

KINGDOM OF CAMBODIA

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THE ARBITRATION COUNCIL

Case number and name: 24/05 – Wear Well

Date of Award: 9 May 2005

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

Wear Well Co., Ltd

(The employer party)

And

Free Trade Union of Cambodia of Wear Well Factory

(The employee party)

DETAIL INFORMATION OF EMPLOYER PARTY

Representative:

- 1- Mr. Seng Kimheang, Company Director
- 2- Mrs. Chan Davy, Compliance Department Officer
- 3- Mr. Som Chomnan, Legal officer of CAMFEBA
- 4- Mr. Cheat Khemara, GMAC representative
- 5- Mr. Chandrathy (Sem)

Address: Phum Trapoengthleoung, Sangkat Chomchao, Khan Dangkor, Phnom Penh

Telephone: 023 985 925 Fax.: 023 985 950

DETAIL INFORMATION OF EMPLOYEE PARTY:

Representative:

- 1- Ou Sophat, Free Trade Union of Cambodia Worker
- 2- Moeun Sreymom, Union President of Wear Well factory
- 3- Oum Phally, Vice Union President of Wear Well factory
- 4- Seng Cheng Leang, Union Secretary of Wear Well factory
- 5- Mann Seng Hak, General Secretary of the Free Trade Union Federation of Workers of Kingdom of Cambodia
- 6- Bin Daline, worker
- 7- So Pom, worker
- 8- Un Sinnoun, worker
- 9- Yis Malis, worker

Address: Phum Baku, Khum Baku, Srok Kandalstoeung, Kandal Province.

Telephone: 011 219 941

ISSUES IN DISPUTE

- 1- The workers demanded that the company stop suspending Ms. Moeun Sreymom, the President of the union of the company, from today ([and the workers will] return to work as normal). However if the company continues to suspend her work the workers will continue striking. The employer argued that the company would not allow Ms. Moeun Sreymom to return to work before the expiration date of her suspension (her work suspension is one week from 1 - 7 April 2005).
- 2- The workers demanded that the company not set a production target which is greater than the workers' capacity. The employer argued that the company does set the production target for the workers, in accordance with the actual situation, and this is not over the workers' capacity.
- 3- The workers demanded that the company facilitate the process of requesting permission for leave when they have necessary personal affairs [to attend to]. The company argued that [in respect of] permission for sick leave, necessary personal affairs or annual leave, the company issued an instruction on the process of requesting permission for leave and made an announcement to workers.
- 4- The workers demanded that the company pay wages regularly on the 7th of the following month. The company will pay wages to workers between the 5th and the 10th of the following month.
- 5- The workers demanded that the company give a warning to Mr. Sem, a company employee, who slapped a worker's face on 2 April 2005, and require him to apologize to that worker. The company cannot warn or ask Mr. Sem to apologize to that worker because he did not make any mistake as accused by the workers.

JURISDICTION¹ OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Section 2B (Article 309 to 317), Chapter XII of the Labour Law (1997); the Prakas on the Arbitration Council 99/04; the Prakas on the Appointment of Arbitrators 103/04 and 265/04 and the Arbitration Council Procedural Rules which form an Annex to the same Prakas 99/04.

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. However the parties could not successfully conciliate, and [therefore] the non-conciliation report number 304 L.V.T dated 5 April 5 2005 was submitted to the Secretariat of the Arbitration Council on 6 April 2005.

¹ Jurisdiction means the power that the Arbitration Council receives under the law to settle labour dispute referred to the council.

ARBITRATION PANEL

Arbitrator chosen by the employer party: Mr. **Kao Thach**
Arbitrator chosen by the worker party: Mr. **Tuon Siphann**
Chair arbitrator (chosen by the two arbitrators): Mr. **Ang Eng Thong**

HEARING AND EVIDENCE

Date of hearing:

- First hearing on 8 April 2005 at 8:00 a.m.
- Second hearing on 19 April 2005 at 8:00 a.m.
- Third hearing on 28 April 2005 at 8:00 a.m.

Place of hearing: The Secretariat of the Arbitration Council Phnom Penh Center, Building A, 3rd Floor, room 331, Sothearos Boulevard, Sangkat Tolebasac, Khan Chamkarmorn, Phnom Penh.

Witnesses and experts: *None*

Evidence considered by the Arbitration Council

Provided by the employer party:

- 1- Internal work rules of the company dated 4 March 2003;
- 2- Draft announcement on providing an incentive bonus to individuals and groups;
- 3- Notice on working conditions for women, [in respect of] maternity leave, leave, etc. (undated);
- 4- Letter proving a method of setting a production target and the result of monthly productivity dated 28 April 2005;
- 5- Letter No. 007/05 of Wear Well company submitted to the Arbitration Council about the general situation regarding the setting of production targets dated 4 May 2005;
- 6- Minute [of a meeting] between the leaders of the Free Trade Union of Workers and the company director, Mr. Seng Kim Heang on payment of wages dated 6 January 2005;
- 7- Agreement on the monthly wages payment schedule for 2005 between the company and shop stewards dated March 2005;
- 8- Productivity table of each worker for March 2005;
- 9- Table of evaluation on productivity dated 9, 11, 12, 18, 19 and 23 April 2005.

Provided by the worker party:

- 1- Letter of demand to the employer to set a production target which the workers can achieve dated 27 April 2005;

- 2- Minute of the meeting between the leaders of the Free Trade Union of Workers and the company director, Mr. Seng Kim Heang on payment of wages dated 6 January 2005.

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

- 1- Report on non-conciliation of the collective labour dispute dated 4 April 2005;
- 2- Report on collective dispute resolution at Wear Well Cambodia company dated 5 April 2005;
- 3- Letter requesting a resolution of collective disputes of Wear Well Cambodia No. 512 MoLVT of the Ministry of Labour and Vocational Training dated 19 April 2005;

Presentation and testimony of employee party and employer party at the hearing

Both parties agreed to have a NON-binding award.

CASE SUMMARY:

Wear Well Co., Ltd. is located at Trapang Tlang, Sangkat Chomchao, Khan Dangkor, Phnom Penh and employs approximately 1,580 workers.

On 1 April 2005 the Labour Inspection Department of Khan Dankor received a complaint through a phone call from workers demanding that the Company improve working conditions in respect of five points. After receiving the information the Labour Inspection Department of Khan Dankor assigned a conciliation officer to conciliate. The last conciliation was on 4 April 2005 and none of the five issues were conciliated. Five non-conciliation issues as set out above were referred to the Arbitration Council on 6 April 2005.

On 8 April 2005 at 8:00 a.m. the Arbitration Council invited both parties to the first hearing. On 19 April 2005 at 8:00 a.m. the Arbitration Council invited the parties to the second hearing. On 28 April 2005 the Arbitration Council invited the parties to the third hearing. At the three hearings, the Arbitration Council tried to conciliate based on a win-win principle. As a result, three of the five issues were conciliated (the first, third and five issues are addressed in a separate agreement). Therefore the Arbitration Council considers the two remaining issues as follows:

FINDINGS OF FACT

- having seen the conciliation report on the collective labour dispute
- having heard the employee and employer parties
- having reviewed the above documents

The Arbitration Council finds the facts are as follows:

2nd issue:

- Wear Well Company determined that working hours are eight per day and that there will not be any overtime work for the workers;
- The company pays a basic wage of US\$54 per month and all other bonuses under the Labour Law;
- The company had made a policy which provides bonuses other than the bonuses provided by the Labour Law. The policy provides an incentive bonus to workers who work fast and reach a daily production target, which the company sets in the policy. The company determined that any worker who can sew more than 70 percent of the production target will be paid an incentive bonus according to the percentage [sewed], from 70 percent to 100 percent. For workers who cannot complete 100 percent s/he will be advised, retrained and warned. However the employer said in the hearing that this warning was not for the intention of dismissing the worker because the company does not have any intention of dismissing them as the company has difficulty in finding skilled workers to do the job.
- The employees thought that the daily production target was higher than the workers' capacity. Workers requested that the company [not] warn workers who cannot reach the company production target, and that workers should get a bonus according to their [completed] piecework.
- The Free Trade Union of Cambodia of Wear Well does not have most representative status in the Wear Well company.

4th issue:

- The company made a table offsetting out the pay day for each month in 2005: first month on the 7th, the second month on the 7th, the third month on the 5th, the fourth month on the 9th, the fifth month on the 7th, the sixth month on the 7th, the seventh on the 9th, the eighth month on the 5th, the ninth month on the 10th, the tenth month on the 11th, the eleventh month on the 8th and the twelfth month on the 8th. The company determined the pay days above because the company has difficulties making the monthly payroll since the company has a lot of workers. The wages cannot be taken from the bank and kept at the company because of safety issues.
- The workers' delegate of Wear Well company signed an agreement regarding the above payment schedule with the company on 15 March 2005.
- The workers demanded that the company pay wages on the 7th of each month because the late payment of wages caused workers who borrowed money from

others [to bear] more interest and some other workers do not have money to pay for rent and daily food [if not paid on time].

- In the record of the meeting dated 6 January 2005 between the Company Director, Mr. Seng Kim Heang, and the FTUWKC union leaders they agreed that the payments would be made on the 7th of every month but if [the payment] is later than the 7th the company will give three days prior notice (before the 7th of every month).
- From 1997 to 1999 the company paid monthly wages between the 3rd and the 10th of each month.
- Because of a strike, from 2000 to 2004 the company paid wages on the 7th of each month.

REASONING

2nd Issue:

In this case, the worker party has brought a complaint regarding the employer's system for providing an incentive bonus. The Arbitration Council first considers the question: is the employer's incentive bonus correct according to the law? The Arbitration Council finds that, from previous cases, Article 2 of the Labour Law states that an enterprise employs "a group of people working together... under the management and supervision of the employer." Under this meaning the Arbitration Council finds that the employer has the right and authority to manage and to lead human resources in the company if that management and authority is according to law. Thus, this Article gives the employer the right and power to manage and lead human resources in the company so long as [these actions] are in accordance with the law.

The Arbitration Council finds that the Labour Law 1997 does not require nor prohibit incentive bonuses; thus, an incentive bonus is superior to the level of benefit required by law. Furthermore, Article 13 of the Labour Law states that the employer may "grant benefits or rights superior to the benefits and the rights defined in this law, granted to the workers by a unilateral decision of an employer or a group of employers, by an employment contract, by a collective convention or agreement, or by an arbitral decision." This means that the employer, through a unilateral decision, can arrange to have a policy which provides other bonuses which are not set out in the Labour Law, in order to encourage workers to try to increase their productivity and [effectively] use short timeframes.

The Arbitration Council finds that providing an incentive bonus is not contrary to the Labour Law, nor does such a policy by itself violate any rights possessed by the workers. In fact, the policy to provide an incentive bonus provides workers with better benefits than those [required by] law. Therefore if the workers make a complaint against this policy the Arbitration Council finds that this dispute is related to an interest.

In relation to interests disputes, in the past the Arbitration Council has always considered the union which brought the case to the Arbitration Council to resolve, most representative status. Article 43 of Prakas 99/04 states that "an Arbitral Award that settles an interests dispute will take the place of Collective Bargaining Agreement for one year from the date the Award comes into effect, except if the parties negotiate for a Collective Bargaining Agreement to replace this Award." In the past, the Arbitration Council has found that If the Arbitration Council issues an Award on this issue it will become a Collective Bargaining Agreement which applies to all workers in the factory, it would also make the other workers lose their right to strike [in respect to] interests disputes in the future, and it may become unfair for the other workers. See 04/03 - Lida; 06/04 - Chousing; 24/03 - Top One; 61/04 - Best Honor; 62/04 - Ecent and 09/05 - Kin Tai. The Arbitration Council has therefore found that a union which does not have most representative status has no right to bring an interests claim to the Arbitration Council to settle (see 31/03 - Hung Wah; 60/04 - United Art; 99/04 – AIA). In order to receive most representative status under Article 277, the union shall register and shall meet the other conditions as stated in that Article.

In this case, the Arbitration Council finds that the FTUC in the Wear Well Factory did not have recognition as most representative in the company. Therefore, this union did not have a legal right to make a Collective Bargaining Agreement on behalf of all the workers in the factory. See Article 96(2)(B); Prakas 305, Article 9(1). This right belongs to a union which registers and has the majority of members, in addition to meeting the other criteria stated in Article 277 of the Labour Law. Therefore, to be consistent with the previous cases the Arbitration Council finds that the FTUC in Wear Well factory has not yet fulfilled sufficient criteria under the law to represent the workers in the whole factory or to resolve a dispute related to the common interests of the workers in the Wear Well Company. Therefore, to be consistent with the previous cases, the Arbitration Council declines to consider the workers' demand that the company not set a production target which is over the capacity of the workers in exchange for giving incentive bonuses.

Moreover, Article 43 of the Prakas states that, "an Arbitral Award that settles an interests dispute will take the place of Collective Bargaining Agreement for one year from the date the Award comes into effect, except if the parties negotiate for a Collective Bargaining Agreement to replace this Award." Therefore if the Arbitration Council issues an Award on this issue it will become a Collective Bargaining Agreement which applies to all workers in the factory and it would also make the other workers lose the right to strike with respect to interests disputes in the future, and it may become unfair for the other workers. See 04/03 - Lida; 06/04 - Chousing; 24/03 - Top One; 61/04 - Best Honor and 62/04 - Ecent. Moreover, in the past the Arbitration Council has also concluded that a union which does not have most representative status has no right to bring an interests disputes to the Arbitration Council to be settled, see 31/03 - Hung Wah; 60/04 - United Art; 99/04 - AIA. Therefore, to be

consistent with the previous cases, the Arbitration Council declines to consider the workers' demand that the company not set the production target over the workers' capacity in exchange for an incentive bonus.

4th issue:

In this case, the employer has created a schedule [setting out the date] of payday for each month in 2005. [This schedule] was agreed between the employer and the worker delegates, but the worker party demands that the employer pay them on the 7th of each month.

The Arbitration Council has considered a similar issue in a previous case (see 03/05 Flying Dragon). In that case, the workers wanted to be paid on the 10th day of each month. The Arbitration Council found that Article 116 of the Labour Law 1997 requires that, "the wages of employees shall be paid at least once a month²" but the Labour Law does not state any specific date on which the employer must pay wages [to the employees]. Therefore the date of payment is a management decision of the employer. Furthermore, Article 2 of the Labour Law gives the employer the right and power to manage and lead human resources in the company so long as [these actions] are in accordance with the law. This means that the employer has the right to determine each month's payday, as long as this decision is in accordance with the law, that is, at least once per month.

In this case, the Arbitration Council finds that the employer's schedule for paydays in 2005 indicates that the workers will be paid at least once per month and that [therefore] the schedule meets the legal requirement.

Furthermore, the company gave evidence to the Arbitration Council that it had already signed an agreement with the worker delegates [shop stewards] dated 6 January 2005, in which the employer agreed to pay wages to workers on the 7th of every month, but in the event payment would be later than the 7th, the employer agreed to give three days prior notice (before the 7th). Therefore the Arbitration Council finds that the employer party and workers are bound by this agreement. The Arbitration Council finds that the employer shall pay wages to workers on the 7th of every month. In a case where the employer cannot pay on the 7th of each month the employer has an obligation to give three days prior notice to the workers.

However on 15 March 2005 the employer party made an agreement with the workers' delegate which determined the pay day schedule for 2005. The company determined the schedule for the payment of wages in each month as follows: the third month on the 5th, the fourth month on the 9th, the fifth month on the 7th, the sixth month on the 7th, the seventh

² The Arbitration Council has previously found that workers at a garment factory are "employees" for the purposes of Article 116. "Employees" are defined in Article 5 of the Labour Law, which states that, "employees or helpers are those who are contracted to assist any person in return for remuneration, but who do not perform manual labour fully or who do so incidentally..." See 03/05 Flying Dragon.

month on the 9th, the eighth month on the 5th, the ninth month on the 10th, the tenth month on the 11th, the eleventh month on the 8th and the twelfth month on the 8th. The Arbitration Council finds that according to the agreement, in some months the employer will pay wages to the workers on the 7th, which is in accordance with the agreement between the union and the employer. However in the agreement between the union and the employer, both parties agreed that if the employer pays wages later than the 7th the employer shall give three days prior notice to the workers. In the hearing both parties already knew about the agreement on the date of paydays, made with the workers' delegate [shop steward] dated 15 March 2005. Moreover in the hearing one member of the employee party not only accepted, but also [stated] that he signed the agreement in the name of the workers' delegate [shop steward] and that this was true.

Therefore the Arbitration Council finds that [the later schedule] is in accordance with the agreement between the union and the employer dated 6 January 2005. Therefore the Arbitration Council accepts the agreement dated 15 March 2005 [which sets the dates for] wages payments until December 2005.

Based on the facts, law, evidence and reasoning, the Arbitration Council decides and issues this award which fully settles the collective dispute as follows:

Decision

- 1- Decline to consider the workers' demand that the company not set the production target beyond the capacity of workers in order to motivate the workers.
- 2- Order the parties to implement the agreement dated 15 March 2005.

Signatures of Members of the Arbitration Panel:

Arbitrator chosen by the employer party:

Name: Mr. Kao Thach

Signature:

Arbitrator chosen by the worker party:

Name: Mr. Tuon Siphann

Signature:

Chair of arbitration panel:

Name: Mr. Ang Eng Tong

Signature:

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