



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាសវនកម្មជាតិ

THE ARBITRATION COUNCIL

Case number and name: 119/08-New Hung Wah

Date of Award: 15 October 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Hem Hour Naryth**

Arbitrator chosen by the worker party: **Ven Pov**

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

DISPUTING PARTIES

Employer party:

Name: **New Hung Wah (Cambodia) Garment MFG. Ltd.**

Address: Trovang Romchek, Sangkat Chom Chao, Khan Dangkor, Phnom Penh

Telephone: 012 837 827 Fax: N/A

Representative:

- | | |
|------------------------|------------------------|
| 1. Mr. Leav Chhay Meng | Manager |
| 2. Mr. Lim Siev Ngim | Head of Administration |

Worker party:

Name: **Worker Union Federation (WUF) and local union of Worker Union (WU) at New Hung Wah factory**

Address: Trovang Romchek, Sangkat Chom Chao, Khan Dangkor, Phnom Penh

Telephone: 012 995 523 Fax: N/A

Representative:

- | | |
|-----------------------|--|
| 1. Mr. Dou Dina | Officer of WUF |
| 2. Mr. Duong Chandara | Officer of WUF |
| 3. Mr. Meas Thearith | President of WU at New Hung Wah factory |
| 4. Mr. Mong Bunthav | Vice-President of WU at New Hung Wah factory |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- Members of WU demand that the company pay their monthly wage on the seventh of the month as it used to practiced in the old Hung Wah Company. The company states the payment date is on the eighth of the month.
- 2- Members of WU demand that the company increase the rate of piece rate number 01 from US\$ 0.040 to US\$ 0.070 per dozen and piece rate number 17 from US\$ 0.045 to US\$ 0.080 per dozen. The company claims that it can increase piece rate number 1 from US\$ 0.040 to US\$ 0.045 per dozen, and piece rate number 17 from US\$ 0.045 to US\$ 0.060 per dozen.
- 3- Members of WU demand that the company provide seniority bonus and living allowance to women worker who take maternity leave for more than 90 days. The company claims that it can allow the women workers to take the leave but it does not provide their seniority bonus and the living allowance.
- 4- Members of WU demand that the company maintain their wage when they take sick leave with a medical certificate from a state or private hospital. The company states that it can maintain only the wage of the workers who take sick leave with a medical certificate from a public hospital.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labor 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. 076 dated 10 May 2007 (Fifth Term).

An attempt was made to conciliate the collective dispute that is the subject of this Award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and the non-conciliation report No. 1007 KB/AK/VK, dated 10 September 2008 was submitted to the Secretariat of the Arbitration Council on 11 September 2008.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Basak, Khann Chamkarmorn, Phnom Penh.

Date of hearing: 22 September 2008 from 2:00 p.m. to 5:30 p.m.

Procedural issues:

On 22 August 2008, the Department of Labour Disputes received a complaint dated 18 August 2008 from WUF demanding the improvement of working conditions. Having received

the complaint, the Department of Labour Disputes designated its officials to conciliate the dispute. The last conciliation session was held on 18 August 2008 with a result of 4 remaining non-conciliation issues among 7 issues. The 4 non-conciliation issues were submitted to the Arbitration Council on 11 September 2008 through the non-conciliation report No. 1007 KB/AK/VK, dated 10 September 2008.

Having received the case, the Secretariat of the Arbitration Council summoned both the employer party and the employee party to the hearing and conciliation on the 4 non-conciliation issues on 22 September 2008 at 2:00pm.

Both parties were present at the arbitration hearing. The Arbitration Council tried to ask for more information relevant to this dispute and attempted to further the conciliation of the 4 non-conciliation issues with a conciliation result on issue 1. Thus, the Arbitration Council will consider and resolve the remaining issue 2, issue 3 and issue 4 based on evidence and finding of facts as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Certificate of commercial registration of Hung Wah Company, dated 12 June 1997.
2. Internal Work Rules of Hung Wah Company, dated 21 October 2005.
3. Memorandum (statute) of establishment of Hung Wah Company, dated 3 March 1997.
4. List of wage payment to a worker named Sam Phorn, ID S3 018 in (2) needles section, commenced work on 1 May 2006.
5. List of wage payment to a worker named Chheng Savon, ID S2 092 in (1) needle overlocking section, commenced work on 6 August 2007.
6. List of wage payment to a worker named Phan Soteang, ID S3 095 in (1) needle overlocking section, commenced work on 22 May 2008.
7. List of wage payment to a worker named Eth Sarorn, ID S3 089 in (1) needle overlocking section, commenced work on 7 May 2008.
8. List of wage payment to a worker named Chhoeun Y Neang, ID S3 087 in (1) needle overlocking section, commenced work on 6 May 2008.

Provided by the worker party:

1. Certificate of registration of local union of WU at Hung Wah factory, No. 1473 KB/VK, dated 16 July 2008.

Provided by the Ministry of Labour and Vocational Training [MoLVT]:

1. Report of collective labour dispute resolution at New Hung Wah Company No. 1007 KB/AK/VK, dated 10 September 2008.
2. Minutes of collective labour dispute resolution at New Hung Wah Company, dated 4 September 2008.

Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to invite the worker party to attend the hearing, No. 581 KB/AK/VK/LKA, dated 16 September 2008.
2. Letter of invitation to invite the employer party to attend the hearing, No. 580 KB/AK/VK/LKA, dated 16 September 2008.

FACTS

- Having reviewed the collective labour dispute conciliation report
- Having listened to the statements by the worker party and the employer party
- Having examined additional documents

The Arbitration Council finds that:

- New Hung Wah Company employs a total number of 992 workers.
- In the company there is only one union, WU, who is the claimant in this case.
- WU has approximately 500 members. This union has union registration No. 1473 KB/VK, dated 16 July 2008.

Issue 2: The workers demand that the company increase piece rate No.'s 01 and 17

- The workers demand that the company increase the price of piece rate No. 01 from US\$ 0.040 to US\$ 0.070 per dozen and piece rate No. 17 from US\$ 0.045 to US\$ 0.080 per dozen. The company party, on the other hand, can increase the piece rate No. 01 from US\$ 0.040 to US\$ 0.045 and piece rate No. 17 from US\$ 0.045 to US\$ 0.060 per dozen.
- The worker party and the company party state that the company uses the average result of work produced by workers who can sew at fast, medium and slow speeds to determine the piece rate. The workers have piece work to perform for a short or long period of time depending on orders from buyers.
- The company states that the majority of workers can earn more than [minimum] wage because piece rates No.'s 01 and 17 are easy and do not require skillful workers. For those workers who earn less than the [minimum] wage, the company would bump up their wage. The workers agree that piece rates No.'s 01 and 17 are easy and do not require skillful workers. However, the workers argue that the majority of workers earn less than their main wage.

- The company provides a list of wage payment for workers named Sam Phorn, Chheng Savorn, Phan Soteang, Eth Sarorn and Chhoeun Y Neang who earned more than the minimum wage to support its claim. The workers do not object to this.
- The workers do not provide documents, evidence or lists of names of how many workers earn less than minimum wage who demand the company to increase the piece rate in support of their demand. However, the workers promised to produce a list of names of workers who earn less than [minimum] wage by attaching a list of the wage for each worker to the Arbitration Council.
- The Arbitration Council ordered the worker party to prepare a name list of workers who earned less than [minimum] wage and submit relevant documents to the Arbitration Council by 26 September 2008. However, the worker party did not prepare the name list of workers who earned less than [minimum] wage to the Arbitration Council but provided only list of workers' wages without mentioning how much wage each workers received. Thus, the Arbitration Council is unable to know how many workers are involved in this demand and how many workers could earn less than minimum wage for the Arbitration Council to use as a basis for consideration.

Issue 3: The workers demand that the company provide seniority bonus and living allowance to women workers who take maternity leave longer than 90 days

- The company provides payment for women workers who take 90 days of maternity leave correctly and in accordance with the Labour Law. However, the workers demand that the company maintain seniority bonus and living allowance for women workers who take one additional month to the 90 days leave because they are still weak and not very healthy.
- The company party states that it has already assisted women workers by providing one more month of leave. However, the company will not provide seniority bonus and living allowance to the women workers.
- The workers state that the women workers demand the company to provide seniority bonus and living allowance to women workers who are permitted to take one more month of leave because seniority bonus is [supposed] to be provided according to the number of years (seniority) the workers have worked for the company, while living allowance is provided monthly to support the living [costs] of the workers and these do not depend of the workers' absence.
- The company restates that it has helped the women workers by allowing the women workers to take one more month off. Thus, the company cannot provide as demanded by the workers.

Issue 4: The workers demand that the company maintain their wages when they take sick leave with medical certificate from either state or private hospital

- The company maintains wages for workers who take sick leave with a proper medical certificate only from state hospitals and the company does not retain wages for workers if the medical certificate is from a private hospital.
- The workers state that they demand the company to retain their wage when they take sick leave with a proper medical certificate recognized by the government because it is difficult for workers to go to a state hospital when they get sick because their houses are far from the state hospital.
- The company party states that some workers falsified medical certificates issued by non-state hospitals such as private hospitals or other places with authority to provide medical services. Thus, the company does not agree to this demand. However, if a worker is sick and the company is the one who brings her/him to a hospital, whatsoever type of hospital, the company will retain their wage.
- The workers claim that some private hospitals such as [clinic] and other hospitals are permitted to operate by the Ministry of Health (with certificate). Thus, the company should recognize [the certificates issued by such hospitals].

REASONS FOR DECISION

Issue 2: The workers demand that the company increase the price of piece rate Number 01 from US\$ 0.040 to US\$ 0.070 per dozen and piece rate Number 17 from US\$ 0.045 to US\$ 0.080 per dozen. The company can increase piece rate Number 01 from US\$ 0.040 to US\$ 0.045 per dozen, and piece rate Number 17 from US\$ 0.045 to US\$ 0.060 per dozen

In this case the Arbitration Council considers that the workers' demand is related to the method of calculating the wage rate in order for workers with average skills working for normal working hours of 8 hours per day to receive a wage equal to or above the minimum wage. Thus, the Arbitration Council will consider **whether the workers are entitled to demand that the employer increase the piece rate.**

Article 108 of the Labour Law states, *"For task-work or piecework, whether it is done in the workshop or at home, the wage must be calculated in a manner that permits the worker of mediocre ability working normally to earn, for the same amount of time worked, a wage at least equal to the guaranteed minimum wage as determined for a worker."*

Article 137 of the Labour Law states, *"In all establishments of any nature, whether they provide vocational training, or they are of a charitable nature or liberal profession, the number of hours worked by workers of either sex cannot exceed eight hours per day, or 48 hours per week."*

In this case, the Arbitration Council does not find how the company determined the piece rate; how many workers were asked by the company to test the work before the company set a piece rate; and after the trial period as a result how many workers who work for 8 hours could receive a minimum wage. However, the company stated in the hearing that the company used the average result of work produced by workers who can sew fast, medium and slow speeds to determine the piece rate. The workers have piece work to complete for a short or long period of time depending on order from buyers.

Point 1 and 2 of Notification 745 KKBV, dated 23 October 2006 states:

1. *“The minimum wage for garment, textile workers and shoe making workers is set at US\$45.00 per month for probationary periods of 01 month to 03 months. At the end of the probationary period, a full-right worker receives the minimum wage of US\$ 50 per month.*
2. *Those whose wage is based on pieces of product produced (pieceworkers) shall receive wages based on the actual result of the work performed. If the output of work allows the worker to receive more than the amount mentioned in (1) above, the worker shall receive that amount. However, if the amount is less, the employer shall provide an additional amount to reach US\$45.00 per month for probationary workers and USD 50 for regular workers.”*

In case 03/05-Flying Dragon, the Arbitration Council considered that the employer had the right to determine or modify piece rate. However, the Arbitration Council also decided that [the piece rate] should be determined in a way to allow workers with average skills working normally to receive minimum wage. (See Arbitral Award 03/05-[Flying Dragon], issue 6).

Regarding piecework, points 1 and 2 of Notification 745/06 above, the employer has an obligation to determine the wage rate in a way to allow workers with average skills working for eight hours per day to receive a wage at least equal to US\$ 50 per month.

In this case, the company claims that majority of workers could work to receive more than their [minimum] wage because piecework No.'s 01 and 17 are easy and do not require skillful workers. Furthermore, the company bumps up the wages of workers who could earn less than the main wage. The workers agree that piecework No.'s 01 and 17 are easy and do not require skillful workers. However, they claim that the majority of workers earned less than the minimum wage.

In previous cases, the Arbitration Council determined that the workers need to provide sufficient documents and evidence to prove which workers who have been working according to piece rates for 8 hours per day could not earn the minimum wage. (See Arbitral Awards 99/04-AIA, issue 8 and 44/06-Goldfame, issue 1).

In this case the Arbitration Council agrees with interpretation of Arbitration Panel in previous cases above that as the workers claim that piece rate workers earn less than minimum wage, the worker party needs to provide evidence such as the identity of workers and list of names of workers who could not earn the minimum wage.

In this case, the worker party claims that they demand the company increase the price of piecework No. 01 from US\$ 0.040 to US\$ 0.070 and piecework 17 from US\$ 0.045 to US\$ 0.080 per dozen because majority of workers who work on piecework 01 and 17 receive less than their minimum wage. However, the workers do not present sufficient evidence or list of names of how many workers who could earn less than their minimum wages to prove which workers who work for 8 hours per day could not receive their minimum wage.

Evidence the Arbitration Council received from the workers party include a list of wage payments to workers which does not mention how much wages each of the workers received thus it does not provide sufficient reason for the Arbitration Council to use as a basis for consideration and decision whether piecework No. 01 and 17 the company set for the workers led majority of workers to earn less than their minimum wage when they work for 8 hours determined in Article 108 of the Labour Law and Notification 745/06.

On the other hand, based on the list of payment of wages to 5 workers provided by the company, the Arbitration Council found that two workers - Phan Soteang and Eth Sarorn, earned less than minimum wage.

Based on this basis, the Arbitration Council decides to reject the workers' demand for the employer to increase piece rate No. 01 and 17.

The Arbitration Council considers that if there is sufficiently evidence such as the identity of workers who could not receive up to the minimum wage, workers payslips and statistics about each worker who could not earn the minimum wage, this case could have been considered differently.

Issue 3: The workers demand that the company provide seniority bonus and living allowance to women workers who take maternity leave longer than 90 days

The company has assisted the workers by providing one more month of leave after they take 90 days off for maternity leave. However, the workers demand that the company maintain seniority bonus and living allowance to women workers who ask for one more month of leave after the 90 days maternity leave. Thus, the Arbitration Council will consider whether the workers can receive seniority bonus and living allowance during the additional one month off.

1. Seniority bonus

In this case, the employer provides US\$ 2 per month as seniority bonus to workers who have been working for at least one year and an additional US\$ 1 each year until the

fourth year the workers receive US\$ 5 per month. However, the company does not provide seniority bonus to women workers whom the company has permitted to take an additional one month after the 90 days of maternity leave because the women workers did not come to work for the company.

Article 113 of the Labour states, *“Wage includes, in particular:*

- *actual wage or remuneration;*
- *overtime payments;*
- *commissions;*
- *bonuses and indemnities;*
- *profit sharing;*
- *gratuities...”*

Based on the contents of this Article, the Arbitration Council considers that the term “wage” is a broad term that includes actual wage, overtime payment, gratuities and so forth. Thus, the Arbitration Council considers that the term wage in this Article is a package of money which includes different types of monies and the workers can receive this wage only when they come to work for the company. However, if the workers do not come to work for the company, their employment contract is suspended as stated in Article 71(6) of the Labour Law: *“A labour contract shall be suspended under the following reasons:*

Absence of the worker authorized by the employer, based on laws, collective agreements, or individual agreements.”

Article 72(1) of the Labour Law states, *“The suspension of a labour contract affects only the main obligations of the contract, that are those under which the worker has to work for the employer, and the employer has to pay the worker, unless there are provisions to the contrary that require the employer to pay the worker.”*

Thus, based on Article 71(6) and Article 72(1) of the Labour Law above, the Arbitration Council considers that when the workers are absent with permission from the employer, the employment contract is suspended and the workers are not required to work for the employer. In this case, the workers take an additional one month off with permission from the employer after they have taken 90 days off for maternity leave, thus the employment contract is suspended and the workers do not come to work for the company.

Hence, the Arbitration Council considers that the obligation to provide wage as stated in Article 72 of the Labour Law can refer to the total wage, including seniority bonus, because when they take unpaid leave, the workers did not work for the company.

The Arbitration Council considers that when the workers’ employment contract is suspended and the workers do not work for the company, the workers should not receive seniority bonus for the period they do not work for the company. Thus, when the workers take one month off, the workers are not entitled to seniority bonus for this one month.

Therefore, the Arbitration Council considers that the fact that the company does not provide seniority bonus to women workers when they take an additional one month off after their 90 days off for maternity leave is reasonable because the women workers do not come to work for the company.

As a result, the Arbitration Council decides to reject the workers' demand for the company to provide seniority bonus to women workers who take an additional one month off after they have taken 90 days off for maternity leave.

2. Living allowance

Point 1 of Notification 032/08 KB/SChN, dated 17 April 2008, states, *“Provide an additional living allowance to support workers, apprentices, casual or floating workers, probationary workers and full-right workers who are working in the garment and shoe making factory, enterprise, establishment in the amount of US\$ 6 (six US Dollar) per month. This allowance is not included as a part of the net wage (basic wage).”*

Point 1 of Minutes of the Meeting on Procedures for Providing the Cost of Living Allowance of Six (6) US Dollars for Textile, Garment and Shoe Workers/Employees states,

“1. For the first month of employment, new workers/employees who have worked for less than twenty six (26) days of the monthly workdays until payday shall be entitled to the COLA as follows:

- a. Those who have worked for thirteen (13) days and below shall be entitled to half of the COLA, i.e. three (3) US dollars.*
- b. Those who have worked for fourteen (14) days and above shall be entitled to the full COLA, i.e. six (6) US dollars.*

2. All workers/employees, both new workers/employees who start the succeeding month of employment and old workers/employees of all types, shall be entitled to the full COLA, i.e. six (6) US dollars without any condition.

Based on the content of the minutes of the meeting above, it means that all workers working for the company from the second month onward will receive the full living allowance of US\$ 6 (six) without any condition. In this case the Arbitration Council considers that the term **“without any condition”** refers to unpaid leave with permission from the employer. Moreover, according to point 1 of Notification 032/08, this allowance shall not be included in the calculation of the actual wage (main wage) Thus women workers should be entitled to full living allowance of US\$ 6 (six) without any condition.

Therefore, the Arbitration Council considers that although the women workers take one additional month off, they are still entitled to the full living allowance of US\$ 6.

In conclusion, the Arbitration Council decides to order the company to provide full living allowance of US\$ 6 to women workers to take one additional month off.

Issue 4: The workers demand that the company maintain their wages when they take sick leave with medical certificate from either a state or private hospital

The company maintains wages for workers who take leave with a medical certificate from a state hospital. However, the workers request that as long as they have a medical certificate, not only medical certificates from state hospitals, the company should accept them. Therefore, the Arbitration Council will consider which types of doctor have authority to issue letters to certify sickness to the workers that the company should recognize according to the law.

Article 71 of the Labour Law states, *“The labour contract shall be suspended under the following reasons: ...*

3. The absence of the worker for illness certified by a qualified doctor. This absence is limited to six months, but ca, however, be extended until there is a replacement...” Article 71(3) above mentions the absence of workers for sickness certified by a qualified doctor, but this is not limited only to certificates issued by state hospitals. In this case, the company recognizes only certificates issued by state hospitals. Thus, the Arbitration Council considers that the fact that the company accepts only certificate from state hospital is not in accordance with Article 71 of the Labour Law.

In Arbitral Award 81/05-Supreme Garment, the Arbitration Council interprets that *“paragraph 3 of Article 71 of the Labour Law simply mandates a qualified doctor. The restriction on a worker to a public hospital for a medical certificate is in conflict with the law because they are legally entitled to more than the entitlement provided.”* (See Arbitral Award 81/05-Supreme Garment, issue 1).

Clause 4 of the company’s Internal Work Rules: Sick Leave states, *“Those who are sick with certification from doctors in state hospital or the company doctor will be provided with full wage in the first month of leave. In the second and third month, the company will provide only 60 percent. From the fourth to sixths month, the company does not provide wage but maintain the position. However, if the duration of leave is longer than six months, the company will consider termination according to the Labour Law.”*

In Arbitral Award 47/07-Chung Fai, the Arbitration Council considers that ***“state doctors consist of doctors from a city/provincial hospital, district/khan referral hospital, or commune health center which is under national health infrastructure especially the Ministry of Health.”***

The Arbitration Council in this case agrees with the interpretation of the Arbitrators in the above case. The Arbitration Council considers that the company’s Internal Work Rules that recognizes only certificate from state hospital or the company doctor is not valid because the term “state doctor” has broad meaning and many different types as mentioned in the Arbitral Award 47/07 above.

In previous arbitral award the Arbitration Council found that as a current practice in Cambodia, state officer, officer of NGOs and staff of some companies accept certification letter from any doctor recognized by authorities concerned according to the laws, state or private. (See *Arbitral Awards 62/04-Ecent, issue 1; 68/04-City New, issue 3 and 81/05-Supreme Garment, issue 1*).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in previous cases. In this case the fact that the company accepts only certificates from state hospital is not a valid action because the Labour Law and the company's Internal Work Rules do not state clearly about medical certificates. Based on the above interpretation, in order to implement the company's Internal Work Rules and in consistency with Article 71(3) of the Labour Law, the company should recognize medical certificates issued by city/provincial hospitals, district referral hospitals, or commune/Khan health centers.

Therefore, the Arbitration Council decides to order the company to recognize medical certificates by the city/provincial hospital, district referral hospital, or commune/Khan health center.

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

DECISION

Issue 2:

- Reject the workers' demand for the employer to increase piece rate No. 01 from US\$ 0.040 to US\$ 0.070 per dozen and piece rate No. 17 from US\$ 0.045 to US\$ 0.080 per dozen.

Issue 3:

- **Seniority bonus:** reject the workers' demand for the company to provide seniority bonus to women workers who take an additional one month off after they have taken 90 days off for maternity leave.

- **Living Allowance:** Order the company to provide the full living allowance of US\$ 6 to women workers who take additional one month off after they have taken 90 days off for maternity leave.

Issue 4:

- Order the company to recognize medical certificates by city/provincial hospitals, district referral hospitals, or commune/Khan health centers.

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 to the Minister of Labour through the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Hem Hour Naryth**

Signature:

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: