

# **WORKER RIGHTS CONSORTIUM ASSESSMENT HONG SENG KNITTING CO., LTD. BANGKOK, THAILAND**



**April 5, 2021**

## I. Introduction

A Worker Rights Consortium (WRC) investigation has identified violations of worker rights and universities' labor standards at Hong Seng Knitting Co., Ltd. ("Hong Seng"), including wage theft, coercion of workers to facilitate that theft, and retaliation against workers who resisted. This factory, located in Bangkok, Thailand, produces collegiate apparel for Nike. It also produces non-collegiate apparel for New Balance and Amer Sports (which owns brands including Salomon, Arc'teryx, and Wilson) and is a former supplier of non-collegiate apparel to Fanatics. Hong Seng Knitting is a subsidiary of Hong Seng Group, a Thai apparel manufacturing conglomerate that owns several factories in Thailand, Cambodia, and Vietnam. According to Nike data, the factory employs 3,360 production workers.

The WRC has engaged with both Hong Seng and with Nike, as the only firm sourcing collegiate apparel from the factory, for seven months, with the goal of achieving remediation of the violations that have occurred. The factory has not remedied these violations in full, and, as of yet, Nike has declined to require the factory to do so. Some partial remedies have been proposed and implemented; however, these do not address the bulk of the violations of Thai law and university labor standards. The WRC is also engaging non-collegiate buyers at the plant.

On March 8, the University Caucus representatives to the WRC Board of Directors wrote directly to the factory to encourage the owner to take further steps to address the results of the WRC investigation.

Based on extensive worker interviews, email exchanges with factory management, and a review of relevant documentation, the WRC has found that Hong Seng:

1. Conducted a scheme to avoid paying workers legally required wages during repeated suspensions of employment;
2. Coerced workers to accede to this scheme, with threats of job loss and by transferring uncooperative workers away from their existing positions in the factory; and
3. Retaliated against a worker leader who peacefully and lawfully protested this illegal scheme by reporting him to the police, which forced him to flee the country.

The wage theft at Hong Seng began in May of 2020. Due to a decline in order volume resulting from the pandemic, the factory wanted to temporarily suspend work, initially for the whole factory and then for certain divisions of its operation, initially for May and June and then for a longer period of months. Under Thai law, when workers are suspended for such purposes, employers must pay partial wages to the affected workers. In order to avoid having to comply with this legal obligation to pay workers, managers instructed all workers to sign a form falsely stating that they wished to take "voluntary" *unpaid* leave. Management then used these falsified forms as a basis for refusing to pay workers their wages.

Workers who refused to sign or indicated that they wanted to consult the Thai government or worker support nongovernmental organizations (NGOs) were called into meetings and intimidated. Factory staff threatened workers with dismissal, even more days of suspension, and other reprisals, including a vague statement that workers would have to "take responsibility for any problems that could arise" if they consulted outside parties. On its Facebook page, the factory threatened workers with legal prosecution for posting about the situation on social media.

When some workers shared their concerns with each other via Facebook Messenger and began formally filing complaints with the Thai labor ministry, the company retaliated by reporting a key worker leader to the police, claiming that his criticism of the company's efforts to compel workers to accept unpaid suspensions constituted an attempt to harm the company. Fearing the factory's actions would result in his unjust imprisonment, the worker leader, a migrant from Myanmar, was forced to flee to that country with his wife and infant child, at significant cost and risk to themselves. His fear of imprisonment was entirely reasonable, given the experience of migrant workers with the Thai criminal justice system. The WRC has also received allegations of retaliation against a second worker who was fired from the factory, which the WRC is still investigating.

Hong Seng was one among many factories in Thailand wanting to reduce payroll last year amidst reduced demand. There are two legal means to do so in the country, both of which involve some cost to employers: (1) dismiss workers permanently, which requires payment of legally mandated severance, or (2) suspend workers temporarily, which requires partial ongoing payment of wages. Wishing to avoid the cost of complying with the law, Hong Seng found a third option: it devised an illegal strategy to reduce payroll without cost, by directing workers to falsely claim that they wished to take unpaid leave. In so doing, it broke the law and deprived workers of substantial income that workers were legally due.

Most workers bowed to management's directive, fearing that a failure to do so would cost them their jobs. The consequences of job loss in the early months of the pandemic were grave, particularly for migrant workers from Myanmar, who represent a substantial portion of the Hong Seng workforce. New jobs were very scarce and border crossing restrictions were being imposed in response to the pandemic, meaning that if a migrant worker was dismissed, and thus lost their right to remain in Thailand, returning home safely was a major challenge in itself, let alone being able to find new employment in Thailand after a period out of the country.<sup>1</sup> A number of the workers were pregnant at the time and therefore particularly vulnerable, since job loss would carry the loss of maternity benefits and reemployment was very unlikely.

Nike has acknowledged some violations at the factory, in those cases where workers refused to sign the unpaid leave documents management pressed them to sign and were then denied pay anyway. Nike asked Hong Seng to reimburse these workers, which it has done. Unfortunately, this group represents less than one percent of the workforce. Nike does not acknowledge the broader violations, stating that its own investigation and another it commissioned concluded that there was no illegality in cases where workers signed an unpaid leave document. Nike also does not acknowledge that filing a police report against a worker who protested management's actions constituted an act of retaliation.

As discussed above, there is convincing evidence that Hong Seng coerced workers to sign documents acknowledging that their leave would be unpaid. In addition, those few workers that resisted the coercion and refused to sign the leave document were still not paid their proper

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<sup>1</sup> International Labour Organization Country Office for Thailand, Cambodia and Lao PDR, *COVID-19: Impact on migrant workers and country response in Thailand*, July 3, 2020, [https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/briefingnote/wcms\\_741920.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/briefingnote/wcms_741920.pdf).

wages, a powerful illustration that the management never intended to pay workers' wages, whether they "volunteered" to go unpaid or not. This evidence, in itself, constitutes definitive proof that management's actions were unlawful.

It is important to understand that there is also a fundamental, *logical* flaw in the analysis of Nike's auditors: in order for their position, that the nonpayment of wages was lawful, to be valid, it would have to be true that more than 99 percent of the Hong Seng workforce made a completely *voluntary* decision to give up weeks of wages that they otherwise would have been entitled to receive. In other words, it would have to be true that almost every worker in this factory *preferred* to go unpaid.

Nike's position also conflicts with a ruling by the Thai government. Thailand's Department of Labour Protection and Welfare (DLPW), in response to a worker complaint, found that the unpaid leave form presented by Hong Seng to workers did not constitute a valid agreement that justified nonpayment of wages.

So far, only those workers who had the wherewithal to withstand management's threats and intimidation have been compensated. While those workers' courage certainly merits admiration, such heroics should not be a prerequisite for workers to be paid what they are legally owed.

It is Nike's obligation, under the terms of its licensing agreements, to require its collegiate suppliers to fully remedy violations of university labor standards. The WRC continues to engage with Nike, as well as with the factory and the non-collegiate buyers, to seek full remediation. Nike has provided to the WRC a statement presenting its position on the case. This statement can be reviewed in its entirety in the "Licensee and Buyer Responses" section of this report.

## **II. Methodology**

The WRC's findings in this report are based on the following sources of evidence:

- Interviews with current and recently terminated Hong Seng workers;
- Email communication with the management of Hong Seng;
- Communication with Nike;
- Documentation related to unpaid suspensions at Hong Seng;
- Police report made by Hong Seng;
- Findings reached by the Thai Department of Labour Protection and Welfare (DLPW); and
- A review of relevant Thai laws and regulations.

## **III. Findings**

### **A. Failure to Provide Legally Required Compensation**

Under Thai law, when a company wishes to suspend operations in part or in whole, it must provide the impacted workers with compensation, during the period of suspension, that is equal

to at least 75 percent of the wages they were receiving before the suspension.<sup>2</sup> An employer could, of course, terminate workers; however, in Thailand, permanent dismissal triggers substantial severance obligations.

In April 2020, Hong Seng's management found itself in a situation where it wanted to suspend operations, initially for the whole factory and subsequently for particular sections. Rather than fulfill its obligation to pay workers, Hong Seng pursued an illegal avenue to eliminate its financial liability: it compelled the workers it wanted to suspend to give up their wages during their suspension by falsely reporting that they were taking voluntary leave.

#### 1. Unpaid Suspensions May–June

In April, the factory began informing the workers of its plans to require that workers accept unpaid leave. While the factory has maintained that the leave was fully voluntary, worker testimony and documentary evidence make it clear that, in fact, this was driven by factory management. As is shown in this chronology, the factory chose dates it wished to suspend workers and instructed the workers to sign on the dotted line; workers did not make a free choice to take these days off. This renders the company's actions illegal under Thai law.

Worker testimony and documents provided by Hong Seng and by workers indicate that this began in April. By April 1, the factory reports it had posted an announcement informing workers that they would have “an opportunity” to take leave without pay. By April 9, the company had begun informing workers verbally that factory management had decided to shutter the factory for three working days in May and four working days in June and that the company would not provide wages on these days to the workers. Workers report that this was not framed as a voluntary opportunity but as a firm plan applying to all workers.

On April 16, at about 4:00 p.m., Hong Seng management instructed workers to sign a prepared form wherein the workers “requested” unpaid leave for the following seven Saturdays: May 2, 6, and 30 and June 6, 13, 20, and 27. Saturday was typically a full workday according to the factory schedule. The WRC has reviewed a sample of the forms that were used, which included a list of workers' names with the days the workers would not be working and a line for each worker to sign.

While the form stated, “I have been informed that requesting leave without pay is voluntary on the part of the workers”, workers did not view this as a free choice. According to detailed, credible, and mutually corroborative worker testimony, most workers felt that a refusal to sign the form would result in retaliation and/or harm their standing with management. Most workers thus signed the form, even though they consistently testified that they had no desire to take

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<sup>2</sup> Thai Labour Protection Act (“LPA”), B.E. 2541, § 75, as amended by LPA (No. 7), B.E. 2562 (2019), § 12 (“In the event where it is necessary for the employer to temporarily stop part of the whole of business operations for any reason, that affects the employer's business causing the employer to be unable to operate the business as usual, which is not a *force majeure*, the employer shall pay to the employee not less than seventy-five percent of the wage on the working day that the employee received before the employer suspended the business throughout the period that the employer does not require the employee to work at the payment place under §55 and within payment deadline under § 70 (1).”

voluntary unpaid leave. The WRC is only aware of one worker, Kyaw San Oo, who refused to sign.

Assuming a daily wage of 330 baht and a workforce total of 3,360, as per Nike disclosure, the WRC estimates that the total cost to workers of the three unpaid days in May was approximately 3,326,400 baht (US\$109,891).<sup>3</sup>

## 2. Unpaid Suspensions June–December

Hong Seng then extended this scheme, increasing the number of days during which workers would be sent home without pay. In this second phase, the number of days—and thus the cost to workers—was significantly larger; workers would be placed on leave for both Fridays and Saturdays, for the remaining seven months of the year. As a result, more workers refused to participate in the scheme, and the company resorted to more direct pressure and threats to induce workers to sign.

### *Initial Rollout of June–December Unpaid Suspensions*

The company reported that it posted a new announcement on May 13. In this announcement, the company stated that from June to December 2020, there would be eight days of unpaid leave per month. The announcement stated that workers “who want to take leave” will have to sign a form showing their intention and that this canceled and replaced the previous announcements regarding unpaid leave.

Workers interviewed by the WRC indicated that they became aware of the new plan on May 20, when management verbally informed them that the company would increase the number of days during which parts of the factory would not be operating and workers would be sent home without pay, from four to eight days per month. Factory management told workers that if the situation did not improve, then the company would continue the unpaid suspensions until further notice. A new form was given to the workers, which they were told to sign. As before, the form listed each worker’s name and then the specific dates—this time, for each month from June to December 2020—for which the workers were supposed to sign up for leave without pay. The unpaid days would be two days per week, and thus varied from seven to nine each month.

### *Threats and Intimidation: Company Response to Worker Resistance*

While many workers signed the form when told to do so, some workers, particularly in the cutting section, were unwilling to do so. Workers interviewed by the WRC believed that at least 60 workers initially refused to sign. In response to the pressure described in this report and the treatment of Kyaw San Oo, approximately 80 percent of these workers ultimately acquiesced and signed the document.

Some workers questioned the legality of the company’s actions. In one meeting between workers and management, the worker Kyaw San Oo asked that the company follow the law and suspend

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<sup>3</sup> The exchange rate used in this report, unless otherwise noted, is USD 1:THB 30.27, the exchange rate as of February 25, 2021.

them with 75 percent of their wages. Management refused and responded that workers' understanding of the law was incorrect.

When workers told factory management that they would make further inquiries about the legality of the unpaid time off work, management responded that if the workers asked outsiders, they would have to "take responsibility for any problems that could arise". The workers interpreted this as a threat.

Over the following days, Hong Seng management intensified the pressure on the workers to sign the unpaid leave form. On May 25, at 2:00 p.m., factory management convened another meeting and informed workers that the company had received fewer orders and, therefore, needed the workers to help the factory by signing up for unpaid leave. Then again on the following day, May 26, the company called the workers who were still refusing to sign into the office individually. At these individual meetings, workers reported that the management again presented them with the unpaid leave forms covering seven to nine days of each month from June to December. When they refused, they were threatened with more dire financial consequences: "You don't want to work here anymore, do you? If you do not sign, you will be suspended for two months!" To the latter threat, some of the workers responded that they would be willing to be suspended, if the company would fulfill the appropriate legal requirements.

On June 24, at 4:40 p.m., the company's human resources staff asked workers to sign an additional unspecified document, with the explanation that it was related to the suspension of work. The workers refused to sign the document because they were not sure what it was. In response, the human resources staff threatened that, "if you do not sign, then from now on if you come to work even one second late, you will get a warning letter."

Instead of further pursuing these "voluntary" signatures, however, the company chose to post an announcement<sup>4</sup> stating that in order to address serious economic difficulties brought about by the Covid-19 pandemic, the company had negotiated with the employees to reduce the impact by "allowing the workers to take leave without pay with their consent". It is not clear what purported negotiation this refers to.

As is described below, the company ultimately acted on its threats to harass workers who refused to acquiesce to its unpaid leave scheme.

### *Changes to the Unpaid Suspension Schedule*

On June 30, Hong Seng announced that due to an influx of new orders, the company would cancel the unpaid suspensions for the sewing division and all sewing supporting sections, of which the company lists 16 divisions, including cutting, embroidery, printing, and quality control. This announcement also stated that other divisions would still follow the previous instruction, continuing the unpaid suspensions.

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<sup>4</sup> On file with the WRC; the announcement was labeled No. 12/2563 (2020).

Worker testimony suggests that the sampling division was placed on partial unpaid suspension for the longest period. In addition, worker testimony indicates that approximately 50 pregnant workers who were on light duty were also kept on suspension during this period. According to worker testimony, the pregnant workers were not called back to work until mid-October 2020, when the factory was expecting a buyer visit. Additional information on the factory's operations will be needed to determine whether this constituted a form of discrimination.

### *Calculation of Total Unpaid Wages*

Hong Seng's continued refusal to provide records requested as part of the WRC investigation has made it impossible for the WRC to fully document the scope of the unpaid suspensions. While the factory has provided some documents in response to repeated requests, it has failed to supply the payroll records necessary to assess this question. The WRC estimate of the total amount of pay denied to workers is shown in Table 1. As the factory declined to provide the full payroll data requested, this calculation is based on incomplete data; it will need to be revised based on full information from Hong Seng to reach a more precise figure.

**Table 1: Calculation of Total Unpaid Wages in Thai Baht and US Dollars**

<b>Month</b>	<b>Days</b>	<b>Workers Affected</b>	<b>Number of Workers</b>	<b>Total (THB)</b>	<b>Total (USD)</b>
May	3	All departments	3360	3,326,400	\$109,891
June	8	All departments	3360	8,870,400	\$293,043
July (1st weekend)	2	All departments	3360	2,217,600	\$73,261
July (remainder of month)	6	All departments except Sewing	1000	1,980,000	\$65,411
August	8	Sample division and pregnant workers	200	528,000	\$17,443
September	8	Sample division and pregnant workers	200	528,000	\$17,443
October	4	Pregnant workers	50	66,000	\$2,180
<b>Total</b>				<b>17,516,400</b>	<b>\$578,672</b>

### 3. Department of Labour Protection and Welfare (DLPW) Findings

In two cases, the relevant Thai government agency, the DLPW, has ordered Hong Seng to provide back pay to workers for the days they were suspended without pay. The first complaint was filed on June 4 and received a response on July 15, and the second was filed on July 17 and received a response on September 11. In each case, a number of workers initially filed the complaints together, but nearly all workers later rescinded their participation.

Four workers participated in filing the initial complaint, which pertained to the unpaid days worked in May. Only one worker, Kyaw San Oo, whose case is further explored below, saw the complaint through to the end. DLPW found that he was entitled to receive compensation for the days addressed in the complaint.



Worker testimony indicates that the remaining three workers withdrew their complaint in response to pressure from management. The workers were called into the factory office, where management asked them why they had filed a complaint at DLPW. When the workers told management that the DLPW officer had informed them that they would likely receive back pay if they filed the complaint, the factory representatives scoffed and told the workers there was no way that they would pay. This testimony indicates that the workers withdrew their complaint in exchange for partial back pay, totaling three days' pay, and, for two of the workers, the reversal of the transfers described below. The workers initially requested, but did not receive, a written commitment from the factory that there would be no future retaliation against them.

The second order directly addresses the validity of the unpaid wage scheme. A slightly larger number of workers participated in the second claim; only Hla Thein Aung pursued it to the end. Hla Thein Aung's order indicates that DLPW does not consider the unpaid leave request form signed by workers to constitute a genuine agreement. Hla Thein Aung had not, in fact, signed the document. Nonetheless, DLPW stated in its findings that, "Even if the company, the employer, would refer to the worker having signed the abovementioned request form for unpaid leave on June 6,13,20,26, in the signing of this unpaid leave request form, the worker would have signed his name in the column titled 'I have been informed that requesting leave without pay is voluntary on the part of the workers,' which credibly is only an acknowledgement of having received the information in the form. **It [the unpaid leave request form] cannot be used as an agreement to take leave without pay**" [emphasis added]. In other words, even if Hla Thein Aung had signed the leave request form, it would not constitute an agreement that would satisfy the legal requirement for unpaid leave.

The same rationale from the DLPW's findings in this case are equally applicable to all workers in the factory and to both the first and second unpaid leave request forms, which were identical in their language. Unfortunately, Hong Seng has failed to recognize the broader applicability of these findings to the rest of its workforce.

It is worth noting that the only two workers who, to the WRC's knowledge, successfully pursued DLPW claims have now been effectively removed from the factory; Kyaw San Oo's case is described below, and the WRC is currently completing an investigation into the termination of Hla Thein Aung.

#### 4. Conclusion

Thai law is clear that employers that wish to suspend workers based on the employer's needs are required to pay workers at least 75 percent of their wages. Hong Seng attempted to circumvent the law by implementing a program of faux-voluntary leave under which workers would receive no payment.

This was not a situation in which workers solicited their employer for unpaid time off. Rather, the employer informed workers that they would not be working or be paid on a certain set of days determined by the employer—and then instructed the workers to request unpaid leave on those days. The factory's claim that this was fully voluntary is implausible on its face; why would workers opt for zero pay in favor of the partial pay that they are entitled to under law?

Management's role as not only architect but enforcer of this plan is further underscored by the fact that any workers who refused to sign were met with intimidation and retaliation, as described in the next section.

Hong Seng has claimed to the WRC that the firm consulted with the government to confirm that its approach was legal. However, the company has failed to provide any official letter from the authorities backing this claim. Rather, as noted above, the Thai government has, in fact, found that the company did violate the law and does have an obligation to provide compensation.

By requiring the workers to request to take leave without payment of wages, the company violated the workers' legal rights to receive pay during suspension and, by extension, university codes of conduct.

## B. Retaliation and Intimidation

As illustrated above, multiple workers described Hong Seng threatening workers with suspension, termination, targeting for disproportionate discipline, and other consequences for refusing to sign the unpaid leave form. This section details cases in which Hong Seng transferred and harassed workers and attempted to criminalize one worker's associational activities by reporting him to the police. It also relates the experience of one worker who alleges that he was terminated in retaliation for his refusal to sign the unpaid leave form; while the WRC is still investigating the details of the termination, we share here our findings as to his treatment leading up to that termination.

### 1. Intimidation and Retaliation against Worker Leader Kyaw San Oo

Mr. Kyaw San Oo, a Burmese migrant worker, was the key leader in the effort to collect signatures protesting the company's wage theft scheme. Kyaw San Oo used private social media messages to his colleagues to lead the collection of the 60 signatures on the letter that was to be sent to Hong Seng and DLPW. Kyaw San Oo also refused to sign the unpaid leave form every time he was called to meet the company's human resources staff and supervisors. At the meeting on May 20, he was the person who suggested that Hong Seng should pay 75 percent of the wages if the company wanted to suspend the workers. He also participated in the May 22 meeting with DLPW.

#### *Intimidation on the Job*

On May 25, Kyaw San Oo was called in to meet the human resources staff three times. The first time, a human resources staff member warned him to be careful because of "many warning letters" and then asked him to sign the unpaid leave form. The second time, another human resources staff member asked, "why are you not signing? Most workers have already signed." He responded that he would sign if the company paid 50 percent wages, which the staff refused. The third time, he was called in and made to sit and wait for half an hour. Again, he was asked to sign the leave form, and again he refused.

On May 26, at 9:00 a.m., the workers at the cutting department who refused to sign were called to meet human resources staff and a supervisor one by one. According to workers' testimonies, at these meetings the human resources staff and supervisor again asked him to sign. When he still refused, the staff told him, "whether you sign or not, the factory will not be operating [those days]."

On May 27, two days after the human resources officer had threatened Kyaw San Oo with "many warning letters", Kyaw San Oo was given a warning letter from his supervisor, which stated that three months earlier in February, he had taken leave without notifying the supervisor. Kyaw San Oo protested that he actually had notified his supervisor when he took leave in accordance with regular practice and that, in any case, the issue was three to four months old. In response, his supervisor said, "I had no fucking idea you left."

### *The Use of the Thai Police to Intimidate Kyaw San Oo*

On May 27, Hong Seng management escalated their intimidation by filing a police complaint against Kyaw San Oo, claiming that the worker had defamed the company. The company has provided the WRC with a copy of the complaint document issued by the police.

In the complaint, the company alleged that Kyaw San Oo had posted in Burmese that "the company was closing down and is forcing workers to sign an acknowledgement that they would not get paid for these days" and "if workers refused to sign, they will be accused of violating company rules." The company claimed these statements "create misunderstanding amongst the workers and damages the company."

The police complaint makes it clear that Hong Seng asked the police to take legal action against Kyaw San Oo. A sentence was written and then crossed out by the company representative, who signed for the change in the margin. The eliminated sentence stated that, "if the worker removes the posts, then the company will withdraw the charges." The fact that this was crossed out suggests that the company's purpose with its complaint is to ensure prosecution of the worker.

Even if the worker had made such statements in public Facebook posts, Hong Seng's actions would constitute a disturbing attempt to criminalize the worker's efforts to protect his rights, denying his right to speech and collective action. However, neither in the police complaint nor to the WRC has Hong Seng produced any evidence that Kyaw San Oo did in fact post publicly about the pressure to sign the unpaid leave form. To the WRC, Hong Seng management provided an undated screenshot showing a posting of a page of the workers' contract, which is not relevant to the complaint. Hong Seng's message to the WRC suggests that perhaps other workers had posted screenshots or shared with management a private message sent them by Kyaw San Oo.

On May 28, Hong Seng posted on its own Facebook page a warning that if any workers were posting on social media anything that the company found defamatory, they would press for "legal prosecution to the fullest" and showed part of the police complaint filed the day earlier against Kyaw San Oo, as an example of an "ongoing legal prosecution report".

On May 29, a manager came to the production line and called over the Burmese line leader to inform him that the company was preparing and printing information on the workers who had

“posted on social media” to be used for a criminal complaint with the police. On June 1, Kyaw San Oo learned from his line leader that he was being targeted for arrest by the company. On the following day, the line leader repeated the threat and added that the company was printing documents to be used as evidence against him and was asking people who were his friends on Facebook to serve as witnesses against him.

### *Kyaw San Oo Flees to Myanmar*

The repeated warnings and threat of imminent arrest by Thai police made Kyaw San Oo fear for his liberty, and he worried that his innocence would not protect him from arbitrary arrest and detention. This was a legitimate concern given the reputation of Thai authorities being biased against migrant workers.<sup>5</sup> Burmese migrant workers who have spoken out against employers have, in recent years, faced jail time and deportation.<sup>6</sup> In one case, a Burmese migrant activist reported experiencing “torture” in the Thai prison and fearing assassination while in prison.<sup>7</sup> He saw no other safe option than to immediately leave the country. In addition, Kyaw San Oo feared that the company could retaliate against his wife, who also worked at Hong Seng.

On June 4, Kyaw San Oo left for Myanmar together with his wife and their nine-month-old child. Because of the border restrictions implemented in response to the Covid-19 pandemic, the family had to pay 13,000 Thai baht (US\$420) to underground agents to secure a passage—through routes and methods arguably unsafe for small children. En route to Myanmar, confirming his fears, a colleague called him on the phone and asked of his whereabouts, telling him that the company was seeking to have him arrested.

### *Conclusion*

Hong Seng management explained to the WRC that they considered Kyaw San Oo to have resigned due to not showing up for work on three consecutive days without taking leave. In response to a DLPW complaint and Nike engagement, it has paid Kyaw San Oo for the unpaid days of leave in May and committed not to make any further efforts to seek police action against him. This explanation of the end of his employment, however, is specious.

It is clear that the company’s choice to report Kyaw San Oo to the police made it impossible for him to keep working and, indeed, impossible for him to stay in Thailand. This is a case of constructive dismissal, rather than a worker simply not showing up for work.

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<sup>5</sup> See, e.g. U.S. State Department, Bureau of Democracy, *Human Rights and Labor, Country Reports 2019: Thailand*, <https://www.state.gov/wp-content/uploads/2020/02/THAILAND-2019-HUMAN-RIGHTS-REPORT.pdf>; Human Rights Watch, *Hidden Chains: Rights Abuses and Forced Labor in Thailand’s Fishing Industry*, January 23, 2018, <https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry>.

<sup>6</sup> See, e.g., Human Rights Watch, “Thailand: Burmese Workers on Trial for Reporting Abuses,” February 7, 2018, <https://www.hrw.org/news/2018/02/07/thailand-burmese-workers-trial-reporting-abuses>; “Thailand releases Burmese migrant activist, will deport him,” March 19, 2019, *The Thaiger*, <https://thethaiger.com/news/bangkok/thailand-releases-burmese-migrant-activist-will-deport-him>.

<sup>7</sup> Zaw Zaw Htwe, “Migrant Activists Fears for His Life in Thai Detention,” *Myanmar Times*, October 26, 2018, <https://www.mmmtimes.com/news/migrant-activist-fears-his-life-thai-detention.html>.

Retaliation by threatening to arrest and filing a police complaint against a worker who demands his legal rights is a direct violation of Thai law, which prohibits the employer from taking any action to render an employee unable to continue working as a result of the employee submitting a demand or complaint.<sup>8</sup> By extension, it is also a violation of university codes. It also constitutes an attempt by the company to criminalize Kyaw San Oo's legitimate activities: his efforts to exercise his associational rights by messaging his coworkers and his effort to file a complaint at DLPW.

In response to engagement by Nike and the WRC, the company has stated that they would rehire Kyaw San Oo if he returned to Thailand. However, understandably, he no longer wishes to return to Hong Seng's employment. The company's successful effort to instill fear in Kyaw San Oo has meant that he and his wife have lost their opportunity to continue employment at the factory through the end of their contracts and have lost their rights to severance.

## 2. Retaliatory Transfers of Workers Who Refused to Sign for Leave without Pay

After having been informed that the number of unpaid days would increase on May 20, several Burmese migrant workers decided to write a protest letter to send to the company and DLPW, the relevant government agency. On the following day, they circulated a draft using Facebook Messenger. While 60 workers signed, the letter was never sent to DLPW or presented to the company due to rumors that the company was preparing to arrest any workers who were involved with the letter.

Instead, four of the Burmese migrant workers went in person to DLPW on May 22 to consult the authorities. They were initially informed that the officer of DLPW would call the employer to discuss this issue on June 2. When the June 2 date passed without further information from the DLPW officer, the four workers who had made the first inquiry proceeded to file a formal complaint, dated June 4, demanding that the employer pay wages for the days they were suspended without pay. One of these the four, Mr. Kyaw San Oo, filed his case in absentia because, as has been detailed above, he was fleeing Thailand out of fear of arrest based on the company's police complaint.

On June 8, just four days after they had filed the complaint at DLPW, the three other complainants were transferred from the cutting department to work at the packing department, where they had no prior experience. On June 24, 2020, two days after the three complainants had been called to provide more details to the labor inspector of DLPW, they were again transferred, this time to the sewing department.

On June 19, another eight Burmese migrant workers also went to DLPW with the intention to file a complaint. They were told by the labor officer that they should wait until the end of the month to file.

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<sup>8</sup> Thai Labour Relation Act ("LRA"), B.E. 2518, § 121 ("An Employer shall not: (1) terminate the employment of or take any action which may result in an Employee, a representative of an Employee, a Committee member of a Labour Union or Labour Federation being unable to continue working, as a result of the Employee or Labour Union calling a rally, filing a complaint, submitting a demand, negotiating or instituting a law suit or being a witness to producing evidence to competent officials under the law on labour protection...").

Three days later, on June 22, these eight workers were transferred from the cutting department to work at the sewing department on the basis that it was the only department that still had work full time. The workers reported they had no prior experience with sewing, but when they were called to the human resources office, they were told by the human resources staff that there was not enough work in the cutting section. Unfortunately, it is not uncommon for the Thai authorities to provide employers with the names of workers raising concerns about their practices, exposing workers to this type of retaliation.

Further information regarding one of these workers, Hla Thein Aung, can be found below.

The company has denied that these transfers were retaliatory.

Hong Seng's pattern of changing the position of the workers promptly after any of them filed a complaint with the labor inspector—or in the case of the second group, even met with DLPW—shows that these transfers were of a retaliatory nature for their filing of a complaint and, therefore, violate Thai law prohibiting retaliation against workers who are filing a complaint to the labor authorities and, by extension, university codes of conduct.

### 3. Intimidation, Retaliation, and Alleged Retaliatory Termination against Hla Thein Aung

One Burmese migrant worker, Hla Thein Aung, continued to pursue his case at DLPW longer than the other workers who initially filed the claim with him. As a result, he also experienced additional harassment from management. This section shares the chronology of his experience, through the time of his dismissal in October 2020. The WRC is currently investigating this dismissal and will share findings regarding his termination once the investigation is complete.

Hla Thein Aung filed a complaint with DLPW on July 17, 2020. He had been among the eight workers who had approached DLPW on June 19 regarding back pay for the unpaid suspensions but did not ultimately file a complaint on that date.

In early August, several weeks after he had filed the complaint, Hla Thein Aung was called to meet factory management in the company office. Factory staff told him that they could not pay him for the days off work. They asked him to sign the unpaid leave request form, telling him that everybody else had signed. The staff told him they faced questions from their boss as to why there was still one worker who had not signed. Hla Thein Aung continued his refusal. Ultimately, he agreed to sign a document acknowledging that he would be transferred to a different department.

Hla Thein Aung's testimony indicates that management deliberately treated him poorly as a response to his continued pursuit of his DLPW complaint. After he had signed the letter, beginning on August 7, he was sent to assist other departments on every Friday and Saturday, the days on which he would otherwise have been on leave. He was not informed in advance as to which department he would work in on any given day. Instead, each Friday morning, a staff person from the human resources department would take him to his workplace for the day.

On August 14, he was sent to the packing department, where he overheard the human resources staff person tell the supervisors that “this is one of the fucking troublemakers who demands to work six days per week. Work him hard and move him around a lot. Soon he won’t be able to take it, and he’ll quit.”

Despite this treatment, Hla Thein Aung continued performing his work. On September 11, 2020, DLPW ordered Hong Seng to provide Hla Thein Aung with back pay for the days he had been suspended without pay.

On October 9, 2020, Hong Seng fired Hla Thein Aung without paying any severance. Hla Thein Aung filed a complaint related to the termination at DLPW and received a finding on December 15, 2020, that he should be provided severance pay. Hong Seng provided this payment in February. The WRC is currently investigating whether this termination constituted retaliation.

#### **IV. Recommendations for Corrective Action**

The WRC recommends that, in order to correct the violations of Thai law and university codes of conduct identified above, Hong Seng should:

- Provide all workers who were told to take unpaid leave with back pay for the days they were suspended without pay from May onwards;
- Provide compensation to Kyaw San Oo and his wife totaling the equivalent of (1) the remaining amount they would have earned during their contracts, (2) the severance pay they would have been entitled to if the company had chosen not to renew their employment at the end of that contract, under the Memorandum of Understanding governing Burmese migrant workers in Thailand, and (3) the amount they had to spend on emergency travel costs, as well as payment for any days that they were suspended without pay that have not already been compensated. The WRC calculates this amount to be 287,068 baht, or US\$9,484; and
- Adopt and abide by a policy that Hong Seng will respect workers’ associational rights and will not harass or retaliate against workers who file complaints or raise concerns with DLPW and with organizations that can provide assistance. This policy should be reviewed by the WRC and by the Human Rights and Development Foundation (HRDF), a Thai organization supporting garment workers, and should then be communicated to all workers.

The WRC had initially provided an additional recommendation regarding the transferred workers, which has been resolved as per the Company Response section below.

The WRC is still investigating the termination of Hla Thein Aung; findings and any necessary recommendations on his case will be forthcoming.

## V. Company Response

The WRC initially attempted to solicit Hong Seng's cooperation in our investigation on July 15; Hong Seng did not respond and reports that it did not receive the message. After requesting Nike's support in facilitating Hong Seng's cooperation, the WRC again wrote Hong Seng on October 23 with a number of questions and document requests. The company then provided a portion of the documents requested and answers to a number of questions, which are enclosed here. In addition, we have had multiple conversations with Nike in which Nike has shared aspects of the company's perspective with the WRC.

As noted above, Hong Seng has repeatedly refused to provide the payroll documents that would be necessary to document the scope of the unpaid leave scheme and calculate the full sum owed to workers, as well as to assess additional possible violations.

### *Unpaid Leave Scheme*

Hong Seng has refused to compensate nearly all of its more than 3,000 workers, except approximately one dozen workers, for the days for which they were not paid.

The company provided a small payment to Kyaw San Oo, totaling 993 baht (US\$33), for three unpaid days of work in May, in response to a DLPW order.

On February 10, according to worker testimony and information from Nike, the company also provided partial compensation to a small number of workers. Workers were aware of eight workers who were offered payment, seven of whom were present that day and able to accept; information provided by Nike indicates that there may have been three additional workers who were offered or received payment. According to worker testimony, these workers received wages for the dates of their unpaid suspensions in June; some received six days of wages and others received eight days. Assuming these payments were made to 8–12 workers, the WRC calculates that the total amount made available to these eight workers is between US\$610 and US\$920, out of a total amount of back pay owed to workers of nearly US\$600,000. Some of these workers were among those who had originally filed complaints at DLPW. Based on information provided by Nike, the WRC understands that these workers were chosen for back pay on the basis that they had refused to sign the unpaid leave request forms and then been suspended without pay regardless.

According to worker testimony, a representative of factory management requested that the workers sign a statement that they would not discuss the payment with other workers. While the workers refused to sign, this request, in itself, constitutes a violation of the workers' associational rights.

A payment was also made to Hla Thein Aung pursuant to a DLPW order.

According to WRC estimates, the payments Hong Seng has made to these and a few additional workers total less than one half of one percent of the total owed in back pay. The company has refused to make the necessary restitution to its workers.



Hong Seng continues to maintain that its unpaid leave scheme is legal and refuses to make payments to the additional workers. The company has not provided a legal analysis to support its position. The company reported that DLPW representatives had approved its approach but could not provide any documentary evidence.

### *Case of Kyaw San Oo*

Hong Seng has refused to provide the recommended compensation to Kyaw San Oo. As the WRC's discussions on this topic have been with Nike, with Nike representing Hong Seng's position to the WRC, further detail on this can be found below in the Licensee and Buyer Responses section.

### *Transfers*

This is the one area of violations which the WRC believes to be resolved. Either in response to engagement by Nike and the WRC or as part of its efforts to induce workers to withdraw their DLPW complaints, or as some combination of the two, Hong Seng offered to transfer the workers back to their former positions. The majority of the workers elected to return to their former positions and the company fulfilled these requests. In at least some cases, as noted above, the company's agreement to return the workers to their previous departments was inappropriately linked to agreements in which workers dropped their rightful complaints with DLPW.

## **VI. Licensee and Buyer Responses**

The WRC has engaged extensively with Nike, the sole licensee sourcing collegiate product from Hong Seng, and has also engaged buyers sourcing non-collegiate apparel from the factory.

### **A. Nike**

Both the WRC and the Thai human rights organization HRDF separately contacted Nike in the summer of 2020 regarding the violations; the WRC sent our first written summary of the areas of our investigation on August 4, 2020. The WRC and Nike have met virtually several times to discuss the case. Nike has encouraged Hong Seng to cooperate with the WRC investigation, with the result that Hong Seng has provided some, but not all, of the necessary documents.

Nike has chosen not to accept the WRC's findings, as laid out in this report, that Hong Seng violated Thai law, Nike's code of conduct, and university codes of conduct through its unpaid leave scheme and retaliation against Kyaw San Oo. Instead, Nike commissioned an investigation by the for-hire auditor Elevate, as described to the WRC on December 22, 2020.

Nike has informed the WRC that Elevate found that Hong Seng's overall unpaid leave scheme was not in violation of Thai law, that Elevate found no indication of coercion or retaliation related to the scheme, and that Nike fully accepts these findings. Nike has declined to share this report with the WRC and has declined to share any legal analysis underlying Elevate's conclusions.

Nike did state that they identified one social media post by Hong Seng, the May 28 post noted above in the section regarding Kyaw San Oo, that could be viewed as a threat of retaliation and that they addressed this with the company. As of March 9, 2021, this social media post had not been removed from Hong Seng's Facebook wall.

Nike's response to the violations documented by the WRC is as follows.

1. Unpaid Leave Scheme

Based on information provided by Hong Seng and on the report commissioned by Elevate, Nike has stated that the vast majority of Hong Seng's workers are not entitled to back pay for the days they were placed on unpaid leave. In Nike's view, the only workers entitled to back pay are workers who refused to sign the unpaid leave forms. It is unclear what the legal basis for the conclusion is, particularly given DLPW's findings in the case of Hla Thein Aung. Nike reports that the number of such workers was 12.

The only way that Nike's conclusion in this case can be accurate is if 99 percent of the workforce simply opted, without any type of coercion or even any incentive, to forego a substantial portion of their wages for six months. Nike's acceptance of the unpaid leave form that workers were instructed to sign as an "agreement"<sup>9</sup> is illogical and in conflict with the relevant Thai government agency's conclusions.

2. The Case of Kyaw San Oo

With regard to the case of Kyaw San Oo, Nike has maintained that the company's reporting the worker to the police does not constitute a form of retaliation. Nike has accepted an argument from the company that the company was simply "informing" the police, rather than requesting police action against Kyaw San Oo. This is contradicted by the documentary record; the police report provided by Hong Seng itself to Nike and the WRC confirms that the police were being asked to take action. Second, it is unclear what legitimate, non-retaliatory purpose Nike believes the company would have in reporting a protesting worker to the police.

Nike wrote to the WRC that, "[w]hile an incident with one worker from Myanmar did not violate the law, the factory has offered to reinstate this worker and pay transportation costs in line with normal repatriation."<sup>10</sup> While it is positive that the company would be willing to reinstate the worker, Kyaw San Oo is understandably unwilling to return to work at a company that attempted to criminalize his exercise of his associational rights. To the WRC's knowledge, Nike has not pressed Hong Seng to provide the remedy recommended by the WRC, which would be to compensate the worker for the actual losses he and his family suffered in having to flee the country: he and his wife lost the opportunity to work the rest of their work contracts and lost the severance to which they would have been entitled if terminated at the end of those work contracts.

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<sup>9</sup> See, e.g., "Nike Hong Seng Statement: 1 March," on file with WRC.

<sup>10</sup> "Nike Hong Seng Statement: 1 March," on file with WRC.

### 3. Nike Statement

The WRC offered Nike the opportunity to provide a statement for inclusion in this report. We provide that statement, dated March 25, here in full.

*Nike is deeply committed to ethical and responsible manufacturing and to helping ensure all people who make our product are valued and treated fairly and with respect.*

*Since the beginning of the pandemic, Nike has been working with our suppliers to support their efforts in response to the dynamic and unprecedented nature of the COVID-19 situation. As they continue to navigate these circumstances, we expect our suppliers to consider their employees' health and livelihoods and continue to comply with local legal requirements and the Nike Code of Conduct on the provision of health & safety, wages, benefits and severance.*

*The WRC shared allegations that Hong Seng Knitting Company Limited ("HSE") – a contract factory in Thailand that produced finished goods for Nike and other brands – violated local legal requirements and the Nike Code of Conduct when asking its employees to accept unpaid leave as part of the factory's response to the unprecedented business circumstances related to the COVID pandemic. Nike investigated these allegations directly, working with outside counsel and consulting with the Thai Department of Labour Protection and Welfare (DLPW). Nike also hired a third-party investigator to conduct an independent, unannounced evaluation of these allegations. Neither Nike's nor the independent third party's investigation found any evidence that HSE coerced its employees into accepting unpaid leave. Based on those investigations, we believe HSE's requests in April and May 2020 that its employees accept unpaid leave were consistent with Thai law. The investigations did find certain actions by HSE that were inconsistent with Nike standards and/or Thai legal requirements. Since then, employees have returned to work, and HSE has remediated the inconsistencies, including by providing full back payment to 12 employees who rejected the request to accept unpaid leave for their suspended workdays.*

#### B. Other Buyers

The WRC has also contacted the three non-collegiate buyers we have identified as sourcing from the plant: Fanatics, New Balance, and Amer Sport. Fanatics informed the WRC that it ended its business relationship with the factory in April of 2020, which is confirmed by import data. The WRC will nonetheless ask Fanatics to press Hong Seng to fully remedy the violations described in this report. We are currently engaging with New Balance and Amer Sport.