



KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអន្តរាគ្នា

THE ARBITRATION COUNCIL

Case number and name: 71/08-River Rich

Date of Award: 10 July 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): **Pen Bunchhea**

DISPUTING PARTIES

Employer party:

Name: **River Rich Textile Ltd., Company**

Address: Street 21, Prek Ta Pring Village, Setbo Commune, Saang District, Kandal Province

Telephone: 016 706 168

Fax: N/A

Representative:

- | | |
|---------------------|---|
| 1. Mr. Tang Sunheng | Head of administration |
| 2. Mr. Pov Bunkhorn | Assistant of administration |
| 3. Mr. Chen Gan | Supervisor of dying section (a witness on behalf of employer) |

Worker party:

Name: **C.CAWDU and the local union of C.CAWDU at River Rich Factory**

Address: #6 C, Street 476, Sangkat Tuol Tompoung 1, Khann Chamkamorn, Phnom Penh

Telephone: 012 282 653

Fax: N/A

Representative:

- | | |
|--------------------|--|
| 1. Mr. Oum Visal | General Secretary of C.CAWDU |
| 2. Mr. Phin Sophea | President of the local union of C.CAWDU |
| 3. Mr. Chek Bunsan | Vice-president of the local union of C.CAWDU |
| 4. Mr. Seng Soeun | General secretary of the local union |

5. Mr. Teng Vannak	Worker in dying section
6. Mr. Hean Hem	Worker in dying section
7. Mr. Yan Non	Worker in dying section
8. Mr. Sokry Kunthea	Worker in dying section
9. Mr. Tang Nhor	Mobile worker
10. Mr. Long Mengheang	Security guard
11. Mr. Chea Phearin	Security guard
11. Mr. Thorn Sokny	Security guard

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The workers demand that the Company calculate maternity leave payments based on 12 months of wages to find an average of 50 percent of wage for a period of 90 days. The Company does not agree, but will calculate according to the existing practice which based on main wage.
- 2- The workers demand that the Company issue the piece rate for each model at least seven days before the workers start working on it. The company does not agree to the demand, but will follow the existing practice of issuing [the piece rate] on the 25th of each month.
- 3- The workers demand that the Company deduct the US\$ 5 attendance bonus pro rata according to the number of days a worker took leave; which means dividing the US\$5 by 26 days and deducting accordingly. The Company does not agree to the demand.
- 4- The workers demand that the Company reinstate 3 security guards. The Company does not agree to the demand.
- 5- The workers demand that the Company reinstate 6 workers. The Company does not agree to the demand.

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 hearing was unsuccessful, and the non-conciliation report No.266/08 KB/KN, dated 16 May 2008 was submitted to the Secretariat of the Arbitration Council on 20 May 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 : 28 May 2008 (from 2:00 p.m. to 3:00 p.m.)
- Second hearing : 09 June 2008 (from 2:00 p.m. to 5:00 p.m.)
- Third hearing : 17 June 2008 (from 2:00 p.m. to 5:00 p.m.)
- Fourth hearing : 24 June 2008 (from 2:00 p.m. to 5:00 p.m.)

Procedural issues:

On 12 May 2008, the Department of Labour and Vocational Training of Kandal Province assigned an officer to conduct a conciliation on 7 issues and as a result two issues were conciliated. The five non-conciliated issues were referred to the Secretariat of Arbitration Council on 20 May 2008.

After receiving the case, the Secretariat of the Arbitration Council summoned the employer party and the worker party to the hearing and conciliation on the 5 non-conciliated issues on the dates listed above.

Both parties were present as invited by the Arbitration Council. The Arbitration Council attempted to ask for information relevant to the dispute and further the conciliation on the five non-conciliated issues but was unable to resolve the issues. Therefore, the Arbitration Council will consider and resolve this case based on the evidence and findings of fact as follows:

EVIDENCE

Witnesses and experts: *N/A*

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Letter to authorize Mr. Tang Sunheng, administration officer, to settle the dispute on behalf of the owner of the Company, dated 16 June 2008;
2. Summary statement by the Company to the Arbitration Council, dated 27 May 2008;
3. Payroll list of security guards who decided to resign.
4. Agreement by Mr. Chea Phearin, security guard, ID K 0008 who decided to resign and be paid according to the Labour Law, dated 11 November 2007;
5. Agreement by Mr. Lon Mengheang, security guard, ID K 0020 who decided to resign and be paid according to the Labour Law, dated 11 November 2007;

6. Agreement by Mr. Thorn Sokny, security guard, ID K 0022 who decided to resign and be paid according to the Labour Law, dated 11 November 2007;
7. Agreement by Mr. Khat Savoeun, security guard, ID K 0032 who decided to resign and be paid according to the Labour Law, dated 11 November 2007;
8. Agreement by Mr. Khon Sok, security guard, ID K 0031 who decided to resign and be paid according to the Labour Law, dated 11 November 2007;
9. Agreement by Mr. Phon Chanrith, security guard, ID K 0007 who decided to resign and be paid according to the Labour Law, dated 11 November 2007;
10. Agreement by Mr. Yon Yoeurn, security guard, ID K 0009 who decided to resign and be paid according to the Labour Law, dated 11 November 2007;
11. Agreement by Mr. Chet Chenda, security guard, ID K 0016 who decided to resign and be paid according to the Labour Law, dated 11 November 2007;
12. Notification to terminate the fixed duration contract of each worker;
13. Note of expiration or termination of fixed duration contract of each worker;
14. Job application form and fixed duration contract of each worker;
15. Certificate of commercial registration of the Company, No. 1992 PN.NTK, dated 03 August 2006;
16. Internal Work Rules of River Rich Company No. 001/07, dated 05 January 2007;
17. Statute of River Rich Company, dated 14 July 2006.

Provided by the worker party:

1. Summary statement by C.CAWDU to the Arbitration Council, dated 09 June 2008;
2. Certificate of registration of the local union of C.CAWDU at River Rich Company, dated 30 July 2007;
3. Certificate of the most representative status of the local union of C.CAWDU at River Rich Company, dated 9 January 2008;
4. Statute of the local union of C.CAWDU at River Rich Company, dated 30 July 2007;
5. Agreement between River Rich Company and C.CAWDU and ITGLWF Union and INDITEX, S.A., Market, dated 07 June 2008;
6. Agreement about measurement for cooperation in the relationship between River Rich Company C.CAWDU, dated 21 February 2008;
7. Agreement between River Rich Company and C.CAWDU, dated 20 February 2008;
8. Minutes of collective labour dispute conciliation, dated 15 March 2008 (non-conciliation issue 4).

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

1. Report of collective labour dispute resolution at River Rich Company, No. 266/08 KB/KN, dated 16 May 2008;
2. Minutes of collective labour dispute resolution at River Rich Company, dated 12 May 2008.

Provided by the Secretariat of the Arbitration Council:

1. Invitation letter No. 339 K.B/AK/LKA dated 21 May 2008 to invite the employer party to attend the first hearing.
2. Invitation letter No. 340 K.B/AK/LKA dated 21 May 2008 to invite the worker party to attend the first hearing.
3. Invitation letter No. 368 K.B/AK/LKA dated 03 June 2008 to invite the employer party to attend the second hearing.
4. Invitation letter No. 369 K.B/AK/LKA dated 03 June 2008 to invite the worker party to attend the second hearing.
5. Invitation letter No. 387 K.B/AK/LKA dated 12 June 2008 to invite the employer party to attend the third hearing.
6. Invitation letter No. 388 K.B/AK/LKA dated 12 June 2008 to invite the worker party to attend the third hearing.
7. Invitation letter No. 397 K.B/AK/LKA dated 20 June 2008 to invite the employer party to attend the fourth hearing.
8. Invitation letter No. 398 K.B/AK/LKA dated 20 June 2008 to invite the worker party to attend the fourth hearing.

FACTS

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

The Arbitration Council finds that:

- River Rich Textile Ltd., employs approximately 2,500 workers.
- There are three worker unions in the River Rich Company: (1) C.CAWDU, (2) Cambodian Labour Union, and (3) Khmer Youth Trade Union. C.CAWDU has the most representative status through a certificate No. 003/08 KB/VB, dated 9 January 2008.
- The local union of C.CAWDU in the Company is the complainant in this case.

Issue 1: The demand for the Company to pay 50 percent of wages for workers who take maternity leave.

- The Company allows women workers who have been working for the Company for at least one year to take maternity leave for 90 days and pays 90 days of wages and perquisites to the workers before they take leave; the company takes 50 percent of the main wage, seniority bonus and attendance bonus [earned by workers] in the last month as the basis for calculation.
- The employer party states that there are about 10 workers who took maternity leave in May 2008.
- In the hearing, the workers party mentions that currently the Company pays 50 percent of wages to workers who take maternity leave by taking the main wage of the last month as the basis for calculation.
- The workers demand that the Company pay 50 percent of the average of the total wage earned each month over the last twelve months; which means taking the [total] wages earned by workers in the last twelve month and dividing by twelve.
- The workers demand that the Company change the method of calculation of payment for maternity leave but does not demand reimbursement for any specific cases in the past.

Issue 2: The workers demand that the Company issue the piece rate of each model within seven days after they start working on it.

- There are workers in many sections who work on a piece rate basis including in the overlocking section, winding section, fray trimming section, ironing section, collar label stitching, stitch checking section, checking section, button attaching section, button hole stitching section, folding section, and packing section. When the Company has a model of clothes for workers to work on, it ask all the workers to work on it to calculate and consider the capacity and ability of all workers so that it can determine an appropriate piece rate; the Company does not inform [workers] about the piece rate for the model in advance but waits until the 25th of the month to notify workers about the piece rate.
- In the hearing, the Company party mentions that the Company follows the practice of issuing all piece rates on the 25th of the month because there are many types and models of clothes and the model that is given to workers is dependant upon the particular orders received from the buyers..
- The Company adds that on average the Company issues 3 new models in a month and in June 2008 the Company issued 5 models for workers to work on.
- The worker party states in the hearing that they demand that the Company issue the piece rate of each model after they have been working on it for seven days because when the Company issues the piece rate on the 25th of the month workers do not know what the piece rate is, they have to work hard, they are worried that piece rate

is low [and] they do not know how much they will earn for their wage. In addition, the model can be finished in a short period of time but workers have to wait until the 25th of the month to know what the piece rate is.

- The Company adds that according to the determination of piece rate in the past, there were very few workers who could not earn the basic wage and when workers could not reach the basic wage, the Company topped up on that day. This means that if a worker cannot work to get the main wage of US\$ 1.92 per day, the Company will top it up to US\$ 1.92 per day.
- The Company adds that the Labour Law does not state clearly [how] the Company should determine the piece rate but the law states that the Company should set a piece rate at least equal to the basic wage and if the workers cannot work to receive the basic wage, the Company should top it up to the basic wage.

Issue 3: The workers demand that the Company deduct the monthly US\$ 5 attendance bonus in proportion to the number of days leave [taken].

- The workers demand that the Company deduct the attendance bonus proportionally by dividing the US\$ 5 by 26 days when [workers] take leave with permission from the employer; because in the current practice the Company deducts the whole US\$ 5 attendance bonus when workers take leave of half a day onwards with permission from the employer.
- The workers state that this demand is only for the days of leave when the Company gives permission for the leave.
- The employer does not agree but will follow Notification 017 SKBY, dated 18 July 2000 emphasizing that according to this Notification if a worker takes leave it means that s/he does not come to work regularly thus s/he is not entitled to the whole attendance bonus.

Issue 4: The workers demand that the Company reinstate three security guards.

- The three security guards are:

No.	Name	Date employment commenced	Date employment contract terminated	Duration of employment	Date the union membership started	Date of warning received
1	Lon Mengheang	08/02/2006	11/11/2007	1 year 9 months and 3 days	04/10/2007	29/07/2007
2	Thorn Sokny	28/06/2006	11/11/2007	1 year 4 months and 14 days	About half a month before the termination	No warning
3	Chea Phearin	09/07/2004	11/11/2007	3 years 4 months and 2 days	Do not recall	06/09/2007

- The three workers had undetermined duration contracts with the Company and received a salary equal to US\$ 85 per month.
- The security guards mentioned in the hearing that on 10 November 2007, the director of the Company and the administration officer met with the 14 workers to strengthen security in the Company because some property of the Company had been stolen. Then they continued by talking about union membership stating that security guards should not be members of a union. The security guards responded that if the director of the Company was not happy that they were union members the director should terminate their employment but they would not resign from the union. The director of the Company asked that the security guards that were members of a union to raise their hand. Eight security guards raised their hands; among them 7 security guards were union members and one of them was not a union members but he wanted to resign because he had another job.
- In the hearing, the Company party claims that on 10 November 2007 at around 5:00 p.m. there was a meeting with 14 security guards. However, the Company did not talk about the union but only discussed [the need] to strengthen the security of the Company as some property of the Company had been stolen. The director of the Company mentioned that if any security guards were not happy with their job they should resign, that they should not work irresponsibly. Eight workers confessed and asked to resign but they mentioned that if they resigned they would not receive much money so they requested the Company to terminate them. Due to the honesty of the security guards, the director of the Company decided to fulfill the request by paying them termination payments on five items according to the Labour Law and told them that they should come to receive the money the next day.
- According to the security guards, on the next day (11 November 2007) four security guards agreed to accept the termination payments from the Company. However, three security guards (as mentioned in the table above) did not agree to accept the payment and requested that the Company reinstate them.
- The Company party states that on 11 November 2007, the three security guards did not agree to accept the termination payment the Company offered because they found that the amount of money was too little that was why they changed their mind and requested that the Company reinstate them.
- The union party claims that the termination of the three security guards amounts to discrimination against the union based on the evidence as mentioned in the conciliation minutes dated 15 March 2008 in relation to the three security guards which states, "in relation to the issue about the security guards, only three security

guards did not agree and asked for reinstatement. The company agreed to reinstate them if they agreed to resign from the union.”

- The three security guards demand reinstatement and reimbursement from the day the Company terminated them. However, the Company cannot reinstate them because they agreed to resign themselves.

Issue 5: The workers demand that the Company reinstate six workers.

- Among the six workers, one worker named Kim Sektin withdrew the demand; thus there are only five remaining workers who are making the demand.
- Both parties agreed that in general, if the employment contract comes to an end it will be renewed within three to seven days if the employer decides to continue to hire the workers.
- The five workers are:

No.	Name	Date employment commenced	Date of the last employment contract	Notification for the last contract	Number of renewals of the contracts	Severance payment	Date employment commenced
1	Kang Nhor	18/05/2007	23/09/07	20/09/07	2 times	Did not accept the severance payment	About 2 months before the non-renewal
2	Heang Hem	15/04/ 2007	22/09/07	19/09/07	3 times	Did not accept the severance payment	About 1 months before the non-renewal
3	Yan Non	20/11/06	01/08/07	28/07/07	5 times	Accepted the severance payment	08/08/07
4	Sokry Kunthea	01/06/07	01/08/07	28/07/07		Accepted the severance payment	08/08/07
5	Teng Vannak	27/11/06	26/10/07	08/10/07	3 times	Accepted the severance payment	About 1 months before the non-renewal

- Among the five workers, two of them did not agree to accept a severance payment.
- The five workers are the type of workers whose last contract with the Company was a fixed duration contract.
- In the hearing, the Company states that for mobile workers and workers in the dying section, the Company no longer hires them directly but subcontracts with Minh Fong Company who is responsible and provides labour force in these sections. The Chinese supervisor of the Company just provides recommendations to Minh Fong Company about those workers whose contract should be renewed. The Company does not provide any documents to support this claim. However, in the hearing the workers accept that they saw workers working in these section hold new ID cards of Minh Fong Company, not River Rich Company.

a. Kang Nhor (mobile worker)

- Kang Nhor endorsed his thumbprint to accept the notification to terminate his employment contract through a notification letter dated 20 September 2007. However, he objected to the severance pay.
- Kang Nhor claims that the Company promised to reinstate workers if they performed well for the Company. However, the Company did not reinstate him even though he did not commit any misconduct but only joined the union for about two months. The Company objected to the allegation claiming that generally the decision to continue [a worker's] employment contract is in the discretion of the Company based on the recommendation from the Chinese supervisor who obtains suggestions from a Cambodian head of group and two other Chinese technical representatives. According to the administration officer, for the case of Kang Nhor, the Company claims that the workers did not follow the procedure to terminate the two months employment contract because he did not accept the severance payment and this was the reason why the Company did not renew his contract. The head of administration says that the decision to continue or discontinue a contract is decided by the Chinese supervisor then a request is made to the administration to prepare a renewal of contract. According to a Chinese supervisor named Chen Gan, the reason that he decides not to continue an employment contract for a worker is generally because s/he does not perform well. However the Chinese supervisor adds that these workers were not informed that their contracts was not renewed because they did not perform well..This [poor performance] could be one of the reasons that the Company decided not to continue the employment contract for Kang Nhor.

b. Hean Hem (dying section)

- The local union of C.CAWDU has 1,559 workers as members in this factory among 2,500 workers who are working in the factory. However, there are no members of the union working in the dying section. There are a total number of 30 workers in this dying section.
- Hean Hem did not endorse his thumbprint on the notification to terminate his employment contract through a notification dated 19 September 2007 and he did not accept a termination payment.
- Hean Hem claims that an interpreter named Sarak called him to meet a Chinese supervisor named Chen Gan and persuaded him to leave the union as a condition for renewal of his employment contract. In the hearing, Chen Gan rejected any claim in relation to discrimination against union because the

technical work and output for the Company is the matter of importance to him. There are many union members in the Company, so if only for the reason of union membership a worker is dismissed, the Company would have no workers to work for it. Mr. Chen Gan and the head of administration claim that the person named Sarak is not an interpreter but a Cambodian head of group in that section who can speak little Chinese and when he communicates with the Chinese supervisor [it is] mainly through body language; thus, Mr. Chen Gan is not sure whether Sarak made the wrong translation. The union party states that there is no other interpreter besides Sarak in this section and all communication with workers is interpreted by Sarak. The Company claims that Sarak has left the Company now.

- The Company claims that Mr. Hean Hem did not follow the procedure for termination of employment because he did not agree to endorse his thumbprint on the notification to terminate his contract and did not accept the termination payment. The administration officer states that the decision whether to continue a contract is decided by Chinese supervisor and then a request is made to the administration to prepare a renewal of contract. In the hearing, the Chinese supervisor says that the reason that he and his working group decide not to continue an worker's employment contract is generally because s/he did not perform well but not because of any discrimination against the union. At the end of the contract, the Chinese supervisor did not tell that worker whether he had performed well or not.

c. Yan Non (dying section)

- Yan Non endorsed his thumbprint to acknowledge the notification to terminate his employment contract through a notification letter dated 28 July 2007 and received the package of termination payments on 01 August 2007.
- Yan Non claims that an interpreter named Sarak and the Chinese supervisor called him and asked him to show up again at the factory with five other workers on 08 August 2007. Mr. Yan Non said that he worked for 3 or 4 hours until 10:00 a.m. when the Chinese head of group told him to take a long term leave. The Company renewed the employment contracts of only three workers who were not union members. Chen Gan, the Chinese supervisor, responded in the hearing that the six workers did show up and waited for the decision by the Company until 10:00 a.m. when he told them that only the employment contracts of the three workers were renewed. The worker party does not object to this statement.

- Yan Non announced that he became a union member on the morning on 08 August 2007, the day when his employment contract was not renewed. Mr. Chen Gan claim that the non-renewal of the employment contract was not relevant to union membership and he did not know nor he was interested in the issue of union membership of Mr. Yan Non.

d. Sokry Kuntha (dying section)

- Sokry Kunthea endorsed his thumbprint to acknowledge the notification to terminate his employment contract through a notification letter dated 28 July 2007 and received the package of termination payments on 01 August 2007 like Yan Non.
- The facts regarding the non-renewal of employment contract of Sokry Kunthea are the same as that of Yan Non.

e. Teng Vannak (dying section)

- Ten Vannak endorsed his thumbprint to acknowledge the notification to terminate his employment contract on 08 October 2007 through a notification letter dated 03 February 2007. However, he declined to accept the termination payment.
- Teng Vannak claims that the non-renewal of his employment contract was because of his membership with the union. He became a union member about one month before his contract was terminated.
- Teng Vannack acknowledges that he received one warning letter because of his mistake of mixing the wrong color(s).
- The Company states that the reason that the Company decided to discontinue the employment contract of this worker was because: (1) he committed a mistake for which he had already received a warning. Besides this, the worker did not commit any other mistake except when he did not come to take the termination payment in accordance with the procedure.
- The Company mentions that his mixing the wrong color caused a big loss to the Company and (2) he did not follow the procedure for termination of his six months contract as he declined to accept the termination payment. The Company claims that union discrimination is not the reason for the non-renewal of the employment contract.

REASONS FOR DECISION

Additional Issue: Is this Arbitral Award a binding award?

In the hearing the Company party choose a non-binding arbitral award but the worker party choose a binding award. The worker party claims that the Company and the local union

of C.CAWDU entered into agreements dated 20 and 21 February 2008; and Clause 9 of the agreement states, “... *in case there is no solution for a collective demand or conflict, after having used all possible measures, this will be referred to the Arbitration Council for the final decision.*” Therefore, the Arbitral Award should be a binding award.

However, in the hearing the representative of the Company states that the Company was not aware of the agreements. Because there is no clear confirmation from the legal representative of the Company on the non-existence of the above mentioned agreements, the Arbitration Council has a duty to consider whether the agreements provided by the worker party as mentioned above are valid and binding on the River Rich Company.

Article 138 of the Law on Commercial Enterprises, dated 19 June 2005 states, “*Statute or internal work rules of a company may include:*

a. Board of director of the Company has the right to manage the company’s offices, appoint company manager, and determine roles and rights of these people clearly in order to manage the business and work of the company.”

According to Clause 9 of the Company statute registered and kept at both the Council of Development of Cambodia, No. 2759/06, dated 21 July 2006 and the Ministry of Commerce, No. 865/04, dated 01 August 2006 states, “*The Company is directed and managed by the owner of the Company or a chair person who is not the owner of the Company. ... This Company is directed by Mr. Sung Chung Kwun, the chairman of the Company. ...*”

The Arbitration Council found that the agreement dated 20 February 2008 does not contain the names of both signatories and the agreement dated 21 February 2008 was signed by Albert Cheung on behalf of River Rich Company. However, the person’s name is not stated in the Company’s statute, the agreement was not stamped by the Company’s seal and it was a photocopied document. In addition, there is no authorization letter from Mr. Sung Chung Kwun or any other executive director of the Company in Cambodia to authorize Mr. Albert Cheung to sign the two agreements as mentioned above. This means that Mr. Albert Cheung cannot be considered a legal representative of River Rich Company in Cambodia.

Therefore, the Arbitration Council considers that the agreements on 20 and 21 of February 2008 provided by the worker party to the Arbitration Council are not authentic enough to use as official [agreements] if they do not have attached a letter from Mr. Sung Chung Kwun or an executive director of River Rich Textile Ltd authorising Mr. Albert Cheung to act as a signatory or River Rich Textile Ltd should endorse these agreements.

Therefore, the Arbitration Council decides that the Arbitral Award is non-binding.

Issue 1: The demand for the Company to pay 50 percent of wage for workers who take maternity leave

The worker party demands that the Company pay 50 percent of the average wage for maternity leave calculated on the average wage for the last twelve months (by taking the total wages for the [previous] 12 months and dividing by 12 to find the average) including perquisites such as attendance bonus, incentive bonus, skill bonus, seniority bonus and overtime payment. This demand is in relation to the [company] practice from now on, but is not a demand for the Company to reimburse for any specific event in the past. In making this demand, the worker party relies on Article 182 and 183 of the Labour Law. The Company party, on the other hand, pays the three months of maternity payment to women workers before they take the leave by taking the 50 percent of their main wage, attendance bonus and seniority bonus and multiplying by 3 for the period of three months. Thus, the Arbitration Council will consider as follows:

Article 182 of the Labour Law provides female workers working for an enterprise covered by the Labour Law with an entitlement to 90 days maternity leave .

Article 183 of the Labour Law 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... However, the wage benefits specified in the first paragraph of this article shall be granted only to women having a minimum of one year of uninterrupted service in the enterprise.”*

The content of Article 183 gives women, whose seniority is at least one year, a right to receive half of their wages including perquisites paid by the employer. However, Article 183 does not mention explicitly what the wage is. Hence, the Arbitration Council will review other Articles of the Labour for the basis for interpretation of Article 183.

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

- *actual wage or remuneration;*
- *overtime payments;*
- *commissions;*
- *bonuses and indemnities;*
- *profit sharing;*
- *gratuities;*
- *the value of benefits in kind;*
- *family allowance in excess of the legally prescribed amount;*
- *holiday pay or compensatory holiday pay; and*
- *amount of money paid by the employer to the workers during disability and maternity leave...*

In relation to wage, Article 103, points 2 and 4 of the Labour Law state that wage includes “overtime payment, bonuses and indemnities”. Based on this Article, the Arbitration Council considers that attendance bonus, incentive bonus, skill bonus, seniority bonus and overtime payment are part of the wage and fall within the provision of this Article if the women workers used to receive them before going on maternity leave. Thus, the employer should take the last twelve months of wage plus all perquisites to be the basis for calculation.

In previous Arbitral Awards, the Arbitration Council held that wages during maternity leave is the wages the female workers received over the 12 months of wage prior to taking maternity leave, divided by 12 to find the average amount of wage for each month, then divided by two to find 50 percent of wage before multiplying it by three for the period of 90 days (three months) which is the duration of maternity leave. (See Arbitral Awards: 68/04-City New, Issue 4; 18/06-GHG, Issue 3 and 33/07-Goldfame, Issue 7).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Panels in previous Arbitral Awards. Therefore, the Arbitration Council decides that the employer should pay women whose employment seniority in the company is at least one year and who take maternity leave an amount of wages equal to 50 percent including perquisites as the basis for calculation. This wage is the workers’ wages over the twelve months prior to taking maternity leave, divided by 12 to find the average wage per month then divided by two and multiplied by three.

Therefore, the Arbitration Council decides that from now on the employer should make the calculation based on the workers’ wages over the last twelve months, divided by twelve, divided by two and multiplied by three.

Issue 2: The workers demand that the Company issue the piece rate of each model within seven days after the [workers] started working on it.

When the Company asks the workers to work on a model, it asks all workers to work on it to calculate the ability and labour cost of workers in order to determine an appropriate piece rate but the Company does not inform the workers in advance. The Company does not inform the workers about the piece rate until the 25th of the month. Thus, the Arbitration Council will consider whether the employer has an obligation to inform the workers about the piece rate and within how many days the employer should inform the workers about the piece rate.

1. Is the employer obliged to inform the workers about the piece rate?

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. The terms regarding wage that apply to the workers before they are assigned to a job or at any time that these terms change.

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

According to the above article, the Arbitration Council considers that when employment conditions, especially the rate of wage, of workers is subject to some change, the employer should inform workers clearly about the wage they will receive. Based on this interpretation, the workers' demand is related to their rights provided under the Labour Law which states that the employer has an obligation to inform [workers] about the status of their wage.

In this case, the worker party and the employer party agree that when the Company assigns a new model for them to work on, it leads to some change on the conditions of wage that will apply to workers because sometimes models have a small number of pieces and workers can finish it within a short period of time. Therefore, the employer should inform the workers about the new rate. (See the Arbitral Award 14/03-Chou Sing for more detail).

2. Within how many days should the employer inform the workers about the piece rate?

Article 112(a) of the Labour Law, mentioned above, does not state clearly the period of time in which the employer should inform the workers about the rate.

In Arbitral Award 62/04-Ecent, Issue 2, the Arbitration Council states, *“Considering the meaning of Article 112, point A of the Labour Law as mentioned above, there is no clear provision about whether or not the employer has to inform the employees about their wage rate within a certain number of days, but the Article means the employer is obliged to inform in advance. As for the number of days the employer needs for the period of notification, the Arbitration Panel needs to consider the practical needs of the employer.”*

In this case, the Company never conducts a prior test before determining piece rate but it asks all workers to work in order to consider and calculate the workers' capacity and labour cost to determine an appropriate piece rate. The Company does not provide the piece rate of a model for workers in advance but waits until the 25th of each month to inform workers about the piece rate. The employer party does not provide a clear reason to why it needs to issue piece rate on 25th of each month. It only states that there are many types and models of clothes so in order to issue piece rate of each model, the Company should consider and calculate the capacity and labour cost of workers. Thus, the workers need to do the work before the Company can know their capacity and labour cost to determine an appropriate piece rate. Therefore, the Company chooses to inform workers about the piece rate on the 25th of each month. However, the employer does not provide any other arguments for the Arbitration Council to consider for another appropriate duration for the issuance of piece rate.

Therefore, the Arbitration Council considers that the employer does not follow its obligation to inform the workers about their wage in a clear and easy to understand manner when their wage are subject to change due to the change of models.

In previous Arbitral Awards, the Arbitration Council found that a general period of time for determination of piece rate is between 3 and 7 days. (See Arbitral Awards 05/06-W&D, Issue 7 and 03/07-The United Knitting, Issue 3).

In this case, the worker party demands that the employer issue the piece rate within 7 days and thus it is consistent with previous Arbitral Awards. Therefore, the Arbitration Council decides that the Company [should] inform the workers about the piece rate for each model after they have been working on it for 7 days.

Issue 3: The workers demand that the Company deduct the US\$ 5 per month attendance bonus in proportion to the number of days leave taken.

The workers demand that the Company deduct US\$ 5 per month attendance bonus in proportion to the number of days leave taken. The Company deducts the [entire] US\$ 5 attendance bonus when workers ask for leave and the leave permitted is from half a day upwards. Thus, the Arbitration Council will consider this issue to determine whether the workers who take leave with permission are entitled to an attendance bonus.

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

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

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

In this case, the Arbitration Council agrees with the above interpretation that the Notification does not clearly state the number of working days [a worker must work] to be considered as regular and entitled to receive the attendance bonus. The Arbitration Council considers that the word “work regularly” has two meanings as follows:

1. Work for 26 days per month if there is no public holiday or any other leave determined by the state.
2. Work for less than 26 days per month in the months with public holidays or any other leave determined by the state which is leave with permission and agreed by the employer. (See Arbitral Awards 44/07-Winner Knitting, Issue 2 and 57/07-Seratex, Issue 3).

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

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

The Arbitration Council considers the attendance bonus is a gratuity paid to workers when they come to work regularly. Thus, attendance bonus is a gratuity within the meaning of Article 103, mentioned above. Because gratuity is a part of wage, thus, the attendance bonus is also a part of wage.

Article 71, paragraph 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 agreement.”

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.”*

Therefore, when workers are absent with permission from the employer, it leads to the suspension of employment contract, during which workers are not required to work for the employer and the employer is not required to pay workers except when there are provisions to the contrary that require the employer to pay the workers. This means that the employer is not required to pay workers on the days the workers are absent with permission from the employer but on the days the workers are not absent (for example, the days the workers come to work), the employer is required to pay workers on those day.

In previous Arbitral Awards, in relation to the attendance bonus, the Arbitration Council considers that *“Attendance bonus” is an incentive bonus provided to encourage and praise the workers who have come to work regularly within a month **without any unreasonable leave.***” (See Arbitral Awards 62/04-Ecent, Issue 1; 63/04-Shine Well, Issue 5; and 15/05-Wing Tai, Issue 1).

Based on the reasons mentioned above and because the attendance bonus is part of the wage, on the days the workers are absent with permission from the employer, the employer is not required to pay the attendance bonus to the workers. This means that the employer can deduct the attendance bonus in proportion to the number of days the workers are absent with permission from the employer. For the remaining number of days when the workers come to work, the employer is required to pay their attendance bonus in accordance

with the Notification. This means that the employer should pay the attendance bonus in proportion to the number of days the workers worked.

In previous cases, the Arbitration Council ordered the employer to deduct the attendance bonus on the days the employer agreed to take leave with permission. (See Arbitral Awards 57/07-Serratex, Issue 3; and 106/07-M&V 3, Issue 2).

In this case, the Arbitration Council agrees with the interpretation of the previous Arbitration Panel in cases where the workers ask for leave with permission and the employer agrees to that.

Therefore, the Arbitration Council decides to order the employer to deduct the US\$ 5 attendance bonus in proportion to the number of days the workers are permitted to take leave.

Issue 4: The workers demand that the Company reinstate three security guards.

The employer claim that there is no discrimination against the union and the reason that the Company does not agree to reinstate the three security guards - Mr. Lon Mengheang, Mr. Thorn Sokny and Mr. Chea Phearin - was because the three people had agreed to accept termination payments and resign from work.

Thus, the Arbitration Council will consider whether the workers had agreed to resign from work without force and whether the reason for the agreement to resign from work was because of the workers' union activities.

Did the three security guards genuinely resign from work?

In this case, all the three workers have undetermined duration contracts.

Article 74(1) of the Labour Law states, *"The labour contract of unspecified duration can be terminated at will by one of the contracting parties. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party."*

A party to a undetermined duration contract can terminate the contract by the employer's will (termination) or by the workers' will (resignation) but the termination must be in accordance with the Law (See Arbitral Awards 09/05-Kin Tai, Issue 1; 91/07-JK, Issue 2 and 101/07-Planet Textile, Issue 1).

In this case, the workers claim that on 10 November 2007, the Company called them to a meeting to strengthen security and to talk to them about their union activities as the Company said that they were not allowed to be union members because they were security guards of the company. In the hearing the Company party did not object to the workers' claim except the statement that the workers themselves agreed to resign. The Arbitration Council asked for further clarification on the reasons that the workers agreed to resign from work but the Company did not provide any other reasons.

The Arbitration Council considers that the workers' claim that they resigned because there was pressure from the Company holds heavier weight as a basis for consideration than the company party's [claim]. The Arbitration Council also found that the Company seemed to have no other reason to respond to the workers' claim. Therefore, the Arbitration Council decides that it was not from their genuine will that the workers agreed to resign from work in the Company but they were under pressure from the Company. Therefore, the Arbitration Council considers that the resignation agreement is null and void.

Is there union discrimination against the three workers?

Article 12 of the Labour Law states, "... no employer shall consider on account of membership of workers' union or the exercise of union activities to be the invocation in order to make a decision on ... hiring ... termination of employment contract ..."

Article 279 of the Labour Law states, "Employers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment ... and dismissal."

In this case, the Arbitration Council found that the employer showed its dissatisfaction and requested the security guards who are union members to resign from the union.

In the hearing, the representative of the union claimed that the company administrative officer did inform the security that they should not be union members while their duty is to protect the Company's property because if they are union members and then some workers, who are also union members, steal the Company's property, for sure they would not arrest those thieves or even help them. The Arbitration Council considers that such concerns could motivate the employer to discriminate against the union and intend that the security staff should not be union members. Pursuant to the law and the constitution, security staff are also entitled to the right to join a legal union of their choice. However, when they do not perform their duties and [fail to meet their] responsibility towards the employer as mentioned in their employment contract and the Company's Internal Work Rules, they should be disciplined according to the law like any other workers.

In addition, in the non-conciliation report, dated 15 March 2008, the employer party states that "**For security guards, there remain only three of them and the Company will reinstate them if they resign from the union.**"

The Arbitration Council found that in the hearing the Company party does not object to the agreement. Thus, the Arbitration Council considers that in this case there is enough evidence to prove that the employer discriminated against the three security guards when they joined the union. Therefore, the Arbitration Council decides to order the Company to reinstate the three security guards and pay back [their wages] from the date the Company terminated them.

Issue 5: The workers demand that the Company reinstate six workers.

In this issue, the six workers involved have fixed duration contracts and their employments were terminated by the employer by a notification of non-renewal of [their] employment contracts. The workers are: (1) Tang Nhor, duration of the last contract is two months, (2) Hean Hem, duration of the last contract is two months, (3) Yan Non, duration of the last contract is two months, (4) Sokry Kunthea, duration of the last contract is two months, (5) Teng Vannak, duration of the last contract is six months, (6) Kim Sokin, withdrew the demand and did not show up at the arbitration hearing. Therefore, the Arbitration Council will consider the demand for the five workers as follows:

Article 73 of the Labour Law states, *“A labour contract of specific duration normally terminates at the specified ending date.”* According to the content of this Article, a fixed duration contract will expire at the specified ending date. This means that the [employment] relationship and employment obligations of the employer and employee will be terminated.

Article 73(5) of the Labour Law states, *“If the contract has a duration of more than six months, the worker must be informed of the expiration of the contract or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have a duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67.”*

According to the article above, [a worker must be provided with] 10 days prior notice of [the non renewal of] a fixed duration employment contract which has a duration exceeding 6 months; if the employer does not provide notification to the workers about the expiration of the contract or the non-renewal of the contract, the fixed duration contract will be automatically renewed and effective for a duration equal to the initial contract.

In this case, the employer gave a notification about expiration and non-renewal of the employment contract to the five workers. In the hearing, the five workers acknowledge that they received the notification and that four of them including Tang Nhor, Yan Non, Teng Vannak, and Sokry Kunthea endorsed their thumbprints on the notification and another worker, Hean Hem, did not agree to endorse the thumbprint on the notification as he was afraid that the Company would terminate him.

The Arbitration Council considers that the employer gave the appropriate amount of notice regarding the non-renewal of the employment contract to the five workers whose fixed duration contracts are less than or equal to six months, according to Article 73 of the Labour Law.

In the hearing, the five workers claim that the employer did not renew their employment contract on the basis of union discrimination as they were members of C.CAWDU. Their membership in the union just started recently; around two months ago

(Tang Nhor), or around one month (Hean Hem and Teng Vannak) and on the day the Company gave the notification of non-renewal of their contract (Yan Non and Sokry Kunthea).

Article 12 of the Labour states, “... no employer shall consider on account of membership of workers’ union or the exercise of union activities to be the invocation in order to make a decision on ... hiring ... termination of employment contract ...”

Article 279 of the Labour Law states, “Employers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment ... and dismissal.”

The Arbitral Award 10/03-Jaqushintex, Issue 2, states, “...both the decision in relation to the non-renewal of undetermined duration contract and the decision in relation to termination of workers with undetermined duration contract should be considered as the type of decision which the employer cannot make on the basis of the workers’ membership in a union or their participation in union activities.”

Based on Article 12 and 279 of the Labour Law and previous decisions of the Arbitration Council, the Arbitration Panel in this case agrees with this interpretation that if the decision about the non-renewal of a fixed duration contract is based on the ground of union membership of the workers [it] is a decision which is contrary to the Labour Law and the jurisprudence of the Arbitration Council.

In this case, the company states that the reason for the non-renewal of the contracts of the five workers [was because] they did not have good work performance, they made mistakes which caused some loss to the Company, they did not accept the notification to terminate their contract and did not accept termination payments when their contracts were terminated. The Company considers this is contrary to the Company’s procedure regarding the non-renewal of contracts. The Arbitration Council considers that the Company has specific reasons for the non-renewal of the expired employment contracts of the five workers.

However, according to previous Arbitral Awards, the Arbitration Council decides that the worker party who claims that the employer terminates their employment contract because of union discrimination has a burden to provide evidence to support their claim. See *Arbitral Awards 93/06-Ever Green, Issue 1; 112/06-River Rich, Issue 1 and 01/07-Supreme and 110/07-Now Corp, Issue 2.*

Generally, the Arbitration Council will analyze all the facts raised by the parties to consider if there is any discrimination against the union.

In this case, the Arbitration Council found that the worker party mentions only that the non-renewal was because of union discrimination but they did not provide any other reasons besides stating that they are members of the union which is not sufficient for the Arbitration

Council to consider that the act of non-renewal of [the workers'] employment contract by the Company is an act of union discrimination.

In addition, the five workers do not have a union membership card and they are not union activists (but only normal members). They have never been involved in union activities such as seeking members or demanding for something else in the past. Moreover, the Arbitration Council notices that the union leaders, union activists and around 1559 other union members are working normally in the Company. Therefore, the claim of union discrimination does not have enough support.

Therefore, the Arbitration Council decides to reject the workers' demand for reinstatement.

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

DECISION

Issue 1: Order the employer to calculate maternity payment based on the wages earned by the workers in the last twelve months, divided by twelve, divided by two and multiplied by three, from the date this Arbitral Award enters into effect.

Issue 2: Order the Company to inform the workers about the piece rate of each model after they have been working on it for 7 days.

Issue 3: Order the employer to deduct the US\$ 5 attendance bonus in proportion to the number of days the workers are permitted to take leave.

Issue 4: Order the Company to reinstate the three security guards and pay back [their wages] from the date the Company terminated them.

Issue 5: Reject the workers' demand for reinstatement of the six workers.

Type of Award: Non binding awards

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: **Pen Bunchhea**

Signature:

Annex of arbitral award case 71/08-River Rich

Dissenting opinion by Arbitrator An Nan

According to clause 37 of PK 099 dated 21 April 2004 of the Ministry of Labour and Vocational Training, in this case, I **Arbitrator An Nan** do not agree with other two arbitrators [decision] to fail to acknowledge the agreement between River Rich Company and CCAWDU dated 21 February 2008 for the following [reasons]:

1. The agreement between River Rich Company and CCAWDU dated 20 and 21 February 2008 clearly states that the parties to the agreement are CCAWDU and the River Rich Company. The company representative received documents and heard the testimony of the union about this agreement and company representative did not refuse to acknowledge this agreement as it was concluded by the company leader but he [company leader] did not attend [the hearing]. As a result, in the absence of any objection from the company representative, the AC should not fail to acknowledge this agreement. [Testimony that] he did not know as he did not participate is very different from refusing to acknowledge [the agreement]. However, for the above agreement, the company representative did not refuse to acknowledge it.
2. The other two arbitrators in this case gave the following reasoning: **the agreement dated 21 February 2008 was signed by Albert Cheung on behalf of River Rich Company. However, the person's name is not stated in the Company's statute, the agreement was not stamped by the Company's seal and it was a photocopied document. In addition, there is no authorization letter from Mr. SUNG CHUNG KWUN or any other executive director of the Company in Cambodia to authorize Mr. Albert Cheung to sign the two agreements as mentioned above. This means that Mr. Albert Cheung cannot be considered a legal representative of River Rich Company in Cambodia.** As a result, on what basis do the other two arbitrators come to this conclusion? I do not think there is sufficient legal basis to come to this conclusion as Mr. Albert Cheung and Mr. SUNG CHUNG KWUN did not appear at the hearing. Moreover, the company representative did not confirm that Mr. Albert Cheung could be a legal representative for Mr. SUNG CHUNG KWUN. As a result, as the company did not confirm [that Mr Cheung was not the legal representative], the Arbitration Council has no reason to decide on behalf of

the party. Hence, I consider that the agreement between River Rich Company and CCAWDU dated 21 February 2008 is valid between the parties.

In the hearing, the company chose a non-binding award and the workers chose a binding award, arguing that the company and CCAWDU have an agreement dated 21 April 2008, which provides in clause 9 that “...*in case there is no solution for claim or collective dispute after using all measures, it will send to arbitrator commission for final decision.*”

Clause 42 of PK 099 of the Arbitration Council dated 21 April 2004 provides that “Article 40 does not apply in case parties to the dispute have agreed in writing before the notification of the arbitral award, or they are bound to comply with a collective bargaining agreement stipulating, that no objection to the award shall be allowed. In such case the award shall become final and binding immediately after notification.”

As a result, I consider that this award is a binding award.

Signature of arbitrator

Name: **An Nan**

Signature: