



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

**ក្រុមប្រឹក្សាអន្តរាជ្ញាកណ្តាល**

**THE ARBITRATION COUNCIL**

**Case number and name: 130/08-Fu Hing**

**Date of Award: 30 October 2008**

### **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: **Ann Vireak**

Chair Arbitrator (chosen by the two Arbitrators): **Kong Phallack**

#### **DISPUTING PARTIES**

##### **Employer party:**

Name: **Fu Hing Garment Factory**

Address: Sangkat Toeuk Thla, Khan Russey Keo, Phnom Penh

Telephone: N/A Fax: N/A

Representative: N/A

Name: **Representative Office “Pada Industrial (Far East) Co., Ltd.”**

Address: Chroy Ampel Village, Kbal Koh Commune, Kien Svay District, Kandal Province

Telephone: 012 626 868 Fax: N/A

Representative:

- Mr. Ham Phea Lawyer, representative of Pada Company

##### **Worker party:**

Name: **National Union Federation Cambodian Workers (NUFCW) (Representative of workers at Fu Hing Company)**

Address: Street 271, Sangkat Psa Deum Thkov, Khan Chamkamorn, Phnom Penh

Telephone: 092 424 800 Fax: N/A

Representative:

|                       |  |
|-----------------------|--|
| 1. Mr. Tol Phanmoeung | President of NUFCW                           |
| 2. Mr. Leang Sophea   | General Secretary of NUFCW                   |
| 3. Mr. Chap Veasna    | Representative of workers at Fu Hing Company |
| 4. Mr. Roeun Nidet    | Representative of workers at Fu Hing Company |
| 5. Mr. Chhuon Soty    | Representative of workers at Fu Hing Company |
| 6. Mr. Chev Khim      | Representative of workers at Fu Hing Company |
| 7. Mr. Meas Samorn    | Representative of workers at Fu Hing Company |
| 8. Ms. Pech Chanthou  | Representative of workers at Fu Hing Company |
| 9. Ms. Mao Sreymok    | Representative of workers at Fu Hing Company |

### **ISSUES IN DISPUTE**

(In the Non-Conciliation Report)

- 1- The workers of Fu Hing factory demand that Pada Company take responsibility for all of the workers at Fu Hing because Pada Company drafted a collective dispute conciliation report with the workers of Fu Hing factory dated 03 April 2007. Pada Company does not agree to the demand of the workers at Fu Hing factory, as the workers were directly paid by Fu Hing Company. Moreover, the collective dispute conciliation report dated 03 April 2007 did not provide that Pada Company take responsibility for termination payments to Fu Hing's workers under the Labour Law.

### **JURISDICTION OF THE ARBITRATION COUNCIL**

*The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labor Law (1997); the Prakas on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators No. 076 dated 10 May 2007 (Fifth Term).*

*An attempt was made to conciliate the collective dispute that is the subject of this Award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and the non-conciliation report No.1113 KB/AK/VK, dated 8 October 2008 was submitted to the Secretariat of the Arbitration Council on 8 October 2008.*

### **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:** 15 October 2008 (at 2:00 p.m.)

**Procedural issues:**

On 23 September 2008 the Department of Labour Dispute received a complaint dated 23 September 2008 by workers regarding their demand that the Pada company should be responsible for the workers at Fu Hing Company, in accordance with the agreement dated 3 April 2007. The agreement contains four points. Upon receipt of the complaint, the Department of Labour Dispute assigned an expert officer to resolve this labour dispute on 26 September 2008, but did not receive a conciliation result. The one non-conciliation issue was referred to the Secretariat of the Arbitration Council on 8 October 2008.

After receiving the case, the Secretariat of the Arbitration Council summoned Pada company and the workers of Fu Hing Company to a hearing and conciliation on the one non-conciliation issue on 15 October 2008 at 2:00 p.m. Both parties were present as invited by the Arbitration Council. In the meantime, the Secretariat of the Arbitration Council tried to contact Fu Hing Company but was unable to make contact with the company as there was no contact phone number. For this reason, Fu Hing Company was not present at the arbitral hearing.

On the hearing day, the Arbitration Council attempted to ask the representative of Pada company and the workers of Fu Hing Company [to negotiate further] regarding this non-conciliation issue, but no agreement could be reached. Therefore, in this case, the Arbitration Council will consider as follows:

## **EVIDENCE**

**Witnesses and experts: N/A**

### **Documents, Exhibits and other evidence considered by the Arbitration Council**

#### **Provided by the employer party:**

1. Power of attorney by Pada Company authorizing Mr. Ham Phea, lawyer, dated 23 September 2008.
2. Minutes of collective labour dispute conciliation at Fu Hing Company, dated 3 April 2007.
3. Certification of commercial registration and company registration of Fu Hing Garment Company No. 1328 PN.PBK.KN, dated 7 May 1997.
4. Certificate of commercial registration of representative office of Pada Industrial (Far East) Company Limited.

#### **Provided by the worker party:**

1. Power of attorney by workers at Fu Hing Company to Mr. Tol Phanmoeung, president of NUFCW, to represent and protect their legal rights and benefits, dated 23 September 2008

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

1. Report of collective labour dispute resolution at Fu Hing Company No. 1113 KB/AK/VK, dated 8 October 2008.
2. Minutes of collective labour dispute resolution at Fu Hing Company, dated 26 September 2008.

Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to invite the worker party to attend the hearing, No. 646 KB/AK/VK/LKA, dated 10 October 2008.
2. Letter of invitation to invite the employer party to attend the hearing, No. 645 KB/AK/VK/LKA, dated 10 October 2008.

**FACTS**

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

**The Arbitration Council finds that:**

- 350 workers signed employment contracts to work for Fu Hing Company at Fu Hing Factory which is located in Sangkat Toeuk Thla, Khan Russey KEo, Phnom Penh.
- Workers at the Fu Hing factory wrote a letter authorizing Mr. Tol Phanmoeung, president of NUFCW, to represent them in this case.
- Fu Hing Company was established and registered in 1997, while Pada Company was registered in 1999.
- Fu Hing Company is a separate legal person from Pada Company because they have a separate commercial registration certificate.
- The workers and the lawyer claim that Pada Company does not have its own workers; instead it has only a warehouse to stock materials and makes contracts to supply materials to other companies.
- The workers consider that Fu Hing Company is their employer and Pada Company is only a supplier of materials for their company. Pada Company also states that it is not the employer of the workers at Fu Hing Company. The workers state that in the past Pada Company subcontracted to provide materials to Fu Hing Company, but the workers do not know the exact date when Pada Company started to supply materials. The lawyer representing Pada Company states that there is no contract in writing regarding this supply of work.

- In September 2006, the boss of Fu Hing Company, Mr. Jung, ran away. Pada Company continued to supply materials for Fu Hing Company and maintained work for Fu Hing Company. Mr. Tseng Ching Kuet, director of Fu Hing Company, managed the company according to its management hierarchy. However, the agreement was not in writing.
- On 3 April 2007 the director of Fu Hing Company, Mr. Tseng Ching Kuet, worker representatives, and the lawyer for Pada Company made an agreement with four points as follows:
  1. *Pada Company agrees to provide materials and equipment for the workers to work until Mr. Jung (owner of Fu Hing factory) returns to take care of Fu Hing Company.*
  2. *Pada Company will not interfere in the property of Fu Hing Company as this still belongs to Fu Hing Company.*
  3. *Workers need to work hard to produce good products on time. In the meantime, Pada Company also needs to provide sufficient equipment and materials for the workers to remain occupied.*
  4. *Pada Company is not responsible for employment seniority and indemnity for workers at Fu Hing Company before September 2006. Those are the responsibility of Fu Hing Company. Pada Company is responsible for the workers from September 2006 onward. This responsibility extends to wages, perquisites and seniority bonuses. The agreement on temporary product delivery between the union and Pada Company, dated 29 March 2007, is voided.*
- The workers claim that the agreement regarding the responsibilities of Pada Company includes the responsibility to pay indemnity for dismissal in the case of contract termination. The lawyer representing Pada Company rejects this claim by the workers.
- Both parties agree that Pada Company is responsible for paying wages, perquisite or attendance bonus and seniority bonus. The worker party claims that on every payday, the accountant for Pada Company came to pay the workers at Fu Hing Company. The lawyer representing Pada Company is unable to comment on this point.
- In August 2008 Pada Company stopped providing goods to Fu Hing Company because it did not have sufficient goods.
- From 20 August 2008 to 20 September 2008 the director of Fu Hing Company, Mr. Tseng Ching Kuet, submitted a request for suspension of employment to the Labour Inspector and suspended employment of the workers for one month, and agreed to compensate them US\$ 15 per month of suspension.

- During the employment suspension, the workers continued to occupy Fu Hing factory but they did not have goods to work on; there was no administrative or management staff; there were only machines and some equipment. The administrative staff and manager of Fu Hing Company, Mr. Tseng Ching Kuet, ran away from their responsibilities during the suspension period in October 2008. The workers could not tell when Mr. Tseng Ching Kuet and the administrative staff ran away.
- The workers demand that Pada Company implement the agreement of 3 April 2007 or terminate them from work and pay them according to the Labour Law.
- The lawyer of Pada Company states that Pada Company is not responsible for the case of termination of workers because it is not the employer of workers at Fu Hing Company. The Company is bound only by the agreement dated 3 April 2007, paragraph four of which holds it responsible for wages, perquisites and seniority bonuses. The company implemented these already. [It has not followed] point one of the agreement, regarding supplying goods for Fu Hing Company until the owner, Mr. Jung returns, since Pada Company currently does not have goods for Fu Hing Company.

#### **REASONS FOR DECISION**

Based on the non-conciliation report and the above findings of fact, the Arbitration Council considers that the workers of Fu Hing Company demand that Pada Company either implement the agreement dated 3 April 2007, or if Pada Company cannot implement this agreement, that it terminate the employment contract made between the workers and Fu Hing Company.

Before considering and solving the dispute in this issue, the Arbitration Council will consider whether the workers and Pada Company have an employment relationship covered by the Labour Law.

Article 1 of the Labour Law states, *“This law governs relations between employers and workers resulting from employment contracts to be performed within the territory of the Kingdom of Cambodia, regardless of where the contract was made and what the nationality and residences of the contracted parties are...”*

Based on the contents of Article 1 of the Labour Law and the above findings of fact, the Arbitration Council considers that the employment relationship of the parties in dispute is between Fu Hing Company and its workers. Thus, there is no employment relationship between the workers of Fu Hing Company and Pada Company. Thus, the Arbitration Council considers that this dispute is not under the jurisdiction of the Arbitration Council.

Article 2 of the Labour Law states, *“All natural persons or legal entities, public or private, are considered to be employers who constitute an enterprise, within the meaning of this law, provided that they employ one or more workers, even discontinuously.”*

Based on the contents of Article 2 of the Labour Law and the above findings of fact, the Arbitration Council considers that Pada Company does not use workers of Fu Hing Company directly at [the location] of Pada Company. The workers perform their work at the Fu Hing Company factory. Thus, Article 2 is not applicable to Pada Company because Pada Company is not the employer of the workers in this case.

Article 3 of the Labour Law states, *“Workers’, within the meaning of this law, are every person of all sex and nationality, who has signed an employment contract in return for remuneration, under the direction and management of another person, whether that person is a natural person or legal entity, public or private...”*

The Arbitration Council considers that [the phrase] *“direction and management”* means that the employer has power over the workers regarding arranging working hours, leave, payment of wages, place to perform work, determination of means/equipment to perform the work and result of work produced by the workers, and the right to impose disciplinary action if a worker makes a mistake.

In case 53/07-E Garment, issue 1, the Arbitration Council considered the following findings of fact in determining whether the workers were under the direction and management of E Garment Company:

- Who recruited the workers;
- Who paid the workers’ wages;
- Who determined the working hours of the workers;
- Who gave permission to workers’ leave request;
- Who resolved problems on issue of serious misconduct; and
- Who terminated the workers’ contracts.

In case 04/05-Eternity Apparel, issue 3, *“...According to the facts, we know that at least 10 of the 16 security guards worked for the company and did not work for other places. They were recruited, had their wages and working hours (12 hours per day) determined, had their permission to take leave approved, were punished and dismissed all by the company; and only the company had the right to decide all those matters in relation to the 10 security guards. The Arbitration Council finds that the relationship between the employer and the security guards is within the meaning of Articles 2 and 3 above...”*

In this case, the workers made contracts with Fu Hing Company and in the hearing the workers claimed that Fu Hing Company is their employer. Moreover, the workers perform their work in the factory belongign to Fu Hing company, use equipment belonging to Fu Hing Company, and are under the management of the director of Fu Hing Company. This means

that Fu Hing Company [“directs and manages[”] the workers [within the meaning of Article 3 of the Labour Law].

However, the Arbitration Council found that after the owner of Fu Hing Company, Mr. Jung, ran away in 2006, the above relationship was changed because Pada Company stepped into the relationship between the workers and Fu Hing Company. On 3 April 2007 Pada Company made an agreement with workers of Fu Hing Company to provide goods for the workers to work on until Mr. Jung returned, and was responsible for wages, attendance bonuses and seniority bonuses. In the hearing the workers claimed that they worked in the Fu Hing factory, and that the director of Fu Hing Company directed the company. The company party claims that the management hierarchy of Fu Hing Company remained in place without any alteration to be under the management of Pada Company. The worker party did not object to the claim raised by the lawyer representing Pada Company. The two parties agree that the workers received wages from Fu Hing Company through the accountant of Pada Company on each payday. Based on the arguments and claims of the parties above, the Arbitration Council considers that the director of Fu Hing Company, Mr. Tseng Ching Kuet, was responsible for managing the workers at Fu Hing Company.

However, the Arbitration Council considers that the involvement of Pada Company in the employment relationship with the workers of Fu Hing Company is unclear. Was Pada Company only the supplier of goods for workers of Fu Hing Company or was it the one who indirectly or by whatsoever means determined the direction and management of Fu Hing Company? None of the parties in the hearing could clarify or provide evidence regarding this relationship. Furthermore, the management staff of neither party was present in the hearing to clarify this point.

In relation to this issue, the Arbitration Council did not receive any clarification or evidence to prove that Pada Company made decisions regarding hiring, terminating, or disciplining the workers, or determining working hours, leave, payment of wages, location of work, or means to perform work.

Based on findings of fact and evidence, the Arbitration Council found that there is not sufficient evidence to determine whether the workers were under the direction and management of Pada Company, and to prove that Pada Company is the employer of the workers in this dispute. Because they do not have an employment relationship as workers and employer in accordance with the Labour Law, the Arbitration Council considers that the Arbitration Council does not have jurisdiction over the workers' demand the the Pada Company either implement the agreement of 3 April 2007, or terminate their employment contract with Fu Hing Company.

Nonetheless, based on the findings of fact, the Arbitration Council found that Pada Company and Fu Hing Company may have a labour contractor relationship. Thus, the Arbitration Council will consider the relationship between the two companies.

Article 45 of the Labour Law states, *“The Labour contractor is a sub-contractor who contracts with an entrepreneur and who himself recruits the necessary work force or workmen for the execution of certain work or the provision of certain services for an all-inclusive price. Such a contract must be in writing.”*

Article 48 of the Labour Law states, *“In case of insolvency or default by the labour contractor, the entrepreneur or the manager of enterprise shall substitute for the contractor to fulfill his obligations to the workers. The hired workers, in such case, may file a case directly against the entrepreneur or manager.”*

According to Article 45 above, when an enterprise subcontracts with another enterprise to provide a work force to perform specific work or a specific service, the contract must be in writing.

In this case, the Arbitration Council found that Pada Company communicated and received orders from buyers, then supplied goods to Fu Hing Company and other companies to work on. Fu Hing Company received work from Pada Company and hired workers who are under the direction and management of its own hierarchy. However, Fu Hing Company did not provide a work force to perform work or a service for Pada Company. Thus, the Arbitration Council considers that the contract made between Pada Company and Fu Hing Company is not of the nature of a labour contractor contract under the Labour Law. Thus, Pada Company is not bound by the obligation provided in Article 48 of the Labour Law.

In conclusion, the Arbitration Council decides to decline to consider the demand of workers of Fu Hing Company that the Pada Company either implement the agreement of 3 April 2007 or terminate the contract made between them and Fu Hing Company.

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

#### **DECISION AND ORDER**

- Decline to consider the demand of workers of Fu Hing Company that the Pada Company either implement the agreement of 3 April 2007 or terminate the contract made between them and Fu Hing Company

#### **Type of Award: Non binding award**

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

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

Arbitrator chosen by the employer party:

Name: **Ouk Ry**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Ann Vireak**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....