KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 78/13-G-Foremost

Date of award: 8 May 2013

Dissenting Opinion by Arbitrator Ing Sothy

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Ing Sothy**

Arbitrator chosen by the worker party: **Liv Sovanna**

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

DISPUTANT PARTIES

Employer party:

Name: **G-Foremost (Cambodia) Co., Ltd.**

Address: National Road No.4, Kambol District, Porsenchey Commune, Phnom Penh

Telephone: 012 626 868 Fax: N/A

Representatives:

1. Mr Hom Phea — Attorney at Law
2. Mr Jiung Zheng Tian — Head of Administration Department
3. Ms Vong Chanthy — Accounting Assistant
4. Mr Reom Virak — Assistant to Attorney at Law

Worker party:

Name: **- Cambodian Labour Union Federation (CLUF)**

- Local Union of CLUF (the union)

Address: House No.30C, Street 371, Teok Thla Commune, Sensok District, Phnom Penh.

Telephone: 012 837 768 Fax: N/A

Representatives:

1.	Mr Khin Sokhoon	Secretary-General of CLUF
2.	Mr Ly Veasna	Vice-President of the union
3.	Mr Chham Tola	Secretary of the union
4.	Mr Tob Leomheng	Under-Secretary of the union
5.	Mr Suorgn Bonith	Consultant to the union

ISSUES IN DISPUTE

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

1. The workers demand that the employer pay a five per cent severance pay within 2-3 days (currently the company takes half a month to make the payment) and maintain their seniority when the company terminates or renews their employment contracts (fixed duration contract) or when the workers request termination of their contracts. The employer claims it does not agree to the demand.
2. The workers demand that the employer provide larger seats to workers in each section for their convenience. The employer claims it does not agree to the demand.
3. The workers demand that the employer either makes payment in lieu of remaining annual leave or permits them to take leave. The employer claims it permits the workers to use up their remaining annual leave and it does not pay them in lieu of remaining annual leave.
4. The workers demand that the employer calculate wages for work performed on Sundays and holidays by dividing the sum of the base wage and skill bonus by 26 and then multiply it by 2. The employer claims it currently divides the base wage by 26 and multiplies it by 2.
5. The workers demand that the employer permit workers to scan their thumbprint twice a day (in the morning and in the afternoon). The employer claims it requires workers to scan four times a day.
6. The workers demand that the employer arrange four light projectors to be placed in front of the factory for their convenience during overtime work. The employer claims it does not agree to the demand.
7. The workers demand that the employer deduct only US$ 2 per day from their US$ 20 bonuses when the workers take sick leave (certified by a doctor) and maintain other perquisites. The employer does not agree to the demand and claims it will maintain the current practice.
8. The workers demand that the employer provide an additional 2,000 riel overtime meal allowance on top of the existing meal allowance to workers who voluntarily perform overtime work from 6:30 p.m. to 8:30 p.m. The employer claims it does not agree to the demand.

9. (Issue 15) The workers demand that the employer place toilets adjacent to their work stations because they claim it takes time to walk if the toilets are located far away. The employer does not agree to the demand.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this award from Chapter XII, Section 2B of the 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. 121 dated 7 June 2012 (Tenth 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. 431 dated 3 April 2013 was submitted to the Secretariat of the Arbitration Council on 3 April 2013.

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 Commune, Tuol Kork District, Phnom Penh

Date of hearing: 25 April 2013 at 2:00 p.m.

Procedural issues:

On 20 February 2013, the Department of Labour Disputes ('the department') received a complaint from the union dated 19 February 2013, outlining the workers' demands for the improvement of working conditions. Upon receiving the claim, the department assigned an expert officer to resolve the labour dispute and the last conciliation session was held on 28 March 2013, resulting in seven of sixteen issues being resolved. The nine non-conciliated issues were referred to the Secretariat of the Arbitration Council (SAC) through the non-conciliation report no.431 dated 3 April 2013.

Upon receipt of the case, the SAC summoned the employer and the workers to a hearing and conciliation of the nine non-conciliated issues, held on 12 April 2013 at 2:30 p.m. The hearing was moved to 25 April 2013 in accordance with the workers' request via request letter no. 3854/13, dated 9 April 2013. At the hearing on 25 April 2013, the Arbitration Council conducted a further conciliation of the nine non-conciliated issues, resulting in six issues (Issues 1 (one part), 2, 3, 5, 6 and 9) being resolved. The workers withdrew Issues 7 and 8 from this case. Therefore, the Arbitration Council considers Issues 1 (non-conciliated part of Issue 1) and 4.

The parties are signatories to the Memorandum of Understanding on Improving Industrial Relations in the Garment Industry ('MoU') dated 3 October 2012. However, at the hearing, the employer's attorney refused to sign for binding arbitration on rights disputes. The refusal does not change the binding nature of the rights findings as both parties are signatories to the MoU, which stipulates that awards on rights disputes are binding. The requirement that parties sign agreements choosing the types of award (in this case, the award on rights disputes is binding) is an internal rule of the Arbitration Council, which was implemented since the formation of MoU on Improving Industrial Relations in Garment Industry, dated 28 September 2010.

Therefore, the Arbitration Council divided the issues into two types: rights disputes and interests disputes. According to the MoU, both parties have agreed to binding arbitration for rights disputes. However, the MoU does not create binding obligations regarding interests disputes. The parties are able to choose non-binding arbitration for interests disputes, and can object to an arbitral award issued in relation to such disputes. Such an objection will not affect the parties' obligation to implement an award on rights issues in accordance with the MoU. In this case, the parties choose non-binding arbitration for their interests disputes.

In this case, both parties agree to choose non-binding arbitration for interests disputes.

At the hearing, the parties agree to defer the date of the award issuance from 30 April 2013 to 8 May 2013.

Therefore, the Arbitration Council will consider the issues in dispute in this case based on the evidence and reasons below.

EVIDENCE

This section has been omitted in the English version of this arbitral award. For further information regarding evidence, please refer to the Khmer version.

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:

- G-Foremost (Cambodia) is a footwear manufacturer. According to the non-conciliation report no. 431 dated 3 April 2013, the company employs 950 workers.
- The union is the claimant in this case. It has 500 members. The union does not hold a certificate of Most Representative Status (MRS).

- At the hearing, the employer agrees that the union has received a certificate of registration from the Ministry of Labour and Vocational Training, and that it has already received the certificate of registration from the union's leader. Therefore, the Arbitration Council assumes that the union certainly receives certificate of registration from the Ministry of Labour and Vocational Training.

Issue 1: The workers demand that the employer maintain their seniority after it provides a five per cent severance pay under a fixed duration contract.

- At the hearing, the workers demand that the employer maintain their seniority (the total duration of the contracts is one month short of two years) when the employer terminates a three month contract. In this case, the employer provided a five per cent severance pay to workers and permitted them to take one week off before continuing under a new fixed duration contract.
- Since 2009, the employer has offered workers fixed duration contracts, and:
    - About 90% of the workers are on fixed duration contract.
    - In general, the employer signs a three-month contract with the workers.
    - The employer arranges a five per cent severance payment for the workers and lets them to take one week off without pay before commencing a new three month contract. Upon commencement of the new contract, the employer disregards the workers' prior seniority. Workers are only entitled to seniority in the latest contract.
    - At the expiration of the fixed duration contract, the employer pays termination compensation to the workers, including outstanding wages, payment in lieu of remaining annual leave and a five per cent severance pay.
- The workers claim:
    - The workers' seniority in previous contracts should not be disregarded because they have been working for the company all along.
    - By disregarding workers' seniority, the employer avoids paying seniority bonuses, maternity payments, and payments in lieu of remaining annual leave to the workers. This practice damages the workers' benefits granted by law.
    - By law, though the employment contract is suspended, seniority is not disregarded. Seniority has been disregarded by the employer in instances where the workers leave the company for a while and return to sign a new contract with the employer. In this case, the employer is only willing to renew their contracts after a one-week break.
- The employer claims:
    - The employer disregards the workers' seniority because 1) the employer pays a five per cent severance pay to the workers at the expiration of the contract,

and 2) at the expiration of the contract, the employer lets them take one -week off before contract renewal. Therefore, the workers' seniority should be disregarded.

- Seniority bonuses and maternity payments will be provided to workers based on their seniority in the new contracts, and valid only from the date both parties signed the contract. The employer does not provide maternity payments, payments in lieu of remaining annual leave or seniority bonuses to workers if their seniority does not reach one year.
- The employer arranges a one week break for workers before contract renewal because the employer does not want the total duration of the contract to exceed two years, which would make the contract an undetermined duration contract.

Issue 4: The workers demand that the employer calculate wages for work performed on Sundays and holidays by divide the sum of the base wage and skill bonus by 26 and then multiply it by 2 for calculation of wages for work performed on Sundays and holidays.

At the hearing, the workers demand that the employer calculate wages for work performed on Sundays and holidays by dividing the sum of the base wage and skill bonus by 26 and multiplying it by 200 per cent.

- The employer calculates the wages for workers working on Sundays and holidays by dividing the base wage by 26 and multiplying it by 200 per cent.
- The workers claim:
  - For overtime work performed, the employer determines the workers' pay by dividing the base wage by 26 and multiplying it by 150 per cent. Therefore, the employer shall calculate wages for work performed on Sundays and holidays the same as it calculates wages for working overtime, namely by dividing the sum of the wages and skill bonus by 26 and multiplying it by 200 per cent.
  - The wage for workers working overtime on Sundays and holidays increases when the employer takes the sum of the base wage and skill bonus as the basis for calculation.
- The employer does not agree to the workers' demand because:
  - The wages of workers working overtime on Sundays and during holidays is calculated by multiplying it by 200 per cent, which is different from the calculation of wages of workers working overtime on regular working days, which is multiplied by 150 per cent.
  - The employer provides many benefits to workers working overtime on Sundays and holidays compared to overtime work performed on regular

working days, such as lunch or a 3,000 riel allowance to purchase lunch per day (additional 1,000 riel on top of the current 2,000 riel allowance to purchase lunch per day on the regular working days.)

- The skill bonus is separate to the base wage.

REASONS FOR DECISION

Issue 1: The workers demand that the employer maintain their seniority after it provides them with their five per cent severance pay and let the workers take a one week break before contract renewal.

Firstly, the Arbitration Council considers whether the issue gives rise to a rights dispute or an interests disputes.

In previous cases, the Arbitration Council finds that *"Rights disputes are the disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement." (see the Arbitral Awards no. 05/11-M & V1, Reasons for Decision, Issue 1 and 5, 13/11-Gold Kamvimex, Issue 1 and 2, 14/11-GHG Cambodia, Issue 4)*

The Arbitration Panel in this case agrees with the interpretation made in the previous cases.

The demand is in relation to maintaining the workers' seniority, which is relevant to the employment contract as well as the interpretation of various relevant provisions of the Labour Law. Therefore, the Arbitration Council finds that this dispute is a rights dispute.

In the findings of the facts, the employer provides a five per cent severance pay to workers who are on a three-month contract, one month before the total length of their contracts reaches two years, and lets them take a one week break without pay before renewal of a three month contract. Upon contract renewal, the employer disregards their seniority from previous contracts. Only seniority in the latest contract is regarded.

In previous cases, the Arbitration Panel interprets the term "**seniority**" that:

"…seniority is the length of successive service which adds more rights or privileges for the worker based on the length of service provided by the worker…The seniority will end only when the worker stops working for the enterprise." (*see the Arbitral Award no.68/05-Gold Lida, no.75/05-Fortune Garment, no.17/10-Zongtex Garment, Issue 3, 60/10-Kin Tai Garment, Issue 2, and 101/10- Tripos International, Issue 2)*

The Arbitration Panel in this case agrees with the interpretation made in the previous cases.

The workers' seniority is considered based on the duration of the workers working at the company. The workers' seniority is still regarded as long as they don't resign or are dismissed from the company or an enterprise. Their seniority will not be regarded when the workers resign or are dismissed from a company or an enterprise.

In the findings of the facts, the Arbitration Council finds that the employer understands and interprets "seniority" differently. The workers claim that their seniority should be maintained since they have been working for the company all along and the seniority should be terminated only in the case that they stop working for the company. However, the employer claims that it terminates the workers' seniority because 1) at the expiration of the contract, the employer provides a five per cent severance pay to the workers and 2) it lets workers take a one week break before contract renewal on the grounds that the employer does not want workers' fixed duration contracts to become undetermined duration contracts. In this case, the Arbitration Council finds that the dispute arises because of different understanding on the term "**seniority**" between the workers and employer.

In reference to the definition of "seniority" above, the Arbitration Council considers:

1) In instances where an employer provides a five per cent severance payment to the workers before starting new contracts, have they stopped working for the company which should lead to a termination of their seniority?

Paragraph 6, Article 73 of the Labour Law states:

> At the expiration of the contract, the employer shall provide the worker with the severance pay proportional to both the wages and the length of the contract. The exact amount of the severance pay is set by a collective agreement. If nothing set in such agreement, the severance pay is at least equal to five per cent of the wages paid during the length of the contract.

In case no.67/10-New Hung Wah, Reason for Decision, Issue 4, the Arbitration Panel considers:

> When the employer makes a five per cent severance pay and payment in lieu of remaining annual leave does not mean that it terminates the workers' seniority because the workers' seniority is terminated only if the workers stop working for the company." *(see the Arbitral Award no. 70/10- Manhattan, no.17/11- JRB Action Textiles, Issue 2 and no. 144-11-Manhattan Textile and Garment, Issue 3)*

The Arbitration Panel in this case agrees with the interpretation made in the previous cases.

In the findings of the facts, the employer claimed workers' seniority is terminated because at the expiration of the contract, the employer provides a five per cent severance pay to them before contract renewal.

Therefore, the Arbitration Council finds that though the employer provides a five per cent severance pay, it does not mean that the workers' seniority is terminated because both the employer and the workers have no will to terminate the contract. Both the employer and the workers know that there will be a three month contract renewal and the workers continue to work for the same company after the provision of a five-per cent severance pay.

2) In instances where the employer arranges a one-week break for the workers before their contract renewal, are they considered to have stopped working for the company, which leads to a termination of their seniority?

In this case, the Arbitration Council finds that when workers take a one week break, both the employer and the workers know that the fixed duration contract will be renewed because it is general practice. In this case, a one-week break is agreed upon by the parties before contract renewal and it does not reflect their willingness of the non-renewal of the contracts.

Moreover, in case no. 235/12- Manhattan Textile and Garment Corp., Reasons for Decision, Issue 1, the Arbitration Council finds that:

> A two-day break agreed upon by both parties is not considered as the workers stop working for the company. This means that the workers' seniority is maintained because the workers do not stop working for the company. Therefore, in this case, the workers who sign a six-month contract twice have the seniority of over one year though there is a two-day break between each contract.

The Arbitration Panel in this case agrees with the interpretation in the case above.

Therefore, the Arbitration Council finds that there is agreement from both parties that when the employer arranges a one week break for the workers before starting new contracts, this is not tantamount to the workers ceasing their employment with the company. This means the workers' seniority is maintained because the workers have not stopped working for the company yet.

Moreover, paragraph 1, Article 13 of the Labour Law states:

> The provisions of this law are of the nature of public order, except derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or a convention that do not comply with the provisions of this law or any legal text for its enforcement, are null and void.

The Arbitration Panel in case no. 64/11- M & V3, Reasons for Decision, Issue 4, states *"Based on an internationally known principle of civil code requires that parties in civil relationships must implement their rights and fulfill their obligations with integrity and in good faith."*

The Arbitration Panel in this case agrees with the interpretation made in the previous case.

In the findings of the facts, the Arbitration Council found that upon starting new contracts, the employer terminates the workers' seniority which is equal to the total length of the past contracts and the seniority is renewed. Starting from the date of new contract commencement, the workers do not receive severance pay (Notification no.041/11), maternity payment (Article 183 of the Labour Law) and right to use annual leave (Article 166 of the Labour Law) because the employer was holding that the workers had not yet accrued

one years' seniority due to the provision of the five per cent severance pay and the arrangement of a one week break one month prior to their contracts cumulatively reach two years. Therefore, the Arbitration Council finds that this practice reflects the employer's intent to avoid not only the situation in which the workers' fixed duration contract become an undetermined duration contract as it mentions above but also a legal obligation in relation to workers' basic rights guaranteed by the Labour Law. Therefore, the intent to avoid legal obligation is in contrast with Paragraph 1, Article 13 of the Labour Law and principle of good faith.

In conclusion, the Arbitration Council finds that the provision of a five per cent severance pay to the workers and a one week break before starting new contracts is not tantamount to the workers ceasing work for the company, and as a result, the workers' seniority should not be terminated.

Therefore, the Arbitration Council decides to order the employer to maintain the workers' seniority after it provides a five per cent severance pay and arranges a one-week break for workers before contract renewal.

Issue 4: The workers demand that the employer calculate the workers' wages for Sundays and holidays by dividing the sum of the base wage and skill bonus by 26 and multiplying it by 2.

Firstly, the Arbitration Council considers whether the issue gives rise to a rights dispute or an interests dispute.

In this case, the workers demand the employer calculate their wages for work performed on Sundays and holidays. The Arbitration Council finds that the demand is a rights dispute because the demand is in relation to Law on the amendment of Article 139 and Article 144 of the Labour Law dated 20 July 2007 and Clause 4 of Prakas no.10 dated 4 February 1999 of the Ministry of Social Affairs, Veterans, and Youth Rehabilitation on wages for working on holidays. Therefore, the demand is a rights dispute *(see the interpretation of the right disputes, Reasons for Decision, Issue 1 above*).

The Arbitration Council considers whether the workers have the right to demand that the employer calculate their wages for work performed on Sundays and holidays by dividing the sum of their base wages and skill bonus by 26 and multiplying it by 200 per cent.

(A) Wage for overtime work performed on Sundays:

Article 137 of the Labour Law states *"In all establishments of any nature, whether they provide vocational training, or they are of a charitable nature or liberal profession, the number of hours worked by workers of either sex cannot exceed eight hours per day, or 48 hours per week."*

Based on Article 137 of the Labour Law above, the number of hours worked by the workers cannot exceed eight hours per day or 48 hours per week.

In this case, the employer asks the workers to work eight hours per day from Monday to Saturday, which equals 48 hours per week. Sundays are the usual day off for workers, and therefore if a worker voluntarily works on a Sunday, they have worked over the regular working hours.

In previous cases, the Arbitration Panel interprets that: *"the number of hours worked by the workers is eight hours per day or 48 hours per week from Monday to Saturday." If the number of hours worked by the workers is exceeded, the Arbitration Panel considers that it is the overtime work." (see the Arbitral Awards no. 114/08-Whitex, Issue 5, no. 52/12-8 Star Sportwear, Issue 2 and no. 248/12-M & V3, Issue 5)*

The Arbitration Panel in this case agrees with the interpretation made in the previous cases.

The Arbitration Council finds that if workers voluntarily work on Sundays, they are working over the regular work hours; therefore, they are doing overtime work.

The Arbitration Council moves on to consider how much the employer shall pay to workers who work on Sunday.

New Article 139 of the Law on Amendment of Article 139 and 144 of the Labour Law dated 20 July 2007 states, *"If workers are required to work overtime for exceptional and urgent jobs, the overtime hours shall be paid at a rate of fifty per cent higher than normal hours. If the overtime hours are worked at night or during weekly time off, the rate of increase shall be one hundred per cent."*

The Arbitration Council finds that the new Article 139 above does not clearly specify that the base wage (minimum wage) is taken as the basis for the calculation of wages for overtime work performed during weekly time off. Therefore, the Arbitration Council will consider the meaning of the term "wage" as stipulated in this article.

Clause 5 of Prakas no. 80 dated 1 March 1999 of the Ministry of Social Affairs, Veterans and Youth Rehabilitation on Overtime Work besides Regular Working Hours that:

> An owner or manager of an enterprise establishment shall pay overtime to workers and employees as followings:
>
> a) an amount equal to 150 per cent (or time and a half) of wages during normal working hours for overtime work on normal working days.
>
> b) an amount equal to 200 per cent (or double time) of wages during normal working hours for overtime work performed at night time (from 10:00 p.m. to 5:00 a.m.).

Based on Clause 5 of Prakas no. 80 dated 1 March 1999 above, the Arbitration Council finds that this clause does not state whether the minimum wage is taken as the basis for calculating overtime work pay. The Arbitration Council finds that Clause 5 of Prakas no.80 dated 1 March 1999 on Overtime Work besides Regular Working Hours above only use the term "**wages during normal working**" but it does not give a clear definition of the term.

Therefore, the Arbitration Council considers the meaning of "wages during regular working hours" and whether or not "wages during regular working hours" includes the skill bonus.

In this case, when the employer identifies workers eligible for a monthly skill bonus, it will provide the bonus to the workers monthly. This means that it does not depend on whether the workers have performed well or the workers have achieved the company's production target in any given month. The workers assume that they will receive this bonus every month and they will consider this bonus as part of the monthly benefits to which they are entitled.

The Arbitral Award no. 74/08-Generation International, Issue 13, the Arbitration Panel finds that:

> The skill bonus that the workers receive for regular working days is part of the minimum wage. Therefore, the Arbitration Council finds that skill bonus is part of the minimum wage that the employer needs to include when calculating wages for workers working overtime. Moreover, the workers use the skill they have to perform the job when working overtime. Therefore, they should receive equal wages as working on regular working days.

The Arbitration Panel in this case agrees with the interpretation in previous cases.

During fact finding, the employer claimed that it calculates wages for overtime work performed on Sundays by dividing the minimum wage by 26 and multiplying it by 200 per cent.

Based on the interpretation above, the Arbitration Council finds that it is not right that the employer calculates workers' wages for overtime work without including the skill bonus. The Arbitration Council finds that "wages for regular working hours" is the base wage that the workers receive every month plus the monthly skill bonus. It means that the employer shall include the skill bonus in the calculation of wages for overtime work performed on regular working days or Sundays.

In conclusion, the Arbitration Council decides to order the employer to calculate the wages for work performed on Sundays and holidays by dividing the sum of the base wage and skill bonus by 26 and multiply it by 200 per cent.

(B) Wages for work performed on holidays

Clause 4 of Prakas no.10 dated 4 February 1999 of the Ministry of Social Affairs, Veterans, and Youth Rehabilitation on Remuneration for Work Performed on Paid Holidays states:

> Employees working on holidays are entitled to a remuneration equivalent to their pay on a normal working day."
>
> Example 1: An employee earns a salary of $52 per month. On March 8, which is a paid holiday, such employee volunteers to work as requested by the employer for the full day. In this case, on their payday he/she will be paid $54 =$52 + ($52/26 X 1).

Based on Clause 4 of Prakas no. 10 dated 4 February 1999 above, the Arbitration Council finds that workers working on holidays are entitled to remuneration equivalent to their pay on a normal working day. However, this Clause does not give a clear definition of "wages during normal working days." Though Clause 4 of Prakas no. 10 dated 4 February 1999 provides an example for calculating wages that the workers are entitled to receive for working on holidays, the Arbitration Panel in this case finds that "wages during normal working days" is the key term that the Arbitration Council needs to consider to determine the calculation of wages for work performed during holidays.

(see the explanation of "wages during normal working days" in point (A) above)

In the fact finding, the employer calculates wages for workers working on holidays by dividing the base wage by 26 and multiplying it by 200 per cent.

Therefore, the Arbitration Panel in this case finds that the employer is required to include the skill bonus in the calculation of workers' wages for working performed on holidays.

In conclusion, the employer shall calculate wages for work performed on Sundays and holidays by dividing the sum of the base wage and skill bonus by 26 and multiplying it by 200 per cent.

Therefore, the Arbitration Council orders the employer to calculate wages for work performed on Sundays and holidays by dividing the sum of the base wage and skill bonus by 26 and multiplying it by 200 per cent.

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

DECISION AND ORDER

Part I. Rights dispute:

Issue 1: Order the employer to maintain the workers' seniority after it provides a five per cent severance pay and arranges a one week break for workers prior to contract renewal.

Issue 4:

- Order the employer to calculate the wages for work performed on Sundays by dividing the sum of the base wage and skill bonus by 26 and multiplying it by 200 per cent.
- Order the employer to calculate the wages for work performed on holidays by dividing the sum of the base wage and skill bonus by 26 and multiplying it by 200 per cent.

Type of award: binding award

The award of the Arbitration Council in Part I will be final and is enforceable by the parties in accordance with the MoU dated 3 October 2012.

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....

Annex to Arbitral Award 78/13-G-Foremost

Dissenting Opinion

Clause 37 of Prakas No. 099, dated 21 April 2004, issued by the Ministry of Labour and Vocational Training states:

> The arbitral panel shall record its decisions in an award which shall be signed by all three arbitrators. If one of the arbitrators does not agree with the decision of the majority, the dissenting arbitrator may record his dissent as an annex to the award.

Based on this clause, I, Arbitrator **Ing Sothy**, would like to record my dissent to Issue 1 of the Arbitral Award **78/13-G-Foremost** in which the employer is ordered to maintain the workers' seniority after it provides a five per cent severance pay and arranges a one week break for workers prior to contract renewal. I would like to explain the reasons for my dissent:

1. Seniority bonus is stipulated in a legal instrument; therefore, workers are entitled to the bonus when they fulfill the legal conditions.

When the employer pays a five per cent severance pay upon conclusion of a fixed duration contract, contracting parties' obligations are fulfilled.

Conversely, if the parties intend to renew their contractual relationship, the parties have the freedom to negotiate to form an agreement on whether or not the employer recognises and agrees to provide such seniority bonus.

If the parties reach such agreement, they can form a new valid and enforceable contract that meets all contractual conditions; then, contracting parties' obligations commence.

2. The employer permitted workers to take a one week break prior to contract renewal. I find it is the employer's right to choose the timeframe for workers to take leave prior to contract renewal.

For instance, the employer concludes a fixed duration contract and decides not to renew it while it permits workers to take a week or half a month break before announcing recruitment of new workers. If the previous workers apply for the jobs and new fixed duration contracts are formed, how should the contracting parties fulfill their obligations? Should they fulfill their obligations under duress or agreement?

Phnom Penh, 8 May 2013

Signature

Abitrator **Ing Sothy**