



**KINGDOM OF CAMBODIA**

**NATION RELIGION KING**

**ក្រុមប្រឹក្សាអន្តរាជ្ញាធាន**

**THE ARBITRATION COUNCIL**

**Case number and name: 111/08-Jung Min**

**Date of Award: 26 September 2008**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRATION PANEL**

Arbitrator chosen by the employer party: **Kao Thach**

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

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

#### **DISPUTING PARTIES**

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

Name: **Jung Min Cambodia Apparel Company**

Address: Morl Village, Sangkat Dangkor, Khann Dangkor, Phnom Penh

Telephone: 012 942 120 Fax: N/A

Representative: **Absent**

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

Name: **Worker Union Federation (WUF) and local union of Worker Union (WU) at Jung Min Factory**

Address: Morl Village, Sangkat Dangkor, Khann Dangkor, Phnom Penh

Telephone: 012 995 523/ 012 263 653 Fax: N/A

Representative:

- |                        |  |
|------------------------|--|
| 1. Mr. Dou Dina        | Coordination officer of WUF              |
| 2. Mrs. Sok Sreylot    | Vice-president of WU at Jung Min Company |
| 3. Mrs. Suong Sophanna | Secretary of WU at Jung Min Company      |
| 4. Mrs. Tun Sophoeun   | Worker delegate                          |

## ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- Members of WU demand that the Company provide them the whole seniority bonus and that it should not make deduction pro-rata to the number of days the workers take leave. However, if the Company deducts the seniority bonus pro-rata, it should include the seniority bonus into their main wage. The Company does not agree to the demand but will follow the existing practice. The employer adds that there is no law or Prakas which explicitly states the Company cannot deduct the workers' seniority bonus when they are absent from work.
- 2- Members of WU demand that the Company reimburse the US\$ 6 per month substantial living allowance the Company paid incorrectly in April and May 2008. The Company states that it already paid the allowance in accordance with Notification No. 032 S.Ch.N from June 2008. The Company requests that the workers should not make a demand for back payments as it made the deduction pro-rata on the allowance in April and May 2008 because the Notification was not clear.

## JURISDICTION OF THE ARBITRATION COUNCIL

*The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labor 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. 076 dated 10 May 2007 (Fifth 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 the non-conciliation report No.935 KB/AK/VK, dated 28 August 2008, was submitted to the Secretariat of the Arbitration Council on 29 August 2008.*

## HEARING AND SUMMARY OF PROCEDURE

**Place of hearing:** The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Basak, Khann Chamkarmorn, Phnom Penh.

**Date of hearing:** 8 September 2008 from 8:00 a.m. to 11:00 a.m.

### **Procedural issues:**

On 2 July 2008 the Department of Labour Disputes received a complaint by Worker Union, dated 24 June 2008 regarding the demand for the Company to improve some working conditions. Then the Department of Labour Disputes assigned an expert officer to settle this labour dispute and the last conciliation was held on 14 August 2008, with a result of two of

two demands remained non-conciliated. The two non-conciliation issues were referred to the Arbitration Council on 29 August 2008 through the report of the collective labour dispute resolution No. 935 KB/AK/VK, dated 28 August 2008.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer party and the worker party to the hearing and conciliation regarding the two non-conciliation issues on 8 September 2008 at 8:00 a.m. However, the company party was absent at the hearing for the reason that the company was busy and the Arbitration Council should proceed with the hearing without the participation of the company party. Thus, the Arbitration Council decided to conduct the hearing in absentia (without participation of the party).

The Arbitration Council tried to ask for more information relevant to the two non-conciliation issues from the worker party; the party also decided to withdraw issue 2 from this case. Thus, only issue 1 remains in this case. The Arbitration Council will consider and settle this issue in dispute based on the evidence and findings of fact as follows:

## **EVIDENCE**

**Witnesses and experts:** N/A

### **Documents, Exhibits and other evidence considered by the Arbitration Council**

Provided by the employer party: N/A

Provided by the worker party: N/A

Provided by the Ministry of Labour and Vocational Training [MoLVT]:

1. Report of collective labour dispute resolution at Jung Min Company No. 935 KB/AK/VK, dated 28 August 2008.
2. Minutes of collective labour dispute resolution at Jung Min Company, dated 14 August 2008.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 548 KB/AK/LKA dated 2 September 2008 to invite the worker party to attend the hearing;
2. Invitation No. 549 KB/AK/LKA dated 2 September 2008 to invite the employer party to attend the hearing.

## **FACTS**

- Having reviewed report of collective labour dispute conciliation;

- Having listened to the statement by the worker party.

**The Arbitration Council finds that:**

- Jung Min Company employs a total number of approximately 800 workers.
- There is only one union in this Company, the Worker Union at Jung Min Factory, which is the claimant in this case.
- The Worker Union at Jung Min Factory has 300 members but does not have the most representative status.

**Issue 1: The workers demand that the Company include seniority bonus into their wage when it calculates their overtime payment.**

- In the hearing, the worker party raises that in case 67/08-Jung Min, issue 1, the workers demanded that the Company should not deduct their seniority bonus pro-rata to the number of days the workers were absent, and then the Arbitration Council issued an Arbitral Award on this issue (*see finding of facts and reasons for decision issue 1*).
- In this case 111/08-Jung Min, issue 1, the workers demand that the Company include their seniority bonus into the main wage when it calculates overtime payments because the company's current method of calculation is to take the main wage and divide it by 26, then by 8 and then multiply by 1.5 which is the overtime rate and multiply by the number of overtime hours worked. However, the workers demand to include the seniority bonus into main wage then multiply by 26 then by 8 and then multiply by 1.5 which is the overtime rate and multiply by the number of overtime hours worked. The difference from previous practice is that the workers demand to include seniority bonus into main wage in order to calculate overtime payment.
- In the hearing, the workers states that the reason that they demand the Company to include seniority bonus into main wage when calculating overtime payment is because the Company deducts their seniority bonus in proportion to the number of days the workers are absent from work. The workers do not have any other reasons to support their demand for inclusion of seniority bonus into their wage when calculating overtime payment.
- The Company party and the worker party do not have any agreement in relation to seniority bonus.

**REASONS FOR DECISION**

**Issue 1: The workers demand that the Company include seniority bonus into their main wage when it calculate overtime payment**

Based on the findings of fact, the Arbitration Council found that the workers' demand for the Company to include seniority bonus into main wage then divide it by 26 and then by 8 then multiply it by 1.5 which is the overtime rate and multiply by the number of overtime hours worked. However, the Company's current practice is to take the main wage to divide by 26 then by 8 and then multiply by 1.5 which is the overtime rate and multiply by the number of overtime hours worked exclusive of seniority bonus in the calculation of overtime payment.

Thus, the Arbitration Council will consider whether, according to the Labour Law as well as other labour regulations, seniority bonus should be included with the main wage when calculating overtime payments.

Point 5 of Notification 017 SKBY, dated 18 July 2000, by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation states, "5. *Workers who have been working for a long time in a factory or an enterprise shall receive a seniority bonus as follows:*

- 5.1: *have been working from 1 year up shall receive a seniority bonus of US\$ 2.00 per month.*
- 5.2: *have been working from 2 years up shall receive a seniority bonus of \$3.00 per month that is \$ 2.00 of the first year plus \$ 1.00 of the second year.*
- 5.3: *have been working from 3 years up shall receive a seniority bonus of \$4.00 per month that is \$ 2.00 of the first year plus \$ 1.00 of the second year and \$ 1.00 of the third year.*
- 5.4: *have been working from 4 years up shall receive a seniority bonus of \$ 5.00 per month that is \$ 2.00 of the first year plus \$ 1.00 of the second year, \$ 1.00 of the third year and \$ 1.00 of the fourth year.*

Moreover, point 3 of Notification 745 KKBV, dated 23 October 2006, states that "*Benefits workers used to receive from Notification No. 017 SKBY dated 18 July 2000 on points 3, 4, 5 and 6 shall be retained.*"

According to Notification 017, the Arbitration Council considers that this Notification is not clear whether the seniority bonus should be deducted pro rata when workers are absent from work and it does not state clearly either whether the seniority bonus should be included in the calculation of overtime payment.

In previous cases the Arbitration Council interprets that seniority bonus is a part of wage. (See *Arbitral Award 41/05-Violet, issue 10; 66/06-Gold Lida, issue 2; 96/06-Wilson, issue 1 and 67/08-Jung Min, issue 1*).

Because seniority bonus is a part of wage, thus when workers do overtime work should the seniority bonus be included into the calculation?

Article 103 of the Labour Law states, "*Wage includes, in particular:*

- *basic wage or remuneration*

- **overtime**
- *commissions*
- *bonuses and rewards*
- *profit sharing*
- **gratuities...**

According to this Article, the Arbitration Council considers that the term “wage” is a broad term which includes actual wage, overtime, and gratuities and so on.

Thus, the Arbitration Council considers that the term wage in this Article refers to a package of a total wage which includes many different types of wages.

In conclusion, the Arbitration Council considers that seniority bonus cannot be included in the calculation of overtime payment for the following reasons: Clause 5(a) of Prakas 80 SKBY, dated 1 March 1999 regarding Overtime Work Outside of Normal Working Hours states, “(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.).*”

However, 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.*” This means that **normal work** of worker is eight hours per day or 48 hours a week and workers will be paid their wage for their eight hours per day or 48 hours a week work.

Article 104 of the Labour Law states, “*The wage must be at least equal to the guaranteed minimum wage; that is, it must ensure every worker of a decent standard of living compatible with human dignity.*”

Based on these Articles, the Arbitration Council considers that workers who work at least 8 hours per day or 48 hours a week should be paid according to the qualification, skill and capacity of each worker. For example, a normal worker receives a wage of US\$ 50 per month, a worker who is a head of cutter receives a wage of US\$ 90 per month, a worker who is a head of group receives a wage of US\$ 95 per month, or a worker who work in administration section receives US\$ 85 per month, but all the workers receive a wage at least equal to the minimum wage.

According to the above interpretation, the Arbitration Council considers that the term “**wages during normal working hours**” is the amount of wage the worker worked for 8 hours per day or 48 hours a week according to qualification, skill and capacity of each worker but the workers need to receive a wage at least equal to the minimum wage guaranteed by Law.

On the other hand, the Arbitration Council considers that seniority bonus or other type of money is provided additionally to the work workers performed for 8 hours per day or 48 hours a week under conditions that workers need to fulfill in order to receive these amount of money. Moreover, according to Article 103 of the Labour Law as mentioned above the term overtime payment and seniority bonus (amount of money which is provided as a bonus) are separate. Thus, the Arbitration Council considers that in this case seniority bonus is already included in the package of the whole wage as mentioned in Article 103 so that there is no reason which requires that seniority bonus, amount of money which is provided as a bonus, should be included again in the calculation of overtime payment because such calculation can cause overlapping as seniority bonus is counted twice, i.e., the inclusion of seniority bonus in the package of wage and into the calculation of overtime payment.

Furthermore, as a general practice in factory, seniority bonus is not included in the calculation of overtime payment.

Therefore, the Arbitration Council considers that seniority bonus should not be included in the calculation of overtime payment.

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

**DECISION**

**Issue 1:**

- Reject the workers' demand for the Company to include seniority bonus in the main wage when the company calculates overtime payment.

**Type of Award: Non binding award**

This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition to the Minister of Labour through the Secretariat of the Arbitration Council within this time period.

**SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:**

Arbitrator chosen by the employer party:

Name: **Kao Thach**

Signature: .....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....