



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអន្តរាគ្នា

THE ARBITRATION COUNCIL

Case number and name: 159/08-Fortune

Date of Award: 30 January 2009

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Kao Thach**

Arbitrator chosen by the worker party: **Tuon Siphann**

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

DISPUTING PARTIES

Employer party:

Name: **Fortune Garment & Woolen Knitting Factory Ltd.**

Address: Prek Kseo Village, Rokar Kpous Commune, Sa-Ang District, Kandal Province

Telephone: 012 522 266 or 012 222 879 Fax: N/A

Representative:

1. Mr. Fong Kin Chhor Factory Director
2. Mr. Sok Hak Factory Deputy Director
3. Mr. Kong Kim Chi Advisor of the Company
4. Mr. Long Heang GMAC Representative
5. Mr. Yon Ros Head of security (Witness)
6. Mrs. Phal Kalyan Head of group (Witness)
7. Mrs. Ho Jian Head of section (Witness)

Worker party:

Name: **Coalition of Cambodian Apparel Workers of Democratic Union (C.CAWDU) and local union of Cambodian Apparel Workers of Democratic Union at Fortune Company**

Address: Prek Kseo Village, Rokar Kpous Commune, Sa-Ang District, Kandal Province

Telephone: 089 845 084 or 012 988 623 Fax: N/A

Representative:

- | | |
|----------------------|--|
| 1. Mrs. Mea Vanny | Officer of C.CAWDU |
| 2. Mr. Sreang Sreng | Officer of C.CAWDU |
| 3. Mr. Lon Simet | President of local union of C.CAWDU |
| 4. Mr. Yan Saran | Vice-president of local union of C.CAWDU |
| 5. Mr. Chon Ranja | Secretary of local union of C.CAWDU |
| 6. Mr. Thann Sophorn | Treasurer of local union of C.CAWDU |
| 7. Mrs. Rim Sora | Worker in fixing section |
| 8. Mrs. Chan Sineang | Worker in fixing section |
| 9. Mrs. Eng Sokly | Worker in fixing section |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

The workers demand that should any problems occur in the future, the company, the union and the workers must try their best to negotiate the problems at the factory level; the workers must continue to do their work for the company, and must not work arbitrarily on other PN's. If negotiation at the factory does not work, the parties should agree to follow legal procedures. On the other hand, the company should allow workers to work on other PN's within two days after they submit a request. If there is no response from the company after two days, it is considered that the company has approved. The company does not agree to the demand and claims that it follows Clause 2, point 11, of the company's Internal Work Rules which means that after workers are assigned work to perform but instead work arbitrarily by not following the company's assignment, the workers are considered as not having performed their work and thus are absent from work.

The result of the negotiation from 17 December 2008 shall be considered totally void.

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 dated 30 December 2008 was submitted to the Secretariat of the Arbitration Council on 31 December 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 January 2008 (from 2:00 p.m. to 5:30 p.m.)

Second hearing: 16 January 2008 (from 2:00 p.m. to 5:30 p.m.)

Procedural issues:

On 23 December 2008, the Kandal Provincial Department of Labour and Vocational Training designated its officials to resolve a collective labour dispute on one issue but did not reach a successful conciliation result. The one non-conciliation issue was submitted to the Secretariat of the Arbitration Council on 31 December 2008.

Having received the case, the Secretariat of the Arbitration Council summoned the employer and worker parties to the hearing and conciliation on the one non-conciliation issue for the first hearing on 9 January 2008 at 2:00 p.m. and the second hearing on 16 January 2008 at 2:00 p.m.

The two parties were present at both arbitral hearings. The Arbitration Council asked for more information related to this dispute and attempted to further the conciliation on the one non-conciliation issue but did not reach a successful conciliation result. Therefore, in this case, the Arbitration Council will consider this dispute based on the evidence and findings of fact as follows:

EVIDENCE**Witnesses (from the company party)**

- | | |
|---------------------|----------------------------|
| 1. Mr. Yon Ros | Head of security (Witness) |
| 2. Mrs. Phal Kalyan | Head of group (Witness) |
| 3. Mrs. Ho Jian | Head of group (Witness) |

Documents, Exhibits and other evidence considered by the Arbitration Council**A. Provided by the employer party:**

1. Letter by the company Director to authorize Mr. Kong Kim Chi, Advisor of the Fortune Company and Mr. Long Hean, Legal Coordination Officer of GMAC to resolve the collective labour dispute with authorized institutes in the collective labour dispute case of Fortune Factory, dated 31 December 2008.
2. Letter by the company to the Arbitration Council regarding submitting summary statement of case, dated 31 December 2008.
3. Letter by the company to the Arbitration Council regarding submitting evidence, dated 14 January 2008.

4. Letter by the company to H.E Thol Neang, head of the Kandal Provincial Department of Labour and Vocational Training, regarding report about 17 workers in fixing section do not abide by the company's assignment, dated 19 December 2008.
5. Letter by the company to H.E Thol Neang, head of the Kandal Provincial Department of Labour and Vocational Training, regarding request for conciliation officer to conduct conciliation of collective labour dispute to resolve problem, dated 24 December 2008.
6. Pictures of workers in fixing section took other PN to work by themselves.
7. List of names of 17 workers in fixing section.
8. Report of workers who work to fix overlocked shirts.
9. Internal Work Rules, dated 10 October 2003.

B. Provided by the worker party:

1. Letter of complaint by workers, dated 17 December 2008.
2. Minutes of collective labour dispute conciliation, dated 24 December 2008.

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

1. Report dated 30 December 2008 on the collective labour dispute settlement at Fortune Company.
2. Minutes of the collective labour dispute conciliation, dated 24 December 2008.

D. Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 782 KB/AK/VK/LKA dated 31 December 2008 to invite the company party to attend the hearing;
2. Invitation No. 783 KB/AK/VK/LKA dated 31 December 2008 to invite the worker party to attend the hearing;

FACTS

- Having examined documents submitted to the Arbitration Council;
- Having reviewed the report of collective labour dispute conciliation;
- Having listened to statements by the representatives of the workers and the employer;
- Having examined additional documents;

The Arbitration Council finds that:

- Currently Fortune Factory employs 2700 workers including 17 workers in the fixing section.

- Local union of C.CAWDU at Fortune Company is the claimant in this case.
- The workers mentioned in the hearing that the demand for the 17 women workers includes three issues:

Issue 1: The demand for the company to provide an additional increase of US\$ 0.05 to the rate for PN 639 from US\$ 0.18 to US\$ 0.23 per dozen

- The workers and the company acknowledge that generally the company asks workers in the fixing section to work on different PNs each month from 1999 until now. So far, no workers in the fixing section earns less than the minimum wage.
- The workers and the company acknowledge that regarding the principles to determine piece rate, generally the company asks all workers in the fixing section to work on a PN for three days. After that, on the fourth day the company will issue the rate of that PN with the endorsed signature of agreement between head of section, head of group and one or two representatives of workers from each group. There is also an agreement about the determination of the piece rate.
- On 12, 13, 15 and 16 December 2008 (14th was Sunday), the company assigned the 17 workers in fixing section to work on PN 639 alone, without mixing with other PNs; except on 12 December 2008 when the workers worked on PN 639 and other PNs when the company had not determined the rate of PN 639 yet.
- It was not until 16 December 2008 that the company determined the rate of PN 639 to be US\$ 0.18 per dozen. When the rate of PN 639 was issued at US\$ 0.18 per dozen, the 178 workers made a complaint to request the company to provide an additional increase of US\$ 0.05 on the rate, which means they requested for US\$ 0.23 per dozen, based on the reason that PN 639 is difficult and they could not earn the daily minimum wage of US\$ 1.92 per day if they worked on PN 639 alone.
- The workers state that if they work on PN 639 alone all day, fast workers can [fix] 9 dozen and the slow workers can [fix] 5 dozen per day but cannot earn US\$ 1.92, the basic minimum wage, per day.
- The company objects to the workers' claim and states that if the workers work hard they would be able to earn the minimum wage from the rate of US\$ 0.18 of PN 639. However, because when the company issued the piece rate of US\$ 0.18 per dozen, the workers complained. For this reason, during this period of the complaint, the workers did not work as hard as they could. Thus, the company cannot use the results from the fast workers' who [fixed] 9 dozen, medium speed workers who [fixed] 6 dozen or the 5 dozen for slow workers as the basis for [the piece rate] calculation because the workers were not in the mood to work.

- The company acknowledges that PN 639 is a bit difficult compared to other PNs and some PNs are easier to work on. The company requires the workers to work on a specific PN alone only when it is urgent to export the product, although this occurs infrequently. The company states that in the past women workers in the fixing section made a demand to increase the piece rate of PN 777 to US\$ 0.20 per dozen from the issued rate of US\$ 0.18 per dozen. During the negotiation stage, the workers worked slowly and made only 6 to 8 dozen per day. However, after the company decided to increase the rate of PN 777 to 0.19 per dozen, each worker could make from 20 to 30 dozen per day.
- The company adds that on 17 December 2008 at 10:00 a.m. Mr. Lon Simet, president of local union of C.CAWDU had a negotiation with Mr. Lim Khun, head of production, to request increasing the piece rate of PN 639 because it was difficult to work on. The head of production then made a promise that he would go to see [the work] himself in order to negotiate for an appropriate solution. However, while the negotiation between the president of C.CAWDU and Mr. Lim Khun, head of production, was going on, 17 workers stopped working on PN 639 and took other PN such as PN 777, PN 776 and PN 658 to work on, on their own, without the assignment by or permission from the company. However, the workers objected to the employer's claim and state that they obtained permission from Ms. Phal Kalyan, head of group, before they took other PNs to work on because at that time Ms. Phal Kalyan could not distribute PN 639 to them on time so she told them to take other PNs to work on.
- Ms. Phal Kalyan, head of group (witness for the company), testified in the hearing that she did not distribute PN 639 to the workers but she told them to go to take PN 639 to work by themselves. She claims that she did not tell the workers to take other PNs to work on. She added that she followed the company's directions because she generally does not distribute PN to the workers but tells them to take the PN and work by themselves, unless the PN is of a small number and it is urgent that she distribute it to the workers.
- The company party states that from 17 to 31 December 2008 the women workers arbitrarily took other PNs to work on and did not listen to the company although the company forbade them to take other PN to work on. The worker party does not object to the claim by the company. The workers state that if they did not take other PN to work on, they were afraid that the company would accuse them of not performing work (going on strike).

Issue 2: The demand for the company to maintain US\$ 5 attendance bonus for December 2008.

- The workers state that the 17 women workers demand that the company maintain their US\$ 5 attendance bonus for December 2008 because they worked fully for the whole month of December 2008.
- The company party states that it cannot provide US\$ 5 attendance bonus for December 2008 as demanded because the women workers arbitrarily took PNs other than PN 639 to work on by themselves and did not follow the assignment by the company. They did not follow the company's directions although it had warned them. The employer considered that the workers were in violation of the company's Internal Work Rules, Clause 2, point 11, in which it states, "After being assigned for work, if the worker performs the work arbitrarily and does not follow the assignment, the company will consider such act to be equivalent to being absent without performing any work at all."

Issue 3: The demand that in the future the company should allow the workers to take other PNs to work on if they do not reach agreement regarding a PN's rate

- The workers demand that they should be entitled to take other PNs to work on during the period they do not reach agreement on the negotiation of a rate because [currently] if the workers take other PNs to work on, the company accuses them of not performing their work (going on strike).
- The company party states that it cannot allow the workers to do as they demand because workers are required to work on the PN assigned by the company as the company knows which PN needs to be exported urgently and which PN should be the next priority within a clear timeframe. Thus, the workers are not entitled to take other PNs to work on.

REASONS FOR DECISION

Before considering the workers' demand in this case, first of all, the Arbitration Council will consider its jurisdiction and determine whether the Council can consider the three issues mentioned by the worker party in the hearing as these issues are not expressly mentioned in the report of collective labour dispute resolution dated 30 December 2008.

Issue 1: The demand for the company to provide an increase of an additional US\$ 0.05 on the rate of PN 639 from US\$ 0.18 to US\$ 0.23 per dozen

Issue 2: The demand for the company to maintain the US\$ 5 attendance bonus for December 2008.

Issue 3: The demand that in the future the company should allow the workers to take other PNs to work on if they do not reach agreement regarding the PN's rate

Article 312(1) of the Labour Law states, *"The Arbitration Council has no duty to examine issues other than those specified in the non-conciliation report or matters which arise from events subsequent to the report that are the direct consequence of the current dispute."*

Furthermore, Clause 33 of Prakas 099 regarding the Arbitration Council, dated 21 April 2004 states, *"The power of an arbitration panel to consider a dispute shall be limited to addressing those issues which are contained in the non-conciliation report including issues which are the direct consequences of the dispute but which arise from events subsequent to the date of the report."*

In previous cases, the Arbitration Council has declined to consider the demand if it is not mentioned in the non-conciliation report and is not the direct consequence of the dispute that arises subsequent to the date of the report. (See *Arbitral Award 62/04-E Cent, issue 17, 18 and 19*).

Based on Article 312(1) of the Labour Law and Prakas 099 of 2004 as well as the Arbitration Council's jurisprudence above, the Arbitration Council considers that issue 1, regarding the demand for an increase of the piece rate of PN 639 from US\$ 0.18 to US\$ 0.23 is not clearly mentioned in the non-conciliation report by the Ministry of Labour and Vocational Training, dated 30 December 2008, but the report does include relevant references to PN.

However, upon review of the dispute negotiation at the factory level on 17 December 2008 up to the conciliation at the Ministry of Labour and Vocational Training on 24 December 2008, the workers maintained their demand related to the increase of the piece rate of PN 639. In addition, the non-conciliation report dated 30 December 2008 mentions a nullification of the result of the negotiation on 17 December 2008 related to increasing the piece rate.

Therefore, the Arbitration Council considers that it has jurisdiction on this issue because the worker party made further clarifications on their demand when they appeared before the Arbitration Council to resolve this issue.

Regarding issue 2 related to the demand for the company to maintain the US\$ 5 attendance bonus for December 2008 for 17 workers, the demand is not mentioned in the non-conciliation report forwarded to the Arbitration Council. However, according to Article 312 of the Labour Law above, the Arbitration Council has a duty to decide on issues mentioned in the non-conciliation report and those which are the direct consequence of the dispute that arise after the report was made.

In previous Arbitral Awards, the Arbitration Council has considered demands which are not mentioned in the non-conciliation report but which are the direct consequence of the

dispute that arise after the report was made. (See *Arbitral Awards 70/04-Hana, issue 4; 111/04-Sun Shiny, issue 4*).

According to the findings of fact, the conciliation session by the Labour Inspector was concluded on 24 December 2008 but the company did not mention a deduction of the attendance bonus of the 17 workers. However, on the date of the arbitral hearing on 9 January 2009, the workers claimed for the attendance bonus for December 2008 which was deducted by the company. In the hearing the company also agreed that it deducted the attendance bonus because during period of negotiation on the piece rate of PN 639 the workers did not follow the company's assignment. Thus, the Arbitration Council considers this is the direct consequence of this dispute. Therefore, the Arbitration Council has jurisdiction over this issue.

Issue 3 regarding the workers' demand that in the future the company should allow the workers to take other PN to work on if they do not reach agreement regarding the PN's rate is mentioned in the Ministry non-conciliation report dated 30 December 2008. Therefore, the Arbitration Council has jurisdiction over this issue.

Issue 1: The demand for the company to provide an increase of an additional US\$ 0.05 on the rate of PN 639 from US\$ 0.18 to US\$ 0.23 per dozen

17 workers in fixing section demand that the company provide an increase of an additional US\$ 0.05 on the piece rate of PN 639 from US\$ 0.18 to US\$ 0.23 per dozen for the reason that if the workers work on this PN alone they would not earn US\$ 1.92 per day because this PN is difficult. Thus, the Arbitration Council will consider as follows:

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."*

Point 1 of Notification 745 KKBV, dated 23 October 2006 states, *"The minimum wage for garment, textile workers and shoe making workers is set at US\$45.00 per month for probationary period of 01 month to 03 months. At the end of probationary period, a full-right worker receives the minimum wage of US\$ 50 per month."*

Based on the contents of Article 108 of the Labour Law above, in previous Arbitral Awards the Arbitration Council considers that the employer has an obligation to calculate wages for the workers who perform task-work or piecework in a manner that permits the workers to earn the guaranteed minimum wage as determined for the workers. (See Arbitral Awards 03/05-Flying Dragon, issue 6; 41/05-Violet Apparel, issue 6; 44/06-Goldfame, issue 1; 73/06-Yung Wah 1, issue 1 and 106/07-M & V 3, issue 7).

Generally, in previous Arbitral Awards the Arbitration Council has considered workers' demands related increasing the piece rate when only one type of piece work is calculated. In such cases the Arbitration Council has determined the workers' wages calculated based on the rate per dozen of only one PN calculated in accordance with Article 108 of the Labour Law.

In this case, workers in the fixing section work on different PNs in a month and the rate of different PNs are calculated together.

The Arbitration Council considers that the main principle of Article 108 of the Labour Law is applicable in this case although the workers work according to the piece rate of this PN together with other PNs: the calculation of the piece rate the company sets should ensure that the workers with average ability, working for 8 hours per day excluding of overtime payments and payments for work on Sundays and holidays, can earn at least US\$ 50 per month.

In previous cases related to piece rate, generally the Arbitration Council has considered two factors to determine whether the piece rate is acceptable: (1) the company should set a test for the workers try working [on a particular PN] before determining the piece rate and (2) [the company should review] the actual results related to wages after the piece rate is determined. (*See Arbitral Awards 03/05-Flying Dragon, issue 6; 11/06-Fortune, issue 1; 44/07-Winner Knitting Factory, issue 1*).

In this case, the Arbitration Council agrees with the determination of the Arbitration Council in previous cases.

Based on the evidence provided by the company party and the worker party, the Arbitration Council found that the company assigned 17 workers in the fixing section to work on PN 639 as a priority before other PNs from 12, 13, 15, 16 December 2008 (totalling 3 days) but the company did not issue the rate of PN 639 yet (for 4 days) until 16 December 2008 when the company set the rate of PN 639 to US\$ 0.18 per dozen.

Thus, based on the evidence, some of the 17 workers in fixing section worked on this PN together with other PNs while some workers worked on PN 639 alone. The Arbitration Council considers the method of determining piece rate by allowing workers to test it in this way is appropriate. Hence, the Arbitration Council will consider whether the determination of PN 639 to US\$ 0.18 per dozen allows workers of average ability working normally for 8 hours per day to receive a wage of at least US\$ 50 per month.

Based on the evidence submitted by the company party and the worker party, among the 17 workers in the fixing section, some of them work on PN 639 and other PNs while some of them worked on this PN alone.

For instance: a woman worker with ID L05 worked on PN 639 and other PNs:

- On 13 December 2008: worked on 9 dozen of PN 639 and one dozen of PN 777

- On 15 December 2008: worked on 8 dozen of PN 639 and 2 dozen of PN 683
- On 16 December 2008: worked on 10 dozen of PN 639, 1 dozen of PN 629, 2 dozen of PN 685 and 5 dozen of PN 776.

Workers with ID L01 worked on PN 639 and other PN:

- On 12 December 2008: worked on 8 dozen of PN 639, 7 dozen of PN 210, 3 dozen of PN 687, 2 dozen of PN 685, and 1 dozen of PN 777
- On 13 December 2008: worked on 9 dozen of PN 639 and 1 dozen of PN 683

For instance: a woman worker with ID L04 worked on PN 639 alone:

- On 13 December 2008: worked on 7 dozen of PN 639
- On 15 December 2008: worked on 6 dozen of PN 639
- On 16 December 2008: worked on 8 dozen of PN 639

Worker with ID L42 worked on PN 639 alone:

- On 13 December 2008: worked on 7 dozen of PN 639
- On 15 December 2008: worked on 8 dozen of PN 639
- On 16 December 2008: worked on 8 dozen of PN 639

Based on the above results, it cannot be determined whether the rate of PN 639, which is set to US\$ 0.18 per dozen for 8 working hours per day by [] workers with average skill, allows workers to earn wages which are less than, equal to or more than the minimum wage because the workers work on PN 639 together with other PNs. Therefore, the Arbitration Council cannot use the result in the list provided by the company party and the worker party as the basis for consideration as to whether the determination of the rate of PN 639 to US\$ 0.18 per dozen allows [] workers to receive a wage less than, equal to or more than the minimum wage.

In addition, the Arbitration Council found that, among the 17 workers, some of them worked on PN 639 alone while some workers worked on this PN together with other PN and they worked for only 3 or 4 days. Thus, although the Arbitration Council found that women workers who work on PN 639 alone would not be able to earn US\$ 1.92 per day, an amount equivalent to the minimum wages, the Arbitration Council is unable to determine who are those women workers who earned less than the minimum wages.

In conclusion, the Arbitration Council decides to reject the workers' demand for the company to provide an increase of an additional US\$ 0.50 on the piece rate of PN 639 on the rate of US\$ 0.18 per dozen determined by the company.

Issue 2: The demand for the company to maintain US\$ 5 attendance bonus for December 2008.

The company asked the 17 workers to work on PN 639 as a priority before other PN because the company needs to export this in urgent. However, the 17 workers arbitrarily took

other PN other than PN 639 to work and, despite warnings from the company, they did not follow the company's assignment because they were afraid that the company would accuse them of not working (going on strike). This means that they worked in December 2008 for the whole month but they did not follow the company's assignment.

Thus, the Arbitration Council will consider whether the employer is entitled to deduct the US\$ 5 attendance bonus of workers in the fixing section when they took PNs other than PN 639 to work arbitrarily and did not follow the assignment of the company.

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*".

Clause 3 of Notification 017 dated 18 July 2000 states that "*Any workers who regularly work according to number of working days per month shall have a reward of at least 5 US dollars per month.*"

The Arbitration Council in previous cases considers that the US\$ 5 attendance bonus mentioned in Notification 017/00 means that the US\$ 5 attendance bonus is an incentive bonus to encourage workers who work for a full month. (See Arbitral Awards 62/04-E Cent, issue 1; 15/05-Wing Tai 2, issue 1; 62/07-Hong Mei, issue 11 and 143/08-Charm Textile, issue 7 and 152/08-Wilson, issue 1).

In this case, the 17 workers worked in December 2008 for the whole month but in performing this work they did not follow the company's assignment. The Arbitration Council considers that the condition of attending work regularly means that the workers come to work on the number of working days per month and follow the company's assignment and Internal Work Rules.

In this case, Clause 2, point 11, of the company's Internal Work Rules states, "*After being assigned for work, if the worker performs the work arbitrarily and does not follow the assignment, the company will consider such act to equally mean absent without performing any work at all.*"

According to the contents of the company's Internal Work Rules above, the Arbitration Council considers that the employer has the right to assign work for the workers and has the right to implement the company's Internal Work Rules.

In this case, the workers performed their work without following the company's assignment. Therefore, the workers are not entitled to attendance bonus.

Therefore, the Arbitration Council decides to reject the demand for the company to provide US\$ 5 attendance bonus for December 2008.

Issue 3: The demand that in the future the company should allow the workers to take other PN to work on if they do not reach agreement regarding a PN's rate

Article 2 of Labour law states “...*The enterprise can consist of ... a group of persons working ... under the supervision and direction of the employer.*” According to this Article the Arbitration Council considers that the employer has a right to supervise and direct the company as long as the supervision and direction is in accordance with the law and reasonable.

In the previous cases the Arbitration Council held that Article 2 of Labour Law means the employer has a right to supervise and direct the company in accordance with the law and [what is] reasonable (see Arbitral Awards 17/03 & 18/03-*Ho Hing*, issue 5; 28/04-*Raffles Grand D'Angkor*, issue 2; 20/06-*New Star*, issue 5; 17/07-*Charm Textile*, issue 3; 116/07-*Grace Sun*, issue 2; and 47/08-*Grandtex*, issue 2).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in previous cases. The Arbitration Council considers that the employer' rights to supervise and direct the company includes the right to assign workers to perform their duty on the work in the company as long as the assignment is in accordance with the law and reasonable.

Therefore, the Arbitration Council considers that the fact that the employer assigned the workers in fixing section to work on a specific PN as valid and reasonable assignment.

The Arbitration Council considers that during the period the parties are negotiating the rate of a specific PN, whether they reach agreement in the negotiation of the rate or not, the workers are not entitled to take other PNs to work on without permission from the company. They can do so only after permission from the company.

Therefore, the Arbitration Council decides to reject the demand that in the future the company should allow the workers to take other PN to work on if they do not reach agreement regarding the PN's rate.

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 provide an increase of an additional US\$ 0.50 on the piece rate of PN 639 on the rate of US\$ 0.18 per dozen determined by the company.

Issue 2: Reject the demand for the company to provide the US\$ 5 attendance bonus for December 2008.

Issue 3: Reject the demand that in the future the company should allow the workers to take other PN to work on if they do not reach agreement regarding the PN's rate.

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: **Kao Thach**

Signature:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature:

Annex to Arbitral Award 159/08-Fortune**Dissenting Opinion on Issue 1
by Arbitrator Tuon Siphann**

According to Clause 37 of Prakas No. 099 SKBY, dated April 21, 2004, of the Ministry of Social Affairs, Labor, Vocational Training, and Youth Rehabilitation, I, arbitrator, Tuon Siphann, present my dissenting opinion on reasoning issue 1 of the Arbitral Award No. 159/08-Fortune Company as follows:

Whether the employer shall provide \$0.23 for the piece rate of PN 639 to workers or not?

Based on the facts provided by the employer and the workers, we find that there are 17 workers in this section, and they received different and mixed PNs, each of which has different price []. Workers started to perform PN 639 from December 12 to December 16, 2008. During this period, there were some workers who performed a mix of [PN] work each day, while others performed only one PN. For those who performed only one PN, they could complete from six to nine pieces per day. Among the 14 workers who performed only one PN per day were the following: those who completed seven pieces per day over 10 days, those who completed six pieces per day over nine days, those who completed eight pieces per day over eight days, those who performed nine pieces per day in one day. In addition to this, there were workers who performed mixed PNs of up to 18 pieces per day, and among those [18] pieces, there were 10 pieces of PN 639; and another worker completed 21 pieces, and among those 21 pieces the worker completed eight pieces of PN 639.

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.”**

The employer asserted if workers could not earn minimum wage, the employer would top up payment to the minimum wage, which would be lawful; as would if the employer calculated the piece rate that was issued to the workers in accordance with lawful procedures. If the actions were not in accordance with the law, then the employer would not be able to perform such actions.

Because some days workers performed mixed PNs and both parties failed to provide sufficient evidence to the Arbitration Council about each of the PNs, the Arbitration Council finds it is not possible to calculate the piece rates when workers performed mixed [PNs]. The Arbitration Council will consider when workers complete pieces from only one kind [of PN] per day. The Arbitration Council finds that the majority of the workers completed an average of seven pieces every day. The Arbitration Council, therefore, will use this production as a basis for the calculation of the piece rate.

Workers involved in the dispute work eight hours per day and 26 days per month, with weekly time off on Sundays. If in a single day a worker completes seven pieces on average, they will complete 182 pieces in a month [seven pieces multiplied by 26 days].

The main wage that each worker receives at a minimum is US\$ 50 per month. Dividing the US\$ 50 monthly wage by the average production completed by a worker in a month, results in US\$ 0.27 per piece. Therefore, US\$ 0.27 is the amount [] that workers should receive at a minimum for PN 639.

There is an agreement between the employer and workers in this company that provides before setting the piece rate, the company will provide products for worker to test three days in advance. On the fourth day, the company will set the piece rate. Regarding this dispute, both parties made the following assertion:

The employer set the piece rate of PN 639 equivalent to US\$ 0.18 on 13 December 2008 and informally notified the workers of this on that day. Until December 16, 2008, the employer formally issued the piece rate to the workers; this was three days after the workers had performed the test. The Arbitration Council finds that the employer set this fixed piece rate, without making any changes [despite the test], and this was the same rate issued between 13 and 16 December. The company asserted in the hearing that it could not use the result of this production as a basis to calculate the piece rate because the company believes that workers are clever and did not work hard during the period of testing products. The Arbitration Council finds that the company had no legal basis to set the piece rate and failed to comply with the agreement made on 12, 13, 15, and 16 December 2008.

In previous Arbitral Awards, the Arbitration Council interpreted [Labour Law Article 108 to mean] that for the work in garment sector, the piece rate shall permit the worker with average ability working normally to earn, by working eight hours per day or not more than 48 hours per week, a wage at least equal to the guaranteed minimum wage. (*See Arbitral Award No. 03/05- Flying Dragon, reasoning issue 6; Arbitral Award No. 41/05- Violet Apparel, reasoning issue 6; Arbitral Award No. 44/06- Gold Fame, reasoning issue 1; Arbitral Award 73/06[-F.Y.], reasoning issue 1; and Arbitral Award No. 106/07- M & V 3, reasoning issue 7*).

Because in this case workers demand the employer to provide a piece rate of \$0.23 per piece --which price is lower than the price they should be entitled to based on the law, the employer should provide a piece rate for PN 639 at least equal to \$0.23 per piece as demanded by the workers.

Name and Signature of Arbitrator

Name: **Tuon Siphann**

Signature

Phnom Penh, 30 January 2009