



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាសវនកម្មជាតិ

THE ARBITRATION COUNCIL

Case number and name: 117/08-Sky Nice

Date of Award: 15 October 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: **Sky Nice International Company**

Address: Psa Kambol Village, Kambol Commune, Ang Snuol District, Kandal Province

Telephone: 012 727 004

Fax: N/A

Representative:

1. Wang Mao Chuan Manager
2. Mr. Cheam Samnang Chief of administration

Worker party:

Name: **Local Union of Free Trade Union of Workers of Kingdom of Cambodia at Sky Nice Company (FTUWKC)**

Address: #16A, Street 376, Sangkat Boeung Keng Kang 3, Khan Chamkarmorn, Phnom Penh

Telephone: 012 263 543 or 012 880 039 Fax: N/A

Representative:

1. Mr. Pao Sina Officer of the federation of FTUWKC
2. Mr. Soum Phearum President of local union of FTUWKC
3. Mr. Prak Sokly Worker representative

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The workers argue that when they work overtime until 9:00 p.m., the company should allow them a meal break at 6:00 pm without deducting it from their working hours or requiring them to do work more hours in compensation. The company does not agree to this demand.
- 2- The workers demand a 1,500-riel meal allowance or one free meal when they work overtime from 4:00 p.m. to 6:00 p.m. The company does not agree to this demand.

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. 437/08 KB/KN, dated 10 September 2008 was submitted to the Secretariat of the Arbitration Council on 10 September 2008.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing: 23 September 2008 from 8:00 a.m. to 11:00 a.m.

Procedural issues:

On 8 August 2008 the Department of Labour Disputes conducted a collective labour dispute conciliation on 27 issues. After settling the first five issues, both parties agreed to schedule another conciliation to settle the remaining issues on 9 September 2008. Eight of 27 issues were not conciliated. The eight non-conciliation issues were referred to the Arbitration Council through the non-conciliation report of collective labour dispute resolution No. 437/08 KB/KN, dated 10 September 2008. However, the two parties agreed that in the meantime an additional six issues were conciliated. Thus, there are only two non-conciliation issues in the non-conciliation report: issue one and issue two.

The Secretariat of the Arbitration Council then summoned the employer party and the worker party to the hearing and conciliation on the two non-conciliation issues on 23 September 2008 at 8:00 a.m.

Both parties were present at the arbitral hearing. The Arbitration Council tried to ask for information relevant to this dispute and attempted to further the conciliation on the two non-conciliation issues but did not receive a conciliation result. Thus, the Arbitration Council will consider and settle this 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:

1. Summary statement by Sky Nice factory, dated 22 September 2008;
2. Certificate of VAT registration of Sky Nice Company, dated 11 September 2007;
3. Statute of Sky Nice Company, dated 21 August 2007;
4. Payroll list for August 2008;
5. Minutes of collective labour dispute conciliation at Sky Nice Company, dated 10 September 2008.

Provided by the worker party:

1. Certificate of union registration of local union of FTUWKC at Sky Nice shoe factory, dated 8 September 2008;
2. Letter regarding registration of local union of FTUWKC at Sky Nice shoe factory, dated 8 September 2008;
3. List of names of factories who provide 1,500 riels as meal allowance for two hours of overtime work and names of factories who allow half an hour of paid time for workers to eat during overtime work exceeding two hours.

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

1. Report of collective labour dispute resolution at Sky Nice Company, No. 437/08 KB/KN, dated 10 September 2008;
2. Minutes of collective labour dispute conciliation at Sky Nice Company, dated 10 September 2008.
3. Minutes of collective labour dispute conciliation at Sky Nice Company, dated 9 September 2008.

Provided by the Secretariat of the Arbitration Council:

1. Invitation letter No. 575 KB/AK/VK/LKA dated 15 September 2008 inviting the worker party to attend the hearing.
2. Invitation letter No. 574 KB/AK/VK/LKA dated 15 September 2008 inviting the employer party to attend the hearing.

FACTS

- Having reviewed the report of collective [labour] dispute conciliation;
- Having listened to the statements by the worker party and the employer party;
- Having examined additional documents.

The Arbitration Council finds that:

- Based on the summary statement by Sky Nice Company, dated 22 September 2008, the company has 1,297 female workers.
- The local union of FTUWKC is the claimant in this case. The local union of FTUWKC has 700 members and does not have most representative status. The local union of FTUWKC at the Sky Nice shoe company was registered on 8 September 2008.

Issue 1: The workers argue that when they work overtime until 9:00 p.m., the company should allow them a meal break from 6:00 to 6:30 p.m. without deducting it from their working hours or requiring them to work more hours in compensation.

- The workers and the employer agreed that overtime work is voluntary.
- The workers and the employer agreed that overtime work is from 4:00 p.m. to 6:00 p.m. or from 4:00 p.m. to 7:00 p.m. or from 4:00 p.m. to 9:00 p.m. Currently, there is not much overtime work from 4:00 p.m. to 6:00 p.m. as the majority of workers work overtime from 4:00 p.m. to 7:00 and continue until 9:00 p.m. Such long [periods of] overtime occurs only once in a while when the company needs to urgently export products.
- The workers stated that because the Labour Law allows no more than two hours of overtime work, when they volunteer to work overtime until 9:00 p.m. the company should allow them to have a meal break from 6:00 p.m. to 6:30 p.m. without deducting the meal break from their working hours or requiring them to work more hours in compensation.
- After finishing their normal work at 4:00 p.m., those workers who volunteer to work overtime start at 4:00 p.m. and finish at 6:00 p.m. or continue until 9:00 p.m. Overtime work is voluntary.
- The company states that it can allow the workers to take half an hour off for their meal but the half an hour will not be counted in their working hours. Currently, the company provides two packets of instant noodles and transportation home for workers who work overtime until 9:00 p.m.
- The company adds that overtime work is voluntary. Therefore, the company cannot meet the workers' demands.

Issue 2: Workers who work overtime from 4:00 p.m. to 6:00 p.m. demand that the company provide a 1,500 riel meal allowance or one free meal.

- The company stated that it provides 1,000 riels for those workers who volunteer to do overtime work from 4:00 p.m. to 6:00 p.m. In addition, if workers volunteer to work overtime to 7:00 p.m., the workers will be provided with an additional 500 riels.
- The worker party stated that in the past the 1,000 riel meal allowance provided by the company to workers who agreed to work overtime from 4:00 p.m. to 6:00 p.m. could buy a meal. However, because of the increase in the price of goods, at present 1,000 riels is not enough to buy a meal. For this reason, the workers request that the company provide a meal allowance of 1,500 riels to those workers who volunteer to work overtime from 4:00 p.m. to 6:00 p.m. They argue that if the company cannot provide 1,500 riels, the company should provide one free meal to the workers.
- The company claims that it cannot provide 1,500 riels to workers who volunteer to work overtime from 4:00 p.m. to 6:00 p.m., but it will follow Notification 017 SKBY, dated 18 July 2000, which means it will continue to pay the 1,000 riel meal allowance.

REASONS FOR DECISION

Issue 1: The workers argue that when they work overtime until 9:00 p.m., the company should allow them a meal break from 6:00 to 6:30 p.m. without deducting it from their working hours or requiring them to work more hours in compensation.

In this case, the company claimed in the hearing that it allows workers who volunteer to work overtime until 9:00 p.m. to take half an hour break to eat their dinner, since this occurs only once a while when the company needs to urgently export products. However, the company cannot count this in their overtime working hours. Currently, for those who volunteer to work overtime until 9:00 p.m., the company provides two packets of instant noodles and transportation home. The workers demand that the company allow them to take half an hour break from 6:00 p.m. to 6:30 p.m. without deducting it from their working hours or requiring them to work more hours in compensation if they volunteer to work overtime until 9:00 p.m. Thus, the Arbitration Council will consider [this issue] as follows:

The Arbitration Council finds that the employer can allow the workers to take half an hour break to have their dinner but the break time is not counted in their working hours. The Arbitration Council considers this is reasonable because when the workers take a break, it means that they are not doing any work for the employer. Moreover, the Arbitration Council finds that there is no Article in the Labour Law or any legal regulation which requires that the employer provide half an hour break for workers to have their meal or that break time should be included in working hours. In addition, the workers' demand for the employer to count the 30 minutes from 6:00 p.m. to 6:30 p.m. as part of their working hours is not mentioned in a law, agreement or collective bargaining agreement supporting their demand.

The Arbitration Council considers that the workers' demand is a demand for something more than what is provided by the law because the workers demand that the employer include the half hour meal break from 6:00 p.m. to 6:30 p.m. in their paid overtime hours. The Arbitration Council considers that overtime pay is provided to workers who work overtime for the employer; thus, in the hour when the workers do not work for the employer, the workers do not receive an overtime payment. Hence, the Arbitration Council considers this an interests dispute.

In relation to interests disputes the Arbitration Council always considers whether the union has most representative status because this provides legal standing to a union to negotiate a collective bargaining agreement with a company (see Article 96, paragraph 2B of the Labour Law and Clause 9, paragraph 1 of Prakas 305) and the legal right to bring a dispute to the Arbitration Council for resolution.

In order to receive most representative status under Article 277 of the Labour Law 1997 and Clause 6 of Prakas 305, dated 22 November 2001, the union must have more than half of the total number of workers in the factory, the union must be registered at the Ministry of Labour and Vocational Training, and the union must fulfill other conditions set forth under the Article.

In previous cases, the Arbitration Council has declined to consider an interests dispute if the union who brings the labour dispute does not have most representative status in the factory. (*See Arbitral Awards 81/04-Evergreen, issue 4; 09/05-Kin Tai, issue 2; 84/07-Yung Wah 2, issue 1; 108/07-8 Stars Sportswear, issue 3; 135/07-Wilson, issue 1; 14/08-Quick Sew, issue 3; 101/08-GDM, issue 3; and 108/08-Hugo, issue 2*).

Based on the above findings of fact, the Arbitration Council found that the local union of FTUWKC does not have most representative status in Sky Nice Company. Thus, the union does not have the legal right to enter into a collective bargaining agreement on behalf of all workers in the enterprise. (*See Clause 9, paragraph 1 of Prakas 305*).

Moreover, Clause 43 of Prakas 099 dated 21 April 2004 stipulates 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 Clause 43 above, the Arbitration Council has found that if it issues an Arbitral Award on an interests dispute, the award will become a collective agreement for one year. This collective bargaining agreement is applicable to all the workers in a company, and would deprive other workers of their right to strike to revise the collective bargaining agreement if it has not yet expired. (*See Article 96 and Article 321, paragraph 2, of the Labour Law*).

Therefore, the Arbitration Council declines to consider the demand of workers that the company allow workers who work overtime until 9.00 p.m. to take half an hour break from 6:00 p.m. to 6:30 p.m. without deducting it from their working hours or requiring them to work more hours in compensation.

Issue 2: Workers who work overtime from 4:00 p.m. to 6:00 p.m. demand that the company provide a 1,500 riel meal allowance, or one free meal

The company provides 1,000 riels to workers who volunteer to work overtime from 4:00 p.m. to 6:00 p.m., and if the workers agree to continue the overtime work until 7:00 p.m. the company provides an additional 500 riels. The workers, on the other hand, demand that the company provide a 1,500 riel meal allowance or one free meal to workers who volunteer to work overtime from 4:00 p.m. to 6:00 p.m.

The workers' demand has two options: **1.** a demand for one free meal, and **2.** a demand for a 1,500 riel meal allowance. Thus, the Arbitration Council will divide the workers' demand into two and consider as follows:

a. Demand for a 1,500 riel meal allowance

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

Point 4 of Notification 017 SKBY, dated 18 July 2000 states, *"Workers who voluntarily work overtime upon request from the employer shall receive a meal allowance of 1,000 riels per day or receive one free meal."*

In this case, the Arbitration Council finds that the employer provides 1,000 riels when the workers volunteer to work overtime from 4:00 p.m. to 6:00 p.m. Thus, the Arbitration Council considers that the employer has fulfilled its obligation in accordance with Notification 017. Further, besides Notification 017 which provides for a meal allowance of 1,000 riels per day as mentioned above, there is no other article requiring that the company provide a 1,500 riel meal allowance to workers who work overtime from 4:00 p.m. to 6:00 p.m. Moreover, the Arbitration Council does not find that the two parties have any agreement or collective bargaining agreement in writing that requires the employer to provide a 1,500 riel meal allowance for workers who volunteer to work overtime.

In previous Arbitral Awards, the Arbitration Council has written, *"The Arbitration Council considers that when workers volunteer to work overtime, they are entitled to receive 1000 riel for a meal allowance or one free meal. This means that regardless of whether the overtime work is more than or less than two hours, the workers are still entitled to receive a 1,000 riel meal allowance or one free meal because the Notification states the period of one day."* (See Arbitral Awards 53/05-Finegis, issue 3; 39/07-San San, issue 1)

In previous Arbitral Awards, the Arbitration Council has declined to consider the workers' demand for the company to provide a 2,000 riel meal allowance when workers work overtime for two hours. (See *Arbitral Awards 66/06-Gold Lida, issue 3; 51/07-Goldfame, issue 4; and 53/07-E Garment, issue 5*).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in previous cases.

Thus, the Arbitration Council considers that the workers' demand does not have a supporting legal ground and this demand exceeds what is provided by law. Thus, this is an interests dispute. (See *Reasons for Decisions in issue 1 regarding an interests dispute*).

Therefore, the Arbitration Council decides to decline to consider the workers' demand for a 1,500 riel meal allowance for overtime work from 4:00 p.m. to 6:00 p.m.

b. Demand for one free meal

According to point 4 of Notification 017 above (see *Notification 017 in issue 2 point "a" above*), the Arbitration Council considers that the meaning of this Notification is a broad one, because the phrase "**shall receive a meal allowance of 1,000 riels per day or receive one free meal**" does not state clearly whether the employer or the workers have the choice between the two options. Thus, the Arbitration Council will consider the meaning and intention of this Notification as well as other relevant factors.

According to previous Arbitral Awards, the Arbitration Council held that "*Consistent with the intention of this Notification, the Arbitration Council finds that the employer has an obligation to provide one free meal to those workers who work overtime. This provision of one free meal is a motivation for workers to continue working overtime because the [meal] is daily necessity for people and cannot be avoided, and this is what the employer is required to give.*" (See *Arbitral Award 47/07-Chung Fai, issue 5*).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in previous cases, that the main intention of Notification 017, point 4, is that the employer provide a meal, not money. The Arbitration Council acknowledges that the employer can have the option of providing 1,000 riels in lieu of one free meal when the workers work overtime, but money is not the main intention of the Notification.

The Arbitration Council observes that currently 1,000 riels cannot buy a meal, as it could in 2000 (the year when the Notification was issued). When the 1,000 riels provided is not sufficient to buy a meal, the workers are entitled to demand that the employer provide a free meal; that demand is not contradictory to the contents of Notification 017. In addition, in this case the workers demand that the employer should provide one free meal instead of money. Thus, the Arbitration Council needs only to consider whether the demand has legal support.

In accordance with the interpretation above, the main contents and purpose of Notification 017, point 4, are that the employer should provide one free meal to workers who work overtime. Thus, the Arbitration Council considers that the workers' demand for one free meal during overtime work is reasonable and consistent with the contents and purpose of Notification 017 above.

In conclusion, the Arbitration Council decides to order the employer to provide one free meal to workers who work overtime from 4:00 p.m. to 6:00 p.m.

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

DECISION

Issue 1:

- Decline to consider the demand for the company to allow workers who work overtime until 9:00 p.m. to have a half hour meal break from 6:00 p.m. to 6:30 p.m. without deducting it from their working hours or requiring them to work more hours in compensation.

Issue 2:

- Decline to consider the demand that the company provide a 1,500 riel meal allowance for overtime work from 4:00 p.m. to 6:00 p.m.
- Order the employer to provide one free meal to workers who work overtime from 4:00 p.m. to 6:00 p.m.

Type of Award: Non-binding award

This Award will become binding after eight 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: