KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 80/13-8 Star Sportwear

Date of award: 23 May 2013

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: **An Nan**

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

DISPUTANT PARTIES

Employer party:

Name: **8 Star Sportwear Ltd.**

Address: Plouv Lorm, Dormnak Thorm Village, Steung Mean Chey Commune, Chormka Morn District, Phnom Penh

Telephone: 012 626 868 Fax: N/A

Representatives:

1. Mr Hom Phea Attorney at Law
3. Mrs Heng Sophy Administrator

Worker party:

Name: **- Cambodian Workers of Economic Union Federation (CWEF)**

- Local Union of CWEF (the union)

Address: #17 E0 , Street 2004, Teok Thla Commune, Sean Sok District, Phnom Penh

Telephone: 012 636 766 Fax: N/A

Representatives:

1. Mr Sreang Narith Vice-President of CWEF
2. Mr Phal Sovannara Secretary-General of CWEF

3. Mrs You Thul — President of the union
4. Ms Sim Phally — Vice-President of the union
5. Mrs Touy Phan — Secretary of 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 increase an accommodation and transportation allowance by US$3 to a total of US$10. The employer claims that it does not agree to the demand and it will comply with notification from the Ministry of Labour and Vocational Training. The employer claims it is now working on increasing minimum wage for workers.
2. The workers demand that the employer provide a 2,000 riel payment in lieu of lunch per day. The company claims it does not agree to the demand. It will comply with any requirements from the Ministry of Labour and Vocational Training.
3. The workers demand that the employer provide a 2,000 riel overtime meal allowance to workers who volunteer to work on Sundays. The employer claims it does not agree to the demand because it will not arrange any work on Sundays anymore.

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. 099 dated 21 April 2004 (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. 463 dated 11 April 2013 dated was submitted to the Secretariat of the Arbitration Council on 19 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: 6 June 2013 at 2:30 p.m.

Procedural issues:

On 12 March 2013, the Department of Labour Disputes (the department) received a complaint from CWEF, 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 4 April 2013, resulting in two of the five issues being resolved. The three non-conciliated issues were referred to the Secretariat of the Arbitration Council (SAC) on 19 April 2013 through the non-conciliation report no. 463 dated 11 April 2013.

Upon receipt of the case, the Arbitration Panel was formed on 22 April 2013. The SAC summoned the employer and the workers to a hearing and conciliation of the three non-conciliated issues, held on 6 May 2013 at 2:30 p.m. Both parties were present. At the hearing, the Arbitration Council conducted a further conciliation of the 3 non-conciliated issues, but they remained unresolved.

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 reflect that the award on rights disputes is not subject to binding because both parties are signatories of the MoU which stipulates that awards on rights disputes are binding. The signatures on agreement to choose types of awards (in this case, the award on rights dispute is binding) is an internal rule of the Arbitration Council, which was implemented since the formation of MoU dated 28 September 2010 on Improving Industrial Relations in Garment Industry.

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 award issuance from 16 May 2013 to 23 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:

- 8 Star Sportwear is a garment manufacturer. According to the non-conciliation report dated 11 April 2013, the company employs 961 workers.
- The union is the claimant in this case. The union receives the certificate of registration no. 2422 dated 12 March 2012 from the Ministry of Labour and Vocational Training. The union does not hold the most representative status (MRS) in the company.

Issue 1: The workers demand that the employer increase the accommodation and transportation allowance by US$3 to a total of US$10.

- The employer provides a US$7 accommodation and transportation allowance per month to the workers.
- At the hearing, the workers claim that the employer provides an additional US$ 3 accommodation and transportation allowance on top of the existing US$ 7. The workers claim:
    - Other neighbouring companies nearby provide a US$10, US$12, and US$15 accommodation and transportation allowance per month. Therefore, the workers want to receive the same allowance.
    - A US$7 accommodation and transportation allowance is only the minimum requirement set by notification of Ministry of Labour and Vocational Training. Thus, the workers demand an increase in the allowance to keep them motivated to work hard resulting in the benefits for the company.
- At the hearing, the employer claims it does not agree to the demand because:
    - The employer provides an accommodation and transportation allowance in accordance with notification.
    - The notification regarding the accommodation and transportation allowance does not state the minimum allowance.
    - The workers cannot demand that the employer provide the same transportation and accommodation allowance as neighbouring companies because they are in a different financial predicament. Therefore, the

accommodation and transportation allowance is different according to their capacity to pay and other determining factors.

- The employer's expenses will go up due to the minimum wage increase for workers starting in May 2013.

Issue 2: The workers demand the employer provide a 2,000 riel payment in lieu of lunch per day.

- The employer does not provide payment in lieu of lunch to workers.
- At the hearing, the workers claim:
  - Their wages are still low, so they cannot afford to cover their daily expense.
  - Other companies provide a free lunch or daily allowance to purchase lunch.
- The employer claims that it does not agree to the demand because:
  - The workers cannot demand that the employer provide the same allowance to purchase lunch as other companies do because different companies have different financial circumstances. Therefore, the benefits for workers are different according to the circumstances of individual factories.
  - The employer' expenses will go up due to the minimum wage increase for workers starting in May 2013.

Issue 3: The workers demand that the employer provide a 2,000 riel overtime meal allowance to workers who volunteer to work on Sundays.

- Regular working hours of the company are 6 days per week (from Monday to Saturday) and 8 hours per day from 7:00 a.m. to 11:00 a.m. and from 12:00 p.m. to 4:00 p.m. On Sunday, workers also work as they would on a regular working day from 7:00 a.m. to 11:00 a.m. and from 12:00 p.m. to 4:00 p.m.
- The workers claim work performed on Sunday is overtime work because it exceeds regular working hours. It exceeds 48 hours per week (from Monday to Saturday.) Therefore, the workers should receive a 2,000 riel overtime meal allowance per day like the meal allowance they receive for overtime work performed on regular working days.
- The employer claims it does not agree to the demand because:
  - Work performed on Sundays is not overtime work. It is work performed during weekly time off (Sundays) and the wages for this performance are 200 per cent of normal wages. It is under a different legal construction than overtime work.
  - The employer will no longer provide Sunday work if it has to provide a meal allowance for Sunday work.
- At the hearing, both parties agree that there are workers working on Sundays in the 2-3 weeks prior to the start of the hearing. The employer cannot guarantee that there

will be no workers working on Sundays in the future. The workers claim that in the week before the commencement of the hearing, workers in the cutting section also worked on Sunday. The employer does not reject this claim. Therefore, the Arbitration Council finds that there are still workers working on Sundays based on the current practice of the company.

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

REASON FOR DECISION

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

Article 312, paragraph 2 of the Labour Law states *"The Council of Arbitration legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective bargaining agreement. The Council's decisions are in equity for all other disputes."*

Clause 43, Prakas no. 099 of the Arbitration Council dated 21 April 2004 stated that:

> An arbitral award which settles an interests 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 Paragraphs 2, Article 312 of Labour Law and Clause 43 of Prakas no. 099 states that the solution of the Arbitration Council based on the interpretation and enforcement of laws or regulations or of a collective bargaining agreement. The Council's decisions are in equity for all other disputes." Therefore, the Arbitration Council finds that rights dispute is the dispute that is relevant to the rights stated in the law, the agreement, or the collective agreement about the demand and the Arbitration Council resolves the rights dispute by-law *(see the Arbitral Awards No. 05/11-M&V 1, Issue 1 and 5,, no. 13/11-Gold Kamvimex, Issue 1 and 2, and no. 14/11-GHG, Issue 4).* Interests dispute are disputes that are not stated in any law, agreement, or collective agreement. The Arbitration Council's decision to resolve interests dispute are in equity *(see the Arbitral Awards no. 31/11*- Quint Major Industrial, Issue 4 *and 62/11-Ocean Garment, Issue 1)*

Issue 1: The workers demand that the employers provide an additional US$3 accommodation and transportation allowance on top of an existing US$7 accommodation and transportation allowance to reach a total of US$10.

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

The notification no. 230 dated 25 July 2012 from the Ministry of Labour and Vocational Training states, *"Provide a US$7 (seven) accommodation and transportation allowance per month."*

According to the findings of fact, the employer provides a US$7 accommodation and transportation allowance per month to the workers. Therefore, the Arbitration council finds that the employer has fulfilled its obligation to provide an accommodation and transportation allowance to the workers in accordance with the aforementioned notification.

Apart from this, the Arbitration Council finds that there are no provisions in the Labour Law, agreements, collective agreements or internal work rules stipulating that the employer is under an obligation to provide an additional US$3 accommodation and transportation allowance per month on top of an existing US$7 accommodation and transportation allowance to reach a total of US$10 for the workers.

Therefore, the Arbitration Council agrees that this dispute is an interests dispute.

For interests dispute, the Arbitration Council considers:

Paragraph 2 of Article 96 of the Labour Law 1997 states:

> The collective agreement is a written agreement relating to the provisions provided for in Article 96 - paragraph 1. The collective agreement is signed between:
>
> a) One part: an employer, a group of employers, or one or more organisations representative of employers; and
>
> b) The other part: one or more trade union organisations representative of workers…

Moreover, Clause 9 of the Prakas 305 dated 22 November 2001 states:

> The union having most representative status has the right to request the employer to negotiate a collective agreement which applies to all workers represented by that union. In this case, the employer has the obligation to negotiate with the union.

According to Article 96 and Clause 9 of the Prakas above, in interests disputes, generally the Arbitration Council takes the most representative status (MRS) of the union into consideration because it provides unions with the legal right to negotiate a collective agreement with the employer, and the union also has the legal right to bring an interests dispute case to the Arbitration Council for resolution.

Clause 43 of Prakas Number 099 dated 21 April 2004 states:

> An arbitral award which settles an interests 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.

In reference to the above Clause 43, an arbitral award which settles an interests dispute takes the place of a collective bargaining agreement. It binds all workers in the company and strips them of their right to strike over interests disputes covered in collective agreements for a one year period. This agreement applies to other workers who are not the members of the MRS union. Hence, the Arbitration Council can only settle interests disputes brought in by unions which have MRS in the enterprise or collective unions which have more than half the number of workers as members in the enterprise *(see the Arbitral Award*

Number 81/04-Evergreen, Reasons for Decision, Issue 4, and Number 98/04-Great Union, Issue 3)

In 169/11-Fortune Teo, Issue 5, the Arbitration Council declines to consider an interests dispute because the union that brought the case did not have MRS in the factory *(see Arbitral Award no. 02/11-Pou Yuen, Reasons for Decision, Issue 2, and 66/11-In Han Sung, Issue 1).*

In this case, the union, the claimant, does not have a certificate of MRS at 8 Star Sportwear. Therefore, this union does not meet the legal requirements necessary to bring an interests dispute to the Arbitration Council.

Therefore, the workers demand that the employers provide an additional US$ 3 accommodation and transportation allowance on top of an existing US$ 7 accommodation and transportation allowance to reach a total of US$ 10.

Issue 2: The workers demand that the employers provide a 2,000 riel allowance to purchase lunch per day to each worker.

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

The Arbitration Council finds that there is no provision in the Labour Law, agreement, collective agreement, or internal work rules or past practice stipulating that the employer is under an obligation to provide lunch or a 2,000 riel allowance per day to purchase lunch for workers. Therefore, the Arbitration Council finds that this dispute is an interests dispute *(see the reason for decision for interests disputes in Issue 1 above).*

Therefore, the Arbitration Council decides to decline to consider the workers' demand that the employers provide a 2,000 riel allowance to purchase lunch per day to each worker.

Issue 3: The workers demand that the employer provide a 2,000 riel overtime meal allowance to workers who volunteer to work on Sundays.

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

In this dispute, the workers demand that the employer provide a 2,000 riel meal allowance to workers who volunteer to work on Sundays. Therefore, the Arbitration Council finds that the demand is a rights dispute.

Point 2 of the notification no. 041/11 dated on 07 March 2011 states, *"The workers who volunteer to work overtime at the employer's request shall receive 2,000 riels of meal allowance per day or be provided with a free meal."*

According to the findings of fact, the employer does not provide a 2,000 riel overtime meal allowance per day to the workers who work eight hours on Sunday because the employer claims, work performed on Sunday is not overtime work. The workers demand that

the employer provide a 2,000 riel overtime meal allowance to workers who volunteer to work on Sundays because they claim, work performed on Sunday is overtime work.

Therefore, before considering whether the demand in this case is a rights dispute or an interests dispute, the Arbitration Council considers whether work performed on Sundays is overtime work.

Article 137 of 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.

According to 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 the fact finding, the employer asks the workers to work eight hours per day from Monday to Saturday, which equal to 48 hours per week. Sundays are considered a day off for the workers; therefore, if the workers volunteer to work on Sundays, they work over regular working hours.

In previous cases, the Arbitration Council interprets that: *"Workers' regular working hours is eight hours per day or 48 hours per week from Monday to Saturday." Besides these working hours, the Arbitration Council considers that it is overtime work (see the Arbitral Awards no. 114/08-Whitex, Issue 5, no. 52/12-Star Sportwear, Issue 2)*

The Arbitration Panel in this case agrees with the interpretation in the previous cases. The Arbitration Council finds that if the workers volunteer to work on Sundays, they work over the regular working hours. Therefore, they are performing overtime work.

According to Point 2 of the notification no. 041/11 dated 7 March 2011 above, the workers who volunteer to work on Sundays on the employer's request shall receive a 2,000 (two thousand) riel overtime meal allowance per day to purchase lunch regardless of the number of hours of overtime work.

In the fact finding, the employer does not provide a 2,000 riel overtime meal allowance to the workers who volunteer to work on Sundays. The Arbitration Council finds that the employer does not fulfil its obligation stipulated in the notification no. 041/11 above.

According to the interpretation above, as work performed on Sundays is overtime work and the employer fails to fulfil its obligation to provide overtime meal allowance to workers who volunteer to work on Sundays in accordance with the Notification no. 041/11, the Arbitration Council orders the employer to provide a 2,000 riel overtime meal allowance per day to workers who volunteer to work on Sundays.

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

DECISION AND ORDER

Part I. Rights disputes:

Issue 3: Order the employer to provide a 2,000 riel overtime meal allowance to workers who volunteer to work on Sundays.

Type of award related with rights dispute:

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.

Part II. Interests disputes:

Issue 1: Decline to consider the workers' demand that the employers provide an additional US$3 accommodation and transportation allowance on top of an existing US$7 accommodation and transportation allowance to reach a total of US$10 to each worker.

Issue 2: Decline to consider the workers' demand that the employers provide a 2,000 riel payment in lieu of lunch per day to each worker.

Type of award related with interests dispute:

The award in Part II 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 within this period, through the Secretariat of the Arbitration Council.

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: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....