



KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាសវនកម្មជាតិ

THE ARBITRATION COUNCIL

Case number and name: 128/08-Wei Hua

Date of Award: 30 October 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

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

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

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

DISPUTING PARTIES

Employer party:

Name: **Wei Hua Garment Co., Ltd.**

Address: #582, Russey Village, Sangkat Steung Mean Chey, Khan Mean Chey, Phnom Penh

Telephone: 012 550 813 or 092 996 539 Fax: N/A

Representative:

- | | |
|-----------------------|-------------------------|
| 1. Mr. Ding Wei Bin | Director of the factory |
| 2. Mrs. Lor Socheata | Interpreter |
| 3. Mr. Tong Heng | Mechanics |
| 4. Mr. Chhean Chansok | Chief of sewing group |

Worker party:

Name: **Worker Union Federation (WUF) and local union Worker Union (WU) at Wei Hua Company.**

Address: #582, Russey Village, Sangkat Steung Mean Chey, Khan Mean Chey, 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. Sak Kakda | President of WU at the factory and a worker delegate |
| 4. Mr. Sa Sri | Vice-president of WU at the factory |
| 5. Mr. Korn Sopheak | Secretary of WU at the factory |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The workers demand that the Company make a one-year fixed-duration contract with them, because, they claim, the current contract period of three months is too short. The company does not agree to the demand and states that it will continue using the three-month contract.
- 2- The workers demand that the company maintain their US\$ 5 attendance bonus when workers ask for one day's leave for personal commitments per month. The company does not agree to the demand as it complies with notification No. 017 S.K.B.Y, dated 18 July 2000.

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. 1083 KB/AK/VK, dated 23 September 2008 was submitted to the Secretariat of the Arbitration Council on 25 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:

First hearing: 9 October 2008 from 2:00 p.m. to 5:00 p.m.

Second hearing: 23 October 2008 from 2:00 p.m. to 3:30 p.m.

Procedural issues:

On 10 September 2008, the Department of Labour Disputes received a complaint by telephone from workers at Wei Hua Garment Company regarding their demand for the company to improve certain working conditions. Having received the complaint, the Department of Labour Disputes designated its officials to resolve the dispute; the last

conciliation was held on 11 September 2008 with a result of two non-conciliation issues on 17 issues. The two non-conciliation issues were submitted to the Arbitration Council on 25 September 2008 through non-conciliation report No. 1083 KB/AK/VK, dated 23 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 two non-conciliation issues for the first time on 9 October 2008 at 2:00 p.m., and for the second time on 23 October 2008 from 2:00 p.m. to 3:30 p.m.

Both parties were present as invited by the Arbitration Council. The Arbitration Council tried to ask for more information relevant to this dispute and attempted further conciliation on the two non-conciliation issues, but did not receive any conciliation result. Therefore, the Arbitration Council will consider and resolve this case based on 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. Certificate of commercial registration of Wei Hua Garment Company, dated 10 January 2006.
2. Certification of registration in the General System of Preference of Wei Hua Garment Company, dated February 2008.
3. Statute of Wei Hua Garment Company, dated 2 December 2005.
4. Notification of establishment of enterprise, dated 9 May 2006.
5. Patent for 2008, dated 28 April 2008.
6. Internal Work Rules of Wei Hua Company, dated 2 April 2008.

Provided by the worker party:

1. Receipt of request for registration of the local union WU at Wei Hua Company, dated 5 September 2008.
2. Letter by workers at Wei Hua Factory to the president of WUF to request help and to authorize the president to represent or accompany them, dated 9 September 2008.
3. List of 380 workers who are members of the union.
4. Letters by workers to apply for membership of the union.

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

1. Report of collective labour dispute resolution at Wei Hua Company No. 1083 KB/AK/VK, dated 23 September 2008.

2. Minutes of collective labour dispute resolution at Wei Hua Company, dated 10 September 2008.
3. Minutes of collective labour dispute resolution at Wei Hua Company, dated 11 September 2008.

Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to invite the worker party to attend the hearing, No. 636 KB/AK/VK/LKA, dated 3 October 2008.
2. Letter of invitation to invite the worker party to attend the hearing, No. 635 KB/AK/VK/LKA, dated 3 October 2008.
3. Letter of invitation to invite the worker party to attend the second hearing, No. 659 KB/AK/VK/LKA, dated 16 October 2008.
4. Letter of invitation to invite the employer party to attend the second hearing, No. 658 KB/AK/VK/LKA, dated 16 October 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:

- Wei Hua Garment Company started its operation in 2006. It is currently employing a total of approximately 600 workers.
- There is only one union in the company, WU, which is the claimant in this case. The WU does not have a certificate of registration yet.
- WU provided a receipt to certify its application for registration, dated 5 September 2008.
- According to the claim by the president of the union in the hearing, the union has approximately 400 members. The union does not have most representative status.
- The workers mentioned in the hearing that Mr. Sak Kakda is the president of the local union and was recently elected worker delegate. The employer did not object to this claim.

Issue 1: The demand for the company to make a six-month fixed-duration contract with them

- Generally, the company makes three-month fixed-duration contracts with its workers.
- The workers mention in the hearing that they dropped their demand for the company to make one-year fixed-duration contract (as mentioned in the non-conciliation report

by the Ministry). Instead, they demand that the company change the duration of fixed-duration contracts from three months to six months when the current three-month fixed-duration contract is over.

- The workers state that the reason that they demand that the company change the duration of contracts from three months to six months is because they are afraid that the company will discriminate against union members by terminating workers without proper cause at the expiration of their contracts. However, the workers do not have any evidence to prove this.
- The employer and the union agree that the three-month fixed-duration contracts of the union leaders had just expired recently and the company renewed their contracts for another three months. Thus, the employer did not terminate their contracts.
- The company party mentioned in the hearing that in fact the majority of workers prefer three-month fixed-duration contracts to six-month fixed-duration contracts because the three-month contracts allow them easily to discontinue their work or switch to another factory. The workers do not agree with the employer's claim and promised that it would provide documents to prove that workers want six-month fixed-duration contracts more than three-month fixed-duration contracts. The two parties did not provide evidence to support their [respective] claims.

Issue 2: The workers demand that the company maintain their US\$ 5 attendance bonus when workers ask for one day's leave for personal commitments per month

- The workers demand that the company maintain the US\$ 5 attendance bonus for workers with less than one year's seniority who ask for one day's leave for personal commitments per month.
- The workers mention in the hearing that they request that the company maintain the US\$ 5 attendance bonus whether or not the leave is permitted by the company, when workers ask for one day's leave for personal commitments (totaling one day per month) that are not included in annual leave, special leave or sick leave with proper [medical] certificate.
- The workers state that as long as the workers submit leave forms, whether or not the company permits [the leave], the company should maintain the US\$ 5 attendance bonus.
- The company states that when the workers ask for one day's leave per month for personal commitments, with or without permission, the US\$ 5 attendance bonus will be deducted because workers need to come to work for 26 days per month to receive the US\$ 5 attendance bonus. Thus, workers who are absent for one day, with or without permission, will not receive the attendance bonus. The company requests to follow Notification 017 SKBY, dated 18 July 2000.

- The company claims that whenever workers submit leave applications it always asks for reasons for the leave, and allows them to take leave if they have proper reasons. The company has objected to very few leave requests. The worker party does not dispute the company's claim.

REASONS FOR DECISION

So far the Arbitration Council interprets that a union with proper registration by the Ministry of Labour has the right to bring a dispute on behalf of their members for a resolution at the Arbitration Council without having an authorization letter.

Generally, the Arbitration Council declines to consider the demand if the union who is the claimant in the case does not have a certificate of registration. In this case, the claimant union does not have certificate of registration. However, Mr. Sak Kakda, a worker delegate, was also present at the hearing.

Hence, the Arbitration Council will considers the reasons why a union without a certificate of registration and an authorization letter from workers is not entitled to bring a dispute for resolution at the Arbitration Council, and whether a worker delegate can bring a dispute for resolution at the Arbitration Council.

The reasons why a union without a certificate of registration and an authorization letter from workers is not entitled to bring a dispute for resolution at the Arbitration Council

Article 268 of the Labour Law stipulates, *"In order for their professional organisation to enjoy the rights and benefits recognised by this law, the founders of those professional organisations must file their statutes and list of names of those responsible for management and administration, with the Ministry in Charge of Labour for registration..."*

If the Ministry in Charge of Labour does not reply within two months after receipt of the registration form, the professional organization is considered to be already registered..."

Based on the contents of Article 268 above, a professional organization will be entitled to benefits recognized by the Labour Law when it is registered by the Ministry in Charge of Labour.

In this case, the union received a receipt acknowledging its request for registration from the Ministry of Labour and Vocational Training on 5 September 2008. However, as of the arbitral hearing date the union has not yet been registered by the Ministry of Labour and Vocational Training. Thus, according to Article 268 above, the union is not entitled to the rights and benefits accorded by the Labour Law.

The Arbitration Council also considers that those rights and benefits include the union's right to represent its members in bringing a dispute for resolution at the Arbitration Council. (See *Arbitral Award 62/06-Quick Sew, issue 2*). This means that the union is not

legally entitled to bring a dispute for resolution on behalf of its members in front of the Arbitration Council.

However, Clause 19 of Prakas 099 SKBY, dated 21 April 2004, regarding the Arbitration Council, allows a disputing party to authorize in writing a person who is not a party in the dispute to represent them at the Arbitration Council. This clause means that although the union is not registered yet, it can represent a party at the Arbitration Council as long as the union is authorized in writing by the complainant workers.

In this case, the Arbitration Council found that the union does not have a letter from the workers authorizing it to represent them in the resolution of this dispute at the Arbitration Council. However, in this case Mr. Sakda, a worker delegate, attended the hearing.

Hence, the Arbitration Council will continue to consider whether a worker delegate can represent workers to resolve a dispute at the Arbitration Council.

Article 283(1) of the Labour Law states, *“In every enterprise or establishment where at least eight workers are normally employed, the workers shall elect a shop steward to be the sole representative of all workers who are eligible to vote in the enterprise or establishment.”*

This Article mean that a worker delegate is elected and supported by workers.

Clause 1 of Prakas 313 SKBY, dated 27 November 2000 on *the Role and Duties of Worker Delegates and Unions* states, *“A worker delegate is a representative of workers in an enterprise/establishment under Chapter 11, Section 3 of the Labour Law.”* Thus, a worker delegate is a representative of workers. Moreover, Article 284(1) of the Labour Law states:

The missions of the shop steward are as follows:

- *to present to the employer any individual or collective grievances relating to wages and to the enforcement of labour legislation and general labour regulations as well as collective agreements applicable to the establishment;*
- *to refer to the Labour Inspector all complaints and criticism relating to the enforcement of the labour legislation and labour regulations that the Labour Inspector is responsible for monitoring;*
- *to make sure the provisions relating to the health and safety of work are enforced;*
- *to suggest measures that would be beneficial to contribution towards protecting and improving the health, safety and working conditions of the workers in the establishment, particularly in case of work-related accidents or illnesses.*

The Arbitration Council considers that, according to the intention in this Article, the mission of worker delegates includes referring workers' complaints through the representatives they gain by election. The Arbitration Council also considers that their rights include the right to bring workers' complaints for a solution at the Arbitration Council.

Thus, the Arbitration Council will consider this dispute as follows:

Issue 1: The workers demand that the company make six-month fixed-duration contracts with them

Article 65 of the Labour Law states, *“A labour contract establishes working relations between the worker and the employer. It is subject to common law and can be made in a form that is agreed upon by the contracting parties.”*

Based on the contents of the above article, the Arbitration Council considers that an employment contract is an agreement between worker and employer and should be in accordance with the provisions of general contract law.

Article 22 of Decree 38 regarding Contract and Other Liability states, *“A contract is a law between the parties. Amendments or cancellation to the contract can only be made with the consent of both contracting party. A contract shall be executed with honesty and according to the will of the parties.”*

Based on this Article, the Arbitration Council considers that neither party in a contract can force the other party to accept any form or type or content of the contract without their consent. Such an act entitles the other party to nullify the contract or it will be nullified by law. Thus, while a party can suggest form, type or contents of a contract, the other party has the right not to accept it. A contract is established only with the agreement of all parties involved. An employment contract is established only with agreement from the worker party and the employer party. (See Arbitral Awards 79/07-Terratex, issue 3; 106/07-M & V 3, issue 1; 123/07-E Garment, issue 2).

In case 56/06-Boric, the Arbitration Council explains that *“labour contract establishes working relations between the worker and the employer and can be made in a form that is agreed upon by the contracting parties as long as it complies with the conditions of the Labour Law. A labour contract is subject to common law. None of the contracting parties can force the other party to sign a contract or to accept any conditions that could not be accepted by the other party. Any contracts made under duress can be voided by the law or by the other contracting party.”* (See Arbitral Award 56/06-Boric, issue 1).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in previous case. In this case, the workers request that the company should change from three-month fixed-duration contracts to six-month fixed-duration contracts for the reason that three-month fixed-duration contracts are too short and the workers are worried about [anti-]union discrimination. The employer party does not agree and argues that three-month fixed-duration contracts are more convenient for workers [who want] to leave work or to work for another factory.

The Arbitration Council considers that the workers' demand for the company to change from three-month fixed-duration contracts to six-month fixed-duration contracts is not

against the law because this is their right when making the employment contract. However, the objection by the employer party is not against the law either because the employer [has the same] right when making the employment contract. This means that in principle no party can force the other party to accept conditions not agreeable to that party. In this case, the workers cannot force the employer to make six-month [fixed-]duration contracts and the employer cannot force the worker party to make three-month [fixed-]duration contracts if the workers do not agree. However, generally if the workers and the employer agree on a type of contract, both parties need to implement the employment contract to its expiration except when the parties agree to make modification on the employment contract.

However, the workers state that they request the company to change from three-month fixed-duration contracts to six-month fixed-duration contracts because they are worried that the company may discriminate against the union at the end of each three-month fixed-duration contract.

According to previous Arbitral Awards, the Arbitration Council decided that a worker party who claims that the employer terminates workers based on [anti-]union discrimination has the burden of providing evidence to support the claim. (See Arbitral Awards 93/06-Evergreen, issue 1; 112/06-River Rich, issue 1; 01/07-Supreme and 110/07-Now Corp, issue 2).

Generally, the Arbitration Council will analyze all findings of fact provided by the parties to consider whether there was [anti-]union discrimination.

In this case, the Arbitration Council found that the workers only allege that they want the company to implement six-month fixed-duration contracts because they are worried that the company might discriminate against the union, but they do not provide any other evidence; the reason provided by the worker party is not sufficient for the Arbitration Council to consider whether the company's refusal to implement six-month fixed-duration contracts is an act of [anti-]union discrimination. Thus, the claim of [anti-]union discrimination does not have sufficient support.

Therefore, based on the above interpretation, the Arbitration Council decides to reject the workers' demand for the company to change from three-month fixed-duration contracts to six-month fixed-duration contracts. However, this decision by the Arbitration Council does not mean that the workers do not have the right to request a different type of employment contract, but this also requires the employer party's consent.

Issue 2: The workers demand that the company maintain their US\$ 5 attendance bonus when workers ask for one day's leave for personal commitments per month

The workers request that the company maintain the US\$ 5 attendance bonus for those workers who ask for one day's leave for personal commitments, with or without

permission from the company. Thus, the Arbitration Council will consider whether the workers are entitled to this attendance bonus according to the Labour Law.

Point 3 of Notification 745 KKBV, dated 23 October 2006, states, *“Benefits workers used to receive from Notification No. 017 SKBY dated 18 July 2000 on points 3, 4, 5 and 6 shall be retained.”*

Points 3 of Notification No. 017 SKBY dated 18 July 2000 states *“Workers who come to work regularly on regular working days of a month shall receive a bonus of at least US\$ 5.00 per month.”*

The Arbitration Council considers that the attendance bonus mentioned in this Notification refers to an incentive to reward those workers who have come to work regularly for a month without taking leave (absence) without valid reasons. This means that if the worker requests leave but is not permitted by the company, the workers are not entitled to this attendance bonus. In this case, there is no valid reason for the workers’ request that the company maintain the US\$ 5 attendance bonus for workers who take one day of leave whether or not it is permitted by the company. Thus, the Arbitration Council decides to reject the workers’ demand for the company to provide an attendance bonus to workers who take leave without permission. However, the workers’ request that the company maintain the US\$ 5 attendance bonus for those who take leave for personal commitments with permission from the company is valid. Thus, the Arbitration Council will consider this as follows:

In previous cases the Arbitration Council orders the employer to deduct attendance bonus in proportion to the number of days the employer permit the workers to take leave. (See Arbitral Awards 57/07-Serratex, issue 3; 106/07-M & V 3, issue 2).

In case 48/05-Manhattan, issue 1, the Arbitration Council writes that *“the Notification does not clearly state the number of working days to be considered as regular for workers to receive the attendance bonus.”* (See Arbitral Award 48/05-Manhattan, issue 1).

In this case, the Arbitration Council agrees with the above interpretation that the Notification does not clearly state how many working days a worker should come to work in order to be considered to have come to work regularly, for purposes of receiving this money. However, according to Article 103 of the Labour Law, bonus is a part of wage.

Article 103 of the Labour Law states, *“Wage includes, in particular:*

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

Article 71, paragraph 1, clause 6 of the Labour Law states, *“The 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, paragraph 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, when the workers are absent with permission from the employer, their employment contract is suspended and the workers are not required to work for the employer and the employer is not required to pay wages, except there are provisions to the contrary that require the employer to pay the workers. This means that the employer is not required to pay the workers on the days they are absent with permission from the employer. However, on the days the workers are not absent (for example, on the days the workers come to work) the employer is required to pay the workers.

Thus, attendance bonus is a part of wages and Notification 017, dated 18 July 2000 does not clearly state the number of working days workers to be considered regular in order for the workers to receive an attendance bonus. Hence, the Arbitration Council considers that if the employer is required to pay US\$ 5 attendance bonus to those workers who are absent with permission from the employer, it is not fair for the employer because the workers do not work for the company. However, it is not fair either for the workers if they take leave with proper permission from the employer and their attendance bonus is deducted because the company permitted the leave.

Therefore, the Arbitration Council considers that the employer can deduct the attendance bonus in proportion to the number of days the workers are absent with permission from the company.

In previous cases, the Arbitration Council has ordered companies to deduct the attendance bonus in proportion to the number of days the employer permits the workers to take leave. (See Arbitral Awards 57/07-Seratex, issue 3; 106/07-M & V 3, issue 2 and 115/07-Whitex, issue 1).

In this case, the Arbitration Council agrees with the interpretation in previous cases above. Thus, the Arbitration Council decides to order the employer to deduct attendance bonus in proportion to the number of days the workers are absent with proper permission from the company.

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

DECISION AND ORDER

Issue 1:

- Reject the workers' demand for the company to change from three-month fixed-duration contracts to six-month fixed-duration contracts.

Issue 2:

- Reject the workers' demand for the company to maintain the US\$ 5 attendance bonus when they take leave for personal commitments without permission.

- Order the employer to deduct attendance bonus in proportion to the number of days the workers take leave for personal commitments with proper permission.

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: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: