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THE ARBITRATION COUNCIL

KINGDOM OF CAMBODIA

NATION RELIGION KING

Case number and name: 23/08-M & V 3

Date of Award: 11 March 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

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

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

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

DISPUTING PARTIES

Employer party:

Name: **M & V International Garment Company 1**

Address: National Road 2, Sangkat Chak Angre Krom, Khann Mean Chey, Phnom Penh

Telephone: 016 707 046 Fax: N/A

Representative:

1. Ms. Van Polim — Director of M & V I Company
2. Mr. Yin Nak — Head of administration
3. Mr. Mam Vuthy — Assistant to administration

Worker party:

Name: **Cambodian Industrial Union Federation (CIUF)**

Address: 60A, St. 386, Sangkat Boeung Keng Kang 3, Khann Chamkarmorn, Phnom Penh

Telephone: 012 699 395 Fax: N/A

Representative:

1. Mr. Hem Sokponlork — President of CIUF
2. Mr. Norn Mengsreang — President of the local union of Cambodian Industrial Union (CIU) at M & V 1
3. Ms. Chan Sothy — Vice-president of the local CIU at M & V 1
4. Mr. Heng Phea — Secretary of the local CIU at M & V 1

5. Ms. San Sivorn — President of the local CIU at M & V 1

6. Ms. Houl Mom — Trainer of local union of CITU at M & V 1

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1- Members of CIU demand that the company calculate the wages of piece rate workers and fixed wage workers correctly. The company states that it correctly calculated the wages of fixed wage workers in accordance with the Labour Law.

2- Members of CIU demand that the company reimburse medical check fee for workers who commenced employment from 01 October 2007 onwards. The company states that it cannot reimburse the money as it follows the Prakas of the Ministry of Labour.

3- Members of CIU demand that the Company add one more day to the annual leave of workers who have been working for three years. The Company states that it was waiting for the Prakas issued by the Ministry of Labour.

4- Pregnant female workers demand that the company provide 90-days maternity leave excluding public holidays and Sundays, and pay them half wages (plus perquisites) and this should be paid before the day they take the leave. The company does not agree, asserting that it follows Article 182 of the Labour Law. The company pays half wages to pregnant women workers every month on the monthly pay day.

5- Members of CIU demand that the company should obtain a permission letter from the Inspection Department when it suspends [workers'] employment contracts, and provide them with half wages. If the company does not provide half wages it should provide appropriate accommodation for workers. The Company states that it follows the Labour Law when suspending [workers'] employment contracts. It provides only US$ 10 per month for accommodation fee.

6- Members of CIU demand that the company change the computer system from a foreign language to the Khmer language to issue workers' monthly pay slips. The company states that it is unable to change the system but it will provide workers with a sample pay slip in Khmer.

7- Members of CIU demand that the company pay in lieu of annual leave according to Article 168 of the Labour Law. The Company states that it follows the Labour Law.

8- Members of CIU demand that the company apply the same suspension of employment contract for all workers. The company states that the suspension of employment contracts is based on the production lines.

9- Members of CIU demand that the company pay a pro rata bonus by dividing it by 26 days per month for those workers whom the company gave authorized leave for

personal commitments. The company states that it follows Notification 017 S.K.B.Y dated 18 July 2000.

10- Members of CIU demand that the company reimburse wages to any female worker who took maternity leave in the last three years and the Company did not follow the law. In the calculation of wages, if a worker has not been working for up to one month, the company should pay them their basic monthly wage. The company does not agree to the demand.

11- Members of CIU demand that the company back pay any monies owed to them as a result of payments which were not in accordance with the Labour Law within the last three years such as their wages on public holidays and Sundays and overtime payments. The Company does not agree to the demand.

12- Regarding the demands in issues 13, 14, 15, 16 and 17, the company does not agree to resolve them because the union did not file a grievance to the company regarding these four demands.

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. 201 KB/AK/VK, dated 11 February 2008, was submitted to the Secretariat of the Arbitration Council on 13 February 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: 20 February 2008 (from 2:00 p.m. to 5:30 p.m.)

Procedural issues:

On 25 December 2007, the Department of Labour Disputes received a complaint dated 13 November 2007 from the local union of CIU at the factory regarding a demand for the company to improve working conditions. Upon receipt of the complaint, the Department of Labour Disputes assigned an officer to conciliate this dispute and the last conciliation was held on 24 January 2008 with the result that 12 out of 17 were not able to be conciliated.

The Department of Labour Disputes, on behalf of the Ministry of Labour and Vocational Training, referred the report of the collective dispute resolution at M&V 1 company, which consisted of 12 non-conciliation issues, to the Secretariat of the Arbitration Council on 13 February 2008 by letter No. 201 KB/AK/VK dated 11 February 2008,.

After receiving the case the Secretariat of the Arbitration Council summoned the employer and the worker party to the hearing and conciliation on the 17 non-conciliation issues on 20 February 2008 at 2:00 p.m. Both parties were present as invited by the Arbitration Council. On the hearing day, the local union of CIU agreed to withdraw issues 5 and 8 related to the suspension of [workers'] employment contracts because the dispute had not actually happened as the company had not suspended the employment of workers in the factory.

In the hearing the Arbitration Council tried to further the conciliation on the other [1]5 issues but did not receive any conciliation result. In addition, in the hearing the employer party refuted to discuss issues 13 to 17 claiming that these issues did not exist in the demand and [were not discussed during] negotiation at the factory level. However, the worker party argued that the five issues were added when they had been a negotiation [on these issues] at the Department of Labour Disputes, Ministry of Labour and Vocational Training.

Therefore, in this case the Arbitration Council will consider the remaining issues in dispute based on the evidence and clarification by the parties in the hearing as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1- Defence statement regarding case 23/08 by M & V Company, dated 23 February 2008.
2- Name list of workers who took leave for personal commitments whose attendance bonus was deducted.
3- Letter by the chief of Department of Labour Inspection to the director of M & V International Garment Company, No. 317 KKBV/AK/ATK, dated 22 May 2007;
4- Letter by the director of M & V International Garment Company to the chief of Department of Labour Inspection, No. 059/07 [MV], dated 5 April 2007.
5- Three copies of payroll list.
6- Letter consists of 13 demands by workers at M & V 1 Company, dated 12 December 2007.

Provided by the worker party:

1- Certificate of union registration of the local union of CIU at M & V 1 factory, dated 10 June 20058.
2- Letter by the chief of Department of Labour Dispute to the president of local union of CIU at M & V 1 Company regarding recognition of new union leadership in its second mandate.
3- Statute of local union of CIU at M & V 1 factory, No. 777 KKBV/AK, dated 10 June 2005.
4- Letter consists of 17 issues by workers of M & V 1 factory, dated 12 December 2007.
5- Workers' monthly pay slip.
6- Name list of workers whose employment contract is converted to casual workers.
7- Name list of workers who took annual leave in 2007.
8- Name list of workers who paid for medical check fee by themselves.
9- Name list of workers who took maternity leave.

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

1- Report of collective labour dispute conciliation at M & V 1 Company No. 201 KB/AK/VK, dated 11 February 2008;
2- Minutes of collective labour dispute conciliation at M & V 1 Company, dated 4 January 2008.

Provided by the Secretariat of the Arbitration Council:

1- Letter of invitation to the company party to attend the hearing, No. 117 KB/AK/VK/LKA, dated 14 February 2008;
2- Letter of invitation to the worker party to attend the hearing, No. 118 KB/AK/VK/LKA, dated 14 February 2008.

FACTS

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

The Arbitration Council finds that:

- M&V 1 Company employs approximately 193 workers.
- There are two unions in M&V 1 Company: 1). the local union of CIU which has 125 members (registered with the Ministry of Labour and Vocational Training) and 2). the local union of CITU which has 56 members (registered with the Ministry of Labour and Vocational Training).

Issue 1 and issue 11: The workers demand that the company calculate the wages of piece rate workers and fixed wage workers correctly. The workers demand that the company back pay [monies owed to them as a result of] payments made by the company which were not in accordance with the Labour Law within the last three years such as their wages on public holidays and Sundays and overtime payments

- The employer party and the worker party agreed that piece rate workers received at least the minimum wage of US$ 50 according to the law.
- In calculating piece rate workers' wages for work on holidays, the employer took the wage earned in that month and divided it by 26 to find the daily minimum wage per month, but did not take into consideration the number of holidays where the workers did not come to work in the month. The employer used this daily minimum wage to calculate the wages to pay to workers on holidays, when they did not come to work. The Company had been using this method of calculation for a long time.
- The worker party states that the method of calculation of wages the employer was using was not the right method. The worker party added that the employer should have taken the amount of wages earned in a month and only divided by the number of days the [workers] had actually worked.
- The Company party, on the other hand, claimed that the method of calculation the employer was using was in accordance with the method and instruction of the Ministry of Labour which means that it should be divided by 26 in order to find the daily wage in a month. The Company did not provide any evidence to the Arbitration Council regarding this instruction by the Ministry of Labour. Thus, the Arbitration Council considers that there is no evidence to prove that the Company received any instruction regarding the matter mentioned above from the Ministry of Labour.
- In the hearing, the worker party did not provide sufficient evidence and documents regarding specific workers who suffered an incorrect calculation of their wage. The Arbitration Council allowed an opportunity to the party to submit evidence and the identity of the claimants whose wages were incorrectly calculated by 25 February 2008. However, the worker party did not provide any documents or evidence relevant to this matter except 13 photocopied pay slips of piece rate workers and 18 photocopied pay slip of fixed wage workers. The union did not write a statement to explain what these pay slips were, what the problems with each pay slip were, where the wrong calculation appeared in the pay slip, how much it was, and how much the employer should pay back.
- The employer party provided to the Arbitration Council the payroll of workers in the sewing section from 1 November 2007 to 15 November 2007, from 16 November

2007 to 30 November 2007, from 1 December 2007 to 15 December 2007, from 16 December 2007 to 31 December, from 1 January 2008 to 15 January 2008 and from 16 January 2008 to 31 January 2008. The employer did not make a detailed statement to describe the method of calculation of workers' wage to the Arbitration Council.

Issue 2: the workers demand that the company reimburse medical check fees for workers whose employment commenced after 1 October 2007.

- According to the statement by Mr. Yin Nak, the employer representative, dated 23 February 2008, workers who commenced work after October 2007 had to go and have a medical check themselves before their employment commenced. This was not an expense which the employer was obliged to meet. According to this, the employer set a condition which required workers who were recruited after October 2007 to have a medical check certificate before they could commence work.
- Both parties agreed that there were workers who had a medical check and paid for it from their own pockets from 1 October 2007. The union provided the names of two workers: Oeurn En, who started work on 18 April 2006 and went to have medical check on 30 October 2007, and Vong Yon, who started work on 20 April 2007 and went to have medical check on 30 October 2007. Each worker paid 12,000 riels for the medical check. Both workers endorsed their thumbprints on the union demand for reimbursement of the medical [check] fee as mentioned above.
- The workers demand that the company reimburse the 12,000 riel medical check fee for those [workers] who had a medical check and paid for it themselves. The company claimed that the company would be responsible for those workers whom they required to have medical check. However, for those [workers] who undertook a medical check themselves before they commenced work with the company, the company would not be responsible.
- Neither party provided legal ground to support their arguments.

Issue 3: The workers demand that the company give workers who have been working for three years one additional day of annual leave

- Under its current practice, the company increases paid annual leave by one day in the fourth year [of service] for those workers who have been working for three years in the company. After this, the company does not increase the number of days of paid annual leave for workers no matter how many years they have been working.

- The majority of workers in the factory have been working for the company for more than six years and they receive 19 days of annual leave. A worker named Heng Sothea has been working for 8 years and he received only 19 days of annual leave.
- On 25 February 2007, the union provided a name list of 23 workers who demanded that the company provide one more day of annual leave for workers who have been working for three years.

Issue 4 and 10: The workers demand that the company provide 90 days of maternity leave exclusive of holidays and Sundays. The workers also demand that the employer provide half wages plus perquisites

- The workers demand that the company reimburse any female workers who had taken maternity leave within the last three years and whose [maternity leave] had not been calculated correctly.
- In accordance with past practice, the company allowed female workers to take 90 calendar days leave. The workers demand that the company should count the 90 days leave as 90 working days, excluding holidays and Sundays. The workers argue that under the Labour Law, it does not state whether it is 90 calendar days or three months.
- During maternity leave, the company calculates the maternity payment based on half of the average wages earned within the last twelve months including the months when [their] employment is suspended, if there was any suspension in the last twelve months. As a practice, the company pays workers US$12 per month for the period of the employment suspension. The company followed this practice for a long time.
- The worker party claimed that it was not correct to include the amount of money provided to them during the month their employment was suspended as the basis for calculating the average wage for payment during maternity leave. The correct method of calculation is to take the minimum wage for the period of employment suspension as a basis for calculating the average wage. The employer party did not respond to this argument.
- As a practice, the employer paid female workers who take maternity leave once a month on the normal pay day. In case the workers could not come to collect their wages themselves, the employer allowed them to make an authorization letter to allow their relatives or colleagues to take the payment for them.
- The workers demanded that the company pay the maternity payment in advance of the leave according to Article 115 of the Labour Law, claiming that the Article requires the employer to pay workers' wages before the leave if the pay day falls on a day-off. In this case, the pay day would fall on the women workers' maternity leave thus the

employer is obliged to pay the full payment they are entitled to before they commence maternity leave. On the other hand, the employer states that it cannot pay the full wages female workers are entitled to during maternity leave before the leave commences. The employer maintains its position arguing that the practice is in accordance with Article 116 of the Labour Law which allows the employer to pay workers' wages at least once per month.

- The workers also demand that in case the workers had not calculated the payment correctly, the company should provide back pay for any female workers who had taken maternity leave in the last three years.
- On 25 February 2007 the union provided a name list of 19 women workers who supported the above demand. Based on this name list, among the 19 women workers, 17 of them took maternity leave and received their wages between 16 August 2005 and 1 November 2007. One of the other two women workers took maternity leave and was paid her wage on 27 December 2004 while the other woman did not mention the actual date she took maternity leave and payment of wages.

Issue 5 and Issue 8: The workers demand that during the suspension of their employment the company should pay an allowance for accommodation equal to half of their wage and request that the company suspend all workers for an equal period of time.

- The workers agreed to withdraw this issue.

Issue 6: The workers demand that the company change the computer system from a foreign language to the Khmer language when it issues pay slips for workers

- The company issues pay slips to workers in both English and Chinese. The company translates the pay slip in a letter to explain the meaning of the pay slip. The company does not attach the explanation letter with the pay slip every time it pays workers' wages.
- The workers demanded that the company issue their pay slips in Khmer because the workers do not read English or Chinese. The workers did not provide any legal grounds to support the demand.
- The company rejected the demand that it should issue [the workers'] pay slip in the Khmer language for the reason that it will need to spend a lot of money to establish a computer program in the Khmer language. The company recently spent its budget to produce a computer program in the English and Chinese languages. The company party did not provide any legal grounds to support its claim.

- The workers demand that the company translate the pay slip in a letter and it should attach the translation each time wages are paid.

Issue 7: The workers demand that the company calculate payment in lieu of annual leave in accordance with Article 168 of the Labour Law

- The company pays US$ 1.92 for one day of annual leave. The amount of US$ 1.92 is calculated by taking the minimum wage of US$ 50 and dividing it by 26 days, which is the average number of working days per month.
- The workers demand that the company calculate the payment in lieu of annual in accordance with the Labour Law by taking the total wages earned in the last twelve months, divided by 12 and then divided by 26 days to find the average wage per day. The workers demand that the company use the average daily wage as the basis for calculating paid annual leave. The employer did not respond to the workers' claim.

Issue 9: The workers demand that the company pay a pro rata [attendance] bonus (by dividing it by 26 days per month) to those workers whom the company authorized leave for personal commitments

- For those workers who come to work regularly in a month, the company provides a US$ 5 attendance bonus in accordance with Notification 017 SKBY, dated 18 July 2000. The company deducts the entire US$ 5 [bonus] if a worker is absent for personal commitments with the permission of the company.
- Regarding this type of leave, the workers demanded that the company pay a pro rata attendance bonus (by dividing the US$ 5 by 26 days per month) because the workers took leave for important commitments and it was approved by the company. The worker party did not provide any legal grounds to support this demand.
- The company party stated that it could not pay a pro rata attendance bonus as it follows Notification 017, dated 18 July 2000 as mentioned above.

Issue 12: Regarding the workers' demands in issues 13, 14, 15, 16 and 17, the company does not agree to resolve them because the union did not file a complaint to the company regarding these four demands

- The union did not mention these demands in the negotiation at the company level before the complaint was brought to the Department of Labour Disputes. The union did not provide reasons why it did not bring these issues for discussion with the employer at the enterprise level but only stated that the negotiation between the employer party and the worker party at the enterprise level over the above issues was

not successful. Thus, when the above issues were referred to the Department of Labour Disputes the worker party made a request to add these new issues.

- The company stated that it would not participate in the process to resolve these four issues because the union did not try to negotiate these new issues at the company level before reporting them to the Department of Labour Disputes.
- The union claimed that it filed a complaint regarding issues 13, 14, 15, 16 and 17 at the Department of Labour Disputes. Thus the union requested that the Arbitration Council settle these issues.

REASONS FOR DECISION

Issue 1 and issue 11: The workers demand that the company calculate the wages of piece rate workers and fixed wage workers correctly. The workers demand that the company back pay [monies owed to them as a result of] payments made by the company which were not in accordance with the Labour Law within the last three years such as their wages on public holidays and Sundays and overtime payments

In the hearing the worker party claim that their demand is related to the calculation of minimum daily wages for piece rate workers in the months in which there were public holidays and the workers did not come to work on those public holidays.

According to the current practice, to calculate the holiday rate for piece rate workers, the employer takes the total wages earned by the workers within that month and divides it by 26, which is the minimum number of working days per month.

The Arbitration Council will consider how the employer should calculate the minimum daily wage to be paid to piece rate workers for [public] holidays as follows:

Article 163 of the Labour Law states, *"Workers paid by the hour, the day, or by the amount produced shall be entitled to an indemnity equal to the wage lost as a result of holidays as defined in Article 161. This indemnity shall be paid by the employer."*

In relation to this Article, in case 82/06-M&V 3 the Arbitration Council states, *"This Article confirms the wage [that should be paid to] piece rate workers who do not work on public holidays. Even when the piece rate worker does not work on holidays, the employer is obliged to pay them an indemnity equivalent to the wage lost as a result of the holiday(s)."*

Notification 745 KKBV, dated 23 October 2006 states: *"...*

1. *... a full-right worker receives the minimum wage of US$ 50 per month.*
2. *Those whose wage based on piece of product produced (pieceworkers) shall receive wages based on the actual result of work performed. If the output of work allows the worker to receive more than US$ 50 per month, the worker shall*

receive that amount. However, if the amount is less, the employer shall provide an additional amount to reach US$ 50 per month. ... "

According to this Notification, piece rate workers are entitled to a wage of not less than US$ 50 per month but if they can produce more than this, they are entitled to receive more money. In the hearing the employer party and the worker party agreed that the workers receive a wage at least equal to the minimum wage of US$ 50 per month.

In the hearing, the employer party claims that the calculation used by the company is in accordance with the instruction [provided] by the Ministry of Labour which is to take the [workers'] total wages earned in a month divided by 26 days. However, there is not enough evidence to prove that the employer received an instruction from the Ministry of Labour as stated [above].

In this case, the Arbitration Council considers that in order to calculate the daily minimum wage of piece rate workers we should examine the amount of wages the workers received in a month and the number of their working days. This means that we should take the amount of wages the workers earned in a month **(S)** and divide this by the number of their working days **(N)** excluding the number of paid holidays **(M).**

(**Note:** it should not be divided by 26 days if the number of working days is not 26 days.)

Therefore, a workers' total wage **(T)** is equal to the total wages earned from the piece work plus holiday wages. The summary formula is as follows:

$$\mathbf{T = S + (\frac{S}{N} \times M)}$$

*For example, in January 2008 there were two public holidays on the 1st and 7th of January. A worker named **Sok** did not come to work on those two days. In addition, he came to work every day of the 25 days in that month and received US$ 70 of wages from the piece work within the 25 days.*

$$T = 70 + (\frac{70}{25} \times 2) = US\$ 75.60$$

Therefore, the employer should calculate the monthly wage and daily wage [to be paid to workers] in the months there are public holidays and workers do not come to work on those days in accordance with the legal procedure mentioned above.

However, in this case the workers demand that the Company [back] pay wages lost within the [last] three years. In relation to this demand, the workers submit some pay slips to support their demand that the employer back pay wages lost due to the employer's incorrect

calculation over the [last] three years. According to the above analysis, the Arbitration Council finds that in the past the employer did not calculate the wage of piece rate workers correctly. Therefore, the Arbitration Council decides that the employer should pay back the amount of wages lost due to the incorrect calculation to the workers.

Nonetheless, Article 120 of the Labour Law states, *"The statute of limitation for a lawsuit for the payment of wages is three years from the date the wage was due.*

Claims subject to the statute of limitation of a lawsuit include the actual wage, perquisites..."

The Arbitration Council finds that the amount of wages lost as mentioned above [comes within the category] of actual wages or perquisites as mentioned in Article 120 of the Labour Law and is subject to a limitation of three years. Thus, the Arbitration Council considers that the employer should pay back the amount of wages lost by piece rate workers within [the last] three years to the date the workers made this complaint.

For the demand for back payment of wages lost within [the last] three years, the workers did not submit specific evidence nor provide a detailed explanation about the amount of wages miscalculated during holidays; but provided only 13 photocopied pay slips of piece rate workers and 18 photocopied pay slips of fixed wage workers; which the Arbitration Council does not consider sufficient evidence to consider the demand.

In principle, when workers make a demand in relation to the compensation of wages incorrectly **calculated by the employer, workers have an obligation to prove the amount of money that was miscalculated, the number of months of the miscalculation, evidence to prove the miscalculation, etc., in order to support their claim.** However, in this case the worker party does not provide any evidence or explanation to the Arbitration Council to clarify the [amount] of their demand as requested by the Arbitration Council.

Therefore, the Arbitration Council decides to reject the workers' demand in relation to the demand for back payment of their wages as mentioned in issue 11.

Issue 2: the workers demand that the company reimburse medical check fees for workers whose employment commenced after 1 October 2007.

In this case, the workers demand that the company reimburse 12,000 riels that they paid for medical checks before they applied to work [at the company]. The union testified that two workers who are claimants for medical check fees are Oeurn En, who started work on 18 April 2006 and went for a medical check on 30 October 2007, and Vong Yon, who started work on 20 April 2007 and went for a medical check on 30 October 2007. They paid 12,000 riels for the medical check.

According to Article 247(a), *"The Ministry in charge of Labour shall issue a* Prakas *to determine the conditions under which pre-employment, re-employment, periodical, and*

special physical exams are given" and *Article 247(c) states, "The Ministry in charge of Labour shall issue a* Prakas *to determined the conditions under which employers are required to establish and provide and their expense: the medical exams of workers as stipulated in point (a) of this article."*

Clause 2(d) of the Inter Ministerial Prakas No. 1191 SHV.PrK JMP, dated 21 November 2006 regarding Fees on Employment Book and Medical Service Charge states that:

"Service charge on medical check employers need to pay is determined as follows:

- For each Cambodian employee, it is determined to be 12,000 riels..."

In the hearing, the employer states that it does not have an obligation to pay the medical check fee for workers if they had the medical check before they commenced their employment. The Arbitration Council considers that generally workers need to have a medical check when they apply for work in an enterprise. The Inter Ministerial Prakas above does not specify whether the employer has an obligation to pay workers' medical check fee if the medical check is conducted before employment or after the employment commenced. This Prakas clearly states that an employer has an obligation to pay for [a] medical check fee in an amount 12,000 riels. Based on this, the Arbitration Council considers that the employer has an obligation to pay for the medical check fee in an amount of 12,000 riels regardless of whether the workers had the medical check before or after they commenced their employment.

Therefore, in this case the Arbitration Council decides that the employer should pay the 12,000 riels medical check fee to those workers who had their medical check from 1 October 2007 as demanded by the workers in this case.

Issue 3: The workers demand that the company give workers who have been working for three years one more day of annual leave

In this case, the two parties do not agree on the increase in the number of [days of] annual leave day for workers who have been working for more than 3 years, 6 years, 9 years, 12 years or 15 years in an enterprise. This dispute arose because the two parties had different interpretations of Article 166(4) of the Labour Law.

Article 166 of the Labour Law states, *"Unless there are more favourable provisions in collective agreements or individual labour contracts, all workers are entitled to paid annual leave to be given by the employer at the rate of one and a half work days of paid leave per month of continuous service...*

The length of paid leave as stated above is increased according to the seniority of workers at the rate of one day per three years of service..."

The employer party claims that it follows Article 166 of the Labour Law because the company provides one more day of paid annual leave, additional to the 18 days of annual leave workers are entitled to each year, for those workers who have been working for three years and more. This means that the employer provides 14 days of paid annual leave from the 4th year a worker has been working for the enterprise.

The worker party does not agree with the employer's understanding and interpretation of Article 166 above. The workers demand that the employer provide 1 additional day of paid annual leave after a worker has been working for three years and 2 [additional] days of paid annual leave after 6 years of employment, in addition to the 18 days of annual leave the worker is entitled to each year. This means that the employer should provide 19 days of annual leave to workers in their 4th, 5th, and 6th years of employment and 20 days to workers in their 7th, 8th and 9th year of employment. The workers claim that the number of days off should be increased in the manner described above ie one day every three years.

In previous Arbitral Awards, the Arbitration Council interpreted Article 166 above and mentioned detailed legal reasons; and provided that Article 166 of the Labour Law above means that workers are entitled to one additional day off after every three year period of employment for an enterprise. This means that Article 166 of the Labour Law provides workers with an entitlement to 19 days of annual leave from the fourth year of employment and 20 days from the seventh year and 21 days from the tenth year and so on. (See Arbitral Awards 62/04-Ecent, issue 8; 68/05-Gold Lida; 81/06-Supreme, issue 2; and 33/07-Goldfame, issue 5).

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

Therefore, the Arbitration Council decides that the workers should be entitled to one additional day of annual leave after every three years of employment.

Issue 4 and 10: The workers demand that the company provide 90 days of maternity leave exclusive of holidays and Sundays and pay half wages and perquisites in advance of maternity leave. The workers state that the company incorrectly calculated [workers' maternity leave payments] and the company should back pay any female worker who took maternity leave within the last three years.

a. Demand for the company to pay 90 days of maternity leave excluding holidays and Sundays

Article 182 of the Labour Law states, *"In all enterprises covered by Article 1 of this law, women shall be entitled to a maternity leave of ninety days."*

In this case, the workers claim that the 90 days mentioned in Article 182 of the Labour Law above refers to the number of working days, not calendar days, because the Labour Law does not state that it refers to calendar days. The workers do not provide any other argument to support their claim.

The Arbitration Council considers that the purpose of the Labour Law in providing 90 days maternity leave is to provide sufficient time for females to take care of both their own health and the [health of the] newborn baby. Based on the contents of this Article, the Arbitration Council considers that the Article does not state whether the 90 days are working days or normal calendar days, which include holidays and Sundays. Moreover, the Arbitration Council finds that there is no Prakas or regulation by the Ministry of Labour and Vocational Training which gives a definition or provides clarification on this point.

However, generally if the law does not specify whether it is working days or normal calendar days, inclusive of holidays and Sundays, the normal presumption is that it is working days. Such a practice is a long standing practice not only in Cambodia but all over the world and a practice that is understood by legal professionals, Cambodian or international (opinion juris). Thus, this practice can be considered a national and international custom. This means that if the law does not specifically mention whether [the reference] is to working days or normal calendar days, [the presumption is that] it is normal calendar days.

In conclusion, the Arbitration Council considers that the 90 days maternity leave referred to in Article 182 of the Labour Law is a reference to working days, which means it is inclusive of Sundays and holidays. Therefore, the Arbitration Council decides to reject the workers' demand on this point.

b. The workers demand that the company provide half their wages including perquisites and this should be paid to them in advance of the maternity leave.

Article 183(1) states, "... *During the maternity leave as stipulated in the preceding article, women are entitled to half of their wage, including their perquisites, paid by the employer."*

In the findings of fact, the Arbitration Council found that the Company calculated half wages by taking the average monthly wage over the last twelve months and dividing it by two to find half the wage.

In relation to the method of calculation of wages during maternity leave, in previous Arbitral Awards the Arbitration Council held that the wage paid during maternity leave is [calculated by taking] the [total] wages paid in the twelve months prior to the female taking leave and divided by twelve to find the average monthly wage. The average monthly wage is then divided by two to find half of the wage; and multiplied by three for the period of 90 days which is the duration of the maternity leave. (See Arbitral Awards 68/04-City New, issue 4; 18/06-GHG, issue 3; 33/07-Goldfame, issue 7 and 06/08-Kingsland, issue 1).

However, in this case, both parties acknowledged that in the past the company calculated the average wages based on the last twelve months of wages including the months of employment suspension when the workers received only US$ 10 per month. The workers demand that when calculating the average annual wage, the company should not include the months when [workers' contracts] were suspended. However, the company party does not agree claiming that during the period of suspension, the company pays US$ 10 per month to the workers.

The Arbitration Council considers that the average wage within the last twelve months refers to the wages workers received each month. If the [workers] employment was suspended in some months, in principle the workers do not receive any wage [for those months]. In this case, the employer provides US$ 10 per month to workers during the suspension period. The Arbitration Council considers that this amount is not equivalent to workers' normal wage because according to the law when a worker worked for a month, the employer is required to pay their wages in an amount at least equal to the minimum wage of US$ 50, as stated in Notification 745 KKBV, dated 23 October 2006. Therefore, the Arbitration Council considers that in order to find the average wage for the purposes of paying maternity leave, it is not valid to include those months that workers' employment was suspended and they did not work.

In order to find the appropriate formula for calculating wages for women workers during their maternity [leave] when the twelve months prior to the leave including periods of employment suspension, the Arbitration Council considers as follows:

Article 72 of the Labour Law states, *"3- Unless otherwise specified, periods of suspension are taken into account when calculating the employment seniority."*

Based on this Article, the Arbitration Council considers that even if worker's employment is suspended in the twelve months prior to maternity leave, the period of employment suspension is included in workers' employment seniority. This means that the calculation of wages should be based on wages [paid] within the last twelve months, even if the workers' employment was suspended during this period. The Arbitration Council considers that in previous cases, the Arbitration Council determined that workers' average wage per month should be used as a basis of calculation of wages during maternity leave. (See Arbitral Awards 57/06-Evergreen, issue 6; 97/06-New Max, issue 1 and 91/07-JK, issue 3).

In this case, the Arbitration Council also considers that the average wages the workers received within the last twelve months should be taken as a basis for calculation. However, because in this case there is suspension of employment within the last twelve months, the Arbitration Council considers that the calculation of the average wage per month

should be based on the wage the workers received when they worked in the last twelve months divided by the number of months the workers worked.

For example, a female worker worked for the whole of 2007 and started her maternity leave in January 2008. In 2007 her employment was suspended for two months. Thus, she only worked for ten months in 2007 and during those ten months she received total wages of US$ 1,000. Thus, her average wage per month is US$ 1,000 divided by 10 months which equals US$ 100 per month. Therefore the average wage per month is divided by two to find half of the wages per month; thus the female worker is entitled to an amount equal to US$ 50.

Therefore, the company should adjust its method for calculating the annual average wage over the last twelve months by taking the total amount of wages workers received in the months that workers' worked divided by the number of months the workers actually worked.

In the findings of fact the Arbitration Council found that the company paid maternity payments to the workers at every normal payday and if the workers could not come in person, they could authorize their relatives or friends to collect the payment for them. However, the workers demand that the company pay women workers who take maternity leave in advance of their taking leave.

In the hearing the Arbitration Council found that the worker party demanded payment of maternity leave benefits in advance because they would have to spend more than normal on medical fees and health care and so on. The employer party claims that it cannot pay this in advance but the payment for maternity leave can be paid to workers at every normal payday and if they cannot come by themselves they can authorize their relatives or friends to receive the payment on their behalf.

Paragraph 3 of Article 115 of the Labour Law states, *"Payment shall not be made on a day-off. If payday falls on such a day-off, the payment of wage shall made a day earlier."*

In previous cases, the Arbitration Council provided detailed reasoning in interpreting the meaning of Article 115 of the Labour Law and decided that payment during maternity leave should be paid to women workers in advance of their taking the leave because payment of wages should not be made on the days workers are entitled to maternity leave but should be paid one day before the leave. (See Arbitral Awards 57/06-Evergreen, issue 6; 97/06-New Max, issue 1 and 91/07-JK, issue 3).

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

Therefore, the Arbitration Council decides that the company should pay the total amount [owed] for maternity leave before the female workers commence the leave.

c. The workers demand that the company should back pay any female workers who took maternity leave within the last 3 years and whose maternity leave [payment] was incorrectly calculated.

The Arbitration Council decided above that the employer incorrectly calculated workers' wages during maternity leave. The worker party submitted the name list of 19 women workers who took maternity leave. Thus, the Arbitration Council considers that the employer has an obligation to back pay the amount of lost wages paid incorrectly to female workers during their maternity leave.

However, according to Article 120 of the Labour Law *"The statute of limitation for a lawsuit for the payment of wages is three years from the date the wage was due."*

Among the 19 workers, the Arbitration Council found that a worker named Chum Srey Sor took maternity leave on 27 December 2004 which means it has passed the limitation for a lawsuit of three years. [In the case of] another woman worker named Nuon Chamroeun the date of her maternity leave was not provided for the Arbitration Council to consider. Therefore, the Arbitration Council will not consider Ms. Nuon Chamroeun's case. The other 17 women workers took maternity leave and received payment between 16 August 2005 and 1 November 2007 which means it is within the three year statute of limitations. Thus, the Arbitration Council decides to order the employer to make back payments to the 17 workers for the amount of wages lost during their maternity leave.

However, none of the women workers provided detailed information regarding the amount of money they had lost, for example, how many days or months during the 90 days of the maternity leave each worker was suspended, the amount of money each female worker lost and the reason for the loss, etc.

In principle, the claimant workers have an obligation to provide specific evidence to the Arbitration Council if they demand damages. But in this case the Arbitration Council does not have detailed information to use as a basis for judgment.

Therefore, the Arbitration Council decides to reject the demand for back payment of maternity leave payments as demanded by the workers in issue 10.

Issue 6: The workers demand that the company change the computer system from a foreign language to Khmer language when it issues pay slips to workers

Article 112 of the Labour Law states, *"The employer must take measures to inform the workers in a precise and easily comprehensible fashion of:*

a...

b. The items that make up their wage for every pay period when there is a change to the items."

In previous Arbitral Awards, the Arbitration Council interpreted this Article to mean that the employer needs to inform workers clearly about their wage if it is subject to some change (see Arbitral Awards 05/06-W&D and 33/07-Goldfame, issue 10).

The Arbitration Council observes that there are many factors that may cause workers' wages to change such as if they are absent which will affect their wage. In this case, the employer issues a pay slip to workers but it is in English and Chinese. The worker party claims that they do not read these foreign languages. The employer produces a separate piece of paper explaining the pay slip to workers. However, this explanation sheet is not attached to workers' pay slip each time.

Article 5 of the Constitution of the Kingdom of Cambodia states, *"The official language and script are Khmer."* Thus, in principle, wage payment documents must be in Khmer and it could also attach [the payslip] in another foreign language for the convenience of investors who are foreigner share owners or directors.

Moreover, Prakas 269 SKBY, dated 11 October 2001 by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation determines that the sample payment book include detailed information in Khmer about workers' identity, position, daily or monthly wage, family allowance, etc. and this can be [also] be written underneath in another language (English or French or any other language). In addition, Article 2 of this Prakas 269 SKBY requires that the employer make a request to the Department of Labour Inspection if they want to use a different payment book from the sample provided by the Ministry. This means that Khmer is the official language.

In this case, the Arbitration Council considers that in order for the workers to be able to understand [the information about] their wages, which is their right according to the Labour Law, the employer should use the Khmer language, the official state language.

Nonetheless, in the hearing the employer claims that it had just created a computer system recently and creating a system in Khmer will cost a lot of money. The Arbitration Council considers that there is no legal argument to release the employer from the obligation to provide a clear and easily comprehensible explanation about workers' wages as required by the Labour Law.

Therefore, the Arbitration Council decides to order the employer to provide workers' pay slips in Khmer.

Issue 7: The workers demand that the company calculate payment in lieu of annual leave in accordance with Article 168 of the Labour Law

Regarding paid annual leave, Article 168 of the Labour states that *"Before the workers departs on leave, the employer must pay him an allowance that is at least equal to the average wage, bonuses, benefits, and indemnities, including the value of benefits in kind,*

but excluding reimbursement for expenses, that the worker earned during the twelve months preceding the date of departure on leave. This allowance shall in no case be less than the allowance that the worker would have received had he actually worked."

According to the above Article, the employer should take the average wage, bonuses, benefits, and indemnities, including the value of benefits in kind, provided to workers in the twelve months prior to taking leave as the basis [of calculation of the payment].

Therefore, the Arbitration Council considers that the practice of using US$ 50 as a basis for calculation of wages paid during annual leave is incorrect. The correct basis of calculation should be the total wages earned in the twelve months [prior to leave] divided by twelve to find the average wage per month. Then take the average wage per month and divide by 26 to find the average wage per day and use this as a basis to pay workers during their annual leave.

Therefore, in this case the Arbitration Council decides to order the employer to use the above formula in calculating workers' wages on the day they take annual leave.

Issue 9: The workers demand that the company pay a pro rata [attendance] bonus (by dividing it by 26 days per month) to those workers whom the company authorized leave for personal commitments

In this case, the workers demand that the company pay a pro rata bonus (by dividing it by 26 days) when they take leave for personal commitment and it is authorized by 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 an 6 shall be retained."*

Point 3 of Notification 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 $ 5.00 per month."* The Arbitration Council observes that the US$ 5 attendance bonus mentioned in this Notification is provided only to those workers who come to work regularly. This Notification does not clearly state what happens if workers are absent with proper permission from the employer.

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(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."

This Article means that if the workers asked for permission from the employer and the leave is authorized, the contract between the workers and the employer is suspended on the day(s) of authorized leave.

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."*

According to this Article, if the employment contract is suspended it means that the workers do not need to go to work and the employer does not need to pay them. Based on the findings of fact, the workers' employment contract is suspended and therefore they are not paid for this period.

In this case, the company gives permission to workers who request leave for personal commitments and the company deducts the workers' daily wage. The Arbitration Council found that the company understands the workers' needs and authorizes the leave for workers who have personal commitments and the workers volunteer not to work for the company. Thus, the Arbitration Council considers that the fact that the employer does not provide daily wage to workers who take leave for personal commitment is in accordance with the law.

Therefore, the Arbitration Council decides that the employer should deduct the attendance bonus in pro rata to the number of days the workers were absent with authorization from the employer. (See Arbitral Awards 57/06-Serratex, issue 3; 103/07-M & V 1, issue 2 and 115/07-Whitex, issue 1).

Issue 12: Regarding the workers' demands in issues 13, 14, 15, 16 and 17, the company does not agree to resolve them because the union did not file a complaint to the company regarding these four demands

Regarding these issues in dispute, the Arbitration Council decides to reject the workers' demands and order the two parties to negotiate these issues with honesty and good-faith before submitting them to the Arbitration Council for a solution for the following reasons:

In the hearing the worker party states that the Arbitration Council has jurisdiction over these issues in dispute because they are mentioned in the non-conciliation report by the Ministry of Labour which was referred to the Arbitration Council.

In general, the Arbitration Council has jurisdiction to settle issues in dispute mentioned in the non-conciliation report referred by the Ministry of Labour. (See Article 312(1) of the Labour Law). However, in this case, the negotiation between the two parties did not take place at the enterprise level because the workers did not bring these issues for negotiation with the employer. In this case, the Arbitration Council found that the employer was willing to negotiate a solution to these issues at the factory level and it did not have any intention to avoid negotiation in good-faith with the union. If it had an intention to avoid a negotiation in good-faith, the Arbitration Council would have considered these issues.

Clause 34 of Prakas 099 SKBY, dated 21 April 2004 states, *"In matters referred to the arbitration panel, the panel shall have the power and authority to fully remedy any violation of provisions provided in the Labor Law, implementing regulations under the Labor Law, collective bargaining agreements or other obligations arising from the professional relationship between employer and employee. Within the limitations of the Labor Law and this Prakas, it has the power and authority to provide any civil remedy or relief which it deems just and fair, including:*

...

e. orders to bargain..."

In this case, the Arbitration Council considers that good faith negotiations between the employer and the workers to solve this dispute is an important social dialogue to ensure the employer party and the worker party maintain and improve their industrial relations at the workplace. To encourage the two parties to build a better relationship at the enterprise level, the Arbitration Council decides that the two parties need to attempt good faith negotiation of these issues before submitting the issues to the Arbitration Council for a solution.

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

DECISION AND ORDER

Issue 1 and Issue 11:

A. Order the employer to correctly calculate workers' monthly wages and daily wage [to be paid to workers] in the months that there are public holidays and the workers do not come to work.

B. Reject the workers' demand for the employer to back pay their wages in accordance with the claim in issue 11.

Issue 2: Order the employer to pay the 12,000 riel medical check fee to those workers who had their medical check from 1 October 2007 as demanded by the workers in this case.

Issue 3: Order the employer to give one additional day of annual leave to workers after every three years of employment.

Issue 4 and issue 10:

A. Reject the workers' demand for the employer to provide 90 days of maternity leave excluding holidays and Sundays.
B. Order the employer to pay maternity leave payments one day in advance of the female workers taking the leave.
C. Reject the demand for the company to make back payment of maternity payments.

Issue 6: Order the employer to provide pay slips in the Khmer language.

Issue 7: Order the employer to calculate payment in lieu of annual leave based on the [worker's] average wage in the twelve months [prior to taking leave].

Issue 9: Order the employer to deduct [the workers] attendance bonus pro rata to the number of days the workers are absent with permission from the employer.

Issue 12:

A. Reject the workers' demand on this issue.
B. Order the workers and the employer to negotiate on this issue.

Type of Award: Non-binding award

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

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature: ....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: ....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: ....