



KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអន្តរាគ្គាន

THE ARBITRATION COUNCIL

Case number and name: 72/08-Yung Wah II

Date of Award: 12 June 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: **Liv Sovanna**

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

DISPUTING PARTIES

Employer party:

Name: **Yung Wah Industrial (Cambodia) Co., Ltd. II**

Address: Thmei Village, Ta Khmao Commune, Ta Khmao District, Kandal Province

Telephone: 012 510 966

Fax: N/A

Representative:

- | | |
|----------------------|------------------------|
| 1. Mr Ng Min Cauan | General Affair Manager |
| 2. Mr. Som Uy Pisey | Administration Officer |
| 3. Ms. Ly Muy Chheng | Administration Officer |

Worker party:

Name: **Cambodian Labour Union Federation (CLUF) and local Cambodian Labour Union at Yung Wah II (CLU)**

Address: #371, Tror Pang Chhouk Village, Sangkat Toeuk Thla, Khann Russey Keo, Phnom Penh

Telephone: 016 657 556/012 931 914

Fax:N/A

Representative:

- | | |
|-----------------------|---------------------------------|
| 1. Mr. Seng Meng Hong | Assistant to CLUF |
| 2. Mr. Phin Thuok | President of CLU at Yung Wah II |

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| 3. Mr. Seng Vechna | Assistant to CLU at Yung Wah II |
| 4. Mr. Kem Sarat | Secretary of CLU at Yung Wah II |
| 5. Mr. Horm Nop | Assistant to CLU at Yung Wah II |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The workers demand that the Company calculate the payment in lieu of annual leave based on the average [of total wages]. The Company requests to discuss this matter with the top boss first before it can give an answer.
- 2- The workers demand that the Company increase wages to talented workers who are cutters, welders and people with other skills in accordance with the Internal Work Rules. The Company does not agree.
- 3- The workers demand that the Company maintain wages and attendance bonus for workers who are sick and have work-related accidents with a medical certificate from a hospital such as the implementation referral district hospital, communal public health center, or any private clinic where physicians are also officials in a public hospital. The Company does not agree, but will follow the existing practice.
- 4- The workers demand that the Company pay their missing wages immediately after their pay day within 3 days at the latest and should not wait until the next pay day and that the Company should pay their monthly wage before 3:00 p.m. The Company does not agree.
- 5- The workers demand that the Company build more canteens for workers working in Buildings Yung Wah 3 and 4, and that the Company open another door in addition to the existing gates. The Company does not agree.
- 6- The workers demand that the Company make a detailed pay slip for workers or staff and arrange enough chairs for each group. The Company does not agree but will follow the existing practice.

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. 271/08 KB/KN, dated 20 May 2008, was submitted to the Secretariat of the Arbitration Council on 21 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: 29 May 2008 (From 2:00 p.m. to 5:30 p.m.)

Procedural issues:

On 12 May 2008 the Department of Labour and Vocational Training of Kandal Province conducted a conciliation regarding 10 collective labour dispute issues with a result that 4 issues were conciliated. The 6 non-conciliation issues were referred to the Secretariat of the Arbitration Council on 21 May 2008.

Having received the case, the Secretariat of the Arbitration Council summoned both the employer party and the worker party to the hearing and conciliation on the 6 non-conciliation issues on 29 May 2008 at 2:00 p.m. Both parties were present as invited by the Arbitration Council.

On the hearing day, the Arbitration Council attempted to further the conciliation on the 6 non-conciliation issues in the non-conciliation report and issue 4, issue 5 and issue 6 were conciliated. The worker party withdrew issue 2 because it appeared in Arbitral Award 58/08-Yung Wah II, dated 29 May 2008. Therefore, in this case the Arbitration Council considers only issues 1 and 3 based on the evidence and clarification of 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. Certificate of commercial registration of the Yung Wah Industrial (Cambodia) Co., Ltd, No. 981 PN.NTK, dated 27 March 1998;
2. Memorandum and statute of Yung Wah Industrial (Cambodia) Co., Ltd, dated 2 April 2002;
3. Internal Work Rules of Yung Wah Industrial (Cambodia) Co., Ltd, No. 008/06 KBV, dated 29 May 2006;
4. Power of attorney by the Company director to Mr. Ng Min Chuan, dated 29 May 2008;
5. Internal announcement of Yung Wah Industrial (Cambodia) Co., Ltd, No. 491/2007 YV, dated 25 June 2007.

Provided by the worker party:

1. Certificate of union registration of local CLU at Yung Wah II Company No. 1246 KB/VK, dated 1 October 2007;
2. Certification letter by the Ministry of Labour and Vocational Training regarding registration of the local CLU at Yung Wah II No. 1246 KB/VK, dated 1 October 2007.

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

1. Report No. 271/08 KB/KN, dated 20 May 2008 on the collective labour dispute settlement at Industrial (Cambodia) Co., Ltd;
2. Minutes of the collective labour dispute conciliation at Yung Wah II Company, dated 12 May 2008.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 341 KB/AK/VK/LKA dated 26 May 2008 to invite the Company party to attend the hearing;
2. Invitation No. 342 KB/AK/VK/LKA dated 26 May 2008 to invite the worker party to attend the hearing.

FACTS

- Having reviewed documents submitted by the parties to the Arbitration Council;
- Having reviewed the report of collective labour dispute conciliation;
- Having listened to the testimonies from both the worker party and the employer party.

The Arbitration Council finds that:

- Yung Wah II Factory employs approximately 5,000 workers.
- The claimant in this case is the local CLU at Yung Wah II which has approximately 400 members. There are five unions in the factory: Cambodia Labour Union, Free Trade Union of Workers of Kingdom of Cambodia, Khmer Youth Trade Union, Coalition of Cambodian Apparel Workers Democratic Union and Cambodian (local) Union.
- According to the claim of the worker party and the employer party, none of the unions in the factory has the most representative status.

Issue 1: The workers demand that the Company calculate the payment in lieu of annual leave based on the average [of total wages]

- The workers states that currently the Company provides 18 days of annual leave per year and adds one more day for each three years of employment.
- Regarding the use of annual leave, the Company mentions that when the workers want to use their annual leave for one day, they need to submit a request to the Company one day in advance. However, if they want to use two or more days of their annual leave, they need to submit the request five days in advance. The Company states that it has never limited the number of days of annual leave used. The Company adds that if the workers do not use up all of their annual leave, the Company pays for the days unused per year by taking the main wage divided by 26 then multiplied by the number of remaining days.
- The workers do not object to the Company's statement but request that the employer change the method of calculation by taking the average wage earned by the workers over 12 months, divided by 26, then multiplied by the number of remaining days.
- The Company does not agree to the demand and requests that the Arbitration Council decide this issue according to the Law then the Company will follow it if it is stated in the Law.
- In the hearing, the worker party and the Company party state that the demand is related to the method of calculation of payment in lieu of annual leave when workers do not use up all of their annual leave within a year during the implementation of contract; this is not a demand in relation to the method of calculation of annual leave at the termination of employment contract.
- In the hearing, both parties mention that the payment in lieu of unused annual leave has been practiced since 2006. However, based on the internal announcement of the Company, dated 25 June 2007, the practice started from 01 July 2007; [the announcement] does not mention the method of calculation but only states that payments would be made in cash.
- There is no agreement regarding this issue.

Issue 3: The workers demand that the Company maintain wages and attendance bonus for workers who are sick and have work-related accidents with medical certificate from a public hospital (provincial or municipal hospital, referral hospital, health center)

- The Company party states that it does not deduct workers' wage and attendance bonus if they take leave within 12 days allowed for sick leave per year. However, they need to have a medical certificate from a public doctor. The Company recognizes only Chey Chomnas Hospital in Kandal Province and the Kbal Thnol labour hospital. In relation to traffic accidents, the Company recognizes only Kosamak Hospital,

Russian Hospital, and Calmette Hospital but the Company will make a follow-up visit to the hospital for verification. The Company does not deduct wages or attendance bonus if the workers take leave within the 12 days allowed for sick leave per year.

- The worker party does not object to the Company's statement but request that the Company recognize medical certificates from all public hospital including referral hospitals and health centers. In the hearing the worker party adds that the Company should not limit it to only Chey Chomnas Hospital in Kandal Province and the Kbal Thnol labour hospital for normal sickness and Kosamak Hospital, Russian Hospital, and Kalmet Hospital for traffic accidents because some workers may live far [from those hospitals] so they cannot go to the hospitals determined by the Company. The Company does not agree but will follow point 4(g) of the Internal Work Rules. Point 4(g) regarding sick leave in the Internal Work Rules states, *"All workers are allowed 12 days paid sick leave per year (for light sickness only) but the workers need to provide a proper certification letter from a government doctor or the Company's doctor. If there is no such letter as mentioned above, they will not be provided sick leave payment. In case workers are sick in serious condition and need treatment for a long period with a proper certification letter from government doctor, the Company will pay full wage during the first month. In the 2nd and 3^d month, the Company will pay only 60% of wage. From the 4th to 6th month, the Company will not pay their wage but their position will be maintained. However, if they take leave for a period longer than 6 months, the Company will terminate their employment in accordance with the Labour Law."*
- There is no agreement regarding this issue.

REASONS FOR DECISION

Issue 1: The workers demand that the Company calculate the payment in lieu of annual leave based on the average [of total wages]

In this dispute, the workers demand that the Company paid for unused annual leave based on the average [of wages earned] during the period the employment contract is implemented. The Arbitration Council will consider this issue as follows:

Article 168 of the Labour regarding paid annual leave states, *"Before the worker departs on leave, the employer must pay him an amount that is at least equal to the average salary, bonuses, benefits, and compensation, 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 sum shall in no case be less than the amount that the worker would have received had he actually worked."*

In the event of a contract termination, then according to the content of the above Article, [to calculate payment in lieu of unused annual leave] the employer should use the average of wages, bonus, benefits, and compensation, including the value of benefits in kind, provided to the workers within twelve months before the leave start as a basis for calculation. In previous Arbitral Awards, the Arbitration Council decides that the employer should pay the payment in lieu of annual leave by taking the total wages within the last twelve months the worker worked, divided by twelve, to find the average wage per month. Then take the average wage per month, divided by 26, to find an average wage per day to be the basis for calculation of the payment for workers during their paid annual leave. (See *Arbitral Awards 27/04-MS, issue 3; 94/07-Fortune Garment, issue 2*)

However, in this case the Company pays the payment in lieu of unused annual leave one time a year during the time the employment contract is still being implemented by taking the main wage, divided by 26, then multiplied by the number of remaining days. Thus, the Arbitration Council will consider this issue as follows:

Article 167, paragraph 3, states: *“Other than this, any agreement providing compensation in place of paid leave is null and void, as is any agreement in which the worker renounces or waives his right to paid annual leave.”*

Based on the content of Article 167, paragraph 3, of the Labour Law, the Arbitration Council considers that the Labour Law prohibits the payment in lieu of annual leave during the time the workers are still working for the Company. Hence, the Arbitration Council considers that the current practice of the Company in paying in lieu of annual leave is contradictory to the intention of Article 167.

In previous Arbitral Awards, the Arbitration Council considers that *“the demand for the Company to pay in lieu of annual leave is the demand against the intention of Article 167, paragraph 3, of the Labour Law 1997. Thus, the demand is not reasonable and not legal.”* (See *Arbitral Awards 45/05-B&N, issue 1 and 94/04-Eternity, issue 2*).

Moreover, According to Article 167, paragraph 4, of the Labour Law *“Acceptance by the worker to defer all or part of his rights to paid leave until the termination of contract is not considered as renunciation. Deferment of this leave cannot exceed three consecutive years and can only apply to leave exceeding twelve working days per year.”* This Article also gives entitlement to the workers to use their annual leave in the next years not exceeding three consecutive years. Therefore, the Arbitration Council encourages the workers to use their annual leave rather than being paid off in cash in lieu of annual leave.

Therefore, Arbitration Council decides to reject the workers' demand in relation to payment in lieu of unused annual leave during the implementation of employment contract which means during the period the workers are working for the Company.

Issue 3: The worker party demands that the Company maintain their wages and attendance bonus when they are sick or have a work-related accident with certificate from a public doctor (provincial/municipal hospital, referral hospital and health center)

Regarding the demand for the Company to maintain wage and bonus, in the hearing both parties agree to follow the contents of point 4(g) of the Company's Internal Work Rules.

Point 4(g) regarding sick leave in the Internal Work Rules states, *"All workers are allowed 12 days paid sick leave per year (for light sickness only) but the workers need to provide a proper certification letter from a government doctor or the Company's doctor.*

If there is no such letter as mentioned above, they will not be provided sick leave payment. In case workers are sick in serious condition and need treatment for a long period with proper certification letter from a government doctor, the Company will pay full wage during the first month. In the 2nd and 3rd month, the Company will pay only 60% of wage. From the 4th to 6th month, the Company will not pay their wage but their position will be maintained the same. However, if they take leave for a period longer than 6 months, the Company will terminate their employment in accordance with the Labour Law."

In the hearing the Company states that according to the current practice, wages and attendance bonus are maintained for the 12 days per year for light sickness with certification letter from Chey Comnas Hospital in Kandal Province and Kbal Thnol Labour Hospital for normal sickness and Kosamak Hospital, Russian Hospital, and Calmette Hospital for traffic accidents.

Thus, the demand for maintaining wage and attendance bonus is not the actual issue in dispute for this case. The actual demand is about the certification from doctors of government hospitals or letters from doctors of Chey Comnas Hospital in Kandal Province and Kbal Thnol Labour Hospital.

Article 71(3) of the Labour Law states, *"The labour contract shall be suspended under the following reasons:... The absence of the worker for illness certified by a qualified doctor. This absence is limited to six months, but can, however, be extended until there is a replacement..."*

In this case, the Arbitration Council considers that the fact that the Internal Work Rules states that the Company only recognizes certification letters from public hospitals or the labour hospital is against Article 71, paragraph 3, of the Labour Law which only mentions a "qualified doctor." "Qualified doctor" in previous cases refers to doctors who are trained by the medical school recognized by the Ministry of Health and have proper certificate with permission letter to practice their profession issued by the Ministry of Health. (See *Arbitral Award 102/07-Teratex, issue 2*).

In this case, the Arbitration Council agrees with the above interpretation. Thus, in order to be consistent with previous Arbitral Awards, the Arbitration Council decides that the

Company should recognize the letter from doctors trained in accordance with the standards of the Ministry of Health who are properly certified with authorisation letters to practice their profession either in public or private hospitals. In order to assure correctness in checking the doctors' authority, the certification letter issued by the public doctor should be stamped by the institution's seal while the letter from private doctor should be attached with the authorisation letter to open the private clinic.

In conclusion, the Arbitration Council decides to order the Company to recognize the certification letter from doctors trained in accordance with the standards of the Ministry of Health who have proper certificates with authorisation letters to practice their profession as a basis for their sick leave in accordance with point 4(g) of the [Company's] Internal Work Rules from the date this Arbitral Award enters into effect.

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

DECISION

Issue 1: Reject the workers' demand in relation to payment in lieu of unused annual leave during the implementation of the employment contract.

Issue 3: Order the Company to recognize certification letter from doctors trained in accordance with the standards of the Ministry of Health who have proper certificate with authorisation letters to practice their profession as a basis for their sick leave in accordance with point 4(g) of the [Company's] Internal Work Rules from the date this Arbitral Award enters into effect.

Type of Award: Non binding award

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

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: