KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 56/11-Star Knitting

Date of award: 23 June 2011

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Mar Samborana**

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

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

DISPUTANT PARTIES

Employer party:

Name: **Star Knitting & Garment Factory Ltd. (the employer)**

Address: Prek Samrong Village, Takhmao District, Takmoa Town, Kandal Province

Telephone: 012 986 933 Fax: N/A

Representative:

1. Mr Chan Serey Head of Administration

Worker party:

Name: **Voice Khmer Youth Union Federation (VKYUF)**

Local Union of VKYUF

Address: Samrong Village, Takmoa District, Takmoa Town, Kandal Province

Telephone: 092 494 145 Fax: N/A

Representatives:

1. Mr Chan Sophan Officer of VKYUF
2. Mr Tith Vannak Officer of VKYUF
3. Mr Joy Vat President of the Local Union of VKYUF
4. Mr Sorn Maninrath Vice-President of the Local Union of VKYUF

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 day-care centre and a breastfeeding room in accordance with the standard set by the Ministry of Labour and Vocational Training. The employer refuses to accommodate the demand.
2. The workers demand that the employer provide three months' wages to pregnant workers when they take maternity leave in accordance with the Labour Law. The employer refuses to accommodate the demand.
3. The workers demand that the employer allow workers who are three months pregnant to have health checks once a month and that their wages and bonuses be maintained. The employer allows only workers who are five months pregnant to have health checks.
4. The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of authorised leave taken. The employer refuses to accommodate the demand.
5. The workers demand that the employer inform them of the new piece rate one week at the most after setting new samples. The employer refuses to accommodate the demand.
6. The workers demand that the employer pay their full wages when it periodically has no work for them. The employer refuses to accommodate the demand.

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 non-conciliation report No. 206/11 KB/KN dated 9 May 2011 was submitted to the Secretariat of the Arbitration Council on 10 May 2011.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing: 6 June 2011 at 2:00 p.m.

Procedural issues:

On 26 April 2011, the Department of Labour Disputes of Kandal province received a complaint from VKYUF outlining the workers' demands for the improvement of working conditions by the employer. Upon receiving the claim, the Department of Labour Disputes of Kandal province assigned an expert officer to conciliate the dispute on 6 May 2011. Four of the 10 issues were resolved. The six non-conciliated issues were referred to the Secretariat of the Arbitration Council on 10 May 2011 via non-conciliation report No. 206/11 KB/KN dated 9 May 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing, to be held on 20 May 2011 at 2:00 p.m. The employer requested the Arbitration Council to adjourn the hearing. The Council set a new hearing for 6 June 2011 at 2:00 p.m.

Both parties were present at the hearing. The Arbitration Council conducted a further conciliation of the six issues, resulting in issues 3 and 6 being resolved. The remaining issues in dispute are issues 1, 2, 4, and 5.

The Arbitration Council will consider the remaining issues in dispute based on the evidence and reasons below.

EVIDENCE

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

FACTS

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

The Arbitration Council finds that:

- Star Knitting & Garment Factory Ltd. commenced operation in 2004. Four different owners have operated the factory since then. The current owner has managed the

factory for two months and employs approximately 393 workers, of whom 275 are female.

- The Local Union of VKYUF, the claimant in this case, holds certificate of MRS No. 003/11 dated 24 January 2011.

Issue 1: The workers demand that the employer set up a day-care centre and a breastfeeding room in accordance with the standard set by the Ministry of Labour and Vocational Training.

- Since 2004 the factory has not had a day-care centre or a breastfeeding room, despite four different owners operating the factory.
- The workers demand that the employer set up a day-care centre and a breastfeeding room as the employer is required by law to do so.
- The employer acknowledges the requirement in the law to set up a day-care centre and a breastfeeding room at the factory. It argues that it cannot afford to accommodate the demand because the new owner took over the factory only two months ago. Moreover, there is no space in the factory for a breastfeeding room or a day-care centre.
- As the employer is required to accommodate their demand, the workers maintain the demand despite the new owner taking over two months ago.

Issue 2: The workers demand that the employer provide three months' wages to pregnant workers when they take maternity leave in accordance with the Labour Law.

- The new owner has not set a policy of providing 50% of three months' wages to pregnant workers when they take maternity leave.
- No female workers have taken maternity leave in the two month period since the new owner took over.
- The workers maintain their demand.

Issue 4: The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of authorised leave taken.

- Workers who attend work regularly receive a monthly US$ 7 attendance bonus.
- The employer's practice is to deduct the full attendance bonus when workers take special, sick, and annual leave.
- The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of authorised special, sick, and annual leave taken.

Issue 5: The workers demand that the employer inform workers of the new piece rate one week at the most after setting new samples for them to complete.

- The employer's practice is to inform workers of the new piece rate one day before pay day.
- The workers make this demand because they want to know how much they can earn from difficult samples.
- The employer normally sets all new piece rates for workers to complete first and then it evaluates how difficult the new piece rate is by taking workers' skill into account.
- The employer states that it does not inform workers of the result of the evaluation before pay day. The reason behind this practice is that it is concerned that new cheaper piece rates may trigger complaints from workers.
- New piece rates always affect workers' wages.

REASONS FOR DECISION

Issue 1: The workers demand that the employer set up a day-care centre and a breastfeeding room in accordance with the standard set by the Ministry of Labour and Vocational Training.

In this case, the workers demand that the employer set up a day-care centre and a breastfeeding room in accordance with the Labour Law. The Arbitration Council will consider this issue below.

Article 186 of the Labour Law states:

> Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a day-care centre.
>
> If the company is not able to set up a day-care centre on its premises for children over eighteen months of age, female workers can place their children in any day-care centre and the charges shall be paid by the employer.

Based on this provision, the Arbitration Council considers that the employer is obliged to set up a breastfeeding room and a day-care centre. If it is unable to set up a day-care centre for children aged over 18 months, female workers can place their children in any external day-care centre and the associated charges will be paid by the employer.

In previous arbitral awards, the Arbitration Council has ruled that employers employing at least 100 female workers are obligated to set up a breastfeeding room and a day-care centre. If the employer is unable to so for children aged over 18 months, female workers can place their children in any external day-care centre and the associated charges

will be paid by the employer based on actual receipts *(see Arbitral Awards 63/04-Shine Well, reasons for decision, issue 2; 68/04-City New, reasons for decision, issue 1; 103/08-Vivatino Design, reasons for decision, issue 2; and 115/08-Top One, reasons for decision, issue 2)*.

According to the facts, the employer cannot afford to set up a breastfeeding room and a day-care centre because the new owner took over two months ago; moreover, the space is too narrow in the factory.

The Arbitration Council considers that the purpose of the requirement in the Labour Law that the employer set up a day-care centre is to enable the mother and child to be close to each other so that the mother can provide loving care and natural breastmilk to the baby without the use of milk formula during the first six months, in accordance with the policy of the Cambodian government, and to maintain the safety of the children while their mothers are working *(see Arbitral Awards 63/04-Shine Well, reasons for decision, issue 2; 68/04-City New, reasons for decision, issue 1; 79/07-Terratex, reasons for decision, issue 8; 77/08-Xing Tai, reasons for decision, issue 3; 103/08-Vivatino Design, reasons for decision, issue 2; and 115/08-Top One, reasons for decision, issue 2)*.

The Arbitration Council considers that there is a mandatory requirement to provide a breastfeeding room. Therefore, the employer must set up a breastfeeding room. Regarding the day-care centre, the employer has the option of providing payment in lieu if it is unable to set up a day-care centre for children aged over 18 months.

In conclusion, the Arbitration Council orders the employer to set up a breastfeeding room and a day-care centre in or nearby to the factory. If the employer is unable to set up a day-care centre for children aged over 18 months, female workers can place their children in an external day-care centre and the associated charges will be paid by the employer based on actual receipts.

Issue 2: The workers demand that the employer provide three months' wages to pregnant workers when they submit maternity leave in accordance with the Labour Law.

In this case, the workers demand that the employer provide maternity payments in accordance with the Labour Law. The Arbitration Council considers the issue below.

Article 182, paragraph one of the Labour Law states that "In all enterprises covered by Article 1 of this law, women shall be entitled to a maternity leave of ninety days."

Article 183, paragraphs 1 of the same law states that "During the maternity leave as stipulated in the preceding article, women are entitled to half of their wage, including their perquisites, paid by the employer."

Based on the abovementioned articles, the Arbitration Council considers that female workers are entitled to a maternity leave of ninety days with half of their wages and perquisites paid during that period.

According to the findings of fact, the employer refuses to pay 50% of the wages and perquisites of female workers in accordance with the Labour Law. The Arbitration Council considers that the employer's decision and practice is improper. Therefore, the Arbitration Council orders the employer to pay 50% of ninety days' worth of wages and perquisites to female workers who take maternity leave.

The Arbitration Council will consider whether the employer is obliged to make maternity payments before female workers take maternity leave.

Article 115, paragraph three of the Labour Law states that "[p]ayment shall not be made on a day-off. If payday falls on such a day-off, the payment of wages shall made a day earlier."

In previous arbitral awards, the Arbitration Council has ruled that the entire maternity payment must be paid to female workers before the commencement of their maternity leave *(see Arbitral Awards 57/06-Evergreen, reasons for decision, issue 6; 97/06-New Max Garment, reasons for decision, issue 1; and 08/08-Hytex, reasons for decision, issue 2)*.

In conclusion, the Arbitration Council orders the employer to pay 50% of ninety days' worth of wages and perquisites before workers commence maternity leave.

Issue 4: The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of authorised leave taken.

According to the facts, the workers demand that the employer deduct from the attendance bonus in proportion to the number of days of authorised leave taken, i.e. special leave, sick leave, and annual leave. The Arbitration Council will consider the issue below.

A. Case of sick leave

Point 1 Notification No. 041/11 KB/SCN dated 7 March 2011 provides that "workers who attend work regularly in accordance with the number of working days in each month will receive a bonus of at least US$ 7 per month."

The Arbitration Council notes that this notification does not contain a clear statement about authorised leave and considers that the same ambiguity exists in both Notification No. 041/11 KB/SCN and Notification No. 017 SKBY dated 18 July 2000, which states that "workers who attend work regularly in accordance with the number of working days in each month will receive a bonus of at least US$ 5 per month."

Because of this ambiguity, in previous arbitral awards the Arbitration Council has ruled that employers must pay the attendance bonus in proportion to the number of days of authorised leave taken by the workers. As the workers are permitted to take the leave, they should not lose the full attendance bonus *(see Arbitral Awards 57/07-Seratex, reasons for decision, issue 3; 106/07-M & V (Branch 3), reasons for decision, issue 3; and 128/08-Wei Hua, reasons for decision, issue 2); and 31/11-Quint Major Industrial, Reasons for Decision, Issue 3)*.

The Arbitration Council will apply the above ruling in this case.

In conclusion, the Arbitration Council orders the employer to deduct from the attendance bonus in proportion to the number of days of authorised sick leave taken.

B. Case of paid annual leave

Article 166, paragraph one of the Labour Law states:

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

In Arbitral Award 21/05-Sinomax, the Arbitration Council ruled that "the employer must pay workers who are on leave in accordance with the law, including a payment to cover the attendance bonus."

The Arbitration Council will apply the above ruling in this case.

In conclusion, the Arbitration Council orders the employer to refrain from deducting the full attendance bonus when workers take paid annual leave.

C. Case of special leave

Article 171 of the Labour Law states:

> The employer has the right to grant his worker special leave during…event[s] directly affecting the worker's immediate family.
>
> If the worker has not yet taken his annual leave, the employer can deduct the special leave from the worker's annual leave.
>
> If the worker has taken all his annual leave, the employer cannot deduct the special leave from the worker's annual leave for the next year.
>
> Hours lost during the special leave can be made up under the conditions set by a *Prakas* of the Ministry in Charge of Labor.

Clause 1 of *Prakas* No. 267 dated 11 October 2001 states:

> Employers in the enterprises and establishments described in Article 1 of the Labour Law have the right to grant their workers and employees special leave with salary of a duration not exceeding seven days in a year on the occasion the workers or employees have to do their own business or on the occasion of events directly affecting the families of those workers and employees, such as:
>
> - Their own weddings;
> - Their wives giving birth;
> - Their childrens' weddings;
> - The illness or death of their husbands, wives, children, fathers, or mothers.

In Arbitral Award 99/04-AIA Garment, reasons for decision, issue 5, the Arbitration Council ruled that:

> Even though Article 171 of the Labour Law and *Prakas* No. 267 do not bind the employer, the employer cannot deduct from workers' wages when they take special leave. According to Article 171 of the Labour Law and *Prakas* No. 267, the employer can deduct special leave from the workers' annual leave. If the employer allows the workers to take special leave and they have used all their annual leave for that year, the employer cannot deduct the special leave from the next year's annual leave. Working hours which are lost through the provision of special leave can be made up according to the conditions set out in the *Prakas* of the Ministry of Labour.

The Arbitration Council will apply the said ruling in this case. Therefore, the employer cannot deduct from the workers' attendance bonuses when they take special leave by using paid annual leave.

In conclusion, the Arbitration Council orders the employer to deduct from the attendance bonus in proportion to the number of days of authorised sick leave taken and to provide the full attendance bonus when workers take paid annual leave and special leave using paid annual leave.

Issue 5: The workers demand that the employer inform workers of the new piece rate one week at the most after setting new samples for them to complete.

The Arbitration Council will consider whether the employer is obliged to inform workers of the new piece rate one week at the most after setting new samples for them to complete.

Article 112 of the Labour Law states:

> The employer must take measures to inform the workers in a precise and easily comprehensible fashion of:
>
> a) The terms regarding wage that apply to the workers before they are assigned to a job or at any time that these terms change.
>
> b) The items that make up their wage for every pay period when there is a change to the items.

Based on this article, the Arbitration Council considers that the employer is required to inform workers of future wages if their wages are going to change. Based on this consideration, the workers' demand concerns their entitlement in the Labour Law that the employer give them prior notice of terms regarding wages.

In this case, the employer and the workers agree that the terms regarding wages are affected upon the new piece rate being issued. The Arbitration Council considers that the employer has failed to observe its obligation to give prior notice in a precise and easily comprehensible fashion of new terms regarding wages due to new price rate or new samples. Therefore, the employer must inform workers of the new piece rate *(see 14/03-Chu Hsing, reasons for decision, issue 2 and 71/08-River Rich, reasons for decision, issue 2)*.

The Arbitration Council will go on to consider how many days in advance the employer is required to inform workers of the new piece rate.

Article 112(a) of the Labour Law does not specify how many days in advance the employer is required to inform the workers of the changes to the terms regarding wages.

In Arbitral Award 62/04-Ecent, reasons for decision, issue 2, the Arbitration Council ruled that:

> Considering the meaning of Article 112(a) of the Labour Law, set out above, there is no clear provision as to whether or not the employer has to inform the employees of their wage rate within a certain number of days, but the article does state that the employer is obliged to inform them in advance. As for the number of days required for the period of notification, the Arbitration Panel needs to consider the practical needs of the employer.

In this case, the employer has been failing to inform the workers of the new piece rate after it has been evaluated. The Arbitration Council considers that the employer's practice is improper, as workers have to be informed of any variation in their wages. Therefore, the employer must inform the workers of the new piece rate after the evaluation is completed.

In previous arbitral awards, the Arbitration Council has ruled between three and seven days is enough time for testing to determine the piece rate *(see Arbitral Awards 05/06-W & D, reasons for decision, issue 7 and 03/07-United Knitting Mfg., reasons for decision, issue 3)*.

In this case, the workers demand that the employer announce the new piece rate seven days after setting a new sample for workers to complete. The employer did not specify when it will be able to announce the new piece rate.

In conclusion, the Arbitration Council orders the employer to inform the workers of the new piece rate of each sample seven days after they commence work on new mode.

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

DECISION AND ORDER

Issue 1: Order the employer to set up a breastfeeding room and a day-care centre in or nearby to the factory. If the employer is unable to set up a day-care centre for children aged over 18 months, female workers can place their children in an external day-care centre and the associated charges will be paid by the employer based on actual receipts.

Issue 2: Order the employer to pay 50% of ninety days' worth of wages and perquisites before workers commence maternity leave.

Issue 4: Order the employer to deduct from the attendance bonus in proportion to the number of days of authorised sick leave taken and to provide the full attendance bonus when workers take paid annual leave and special leave using paid annual leave.

Issue 5: Order the employer to inform workers of new piece rate of each sample after they have worked on new piece rate for seven days.

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: **Mar Samborana**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....