KWPFU does not hold MRS.

In previous Arbitral Awards, the Arbitration Council has declined to consider an interests dispute if the union bringing the dispute to the Council does not have MRS while another union has MRS (*see AAs 48/09-Roo Hsing, Reasons for Decision, Issue 2 and 24/10-Reliable Source, Reasons for Decision, Issue 5*).

Further, clause 43 of *Prakas* No. 099, dated 21 April 2004, states:

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

Based on this clause, the Arbitration Council holds that if it issues an award on an interests dispute, it will become a one year collective agreement. Normally, a collective agreement applies to all workers in the factory and the right to strike cannot be exercised to review the collective agreement before its expiry (*see AA 152/08-Wilson, Reasons for Decision, Issue 2*).

In previous Arbitral Awards, the Arbitration Council has ruled that a non-MRS union does not have legal standing to bring an interests dispute to the Arbitration Council for

resolution (see AAs 48/09-Roo Hsing, Reasons for Decision, Issue 2 and 24/10-Reliable Source, Reasons for Decision, Issue 5).

In this case, the Arbitration Council agrees with the interpretation above. The claimant union does not have an MRS certificate; therefore, it does not have legal standing to bring an interests dispute to the Council for resolution. This right is reserved for the MRS union.

In conclusion, the Arbitration Council rejects the workers' demand that the employer either grant women workers a daily break for breastfeeding until their children are 18 months old or provide them with US\$ 15 per month to buy milk formula.

Issue 6: The workers demand that the employer reintroduce technical examinations for all workers for the purpose of increasing the skill bonus.

The Arbitration Council considers this case as follows:

At the hearing, the workers stated that technical examinations were introduced on 23 October 2008, and took place once a week; however, the employer ended the examinations in September 2009. When asked by the Council, the workers stated that although the employer has an agreement with other unions regarding technical examinations, it does not have any agreement with them.

In this case, the workers failed to present any agreement made by the employer, or any information regarding the examination procedure, how many workers have participated, and how much they have earned from the examinations. The workers also failed to present any agreement obligating the employer to hold examinations for the workers for the purpose of receiving a skill bonus. Moreover, the workers failed to submit any agreement made between the employer and another union.

In previous Arbitral Awards, the Arbitration Council has held that the claimant holds the burden of proof (see 163/09-Tack Fat, Reasons for Decision, Issue 2 and 168/09- Teok Tla Plaza II, Reasons for Decision, Issue 2).

Based on this interpretation, the Arbitration Council finds that the workers failed to present a proper basis for their claim and relevant documents to substantiate their claim. Therefore, the Arbitration Council rejects the workers' demand that the employer hold technical examinations for the purposes of increasing the skill bonus.

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

DECISION AND ORDER

Issue 2: Reject the workers' demand that the employer notify them one week in advance of any substitution of public holidays or weekly days-off with normal working days.

Issue 4: The employer must allow pregnant workers to punch in their cards 10 minutes late without deducting the US\$ 5 attendance bonus, unless the employer takes appropriate measures to prevent possible accidents.

Issue 5: Reject the workers' demand that the employer either grant women workers a daily break for breastfeeding until their children are 18 months old or provide them with US\$ 15 per month to buy milk formula

Issue 6: Reject the workers' demand that the employer reintroduce technical examinations for the purpose of increasing the skill bonus for workers.

Type of Award: Non-binding award

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

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Seng Vuoch Hun**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Tan Try**

Signature: