



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**ក្រុមប្រឹក្សាអង្គជំនុំជម្រះ**

**THE ARBITRATION COUNCIL**

**Case number and name: 107/13-Sun Well Shoes**

**Date of award: 20 June 2013**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRAL PANEL**

Arbitrator chosen by the employer party: **Mar Samborana**

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

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

#### **DISPUTANT PARTIES**

##### **Employer party:**

Name: **Sun Well Shoes Co., Ltd**

Address: Plouv Cham Chao, Tropheang Thleng Village, Cham Chao Commune, Porsean  
Chey District, Phnom Penh

Telephone: 012 899 980

Fax: N/A

Representatives:

- |                     |                                   |
|---------------------|-----------------------------------|
| 1. Ms Dy Chhivbie   | Head of Administration Department |
| 2. Mr Phun Chandara | Administrative Assistant          |

##### **Worker party:**

Name: - **Workers Union Federation (WUF)**

- **Local Union of WUF (the union)**

Address: Tropheang Thleng Village, Cham Chao Commune, Porsean Chey District, Phnom  
Penh

Telephone: 012 210 317

Fax: N/A

Representatives:

- |                  |                          |
|------------------|--------------------------|
| 1. Mr Sorn Prak  | Secretary-General of WUF |
| 2. Mr Lim Dara   | Officer of WUF           |
| 3. Mr Som Vichet | President of the union   |

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- |                      |                                  |
|----------------------|----------------------------------|
| 4. Ms Ngoun Than     | Secretary of the union           |
| 5. Ms Phoun Sophanna | Activist of the union            |
| 6. Mr Tep Saroeun    | President of Worker's Will Union |

### **ISSUES IN DISPUTE**

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

1. The workers demand that the employer provide a US\$10 payment in lieu of milk formula to new mothers. The employer claims it cannot afford to meet the demand.
2. The workers demand that the employer pay the attendance bonus in proportion to the number of days of leave for personal commitment taken by the workers. The employer claims it will not provide attendance bonus to the workers taking leave for personal commitment.
3. The workers demand that the employer arrange hot-water dispenser in each building. The employer claims it does not agree to the demand because it has already arranged it in the infirmary.
4. The workers demand that when calculating the overtime payment to be paid to team supervisors, the calculation must include the sum of the base wage and the position bonus, divided by 26. The employer claims it cannot afford to meet the demand.
5. The workers demand that the employer increase the minimum wage of the workers have been working for at least 4 years by US\$10. The employer claims it cannot afford to meet 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. 597 dated 22 May 2013 was submitted to the Secretariat of the Arbitration Council on 23 May 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 2:00 p.m.

**Procedural issues:**

On 3 May 2013, the Department of Labour Disputes (the department) received a complaint from the union, 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. The last conciliation session was held on 16 May 2013, and at its conclusion, five of fifteen issues remained unresolved. The five non-conciliated issues were referred to the Secretariat of the Arbitration Council (SAC) on 22 May 2013.

Upon receipt of the case, the Arbitration Panel was formed on 29 May 2013. The SAC summoned the employer and the workers to a hearing and conciliation of the five non-conciliated issues. The hearing was held on 6 June 2013 at 2:00 p.m. Both parties were present.

At the hearing, the Arbitration Council conducted a further conciliation of the five non-conciliated issues, and as a result issue 1 was resolved. At the hearing, the workers withdrew three of their demands, Issues 2, 3, and 5. Therefore, the Arbitration Council will consider the remaining non-conciliated Issue 4.

The Arbitration Council divided the issues into two types: rights disputes and interests disputes. In this case, the parties are signatories to the Memorandum of Understanding on Improving Industrial Relations in the Garment Industry (MoU), dated 3 October 2012. 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. The award in this case is binding arbitration.

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:**

- Sun Well Shoes is registered as a shoes manufacturer (Corporate Charter of Sun Well Shoes dated 22 May 2008). The company has received a certificate of business registration no. Inv.1264 E/2007 dated 17 October 2007 (certificate of business registration no. 3940 dated 24 August 2010). According to the non-conciliation report of Sun Well Shoes no. 597 dated 22 May 2013, the company employs a total of 1,200 workers.
- The union is the claimant in this case. The union received a letter no. 1080 on the recognition of the union's new leaders dated 13 September 2012 from the Department of Labour Disputes.

**Issue 4: The workers demand that when calculating the overtime payment to be paid to team supervisors, the calculation must include the sum of the base wage and the position bonus, divided by 26.**

At the hearing, the workers clarify their demand the workers demand that the employer take the sum of the base wage and the position bonus into consideration when calculating the overtime payment payment for team supervisors.

- The employer rejects the demand, and asserts that it will take only the base wage into consideration when calculating overtime payment, irrespective of whether the payment is for workers or team supervisors.
- The workers claim:
  - Team supervisors should not receive a lower wage than non-supervisor workers.
  - In other factories, the employer does not sepapayment the position bonus from the base wage of team supervisors. In short, team supervisors receive a higher base wage than normal workers do. When calculating an overtime payment for team supervisors, the employer takes that base wage as basis for the calculation.
  - The position bonus of team supervisors is not severable from their base wage. A supervisor's overtime payment payment should be calculated according to their competency and position, because team supervisors exercise this competency and position to achieve the objectives set for them by their employer.

- The workers raise a case in relation to the calculation for an overtime payment for Mr Sam Vichet, a team supervisor:
  - Mr Sam Vichet receives the same base wage of US\$ 80 as other regular workers. Apart from this, he receives a US\$ 85 position bonus per month.
  - When calculating his overtime payment, the employer takes only his base wage into consideration when determining the total sum to be paid.
- Concerning the promotion to be a team supervisor and the provision of the position bonus, the employer claims:
  - The employer promotes a particular worker to be a team supervisor based on his or her good performance. The promotion is done on request and the approval from the employer is required.
  - The employer provides the position bonus to team supervisors without amending any condition in the written employment contracts of team supervisors. The contract remains the same as before the promotion.
- The employer rejects the demand, but it does not provide specific reasons for its decision. The employer only claims that team supervisors receive the position bonus in addition to their base wage, and that this base wage is equal to that of normal workers. At the hearing, the Head of Administration (representing the employer), admits that he is unclear about the relationship between position bonus and base wage. He explains that the employer has the power to determine the amount paid under the position bonus, and asserts that for the duration of his employment at Sun Well Shoes, the base wage alone has been included for the calculation of the overtime payment.

#### **REASONS FOR DECISION**

#### **Issue 4: The workers demand that the employer take the sum of base wage and position bonus as the basis for calculating overtime payment for team supervisors.**

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

Paragraph 2 of Article 312 of the Labour Law states *“The Arbitration Council has legal jurisdiction to decide disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council’s decisions are in equity for all other disputes.”*

Clause 43 of the Prakas 099 on the Arbitration Council 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.

Paragraph 2 of Article 312 of the Labour Law and Clause 43 of the Prakas no.099 on the Arbitration Council states that the Arbitration Council has legal jurisdiction to decide disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council's decisions are in equity for all other disputes. The Arbitration Council concludes that disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement are rights disputes and the Arbitration Council has jurisdiction to settle the rights disputes (*see the Arbitration Award 05/11-M & V (Branch 1), Issue 1&5, 13/11-Gold Kamvimex, Issue 1&2, 14/11-GXG, Issue 4*). Any kinds of disputes that are not stipulated in the agreement or collective agreement are interests disputes and the Arbitration Council settles interests disputes based on equity (*see the Arbitral Award 31/11-Quint Major Industrial, Issue 4 and 62/11-Ocean Garment, Issue 1*).

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

The Panel finds that the workers' demand is relevant to Article 139 dated July 2007, and Clause 5 of Prakas 80 dated 1 March 1999 of the Ministry of Social Affairs, Veterans, and Youth Rehabilitation on overtime work besides regular working hours. Therefore, the Arbitration Council finds that based on the interpretation of rights dispute above, the demand in this case is a rights dispute. In this case, the workers' demand, in relation to calculation for overtime payment of the workers (holding the position of team supervisors), is relevant to new Article 139 of the Law on Amendment of Article 139 and 144 of the Labour Law dated 20 July 2007 and Clause 5 of Prakas 80 dated 1 March 1999 of the Ministry of Social Affairs, Veterans, and Youth Rehabilitation on overtime work besides regular working hours. Therefore, the Arbitration Council finds that based on the interpretation of rights dispute above, the demand in this case is a rights dispute.

Concerning the workers' claim that when calculating the overtime payment to be paid to team supervisors, the calculation must include the sum of the base wage and the position bonus, the Arbitration Council considers the following:

Article 139 of Law on the Amendment of Articles 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 payment of fifty per cent higher than normal hours. If the overtime hours are worked between 7 p.m. to 5 a.m. or during weekly time off, the payment of increase shall be one hundred per cent.

The Arbitration Council finds that Article 139 above does not clearly state whether base wage (minimum wage) is taken as basis for calculation of overtime payment. Therefore, the Arbitration Council will consider the meaning of the term "wage" stated in the 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 states that:

Owner or manager of enterprise establishment shall pay overtime to workers and employees as followings:

- a) an amount equal to 150 percent (or time and a half) of wages during normal working hours for overtime work on normal working days.
- b) an amount equal to 200 percent (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 or not the base wage is taken as basis for the calculation. The Arbitration Council finds that Clause 5 of Prakas no.80 dated 1 March 1999 on Overtime Work besides Regular Working Hours above uses only use the phrase **“wages during normal working hours”**. However, it does not specifically define this phrase. The Arbitration Council in this case finds that “wage during normal working hours” is the key phrase determining the calculation of overtime payment.

Therefore, the Arbitration Council will consider the meaning of “wages during normal working hours” and whether or not this phrase also includes the position bonus.

Article 102 of the Labour Law in 1997 states:

For the purpose of this law, the term "wage", irrespective of what the determination or the method of calculation is, means the remuneration for the employment or service that is convertible in cash or set by agreement or by the national legislation, and that shall be given to a worker by an employer, by virtue of a written or verbal contract of employment or service, either for work already done or to be done or for services already rendered or to be rendered.

Based on Article 102 of the Labour Law above, the Arbitration Council finds that in the spirit of the law, the principal meaning of the term “wage” is remuneration paid by the employer to the workers in exchange for any particular work performance.

Therefore, the Arbitration Council will consider whether or not the position bonus granted to a team supervisor is considered to be part of the “wage” based on Article 102 of the Labour Law above.

According to the facts, the employer provides a base wage of US\$80 per month to team supervisors, which is equal to the wages of a non-supervisor. Apart from this, the employer provides the position bonus in addition to the team supervisors’ base wage. This bonus is provided without setting any specific conditions in a written employment contract or agreement besides requiring them to fulfill their job or position as team supervisors for the employer.

In this case, based on the nature of the position bonus, the Arbitration Council finds that the position bonus is an additional wage that the employer provides to the workers holding the position of team supervisors in exchange for the daily performance of work assigned by the employer. Therefore, the position bonus is an addition to the wage for regular work provided to team supervisors on top of their base wage.

In the Arbitral Award no. 74/08-Generation, Reasons for Decision, Issue 13, the Arbitration Council interprets:

When it is determined by the employer that the skill level of a worker is suitable for a monthly skill bonus, they will normally receive such monthly bonus. This does not reflect that such bonus is to be provided based on the workers' performance in each month or only when the workers reaches a target set by the employer in any month. The workers will expect that they will receive this monthly bonus and regard it as one part of the package of benefits to which they entitled to receive when performing work for the employer...the skill bonus or the position bonus that the workers receive during normal working hours is also part of wages paid in normal working hours. Therefore, the Arbitration Council finds that the skill bonus or the position bonus is also part of wages that the employer shall include in calculation for workers' overtime payment (*see more in Arbitral Award no. 78/13-G Formost, Issue 4*).

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

In this case, the Arbitration Council finds that the nature of the skill bonus and the position bonus is no different. Skilled workers use their skill to perform a task for the employer, and in exchange for such skill the employer pays compensation in the form of the skill bonus. For the position bonus, the Arbitration Council finds that, on the employer's decision, the workers shall also receive such a bonus when they perform their work and take specific responsibility assigned by the employer in their position as team supervisors. Therefore, the Arbitration Council finds that both the skill bonus and the position bonus must be considered to be an indivisible element of the wage, which is paid to skilled workers or workers who hold a particular position, as remuneration for their normal work activities.

In conclusion, the Arbitration Council finds that **“wage during normal working hours”** mentioned in Clause 5 of Prakas 80 dated 1 March 1999 includes both base wage and the position bonus or skill bonus. As a result, the employer shall take the sum of base wage and the position bonus as the basis for the calculation of overtime payment.

According to the facts, the employer takes only base wage as basis for calculation of overtime payment for regardless of normal workers or team supervisors.

In this case, the Arbitration Council finds that it is not right for the employer to take the base wage alone as basis for calculation of overtime payment for team supervisors.

Therefore, the Arbitration Council orders the employer to take the sum of the base wage and the position bonus as basis for calculation of overtime payment for team supervisors.

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 4: Order the employer to take the sum of base wage and position bonus as the basis for calculating overtime payment for team supervisors.

**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 28 September 2010.

**SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL**

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature: .....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....