

KINGDOM OF CAMBODIA
NATION RELIGION KING

THE ARBITRATION COUNCIL

Case: 51/04

Date of award: 22 July 2004

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

Sam Han Garment Company (Cambodia) Fabric Co., Ltd

(Employer party)

AND

Democratic Union of Apparel Workers of Sam Han Factory

(Employee party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Representatives:

1- Mr. Kim Nam Kyun	Manager
2- Mr. Chan Sochetra	Administration staff
3- Mr. Kim Fasok	Interpreter
4- Mr. Ouk Sophal	Administration staff

Address: Street 68, Sangkat Tuol Sangke, Khan Reussey Keo, Phnom Penh.

Tel: 012 697 775/ 012 875 780/ 023 368 287 Fax: 023 368 297

DETAILED INFORMATION OF EMPLOYEE PARTY:

Representatives:

1- Mr. Suong Khaysy	Representative of Coalition of Cambodia Apparel Workers Democratic Union (CCAWDU)
2- Ms. Chhorn Sokha	President of CCAWDU
3- Mr. Chum Cham	Assistant for controversy
4- Mr. An Nath	President of Union
5- Mr. Phav Phen	Adviser to Union
6- Mr. Sar Pora	Vice-President of Union
7- Mr. You Sambath	Carpenter
8- Mr. Ros Sameun	Carpenter
9- Mr. Bou Veasna	Carpenter
10- Mr. Yem Samoeun	Carpenter

Address: # 6C, Street 476, Sangkat Tuol Tompoung I, Khan Chamkar Morn,
Phnom Penh.

Tel: 012 650 013/ 023 210 481 Fax: 023 210 481

ISSUES IN DISPUTE:

(In non-conciliation report)

- 1- The employees demanded the company reinstate the four dismissed carpenters or give other indemnities for dismissal according to the Labour Law. The company cannot reinstate these four dismissed workers, but can pay them the indemnity as stipulated in Article 89 of the Labour Law.
- 2- The employees demanded the company be held responsible for losing their motorbikes or bicycles parked in the factory. The company refuses to be responsible for their loss, but promises to strengthen the security in the factory.

JURISDICTION OF THE ARBITRATION COUNCIL :

The Arbitration Council derives its power to make this Award from Section IIB of Chapter 12 of the Labour Law (1997); the Prakas on the establishment of the Arbitration Council (No. 338, dated 11 December 2002; 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 Nomination of Arbitrators No.103, dated 26 April 2004.

An attempt to conciliate the collective dispute that is the subject of this Award was made as required by Chapter XII Section 2A of the Labour Law. That conciliation hearing was unsuccessful. The non-conciliation report No. 2022 MoSALVY dated 29 June 2004 was submitted to the Secretariat of the Arbitration Council on 1 July 2004.

COMPOSITION OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party:	Mr. Kao Thach
Arbitrator chosen by the worker party:	Mr. Ven Peo
Chair arbitrator (chosen by the two arbitrators):	Mr. Kong Phallack

HEARING AND EVIDENCE:

Date and place of hearing:

- First hearing: 7 July 2004 (8:00 a.m. – 11:00 a.m.)

- Second hearing: 12 July 2004 (8:00 a.m. – 11:00 a.m.)

At the Secretariat of the Arbitration Council, Phnom Penh Center, Building A, Street Sothea Ros, Sangkat Tonle Bassac, Phnom Penh.

EVIDENCE THAT WAS CONSIDERED BY THE ARBITRATION PANEL IS AS BELOW:

Provided by the employer party:

- 1- The certificate of the registration in trade and company list dated 24 August 1995;
- 2- The Internal Work Rules of the company dated 10 February 1997;
- 3- The minutes of the conciliation of the collective dispute dated 30 April 2003;
- 4- The minutes of the conciliation of the collective dispute dated 21 June 2004;
- 5- The agreement dated 28 May 2004;
- 6- The agreement dated 11 March 2004;
- 7- The contract dated 13 June 2004;
- 8- The contract dated 20 April 2004;
- 9- The pay-rolls of the four carpenters for January 2000;
- 10- The pay-rolls of the four carpenters for February 2000;
- 11- The pay-rolls of the four carpenters for March 2000;
- 12- The pay-rolls of the four carpenters for April 2000;
- 13- The pay-rolls of the four carpenters for November 2001;
- 14- The pay-rolls of the four carpenters for December 2001;
- 15- The pay-rolls of the four carpenters for October 2003;
- 16- The pay-rolls of the four carpenters for November 2003;
- 17- The pay-rolls of the four carpenters for December 2003;
- 18- The pay-rolls of the four carpenters for January 2004;
- 19- The pay-rolls of the four carpenters for February 2004;
- 20- The pay-rolls of the four carpenters for March 2004;
- 21- The delegation letter dated 7 July 2004;
- 22- The letter requesting leave dated 24 January 2004; and
- 23- The dismissal letter dated 25 March 2004.

Provided by the employee party:

- 1- The minutes of the conciliation of the collective dispute dated 21 June 2004;
- 2- The minutes of the conciliation of the individual dispute dated 10 May 2004;
- 3- The minutes of the conciliation of the individual dispute dated 10 May 2004;
- 4- The minutes of the conciliation of the individual dispute dated 10 May 2004;
- 5- The minutes of the conciliation of the individual dispute dated 10 May 2004;
- 6- Sample of the employment contract;

- 7- The letter from the Minister of the Ministry of Social Affairs, Labour and Vocational Training, and Youth Rehabilitation dated 6 March 2003;
- 8- The certificate of the union's registration dated 6 March 2003;
- 9- The complaint dated 8 June 2004;
- 10- The complaint dated 11 May 2004;
- 11- The complaint dated 2 April 2004; and
- 12- The agreement dated 16 March 2004.

The presentation and testimony provided by representatives of both parties during the hearing.

Both parties decided in the hearing that *this award is not binding.*

CASE SUMMARY:

Sam Han Garment Company (Cambodia) Fabric Co., Ltd., employs a total of 7,300 workers. In January 2004, the company dismissed four carpenters named Mr. Ros Sameun, Mr. You Sambath, Mr. Bou Veasna, and Mr. Yem Sam Oeun. A dispute arose concerning these dismissals and the indemnity for dismissal between the union and the company.

Regarding the payment for indemnity for dismissal of the four carpenters, the company and the union signed Agreement No. 006 in March 2004. The second point of the Agreement states that the four carpenters will be legally compensated by the company based upon a calculation by the Ministry of Social Affairs and the compensation will be paid by the end of March including payment of their salaries for March (see the Agreement). However, there was no calculation and the carpenters had not yet received any indemnity for dismissal.

On 10 June 2004, the Democratic Union of Apparel Workers of Sam Han factory filed a complaint with six issues to the Labour Inspection Office of Khan Reussey Keo. After receiving the complaint, the Labour Inspection Office went to hold a conciliation between the parties on 12 June 2004. During the conciliation, the parties reached agreement on four of the six issues. The non-conciliation report was submitted to the Arbitration Council on 1 July 2004. After receiving the case, the Arbitration Council summoned both parties to a hearing on the remaining two issues on 7 July 2004 at 8:00 a.m.

- 1- The employees demanded the company reinstate the four dismissed carpenters or give other indemnities for dismissal according to the Labour Law.
- 2- The employees demanded the company be held responsible for the loss of their motorbikes or bicycles parked in the factory.

Regarding these two points, the employer declined to meet the demands of the employees, but agreed as follows:

- 1- The company cannot reinstate these four dismissed workers, but can only pay them the indemnity as stipulated in Article 89 of the Labour Law.
- 2- The company refuses to be responsible for the loss, but promises to strengthen the security in the factory.

During the hearing, the Arbitration Panel asked for more information and tried to conciliate between the parties. As a result, both parties reached agreement on the second point (please see the Agreement on page 14); in respect of the first point, the parties agreed [that the employer would] carry out the payment of indemnity for dismissal and the Arbitration Panel would decide on the payment.

FINDINGS OF FACT:

- Having examined the non-conciliation report;
- Having listened to the representatives of both employer and employee sides; and
- Having reviewed the above documents;

We find that:

1st issue:

In January 2004, the employer dismissed the above workers. No worker was dismissed because of serious mistakes, and these workers were hired via unspecified duration employment contracts.

The employer refused to reinstate these four carpenters, but paid them the dismissal indemnity according to Article 89 of the Labour Law. The employees demanded the company pay them according to Articles 75, 89, 91, and 166 of the Labour Law.

1- Mr. Ros Sameun

Mr. Ros Sameun has worked for Sam Han Company for seven years and six months. He started working on 10 July 1996 and was dismissed on 24 January 2004. After the dismissal, he received full pay (\$90) for January 2004 and half pay (\$45) for February and March 2004. He had never received any prior notice of his dismissal, but was told to take 18 days of annual leave from 24 January 2004. But when he returned to work on 14 February 2004, the administration manager, Mr. Chetra, told him that he had been dismissed effective from 24 January 2004.

Concerning the dismissal, the company said that he had often drunk wine during working time and had been absent many times. Mr. Sameun replied that the company dismissed him because he had refused to work overtime, and the reasons raised by the company had happened a long time ago.

Regarding the dismissal indemnity, the company said that it would calculate the payment according to the basic wage of \$45 that was the pay for March 2004. The company said that Mr. Ros Sameun took annual leave two times in 2000 for seven days each time and in 1996 took annual leave for 15 days. Mr. Ros Sameun answered that he used to take leave but not annual leave because the employer had been angry with him and ordered him to stop working temporarily, then usually called him to return to work without any salary deduction. His basic wage is \$90, not \$45 because the company paid him only 50% for this March.

2- Mr. You Sambath, Mr. Bou Veasna and Mr. Yem Samoeun

These three carpenters received the same salary.

Mr. You Sambath has worked for Sam Han company for six years and six months. He started working on 7 June 1997 and was dismissed on 24 January 2004. After the dismissal, he received full pay (\$55) for January 2004 and half pay (\$27) for February and March 2004. He did not receive any prior notice of his dismissal.

Mr. Bou Veasna has worked for Sam Han company for five years and two months. He started working on 8 November 1998 and was dismissed on 24 January 2004. After the dismissal, he received full pay (\$55) for January 2004 and half pay (\$27) for February and March 2004. He did not receive any prior notice of his dismissal.

Mr. Yem Samoeun has worked for Sam Han company for five years and two months. He started working on 8 November 1997 and was dismissed on 24 January 2004. After the dismissal, he received full pay (\$55) for January 2004 and half pay (\$27) for February and March 2004. He did not receive any prior notice of his dismissal. The company said that Mr. Yem Samoeun took annual leave once in 2000, for seven days, but Mr. Yem Samoeun said that it was the company which asked him to take leave because the company was angry with him, and then called him to return to work without any salary deduction.

Mr. You Sambath, Mr. Bou Veasna and Mr. Yem Samoeun said the company dismissed them and Mr. Ros Sameun because of their refusal to work overtime; however,

the company said they were dismissed because they had often drunk wine during working time and had been absent many times.

The four carpenters said they had already received the wage for 2003's annual leave.

REASON FOR DECISION:

1st issue:

As the parties reached agreement on the dismissal indemnity of the four carpenters and the dismissal is not illegal, the company should pay them the dismissal indemnity according to Articles 75, 89, 91 and 166 of the Labour Law.

a- Article 75

According to this Article, the employer has to give the employees prior notice when s/he dismisses them for a reason other than serious misconduct. In this case, the company did not give prior notice to the four carpenters who were dismissed on 24 January 2004. Based on this Article, the employer is required to give employees prior notice two months in advance. Since the company failed to give prior notice, the company has to compensate the carpenters with the wages that they would have received during the two months of prior notice. In this case, each carpenter has already received half salary for two months after the dismissal. So, the company has to pay them only one month more for not giving prior notice. This one month salary is the average salary which is calculated as follows: total wages including overtime wage and bonus which each worker received during the 12 months prior to the dismissal, divided by 12.

b- Article 89

In this case, the company is responsible for paying the dismissal indemnity to the dismissed carpenters because they did not commit any serious misconduct and the dismissal was at the sole will of the employer. Thus, the carpenters should receive the entire dismissal indemnity as mentioned in the second paragraph of Article 89 of the Labour Law.

The Arbitration Council has already issued an award relating to dismissal indemnity in 27/04 - MS International. In that case, the Arbitration Council was convinced that Article 89 of the Labour Law requires an indemnity for dismissal equal to 15 days of wage and fringe benefits for each year of service. In consideration of whether the fifteen days should be calculated with respect to the [mandated] minimum wage or the actual wage [received by the employee], the Arbitration Council found that Article 102 and 103 of the Labour Law states

that wages consist of the actual wage or remuneration, overtime payments, bonuses and indemnities and do not include particular specified payments.

Referring to the calculation method of wage and fringe benefits based on Article 89 of the Labour Law, the Arbitration Council found the wage calculation during holidays is the average wage during 12 months in accordance with Article 168 of the Labour Law.

For example, one employee has work seniority of 13 months, so according to Article 89 of the Labour Law, s/he has the right to get wage and fringe benefits for 15 days calculated as follows:

To find the average monthly wage, divide by 12 the total wages, including overtime payments and bonuses that the worker has received for 12 months before his/her dismissal. To find the average daily wage, divide by 26 the monthly average wage. This average daily wage is considered as the basis of calculating the dismissal indemnity.

According to Article 89 of the Labour Law, the employee should receive indemnity for dismissal that is equal to 15 days of wages and fringe benefits for each year of service. In order to calculate the dismissal indemnity, multiply the average daily wage by 15 days for each year of service.

Referring to Article 89, if the worker's length of service is longer than one year, time periods of service of six months or more shall be counted as an entire year. In this case the four carpenters have worked for more than one year; so the above provision will be applied to their dismissal. The calculation of indemnity for dismissal is explained as follows:

- 1- Mr. Ros Sameun has worked for the company for seven years and six months. According to the second point of Article 89, he will get an indemnity for dismissal for eight years multiplied by 15 days for each year; this is equal to 120 days of the average daily wage.
- 2- Mr. You Sambath has worked for the company for five years and two months. According to the second point of Article 89, he will get indemnity for dismissal for five years multiplied by 15 days for each year; this is equal to 75 days of the average daily wage.
- 3- Mr. Bou Veasna has worked for the company for five years and two months. According to the second point of Article 89, he will get indemnity for dismissal for five years multiplied by 15 days of each year; this is equal to 75 days of the average daily wage.
- 4- Mr. Yem Samoeun has worked for the company for six years and six months. According to the second point of Article 89, he will get indemnity for dismissal for

seven years multiplied by 15 days of each year; this is equal to 105 days of the average daily wage.

c- Article 91

In accordance with this Article, the termination of a labour contract without valid reason

by either party to the contract entitles the other party to damages. In this case, the company dismissed the four carpenters by its will alone and without a valid reason. But the carpenters did not provide evidence of other damages or loss besides the damage stated in Articles 75, 89 and 166. So the Arbitration Panel rejects the employees' demand to apply Article 91.

d- Article 166

The four carpenters demanded the paid annual leave for all years except the year 2003. They said that there was no the practice of giving annual leave to workers in that time and they had therefore not requested any leave. However in 2003, they already received annual leave.

The employer said that Mr. Ros Sameun and Mr. Yem Samoeun had taken annual leave. According to Article 170 of the Labour Law, annual leave is normally given for the Khmer New Year unless there is a different agreement between the employer and the worker. In this case, the Arbitration Council finds that there was no agreement concerning annual leave. Therefore the leave of Mr. Ros Sameun and Mr. Yem Samoeun is not annual leave.

The Arbitration Council has issued an Award concerning paid annual leave in 27/04 - MS International.

In this case, the Arbitration Council finds that the workers' demand is related to Article 167(2) of the Labour Law which states, "If the contract is terminated or expires before the worker has acquired the right to use his paid-leave, an indemnity calculated on the basis of article 166 above is granted to the worker."

In order contradict the demand of the workers, the employer argument can be based on Article 120 which states, "The statute of limitation for a lawsuit for the payment of wages is three years from the date the wage was due;" and Article 167(4) which states, "Deferment of this leave cannot exceed three consecutive years ..."

Consistent with 27/04 - MS International, the Arbitration Council disagrees with the employer's arguments based on Articles 120 and 167 of the Labour Law because:

a- Article 120 refers to the statute of limitations for lawsuits, and that they can be made within three years from the date the wage was due, and according to Article 167(2), paid-leave can be provided in cases where the contract has terminated or expired. In this case, the lapse of three years in reference to Article 120 is considered from the date of termination (24 January 2004).

b- Article 167 is a provision protecting the right of workers to take annual leave. In addition Article 363 of the Labour Law states that employers who violate Article 167 are liable to a fine of thirty-one to sixty days of the base daily wage. In this case, Article 167 should not be interpreted to mean that the annual leave of workers is lost if they do not use it in each year. Article 167(4) states, "Deferment of this leave cannot exceed three consecutive years and can only apply to leave exceeding twelve working days per year." In this case there is not a deferment or a lapse of paid annual leave because there is no agreement to defer the leave.

Based on the above reasons, the Arbitration Council finds that the employer has to pay the employees for in lieu of annual leave and the calculation is based on the full length of service that the employees worked for the company.

Article 166 states, "Unless there are more favourable provisions in collective agreements or individual labour contracts, all workers are entitled to paid annual leave to be given by the employer at the rate of one and a half work days of paid leave per month of continuous service ... The length of paid leave as stated above is increased according to the seniority of workers at the rate of one day per three years of service."

In this case, the workers claim that they have never received paid annual leave, except in 2003. The company did not provide any proof or arguments to evidence that it had given them paid annual leave, except for the annual leave provided in 2003.

The Arbitration Council acknowledges that the company should give the four carpenters the wage for their remaining accrued annual leave as follows:

1- Mr. Ros Sameun, according to Article 166, is entitled to paid annual leave as follows:

- 18 days per year from the first year to the third year;
- 19 days per year from the fourth year to the sixth year; and
- 20 days per year from the seventh year to the date of dismissal.

From the seventh year until 24 January 2004, he has worked for one year and a half and he has already received the wages for annual leave in 2003. Therefore he should receive only an additional ten days of wages.

2- Mr. You Sambath, according to Article 166, is entitled to paid annual leave as follows:

- 18 days per year from the first year to the third year; and
- 19 days per year from fourth year until the date of dismissal.

From the fourth year until 24 January 2004, he has worked for one year and two months and he has already received wages for annual leave in 2003. Therefore he should receive only an additional 3.7 days of wages.

3- Mr. Bou Veasna, according to Article 166, is entitled to paid annual leave as follows:

- 18 days per year from the first year to the third year; and
- 19 days per year from fourth year until the date of dismissal.

From the fourth year until 24 January 2004, he has worked for one year and two months and he has already received wages for annual leave in 2003. Therefore he should receive only an additional 3.7 days of wages.

4- Mr. Yem Samoeun, according to Article 166, is entitled to paid annual leave as follows:

- 18 days per year from the first year to the third year;
- 19 days per year from the fourth to the sixth year. He has already taken annual leave for the last six months of the sixth year. Therefore he can receive only an additional 9.5 days of wages for the sixth year;
- 20 days per year from the seventh year until the date of dismissal.

From the seventh year until 24 January 2004, he has worked for six months and he has already received wages for annual leave [in 2003].

The calculation of the wage for annual leave shall be based on the average daily wage.

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

DECISION

- 1- Order the company to give an indemnity for dismissal to the four carpenters in compliance with Articles 75, 89 and 166 of the Labour Law. The calculation of this indemnity shall be based on the above reasoning and be given to the workers not later than 30 August 2004;
- 2- Order the company to carry out the agreement as follows:
 - The company agrees to issue a parking card for bicycles and motorbikes and to reserve a place for parking;
 - The union agrees to help register and collect photographs of the employees who have bicycles and motorbikes in order to produce the parking cards;
 - The company agrees to produce parking cards gradually upon the registration and photo collection by the union;
- 3- - The union promises to accelerate this work and asks the company to co-operate with it when it goes to register [employees for the card] during working hours.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Kao Thach**

Signed:

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signed:

Chair of arbitration panel:

Name: **Kong Phallack**

Signed:

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.