

**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**THE ARBITRATION COUNCIL**

Case: 03/05

Date of award: February 01, 2005

**ARBITRAL AWARD**

(Issued under Article 313 of the Labor Law)

**Flying Dragon Com., Ltd.**

(The employer party)

**And**

**C.CAWDU to Flying Dragon III**

(The employee party)

**Detailed Information of the Employer**

Representatives:       1- Mr. Rai Long, General Manager  
                                  2- Mr. In Pouve, Transportation Manager and Accountant  
                                  3- Mr. Kong Karona, Administration Manager

Address:                   Phum Trea, Stroeung Mean Chey, Khan Mean Chey, Phnom Penh.

Tel:                        023 802 289                   Fax: 023 424 068

**Detailed Information of the Employee**

Representatives:       1- Mr. Ek Sopheak, Manager of Dispute office of CCAWDU  
                                  2- Ham Lor Hoeun, Local Union President  
                                  3- Ou Nam, Local Union Vice President  
                                  4- Chim Sokkea, Local Union secretary

Address:                   #6C, St. 476, Toul Tompong1, Khan Chomkamorn, Phnom Penh.

Tel:                        023 210 481/ 012 942 143/ 023 210 481

**ISSUES IN DISPUTE:**

(In non-conciliation report)

- 1- The employees demanded that the employer pay 2000 riel for meal allowance for the workers who work 4 hours and 30 minutes of overtime per day.
- 2- The employees demanded that the employer pay their wages and attendance bonus on the 10<sup>th</sup> of the following month at the latest.

- 3- The employees demanded that the employer pay their wages and attendance bonus for the workers who went on strike from 24 to 28 December 2004.
- 4- The employees demanded that the employer convert the casual workers who have worked for the factory for two months or more to permanent workers.
- 5- The employees demanded that the employer change the working starting time from 6:00 a.m. to 7:00 a.m.
- 6- The employees demanded that the employer increase piece rate to the same rate as before.

### **JURISDICTION<sup>1</sup> OF THE ARBITRATION COUNCIL**

The Arbitration Council derives its power to make this Award from Section II B<sup>2</sup> Chapter 12 of the Labor Law (1997); the Prakas on the Arbitration Council (#099 of 21 April 2004), the Prakas on Appointing members of the Arbitration Council #103 dated 26 April 2004 and #265 dated July 13, 2004, and the Arbitration Council Procedural Rules.

An attempt to conciliate the collective dispute which is the subject of this Award was made as required by Chapter XII Section 2A of the Labor Law on 11 June 2004. That conciliation hearing was unsuccessful and non-conciliation report dated 05 January 2005 was submitted to the Secretariat of the Arbitration Council on 06 January 2005.

### **COMPOSITION OF THE ARBITRATION PANEL**

Arbitrator chosen by the employer party:	Mr. Mar Samborana
Arbitrator chosen by the worker party:	Ms. Sin Kim Sean
Chair arbitrator (chosen by the two arbitrators):	Mr. Run Saray

### **HEARING AND EVIDENCE**

#### **Date and place of hearing:**

- 14 January 2005 at 14h30 at the Secretariat of the Arbitration Council.
- 28 January 2005 at 15h30 at the Secretariat of the Arbitration Council.

**Witnesses and experts: N/A**

### **DOCUMENTS AND OTHER EVIDENCE CONSIDERED BY THE ARBITRATION COUNCIL AS FOLLOWS:**

#### **From the Employer Party:**

- 1- Non-conciliation report of collective labor dispute dated June 29, 2004
- 2- A request for appointment [What that?] to resolve the issues in the complaint of the workers from the C.CAWDU to the employer dated November 29, 2004;
- 3- Complaint of the Union of Flying Dragon III submitted to the C.CAWDU requesting for intervention to resolve their 14 issues with the employer;

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<sup>1</sup> Jurisdiction means judicial power.

<sup>2</sup> From Articles 309 to 317 of the Labor Law

- 4- Record of labor dispute negotiation with the employer made by C.CWADU to Flying Dragon III dated December 7, 2004;
- 5- Report on strike dated December 24, 27, 28, 2004;
- 6- Internal Work Rules of the Company dated October 6, 2000;
- 7- By-laws of the Flying Dragon company dated August 2, 1999;
- 8- Notice of the Company dated December 18, 2004 on disciplinary actions to workers whose piece work production is less than the monthly production target, earn less than monthly hour rate wages including overtime and require the company to subsidize [their salaries] more than 50%;
- 9- Letter of Flying Dragon II Union Federation dated January 17, 2005 requesting the company to keep the start time at Flying Dragon II, at 6:00 a.m. attached with the thumb printed list of 227 workers;
- 10- Letter of delegate FD 005/001 of the Cambodia Flying Dragon Garment dated January 21, 2005 authorizing to Mr. Kong Karona and Mr. Noun Vicheat;
- 11- Table of comparison of the piece rate after adjustment;
- 12- Payroll of the Flying Dragon workers in November and December 2004;
- 13- Letter No. 2464 & 2565 dated October 5, 2004 from the Labor Inspection Department, on overtime work in the Flying Dragon II and III;
- 14- Letter No. 2567 dated October 5, 2004 from the Labor Inspection Department on suspension of weekly time off in the Flying Dragon Company III;
- 15- Letters of resignation dated January 22, 2005 from workers, Ou Nam, Ham Lamheoung & Chim Sokea;
- 16- Individual labor dispute conciliation report dated December 29, 2004 between the Flying Dragon and Ou Nam, Ham Lamheoung & Chim Sokea;
- 17- List of the Flying Dragon workers who were subsidized in November and December 2004 (November 573/589 workers, 87% and December 349/636 workers, 55%).

**From employee party: N/A**

- 1- Letter No. 2668 kkbv/Gk dated October 22, 2004 from the Labor Inspection Department recognizing the leaders of Garment Worker Democratic Union of the Flying Dragon Factory III;
- 2- Letter No. 561 MSALVY dated December 22, 2003 on registration of Garment Worker Democratic Union of the Flying Dragon Factory III and a registration certification No. 531 dated December 22, 2003;
- 3- Statements supporting strike of the workers in Flying Dragon III and I.

**From the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation:**

- 1- Report of the Department of Labor Inspection No. 013 kkbv/Gk dated January 05, 2005 of the Ministry of Labor and Vocational Training.
- 2- Record of collective labor dispute conciliation dated December 24, 2004.

### **Evidence and Testimony of the parties at the hearing**

**Both Parties agreed to have Non-binding award.**

### **DOCUMENTS AND PRESENTATIONS BY THE DISPUTING PARTIES IN THE HEARING**

#### **Case Summary**

The Cambodia Flying Dragon Garment Company is located at Phum Trea, Sangkhan Stoeung Mean Chey, Khan Mean Chey, Phnom Penh and employs 1850 workers. Workers filed complaint with the Labor Inspection Office in Khan Mean Chey on December 24, 2004 demanding that the company improve working conditions. Khan Mean Chey Labor Inspection Office started conciliation to resolve the dispute on December 24, 2004 and continued to December 28, 2004. Both parties agreed on 8 of 14 issues and disagreed on 6 issues. The non-conciliation issues are as follows:

- 1- The employees demanded that the employer pay 2000 riel for meal allowance for the workers who work 4 hours and 30 minutes of overtime per day.
- 2- The employees demanded that the employer pay their wages and attendance bonus on the 10<sup>th</sup> of the following month as latest.
- 3- The employees demanded that the employer pay their wages and attendance bonus for the workers who went on strike from 24 to 28 December 2004.
- 4- The employees demanded that the employer convert the casual workers who have worked for the factory for two months or more to permanent workers.
- 5- The employees demanded that the employer change the working starting time from 6:00 a.m. to 7:00 a.m.
- 6- The employees demanded that the employer increase the piece rate to the same rate as before

#### **FINDINGS OF FACT:**

- After having reviewed the non-conciliation report of the labor dispute,
- After having heard the presentation of the company and employees as described above and in the hearing records,
- After having reviewed documents as described above.

**We find that:**

### **1<sup>st</sup> issue:**

Workers demanded that the Flying Dragon factory provide a meal allowance of 2000 riels for each employee who works 4.5 hours of overtime. At the first hearing, the employees requested a meal allowance of 1000 riels for working overtime to 6:00 p.m, i.e. two hours of overtime.

The factory argued that this overtime is on a voluntary basis and no one is forced [to work overtime] and the company already provides 1000 riels as a meal allowance for working 4 hours and 30 minutes of overtime. If any worker does not want to work overtime, it is no problem.

Before working overtime, the factory asks and gives prior notice to all workers whether the workers want to work overtime or not. If the workers agree to work for overtime the factory representative will ask workers for their thumbprint to prove their agreement. The workers argued that the thumbprint proving their agreement had never previously been required but was instituted later.

The workers requested the factory [limit] overtime work to two hours per day. The factory argued that working overtime is based on a voluntary principle: if the workers don't want to work overtime that is the workers' right, however, the factory can't allow them to work only two hours of overtime. If the workers agree to overtime it is for four and half hours because most of the work is network if some workers work only for two hours and other work for four and half hours the factory can not hire replacement for only two hours.

The company received permission letters No. 2564 and 2565 from the Labor Inspection Department allowing the Flying Dragon II and II to have their workers work overtime for three months counting from the date of issuing such letters and allow for two hours of overtime per day on a voluntary basis and the employer must provide free meal and overtime payment. The company received a letter No. 2567 dated October 5, 2004 from the Labor Inspection Department allowing the company to suspend weekly time off [that would otherwise be permitted under the Labor Law] in Flying Dragon III until November 4, 2004.

### **2<sup>nd</sup> issue:**

Workers demanded that the company pay their monthly wages at the latest on the 10<sup>th</sup> of the following month based on the agreement between the factory and the worker representative dated January 24, 2004. The employee party did not provide a copy of the January 2004 agreement to the Arbitration Council although the Arbitration Council requested it from them.

The factory argued that the factory can not do that because of security reasons and based on the agreement dated March 23, 2004 on safety measures for providing wage payment to the workers between the 8<sup>th</sup> and 13<sup>th</sup> of the following month. The employer provided the Arbitration Council with a copy of the agreement. This agreement was made before Labor Inspector with thumb prints of union president and 6 worker representatives.

The factory argued that the company needs to prepare many relevant documents, to have approval of this wage payment from the company based in Hong Kong and to calculate overtime

compensation for more than 1850 workers. The company also raised the point that in the past there was a robbery of the money for payment to workers therefore the company must have measures and time to prevent outsiders from knowing the day that the company pays workers' wages.

The workers representative argued that this payment of monthly wages sometime is delayed until the 14<sup>th</sup> of the following month. This late payment affects to the workers because they need to pay for water, electricity, rent and daily living expenses.

The company denied that the company pays wages later than the 14<sup>th</sup> of the following month.

### **3<sup>rd</sup> Issue:**

At the first hearing the employee demanded that the company provide wage and attendance bonus during strike on 24-28 December 2004. The employee representative and union asked the company to excuse the strike on the ground that strike occurred because the company hid the piece rate record and the strike were happened after the employee were found about this. The employees recognized that they did not give prior notice to the employer. The worker representatives and union discussed this issue with the employees when they returned to work [after the first hearing] whether they continue the case or withdraw this non-conciliation point.

At 1<sup>st</sup> hearing the company representative refused the employee's claim because the strike was conducted without prior notice therefore [the company argued that] the strike was illegal and the Company lost profits because of the strike. The company's position remained the same by refusing the employees' claim.

At the 2<sup>nd</sup> hearing the worker representatives were absent and only the CCAWDU officer was present and was authorized with delegation powers to represent workers at the hearing however he did not show any more evidence to support this argument. CCAWDU did not confirm their withdrawal of this claim. The AC finds that the employee party has no evidence to support this claim.

### **4<sup>th</sup> Issue:**

At the 1<sup>st</sup> hearing the employees demanded that the company convert casual workers who continuously work for the company more than 2 months to regular workers. The worker representative and union argued that all casual workers work for a length of time equal to the regular workers. They work 26 days a month and up to 3 months then the company stops hiring them for a period and then hires them as casual workers again. The company always does that. The workers demanded that the employer convert those workers who work for the company over two months to regular workers.

At the 1<sup>st</sup> hearing the company representative argued that the casual workers did not work up to 3 months, it is only 2 months at most and sometimes the casual workers work only 2 weeks or 1 month and then they had 1-2 week break then later they were rehired if the new order arrives.

At the 2<sup>nd</sup> hearing the employer clarified that there are 167 casual workers who are working (among them there are 47 workers working at QC, quality checking, and 120 workers working at laundry section). Now in the company there are some casual workers working from November and some others from December 2004. They were paid the same benefits as the regular workers such as minimum wage and attendance bonus, but not severance pay. The company also stated that the company terminated the employment contract of workers who had worked for two months and when there is a lot of work the company will recruit casual workers again so the rehired workers may be the previous casual workers who were just terminated. These workers have worked until the contract ended under irregular period of time it is based on the workload, one or two months.

The Arbitration Council did not receive any document or evidence from the employee party to support their claim on the 4<sup>th</sup> issue.

#### **5<sup>th</sup> issue:**

CCAWDU at Flying Dragon III brought a claim based on a request of some workers at the Flying Dragon II to the employer to change the start working time from 6:00 a.m. to 7:00 a.m. because it is difficult to come to work very early in the morning and their homes are far from the workplace.

The company argued that this Union does not represent most of the workers at the Flying Dragon II. Most of workers at the Flying Dragon II want to start working according to the time determined by the company at 6:00 so they can leave home not so late at night when they work overtime. Moreover the factory, Flying Dragon II, has a worker union, Khmer Union of the Flying Dragon II but they do not demand to change the start time. The Internal Working Rules of the Flying Dragon Company Article 4 states that "starting at 7:00 a.m. to 11:00 a.m. and 12:00 p.m. to 16:00 p.m. At the Flying Dragon II it has two working shifts: 1<sup>st</sup> shift 6:00 to 15:00 and 2<sup>nd</sup> shift 15:00 to 22:00. The workers at the Flying Dragon II are 502 who are represented by the other union.

The Arbitration Council required the CCAWDU Union of the Flying Dragon III conduct a survey at the Flying Dragon II to know whether majority of workers at Flying Dragon II really want to change the start working time from 6:00 a.m. to 7:00 a.m., and required the employer to give notice to the Union in Flying Dragon II to clarify the position of the majority workers on this matter. On January 19, 2005 the Arbitration Council received information that 227 workers at Flying Dragon II printed their thumb and sent a letter through Khmer Union Federation to the employer requesting to keep the start time at 6:00 a.m. because of (1) the workers working for two shifts, (2) the workers at the 2<sup>nd</sup> shifts whose houses are far, (3) the temperature inside the building is very hot at 3:00 p.m. Therefore, according to the letter signed by 227 workers of Flying Dragon II,

changing the starting time from 6:00 a.m. to 7:00 a.m. would affect to the interests of most workers in the factory represented by another union.

At the second hearing, the representative from CCAWDU provided no evidence that they were authorized from the local union of the Flying Dragon II and/or to represent the workers of the Flying Dragon II, or any evidence that the workers of Flying Dragon II wanted to change their start time.

In this case, the Arbitration Council finds that CCAWDU has no authority to represent the workers of the Flying Dragon II or to claim for a change in the start time at the Flying Dragon II.

#### **6<sup>th</sup> issue:**

This issue involves two problems: a)- Changing piece rate and b)- disciplinary actions to the workers who work and earn less than the minimum wage.

##### **6.1- Changing piece rate:**

The Flying Dragon Company pays wages to workers based on their piecework. The company applies this principle since the beginning of its operation, for 6 years, and so far there is no problem on this piece rate. Recently the company received a new order for the company to determine the piece rate for workers in the sewing section by using Chinese workers to sew some samples to determine the average of a piece rate and then decrease to 60% to 70% of Chinese target for Cambodian workers to sew because the Cambodian workers are not as skillful as Chinese workers. After letting the Cambodian workers sew for a month then the company will determine the piece rate again to adjust for the difficult piecework (which worker can not sew to reach the production target) and the easy piecework (which workers can sew over the production target) to use it in the company to calculate workers' wages.

In this case the employer decreased the piece rate in 16 processes, increased in 7 processes and kept the same rate in the remaining 6 processes. Decreasing of piece rate in 16 processes caused the income of some workers to decrease including Ms. Ham Lor Hoeun who is the local CCAWDU Union president to Flying Dragon III.

Actually for the last month before the piece rate changed she earned USD \$160 including overtime pay and after the changing the new piece rate she only earned USD \$80. Ms. Ham Lor Hoeun argued that the employer decreased her piece rate to help the workers who are slow and found that the company should not do that. She argued that for piecework which the workers can produce in high quantity and quality, the company should encourage workers and give a larger bonus.

The company argued that for the interest of all workers in the factory the company must adjust the piece rate and for the workers who earn less than the minimum wage the company will subsidize to the minimum wage as required by the Law. At the 1<sup>st</sup> hearing the company provided the figure that among 246 workers in the sewing section, after changing the piece rate there are 192 worker, 78%, whose wage were subsidized by the company to the minimum wage and there

are 53 workers, 21.5%, who earn less than 50% of minimum wage and were warned in writing by the Company. The above figure does not include the payment of work for overtime, weekly days off and public holidays and it is calculated only for work during the normal working hours in December 2004.

On January 28, 2005 the Arbitration Council received additional documents from the company proving that in November 2004 before modification of the piece rate there were only 13% of workers in Line A who can perform and earn equal or above the minimum wage, USD \$45.00 (among 587 workers). However, after the modification of the piece rate there are approximately 45% of workers (287/636 workers) in Line A, who can earn equal or above the minimum wage. Therefore there is approximately 55% of the workers whom were subsidized by the company to receive the minimum wage.

#### **6.2. Warning to the workers who achieved less than 50% of minimum wage, USD \$45:**

The company issued a notice on December 18, 2004 on disciplinary action to workers whose wage calculated based on their monthly piecework is less than the minimum wage including overtime and are subsidized more than 50% by the company; they will be warned in writing for three consecutive times.

Article 10 of the Internal Work Rules of the Flying Dragon III provides that if there is evidence of employees who intentionally commit misconduct then the company will punish them based on the seriousness of their misconduct as follows:

- 1- Light misconduct: 1<sup>st</sup> warning is verbal and recorded in the personal file. If the misconduct is repeated the 2<sup>nd</sup> warning is in writing.
- 2- Medium misconduct: 1<sup>st</sup> warning is in writing and recorded in the personal file. The 2<sup>nd</sup> warning is to stop working without pay for a period (not more than 7 days). The 3<sup>rd</sup> warning, in case of repeating, is dismissal.

The employee party argued that the employer gives workers written warnings as stated in the notice and asked workers for their thumbprint, that causes workers to be afraid and worry of being dismissed by the company. The worker argued that in the past the company never required the workers to print their thumb on the written warning as defined in the above notice.

The company argued that in this new stage there is strong competition so the company must strengthen the discipline in the company and requires all workers to try to work for the company and workers who are lazy or work slowly must try more therefore the company must apply written warnings to the workers who earn less than 50% of minimum wage. The company remarked that unless there are 3 written warnings the company would consider whether to keep or to dismiss the workers and not to immediately dismiss. Moreover the number of workers who were warned is small, particularly in Group A there are 70 workers in which 4 of them were warned and in Group E there are 67 workers in which 17 of them were warned (that is, from 6% to 25%).

## **REASONS FOR DECISION:**

### **1<sup>st</sup> issue:**

Article 1 of Prakas 80 MOSALVY dated March 01, 1999 states that "Owner or director of enterprise or establishment covered by the Labor Law may make a request to MOLSAVY for working overtime to extend their normal working hours." In this case, the employer of Flying Dragon received permission letters No. 2564 and 2565 from the Labor Inspection Department dated October 05, 2004 allowing the Flying Dragon II and III to work for overtime for three months from the date of issuance of this letter and allowing two hours of overtime per day on a voluntary basis and the employer shall provide free meals and overtime payment.

Moreover the Notification No.17 MASALVY dated July 18, 2000, point 4 states that "workers who volunteer to work for overtime according to the employer's request shall receive 1000 riels per day or have a free meal."

However, the employer argued that the workers agreed with the factory to work overtime for four and half hours and volunteer to get 1000 riel for meal allowance. Therefore [the employer argued that] when the workers work overtime only for two hours they cannot receive 1000 riel for meal allowance.

The Arbitration Council finds that although there is an agreement but the workers who work two hours of overtime for the company are entitled to 1000 riels as a meal allowance in accordance with the Notification No. 17 MASLVY dated July 18, 2000 and Article 13 of the Labor Law stating that "all regulations ..in contract or collective bargaining agreement which do not followed the provisions of this law ... shall be null and void."

The Arbitration Council decides the employers must pay 1000 riels for meal allowance per day<sup>3</sup> to the workers (not pay 2000 riels as demanded by the workers), regardless of the length of overtime.

### **2<sup>nd</sup> issue:**

Article 116 of the Labor Law states that "...wages of employee shall be paid at least once a month."

Article 5 of the Labor Law states that "Employees or helpers are those who are contracted to assist any person in return for remuneration, but who do not perform manual labor fully or who do so incidentally."

Under this meaning, workers of the Flying Dragon are employees under the above Article 5 and 116.

The Labor Law does not state on any specific date on which the employer is required to pay wages to the employees. Therefore the date of payment is based on the management decision

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<sup>3</sup> The Arbitration Council notes that under the permission letter from the Labor Inspection Department the employer is allowed to ask the workers to work overtime only two hours per day.

of the employer so long as the payment follows the meaning of Article 116, this means at least once per month.

In this case the workers and the employer agreed under an agreement dated March 29, 2004 that for security reasons wages will be paid between the 8<sup>th</sup> and 13<sup>th</sup> of the following month.

However, the workers argued that there is an agreement dated January 24, 2004 stating that the wage payments shall not be done longer than the 10<sup>th</sup> of the following month. The workers did not provide any document to prove this agreement. The Arbitration Council finds the workers do not have evidence to prove the agreement dated January 24, 2004 on wage payments. Therefore the Arbitration Council considers that the agreement dated March 2004 regarding the date of wage payments to workers in the factory is effective and binding on the parties because this agreement is in accordance with the Article 116.

Therefore the Arbitration Council finds that the employer has the right to pay wages to workers based on the agreement dated 24 March 2004 between 8<sup>th</sup> and 13<sup>th</sup> of the following month.

### **3<sup>rd</sup> Issue:**

In previous cases regarding illegal strikes the Arbitration Council determined that workers are not entitled to wage and attendance bonus (see Lida 04/03, Wash Concept 08/04, Lucky Zone 15/04). Article 337 of the Labor Law give exclusive power to the court to review the legality of a strike but sometimes the Arbitration Council has found that it was necessary to consider the legality of the strike which was part of a claim. See Lida case 04/03 dated June 19, 2003 in which the Arbitration Council considered the legality of the strike as a part of the demand for wage during a strike based on the legal procedure as required by the Labor Law.

Under Article 336 and 337 a strike will be an illegal strike if it does not follow the procedures of the Labor Law.

Article 318 and 321 of the Labor Law are general provisions on strikes including requirements for the strike to be conducted after peaceful dispute resolutions are exhausted with the employer.

Under Article 324 of the Labor Law, the union has to give notice prior to 7 days counting working days, to the employer and the Ministry in charged of Labor issue (if the strike affects the basic service, the notice is 15 days counting working days) and must try all the ways to conciliate among the parties within the notice period.

In fact, the strike at the Flying Dragon happened while the peaceful dispute resolutions were not exhausted because the workers conducted the strike without giving prior notice, and did not try their best to resolve and conducted the strike prior to the settlement process of the Arbitration Council which is instituted to settle collective labor disputes in peaceful way.

Article 332 of the Labor Law states that " labor contract shall be suspended during a strike. During a strike the allowance for work is not provided and wages shall not be paid."

Article 334 of the Labor Law prohibits the employer from hiring replacement workers except when the recruitment is to maintain minimum services; in cases of violation of this rule the employer is obligated to pay workers their wage for the strike duration.

Finally Article 333 of the Labor Law prohibits the employer from imposing any punishment to workers because of their participation in a strike. However this prohibition is enforceable so long as the strike is conducted in accordance with lawful procedures.

If the workers do not follow the law they cannot expect to receive wage and attendance bonus. (See award in Lida 04/03, Wash Concept 08/04, Lucky Zone 15/04.)

Therefore the demand of the workers to the employer to pay their wage and bonus during the strike from 24 to 28 December 2004 has no legal basis.

Therefore the Arbitration Council decides to deny the demand of workers for wage and bonus during the strike.

#### **4<sup>th</sup> Issue:**

The 4<sup>th</sup> issue is related to regular workers and casual workers. Article 9 of Labor Law divides employees into two types: "regular workers and casual workers who are engaged to perform an unstable job. Regular workers are those who regularly perform a job on a permanent basis. Casual workers are those who sign contract to perform a specific work that shall normally be completed in short period of time and perform work temporarily, intermittently and seasonally."

Although the Labor Law does not specify the duration that the employer employs casual workers, the law states clearly that any employee who perform job regularly and full time for specific period of time, those employee are not considered as casual workers. Article 166 (3) of Labor Law provides that "For jobs that are not performed regularly throughout the year, a worker is considered to have met the condition of continuous service if s/he works an average of 21 days per month."<sup>4</sup>

The Arbitration Council decided in Sport Wear case No. 26/04 dated June 16, 2004 that the employee shall not be considered casual workers if they work an average of more than 21 days for more than 2 months consecutively. In this case, the workers should be considered as regular worker under fixed duration contracts or undetermined duration contracts. Moreover, casual workers are entitled to receive the same benefits as other regular workers based on Article 10 of the Labor Law "*Casual workers are subject to the same rules and obligations and enjoy the same rights as regular workers, except for the clauses stipulated separately.*"

The Arbitration Council finds that the company should have a policy that complies with Article 9, 10, and 166 of the Labor Law and should implement it appropriately.

The worker representatives argued that the casual workers work for the company up to 3 months and still have the same status of casual worker but the representatives failed to mention any particular casual worker and offered no evidence to support their argument. Furthermore at the

2<sup>nd</sup> hearing the Union did not have any evidence to support their argument therefore the Arbitration Council finds that this issue is not happened in this company.

Therefore the Arbitration Council decides to deny the 4<sup>th</sup> demand of the workers.

#### **5<sup>th</sup> Issue:**

The Arbitration Council finds that there is no evidence that the workers of Flying Dragon II authorized local CCAWDU Union of Flying Dragon III or any worker representative from the Flying Dragon II to demand changing the start time from 6:00 a.m. to 7:00 a.m. Therefore the Arbitration Council finds that CCAWDU of Flying Dragon III has no authority to be a party or demand for changing the start time at the Flying Dragon II.

Therefore the Arbitration Council decides not to consider the claim of CCAWDU Union of the Flying Dragon III on the issue of changing the starting working time in the Flying Dragon II.

#### **6<sup>th</sup> Issue:**

##### **6.1. Changing piece rate:**

Here, the Arbitration Council shall consider does the employer have the right to change the piece rate or not? Does the changing of rate cause the workers to receive benefits less than the law requires?

Under Article 2 of the Labor Law "each enterprise may have ... a group of people working under the ***management and supervision*** of the employer." ([Emphasis added.]) Under this meaning the Arbitration Council finds that the employer has the right to *manage and supervise* work in the company if the management and supervision is done in compliance with the law (see case #28/04 Raffle Grand D' Angkor).

The Arbitration Council finds that under the above Article 2 providing the right to manage and supervise the business, the employer has the legal right to determine and change the piece rate of products. In this case the employer changed the piece rate of products when the company received the new order to adjust the piece rate of difficult piecework which the workers do slowly (complicate) and of easy piecework that the workers to be able to do very fast (easy) in order for all the workers to be able to earn similar minimum wage based on the work and the same duration.

Article 108 of the Labor Law states that "for task work or piecework ...the wage must be determined in a manner that permits the worker of average skills working normally to earn, for the same amount of time worked, a wage at least equal to the guaranteed minimum wage as determined for the employees."

Article 137 states that "...the duration of full time work of the workers of both sex shall not exceed eight hours per day or 48 hours per week."

Notification No.17/00 MSALVY dated July 18, 2000 of MSALVY provides garment workers with the minimum wage of USD \$45.00 per month.

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<sup>4</sup> This article is for calculation of annual leave compensation.

The Arbitration Council finds that Article 108 provides a guideline to determine the piece rate (piecework cost) under the Labor Law and means that piece rate shall allow workers who have average skills working during the normal 8 hours per day (48 hours per week) to receive at least the minimum wage (USD \$45.00 per month for garment workers).

As a consequence, in this case, the change caused some workers who used to do easy piecework to have their wage decrease and the workers who do the difficult piecework to have their wage increase. The change decreased the wage of workers in 16 processes, increased the wage of workers in 7 processes and kept the same wage to workers in 6 processes.

The Arbitration Council notes that in November 2004 before changing the piece rate there were only 13% of the workers in Line A who could receive equal to or above the minimum wage of \$45.00 (among 587 workers). However after the change, there were approximately 45% of the workers in Line A (287/636 workers) who can earn equal or above the minimum wage. Therefore there are only 45% of workers can earn equal or above the minimum wage.

In Chusing case #14/03 dated October 3, 2003 the Arbitration Council considered Article 108 of the Labor Law and found that "nothing in the article provides a determination of piece rates rather it concerns the calculation of wages." In Chusing the Arbitration Council concluded that "wages paid to workers were equal to or greater than the minimum wage as required by law even if the amount as calculated on the basis of the piece rate was less than the minimum wage. Thus the employer complied with the provisions of the law which required it to pay the minimum wage, and as such there is insufficient legal basis for the workers to demand the employer to raise the piece rate." The determination of the Arbitration Council in this case is different from the Chusing case because the Arbitration Council finds this case is distinguishable from Chusing.

In Chusing, there is no evidence to prove that the piece rate was set at a rate such that an average worker working normal hours could not have earned at least the minimum wage; whereas in this case, approximately 55% of the workers in Line A were not able to earn at least the minimum wage when calculated on the basis of the piece rate. Also In Chusing, there was no payroll submitted into evidence and no finding as to whether the employees worked any overtime, holidays or Sundays. On the other hand, in Flying Dragon, a payroll was submitted that shows a many workers worked overtime, holidays and Sundays.

Moreover, the discussion of Article 108 in Chusing does not necessarily conflict with the Arbitration Council's interpretation of Article 108 in this Award. In Chusing, the AC stated that it did not find that Article 108 determines "the rate at which the piece rate must be set, rather it concerns the calculation of the wage." In this Award, the Arbitration Council also finds that Article 108 does not determine the rate at which the piece rate must be set; instead, the Arbitration Council finds that the employer has the right, as part of the employer's authority under Article 2 to manage and supervise the business, to set and change the piece rate. However, once the piece rate has been set by the employer, the Arbitration Council must determine whether the employee's wage calculated on the basis of the piece rate is in accordance with Article 108 of the Labor Law. It

means that, for piecework, the wage must be calculated in a manner that allows the average worker working during normal working hours to earn at least the minimum wage (in this case it is \$45.00 per month).

Although, in this case the employer subsidized workers who earned less than \$45.00 following the Notification 17/00 dated July 18, 2000 of the MSALVY, the Arbitration Council concludes that, because 55%<sup>5</sup> of the workers are not able to earn at least the minimum wage when calculated on the basis of the piece rate, therefore the Arbitration Council finds that the piece rate, in this case, is low.

The Arbitration Council finds the employer has the right to set and change the piece rate, however, the rate must follow the principles of Article 108.

Therefore the Arbitration Council decides that the employer shall set the piece rate in a manner to allow the worker of average ability working normally (without overtime, public holidays or Sundays) to earn at least equal to the guaranteed minimum wage.

## **6.2 Warning workers who work less than 50% of minimum wage, \$45.00**

Under Article 2 of the Labor Law as interpreted above, the employer has the right to discipline workers who commit misconduct in accordance with the Internal Work Rules of the company.

Under the Article 10 of the Internal Work Rules of the Flying Dragon III, the employees intentionally commit misconduct then if there is evidence the company will punish them based on the seriousness of misconduct as follows:

- 1- Light misconduct: 1<sup>st</sup> warning is verbal and recorded in the personal file. If the misconduct is repeated the 2<sup>nd</sup> warning is in writing.
- 2- Medium misconduct: 1<sup>st</sup> warning is in writing and recorded in the personal file. The 2<sup>nd</sup> warning is to stop working without pay for a period (not more than 7 days). The 3<sup>rd</sup> warning, in case of repeating, is dismissal.

In this case the employer issued a notice on disciplinary actions to the workers who work and earn less than 50% of minimum wage dated December 18, 2004 and immediately applied the disciplinary actions to the above workers. The last sentence of the 3<sup>rd</sup> point in the notice states that the company has the right to consider whether to terminate workers who get written warnings with thumb print for three times based on the company disciplinary actions.

The Arbitration Council finds that this notice is far different from the disciplinary actions stated in the IWR.

However, in the hearing the company clarified its position that the company will verbally warn the employee who commits misconduct as the first warning then give 3 written warnings and

then the company will consider whether to dismiss or keep that employee. Under the above meaning the Arbitration Council finds that the disciplinary action is a modification of the Internal Work Rules of the company and the company has an obligation to follow Article 30 of the Labor Law to have this modification come into effect under the Law. For example taking the modification to consult with worker representative or union and getting approval from Labor Inspector and also providing notice of the new discipline to the workers.

#### **DECISIONS AND ORDERS :**

- 1- Decides that the employer shall pay 1000 riel as a meal allowance or provide a free meal for workers who volunteer to work overtime in addition to overtime payment.
- 2- Denies the 2<sup>nd</sup> claim of the workers
- 3- Denies the claim of the workers that the employer pay workers' wages and attendance bonus during the strike.
- 4- Denies the claim for converting casual workers or temporary workers to be regular workers in this case.
- 5- Decline to consider the claim of the CCAWDU of the Flying Dragon III in changing the start time at the Flying Dragon II.
- 6- Decides:
  - a. The company shall determine the piece rate in the manner that allows the workers of average ability working normally (without OT, work on public holidays or Sundays) to earn at least minimum wage as guaranteed by law. The adjustment of the piece rate shall be done within one month after the award comes to effect.
  - b.
    - i. For the workers whose wage based on piecework is less than 50% of minimum wage the new disciplinary actions shall be applied as follows:
      1. the employer gives a verbal warning as the 1<sup>st</sup> warning for the 1<sup>st</sup> misconduct;
      2. the employer gives a written warning for three times if the misconduct is consecutively repeated;
      3. upon the 3<sup>d</sup> written warning the employer will consider whether to terminate the contract of the worker.
    - ii. the employer shall take necessary steps as required by law to amend the Internal Work Rules as explained in the reasoning.

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

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<sup>5</sup> This figure is specified by the Arbitration Council only for this case.

Arbitrator chosen by the employer party:

Name: **Mr. Mar Samborana**

Signature: .....

Arbitrator chosen by the employee party:

Name: **Ms. Sin Kim Sean**

Signature: .....

Chair of Arbitration Panel:

Name: **Mr. Run Saray**

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.*

*This Award is immediately binding upon the parties if parties have agreed as such in writing before the notification of the Award, or if parties are bound to comply with a collective bargaining agreement stipulating that no opposition to the Award may be lodged.*