



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 39/07- San San

Date of Award: 4 May 2007

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **OUK RY**

Arbitrator chosen by the worker party: **AN NAN**

Chair Arbitrator (chosen by the two Arbitrators): **PEN BUNCHHEA**

DISPUTING PARTIES

Employer party:

Name: **San San Garment**

Address: Damnak Thom Village, Sangkat Stoeung Mean Chey, Khann Mean Chey, Phnom Penh

Telephone: 012 857 962 or 023 424 538

Fax: 023 234 198

Representative:

1. Mr. Ouk Savy Head of Administration of the Company
2. Ek Arun Vice-head of Administration of the Company
3. Mr. Long Heang Dispute Resolution Officer of GMAC

Worker party:

Name: **FTUWKC and local FTUWKC at San San Factory**

Address: #28B, Street 222, Sangkat Boeung Rang, Khann Doun Penh, Phnom Penh

Telephone: 012 724 450 or 012 929 174

Fax: N/A

Representative:

1. In Srey Yon General Secretary of local FTUWKC at San San Factory
2. Mr. Yan Rath Keo Pisey Vice-general Secretary of FTUWKC
3. Mr. Chou Sopheap President of local FTUWKC at San San Factory

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| 4. Mr. Tong Kimheang | Vice-president of local FTUWKC at San San Factory |
| 5. Mr. Fa Saly | Labour Dispute Resolution Officer of FTUWKC |
| 6. Mr. Van Sengly | Labour Dispute Resolution Officer of FTUWKC |
| 7. Mr. Nhean Sna | Worker at San San Factory |
| 8. Kun Chea Seng | Worker at San San Factory |
| 9. Sieng Seap | Worker at San San Factory |
| 10. Phot Sareth | Worker at San San Factory |
| 11. Ly Phary | Worker at San San Factory |
| 12. Ros Veasna | Worker at San San Factory |
| 13. Mech Srey | Worker at San San Factory |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. The workers demand the company to provide an additional 1,000 riel for food allowance if workers work overtime from 6:00 p.m. to 8:00 p.m. The company does not agree to this demand because it has no ability to provide it.
2. The workers demand the company to allow workers to continue to receive main wages because the company does not have automatic machines or standards and they are worried that the piece rate will be cheap, as there are old workers who work on piece rate who cannot earn the main wages and are terminated after three months. The company does not agree but states that it has a principle for workers to work on piece rate because, by working on piece rate, workers can receive even more benefits.
3. 127 workers demand the company to add a transportation fee to their main wages because the company did this for workers once already. The company, on the other hand, does not agree to add the transportation fee of US\$ 5 into workers' main wages because this amount of US\$ 5 is only provided to facilitate workers to travel from Chak Angre Leu to the new factory.

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. 099 dated 11 May 2006 (Fourth 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 hearing was unsuccessful, and the non-conciliation report No.344 K.K.B.V/A.K/V.K, dated 10 April 2007 was submitted to the Secretariat of the Arbitration Council on 10 April 2007.

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: 20 April 2007 (From 2:00 p.m. to 5:00 p.m.)

Procedural issues:

On 26 March 2007, the Department of Labour Disputes received a complaint by the FTUWKC, dated 13 March 2007, regarding the demand for the company to improve working conditions on seven issues. Then the Department of Labour Disputes assigned officers to settle this dispute and the last conciliation was held on 28 March 2007 with a result that four of seven issues were resolved. The three non-conciliated issues were submitted to the Secretariat of the Arbitration Council on 10 April 2007 through a non-conciliation report of collective labour dispute No. 057 K.K.B.V/AK/V.K, dated 10 April 2007.

Upon receipt of the case, all parties to the dispute were summoned by the Arbitration Council to a hearing on 20 April 2007 at 2:00 p.m.

Both parties were present at the arbitral hearing. The Arbitration Council sought information related to this dispute and attempted to further the conciliation on the three non-conciliated issues but could not receive a conciliated result. Therefore, the Arbitration Council will consider [the issues] based on the evidence and findings of facts as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Letter to authorize Mr. Long Heang, dispute resolution officer of GMAC, to make contact and settle the collective labour dispute of San San company with the Arbitration Council and authorities of all level, dated 10 April 2007
2. Letter by the company to the Arbitration Council to request for an intervention regarding the workers' strike, dated 10 April 2007
3. Attendance list (with signatures of workers) of 142 workers who participated in a meeting to inform them about the change from monthly-based wage to piece rate wages, on 20 January 2007

Provided by the worker party:

1. Certificate of union registration of local FTUWKC at San San Factory, No. 1088 K.K.B.V/VK, dated 3 January 2007
2. Minutes of the labour dispute conciliation meeting between worker representatives and the employer of the company (agreement), dated 19 June 2001
3. Notification by San San Company regarding the transfer of workers from San San I to San San II, dated 20 April 2001

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

1. Report of the collective labour dispute resolution at San San Company, No. 344 K.K.B.V/AK/V.K, dated 10 April 2007
2. Minutes of the collective labour dispute conciliation, dated 27 March 2007.

Provided by the Secretariat of the Arbitration Council:

1. Invitation letter No. 151 K.K.B.V//AK/VK/LKA, dated 12 April 2007 to invite the worker party to attend the hearing.
2. Invitation letter No. 152 K.K.B.V//AK/VK/LKA, dated 12 April 2007 to invite the employer party to attend the hearing.

FACTS

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

The Arbitration Council finds that:

Issue 1

- San San Company employs a total of approximately 1,852 workers.
- The company started operating in 1997. In 1999, the company started to provide a box of rice for all workers for their lunch.
- In 2000, the company provided an additional 1,000 riel, when workers worked overtime in accordance with Notification 017 SKBY, dated 18 July 2000 by the Ministry of Labour.
- In 2002, the company stopped providing the box of rice to workers but provided 1,000 riel instead. The workers continuously demanded the employer to continue to provide the box of rice but the employer did not agree to the demand.
- The company has overtime work for workers to do
 - From 4:00 p.m. to 6:00 p.m.
 - From 6:00 p.m. to 8:00 p.m.

- The company states that it provides 1,000 riel to workers who work overtime but that it cannot meet the workers' demand for the company to provide an additional 1,000 riel to workers who work overtime from 6:00 p.m. to 8:00 p.m. For overtime work, the company bases this on a voluntary principle. In addition, the company has not provided this additional 1,000 riel for 5 years, i.e., from 2002 to 2007.
- The company also considers the workers' demand for an additional 1,000 riel as unreasonable because if workers work overtime from 4:00 p.m. to 6:00 p.m., they receive 1,000 riel and if from 6:00 p.m. to 8:00 p.m., they still receive 1,000 riel.
- The workers agree that the company follows the voluntary principle in asking workers to work overtime. The workers say that they have helped the company so the company should help to provide an additional 1,000 riel to workers who work overtime because most of the workers live far from the factory and some companies provide 1,000 riel to workers who work overtime from 6:00 p.m. to 8:00 p.m.

Issue 2

- The company followed the monthly-based wage since the start of its operation.
- In January 2007, the company made an announcement regarding the change from monthly-based wages to piece rate which would be implemented in March 2007.
- On 20 January 2007, the company arranged a meeting with workers in different sections in the factory (as in the attendance list provided by the company, the Arbitration Council found that there were 142 workers' [names] and their signatures) to inform them about the change from monthly-based wages to piece rate wages.
- In March 2007, the company started implementing piece rate wages to workers, both in Building A and Building B. However, all workers in Building A did not agree to work on piece rate as suggested by the company.
- Workers in Building B agreed to work by piece rate but, less than a month later, the workers demanded to go back to monthly-based [wages].
- On 9 March 2007, all workers in the factory went on strike and stopped the strike on 11 April 2007 after the Arbitration Council issued an Interim Order.
- The workers stated that the piece rate workers are worried that the piece rates are cheap and they do not know the different rates of different PNs, so they have to learn more. Sometimes, workers at the front line are free and sometimes those at the back line are free, thus some workers can do a lot but some can do very little.
- The workers add that in the monthly-based [system] workers used to receive US\$ 60 to US\$ 70 per month but [they are concerned] that when they turn to work on piece rate, their salary will decrease; they are especially worried that when they work on

piece rate and cannot earn the main wage for three months, the company will terminate them from work.

- Workers mention that in March 2007, some workers received a lot of wages but some received little and some could get only US\$ 30 per month. The employer, on the other hand, mentioned that the workers who received only US\$ 30 were those who did not agree to submit piece-rate slips properly for the whole month.
- The company stated in the hearing that for any workers who cannot earn the main wage, the company will add that up for them and the company maintains its position to have workers work on piece rate because they have not actually tried it.

Issue 3

- Before transferring from San San I to San San II, the workers demanded US\$ 8 per month for a traveling allowance but the company did not agree to this demand. Later on, because there was an agreement, workers agreed to US\$ 5 and added this amount to the main wages.
- On 21 April 2001, representative(s) of the company, head of group, and worker representative(s) met for a discussion and agreed to make an announcement to workers who agreed to transfer from San San I to work in San San II, the company would add US\$ 5 onto their US\$ 45 wages, to become US\$ 50.
- According to the minutes of the labour dispute conciliation meeting, dated 19 June 2001, point 2, the representative(s) of the company and the worker representative(s) agreed that “[f]or wage, the company provides US\$ 45 of wage plus US\$ 5 of traveling fee for workers who transfer from the former San San I. For workers of former San San II, the Company provides the normal wage of US\$ 45.”
- The company followed the above mentioned agreement by adding the amount to [workers’] main wage from 2001 to the end of 2006.
- At the beginning of 2007, the company increased the workers’ wages from US\$ 45 to US\$ 50 in accordance with Notification 745 KKBV, dated 23 October 2006 by the Ministry of Labour and Vocational Training. Since that time, the company agreed to continue to provide workers the US\$ 5 for transportation fare [but began to include it as a part of the main wages], reasoning that the main wage was increased from US\$ 45 to US\$ 50, in accordance with the Notification by the Ministry of Labour and Vocational Training.
- 127 workers (evidenced by a list of names with thumbprints) demand the company to add the US\$ 5 for workers’ transportation fare into their main wage as the company had agreed and practiced in the past.

REASONS FOR DECISION

Issue 1

The workers claim that workers who work overtime from 4:00 to 6:00 p.m. receive a meal allowance of 1,000 riel but do not receive an additional 1,000 riel when they work overtime from 6:00 to 8:00 p.m. The workers think that this practice is not fair.

Point 4 of Notification No. 017 SKBY, dated 18 July 2000 by the Ministry of Labour, states, “[w]orkers who voluntarily work overtime upon the request by the employer shall receive a meal allowance of 1,000 riel per day or receive one free meal.” The content of this Notification states clearly that the 1,000 riel meal allowance for overtime work is based on the basis of “one day”.

In this case, the workers accept that the company asks the workers to work overtime based on a voluntary principle and for workers who work overtime, the company provides them 1,000 riel per day. The Arbitration Council considers that when workers work overtime voluntarily, they should receive 1,000 riel for a meal allowance or one free meal. This means that even when the overtime is more than or less than two hours, the workers should still receive 1,000 riel or one free meal because the Notification mentions about one day.

The Arbitration Council considers that besides the Labour Law which establishes the voluntary principle of overtime work and Notification 017 SKBY, dated 18 July 2000 by the Ministry of Labour as mentioned above, there is no [other] article which requires the company to pay an additional 1,000 riel to workers for overtime work. Thus, the Arbitration Council considers that the workers’ demand is related to a benefit which is above what is mentioned in the Labour Law, which means that it is an interests dispute.

The Arbitration Council can settle an interests dispute only when the union who brings the case is the union with the most representative status in the enterprise or when many unions join together to make up more than half of the number of workers in the enterprise. (See award 81/04-Evergreen, Issue 4; and 98/04-Great Union, Issue 3).

The Arbitration Council considers that a union’s most representative status provides the legal capacity in negotiating to create a CBA in a company and a legal right to bring a dispute case to the Arbitration Council for solution. (See award 57/06-Evergreen, 81/04-Evergreen and 98/04-Great Union).

In order to have this most representative status, Article 277 of the Labour Law states that the union has to be registered and have complied with other conditions mentioned in this Article.

In this case, the Arbitration Council finds that the local FTUWKC in the factory does not yet have most representative status. In Arbitral Award 07/06-Dai Young, Issue 3, the Arbitration Council explained, “[t]his right belongs to the registered union with most representative status and which has complied with the other criteria under Article 277 of the Labour Law.” Thus, to be consistent with previous cases, the Arbitration Council considers

that the local FTUWKC does not have enough legal capacity to be a representative for the workers to settle a dispute related to the collective benefits of all the workers in the company.

In addition, Clause 43 of Prakas 099, dated 29 April 2004 states, “[a]n arbitral award which settles an interest 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”.

So far, the Arbitration Council considers that if the Arbitration Council issues an award on this point, it will become a CBA which will be applied to all workers in the company and will make other workers who are not members of this union lose their right to strike in relation to a dispute related to benefits in the future. Thus, it will be unfair for those workers. (See arbitral awards 57/04-Evergreen; 60/04-United Art, Issue 3; and 08/07-Siu Quinh, Issue 3).

In this case, the Arbitration Council agrees with the interpretation and award of previous Arbitration Panels. In this case, the local FTUWKC does not have most representative status in the company yet. Thus the Arbitration Council declines to consider this issue.

Issue 2

The company has issued a policy to have workers who receive monthly-based salaries to be piece rate workers based on a notification about the change of the monthly-based wages into piece rate in January 2007. The employer started implementing this piece rate in March 2007. However, the workers do not agree to the practice of piece rate and demand the company to continue to practice the monthly-based wage as before.

Article 2 of the Labour Law states, “[e]very enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in factory, workshop, work site, etc., under the supervision and direction of the employer...”

In previous cases, the Arbitration Council considered Article 2 to mean that the employer has the right to make arrangements and direct the company as long as these are in accordance with the Law and is reasonable. (See arbitral awards 62/06-Quick Sew, Issue 5; 108/06-Trinunggal Komara; and 37/07-Goldfame, Issue 3). The Arbitration Council considers that the employer's right to supervise includes the right to determine which workers in which section should work on piece rate and which sections should work on fixed wages (monthly-based salary) as long as this practice is in accordance with the Law and is reasonable.

Article 108 of the Labour Law states, “*For task-work or **piecework**, whether it is done in the workshop or at home, the wage must be calculated in a manner that permits the worker of mediocre ability working normally to earn, for the same amount of time worked, a*

wage at least equal to the guaranteed minimum wage as determined for a worker.” Based on the contents of this Article, it means that the Labour Law also recognizes this piece rate work.

Nonetheless, the change from monthly-based wages to piece rate can affect the conditions of the contract between the employer and its workers. To speak specifically in this case, the change can affect the wages and benefits the workers may receive. Workers who work on monthly-based wages used to receive a wage and some specific benefits provided by the workers of an amount around US\$ 60 to 70 per month on average. The Arbitration Council considers that the amount received was clear for both parties. The clarity of the wages and benefits can become a practice which binds the obligation of both parties to continue to practice this further (see arbitral award 109/06-Trinunggal Komara). In addition, the provision of this wage can be established a long time ago and both the employer party and the worker party have the same understanding about the amount of main wages and other benefits the workers should receive. Thus, the amount of main wages and other benefits have become an implied condition of the labour contract.

A contract is the law of the parties, thus both parties to a contract have an obligation to follow the conditions of the contract. Because the amount of main wages and other benefits have become [part of] the conditions of the contract, to follow this condition the employer which is a party to the contract has an obligation to provide the workers the amount of main wages they used to receive. In this case, it means that an employer must provide main wages and benefits to the workers at least in an amount equal to the wages and benefits workers used to receive under the monthly-based wage when the employer changed the work to piece rate.

Thus, the Arbitration Council considers that the employer has the right to ask workers who receive monthly-based wages to become piece rate workers as long as the change from monthly-based wages to piece rate does not affect the wages and benefits workers used to receive in the past.

In this case, the employer started to have workers work on piece rate in March 2007. However, all workers in Building A did not agree to work on piece rate and the workers in Building B agreed to follow the employer and work on piece rate for about one month and then complained until a strike commenced. For the month of March, some workers did not submit their piece rate slips to the employer because the workers were worried that if they could not earn the minimum wage for three months consecutively, the employer may punish them. The non-cooperation in providing piece rate slips prevented the calculation of wages from going smoothly. Thus, the evidence the Arbitration Council received does not provide enough ground for a fair comparison to see whether, working by piece rate, the workers can

earn a wage which is less than, equal to, or more than the wages and benefits they used to receive in the past.

Thus, the Arbitration Council will decide in principle that San San Company has the right to change the workers from monthly-based wages to piece rate as long as the change ensures that workers will receive [the same] wages and benefits they used to receive in the past.

Issue 3

127 workers demand the company to add US\$ 5 of the workers' transportation allowance into their main wages.

In June 2001, the employer and the workers agreed that the employer would provide a transportation allowance of US\$ 8 to the workers of San San I who agreed to go to work in San San II. Before transferring from San San I to San San II, the workers demanded US\$ 8 per month for transportation but the company did not agree to this demand. Later on, because there was an agreement, the workers agreed to US\$ 5 by adding this amount of US\$ 5 to their main wages. This agreement was visaed by a Conciliator, dated 19 June 2001, and states, *"For wages, the company provides US\$ 45 of wage plus US\$ 5 of traveling fee for workers who transfer from the former San San I. For workers of former San San II, the Company provides the normal wage of US\$ 45"*.

The Arbitration Council notes that the wage amount of US\$ 45 stated the above mentioned agreement was the minimum wage stated in point 2 of Notification No. 017 SKBY, dated 18 July 2000 which states, "Workers shall receive a minimum wage of US\$ 45 per month when the probationary period is finished and the workers become regular workers..."

At the beginning of 2007, the employer increased the minimum wage of workers from US\$ 45 to US\$ 50 following point 1 of Notification 745 SKBY, dated 23 March 2006, which states, "...[a]t the end of probationary period, a full-right worker receives the minimum wage of US\$ 50 per month.". For the traveling allowance of US\$ 5 the company continues to maintain it for the 127 workers but does not add it into wage anymore, based on a fact that the minimum wage has increased from US\$ 45 to US\$ 50 per month.

Is the agreement regarding the inclusion of US\$ 5 traveling allowance into the US\$ 45 wage, dated 19 March 2001, still in effect when Notification 745 KKBV, dated 23 October 2006 entered into force at the beginning of year 2007?

The Arbitration Council considers that, among all the purposes of Notification 745 KKBV, dated 23 October 2006, one of its main purposes is to increase workers' minimum wage in the garment, textile, and shoe industries to US\$ 50 per month. When this Notification entered into force at the beginning of 2007, all employment contracts or agreements which provided a minimum wage less than US\$ 50 to regular workers should follow this Notification

by increasing the wage to at least equal to US\$ 50 per month. This Notification does not intend to nullify any employment contract or agreement. Thus the agreement dated 19 June 2001 between the employer and the workers is still in effect while this Notification enters into force.

Based on the above mentioned analysis, the agreement should replace the provision of US\$ 50 from US\$ 45 after the Notification enters into force. In this case, the employer has increased the workers' wages from US\$ 45 to US\$ 50. Because the agreement is still in effect, the employer has an obligation to add the US\$ 5 for travel allowance into workers' wages.

The Arbitration Council notices that in Issue 2 above, the Arbitration Council decides that the employer has the right to change the workers from receiving monthly-based wage to piece rate but it has to ensure that the workers receive [the same] wages and benefits they used to receive in the past. In this case, the wages of the 127 workers which include the US\$ 5 have become a part of this wage and a basis for the employer to calculate their wages when the company changes workers from monthly-based wage to piece rate.

Thus, the Arbitration Council determines that the employer has to add the traveling allowance of US\$ 5 into the workers' main wages as in the agreement dated 19 June 2001 which the company practiced from 2001 to the end of 2006.

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

DECISION

Issue 1

- Declines to consider the workers' demand that the company pay 1,000 riel in addition for workers who work overtime from 6:00 p.m. to 8:00 p.m.

Issue 2

- The employer has the right to change workers from receiving main wages to receiving piece rate wages as long as this change ensures that the workers will receive the same wages and benefits as they used to receive in the past.

Issue 3

- The employer has to add the transportation fee of US\$ 5 to workers' main wages in accordance with the agreement dated 19 June 2001 which the company has been practicing from 2001 to the end of 2006.

Type of Award: Non binding

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.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **OUK RY**

Signature:

Arbitrator chosen by the worker party:

Name: **AN NAN**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **PEN BUNCHHEA**

Signature:

Dissent by Arbitrator Ouk Ry

in case 39/07-San San

Issue 2: Workers demand the company not to practice the piece rate.

I, Arbitrator Ouk Ry, would like to attach my dissent to arbitral award of Arbitrators An Nan and Pen Bunchhea on the point which orders that “as long as this change ensures that the workers will receive the same wage and other benefits as they used to receive in the past.”

The change to piece rate is the employer’s right to make an arrangement and when the change happens and it causes workers to earn wages and benefits less than what they used to earn before, the workers have the right to file a complaint against the employer for a legal solution. In addition, the workers did not make a demand on this point, thus the Arbitration Council should not have considered and made a decision on this point. When we make such decisions, it creates a jurisdiction and practice that we should avoid in order to not create disorder in the industrial relationships between workers and employers. In addition, it would be reasonable for the Arbitration Council to have considered it if workers complained about losing their wages after working on piece rate rather than making a decision [on an issue] which was not complained about or has not yet happened.

Phnom Penh, 4 May 2007

Signature

Ouk Ry