



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអន្តរាជ្ញាគណៈ

THE ARBITRATION COUNCIL

Case number and name: 49/08-Flying Dragon

Date of Award: 30 April 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Chhiv Phyrum**

Arbitrator chosen by the worker party: **An Nan**

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

DISPUTING PARTIES

Employer party:

Name: **Flying Dragon (Cambodia) Garment**

Address: Chom Chao Street, Sangkat Steung Mean Chey, Khann Mean Chey, Phnom Penh

Telephone: 012 573 795 Fax: N/A

Representative:

1. Mr. Vat Oeurt Head of administration

Worker party:

Name: **C.CAWDU and local union of C.CAWDU**

Address: #6, Street 476, Sangkat Tuol Tompoung, Khann Chamkarmorn, Phnom Penh

Telephone: 012 282 653/023 210 481 Fax: 023 210 481

Representative:

1. Mr. Oum Visal Deputy Secretary of C.CAWDU
2. Ms. Nat Sieng Leap President of local union of C.CAWDU at the factory
3. Ms. Keo Pov Secretary of local union of C.CAWDU at the factory

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The workers demand that the Company make one year fixed duration contracts. The Company states that it is able to make four to six months fixed duration contracts only.
- 2- The workers demand that the Company should not terminate [workers'] fixed duration contracts without valid reasons and that it [should] follow the agreement made at the Arbitration Council dated 13 March 2006 and 06 November 2007. The Company states that the termination of workers' fixed duration contracts is in accordance with the Labour Law and is based on the workers' poor performance and not union discrimination.
- 3- The workers demand that the Company build a daycare center or pay them US\$ 10 per month for formula milk. The Company states that it does not have enough space to build the daycare [centre] and is able to provide only US\$5 per month for formula milk.
- 4- The workers demand that the Company should not set a target for piecework and force workers to work to reach it. When the Company does not have work for workers to do for one or two hours, it must write that down on workers' piecework slip. The Company states that it sets the piecework target according to workers' ability and the output produced by the majority of workers.
- 5- The workers demand that the Company make payment in lieu of annual leave (for 2006 and 2007) because the Company has asked workers to use their annual leave when it does not have work for them to do. The Company states that it provides [payment] only for 2006, and for their annual leave in 2007, the company will allow the workers to use it in 2008.
- 6- The workers demand that the Company make two copies of their employment contract, one to be kept by the company and another by the workers (original copy) and this must be given to workers on the date the contract is made. The company states that it can give the duplicated copy and this can be given one day after the contract is made.
- 7- The workers demand that the Company allow them to take sick leave for surgical treatment and maintain their wages during this leave on the provision of a doctor's certificate [by the worker]. The Company states that it follows the Company's Internal Work Rules registered at the Department of the Labour Inspector.
- 8- The workers demand that the Company maintain full wages when it does not have work for them to do. The Company states that when there is no work for workers to do for a short period of time it pays half wages.
- 9- The workers demand that the Company deduct union contribution fees from the wages of union members provided the workers have proper documents. The

Company states that it can deduct this as long as the union provides documents with a photo of each member.

- 10- The workers demand that the Company should not deduct the wages of the leaders of the local union when they are invited to join the labour dispute resolutions process and seminars by the Union Federation, Ministry of Labour and Vocational Training, Arbitration Council and other organizations. The Company states that it allows them to go only when there is an invitation letter from the Ministry of Labour and Vocational Training and the Arbitration Council.

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. 427 KB/AK/VK, dated 28 March 2008, was submitted to the Secretariat of the Arbitration Council on 31 March 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: 8 April 2008 (from 8:00 a.m. to 11:00 a.m.)

Procedural issues:

On 5 March 2008 the Department of Labour Disputes received a complaint by letter No. 002-1-08 SBKK, dated 5 March 2008, from 442 workers represented by C.CAWDU demanding that the Company improve working conditions. Immediately after the receipt of the demand the Department of Labour assigned an officer to conduct conciliation on this dispute and the last conciliation was held on 20 March 2008 with the result that 1 out of 11 issues was resolved. The 10 unresolved issues were referred by the Department of Labour to the Secretariat of the Arbitration Council on 31 March 2008 through the report of the collective labour dispute settlement at Flying Dragon Company, No. 427 KB/AK/VK, dated 28 March 2008.

Having received the case, the Secretariat of the Arbitration Council summoned both the employer party and the worker party to the hearing and conciliation on the 10 unresolved

issues on 8 [April] 2008 at 8:00 a.m. Both parties were present as invited by the Arbitration Council.

In the hearing, the Arbitration Council attempted to further the conciliation on the 10 unresolved issues and was able to conciliate issue 4 (regarding the issue of [payment for] workers when there is no work for a period of two hours, which happens on occasion), issue 6 and issue 7. The worker party withdrew issues 1, 2, 3, 5 and 10 from this case 49/08-Flying Dragon. Therefore, in this case the Arbitration Council considers only issues 4 (determination of piece rate), 8 and 9 based on the evidence and clarification of the parties in the hearing as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Authorization letter by the Company to Mr. Va Oeurt, dated 17 March 2008.
2. Certificate of commercial registration of Flying Dragon Company No. 113 PN.NTK, dated 12 January 1998.
3. Certification letter by the Minister of Commerce regarding the commercial registration of Flying Dragon Company No. 113 PN.NTK, dated 12 January 1998.
4. Sample of probationary employment contract of the Company.
5. Sample of fixed duration employment contract of the Company.
6. Statute and memorandum of Flying Dragon Company, dated 2 August 1999.
7. Internal Work Rules of Flying Dragon Company, registration No. 037 KKBV/AK, dated 6 April 2005.
8. Notification of Flying Dragon Company FD:07/0055, dated 1 November 2007.
9. Notification of Flying Dragon Company FD:07/0040, dated 4 August 2007.
10. Leave request of Duong Sava.
11. Leave request of Nat Sieng Leap.
12. Agreement between workers and the Company director No. FD:009/004, dated 12 September 2004.

Provided by the worker party:

1. Summary statement of the dispute at Flying Dragon 3 Company, dated 22 April 2008.

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

1. Report of collective labour dispute resolution at Flying Dragon Company No. 427 KB/AK/VK, dated 28 March 2008.

2. Minutes of collective labour dispute conciliation at Flying Dragon Company, dated 20 March 2008.

Provided by the Secretariat of the Arbitration Council:

1. Invitation letter No. 243 KB/AK/VK/LKA dated 1 April 2008 to invite the company party to attend the hearing.
2. Invitation letter No. 244 KB/AK/VK/LKA dated 1 April 2008 to invite the worker party to attend the hearing.

FACTS

- Having reviewed the report of the collective labour dispute conciliation;
- Having examined the documents submitted by the parties to the Arbitration Council;
- Having listened to statements by representatives of the workers and the employer.

The Arbitration Council finds that:

- Flying Dragon factory employs approximately 1,124 workers.
- The local union of C.CAWDU at Flying Dragon Company, the complainant in this case, represents 442 workers, based on the non-conciliation report No. 427 KB/AK/VK, dated 28 March 2008 which was referred to the Secretariat of the Arbitration Council on 31 March 2008. The employer party does not object to the number of workers in this case.

The worker party requested to withdraw the following demands from case 49/08:

Issue 1: The worker party requested to withdraw this issue from this case.

Issue 2: The worker party requested to withdraw this issue from this case.

Issue 3: The worker party requested to withdraw this issue from this case.

Issue 5: The worker party requested to withdraw this issue from this case.

Issue 10: The worker party requested to withdraw this issue from this case.

The worker and the employer parties reached agreement on the following demands in case 49/08:

Issue 4: When there is no work for periods of one or two hours (which happens once in a while), the Company party agrees to write this down on workers' piece rate [slips].

Issue 6: The Company party agrees to provide workers with an original copy of their employment contract on the date that it is signed.

Issue 7: For those workers who had a surgical operation, the Company agrees to follow its Internal Work Rules.

The Arbitration Council will issue an award in case 49/08 on the following non-conciliation issues:

Issue 4: The workers demand that the Company should not increase the production target [and set it too high] for piece rate workers

- The worker party claims that approximately 80% of workers have been piece rate workers since 2000. Piece rate workers work in the sewing section, backstitching section, ironing section, and overlocking section. The representative of the Company did not respond to the workers' claim.
- The workers mention that since 2007 the Company has increased the production target [and set it too high] for piece rate workers. The worker party demands that the Company should not increase the production [target] because the workers receive less money and have no motivation to work and that only 40% of workers can achieve [the target]. The workers give an example that when there is a new model (backstitching in 8 places), in the first month the Company will set [the target] at 400 pair of trousers per day but one month later, when the Company sees that the workers can [achieve the target], the Company increases it to 490 pair of trousers per day which means [an additional] 90 pairs of trousers compared with the previous month. The workers state that the Company does this for every model.
- The workers add that even if the workers do not reach the target set by the Company, there is no punishment and this does not affect the main wage of the workers.
- The Company representative states that he does not know the detail of this issue but about 50-60% of the workers can reach the production target set by the Company. The Company representative promises to provide documents related to the practice in providing wage to workers by 21 April 2008. The Arbitration Council received the document from the Company on 21 April 2008 but the document is in a foreign language [not comprehensible to the Arbitration Council] and cannot be taken into consideration. Thus, the Arbitration Council does not consider this document.

Issue 8: The workers demand that the Company maintain full wages when it has no work for workers to do.

- The workers demand that the Company maintain full wages when it has no work for them to do because the Company does not inform the workers in advance and does not ask for permission from the Ministry of Labour. The workers do not make this demand for the previous periods where there was no work but for the future when the Company will not have work for the workers to do.
- According to the company's practice, the workers come to work at the factory, [work for a few hours] and if there is no more work for the next hour or no work for workers

to do at all, the Company will ask the workers to go back home and pay them half their wages.

- The Company does not agree but requests that it follow the agreement dated 12 September 2004 between workers representatives in factory 1, representatives in factory 2 and representatives in factory 3 together with union representatives of factory 1, factory 2 and factory 3; clause 1 of the agreement is about the responsibility of the factory to workers when there is no work or lack of work for workers to do. This clause states:

a. Where the Company does not have sufficient work for the workers and they work intermittently for 21 days or more, the Company agrees to provide the following [benefits] to the workers:

- 1. half or "50%" of basic wages on the days there is no work.*
- 2. full "attendance bonus"*
- 3. it will not deduct the number of days from the [workers'] annual leave.*

b. Where the factory does not have sufficient work for the workers and they work intermittently for less than 21 days, the Company agrees to provide the following [benefits] to the workers:

- 1. half or "50%" of basic wages on the days there is no work.*
- 2. "attendance bonus" in proportion to the number of days worked.*
- 3. it will not deduct the number of days from the [workers'] annual leave.*

c. In case the factory does not have sufficient work or has no work for the workers to do for many days for a period not exceeding 2 months, the factory has a right to notify the office responsible for Labour in writing to request the suspension of the obligations in the contract. Thus, after the decision of the Ministry of Labour, the factory will not provide anything to the workers except:

- 1. seniority bonus; and*
- 2. annual leave.*

- The worker party states that in July, August and September 2007, there were two or three days per month where there was a lack of work. The Company put the workers on leave on a rotational basis.
- The Company party states that it does not ask for permission from the Ministry of Labour when there is no work for a period of less than two months.

Issue 9: The workers demand that the Company deduct union contribution fees from the wages of members who have proper documents.

- Both parties state that the Arbitration Council has already issued an Arbitral Award on this issue in case 35/07-Flying Dragon, issue 1.

- The union party states that it has not brought this [issue] to the court and requests that the Arbitration Council redetermine the issue.

REASONS FOR DECISION

The demands the worker party requested to withdraw from case 49/08:

According to the findings of fact above, the worker party withdrew issues 1, 2, 3, 5 and 10 from this case. Thus, the Arbitration Council will not consider these issues.

The worker and employer parties reached agreement on the following demands in case 49/08:

Issue 4: When there is no work for periods of one or two hours (which happens once in a while), the Company party agrees to write this down on workers' piece rate [slips]. Thus, the Arbitration Council will not consider issue 4.

Issue 6: The Company party agrees to provide workers with an original copy of their employment contract on the date that it is signed. Thus, the Arbitration Council will not consider issue 6.

Issue 7: For those workers who had a surgical operation, the Company agrees to follow its Internal Work Rules. Thus, the Arbitration Council will not consider issue 7.

The Arbitration Council will issue an award in case 49/08 on non-conciliation issue 4 (the demand that the Company should not increase the production target for piece rate workers), issue 8 and issue 9. The Arbitration Council will consider these non-conciliation issues as follows:

Issue 4: The workers demand that the Company should not increase the production target [and set it too high] for piece rate workers

Article 2 of the Labour Law states, "...enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in factory, workshop, worksite, etc., under the supervision and direction of the employer."

In previous cases, the Arbitration Council held that Article 2 of the Labour Law means that an employer has a right to manage and direct the Company as long as this right is performed in accordance with the law and is reasonable. (See *Arbitral Awards 62/06-Quick Sew, issue 5; 108/06-Trinunggal Komara and 33/07-Goldfame, issue 3*).

In relation to this demand, the Arbitration Council considers that there is no provision in the Labour Law which prohibits an employer from increasing the production [target] because this is in accordance with the right to manage and operate the production line of an employer's enterprise and Article 2 of the Labour Law also grants this right to the employer. In case 10/03- Jacqsintex, the Arbitration Council held that the determination of the

production target for piece rate workers and [the] variation of the target is generally not a violation of the contract. (See *Arbitral Award 10/03- Jacqsintex, issue 3*)

Moreover, in previous cases the Arbitration Council held that the employer has a right to set or increase the production target or increase the piece rate but the determination [of the rate or target] should be based on proper reasons and should not affect workers' wages. (See *Arbitral Awards 14/03-Chou Sing, issue 2; 03/05-Flying Dragon, issue 3; and 116/07-Grace Sun, issue 2*).

Article 104 of the Labour Law states, "*The wage must be at least equal to the guaranteed minimum wage; that is, it must ensure every worker of a decent standard of living compatible with human dignity.*"

The Arbitration Council considers that Article 104 requires the employer to set the wage at least equal to the minimum wage to ensure every worker a decent standard of living compatible with human dignity.

Article 108 of the Labour Law states, "*For task-work or piecework ... the wage must be calculated in a manner that permits the worker of mediocre ability working normally to earn, for the same amount of time worked, a wage at least equal to the guaranteed minimum wage as determined for a worker.*"

The Arbitration Council considers that Article 108 of the Labour Law provides a basis for calculating the piece rate (rate of task-work). According to the Labour Law, the *piece rate needs to allow a worker of average ability who works 8 hours per day (48 hours per week) to earn at least the minimum wage* without the employer topping up the worker's salary to ensure they meet the minimum wage.

Based on the above findings of fact, the workers and the employer agree that all workers receive the minimum wage, exclusive of overtime payments or payment for work on holidays, and that a top up is not needed to reach the minimum wage. In addition, the workers do not provide any evidence to prove that the employer's practice is against Article 104 and 108 of the Labour Law. Thus, the Arbitration Council considers that the Company's management in relation to setting the piece rate is not unlawful. (See *Arbitral Award 10/03- Jacqsintex, issue 3*).

Nonetheless, is the company's management [in setting the piece rate] reasonable? It is not clear from the facts provided by either party how the increase of the production target every month has led to a decrease in workers' wages and how many workers are able to reach the previous target. In addition, the Arbitration Council does not find there is any evidence which proves that the increase is unreasonable. Thus, the workers' demand is an interests dispute.

In general, the Arbitration Council will reject an interests dispute if the union who brings the dispute does not have most representative status in a factory. The most

representative status of a union provides it with legal standing to enter into a CBA with the company (see Article 96, paragraph 2B and Prakas 305 SKBY, clause 9, paragraph 1) and the legal right to bring an interests dispute to the Arbitration Council for resolution. In order to obtain most representative status, Article 277 of the Labour Law 1997 states that a union need to be registered and fulfil other conditions stated in this Article. (See *Arbitral Awards 57/04-Evergreen; 60/04-United Art, issue 3; 08/07-Siu Quinh, issue 3; and 33/07-Goldfame, issue 2*).

In this case, the local union of C.CAWDU does not have most representative status. Therefore, the Arbitration Council declines to consider the demand.

Issue 8: The workers demand that the Company maintain full wages when the Company does not have work to do

There are provisions of the Labour Law which deal with the suspension of workers' employment contracts and the [Labour Law specifies that the] suspension must be in accordance with the procedures set out in Article 71, paragraph 11 of the Labour Law for the following reasons:

"1. When the enterprise faces a serious economic or material difficulty or any particular unusual difficulty, which leads to a suspension of the enterprise operation for a period not more than two months.

2. The suspension of the operation is subject to inspection by the labour inspector."

Moreover, Article 72, paragraph 1, of the Labour Law states, *"The suspension of a labour contract affects only the main obligations of the contract, that are those under which the worker has to work for the employer, and the employer has to pay the worker, unless there are provisions to the contrary that require the employer to pay the worker."*

Thus, in general, before suspending workers' employment contracts the Company is required to notify the Department of Labour Inspection and Labour Inspector must inspect and certify the suspension of [workers'] employment contracts. According to this Article the Labour Inspector has a duty to inspect and advise regarding employment suspension at the Company [to determine] whether the company is actually facing economic difficulties.

The Arbitration Council finds that the Labour Law allows the Company to suspend [a worker's] employment contract but the employer needs to inform the Labour Inspector about the reasons that led to the suspension of the workers' employment contracts and the duration of the suspension.

If the Company follows [correct] legal procedures and the suspension is under the [control of] the Labour Inspector, the Company does not have an obligation to pay wages to workers (see Article 72, paragraph 1 of the Labour Law). However, if the Company does not follow the [correct] legal procedures, as described above, when suspending workers'

employment contracts, the Company has an obligation to pay full wages to the workers even though it does not have any work for the workers to do (see *Arbitral Awards 21/03-Loyal, issue 8; 01/04-New Point; 46/04-M&S, issue 1; 60/06-New Max, issue 2; 74/07-Global Apparel, issue 1*).

In this case, based on the above findings of fact, when the Company has no work for the workers for a short period of time, the Company does not apply to the Labour Inspector to suspend the workers' employment contracts. On the other hand, the Company made an agreement with the workers that when the Company does not have work for the workers to do the Company would pay half wages to the workers, which is contrary to Article 71, paragraph 11, of the Labour Law.

The workers now demand that if, in the future, the Company does not have work for them to do for a short period of time, the Company provide full wages to them and [the workers] no longer agree to receive half wages as they did in the past.

The Arbitration Council considers that in this case the Company does not suspend [workers'] employment contracts in accordance with the Labour Law; as stated in Article 71, paragraph 11, of the Labour Law when it does not have work for workers to do, the Company has an obligation to pay full wages because the suspension is not in accordance with the law.

However, in this case the worker party does not demand that the Company make back payment for past work suspensions but they are demanding that the employer provide full wages when there is no work for the workers to do in the future. Thus, the Arbitration Council considers that for a demand for something which has not yet occurred, the Arbitration Council cannot find any specific facts or evidence related to the workers who made the demand for consideration and [in order to make a] decision.

In relation to future demands, in case 10/03- Jacqsintex, the Arbitration Council held that, "*The Arbitration Council was created to in order to resolve existing labor disputes and not in order to resolve disputes which have not yet occurred.*" (See *Arbitral Award 10/03-Jacqsintex, issue 2*).

In this case the Arbitration Council agrees with the interpretation of the Arbitration Council in the above case because no one can anticipate in advance an incident which might happen in the future and whether that problem will happen at all, where and when it will happen, which workers will be affected by it (including the names of the workers who make the demand), which group or section the workers work in, how many [workers], how many days the company does not have work for them to do, etc. (See *Arbitral Awards 68/04-City New, issue 4; 36/06-Mondotex, issue 5; 58/07-8 Stars Sportswear, issue 1*).

Nonetheless, based on the above findings of fact and interpretation, the Arbitration Council finds that the Company did not follow proper procedures when suspending workers'

employment contracts. Clause 34 of Prakas 099 SKBY, dated 21 April 2004, regarding the Arbitration Council states that *“Within the limitations of the Labor Law and this Prakas, it has the power and authority to provide any civil remedy or relief which it deems just and fair”*

Therefore, the Arbitration Council decides to order the Company to stop this practice immediately and the Company should ensure that any [work] suspension in the future is implemented in accordance with the [proper] legal procedures under the Labour Law.

Issue 9: The workers demand that the Company deduct union contribution fees from the wages of members who have proper documents.

After having considered the evidence submitted by the parties, the Arbitration Council finds that the demand in this case is the same as the demand in case 35/07-Flying Dragon, issue 1, which was referred to the Arbitration Council on 3 April 2007 and the Arbitration Council issued an Arbitral Award on 8 May 2007.

Based on the **Principle of Res Judicata**, a dispute which has already been decided cannot be reconsidered if it is between the same parties on the same issue.

In previous cases, the Arbitration Council held that *“Res judicata is the principle that the same issue between the same parties may not, generally, be reconsidered once it has been decided on the merits.”* (See cases 10/06-North Gaiety; 24/06-Fortune, issue 4; and 106/06-Quick Sew, issue 5).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in previous cases. In this case, the Arbitration Council has already decided this issue once in case 35/07-Flying Dragon, issue 1. Therefore, the Arbitration Council declines to consider the demand that the Company deduct union contribution fees because the Arbitration Council has already issued an Arbitral Award on this issue.

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

DECISION

Issue 4

Reject the demand that the Company should not increase the production target [and set it too high] for piece rate workers

Issue 8:

Reject the demand that the Company provide full wages for the future suspension of work.

Order the Company to immediately stop suspending work in a manner which is not in accordance with Article 71, paragraph 11, of the Labour Law.

Issue 9:

Decline to consider the workers' demand that the employer deduct union contribution fees from the wages of union members who have proper documents.

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: **Chhiv Phyrum**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: