



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 77/11-Inkyung Wondang Apparel

Date of Award: 18 July 2011

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Chhiv Phyrum**

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

Chair Arbitrator (chosen by the two Arbitrators): **Ang Eng Thong**

DISPUTANT PARTIES

Employer party:

Name: **Inkyung Wondang Apparel Co., Ltd (the employer)**

Address: Damnak Thom Village, Phnom Penh Thmey Commune, Sen Sok District, Phnom
Penh

Telephone: 099 213 106

Fax: N/A

Representatives:

1. Mr Om Sovannarith Head of Administration
2. Mr Top Sitha Assistant to the Administrator

Worker party:

Name: **Worker Freedom Union Federation (WFUF)**

Local Union of WFUF

Address: Damnak Thom Village, Phnom Penh Thmey Commune, Sen Sok District, Phnom
Penh

Telephone: 077 550 979

Fax: N/A

Representatives:

1. Mr Den Samarth President of WFUF
2. Mr Nen Chenda Vice-President of WFUF

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| 3. | Mr Den Sokchea | Officer of WFUF |
| 4. | Ms Terk Sophin | President of the Local Union of WFUF |
| 5. | Ms Him Rina | Vice-President of the Local Union of WFUF |
| 6. | Ms Ket Ngeurn | Secretary of the Local Union of WFUF |

ISSUES IN DISPUTE

(From the Non-Conciliation Report of the Ministry of Labour and Vocational Training)

1. The workers demand that the employer reinstate eight workers and union leaders of WFUF whom it dismissed on 25 June 2011.
2. The workers demand that the employer provide a 4,000 riel meal allowance to those working overtime until 8:30 p.m.
3. The workers demand that the employer pay their wages from the 7th to the 10th each month.
4. The workers demand that the employer arrange to have a day-care centre.
5. The workers demand that the employer provide termination payments in accordance with the Labour Law to workers dismissed for reasons other than serious misconduct.
6. The workers demand that the employer ask them to work overtime on a voluntary basis.
7. The workers demand that the employer allow pregnant workers to leave 15 minutes early.
8. The workers demand that the employer allow pregnant workers to take one day off each month without a deduction in wages to have a medical check.
9. The workers demand that the employer allow them to take leave for personal commitments.
10. The workers demand that the employer deduct only US\$ 2 from the attendance bonus when they take authorised leave for personal commitments.
11. The workers demand that the employer provide them with an accommodation allowance of US\$ 5.
12. The workers demand that the employer maintain their accommodation allowance when they take authorised leave for personal commitments.
13. The workers demand that the employer convert the contracts of workers who have worked for three months to regular worker contracts.

14. The workers demand that the employer allow them to have medical checks.
15. The workers demand that the employer arrange to have a nice and hygienic canteen.
16. The workers demand that the employer allow them to use annual leave and special leave for personal commitments.
17. The workers demand that the employer pay the overtime meal allowance once a week.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this award from Chapter XII, Section 2B of the Labour 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. 133 dated 9 June 2010 (Eighth 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 non-conciliation report No. 688 KB/RK/VK dated 28 June 2011 was submitted to the Secretariat of the Arbitration Council on 28 June 2011.

HEARING AND SUMMARY OF PROCEDURE

Hearing venue: The Arbitration Council, No. 72, Street 592, Corner of Street 327 (Opposite Indra Devi High School) Boeung Kak II Quarter, Tuol Kork District, Phnom Penh

Date of hearing: 5 July 2011 at 8:30 a.m.

Procedural issues:

On 27 June 2011, the Department of Labour Disputes received a complaint from WFUF, dated 26 June 2011, outlining the workers' demands that the employer improve working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to conciliate the dispute, resulting in none of the issues being resolved. The 17 non-conciliated issues were referred to the Secretariat of the Arbitration Council on 28 June 2011, via non-conciliation report No. 688 KB/RK/VK dated 28 June 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the non-conciliated issues, held on 5 July 2011 at 8:30 a.m.

Both parties were present at the hearing, at which they informed the Council that they had only five disputed issues. The Arbitration Council attempted to conciliate the issues, resulting in issues 4 and 10 being resolved. Issues 1, 11, and 17 remain unresolved.

The Arbitration Council will consider the issues in dispute based on evidence and reasoning as follows.

EVIDENCE

Witnesses and Experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council:

A. Provided by the employer party:

1. Authorisation letter from the employer to Om Vannarith, dated 4 July 2011.
2. Six photographs of the workers' strike.
3. Outstanding wages and termination payment payroll information for Kim Pov, Chem Yos, Run Sreyoun, Ngor Samnang, and Men Thim.
4. Request for termination payments of Kim Pov, Chem Yos, Run Sreyoun, Ngor Samnang, and Men Thim, dated 4 July 2011.
5. Resignation letters of Kim Pov, Chem Yos, Run Sreyoun, Ngor Samnang, and Men Thim, dated 25 June 2011.
6. Record of collective labour dispute conciliation, dated 27 June 2011.
7. 8-point agreement made between the employer and workers, dated 28 June 2011.
8. Certificate of commercial registration, dated 23 February 2011.
9. Patent certificate, dated 18 March 2011.

B. Provided by the worker party:

1. Certificate of union registration of WFUF, dated 26 April 2011.
2. Letter from the Local Union of WFUF to the Minister for Labour and Vocational Training requesting union registration, dated 13 June 2011.
3. Letter from the leaders and standing committee of the Local Union of WFUF to the President of WFUF requesting intervention to improve working conditions, dated 26 June 2011.
4. Notification from WFUF to the employer regarding the establishment of a professional organisation, No. 019/11 dated 12 June 2011.
5. Letter, No. 001/11 dated 12 June 2011, from WFUF to the Minister of Labour and Vocational Training, requesting union registration.
6. List of names of workers participating in the election to establish the Local Union of WFUF, dated 12 June 2011.
7. Personal declarations and CVs of Ket Ngeurn, Him Rina, and Terk Sophin.

8. List of names of persons in charge of leadership and administrative tasks at the Local Union of WFUF, dated 12 June 2011.
9. Statute of the Local Union of WFUF, dated 12 June 2011.
10. Report on the election for the Local Union of WFUF, dated 12 June 2011.

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

1. Report on collective labour dispute resolution at Inkyung Wondang Apparel Co., Ltd, No. 688 KB/RK/VK, dated 28 June 2011.
2. Record of collective labour dispute resolution at Inkyung Wondang Apparel Co., Ltd., Ltd, dated 27 June 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend to the hearing addressed to the employer, No. 438 KB/AK/VK/LKA, dated 30 June 2011.
2. Notice to attend the hearing addressed to the workers, No. 439 KB/AK/VK/LKA, dated 30 June 2011.

FACTS

- Having examined the report on collective labour dispute resolution;
- Having listened to the statements of the representatives of the employer and the workers; and
- Having reviewed the additional documents;

The Arbitration Council finds that:

- Inkyung Wondang Apparel Co., Ltd employs a total of 700 workers.
- The Local Union of WFUF, representing 400 workers, is the claimant.

Issue 1: The workers demand that the employer reinstate the union leaders and eight workers whom it dismissed on 25 June 2011.

- The workers stated that they have withdrawn the demand in relation to the eight workers, and demand only that the employer reinstate the union leaders.
- The union leaders are Terk Sophin (President), Him Rina (Vice-President), and Ket Ngeurn (Secretary). They were employed under undetermined duration contracts.
- On 12 June 2011, the election to establish the Local Union of WFUF was held.
- On 15 June 2011, the Local Union of WFUF notified the employer of its establishment via a letter dated 12 June 2011 indicating the names of the three union leaders and seven members of the union's standing committee. Mao Chanthorn, a security guard with ID no. 135, acknowledged the notification.

- On 16 June 2011, the Local Union of WFUF submitted an application for union registration dated 13 June 2011 to the Ministry of Labour and Vocational Training. The recipient acknowledged the application without issuing a receipt of acknowledgement, due to a lack of receipts.
- On 25 June 2011, the employer terminated the contracts of the seven members of the union's standing committee. The workers accepted termination payments. Later, the employer held a meeting with the three union leaders and asked them: "Do you agree to accept termination payments as the seven workers have done?" "No, I do not", responded each of the three leaders. The employer abruptly responded that if the workers did not agree they needn't attend work on Monday 27 June 2011, as they were dismissed.
- The employer argues that it did not issue written dismissal letters to the three leaders on 25 June 2011.
- On 27 June 2011, [a group of] workers staged a strike, demanding that the employer reinstate the three union leaders. On the same date, the employer dismissed [the three union leaders], alleging that they prevented other workers from entering the factory. The workers refute the employer's allegation.
- The employer submitted photographs of a strike led by the three union leaders on 27 June 2011. The Arbitration Council has examined the evidence and considers that the photographs merely show strike action. Therefore, they are insufficient to prove that the striking workers prevented other workers from entering the factory.
- The employer failed to request approval from the Labour Inspector before dismissing the three union leaders.
- The workers demand that the employer reinstate the three union leaders. The employer refuses to accommodate the demand.

Issue 4: The workers demand that the employer arrange to have a day-care centre.

- The employer agrees to comply with the Labour Law. Thus, the employer will arrange a day-care centre. If the employer cannot afford a day-care centre for children aged over 18 months, the workers are entitled to place their children at any external day-care centre and the employer will pay the associated expenses.

Issue 10: The workers demand that the employer deduct from the attendance bonus in proportion to the number of days of authorised leave taken.

- The employer agrees to comply with the Labour Law and to deduct from the attendance bonus in proportion to the number of days of authorised leave taken.

Issue 11: The workers demand that the employer provide a monthly accommodation allowance of US\$ 5 to all workers.

- The employer's current practice is to pay an accommodation allowance of US\$ 5 to sewing workers only. Workers in the ironing, cutting, controlling, and packaging sections are not entitled to the accommodation allowance of US\$ 5.
- The employer has been providing the allowance to sewing workers for eight months.
- The employer states that the reason it provides the allowance only to sewing workers is that it finds it difficult to find sewing workers and wants to retain them in the factory.
- The workers argue that, being workers in the same factory, they should receive equal treatment.
- There is no previous agreement regarding an accommodation allowance of US\$ 5 for all workers.

Issue 17: The workers demand that the employer pay the overtime meal allowance on a weekly basis.

- The employer pays the overtime meal allowance once a month, along with monthly wages.
- The workers make this demand because they do not have enough money to buy meals until pay day on the 6th of every month. They further contend that they earn a small monthly wage and therefore they need the allowance to support their daily lives.
- The employer refuses to accommodate the workers' demand.

REASONS FOR DECISION

Issue 1: The workers demand that the employer reinstate the union leaders and eight workers whom it dismissed on 25 June 2011.

The Arbitration Council considers whether the employer is obligated to reinstate the three union leaders.

Before considering the reinstatement claim, the Arbitration Council will consider whether the three union leaders are entitled to special protection.

Article 293 of the Labour Law states:

The dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector...

The Labour Inspector, who has been referred a request to authorise the dismissal of a worker covered by the present article, shall give his decision to the employer

and to the worker in question...within one month at the latest upon receipt of the case...

If there is no notification of the Labour Inspector's decision within the allotted time...the case [is] considered to be rejected.

This means that before dismissing a worker delegate or worker entitled to special protection, an employer must seek approval from the Labour Inspector and the Minister in Charge of Labour. The Labour Inspector has a duty to investigate and to grant or reject a dismissal request within one month following receipt of the case (*see AAs 149/08-Cambo Handsome, Reasons for Decision, Issue 1 and 175/09-Apsara Authority, Reasons for Decision, Issue 2*).

Clause 4, paragraph 1 of *Prakas* No. 305 SKBY dated 22 November 2001 states:

From the time that the application for registration is submitted, all workers who are founding members of a union, as well as those workers who voluntarily join the union during the application period, shall enjoy the same protection as shop stewards.

The union leaders are founding members of the union and are, according to this clause, entitled to the same special protection against dismissal as worker delegates within the period of union registration. Thus, the employer was required to seek approval from the Labour Inspector if it wished to dismiss the union leaders within this period.

In this case, the Local Union of WFUF submitted an application for registration on 16 June 2011. The workers state that they were dismissed on 25 June 2011, but the employer states that it officially dismissed them on 27 June 2011. The Arbitration Council has not been provided with evidence from both parties regarding the date of dismissal. However, the Arbitration Council considers that the employer dismissed the three union leaders within the period of registration, regardless of whether they were dismissed on 25 or 27 June 2011.

Clause 3, paragraph 3 of *Prakas* No. 305 provides that “the employer must be duly informed of the candidacy by any reliable means. However, the employer shall only be required to comply with this provision once for each election of union leaders.”

Based on this clause, the Arbitration Council considers that the union leaders were entitled to special protection as long as the union notified the employer of their candidacy through reliable means.

According to the facts, on 15 June 2011 the employer was notified of the establishment of the Local Union of WFUF via a letter dated 12 June 2011 indicating the names of the three union leaders and seven members of its standing committee. Mao

Chanthorn, a security guard with ID no. 135, acknowledged the notification. The Arbitration Council considers that the Local Union of WFUF notified the employer of the candidacy.

The Arbitration Council finds in this case that the three union leaders qualified for special protection because: (1) they were candidates entitled to special protection; (2) they were dismissed during the period of union registration; and (3) the Local Union of WFUF notified the employer of the candidacy through reliable means, and the employer's security guard acknowledged the notification. Therefore, the Arbitration Council considers that the employer was required to seek approval from the Labour Inspector before dismissing them.

According to the facts, the employer failed to seek approval from the Labour Inspector to dismiss the three union leaders. The Arbitration Council considers that the employer dismissed the three union leaders in contravention of Article 293, paragraph 1 of the Labour Law and Clause 3, paragraph 3 and Clause 4, paragraph 1 of *Prakas* No. 305.

In conclusion, the Arbitration Council orders the employer to reinstate Terk Sophin, Him Rina, and Ket Ngeurn.

Issue 11: The workers demand that the employer provide a monthly accommodation allowance of US\$ 5 to all workers.

The Arbitration Council considers whether the employer is obliged to provide a monthly accommodation allowance of US\$ 5 to all workers.

According to the facts, the employer's practice is to provide an accommodation allowance of US\$ 5 only to sewing workers, and there is no agreement between the employer and the workers regarding the provision of the allowance. Furthermore, the Arbitration Council finds that there is no article in the Labour Law 1997 or any other legal provision requiring the employer to provide the allowance to all workers. The workers' demand is more than they are entitled to under the law, making this an interests dispute.

With respect to interests disputes, the Arbitration Council considers whether the disputant union has most representative status (MRS). The Arbitration Council considers that having MRS gives a union the legal capacity to negotiate with an employer to establish a collective agreement and gives it legal standing to bring an interests dispute before the Arbitration Council for resolution.

Clause 43 of *Prakas* No. 099 dated 21 April 2004 states:

An arbitral award which settles an interest dispute takes the place of a collective bargaining agreement and shall remain in effect for one year from the date on which it becomes final unless the parties agree to make a new collective bargaining agreement replacing the award.

Based on this provision, the Arbitration Council considers that if it issues an arbitral award to settle an interests dispute, the award will become a one-year collective agreement. Generally, a collective agreement must be applicable to all workers at the enterprise and the right to strike cannot be exercised for the purposes of revising an unexpired collective agreement (*see AA 152/08-Wilson, Reasons for Decision, Issue 2*).

In order to possess MRS, a union must be registered and fulfil the other conditions stipulated in Article 277 of the Labour Law 1997.

In Arbitral Award 07/06-Dai Young, Reasons for Decision, Issue 3, the Arbitration Council ruled that “This right [to make a collective agreement on behalf of workers] belongs to the registered union with most representative status and which has complied with the other criteria under Article 277 of the Labour Law.”

In previous Arbitral Awards, the Arbitration Council has declined to consider an interests dispute if the union bringing the dispute to the Council does not have MRS (*see AAs 71/09-Hytex, Reasons for Decision, Issue 10; 84/10-Ming Da Footwear, Reasons for Decision, Issue 3*).

The Arbitration Council agrees with the abovementioned interpretation.

In this case, the Local Union WFUF does not hold an MRS certificate. Therefore, the Council considers that the Local Union of WFUF does not have legal standing to bring an interests dispute before the Council for consideration. Only an MRS union is entitled to do so.

In conclusion, the Arbitration Council declines to consider the workers’ demand that the employer provide a monthly accommodation allowance of US\$ 5 to all workers.

Issue 17: The workers demand that the employer pay the overtime meal allowance on a weekly basis.

The Arbitration Council considers whether the employer is obliged to pay the overtime meal allowance on a weekly basis.

In a previous Arbitral Awards, the Arbitration Council has ruled that:

the overtime meal allowance is not part of overtime wages because this payment is in lieu of a meal, and it is not the payment gained from overtime work. If the employer does not provide the meal allowance, then he is obliged to provide a free meal. Thus, the provision of overtime meal allowance is not related to the overtime wages (*see AAs 85/09-Nan Kuang, Reasons for Decision, Issue 10 and 110/09-Berry Apparel, Reasons for Decision, Issue 1*).

The Arbitration Council agrees with the abovementioned interpretation. Therefore the overtime meal allowance must not be paid with the overtime payment.

Point 2 of Notification No. 041 dated 7 March 2011 stipulates that “workers who volunteer to work overtime at the employer’s request will receive an overtime meal allowance of 2,000 riels per day or a free meal”.

The Arbitration Council considers that the abovementioned notification does not specify a period for payment of the overtime meal allowance. However, the employer must provide a free meal to overtime workers. The provision of a free meal enables workers to work overtime upon the completion of service during normal working hours, given that food is an undeniable basic need for all human beings and, further, the employer is obligated to provide it. Moreover, the notification states that if the employer is unable to provide a free meal, it must provide a 2,000 riel meal allowance each day. The Arbitration Council is of the view that the overtime meal allowance must be paid at an appropriate time to ensure that the workers are able to buy meals, whether this be once a day, once a week, or once a month.

In previous Arbitral Awards, the Arbitration Council has determined that a free meal must be provided for each day of overtime work. Therefore, it is reasonable for the overtime meal allowance to be paid to workers on each day of overtime work (*see AAs 47/07-Chung Fai, Reasons for Decision, Issue 5; 79/07-Terratex, Reasons for Decision, Issue 5; 85/09-Nan Kuang, Reasons for Decision, Issue 10*).

The Arbitration Council agrees with the interpretation above. Furthermore, the Council is of the view that the demand for payment of the overtime meal allowance should be granted according to the workers’ circumstances. In some circumstances the workers are able to buy a meal during overtime work even though the employer has not paid the allowance. Sometimes the workers are able to buy meals where the allowance is paid once a week or once a month. Thus, the Arbitration Council will consider this issue in light of the workers’ circumstances in this case.

According to the facts, the workers demand that the employer pay the overtime meal allowance once a week because they need money to buy meals for each day of overtime work. The employer refuses to accommodate the demand due to its existing practice.

The Arbitration Council is of the view that the workers’ daily living issues are of paramount importance. Although the workers are able to buy meals for each day of overtime work when the employer pays the overtime meal allowance once a week, they are unable to buy meals everyday if the employer pays them once a month. Moreover, the intention of the law is to provide the overtime meal allowance for each day of overtime work. Thus, the Arbitration Council considers that it is legitimate for the workers to demand that the employer pay the overtime meal allowance once a week.

In conclusion, the Arbitration Council orders the employer to pay the overtime meal allowance on a weekly basis.

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

DECISION AND ORDER

Issue 1: Order the employer to reinstate Terk Sophin, Him Rina and Ket Ngeurn.

Issue 11: Decline to consider the workers' demand that the employer provide a monthly accommodation allowance of US\$ 5 to all workers.

Issue 17: Order the employer to pay the overtime meal allowance on a weekly basis.

Type of award: non-binding award

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

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Chhiv Phyrum**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Ang Eng Thong**

Signature: