

**KINGDOM OF CAMBODIA
NATION KING RELIGION**

THE ARBITRATION COUNCIL

Case number and name: 47/06- Flying Dragon

Date of Award: 03 July 2006

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Ms. Seng Vuoch Hun**

Arbitrator chosen by the worker party: **Mr. Tuon Siphann**

Chair Arbitrator (chosen by the two Arbitrators): **Mr. Nhean So Munin**

DISPUTING PARTIES

Employer party:

Name: Flying Dragon (Cambodia) Garment Company

Address: Chaom Chao Street, Sangkat Steung Mean Chey, Khan Mean Chey, Phnom Penh.

Telephone: 012 885 911/ 023 424 068

Representative:

- Mr. Ann Earth (alias Udom) Head of Administration

Worker party:

Name: C-CAWDU

Address: No. 6 C, Street 476, Sangkat Toul Tompoung 1, Khann Chamkar Morn, Phnom Penh.

Telephone: 012 709 509

Representative:

- | | |
|------------------------|---|
| 1. Mrs. Lim Thida | C-CAWDU's Dispute Resolution Officer |
| 2. Ms. Nath Leang Seab | Head of Local C-CAWDU of Flying Dragon factory |
| 3. Mrs. Phon Sroeun | Vice-head of Local C-CAWDU of Flying Dragon factory |
| 4. Ms. Phai Phal | Union Member |

ISSUES IN DISPUTE

(In the non-conciliation report)

Workers demand the Company to carry out the agreement dated 13 March 2006 on reinstating Ms. Phai Phal and properly carry out the Labour Law.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B (Article 309 to 317) 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. 099 KKBV/PrK 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.800 KKBV/AK/VK dated 08 June 2006 was submitted to the Secretariat of the Arbitration Council on 09 June 2006.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing: 16 June 2006 at 8:00 a.m.

Procedural issues:

The dispute between the parties started on 3 May 2006 and later, on 8 May 2006, it was submitted to the Labour Inspector. On 10 May 2006 the Minister chose conciliator Ham Phea to begin conciliation of this case. There are three issues recorded in the conciliation report (but in fact there are only two issues) regarding the workers' demand that the company reinstate Ms. Phai Phal and Mr. Peo Seiha in conformity with the agreement dated 13 March 2006. The conciliation ended on 31 May 2006 with one issued conciliated, i.e., the company agreed to reinstate Mr. Peo Seiha. But one issue remains; that is, the company does not agree to reinstate Ms. Phai Phal. Both parties demanded that the non-conciliated issue be brought to the Arbitration Council for settlement. On 9 June 2006, the Secretariat of the Arbitration Council received the case. The Arbitration Panel for this case was formed on 12 June 2006. As scheduled, on 16 June 2006 at 8:00 a.m., both parties attended the hearing. Before starting the hearing, the parties agreed to give a chance for conciliation by the Arbitration Council. The Arbitration Council met the parties one by one - seeing the worker party first then the company party. But the company did not allow a choice for any other solution of this case, i.e., they held firmly to the former stance. Thus the conciliation was not successful. After that the Arbitration Council started the hearing and ended it at about 12:00 noon of that same day.

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Letter dated 16 June 2006 from the Company to assign a representative to attend the hearing
2. The delegation letter from the Company to Mr. Ann Earth to represent the Company in settling the dispute dated 15 June 2006
3. Letter dated 9 June 2006 regarding the choosing of arbitrator.

Provided by the worker party:

1. Summary statement of the dispute dated 14 June 2006
2. The letter of Department of Labour Dispute dated 6 December 2005 to acknowledge the union's leaders
3. Letter dated 9 June 2006 regarding the choosing of arbitrator.
4. Minute of the collective labour dispute conciliation (contains of 9 agreed issues) dated 13 March 2006.
5. Labour Contract for taskworker Peo Seiha
6. ID cards for piece-rate workers and floating workers to wear to work in factory 2.

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

1. Letter No. 638 K.K.B.V dated 13 June 2006 by the Minister of the Ministry of Labour and Vocational Training regarding request for collective labour dispute resolution of Flying Dragon Company.
2. Report on Collective Labour Dispute No: 800 KKBV/AK/VK dated 8 June 2006 by Mr. Koy Tepdaravuth, head of the Department of Labour Dispute.
3. Minute of collective labour dispute dated 31 May 2006.

Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to the worker party to attend the hearing, No. 229 LKA, dated 12 June 2006
2. The letter of invitation to the employer party to attend the hearing, No.230 LKA, dated 12 June 2006

FACTS

- Having examined documents submitted to the Arbitration Council
- Having examined report of collective labour dispute.

- Having listened to the statements of the employer party and the worker party

The Arbitration Council finds that:

Flying Dragon factory, located at Chaom Chao Street, Sangkat Steung Mean Chey, Phnom Penh, employs approximately 2500 workers working in two campuses, Flying Dragon 2 and Flying Dragon 3 (Flying Dragon 1 has been closed down).

The Company employs several types of workers such as probation workers under the 2-month fixed term written contracts, permanent workers who receive fixed monthly wages, permanent workers who receive payments based on piecework, workers whom the Company called the taskworkers (“Kamaka Mao Ka”) with written 2-month fixed term contracts, and the taskworkers with verbal contracts who receive payment based on amount of product (the company previously referred to the taskworkers as floating workers and considered them as the casual workers).

For the taskworkers who receive payments based on amount of product, the Company has allowed permanent workers who are supervisors to recruit, mentor and supervise them (but there is no restriction to the daily or weekly working hour and minimum number of pieces to be produced; and whenever those workers wished to have a day off, they must ask for prior permission from the supervisor; otherwise, the supervisor can terminate them). The Company has made staff ID cards to identify the type of workers in order for them to show the security guards for access to the Company. The Company was the one who fixed the rate of wage, calculates monthly wages with proper acknowledgement from the supervisors and then pay taskworkers in the factory. The rate varies from clothing-type to clothing-type and is based on the determination of the Company. Above all, the Company manager has the right to order the supervisors to terminate any taskworkers.

Amongst the approximately 70 workers whom the Company called taskworkers and hired to cut the fray of clothes and are paid based on amount of products, Ms. Phai Phal was a worker whom the Company has employed from 1999 to 18 March 2006, when the Company manager order the supervisor to terminate her by claiming that she could not work well (not respect the Company’s policy and order). The Company as well as the supervisor has never explained her how her wages are paid, yet she has never dared to ask about it as she was afraid of dismissal. Even though there is no restriction to the working hour, condition of work and no information about her rate of wage, Ms. Phai Phal has always come to work regularly for 8 hours per day. Based on the requirement of the Company, she sometimes worked for 2-3 hours as overtime per

day and even worked on Sunday or public holidays. Ms. Phai Phal has rarely taken a holiday in each year, but she sometimes has been asked by the Company to stay home for a few days when the Company had no work. Whenever she needed to take a day off, she always asked for permission from the supervisor. In her performance as a fray cutting worker, she always proved to be a good worker, who could work as quickly as other workers and never spoiled any products even though she is a disabled person. On average she received US\$ 60-90 per month. But as the Company considered her as a taskworker or casual worker, she has never been paid the seniority bonus, incentive bonus, annual leave compensation and other benefits that the Company gave to the regular workers. And when she was terminated, she was not paid the termination compensation and other benefits.

Ms. Phai Phal is a normal member of the Local C-CAWDU in Flying Dragon 3 which is a member of C-CAWDU. She joined the strike led by C-CAWDU at Flying Dragon 3 from 22 February 2006 to 13 March 2006. In the evening of 13 March 2006, after making an agreement with the Company, the workers stopped the strike and went back to work and received their wages of the previous month. But since the strike lasted for nearly one (1) month, the operation at Flying Dragon 3 was disrupted. As the work at Flying Dragon 2 relied on that of Flying Dragon 3, the workers at Flying Dragon 2 had no work until 13 March 2006. Thus workers in Flying Dragon 2 restarted work on 13 March 2006. The contents in the agreement between the Company and workers which have been written in the conciliation report dated 13 March 2006 are as follows:

1. Before terminating any worker, the Company will look for the valid reasons (internal rules and Labor Law). The Company would not use the contract termination as the pretext to dismiss a permanent worker, union activist and leader.
3. The Company will convert all casual workers who have worked well in the Company for a long time to be the permanent workers. For the remaining casual workers, the Company will discuss with the union or they can complain to the court.
6. The Company agreed that it would not commit reprisals against any worker who joined the strike including the regular workers, probation workers, taskworkers and reinstate all workers who were terminated during the strike.

REASONS FOR DECISION

1. Does the Company have an employment contract relationship with Ms. Phai Phal?

In this case, the Company has called Ms. Phai Phal a taskworker (“Kamaka Mao Ka”) who has no employment contract with it; thus the Company has no contractual relationship

which creates right and obligation under the Labour Law with Ms. Phai Phal. The Company argued that it is entitled to terminate her any time with no requirement to respect conditions and legal procedures; and the Company will not reinstate her.

To determine if Ms. Phai Phal is entitled to the right to be reinstated under the provisions of Cambodian Labor Law, the Arbitration Council will firstly need to determine if she has an **employment contract relationship** which requires adherence to the Labour Law.

Article 1 of Labour Law 1997 reads that “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.” So in this case, the Arbitration Council must determine if Ms. Phai Phal is a worker of the Company who has an employment contract with the Company (employer).

Article 3 of the Labour Law 1997 states that “**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. To clearly determine the characteristics of a worker, one **shall not** take into account of neither the jurisdictional status of the employer nor that of the worker, **as well as the amount of remuneration.**” Article 65 states that “A **labour contract** is a contract which 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. It can be written or verbal... The verbal contract is considered to be a tacit agreement between the employer and the worker under the conditions laid down by the labour regulations, even if it is not expressly defined.”

Thus, as stated in the Labour Law, an individual becomes a worker of another individual who is an employer when both parties make a labour contract, whether it is verbal or written, in order to allow the worker to perform a specific work to receive remuneration, whether small or large, under supervision of the employer or his/her representative, regardless of the way the wages is calculated. To make it clear, the Arbitration Council explains legal meaning of “signed an agreement” that, under the Labour Law, it does not necessarily mean that the agreement must be made in writing or the agreement must clearly talk about the specific working conditions. But it means that there is an agreement in regard to providing a job and accepting the work to receive remuneration.

So in this case, the AC finds that Ms. Phai Phal is a worker whose contract is the verbal employment contract and has the employment condition as stated in the Labour Law although she has been recruited by a supervisor who was just a simple worker who gets salary from Company because this supervisor has been assigned by the Company to be its representative in

order to recruit workers and the Company reserved its rights to order, manage or dismiss Ms. Phai Phal through this supervisor. When she needs to take leave, she must always ask for permission from the supervisor; otherwise, she can be terminated. In particular, she always received her monthly wages from the Company.

2. What is the type of Ms. Phai Phal's employment contract with the Company?

Based on article 66 and 67 of Labour Law, there are two types of employment contracts: Fixed Duration Contract – FDC and Undetermined Duration Contract – UDC. The FDC must be made in writing, have a clear expiry date and cannot exceed 2 years; but it can be renewed one or more times if the renewal does not exceed 2 years. Any employment contract which is not made in writing shall be considered as the UDC. When an FDC, whose period is less than or equal to 2 years, continues quietly at its expiry date, it will become a UDC.

In this case, the Arbitration Council finds that Ms. Phai Phal is a worker **whose employment contract with the Company has been a UDC** since she started working with the Company in 1999 until she was terminated because the Company has never made a written contract with her.

3. What type of worker is Ms. Phai Phal? And what are the benefits she is entitled to under the Labour Law?

According to Article 9 of this law and based on the work sustainability, it is noted that there are **two types** of workers: **regular** workers and **casual** workers. The regular workers, (popularly called in Cambodia as the permanent workers) “are those who work regularly **in a specific permanent work.**” For the casual workers (popularly called in Cambodia as the temporary workers or floating workers) are those who made a contract to **do a specific work**, which **needs to be completed in a short period of time; work occasionally, intermittently or seasonally.**

And Article 11 of Labour Law reads that “based on the wages payment way, workers are categorized as the following:

1. Workers remunerated on a time basis “monthly, daily and hourly” who are paid daily or at an interval of time not longer than 15 days or one month;
2. Workers remunerated based on amount of product or task;
3. Worker remunerated in commission. “

Article 6 of this Law reads that “...The status of labourer is **independent of the method of remuneration**; it is determined exclusively by the **nature of the work**”.

Based on the provisions above, a natural person becomes a regular worker (permanent worker) or a casual worker (floating or temporary worker) of another person who is the employer whenever both parties have made a contract verbally or in writing. This contract aims to allow the worker to work to earn a small or large amount of money under the management of an employer or his/her representative, regardless of the way the wages is provided. And the exact type of such worker is determined by the provisions in the contract and the employment conditions, regardless of whatever type the employer may label or consider the worker to be. Based on the agreement between worker and employer or his/her representative who has the right to make the decision, contractual parties can choose one of the 4 ways to receive payment as stated in Article 11 of the Labour Law which are: payment on a time basis, payment on the basis of amount of product, payment on the basis of taskwork, or payment in commission. These four types of payments can be chosen to be used legally by both parties, even though they are the regular workers (permanent workers) or a casual workers (temporary or floating workers).

Article 166 (3) of the Labour Law states that “For jobs that are not performed regularly throughout the year, a worker is considered to have met the condition of continuous service if he works an average of 21 days per month”. This determination is in order to calculate the annual leave payment. In the Case 26/04-Cambodia Sports Wear, the Arbitration Council decided that “casual workers” become regular workers when they work with the same employer for at least 21 days per month for 2 consecutive months. In Case 03/05-Flying Dragon, the Arbitration Council seemed to consider that a “taskworker” (“Kamaka Mao Ka”) is the same as a temporary worker or casual worker by writing that the Labour Law “does not state about the period that employers hire taskworkers, but the Labour Law states clearly that any worker who works regularly and full time in a period of time, this worker cannot be considered as taskworker.” And based on Case 26/04, it is written that “Workers are not considered as taskworkers if they work for at least 21 days for longer than 2 consecutive months. In this case, this worker must be considered as regular worker with a fixed duration contract or undetermined duration contract”.

In this particular case, the Arbitration Council maintains that, whatever the employer may call a worker, the terms floating worker, temporary worker and casual workers are legally the same and maintains the interpretation of the period of time that casual workers or temporary workers are considered permanent workers. But the Arbitration Council does not agree with the classification of taskworkers as the general casual workers because the term “taskwork” (“Mao Ka”) is determined by law as the method of payment; it is not for determining if a worker is a permanent worker or a casual worker. Since there has been widespread use of the term “Mao Ka” (taskwork) in the general contracts which are under the Decree on Contract such as contracting to build or do something, there is considerable confusion between the term “Mao Ka” and the term “Labor contractor” in the Labour Law.

Based on Article 45 of Labour Law, “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.” According to this meaning, Labour Contractor, which is popularly called [Neak Mao Ka], is the contractor who accepts work on a contractual basis, is not the employee of the entrepreneur. But he is the business person who makes profit from making a contract with an entrepreneur to do something but then hire some other workers to do it. He does not make this contract with an entrepreneur to get wages and he does not work under the direction and supervision of another contracting party. So [Neak Mao Ka], the labour contractor, under general meaning, is not the same as the worker who made a contract to work under the direction and authority of an employer to get wages on the basis of taskwork.

However, based on Khmer dictionary published by Buddhist Institute in 1967 on page 572, the term “Mao” is a verb which means overall inclusion, overall acceptance, accepting the work with all things, accepting to do a task until it is completed. Therefore, the Arbitration Council understands that the employment contract in which wage is based on taskwork (“Mao Ka”) is a type of contract to determine the specific type and size of work and total wage that workers have the right to receive based on determined conditions; in this type of contract, the length of duration in order to complete this specific work might or might not be fixed. But it is not necessarily that the employer orders and controls workers about the time of work. The [Mao Ka] employment contract can be UDC or FDC and the workers can be regular workers or casual workers based on the real situation.

To make it clearer, the Arbitration Council wished to make further explanation that a contract to work to receive payment based on the amount of product (based on piecework) is not completely the same as a contract to receive payment based on taskwork (“Mao Ka”). For the contracts to receive payment based on the amount of product, employers can fix an acceptable conditions for workers to achieve minimum amount within a specific period of time, fix the rate for each product (not the total wages for the entire work) and employers can suggest worker to work quickly and the contract allows the employer to have the right to order workers to work fully during working hour (unless there is any specific condition set forth in the employment contract or the internal rules). Contracts to receive payment based on amount of product (paying by piecework) can also be an FDC or a UDC and workers can be regular workers or casual workers depending on real situation. Contracts which workers are paid based on time give employers the right to control and order workers to do his job in proper time. This contract can be an FDC or a UDC and the workers can be a regular workers (permanent workers) or casual workers (temporally or floating workers) depending on real situation.

As for Ms. Phai Phal's case, the Arbitration Council finds that she is not a taskworker in the form of a labor contractor because, as mentioned above, she has employment relationship with the Company through the verbal contract she made with the Company's representative who is also under supervision and management of the Company. And as she has worked 8 hours per day every normal working day and she sometimes worked over time or on Sunday or on holiday for over 6 consecutive years, therefore by law **she is a regular worker**. Therefore for the company to consider her as a casual worker or floating worker is not correct or lawful. Furthermore, Ms. Phai Phal always received wages from the Company based on the amount of product at the rate for **each** clothing item as fixed by the company, by law she is **a worker who has a contract to work and receive payment based on the amount of product**, not a task worker as called by the company because her verbal contract did not determine the total size of specific work and the total salary for this job. The Arbitration Council notes that in the prior Arbitral Award of 23/05-Jung Min Cambodia, the Arbitration Council reconsidered whether the previous interpretation regarding the conversion of casual workers to regular workers after 21 days of 2 consecutive months was correct. But even if there is a question about the period of time for casual workers to be considered regular workers, it is not an obstacle to issuing an award for this case because Article 10 of Labour Law states, "**Casual worker are subject to the same rules and obligations and enjoy the same rights as regular workers**, except for the clauses stipulated separately." So Ms. Phai Phal is entitled to the same right as regular workers, particularly the right to minimum wages, incentive bonus, paid annual leave, annual leave, holiday leave, indemnity, dismissal compensation and other rights relating to dismissal such as the right to get good reason, prior notice about termination of contract and the right to non-discrimination...etc.

The Arbitration Council also notes that Article 120 of the Labour Law provides for the right to claim for wages which last for only 3 years. Thus Ms. Phai Phal has no right to claim for wages beyond the past 3 years.

4. Is the termination of Ms. Phai Phal lawful or not?

Article 74 of Labour Law states that "The labour contract of undetermined duration can be terminated at will by one of the contracting parties. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party. However, no layoff can be taken without a valid reason relating to the worker's aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or group." Article 77 of the Labour Law states that "The termination of a labour contract at will on the part of the employer alone, without prior notice or without compliance with the prior notice

periods, entails the obligation of the employer to compensate the worker the amount equal to the wages and all kinds of benefits that the worker would have received during the official notice period.”

In Arbitral Award 19/04-Kbal Koh II, the Arbitration Council made an interpretation that if a dismissal is not in accordance with the law, the dismissal is null and void and the employee will be considered to have remained employed by the company.

The Company dismissed Ms. Phai Phal by accusing her for not doing good work. But the Arbitration Council does not believe that she could not work well because she has worked with this factory for 6 consecutive years. She has worked as quickly as all other permanent workers and has never committed any misconduct or damaged factory’s property. Moreover, the Company did not have any policy to reduce workers at the moment; on the contrary, it has a policy to transfer taskworkers to become regular workers. And when the Arbitration Council asked why the company needed to dismiss Ms. Phai Phal, the company’s representative did not mention her attitude or character. The factory only mentioned that it wanted to use its right to terminate taskworkers who do not have fixed contracts. It also wanted to follow its policy and rules and did not want to make a bad example or provide improper benefits to the union by reinstating Ms. Phai Phal or paying her the dismissal compensation. So the Arbitration Council finds that the Company has no valid reason to dismiss Ms. Phai Phal, therefore she is entitled to be reinstated. Furthermore, the Arbitration Council also considers that the company violates the agreement dated 13 March 2006, especially point 1 of the agreement because the termination was done without valid reason and point 6 of the agreement because the termination was made on the day which general workers came back to work and Ms. Phai Phal joined the strike before there was the agreement. This shows the employer’s act of revenge against Ms. Phai Phal.

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

DECISION

- 1- Order the employer to reinstate Ms. Phai Phal as a regular worker with a undetermined duration contract from the day that this Award comes into effect.
- 2- Order the employer to pay back bonus, paid annual leave and other benefits, which Ms. Phai Phal is entitled to during the last 3-year period, as stated in the Labour Law and other relating regulations, on the day this Award come in to effect. The Company shall use the minimum wage of the permanent workers for calculation of the wages to

be paid back to Ms. Phai Phal for the period from the day which she was terminated until the day she will be reinstated. The employer shall pay her these benefits within one month from the day this Award comes into effect, at the latest.

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: **Seng Vuochhun**

Signature:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Nhean So Munin**

Signature: