

**KINGDOM OF CAMBODIA**

**NATION KING RELIGION**

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**THE ARBITRATION COUNCIL**

Case: 27/04

Date of Award: June 16, 2004

## **ARBITRAL AWARD**

(Issued under Article 313 of the Labor Law)

**MS International Garment Limited**

(the “*employer party*”)

**AND**

**CCAWDU**

(the “*worker party*”)

### **Details of employer party:**

*Address:* #68, Street Thmey Village, Tuol Sangke commune, Russey Keo district, Phnom Penh

*Telephone:* (855) 23 368 287/ (855) 12 875 780

*Fax:* N/A

*Representatives:*

- 1- Mr. Kim Do Sam, the owner of the company;
- 2- Mr. Kim Nan Kyun, Accountant;
- 3- Mr. Chan Sochitra, Admin official; and
- 4- Mr. Ok Sophal, Admin official

### **Details of worker party:**

*Address:* Temporarily located in the factory

*Telephone:* (855) 12 922 103

*Fax:* N/A

*Representatives:*

- 1- Ms. Chhan Sokha, President of CCAWDU;
- 2- Ms. Lim Thyda, Dispute Resolution official of CCAWDU;
- 3- Ms. Bou Sarang, President of MS Union; and
- 4- Mr. Iem Yeam, Advisor for MS Union.

## **ISSUES IN DISPUTES**

### **(In non-conciliation report)**

- 1- The workers demand that the company use the pay in the last month that the workers had full time work or the average wage over 12 months when calculating termination benefits. The factory maintains that they should use the basic salary of US\$45 because they say that the company has not been operating for three months already;
- 2- The workers demand that the employer accept the leadership of the union and the old workers back to work if the company recommences operations. The employer states that they closed down starting from 1 January 2004 and that the new company has nothing to do with MS;
- 3- The worker demand compensation for annual leave for 1999, 2000 and 2001 which the company failed to provide adequately. The employer [states that] they cannot pay the compensation for annual leave in the years 1999, 2000 and 2001 because they say that on 2 May 2003 the workers and the company agreed only to give annual leave starting from the year 2002.

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

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

The Arbitration Council derives its power to make this Award from Section II B<sup>2</sup> of Chapter 12 of the 1997 Labor Law (Labor code), the Prakas on the Arbitration Council (No. 338, of 11 December 2002) and the Arbitration Council Procedural Rules.

An attempt to conciliate the collective dispute which is the subject of this Award was made in accordance with Chapter XII Section 2A of the Labor Law. That conciliation hearing was unsuccessful and a non-conciliation report dated May 5, 2004, was sent to the Secretariat of the Arbitration Council on May 6, 2004.

**COMPOSITION OF THE ARBITRATION PANEL :**

Arbitrator chosen by the employer party:	<b>Mr. Hem Huor Naryth</b>
Arbitrator chosen by the worker party:	<b>Mr. Vuong Vanna</b>
Chair arbitrator (chosen by the above two arbitrators):	<b>Mr. Men Nimmith</b>

**HEARING AND EVIDENCE:**

*Date and place of hearing:* (1) May 21, 2004 at 2:00pm, and (2) May 28, 2004 at 9.00am at the Arbitration Council Secretariat, Phnom Penh Center (A), Sothearos Blvd., Sangkat Tonlebasak, Phnom Penh.

*Expert witnesses other than the parties:* N/A

**Documentary and other evidences considered by the arbitration panel are as follows:**

*A- Received from employer party:*

1. Certificate of MS Registration (No. 02 February 2000);
2. Internal Work Rules of the company;
3. Two model labor contracts;

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<sup>2</sup> Art. 309 through 317 of Labor Law

4. Bylaw of BC (Cambodia) Garment Co., Ltd (hereinafter known as BC);
5. Bylaw and Memorandum of Sam Han (Cambodia) Garment Co., Ltd;
6. Letter from Cambodian Development Council acknowledging the change in company name from MS to BC;
7. Letter from Ministry of industry, Mines and Energy acknowledging the change in company name from MS to BC;
8. Letter from Ministry of Commerce acknowledging the change in company name from MS to BC;
9. Letter of MS registration from Ministry of Commerce;
10. Letter from Cambodian Development Council permitting the MS operation;
11. Certificate of MS registration in the Commercial Record;
12. Letter from Kim Do Sam giving the reasons for the closure of the factory;
13. Lease of the enterprise with Cambo Fashion Garment;
14. Formula from GMAC for calculating severance pay for contracts of undermined duration; and
15. Name list of old and new workers of MS.

B- Received from employee party:

1. Name list of union leadership, activists and members; and
2. Internal Work Rules of the company.

**SUMMARY OF THE CASE:**

The MS company is located at #68 New Road, Tuol Sangkae Commune, Russey Keo District, Phnom Penh. This company received permission to operate from the Council for the Development of Cambodia, was entered on the commercial register on 2 February 2000 and started operation from this date. The company hired 380 workers. From January to March 2004 encountered difficulties in that the number of orders received dropped. This lead to a

suspension of production. On 9 March 2004 the company terminated its entire workforce and closed down the whole factory. On 20 April 2004 the Democratic Workers Union of MS made a complaint to the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation (MOSALVY) with regard to the above listed three points. On 22 April 2004, after receiving the complaint, the district office of the labor inspectorate in Russey Keo attempted to conciliate the dispute but this was not successful.

On 24 April 2004 the company changed its name from MS to BC (Cambodia) but kept the old statutes of MS in force. After this change of name the company rented the whole factory out to another company which started operating again at the beginning of April 2004, but without allowing some 200 of the old workers to return to work, which included the union leadership and some union members. During the period when the factory was shut down the factory gave the workers 50% of their wages plus their bonus. Thereafter MS or BC paid out compensation for annual leave, but not in full.

On May 13, 2004 the Arbitration Council received a complaint from the workers and the employer about the three non-conciliated points listed above. On the May 21, 2004 at 2pm and on May 27, 2004 at 9am the Arbitration Council conciliated and heard this case according to its procedures.

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

After having considered the non-conciliation report and having heard the evidence from the parties including having reviewed all of the documents which were submitted to the Arbitration Council, the Arbitration Council finds that:

- 1- MS officially opened for business on 1 February 2000 and continued its business from that day on. However, because of a drop in orders the company reduced production and suspended its operation for 4 months from January to April 2004.

However, in any case the company only reduced its operations and suspended production until it had changed its name from MS to BC while the owner of the company (Kim So Seam) remained the same. Furthermore the company requested and received permission from the Council for the Development of Cambodia and the Ministry of Commerce to keep using the statutes of MS. This company did not produce documents relating to its bankruptcy as requested by the Arbitration Council during the hearing. This indicates that the company was not declared bankrupt and was not officially declared closed.

- 2- The owner of MS rented the operations in their totality to another company called Cambo Fashion after changing its name to BC.
- 3- The company helped to deduct union dues from union members, activists and leaders so MS or BC must have had a list of all these people in their pay records as well as a list of their other employees.
- 4- MS or BC want to pay severance benefits but insist on the using the final month's salary which is equal to 50% of the basic salary as the basis for calculation.
- 5- The decision to terminate workers because the factory had suspended its operations and changed its name was done without informing the workers first and without giving any reasons for the terminations. Thereafter operations were recommenced by renting the factory on 6 January 2004.

**REASONS FOR DECISIONS :**

*Issue 1:*

1. With regard to this issue the workers demand the company to take the last month where the workers had full work or the average of the previous 12 months into consideration for calculation on indemnity for dismissal when the company is closed.
2. The employer's position is that the indemnity should be on the basis of the minimum wage (US\$45/month)
3. On this point Art. 89 of the labor law requires that the indemnity for dismissal shall be calculated on the basis of 15 days wages and fringe benefits for each year of service. In deciding whether these 15 days should be calculated on the basis of the minimum wage or actual earnings, the ARBITRATION COUNCIL is guided by Arts.102 & 103 of the Labor Law which state that wages include all "remuneration for employment or service" including overtime and bonuses.

As such the Arbitration Council finds that the employer's argument that the words "wages and fringe benefits" means the minimum wage is wrong.

In deciding how to calculate wages and fringe benefits for the purpose of Art. 89 the ARBITRATION COUNCIL is guided by Art. 168 which requires the calculation of pay during leave on the basis of average earnings over a 12 month period.

Thus for example a worker with 13 month's seniority would be entitled to 15 days wages and fringe benefits indemnity in accordance Art. 89 calculated as follows:

Total gross wages including overtime and bonuses received by the worker over the 12 months prior to dismissal (A) divided by 12, divided by 26, multiplied by 15.

*Issue 2:*

1. The workers demand the employer to reinstate the leaders of the union and the previous workers at the factory which is currently operating at the former premises of MS. Their claim is based on Article 95 (5) of the labor law which states that in cases of collective termination for economic reasons: "The dismissed workers have, for two years, priority to be re-hired for the same position in the enterprise".
2. The employer (represented by Mr Kim) responded to this claim stating that he was not in a position to rehire any workers as he no longer operates the garment factory in question.
3. Mr Kim further testified that MS's business problems stemmed from the collapse of its Korean parent company in late 2003. As the owner of MS Cambodia, Mr Kim stated that he changed the name of the company to BC on DATE and then sub-leased the factory premises to another company called Cambo Fashion which has since commenced garment manufacture in the premises. Mr Kim however, testified that neither he nor MS have any stake in Cambo Fashion as either a shareholder, director or manager.
4. The workers on the other hand asserted that Cambo Fashion was in fact the same company as MS or, in the alternative, that Cambo Fashion was a successor company of MS within the meaning of Art. 87 of the Labor Law. These assertions were based on testimony from workers that Cambo Fashion was operating in the same premises as MS, that the sign outside the door reads BC, and that many of the managers and supervisors who previously worked for MS were now engaged by Cambo Fashion.
5. To satisfactorily establish a claim for rehire in this case the workers must:
  - (i) bring a claim against the company which is currently employing workers at the premises (Cambo Fashion); and

(ii) convince the Council that this company is a successor of their previous employer in accordance with Art. 87 of the Labor Law.

6. Although the employer was not able to provide documentation to support his testimony, the ARBITRATION COUNCIL found him to be a credible witness. It follows that in the absence of evidence establishing that he, BC or MS is currently employing workers at the factory, the workers' claim to be rehired by either of these companies cannot succeed.

*Issue 3:*

1. The workers claim compensation for leave accrued during the years 1999, 2000 and 2001. During this time the workers say that there was no practice of granting paid annual leave to workers and as such they did not request any.
2. With regard to 2002, 2003 and 2004 the parties have reached an agreement on compensation, however, with regard to the earlier years the employer asserts no liability on the basis that more than three years has elapsed.
3. The worker's claim is based on Art. 167 (2) of the labor law which states that "If a contract is terminated or expires where workers have a right to paid leave then they shall be compensated in accordance with Art. 166 above."
4. A possible counter argument for the employer is based on Art. 167 (4) of the labor law which states that "deferment of leave cannot exceed 3 consecutive years" and Art. 120 which states that "the statute of limitations on law suits for payment of wages is 3 years from the date on which the wages were due."

5. However, these arguments based on Arts. 167 and 120 of the Labor Law do not persuade the Arbitration Council for the following reasons:
  - a. Art. 120 refers to a limitation of actions brought in excess of "three years from the date on which wages were due." In accordance with Art. 167 (2) payment in lieu of leave not taken is only due when the contract is terminated or expires. Thus, in this case the statute of limitations referred to in Art. 120 will lapse three years from the date of termination (9 March 2004) and not the date on which leave was accrued.
  - b. Art. 167 is a provision which is designed to protect workers' rights to annual leave. This is indicated by Art. 363 of the labor law which provides that an employer who breaches Art. 167 may be fined in the amount of 31 to 60 times the base daily wage. In these circumstances, Art. 167 should not be interpreted to mean that workers forfeit their leave if they do not use it each year. Art. 167(4) of the law provides that a worker may not agree to defer the paid leave for more than three consecutive years and further may only agree to defer leave in excess of 12 days per year. In the present case, however, the workers' failure to take leave arose because annual leave was not practiced in the enterprise. In these circumstances the matter of deferral and its limitation to three years does not arise as there was no real agreement to defer leave.
6. Based on the above arguments the Arbitration Council finds that the employer must pay the workers an indemnity for leave not taken calculated on the full duration of their period of employment at the company.
7. This indemnity must be calculated on the basis of the average wages over a 12-month period as set out in Art. 168 of the Labor Law.

**ORDERS :**

1. That any indemnity for dismissal owed to a worker under Art. 89 of the Labor Law shall be calculated in accordance with the formula: Total gross wages including overtime and bonuses received by the worker over the 12 months prior to dismissal divided by 12 divided by 26 multiplied by the number of days of indemnity to which the worker is entitled under Art. 89 of the Labor Law.
2. To reject the workers demand that the employer reinstate the leaders of the union;
3. That the employer must compensate each worker for the full amount of unused annual leave accrued at the rate of 1.5 days per month for the duration of their employment with MS. This payment must be calculated in accordance with the formula: Total gross wages including overtime and bonuses received by the worker over the 12 months prior to dismissal divided by 12 divided by 26 multiplied by the number of days of annual leave owed to the worker on the date of termination.

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

Arbitrator chosen by the employer party:

Name: **Mr. Hem Huor Naryth**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Mr. Vuong Vanna**

Signature: .....

Chair of arbitration panel:

Name: **Mr. Men Nimmith**

Signature: .....

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

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