

KINGDOM OF CAMBODIA
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ARBITRATION COUNCIL

Case number and name: 06/06- M &V International 1

Date of Award: 16 February 2006

ARBITRAL AWARD

Issued under Article 313 of the Labour Law

ARBITRATION PANEL

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

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

Chair arbitrator (chosen by the two Arbitrators): **Ang Eng Thong**

DISPUTING PARTIES

Employer party:

Name: M & V International 1 company

Address: National road number 2, Chak Angrei Kraum Meanchey district, Phnom Penh.

Telephone: 012 522 266 Fax: N/A

Representatives:

1. Mr. Long Heng GMAC representative
2. Mr. Yin Nak Administration Vice Manager

Worker party:

Name: Cambodian Industrial Union Federation (CIUF) and Cambodian Industrial Union at the company.

Address: National road number 2, Chak Angrei Kraum Meanchey district, Phnom Penh.

Telephone: 012 580 912

Representatives:

1. Mr. Lou Sak President of CIUF
2. Mr. Thuyn Sothea President of Cambodian Industrial Union at the company
3. Mr. Lean Meng Sreng Secretary of Cambodian Industrial Union at the company

ISSUES IN DISPUTE

(in the non-conciliation report)

1. The workers demand that the company apply annual leave in reference to the seniority of workers by following Article 167 of the Labour Law. The employer allows annual leave from a period of 1 January to 31 March of each year.
2. The workers demand that the company add one more day of annual leave for the workers who have worked for more than three years. But the company wishes to provide 18 days annual leave in the first and second year and from the third year onward, 19 days.

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. 99 of 2004 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. 513 dated 19 April 2005 (Third 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. However both parties did not reach an agreement and the non-conciliation report No. 117/MoVLT dated 24 January 2006 was submitted to the Secretariat of the Arbitration Council on 26 January 2006.

HEARING AND SUMMARY OF PROCEDURE BEFORE THE ARBITRATION COUNCIL

Place of hearing: Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd, Tonle Bassac, Chamkamorn, Phnom Penh.

Date of hearing: 3 February 2006 (2:30 to 4:30 p.m.)

Procedural issues:

On 29 December 2005, the Labour Dispute Resolution Department received a complaint from the workers at M & V International 1 demanding that the company improve working conditions in accordance with the Labour Law. On 5 January 2006, the Labour Dispute Department conducted a conciliation in respect of two collective labour disputes. The two issues were not successfully conciliated. On 26 January 2006 the Arbitration Council received the case and the non-conciliation report on labour disputes No. 117/MoLVT from Mr. Koy Tepdaravuth, Director of the Labour Dispute Resolution Department dated 24 January 2006.

After receiving the case, the Arbitration Council invited both the employer and worker parties to conduct a conciliation and a hearing in respect of the two non-conciliation issues on 3 February 2006 at 2:30 p.m. Both parties attended the Arbitration Council process. At the [conclusion] of the conciliation stage the parties could not reach an agreement in respect of their dispute. Thus the Arbitration Council continued to conduct a hearing on the same date, in order to make its decision on the two issues.

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Delegating letter from M &V International 1 company to Mr. Long Heng dated 3 February 2006.

Provided by the worker party:

1. Registration certificate No. 777 dated 10 June 2005

Provided by the Ministry of Labour and Vocational Training:

1. Letter No. 071/MoLVT dated 27 January 2006 of H.E **Nhep Bunchin**, Minister of the Ministry of Labour and Vocational Training requesting resolution of a collective labour dispute at M & V International 1.
2. Report No. 117/MoLVT dated 24 January 2006 on Collective Labour Dispute Resolution at M & V International 1 from **Mr. Koy Tepdaravuth** Director of the Labour Dispute Department.

Provided by the Secretariat of the Arbitration Council:

1. Invitation letter No. 038 dated 30 January 2006 inviting the workers to appear at the hearing.
2. Invitation letter No. 037 dated 30 January 2006 inviting the employer to appear in the hearing.

FACTS

- Having examined all documents submitted to the Arbitration Council;
- Having listened to both parties' arguments;
- Having checked the report on the conciliation of the collective labour dispute.

The Arbitration Council finds that:

Issue 1:

- The company introduced a policy that workers should take all their accrued annual leave from 1 January to 31 March each year. The employee party did not agree with this policy for the following reasons:

1. According to the Labour Law, workers are only entitled to use their annual leave after one year of service. Thus the company cannot require workers to take annual leave between January and March. This is unlawful.

2. Moreover, this policy affects workers' special leave because when the company arranges for workers to take all their annual leave between January and March each year, the workers cannot use their annual leave after March each year.

3. The workers have received money instead of using their annual leave because, in the past the company has not had enough work between January and March of each year, so the company has often arranged for workers to take their annual leave during these three months while the employer suspends work until there is enough product and work. The union representatives stated that they had asked the company to arrange annual leave in June and July. This is a time when the company has too much work. [The union questioned] why the company does not allow [employees] to take leave [at this time]? If the company arranged for annual leave in June and July of each year, the company could provide money to the workers instead of annual leave. [This would] add to the employees' salary [and ensure] that the employer maintains productivity on time for buyer [deadlines]. The workers can then earn more benefits than if they took annual leave between January and March of each year. The company said that they needed to arrange annual leave for the workers during the period 1 January to 31 March of each year because:

- a. This period is the time when the company closes its accounting system and its finance [department];
- b. During this period the company has not had enough work for the workers to do, so it is therefore an opportunity to ask the workers to take leave and the company can then suspend or reduce its business operation; and
- c. Arranging time for the workers to take their annual leave during June and July is harmful to the company's production line.

Issue 2:

- The union party demanded that the company provide one additional day to the workers who have three years seniority in the company. This means that workers should be allowed to take 18 days leave at the 1st and 2nd years, then in the 3rd year

[the workers should be allowed to take] 19 days, and then in the next three years the workers must [be allowed] to have 20 days leave (an additional one day from 19 days).

- The company did not agree to the above demand by saying that the company agreed to provide annual leave in the 1st and 2nd years at 18 days, and beginning in the 3rd year they will provide 19 days [only].

REASONS FOR DECISION

Issue 1:

The workers demanded that [they be able] to take annual leave when they have worked for one year. The employer provides annual leave to the workers between January and March each year.

Article 170 of the Labour Law states that *“In principle, annual leave is normally given for the Khmer New Year unless there is a different agreement between the employer and the workers”*.

According to this Article, in principle, the employer should arrange annual leave during Khmer New Year and if this policy fails, there must be an [alternative] agreement with the workers. However, in this case, the parties did not enter into an agreement about taking annual leave outside of the Khmer New Year period. Thus the Arbitration Council must consider the reason behind the disputed idea in order to make its decision.

During this case, the union party said in respect of this issue that according to legal principles, annual leave cannot be used by a worker until the worker has worked for one year, then the employer has the power to provide annual leave to them. Thus, a policy which allows workers who have worked less than one year to take their annual leave is contrary to Article 167, paragraph 1 of the Labour Law. Therefore the employer’s policy for workers, who started work on different dates, to take annual leave in the period of January to March is not correct.

The language *“The right to use paid annual leave is acquired after one year of service”* in paragraph 1 of Article 167 means that workers are not entitled to take annual leave unless they have worked for one year, but [this Article] does not prevent the company from providing annual leave to workers who have worked less than one year. The substantive [meaning] of this paragraph is that workers can demand their annual leave even though they have worked for one year [or less] for the employer, [and] if the employer allows them to take annual leave, the workers can take their annual leave. Thus, a policy [which allows] workers who have worked for less than one year to take their annual leave is not

against the Labour Law. In addition, the union party stated that the policy for using annual leave during the period between January and March of each year impacts on the workers' special leave. According to Clause 2 of Prakas 267/01 on special leave, "The employer can deduct special leave from the annual leave of the workers, if the worker has not used all their annual leave or [alternatively] can require the workers to work to make up the time taken if the workers have used all their annual leave". According to this [Clause] special leave of the workers can be applied for, even though the workers have used all of their annual leave and then [the workers] just [makes up the time] to the employer as mentioned in Prakas No. 267/MoSALVY dated 11 October 2001 above.

The third reason for why the union does not agree with the policy for annual leave as determined by the employer, is that this policy results in the workers losing the opportunity to earn wages instead of taking annual leave, which provides an additional benefit to the workers. Article 167 states that "... If the contract is *terminated or expires where the workers have acquired the right to use his paid-leave, an indemnity calculated on the basis of Article 166 above is granted to the workers.*

Apart from this, any collective agreement providing compensation in lieu of paid leave, as well as any agreement renouncing or waiving the right to paid annual leave, shall be null and void..." According to the meaning of this Article the employer has an obligation to pay compensation for [accrued] unused annual leave at the end or termination of the contract of the worker. However, the employer cannot make an agreement or arrange for workers to give up their right to use their annual leave, even if it is paid out instead. This action would be contradictory to the substance of this Article and would be null and void. Therefore this argument [from the union] is not correct according to legal principles.

The employer gave the following reasons in support of its policy requiring workers to take their annual leave between January and March each year:

1. This period is the time when the company closes its accounting and finance system;
2. During this period the company has not had enough work for the workers to do, so it is therefore an opportunity to ask the workers to take leave and the company can then suspend or reduce its business operation; and
3. Arranging time for the workers to take their annual leave during June and July is harmful to the company's production line

Moreover, according to Article 2 of the Labour Law "Every enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in factory, workshop, work site, etc., under the supervision and direction of the employer." According to this Article, the Arbitration Council finds that the employer has the right and power to supervise and direct human resources and to operate the company;

however, this supervision and direction must be made in accordance with the law and be reasonable. (See arbitral award in 28/04-Raffles Grand Hotel).

In this case the employer has a good reason for its policy requiring workers to take their annual leave according to the Labour Law. This is to avoid any loss of workers' benefits and facilitate the production of the company; [in addition] the workers can use their annual leave properly in accordance with the law. Thus the Arbitration Council decides to reject the union's demand that annual leave be allowed to be taken immediately upon [the completion of] one year of service.

Issue 2:

In this case, the dispute occurred because each party interpreted Article 166 paragraph 4 of the Labour Law differently.

Article 166 of the Labour Law 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 half work days of paid leave per month of continuous service”*. Article 166, paragraph 4 provides that *“The length of paid leave as stated above is increased according to the seniority of workers at the rate of one day per three years of service”*.

The employer argued that the company applies Article 166 of the Labour Law because the company provides additional annual leave by adding one day [beginning] in the 3rd year equal to 19 days for [each of] workers' subsequent years. In respect of [providing] an additional one day when the workers have worked for the company for six or seven years, the company refuses to provide it because the Labour Law does not provide for this clearly.

The employees did not agree with the employer's interpretation regarding Article 166 of the Labour Law and demanded that the company provide 19 days annual leave in the 3rd, 4th, and 5th years and from the 6th year onwards [they] demanded 20 days. The following table sets out each party's interpretation:

A number of employment year	The workers' argument	The employer's argument
1 st year	18 days	18 days
2 nd year	18 days	18 days
3 rd year	19 days	19 days
4 th year	19 days	19 days
5 th year	19 days	19 days

6 th year	20 days	19 days
7 th year	20 days	19 days
8 th year	20 days	19 days
9 th year	21 days	19 days

The Arbitration Council finds that the language of Article 166, paragraph 4 which provides that "**at the rate of one day per three year of service**" is not clear and this has been interpreted in different ways because of different understandings. Therefore, the Arbitration Council will [provide an interpretation] based on legal bases, principles of equity and the legal purpose [of the Labour Law] as below:

1. Legal principles of Interpretation

When the language of any provision of the law is not clear, one must interpret the law in accordance with legal principles and [determine whether there is any] consistency between the unclear provision and other provisions of the law. In respect of the meaning of Article 166 above, the Arbitration Council finds that the addition of one day of annual leave is based on an increase of workers' seniority in the factory or enterprise. The Arbitration Council finds that it should interpret the word "**seniority**" in conformity with the meaning used in other Articles of the law. The idea of seniority in other Articles, such as Articles 75, 89 and 95, is that workers who work and provide [services] to the enterprise for a long period are entitled to more privileges according to their seniority. For example Articles 73 and 75 of the Labour Law determine the increased length of the notice period for terminating a labour contract based on the length of the contract or period of service for the employer. According to Article 75, workers who regularly work in an enterprise from six months to two years are entitled to a minimum notice of 15 days. If they have worked for five to ten years, the length of prior notice increases to up to two months. If we examine this increase, we find that the workers' right must be increased according to the stage of the defined period. Even if the contract is finished in any year between the fifth and tenth year, the workers are entitled to prior notice of at least two months. This means that the rights which workers receive for working for a certain period must not be reduced. Similarly Article 89 of the Labour Law determines an increased indemnity for dismissal based on the length of a worker's service. Workers who have worked for six months to one year must receive at least seven days wages and miscellaneous bonus. The amount of compensation will be increased up to 15 days, if the worker works for over one year. The right to indemnity for dismissal increases

continuously and the workers are automatically entitled to this increase based on their length of service and such right shall not be reduced. Another example is, Article 95 of the Labour Law which concerns mass lay off. The enterprise must consider the seniority of the worker, which means that workers who have less seniority will be terminated first.

Thus the Arbitration Council finds that seniority entitles workers to additional rights, benefits and privileges based on their length of service.

Generally, workers with a higher seniority receive greater benefits than other workers who have lower seniority. Such benefits relate to transferring of work, promotion, notice for dismissal, annual leave and getting priority to be reinstated, for example. The rights and benefits that a worker receives because of their seniority are not based on their productivity or increased income of the workers like bonuses or indemnities, **it is an automatic right of workers** based on their length of service with the employer. This right should not be reduced or varied under any circumstances whether by the employer's will or any agreement, or with any other conditions, unless it results in the worker receiving superior benefits. Accrued seniority will only cease when the worker stops working for the enterprise.

2. Principles of Equity

Equity principles also support the idea of seniority. There are also economic reasons [to recognize seniority, such as] a worker's [increased] understanding [of the employer's business] and increases in skills and talent over the time that the worker works for the employer. As the seniority of the worker increases, the worker performs their job better and faster, and as a result the employer also receives better benefits because productivity grows and this makes the work more effective. Thus, there are good reasons for the employer to provide benefits and motivation to workers who have worked in its enterprise longer. Therefore, workers' benefits also should be increased when the workers' knowledge, skill and talent are increased. Thus, based on equity principles the workers should be entitled to increased leave and this increase should not be reduced, while their seniority still increases.

3. Purpose of the Labour Law

In addition, the purpose of the law is to serve [both] the workers and the employers' benefit. Thus the meaning of Article 166 paragraph 4 provides that "**at the rate of one day per three year of service,**" is aimed at motivating the

workers to do their best in performing their jobs and encourage them to continue working for the employer as long as possible because when the workers work for the employer for a longer period, the more benefits they deserve. This means that they are entitled to more annual leave than workers of lower seniority. If they resign and find another job, then they lose those benefits. The employer also obtains advantages from workers who work for a long period. First, [more experienced workers] are faster, second [they have proven] honesty and [have shown an intention] to continue work, and third the mutual understanding among the employer and the employees.

Based on legal principles, equity principles and the purpose of the Labour Law above, the Arbitration Council finds that, according to Article 166 of the Labour Law, the workers are entitled to 19 days at the 4th, 5th, and 6th years of service, and when they have worked for another three years, they are entitled to 20 days annual leave at the 7th, 8th, and 9th years as well, and at every [additional] three years.

A number of yearly employment	Annual leave according to Article 166 (4)
1 st year	18 days
2 nd year	18 days
3 rd year	18 days
4 th year	19 days
5 th year	19 days
6 th year	19 days
7 th year	20 days
8 th year	20 days
9 th year	20 days
10 th year	21 days
11 th year	21 days
12 th year	21 days

The table above is the interpretation of Article 166, paragraph 4 of the Labour Law and is consistent with the decisions of the Arbitration Council in cases 51/04-Sam Han, 62/04-E Cent, 68/05-Gold Lida and 75/05-Fortune.

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

DECISION

1. Reject the union's demand relating to the employer's policy requiring the workers to take all their accrued annual leave in the period January to March of each year.
2. The company must **provide annual leave to the employees according to their seniority in their enterprise by adding [to annual leave] one [additional] "working day" per every three years of service.** The employer must provide paid annual leave in the amount of 19 days in the 4th, 5th, and 6th years and provide paid annual leave of 20 days at the 7th, 8th, and 9th years... and continue [in this pattern] every three years.

Type of Award: Non binding award

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: **An Nan**

Signature:

Chair of arbitration panel:

Name: **Ang Eng Thong**

Signature: