



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**ក្រុមប្រឹក្សាអាជ្ញាគណ្តារ**

**THE ARBITRATION COUNCIL**

**Case number and name: 226/13-Pou Yuen (Cambodia)**

**Date of award: 28 November 2013**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRAL PANEL**

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

Arbitrator chosen by the worker party: **An Nan**

Chair Arbitrator (chosen by the two Arbitrators): **Kong Phallack**

Dissenting Opinion by: **Arbitrator Ing Sothy**

#### **DISPUTANT PARTIES**

##### **Employer party:**

Name: **Pou Yuen Cambodia Enterprise**

Address: Sang Thmey Road, Khan Sen Sok, Phnom Penh

Telephone: 012 437 068

Fax: N/A

Representatives:

- |                   |                            |
|-------------------|----------------------------|
| 1. Ms Lim Muykea  | Assistant to Director      |
| 2. Mr Heng Bunnak | Assistant to Translator    |
| 3. Mr Sorn Udom   | Assistant to administrator |

##### **Worker party:**

Name: - **Workers Union Federation (WUF)**

Address: Sang Thmey Road, Khan Sen Sok, Phnom Penh

Telephone: 092 474 186

Fax: N/A

Representatives:

- |                   |   |
|-------------------|---|
| 1. Mr Ly Veng     | President of WUF  |
| 2. Mr Mai Syma    | Officer of WUF  |
| 3. Mr Khim Champa | President of Cambodian Union of Workers Spirit<br>at Pou Yuen |

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|--------------------|---|
| 4. Ms Nai Telap    | Secretary of Cambodian Union of Workers Spirit<br>at Pou Yuen |
| 5. Ms Huy Sokleang | Secretary of Union of Workers' Will of Pou<br>Yuen            |
| 6. Ms Sor Samoeun  | Vice-President of Union of Workers' Will of Pou<br>Yuen       |
| 7. Ms Ngo Ro       | Secretary of local union of WUF                               |

### **ISSUES IN DISPUTE**

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

1. The workers demand that the employer pay full wages without inspection and approval from Labour Inspectors when the employer has no work supplied to the workers. The employer does not agree to the demand.
2. The workers demand that the employer use twelve months as the basis for calculating payment in lieu of annual leave.
3. The workers demand that the employer provide a US\$20 gift to each worker who takes maternity leave. The employer claims it cannot afford to meet the demand.
4. The workers demand that the employer provide female workers US\$20 per month from the date of labour until the babies reach 18 months of age. The employer claims it cannot afford to meet 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. 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. 1297 dated 18 October 2013 was submitted to the Secretariat of the Arbitration Council on 18 October 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:** 8 November 2013 (at 1:30 p.m.)

**Procedural issues:**

On 16 September 2013, the Department of Labour Disputes (the department) received a complaint from WUF, 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 14 October 2013, resulting in four of eight issues being resolved. The four non-conciliated issues were referred to the Secretariat of the Arbitration Council (SAC) on 18 October 2013.

Upon receipt of the case, the SAC summoned the parties to a hearing and conciliation of the four non-conciliated issues, held on 28 October 2013 at 2 p.m. By written correspondence from the director of Pou Yuen, dated 25 October 2013 submitted to the Arbitration Council on 25 October 2013, the employer requested the date of the hearing be deferred. The workers agreed with the request.

The SAC summoned the parties to a hearing held on 6 November 2013 at 2 p.m. The parties were present. However, the arbitrator from employer list was on urgent business and was unable to attend the hearing on time. Therefore, the Arbitration Council decided to defer the hearing to 8 November 2013 at 1:30 p.m. with the parties' agreement.

The SAC summoned the parties to the hearing held on the aforementioned date. Both parties were present.

The Arbitration Council conducted a further conciliation of the four non-conciliated issues, but they remained unresolved. At the hearing, the workers withdrew Issue 1 and 4 from the case. Therefore, the Arbitration Council considers the two non-conciliated issues: Issue 2 and 3.

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

In this case, the parties chose non-binding arbitration in relation to interests disputes.

The parties agreed to defer the date of arbitral award issuance from 13 November 2013 to 28 November 2013.

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

## **EVIDENCE**

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

## **FACTS**

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

### **The Arbitration Council finds that:**

- Pou Yuen (Cambodia) Enterprise (“Pou Yuen”) is a footwear manufacturer. Pou Yuen employs a total of 3,500 workers.
- WUF and three other unions under WUF, including: the local unions of WUF, Union of Workers’ Will at Pou Yuen, and Union of Workers Spirit at Pou Yuen, are claimants in this case.
- The workers claim the three unions have 2,300 members.
- The parties agree that the total membership of the three unions’ number 1,900; based on the number of workers from whom wages were deducted by the employer for the union contribution fee in October 2013.
- In its second term, the leaders of Union of Workers Spirit: 1) Mr Khim Champa-President, 2) Ms Vong Nom-Vice-President, and 3) Ms Nai Telap-Secretary are recognised by the department through a letter no. 984 dated 13 August 2013:
- The leaders of the Union of Workers’ Will at Pou Yuen: 1) Ms Vik Mom-President, 2) Ms Sor Samoeun-Vice-President, 3) Ms Huy Sokleang-Secretary are recognised by the department through a letter no. 985 dated 13 August 2013:
- The leaders of the local union of WUF: 1) Mr Pen Chanrith-President, 2) Mr Yan Bunthan-Vice-President, and 3) Ms Ngo Ro-Secretary are recognised by the department through a letter no. 1522 dated 31 December 2012:

### **Issue 2: The workers demand that the employer use twelve months as the basis for calculating payment in lieu of annual leave.**

- The employer calculates payment during leave and payment in lieu of remaining annual leave by using base wage, divided by 26, then multiplied by the number of days of annual leave taken by the workers, or multiplied by the number of days of any remaining annual leave.

- The workers demand that the employer calculate payment during leave and payment in lieu of remaining annual leave by taking the average sum of wages from the last 12 months as the basis for calculation. The sum of wages received by workers from the last 12 months is divided by 26 then multiplied by the number of days of annual leave taken by the workers or the number of days of the remaining annual leave.
- The parties agree that they only disagree on calculation methodology for payment in lieu of annual leave-not the timing of the payment in lieu of annual leave.
- The workers make the demand based on the following reasons:
  - o Based on the provisions of the Labour Law (they cannot recall the article), wages comprises base wages and perquisites.
  - o Taking annual leave is taking paid leave which is a lawful entitlement of the workers. Therefore, the calculation of payment during leave should be made in proportion to wages that the workers have already earned.
  - o Using base wage as the basis for calculation fails to include other workers' benefits such as attendance bonus, accommodation and transportation allowance, and incentive bonus.
- The employer claims it will not meet the demand because:
  - o The employer has taken base wages as the basis for the calculation since the commencement of its operations.
  - o The employer has also used base wage as the basis for docking the wages of workers taking unpaid leave. If the employer uses the sum of base wage and perquisites as the basis docking wages from workers' taking unpaid leave, the workers would not agree on the wages being docked on the basis of base wages and perquisites.

**Issue 3: The workers demand that the employer provide a US\$20 gift to workers who are about to take maternity leave.**

- The employer has never provided gifts to workers who are about to take maternity leave.
- The workers claim female workers have been working hard for many years; therefore, the employer should provide them with a gift of US\$20 when they are about to take maternity leave.
- The employer claims that on average, there are about two to three workers taking maternity leave; however, in this latest month, there are 50 workers taking maternity leave.
- The employer claims that the employer cannot afford to meet the demand.
- The parties agree that there is no agreement or internal work rule to support the demand.

## REASONS FOR DECISION

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

Paragraph 2, Article 312 of the Labour Law states:

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

Clause 43 of the Prakas No. 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 legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council's decisions are in equity for all other disputes. 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 (*see the Arbitration Award 05/11-M & V (Branch 1), Reasons for Decision, Issue 1&5, 13/11-Gold Kamvimex, Issue 1&2, 14/11-GXG, Issue 4*).

Any kinds of disputes that are not stipulated in an agreement or collective agreement are interests dispute and the Arbitration Council settles interests disputes based on equity (*see Arbitral Award 31/13-Quint Major Industrial, Reasons for Decision, Issue 4 and 62/11-Ocean Garment, Issue 1, 98/13-Minfu Garment, and 92/13-S L Garment Processing, Issue 5 and 6*).

**Issue 2: The workers demand that the employer take the average sum of wages that the workers have already earned from the last 12 months as the basis for calculating payment during leave and payment in lieu of the remaining annual leave.**

Before considering the demand, the Arbitration Council will consider whether the demand gives rise to a rights dispute or an interests dispute.

Paragraph 1, Article 166 of the *Labour Law* (1997) states that:

Unless there are more favorable 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...

Article 168 of the *Labour Law* (1997) states that:

Before the worker departs on leave, the employer must pay him an allowance that is at least equal to the average wage, bonuses, benefits, and indemnities, including the value of benefits

in kind, but excluding reimbursement for expenses, that the worker earned during the twelve months preceding the date of departure on leave. This allowance shall in no case be less than the allowance that the worker would have received had he actually worked.

Based on the interpretation of a rights dispute above, the Arbitration Council finds that Issue 2 gives rise to a rights dispute because the demand is about annual leave stipulated in Article 166 and 168 of the Labour Law.

The Arbitration Council will consider whether or not the employer shall take the average sum of wages that the workers have earned within the last 12 months as the basis for calculating payment during leave and payment in lieu of the remaining annual leave.

In this case, the parties agree that there is no dispute about the timing of payment in lieu of the remaining annual leave; however, the parties disagree on the formula for calculating payment in lieu of the remaining annual leave.

According to Article 168 of the *Labour Law* mentioned above, the Arbitration Council finds that before the worker departs on leave, the employer must pay him an allowance that is at least equal to the average wage, bonuses, benefits, and indemnities, including the value of benefits in kind that the worker earned during the twelve months preceding the date of departure on leave.

In previous arbitral awards, the Arbitration Council interpreted Article 168 of the Labour Law to say that the employer shall calculate payment during leave and payment in lieu of the remaining annual leave by dividing the sum of wages that the workers have earned within the last 12 months by 12 (to get the average monthly wages) and 26 (to get the average daily wages) and multiplying by the number of days of leave that the workers take or the remaining annual leave (*see Arbitral Award no. 27/04-M S, Reasons for Decision, Issue 2, 23/08-M & V 1, Issue 7, 25/08-A S D, Issue 2, 94/07-Fortune Garment, Issue 2, 57/10-Canterran, Issue 3, and 07/13-Ocean Garment, Issue 3*).

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

In this case, the employer calculates the payment during leave, and payment in lieu of the remaining annual leave, by using base wages as the basis divided by 26 and multiplied by the number of days of annual leave the workers take or the number of days of the remaining annual leave. In this case, the employer does not take to the average sum of wages, bonuses, benefits, and indemnities, including the value of benefits in kind that the worker already earned from the last twelve months preceding the date of departure on leave as the basis for calculating payment during leave or by the remaining annual leave. Therefore, the Arbitration Council finds that the employer does not comply with the aforementioned Article 168 of the *Labour Law* and previous arbitral orders.

Therefore, the Arbitration Council decides to order the employer to calculate payment during leave and payment in lieu of the remaining annual leave by dividing the sum of wages

that the workers have earned within the last 12 months by 12 (to get the average monthly wages) and 26 (to get the average daily wages) and then multiplying by the number of days of annual leave that the workers take or by the remaining annual leave.

**Issue 3: The workers demand that the employer provide a US\$20 gift to workers who are about to take maternity leave.**

Before considering the demand, the Arbitration Council will consider whether the demand gives rise to a rights dispute or an interests dispute.

The Arbitration Council finds that there is no legal provision, agreement, collective agreement, internal work rule, or past practice obligating the employer to provide a gift of US\$20 to pregnant workers who are about to take maternity leave. Therefore, the Arbitration Council finds that the issue is an interests dispute.

For interests disputes, the Arbitration Council considers as follows:

Paragraph 2 of Article 96 of the *Labour Law (1997)* states:

*The collective agreement is a written agreement relating to the provisions provided for in Article 96 - paragraph 1. The collective agreement is signed between:*

*a) One part: an employer, a group of employers, or one or more organisation representative of employers; and*

*b) The other part: one or more trade union organisations representative of workers...*

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

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

In reference to Paragraph 2, Article 96 and Clause 9 of Prakas no. 305, generally the Arbitration Council always considers the most representative status 'MRS' of the claimant union in interests dispute cases because the MRS gives legal rights to unions to form collective agreements with employers and to bring interests disputes to the Arbitration Council for resolution.

Clause 43 of the Prakas No. 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 applies to all workers in the company thereby removing the right to strike in relation to future interests disputes from workers who are not the members of the union. Therefore, the Arbitration Council can only settle interests disputes brought by the union which has MRS in the enterprise or collective unions which have more than half of the number of workers in the enterprise as members

(see *Arbitral Awards 81/04-Evergreen, Reasons for Decision, Issue 4, and 98/04-Great Union, Issue 3*).

In Award 19/08 & 20/08-Quint Major Industrial, New Reasons for Decision, Issue 3, the Arbitration Council held that in the situation where there is no single union with MRS, all the unions with members at the enterprise or establishment, or a number of them, may join together to submit a joint draft of a collective bargaining agreement, if the number of their members creates a majority among the total number of workers. Therefore, the Arbitration Council considers that if none of the unions has the MRS, a collection of unions with a majority of members can bring interests disputes before the Arbitration Council for resolution (see *Arbitral Award no. 81/07-Supreme, Reasons for Decision, Issue 1*).

The Arbitration Panel in this case agrees with the interpretation made regarding MRS in previous awards.

In this case, three unions from *Pou Yuen* including the local union of WUF, Union of Workers Will at *Pou Yuen*, and Union of Workers Spirit at *Pou Yuen* are joint claimants. The parties agree that the number of workers who are members of the three unions from whose wages the employer deducted the union contribution fee in the last month (October 2013) is 1,900. In this case, the Arbitration Council finds the collective membership of the three unions comprises 1,900 workers among the total number of 3,500 workers at *Pou Yuen*. The collective membership of the three unions comprises 54.29% which is more than half of the total number workers at *Pou Yuen*. Therefore, the Arbitration Council finds that the three unions have lawful right to bring interests disputes to the Arbitration Council to consider.

According to Article 312, the Arbitration Council resolves interests disputes based on equity.

In this case, the workers demand based on the reason that the workers have been working hard for many years, therefore, the employer should provide a gift of US\$20 to workers who are about to take maternity leave. Besides this claim, the workers do not provide other specific claims or reasons to support their demand and Arbitration Council's consideration of the based on equity.

Therefore, the Arbitration Council decides to reject the workers' demand that the employer provide a gift of US\$20 to female workers who are about to take maternity leave.

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 2:** Order the employer to calculate payment during leave and payment in lieu of the remaining annual leave by dividing the sum of wages that the workers have earned within the

last 12 months by 12 (to get the average monthly wages) and 26 (to get the average daily wages) and then multiplying by the number of days of annual leave that the workers take or the remaining annual leave.

**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 3:** Reject the workers’ demand that the employer provide a gift of US\$20 to female workers who are about to take maternity leave.

**Type of award: non-binding award**

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

**SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL**

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature: .....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....

## Annex to Arbitral Award 226/13-Pou Yuen

### Dissenting Opinion

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

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

Based on this clause, I, Arbitrator **Ing Sothy**, would like to record my dissent on Issue 2 of the Arbitral Award **226/13-Pou Yuen** in which the employer is ordered to calculate payment during leave and payment in lieu of the remaining annual leave by dividing the sum of wages that the workers have earned within the last 12 months by 12 (to get the average monthly wages) and 26 (to get the average daily wages) and multiplying with the number of days of annual leave that the workers take or the remaining annual leave.

I would like to explain the reasons for my dissent:

I agree with the Arbitration Council's decision in this arbitral award which is applied to only the calculation in accordance with Paragraph 2 of Article 167 and Article 168 of the Labour Law. If the calculation methodology is applied differently to the law as cited above, such application is illegitimate and I will object to such application except if it is applied with the parties' agreement."

Phnom Penh, 28 November 2013

Signature

**Ing Sothy**