KINGDOM OF CAMBODIA
Nation King Religion

ARBITRATION COUNCIL

Case number and name: 05/06-W&D

Date of Award: 10 February 2006

ARBITRAL AWARD

Issued under Article 313 of the Labor Law

Arbitration Panel

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

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

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

Disputing parties

Employer party:

Name: W&D Cambodia Co. Ltd.

Address: Reusey Village, Sangkat Meanchey, Khan Meanchey, Phnom Penh

Telephone: 012 522 255

Fax: N/A

Representative:

Mr. Cheat Khemra, representative of the company

Worker party:

Name: Khmer Youth Federation Trade Union (KYFTU) and Khmer Youth Union at W&D Cambodia Co. Ltd.

Address: Village, Sangkat Meanchey, Khan Meanchey, Phnom Penh

Telephone: 011 753 847 / 011 622 963

Fax: N/A

Representative:

1. Mr. May Vathana, Officer of KYFTU
2. Mr. Long Sophat, Officer of KYFTU
3. Mr. Nov Titha, Officer of KYFTU
4. Mr. Sea San, Officer of KYFTU
5. Mr. Phu Sitha, President of Khmer Youth Union at W&D Cambodia Co. Ltd.

6. Ms. Tuy Makara, Vice-President of Khmer Youth Union at W&D Cambodia Co. Ltd.
7. Ms. Hong Kimly, union commission of Khmer Youth Union at W&D Cambodia Co. Ltd
8. Ms. Sok Sinat, union commission at Khmer Youth Union at W&D Cambodia Co. Ltd.
9. Ms. Sang Srey Yet, worker at W&D Cambodia Co. Ltd.

Issues In Dispute

Pursuant to the non-conciliation report, the following non-conciliated issues are the demands made by the worker party in this case:

1. The workers demanded that the company reimburse the expense related to medical exams of 10,100 riel to each of them and that the medical expense be covered by the company upon recruiting new workers.
2. The worker party demanded that the company implement a system allowing workers to sign day-by-day for their overtime work, that the overtime work is voluntary, and that no punishment will be imposed on workers for their failure to work overtime.
3. The workers demanded that the company grant at least seven days of marital leave.
4. The workers demanded that the company provide severance pay of five percent and other benefits as mandated by the law to any worker holding a fixed duration contract when either the company or the worker do not wish to renew the contract.
5. The worker party demanded that the company recruit the number of apprentices in accordance with the Prakas of the Ministry of Labour and Vocational Training.
6. The worker party demanded that the company construct a reasonable canteen with tables and chairs for the workers to use for having meal.
7. The workers demanded that the company issue the piece rate of a model three days prior to working on it.
8. The workers requested that the company not deduct their wages when taking leave.
9. The workers demanded that the company rescind the fixed duration contracts.
10. The workers demanded that the company bear responsibility for work-related accidents.
11. The workers demanded that the company deduct the wages of workers for union contributions.

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 (99/04); the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators (Third Term) (513/05).

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. 100 KKBV/AK/VK, dated 23 January 2006 was submitted to the Secretariat of the Arbitration Council on 23 January 2006.

Hearing and Summary of Procedure before the Arbitration Council

Place of hearing: Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Basak, Khan Cham Kar Mon, Phnom Penh

Date of hearings:

- **First Hearing:** 27 January 2006 (2:30 p.m. – 5:00 p.m.)
- **Second Hearing:** 2 February 2006 (2:30 p.m. – 4:30 p.m.)

Procedural issues:

On 6 December 2005, the Department of Labour Disputes received a petition with 11 issues from the KYFTU, dated 6 December 2005, demanding that W&D Cambodia Co. Ltd. improve working conditions to conform with the Labour Law. Following the receipt of the petition, the Department of Labour Disputes assigned a Labour Dispute Settlement Officer to conciliate the dispute. The last conciliation took place on 16 January 2006; however, no agreement was reached on any of the 11 issues.

On 23 January 2006, the Arbitration Council received the case and its non-conciliation report No. 100 KKBV/AK/VA, dated 23 January 2006 [signed] by Mr. Koy Tep Daravuth, the Chief of the Department of Labour Disputes. Subsequent to the receipt, the Arbitration Council invited the disputing parties to the hearing. The Arbitration Council conciliated the 11 issues on 27 January 2006, starting from 2:00 p.m, and on 2 February 2006, [also] starting from 2:00 p.m. Both parties were present upon invitation of the Arbitration Council on both occasions. At both hearings, the Arbitration Council tried to further conciliate the 11 issues, during which [the following] eight issues were successfully conciliated: Issue 2, Issue 3, Issue 4, Issue 5, Issue 6, Issue 8, Issue 9, and Issue 10. Therefore, in this award the Arbitration Council will only consider the unsuccessfully-conciliated issues: Issue 1, Issue 7 and Issue 11 on the basis of evidence and findings of fact as follows:

Evidence

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Power of Attorney from the Director of W&D Cambodia Co. Ltd. designating authority to Mr. Cheat Khemra, dated 16 January 2006
2. Certificate of business registration No. 3174 PN.PAB.KN, dated 24 November 1997
3. Articles of Incorporation of W&D Cambodia Co. Ltd.
4. Letter of approval in respect of petition with 11 issues by three workers' representatives, No. 06014/133, dated04 January 2006
5. Minute of meeting dated 3 January 2006
6. Minute of collective labour dispute conciliation dated 17 June 2005
7. Internal Work Rules of W&D Cambodia Co. Ltd. as certified by the Department of Labour Inspection, dated 4 February 2005.

Provided by the worker party:

1. Certificate of registration of Khmer Youth Union at W&D Cambodia Co. Ltd., dated 30 December 2005
2. Several labour contracts
3. Statute of Khmer Youth Union at W&D Cambodia Co. Ltd.

Provided by the Ministry of Labour and Vocational Training:

1. Letter No. 071, dated 27 January 2006. from H.E. Nhep Bunchin, Minister of Labour and Vocational Training on the request for the settlement of collective labour dispute at W&D Cambodia Co. Ltd.
2. Report No. 100AABV/AK/VK, dated 23 January 2006, on the collective labour dispute settlement at W&D Cambodia Co. Ltd. by Mr. Koy Tep Daravuth, Chief of the Department of Labour Disputes.
3. Minute of the collective labour dispute conciliation, dated 16 December 2005

Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to the hearing to the worker party No. 024, dated 23 January 2006
2. Letter of invitation to the hearing to the employer party No. 025, dated 23 January 2006

Facts

- Having examined the documents submitted to the Arbitration Council
- Having examined the report of the collective labour dispute
- Having listened to the arguments raised by the worker party and the employer party

The Arbitration Council finds that:

- The Khmer Youth Union officially registered on 30 December 2005. This union has approximately 300 members, and does not have representative status yet. Besides this union, there are two other unions in this factory. These unions do not have most representative status.

Issue 1: Medical expense of 10,100 riel

- The union and the workers' representatives demanded the reimbursement of medical check [expenses] paid since 1998 for all 1,700 workers, which were not paid by the employer. The demand is based on Article 247(a) and Article 247(c) of the Labour Law and Prakas 09/94.
- The employer party did not agree to the demand, asserting that workers having medical checks is one of the pre-conditions set by the company[;] Article 247(a), Article 247(c) of the Labour Law, and Prakas No. 09/94 covers only periodical and special physical exams. Therefore, the company will cover only the expenses associated with special medical checks. The company will not cover the expenses related to preliminary medical checks because the Labour Law and related regulations do not obligate the employer to cover this.
- The employer party and the worker party argued that the company had invited the Labour Physician to the factory to conduct physical exams for the workers who had just been offered a job. The company subsequently deducted the medical expense of 10,100 riel from the [overtime] meal allowance of the workers. For those workers who were later recruited to work at the factory, the prerequisite for the company to consider employing them is that they must have undertaken a physical exam. That means the workers must have paid for their own physical exams before receiving a medical certificate as required for their job application.

Issue 7: Demand for the disclosure of piece rate three days in advance

- To have a basis for the calculation of their wages and to be aware of the piece rate of a model, the workers demanded that the company disclose the rate of each model, on which the company used to set their minimum wage, three days prior to getting the workers to work on it. At the hearing, the employer party pointed out that this rate could not be issued in advance; it would take at least three to seven days following the sewing trial of each model [to issue the rate]. The workers agreed with this assertion raised by the employer party. However, the [representative for the] employer party could not decide on this point, reasoning that it was up to the strategy of the company.

- According to the current practice, the company informs the workers of the piece rate on their pay day. Such practice has been implemented since 2001, and a dispute in relation to this practice had never arisen.
- The lowest wage the workers received was US$25 and the highest wage was US$80 per pay day. The company pays the workers twice per month, with a record reflecting the total quantity produced by each worker attached to their monthly payroll. The paper does not delineate the wage calculation method for each model; it merely indicates the model, finished quantity and total wage.
- At the hearing, the company representative Mr. Cheat Khemra could not explain the method, asserting that it involved technical knowledge. The Arbitration Council requested the company bring its expert for clarification on the issue; however, the company did not designate anyone to attend the hearing.

Issue 11: Demand to deduct wage for union contributions

- Khmer Youth Union demanded that the company deduct 1,000 riel out of the wage of its member workers for union contribution fees.
- The employer party did not agree to the demand and left this issue to the Arbitration Council for settlement.

Reasons for Decision

Issue 1:

In the present case, the workers demanded that the company reimburse the medical check expense of 10,100 riel to each worker who had that amount deducted from their [overtime] meal allowance or had themselves paid prior to their recruitment.

Article 247(a) of the Labour Law reads, *"The Ministry in charge of Labour shall issue a Prakas to determine the conditions under which pre-employment, re-employment, periodical and special physical exams are given…"*, while Article 247(c) of the Labour Law stipulates that the Ministry in charge of Labour shall issue a Prakas to determine the conditions under which employers are required to establish and provide at their expense a physical exam as indicated in Article 247(a) of the the Labour Law.

Article 3 of Prakas 09/94 provides that *"Prior to working, both Cambodian nationals and foreigners are required to undertake compulsory physical exams at the Department of labour hospital located at Building 482, National Rd. #2, Sangkat Chak Angre, Khan Mean Chey, Phnom Penh."* Article 5 of the same Prakas states that *"The physical exam can be special*

medical check-up contingent upon the actual expertise." Article 7 of the Prakas specifies that *"The owner of an enterprise must pay the expenses on physical exams for their workers as determined in Article 5 on case by case basis."* On the basis of Article 247 of the Labour Law and Prakas 09/94, the Arbitration Council finds that employers are obliged to pay the expenses of physical exams of his/her workers. (See 02/03-Chou Sing, 21/03-Royal Cambodia, 19/04-Kbal Koh 2, and 53/04-Kung Hong.)

The Arbitration Council notes that in the past, there were some cases in which the Arbitration Council and employers raised a question regarding the effectiveness of Prakas 09/94 (see for example, 64/04 - Mercury, 98/04 - Great Union, 106/04 - Suit Wear); however, in the majority of cases, including the most recent cases, the Arbitration Council has found that employers are obligated to cover the medical expenses [of their workers] of 10,100 riel. (See 16/05 - New Point Trade.)

In the present case, the workers requested the reimbursement of their medical expense [in the amount] of 10,100 riel, which was either deducted from their meal allowance or paid by themselves, in the period since the factory started its operations in 1998. The Arbitration Council must consider which workers have the right to the reimbursement of the medical expense.

Article 120 of the the Labour Law reads that:

> *"The statute of limitations for a lawsuit for the payment of wages is three years from the date the wage was due.*
>
> *Claims subject to the statute of limitation include the actual wage, perquisites and all other claims of the worker resulting from the labour contract, as well as the indemnity in the event of dismissal."*

According to the Article, the Arbitration Council determines that the claim for 10,100 riel results from the labour contract because [the fact] that a worker had to personally cover the expense of his/her own physical examination was one of the terms of his/her labour contract. This condition does not conform to Article 247 of the Labour Law. The question arises as to when the statute of limitation starts, so the Arbitration Council will consider as follows:

A. Workers whose expense for physical exams was deducted from their meal allowance

The Arbitration Council determines that the statute of limitations applicable to the workers under this category starts from the date on which the medical expense was deducted from their meal allowance [in respect of overtime] because paragraph 1 of Article 120 states that the statute of limitations is three years from the date the wage was due; that means, the statute of limitations for the lawsuit for the medical expense is three years from the date the medical expense was deducted.

B. Workers who personally paid for the physical examination

The statute of limitation for the workers under this category is three years from the date the employment contract was concluded because the employment relations commenced at that point in time, although Article 120 of the Labour Law does not explicitly provide clarification [on this issue]. Paragraph 2 of Article 120 of the Labour Law merely provides for the claims resulting from the employment contract. The employment relationship is established when the worker concludes his employment contract with the employer and such relationship bestows upon the workers rights that they are entitled to under the law, including those obligations to be fulfilled by their employer for them. That means the statute of limitation for the medical expense in this case is three years from the date the employment contract was concluded or the date from which the workers started working.

Furthermore, on the basis of general legal principles, a person is considered to be aware of a law after it has entered into effect. Article 93 of the Constitution of the Kingdom of Cambodia of 1993 provides that any law signed by the King for promulgation shall go into effect in Phnom Penh 10 days after its signing and throughout the country 20 days after its signing. The Arbitration Council determines that the parties must be aware of the provisions of the Labour Law because the law entered into effect in 1997 and Prakas 09/94 became effective in 1994. Thus, the claim of the workers for the reimbursement of medical expense deducted in 1998 has been expired since 2001. (See 78/04 - AIA)

Article 13 of the Labour Law reads that all rules resulting 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.

In conclusion, the Arbitration Council determines that only the workers whose wage or perquisites were deducted or the workers who started work from February 2003 to the date on which the award enters into effect have the right to get their medical expense refunded.

Therefore, the employer has to reimburse the medical expense of 10,100 riel to each claimant worker whose wage or other perquisites were deducted or to the demanding worker who started work from February 2003.

Issue 7

The actual issue in the present case concerns the demand made by the workers for the actual piece rate for each model. The Arbitration Council finds that the demand made by the workers is related to a legal entitlement; that is whether an employer is under an obligation to give prior notice regarding the terms of wages of the workers.

Article 112(b) of the Labour Law reads that, *"The employer must take measures to inform the workers in a precise and easily comprehensible fashion of the total wage of the worker for a pay period when the wage is likely to change."*

This means that when the wage of a worker changes, the employer must take measures to inform the worker of the wage s/he will be entitled to in an easily comprehensible fashion. The Arbitration Council finds that the change in model that a worker must sew results in the change in wage of that worker. Therefore, the employer must inform the workers about the new rate for each new model.

In the present case, the workers demanded that the employer inform them of the piece rate three days in advance of any change of model. At the hearing, the employer asserted that the rate could [only] be issued at least three to seven days following the trial sewing of each model. The Arbitration Council finds that Article 112 of the Labour Law does not explicitly provide for when the employer has to inform the workers of their wage, but it clearly obligates the employer to inform the worker. Therefore, the Arbitration Council will consider the appropriate time for the employer to inform the workers based on the constraints of the employer.

At the hearing, the employer party stated that the quantity rate could not be issued in advance; it required at least three to seven days after the trial sewing of each model for the rate to be issued. The Arbitration Council finds that the argument raised by the employer party was reasonable and is compatible with Article 112 of the Labour Law. Nevertheless, in 62/04 - Ecent, the Arbitration Council found that, "[a]s far as the examination on sewing difficulty is concerned, the employer can only examine a small portion as a sample to determine the piece rate for the piece workers. Such determination cannot exceed three days."

However, in the present case, the company did not dispatch its expert to provide testimony as requested by the Arbitration Council, and the workers agreed with the argument raised by the employer party that it needs three to seven days following the sewing test in order to determine the piece rate for each model. Thus the Arbitration Council decides that the company must inform the workers of the piece rate three to seven days following the testing of each model.

Issue 11

In the present case, the union demanded that the company deduct 1,000 riel from the wages of its member workers for union contribution fees. The employer did not agree to the demand, and left this issue for the Arbitration Council to decide. Therefore, the Arbitration Council will consider the issue as follows:

Article 281 of the Labour Law states that*, "All employers are forbidden to deduct union dues from the wage of their workers and to pay the dues for them."* The Arbitration Council finds that the meaning of Article 281 is to protect the rights of the workers and preclude the employer from using his influence to interfere with the establishment of a worker organization as provided under Article 280 of the Labour Law. The Article reads that, *"Acts of interference are forbidden. Within the meaning of the present article, acts of interference are primarily measures tending to provoke the creation of worker organizations dominated by an employer or an employers' organization, or the support of worker organizations by financial or other means, on purpose to place these organizations under the control of an employer or employers' organization."*

Nonetheless, as far as the wage deduction for union contribution is concerned, paragraph 2 of Article 129 of the Labour Law stipulates that *"However, the worker can authorize deductions of his wage for dues to the trade union to which he belongs. This authorization must be in writing and can be revoked at any time."* Further, Article 5 of Prakas 305/01 of the Ministry of Labour, Vocational Training, and Youth Rehabilitation provides that, "*A worker who is a union member can make a written request 15 days in advance to the employer for his wage deduction for contribution to the union which he belongs to in accordance with Article 129 of the Labour Law.*"

As far as the wage of workers is concerned, Article 112 of the Labour Law reads that "*A worker must take measures to inform the workers in a precise and easily comprehensible fashion the total wage of the worker for a pay period when the wage is likely to change.*" This article mandates the employer to inform the workers in an easily comprehensible

fashion at each pay period, so that the workers may have a basis for complaints if the wage deduction for union contribution is against their will.

On the basis of the Labour Law and this Prakas, the employer must deduct the wage of the workers for their union contribution if the worker who is a member of the union makes such a request. (See 99/04 - AIA.)

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

Decision

1. Order the company to reimburse the medical [check] expense of 10,100 riel to the workers whose wage or other perquisites were deducted for such medical [check] expense and to the workers who entered into their labour contract from February 2003.
2. Order the company to inform the workers of the piece rate for each model within three to seven days following the trial sewing of a model.
3. Order the company to deduct 1,000 riel for union contribution from the wage of workers upon their request.

Type of Award: *Non binding awards*

This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition with the Secretariat of the Arbitration Council within this time period.

Signatures of Members of the Arbitration Panel:

Arbitrator chosen by the employer party:

Name: MAR Samborana

Signature: ....

Arbitrator chosen by the worker party:

Name: LIV Sovanna

Signature: ....

Chair of arbitration panel:

Name: KONG Phallack

Signature: ....