



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអង្គជំនុំជម្រះ

THE ARBITRATION COUNCIL

Case number and name: 247/13-Juhui Footwear

Date of award: 13 December 2013

Dissenting Opinion: 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): **Pen Bunchhea**

DISPUTANT PARTIES

Employer party:

Name: **Juhui Footwear Co., Ltd.**

Address: Roveang Village, Knol Dambong Commune, Cheung Prey District, Kompong Cham

Telephone: 012 234 782

Fax: N/A

Representatives:

- | | |
|--------------------|------------------------------------|
| 1. Mr Robin Hsin | Specialist |
| 2. Ms Chav Meiling | Assistant to Administrator |
| 3. Mr Touch Udom | Assistant to Labour Officer (GMAC) |
| 4. Mr Soung Houth | Labour Officer (GMAC) |
| 5. Mr Tor Dararith | Staff (GMAC) |

Worker party:

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

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

Address: Roveang Village, Knol Dambong Commune, Srok Cheung Prey, Kompong Cham Province

Telephone: 016 65 75 56

Fax: N/A

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Representatives:

- | | |
|---------------------|-----------------------------|
| 1. Mr Khin Sokhon | Secretary-General of CLUF |
| 2. Mr Cheng Noun | Officer of CLUF |
| 3. Ms Ly Nget | President of the union |
| 4. Mr Ouk Chanthea | Vice-President of the union |
| 5. Ms Seam Sina | Secretary of CLUF |
| 6. Mr Heng Tithchay | Union Consultant |
| 7. Mr Cheang Hab | Union Consultant |

ISSUES IN DISPUTE

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

1. (1) The workers demand that the employer maintain team supervisors' skill bonus and provide back pay of skill bonus, which have been cancelled in the past.
2. (3) The workers demand that the employer pay attendance bonus in proportion to the number of days of authorised leave that the workers take.
3. (8) The workers demand that the employer provide an additional US\$7 accommodation and transportation allowance on top of the existing one.
4. (9) The workers demand that the employer provide a 2,000 riel payment in lieu of lunch.
5. (10) The workers demand that the employer provide a 2,000 riel overtime meal allowance per hour to workers, who volunteer to work overtime.

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. 155 dated 17 June 2013 (Eleventh 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. 72/13 dated 7 November 2013 was submitted to the Secretariat of the Arbitration Council on 13 November 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: 28 November 2013 (at 2 p.m.)

Procedural issues:

On 30 October 2013, the Department of Labour and Vocational Training of Kompong Cham Province (the department) received a complaint from CLUF, 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 6 November 2013, resulting in 15 of 20 issues being resolved. The five non-conciliated issues were referred to the Secretariat of the Arbitration Council (SAC) on 13 November 2013.

Upon receipt of the case, the SAC summoned the employer and the workers to a hearing and conciliation of the five non-conciliated issues, held on 13 November 2013. Both parties were present.

At the hearing, the Arbitration Council conducted a further conciliation of the five non-conciliated issues, resulting in issue 1 being resolved. The workers decided to withdraw Issues 8, 9, and 10. Therefore, the Arbitration Council will consider only Issue 3.

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. In this case, the parties choose non-binding arbitration for their interests disputes.

The parties agreed to defer the award issuance from 9 December 2013 to 13 December 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:

- Juhui Footwear Co., Ltd. is a footwear manufacturer was opened for business in 2012 under registration Inv. 0879 E/2012 dated 29 March 2012. Juhui employs 4,300 workers.
- The union is the claimant in this case; it has 819 members. The union received certificate of union registration from the Ministry of Labour and Vocational Training on 5 September 2013.

Issue 3: The workers demand that the employer pay attendance bonus in proportion to the number of days of authorised leave that the workers take.

- The workers' demand was not in relation to annual, special, and sick leave.
- The employer provides workers with a US\$10 attendance bonus per month. The employer pays the attendance bonus as follows when the workers take authorised leave (except annual, special, and sick leave):
 - The employer pays the attendance bonus in proportion to the number of days of authorised leave if the workers take only two days' leave.
 - The employer withholds the entire attendance bonus from a worker once the worker uses two and a half days' leave.
- The workers claim 1) the workers request leave authorisation from the employer and 2) Previous arbitral awards have ordered the employer to pay an attendance bonus pro rata.
- The employer claims it will not meet the demand because it follows parent company in China.

REASONS FOR DECISION

Before considering the demand, the Arbitration Council distinguishes rights and 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.

According to paragraph 2 of Article 312 of the Labour Law and Clause 43 of the Prakas no.099 on the Arbitration Council, 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 which Arbitration Council settles based on equity.

Issue 3: The workers demand that the employer pay attendance bonuses in proportion to the number of days of authorised leave taken by the workers.

Before considering the demand, the Arbitration Council will consider whether the issue gives rise to a right or an interests dispute.

Point 2 of the Notification no. 230 dated 25 July 2012 states: “*Workers who attend work regularly in accordance with the number of working days in each month without absence will receive a monthly bonus of at least US\$10.*”

As the issue is in relation to attendance bonus payment stipulated in the notification above, the Arbitration Council finds that the issue is a rights dispute.

The employer provides workers with a US\$10 attendance bonus per month. The employer pays attendance bonus as follows when the workers take authorised leave (except annual, special, and sick leave):

- The employer pays attendance bonus in proportion to the number of days of authorised leave if the workers take only two days’ leave.
- The employer withholds the entire attendance bonus if the workers take at least two and a half days’ leave.

The Arbitration Council will consider whether or not the workers are entitled to the pro rata payment of the attendance bonus when the workers take authorised leave (excluding annual leave).

The Arbitration Council issued the Arbitral Award which ordered the employer to pay the attendance bonus in proportion to the number of days of authorised leave taken by the workers through the interpretation based on Point 1 of the Notification no. 041 dated 7 March 2011 which states that “*Workers who attend work regularly in accordance with the number of working days in each month without absence will receive a monthly bonus of at least US\$7.*” (*see the Arbitral Award no. 112/11-Yung Wah 1, Issue 3, 136/11-Cambo handsome (Branch 1), Issue 1, and 154/11-B & N, Issue 7 (2)*). However, this notification was substituted by the Notification no. 230 dated 25 July 2012, Point 2 which states: “*Workers who attend work regularly in accordance with the number of working days in each month without absence will receive a monthly bonus of at least US\$10.*”

Point 2 of the *Notification* no. 230 dated 25 July 2012 increased the attendance bonus to US\$10 per month and added the term “**without absence**” which was enforced from 1 September 2012 onwards.

The Arbitration Council finds that there are many kinds of bonuses and the amount of the bonus also differs depending on the owners of each enterprise or the company, because they have the right to direct and supervise in order to motivate their workers and increasing work effectiveness and productivity. The US\$10 of the attendance bonus stipulated in Point 2 of the *Notification* no. 230 dated 25 July 2012 is not under the rights of the employer to direct. Also, it's not a method to supervise and the employer cannot supervise or change the attendance bonus of US\$10 because it is a bonus stipulated in Point 2 of the *Notification* no. 230 dated 25 July 2012 with which all garment and footwear sector employers must comply. This means the employer is under an obligation to provide the attendance bonus of US\$10 per month to workers who attend work regularly in accordance with the number of working days in each month without absence. However, the Arbitration Council finds that in Point 2 of the statement of the Labour Advisory Committee dated 11 July 2011 says that the employer shall provide the attendance bonus of US\$10 per month. Point 2 of the *Notification* no. 230 dated 25 July 2012 states that the workers who attend work regularly in accordance with the number of working days in each month **without absence** will receive a monthly bonus of at least US\$10. The Labour Advisory Committee has not interpreted the term **without absence** to mean absence with authorisation or without authorisation or anything else. The Arbitration Council is not able to interpret or assume that the absence in this case is an absence with authorisation or an absence without authorisation without taking legal provisions and reasoning into consideration.

The Arbitration Council finds that the term **absence stipulated in the law** includes: absence by taking annual leave, special leave, maternity leave, holidays, and weekly time off. The term absence stipulated in the laws does not require the workers to reduce the attendance bonus, which means the workers receive full attendance bonus, which is US\$10 per month. Because absence (authorised leave for personal commitment) is not stipulated in the laws, the important question is whether the workers will receive full attendance bonus, an attendance bonus in proportion to the number of days of authorised leave accessed or no attendance bonus at all.

The Arbitration Council finds that because of the many types of aforementioned absences, the Arbitration Council cannot interpret or assume the **absence** in the *Notification* no. 230 dated 25 July 2012 to be any particular type of absence. Therefore, Arbitration Council considers the demand according to each particular case. In this issue, the workers demand that the employer deduct the attendance bonus in proportion to the number of days of authorised leave that the workers have taken.

The Arbitration Council finds that it is the discretion of the employer to decide to authorise or not authorise the workers to take leave (for a personal commitment) based on the administrative procedures, internal rules, and the production requirements of each enterprise and workplace. In the case that the employer decides to authorise a worker to take leave, the employer should know that production of the company will not be interrupted by the workers' absence. The administrative procedures and the internal rules of the enterprise distinguish between authorised leave and unauthorised leave where disciplinary action can be taken against workers who do not comply with relevant leave arrangements. When the workers are authorised to take leave, the leave is taken in accordance with the administrative procedures and internal rules of the enterprise or workplace. In these instances, workers are not subject to any disciplinary action from the employer.

Workers who take authorised leave for personal commitments are concluded to have an agreement with the employer that the workers will not receive their wages on the day(s) that they don't come to work. The employer also agrees to permit the workers to take unpaid leave on the agreed upon day(s), not to take any disciplinary actions against the workers, and maintain the job and other benefits once the workers return to work.

The Arbitration Council finds that in the case that the employer authorises the workers to take leave, the employer cannot regard it as an absence requiring disciplinary action.

The Arbitration Council finds that the phrase "**attend work regularly in accordance with the number of working days in each month**" in the Notification no. 230 dated 25 July 2012 refers to the number of days in each month that the employer requires the workers to attend work or the workers are under obligation to provide service to the employer. In the current practice of the enterprises and establishments in Cambodia, according to the law, the term "**working days in each month**" can be:

- 1) Full working days of each month (in the case that there is no holiday and other national event determined by laws, the number of working days is 26 days per month subject to company policy).
- 2) Some working days of each month (in the case that there is a holiday or other national events determined by law, the number of working days is less than (1) or just 21-22 days per month, depending on the number of holidays and other national events determined by laws and subject to company policy).
- 3) Some working days of each month (in the case that there is authorisation from the employer, the number of working days of the month is less than (1) or (2), subject to the company practice and the number of days of authorised leave that the workers take).

Therefore, if the workers have been working in accordance with the number of days that they are obliged to perform in each month and take authorised leave, the workers are considered to have attended work regularly. The term “**working days in each month**” in such cases does not include the holidays determined by laws and authorised leave.

The Arbitration Council finds that if the employer is ordered to pay full wages to workers taking unpaid authorised leave, it is not fair for the employer because the workers do not attend work.

Article 103 of the Labour Law states: “*Wage includes, in particular:...*”

- *Bonuses and indemnities...*”

The Arbitration Council finds that the attendance bonus stipulated in the Notification 230 dated 25 July 2012 is the bonus provided by the employer. Therefore, the attendance bonus is considered as part of a worker’s wage.

Paragraph 6 of Article 71 of the Labour Law states: “*The labour contract shall be suspended under the following reasons: ...*”

6. Absence of the worker authorised by the employer, based on laws, collective agreements, or individual agreements...”

Paragraph 1 of Article 72 of the Labour Law states:

The suspension of a labour contract affects only the main obligations of the contract, that are those under which the worker has to work for the employer, and the employer has to pay the worker, unless there are provisions to the contrary that require the employer to pay the worker...

In reference to Paragraph 6 of Article 71 and Paragraph 1 of Article 72 of the Labour Law, The Arbitration Council finds that authorised leave is leave requested by the worker and agreed to by the employer. Therefore, the authorised leave is considered a contract suspension between the employer and the worker and the employer is under no obligation to pay the wages to the worker on the day that they take authorised leave for personal commitment. It also means the employer is under no obligation to provide the attendance bonus to worker on the day that the worker takes authorised leave for personal commitment. Therefore, the employer has no right to withhold the entire attendance bonus from the worker. It only has the right to pay the attendance bonus in proportion to the number of days of authorised leave for personal commitment that the worker has taken.

Based on the reasons and interpretation above, the Arbitration Council orders the employer to pay a US\$10 attendance bonus per month in proportion to the number of days of authorised leave for personal commitment taken by the workers.

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: Order the employer to pay a monthly US\$10 attendance bonus in proportion to the number of days of authorised leave for personal commitments taken by the workers.

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.

Part II. Interests dispute: N/A

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: **Pen Bunchhea**

Signature: