

KINGDOM OF CAMBODIA
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ARBITRATION COUNCIL

Case number and name: 03/06- Flying Dragon

Date of Award: 7 February 2006

ARBITRAL AWARD

Issued under Article 313 of the Labor Law

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Chhiv Phyum**
Arbitrator chosen by the worker party: **Sin Kim Sean**
Chair arbitrator (chosen by the two arbitrators): **Nhean So Munin**

DISPUTING PARTIES

Employer party:

Name: Flying Dragon Garment Factory
Address: Street Cham Chao; Steng Meanchey commune; Meanchey district; Phnom
Penh
Telephone: 023 80 22 89
Representative:

First hearing on 18 January 2006

- Inn Peov Male Chief of transportation department;
- Hang Vandeth Male Chief of administration;
- Noun Vicheith Male Staff of finance department

Second hearing on 26 January 2006

- Inn Peov Male Chief of transportation department;
- Hang Vandeth Male Chief of administration;
- Noun Vicheith Male Staff of finance department;
- Cheat Khemera Male GMAC official

Worker party:

Name: Coalition of Cambodian Apparel W.D.U (C.CAWDU) of Flying Dragon 3
Address: #6C; Street 476; Toul Tem Pong I commune; Chamkamorn district; Phnom
Penh
Telephone: 012 709 509

Representative:

First hearing on 18 January 2006

- Ath Thun	Male	President of C.CAWDU
- Heng Chinda	Female	Educational Official of C.CAWDU
- Nath Lengseap	Female	Union President
- Keo Poev	Female	Union Vice President
- Nath Lengseth	Female	Union Secretary

Second hearing on 26 January 2006

- Ath Thun	Male	President of C.CAWDU
- Heng Chinda	Female	Educational Official of C.CAWDU
- Nath Lengseap	Female	Union President
- Keo Poev	Female	Union Vice President
- Nath Lengseth	Female	Union Secretary

ISSUES IN DISPUTE

The workers demand that the company re-apply undetermined duration contracts (UDC) based on the legal principle of the 1997 Labour Law. If the employer wants to apply fixed duration contracts (FDC), the company must pay any termination compensation correctly in accordance with the Labour Law and the FDCs must be signed for each year. The company stated that they would apply the Collective Bargaining Agreement (CBA) made between the workers and employer on 28 October 2005.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B (Articles 309-317) of the 1997 Labor Law; the Prakas on the Arbitration Council 99/04; and the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators 513/05 (Third 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 Labor Law. However; both parties did not agree and the non-conciliation report number 049/MoLVT dated 5 April 2006 was submitted to the Secretariat of the Arbitration Council on 11 April 2006.

HEARING AND SUMMARY OF PROCEDURE BEFORE THE ARBITRATION COUNCIL

Place of hearing: Arbitration Council; Phnom Penh Center; 3rd Floor, Room 331; Bldg. A; Sothearos Blvd; Tonle Bassac; Phnom Penh.

Date of hearing: First hearing on 18 January 2006 at 2:00 p.m.
Second hearing on 26 January 2006 at 2:00 p.m.

PROCEDURAL ISSUES:

On 20 December 2005, the Labour Dispute Resolution Department received a complaint from C.CAWDU dated 13 December 2005 demanding that the Flying Dragon Company improve working conditions in accordance with the Labour Law. The Labour Dispute Resolution Department conciliated this dispute on 3 January 2006, which resulted in the unsuccessful resolution of one issue. The Secretariat of the Arbitration Council (SAC) received the non-conciliation report on a collective labour dispute on 11 January 2006. The Arbitration Panel was selected in accordance with the procedure set out in the Prakas on the Arbitration Council 99/04 on 13 January 2006. The Panel determined to fix a hearing for 18 January 2006 in order to make its decision in respect of this dispute.

Before the hearing, the company sent a letter to the SAC proposing a delay of the hearing until 25 January 2006 because [it] was busy seeking documents for the ILO, providing input for IMS and meeting with a buyer who came to check the factory. At the hearing the company party appointed representatives who had the authority to make decisions in respect of the dispute. [These representatives] appeared at the hearing as scheduled.

During the first hearing, there were three company representatives, and five union representatives. In this first hearing, according to an Arbitration Council proposal, both parties attempted to negotiate again in front of the Arbitration Council and explain their case to the Arbitration Council. [The matter] could not be conciliated. Before closing the first hearing, both parties agreed to extend the arbitral award due-date until 7 February 2006 for the purposes of reconsidering [their positions] and further negotiation. In addition, [the parties] would have time to prepare additional documents along with an opportunity to appear at the second hearing fixed for 26 January 2006; if both parties had not reached a negotiated settlement. During the second hearing the parties again did not reach agreement. In the second hearing there were four representatives from the company side (one was a GMAC official) and five representatives from the union (two from the union federation) as mentioned above.

EVIDENCE

Witnesses and experts:

First hearing: N/A

Second hearing: The Arbitration Panel invited three witnesses to appear at the hearing and they are as follows:

- | | | |
|-----------------|--------|--------------------------------|
| 1. Kong Sokhorm | Female | Line leader |
| 2. Sor Narin | Female | Shop steward and union member |
| 3. Peng Lida | Female | President of Khmer Trade Union |

DOCUMENTS, EXHIBITS AND OTHER EVIDENCE CONSIDERED BY THE ARBITRATION COUNCIL

Provided by the employer party:

- Statute and memorandum of the Flying Dragon (Cambodia) Garment Co. Ltd., dated 2 August 1999;
- Certificate of business license of Flying Dragon (Cambodia) Garment Co. Ltd., dated 12 January 1998;
- Brief memo of labour dispute;
- Collective Bargaining Agreement between the company and the workers dated 28 October 2005 and registered on 4 November 2005;
- Notice of the company to the workers stating that their contracts are terminated and changed to three-month FDCs according to the CBA, dated 11 November 2005.
- Internal Work Rules of the company, amended on 11 March 2005 and registered on 5 April 2005;
- Internal Work Rules of the company dated 5 January 2006;
- Payment sheets for termination compensation during 1997 to September 2004 (first step and second step) attached to invoice.
- Minute and report on meeting about that CBA (commenced on 7 October 2005 and concluded on 22 October 2005).
- Minute on the resolution of dispute in respect of changing the employment contracts between the company and union representatives (commenced on 4 November to 28 November 2005);
- Documents from the workers (application form for employment, employment contract; notice before contract termination; resignation letter, etc.);
- Certificate of the Khmer Trade Union at Flying Dragon dated 22 August 2005 and registration letter of the same date;
- Letter from the company dated 16 January 2006 asking for a postponement of the hearing until 25 January 2006;
- Authorization letter dated 18 January 2006 to Mr. Inn Poev to make any decision with respect to this dispute.

Provided by the worker party:

- Certificate of registration of the Worker Democratic Union at Flying Dragon 3 dated 5 October 2003 and letter no. 562/MoSALVY dated 22 December 2003 certifying legal registration;
- Letter no. 2668/MoLVT dated 22 October 2004 certifying recognition of the union leaders;

- Statute of the Worker Democratic Union of Flying Dragon 3 dated 5 October 2005 in respect of amendment to union leaders;
- Letter dated 13 October 2005 of C.CAWDU sent to the Labour Dispute Resolution Department in respect of help to resolve an issue over termination and/or continuing employment contracts at Flying Dragon 3.

Provided by the Ministry of Labour and Vocational Training:

- Letter no.088/MoLVT dated 17 January 2006 to the Arbitration Council;
- Letter no.049/MoLVT dated 11 January 2006 of non-conciliation report on the collective labour dispute at Flying Dragon;
- Minute of the collective labour dispute resolution dated 3 January 2006.

Provided by the Secretariat of the Arbitration Council:

- Letter in respect of selection of arbitrators dated 11, 12 and 13 January 2006
- Letter of invitation to both disputing parties to appear at the first and second hearing;
- Letter seeking an extension of award issuance date until 7 February 2006.

FACTS

The Flying Dragon Company commenced its business operations in 1997. The company registered for a business license in Cambodia in January 1998 and prepared a statute and memorandum of the company in order to achieve this registration at the Committee for Investment of Cambodia in 1999.

The company is located at Chamchao Street, Steng Mean Chey commune, Meanchey district, Phnom Penh. The company currently has three branches and has about 1,745 workers. Most of the workers have joined [one of] two registered unions; the Worker Democratic Union at Flying Dragon 3 and the Cambodian Union at Flying Dragon factory.

The Worker Democratic Union at Flying Dragon 3 was established and registered in October 2003 and consists of about 601 workers and has joined the Coalition of Cambodian Apparel W.D.U (C.CAWDU). On 22 January 2005, three union leaders resigned from their jobs at the same time by letter which promised the company that they would not incite other workers to conduct any activities which were against the law. The resignation of the three union leaders left vacancies in the union leadership for a time. On 6 August 2005, members of the union agreed to organize an election for union leadership. 95 workers took part in the election which was organized by C.CAWDU. As a result of the election, Ms. Nath Lengseth was elected as President, Ms. Chon Sreng was elected as Vice President, Ms. Keo Pouy was elected as Secretary and Ms. Wit Senghay was elected as Treasurer. The union

registered the results of the union leadership election on 24 October 2005 and notified the management of the company on 10 November 2005.

The Cambodian Union at Flying Dragon was registered in August 2005 and consists of about 607 workers.

The company's representative argued that when the workers started to work for the company, each worker and the company signed one year FDCs which came into effect when the company opened in 1997. Because of technical mistakes, the company did not inform the workers about the renewal of their FDCs in accordance with the Labour Law and acknowledged that this error led the FDCs to become UDCs . The union representatives who took part in the hearing did not have the ability to verify whether the company signed one year FDCs in 1997 or not, because [those union representatives] only started work for the company in 2000. Some of the worker party's witnesses had worked [at the company] since 1997 and when questioned by the Arbitration Council, answered that they did not sign one year FDCs at that time, they only filled out their employment background forms [setting out their personal employment information] for the job. The Arbitration Council requested that the company provide documents verifying their allegations in respect of the one-year FDCs, however the company did not provide evidence to support its argument. The company only provided an application form from 1997, a one-year FDC made in 2004 and a three-month FDC made in 2005.

In September 2004, the company announced over loudspeaker, and telling the line leaders of all the workers to come and give their thumbprints on one-year FDCs. During the hearing, the worker witnesses said that they were called to give their signatures and to fill out new [employment backgrounds] only. At that time the employer did not object to the workers' evidence, the employer party simply told the Arbitrators that the new [employment backgrounds] were attached to the labour contracts as an annexure.

After listening and reviewing carefully the parties' arguments, the witnesses' testimony, the company's Internal Work Rules and documents related to the employment contract, the Arbitration Council concluded that the company signed probationary contracts with a duration of two months for some workers. After the two-month probationary period, the relevant workers continued to work as regular workers. Some of these workers signed one-year or six-month FDCs and some did not sign a written contract at all. Some workers who have worked since 1997 did not sign an FDC until 2004, when the company pushed to have one-year FDCs.

At this time FDCs applied to all workers; including both old and new workers. However, the company did not notify clearly about its intention to cancel the relevant UDCs.

The company amended its Internal Work Rules in accordance with the Labour Law with an agreement from the shop stewards in the three factories on 11 March 2005 and registered [these Rules] on 5 January 2005. Clause 2 of the amended Internal Work Rules states that, “All workers must be subjected to FDCs...”.

According to the workers’ representatives, the company attempted to negotiate with the workers in relation to the termination of the UDCs and [the application] of the one-year FDCs which started in September 2004. [Negotiations concerned] termination payments and the application of a new contract which would have a three-month fixed duration. These negotiations started in October 2005. The company proposed that workers receive ten days per year of severance pay upon the termination of their UDC. The workers’ representatives however, demanded 15 days per year and the retention of their seniority. The negotiations ended on 22 October 2005. The company agreed with the workers’ proposal (this is reflected in the report on the meeting for settlement of severance pay from 1997 to September 2004 with some thumbprints of workers’ representatives).

The company’s management and the worker representatives who are shop stewards, union leaders and members of the Cambodia Union and usual members of the Workers Democratic Union at Flying Dragon 3 signed a CBA on 28 October 2005, but there was no agreement from the union leaders or lawful representatives from the Worker Democratic Union at Flying Dragon 3. The CBA was registered on 4 November 2005. On 11 November 2005 the company issued a written notice to workers [which informed them] that their contract had ended, and that their one-year FDCs had changed to three-month FDC according to the language of the CBA. On 4 November 2005 the Worker Democratic Union at Flying Dragon 3 made their complaint [questioning the validity] of the CBA.

At the time of the second hearing (26 January 2006) the workers in group 1 and 2 were paid their severance pay up to September 2004, whereas the workers in group 3 had not received their severance pay yet. Most of the workers had provided their thumbprints on a three-month FDC, but they had also provided their thumbprint on the union complaint about unlawful payment of their severance pay which disputed the validity of the three-month FDCs.

REASONS FOR DECISION

In reviewing all legal documents such as employment contracts and CBAs, one first must see whether those documents were made according to [relevant] legal procedures or not. If these documents were indeed made according to law, it is then necessary to consider the substance [of the document] and whether it is substantially lawful or not.

1. The Fixed Duration Contracts

In respect of the procedural requirements for making a valid contract, the Arbitration Council notes Article 1 of the State Decree no. 38 dated 28 October 1988 on Contract and Liability which states that, “A contract is an agreement freely entered into by two or more persons [in order] to create, change or terminate one or more obligations which bind them ...

” Willing agreement means a true and free agreement without coercion.”

Article 65 of the Labour Law states that, “A labour law establishes working relations between the workers and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties”.

In this dispute, the employer has the intention to change the [workers’] employment contract from a UDC into an FDC. In order to change the labour contract lawfully, there must be true and free agreement from the workers. [In order to achieve] this condition of having free and true agreement, the employer must inform [the workers] clearly about his/her intention in terminating the UDC and make new proposals for the FDC to replace [the existing UDC]. The employer must also provide an appropriate time, of at least seven days in the case of cancellation of the employment contract - as mentioned in Article 75 of the Labour Law - in order that the workers can take into consideration the facts and make their own decisions to provide their signatures on a new employment contract willingly

However, in this dispute the proposal for having a new employment contract with a fixed duration was only made through the loudspeaker and the spirit [of the change] was unclear when [management] told each line leader [about the change]. These line leaders were told that “The Company asked that new [employment backgrounds] be made”.

The Arbitration Council finds that the workers cannot be considered to have signed the contract freely and willingly because the workers did not receive clear and specific information about the employer’s intention in terminating the UDCs. In addition, there was no clear evidence stating that the workers had enough time to consider their new contracts . Thus the Arbitration Council finds that the one-year FDCs made in 2004 were not made in conformity with effective legal procedures. Therefore, without [needing to] consider the substantive [legal issues], the [Arbitration Council finds that the] FDCs made in 2004 are invalid. Because the one-year FDCs are not valid, the consequent three-month contracts which continued from those one-year contracts are also not valid according to the law.

2. The CBA

Article 96(2) of the Labour Law states [in part] that “... The collective agreement is signed between: [a) one part:] an employer, a group of employers, or one or more organizations representative of employers; and [b) the other part:] one or more trade union organizations representative of workers.” In particular shop stewards can sign a CBA only in

the transitional period when there is not any union representative in the enterprise. Moreover, Article 6 of Prakas 305/01 states that “If a union has in its membership an absolute majority of the workers of an enterprise or establishment, it shall be entitled to represent all the workers of said company or establishment.... If it does not meet this requirement, it shall represent only its own members”.

In this case, the CBA signed on 28 October 2005 did not get approval from a representative of the Worker Democratic Union in Flying Dragon 3. Thus, without [having to] take into consideration the language of the CBA, the Arbitration Council finds that the CBA is not valid in respect of workers who are members of the Worker Democratic Union at Flying Dragon 3.

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

DECISION

1. Order null and void the one-year FDCs made in 2004 in respect of the workers who are members of C.CAWDU at Flying Dragon 3 which sought to cancel the past UDCs. Order null and void the three-month contracts which continued from the one year contracts.
2. Order the company to continue to apply the UDCs for those workers who are members of the Worker Democratic Union at Flying Dragon 3 until the legal cancellation of those contracts.
3. Order that the CBA signed on 28 October 2005 be invalidated in respect of the plaintiffs, the members of the Worker Democratic Union at Flying Dragon 3 garment factory.

Type of Award: Non binding awards

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: **Chhiv Phyum**

Signature:

Arbitrator chosen by the worker party:

Name: **Sin Kimsean**

Signature:

Chair of arbitration panel:

Name: **Nhean So Munin**

Signature: