KINGDOM OF CAMBODIA

NATION RELIGION KING

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THE ARBITRATION COUNCIL

Case number and name: 16/11-Cambo Handsome (Branch 1)

Date of award: 11 February 2011

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Ing Sothy**

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

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

DISPUTANT PARTIES

Employer party:

Name: **Cambo Handsome Ltd. (Branch 1)**

Address: Prey Tea Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 012 249 633 Fax: N/A

Representatives at the first hearing:

1.	Mr Hom Phea	Lawyer for Cambo Handsome Ltd.
2.	Ms Hwang Joo Young	Corporate Social Responsibility Manager
3.	Mr Do Sang Kyu	Assistant to the Corporate Social Responsibility Manager
4.	Mr Chan Davuth	Head of Administration
5.	Mr Chet Khemara	Officer of the Garment Manufacturers Association in Cambodia
6.	Mr Huot Sok	Member of Legal Staff
7.	Mr Pon Borith	Member of Legal Staff
8.	Ms Lon Soriya	Interpreter

Representatives at the second hearing:

1.	Mr Hom Phea	Lawyer for Cambo Handsome Ltd.
2.	Ms Hwang Joo Young	Corporate Social Responsibility Manager

3.	Mr Do Sang Kyu	Assistant to the Corporate Social Responsibility Manager
4.	Mr Chan David	Head of Administration
5.	Mr Chet Khemara	Officer of the Garment Manufacturers Association in Cambodia
6.	Mr Huot Sok	Member of Legal Staff
7.	Mr Pon Borith	Member of Legal Staff
8.	Ms Lon Soriya	Interpreter
9.	Mr Suong Piseth	Member of Legal Staff
10.	Mr Pum Muon	Worker in the Cutting Section

Worker party:

Name: **Cambodian Worker's Force Democratic Federation Union (CWFDFU)**

Local Union of CWFDFU

Address: No. 10A, Trapang Chrey Village, Kakab Commune, Dangkor District, Phnom Penh

Telephone: 012 519 560 Fax: N/A

Representatives at the first hearing:

1.	Mr Phoung Montry	President of the Union Federation of Independent and Democratic (UFID)
2.	Mr San Bunsan	President of CWFDFU
3.	Mr Rith Kimbuoy	Vice-President of CWFDFU
4.	Mr Pok Meax	Treasurer of CWFDFU
5.	Mr Ly Boravuth	General Secretary of CWFDFU
6.	Mr Ly Bunnarith	President of the Local Union of CWFDFU
7.	Mr Suong Won	Vice-President of the Local Union of CWFDFU
8.	Mr Plork Bunly	Secretary of the Local Union of CWFDFU
9.	Mr Yi Davy	Union Activist
10.	Mr Nhget Morn	Union Activist

Representatives at the second hearing:

1.	Mr Phoung Montry	President of the Union Federation of Independent and Democratic (UFID)
2.	Mr Ly Boravuth	General Secretary of CWFDFU
3.	Mr Ly Bunnarith	President of the Local Union of CWFDFU
4.	Mr Suong Won	Vice-President of the Local Union of CWFDFU
5.	Mr Plork Bunly	Secretary of the Local Union of CWFDFU
6.	Mr Yi Davy	Union Activist
7.	Mr Nhget Morn	Union Activist

Name: **Workers Freedom Union Federation (WFUF)**

Local Union of WFUF

Address: Prey Tea Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 077 550 797 Fax: N/A

Representatives at the first hearing:

1. Mr Seang Sambath — President of WFUF
2. Mr Dit Samart — Vice-President of WFUF
3. Ms Thok Senghun — Vice-President of the Local Union of WFUF
4. Mr Oeun Sarath — Secretary of the Local Union of WFUF

Representatives at the second hearing:

1. Mr Dit Samart — Vice-President of WFUF
2. Mr Sam Rong — Secretary of WFUF
3. Ms Thok Senghun — Vice-President of the Local Union of WFUF
4. Mr Oeun Sarath — Secretary of the Local Union of WFUF

ISSUES IN DISPUTE

(From the Non-Conciliation Report of the Ministry of Labour and Vocational Training)

1. Nhget Morn and Yi Davy demand that the employer reinstate them and back pay their wages from the date of their dismissal to the date of reinstatement. The employer states that it cannot reinstate them because Nhget Morn had an altercation with another worker at the factory and Yi Davy incited workers to go on strike.
2. Ly Bunnarith, Suong Won, Plork Bunly, Van Rin, Oeun Sarath, and Thok Senghun demand that the employer reinstate them. The employer states that it will not reinstate them because they incited workers to go on strike and turned off the electrical switch to prevent workers from working overtime. Therefore, the employer is suing them in court and has submitted a request to the Ministry of Labour and Vocational Training for authorisation to dismiss them.
3. The workers demand that the employer maintain the wages and benefits of workers for the duration of the strike because the employer has not agreed to the demand which prompted the strike.
4. The workers demand that the employer not discriminate against the union.
5. The workers demand that the employer install more toilets.
6. The workers demand that the employer increase the meal allowance to 2,000 riel for workers who work overtime until 8:00 p.m. or later.

7. The workers demand that the employer allow pregnant workers to leave the factory 30 minutes early.
8. The workers demand that the employer stop forcing them to work overtime to make up for sick leave and leave taken for personal commitments.
9. The workers demand that the employer soundproof the infirmary.
10. The workers demand that the employer provide a physician and beds for medical treatment when they are sick.
11. The workers demand that the employer open more entrance and exit gates.
12. The workers demand that the employer dismiss administration staff members Chan Davuth and Bun Borin because they oppress and threaten workers.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this award from Chapter XII, Section 2B of the Labour 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. 133 dated 9 June 2010 (Eighth 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 non-conciliation report No. 078 KB/RK/VK dated 20 January 2011 was submitted to the Secretariat of the Arbitration Council on 21 January 2011.

HEARING AND SUMMARY OF PROCEDURE

Hearing venue: The Arbitration Council, No. 72, Street 592, Corner of Street 327 (Opposite Indra Devi High School), Boeung Kak II Commune, Tuol Kork District, Phnom Penh

Date of hearing: First hearing: 1 February 2011 at 2:00 p.m.
Second hearing: 4 February 2011 at 8:00 a.m.

Procedural issues:

On 13 October 2010, the Department of Labour Disputes received a complaint from CWFDFU, outlining its demands for the improvement of working conditions by the employer. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to conciliate the labour dispute and the last conciliation session was held on 17 January 2010. None of the issues were resolved. The 12 non-conciliated issues were referred to the Secretariat of the Arbitration Council on 21 January 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the 12 non-conciliated issues, held on 1 February 2011 at 2:00 p.m. A second hearing was held on 4 February 2011 at 8:00 a.m.

On the hearing date, the Arbitration Council conducted a further conciliation of the 12 non-conciliated issues, resulting in the resolution of six issues (issues 5, 7, 8, 9, 10, and 11) and the withdrawal of issue 4 by the workers.

The Arbitration Council will consider issues 1, 2, 3, 6, and 12 based on the evidence and reasons below.

EVIDENCE

This section has been omitted in the English version of this arbitral award. For further information regarding evidence, please refer to the Khmer version.

FACTS

- Having examined the report on collective labour dispute resolution;
- Having listened to the statements of the representatives of the employer and the workers; and
- Having reviewed the additional documents;

The Arbitration Council finds that:

- Cambo Handsome Ltd. employs approximately 2,000 workers.
- There are three unions at the factory: the Cambodian Worker's Force Democratic Federation Union (CWFDFU); the Workers Freedom Union Federation (WFUF); and Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC). FTUWKC holds most representative status (MRS).
- CWFDFU and WFUF are the claimants in this case.
- CWFDFU receives union contribution fees from the wages of 324 workers and WFUF is requesting that the employer deduct union contribution fees from its members' wages.

Issue 1: The workers demand that the employer reinstate Nhget Morn and Yi Davy and back pay their wages from the date of termination to the date of reinstatement.

Case of Nhget Morn:

- Nhget Morn, a mechanic, commenced work on 14 August 2009. He held an undetermined duration contract. The employer dismissed him on 7 January 2011.

- Nhget Morn demands reinstatement because he did not commit serious misconduct as alleged by the employer when he had an altercation with Pum Muon.
- Nhget Morn argues that whilst walking through the factory on 7 January 2011 at 7:40 a.m. he took his phone from his pocket to check the time before a meeting. Pum Muon suddenly tried to snatch his phone, claiming that Nhget Morn had taken a photograph of him. Next, Pum Muon used one hand to hold up Nhget Morn's hands and the other to reach into his pocket for the phone. Nhget Morn tried to move away and eventually the two had a physical altercation, injuring Nghet Morn's hands.
- Nhget Morn claims that he and Pum Muon did not know each other before these events and there was no grudge between them. He does not understand why the employer dismissed only him and not Pum Muon.
- The employer states that Nhget Morn was dismissed because he took a photograph of Pum Muon and then hit him. The employer only gave a warning to Pum Morn following the incident because he did not hit Nhget Morn and was not the instigator. Nhget Morn's dismissal was based on Article 83 of the Labour Law.
- The employer states that on 7 January 2011, Pum Muon filed a complaint with the administration office claiming that Nhget Morn had hit him. Subsequently, the employer conducted an investigation and interviewed workers who witnessed the incident. The employer states that the witnesses were selected from non-union members.
- The employer submits that the witnesses stated that on 7 January 2011 at 7:00 a.m. Pum Muon was talking with someone and Nhget Morn took a photograph of him with his phone. Pum Muon approached Nhget Morn to ask why he had done this, and Nhget Morn got angry and grabbed Pum Muon's collar and hit him with a screwdriver.
- The Arbitration Council ordered the employer and the workers to present their witnesses.
- Ros Vannak, a worker in the sewing section, testified before the Arbitration Council that "while I was walking down to draw water from a nearby lake, I saw a worker in the cutting section grasping a mechanic (Nhget Morn)'s collar and I saw a mechanic (Nhget Morn) step back and hold the other". Upon cross examination, the witness added: "I also saw a mechanic (Nhget Morn) holding a screwdriver in his pocket".
- Pat Samol, a worker in the cleaning section, testified before the Arbitration Council:

  In the morning, while I was washing windows, I saw a mechanic (Nhget Morn) take a photograph of Pum Muon. Then, Pum Muon asked the mechanic to let him check his phone. I did not hear what they were talking about, I just saw their

gestures. Then I saw the mechanic grasping Pum Muon's collar and taking a screwdriver to hit him and then they were holding one another.

- The Arbitration Council finds that the employer has submitted written evidence summarising the statements of workers who witnessed the incident: Moeun Chreng, ID 3590; Sou Savin, ID 8099; Sean Sokheang; and Kim Kimly, ID5 2145. They collectively state that Nhget Morn took a photograph of Pum Muon, Pum Muon asked to check his phone, and then they had an altercation.

Case of Yi Davy:

- Yi Davy commenced work on 2 September 2009 on an undetermined duration contract and was dismissed on 12 January 2011.
- Yi Davy states that he demands reinstatement because he did not, as alleged, incite other workers to stop working.
- Yi Davy states that on the morning of 10 January 2011 he saw the employer taking Nhget Morn to the security station. When female workers asked him "what happened?", he told them that Nhget Morn had been dismissed and then he returned to work.
- The employer states that Yi Davy was dismissed because he incited other workers to stop working, which is an offence under Article 83, point 5 of the Labour Law. The employer argues that inciting other workers to stop working is tantamount to inciting other workers to commit serious misconduct because work stoppages are considered serious misconduct.
- The employer states that on 10 January 2011 it took Nhget Morn to the security station in order to pay him a termination payment. Yi Davy entered the work station and shouted to the workers to come out. At that time, almost 100 workers stopped working for about 4-10 minutes. After negotiations with the employer, the workers decided to return to work.
- The workers and the employer asked the Council for permission to present more witnesses to support their statements.
- Van Samlei, a sewing worker, testified before the Arbitration Council:

  When I entered the factory on 10 January 2011, I saw that a mechanic was being detained and I asked a representative of my union and Yi Davy about the detention. At that time, the workers asked the employer for permission to come out to see what had happened, but were stopped later on. The workers stopped working for about 10 minutes. The work stoppage was not triggered by anyone.

- Sim Chana testified before the Arbitration Council that "on 10 January 2011 at about 8:00 a.m. I saw Ly Bunnarith and Yi Davy waving their hands for the workers to come out. At the time, some workers were still sitting and some were surprised."
- Put Phally, Sewing Group Leader, testified before the Arbitration Council that "on 10 January 2011 at about 7:45 a.m. there were two or three workers shouting at other workers to stop working. The persons who shouted at other workers were Ly Bunnarith and Yi Davy. They shouted and waved for other workers to come out."

Issue 2: The workers demand that the employer reinstate Ly Bunnarith, Suong Won, Plork Bunly, Oeun Sarath, and Thok Senghun.

- According to the workers' statement, Ly Bunnarith is President of the Local Union of CWFDFU, Suong Won is Vice-President, and Plork Bunly is Secretary. Thok Senghun is Vice-President of the Local Union of WFUF and Oeun Sarath is Secretary.
- The employer states that it notified the five workers of their suspension on 11 January 2011.
- On 12 January 2011, the employer sent the Labour Inspector a request for authorisation to dismiss the five workers. The employer stated that the reasons for dismissal were that they had incited other workers to stop working and turned off the electrical switch, causing unrest in the factory. All of these factors contributed to a significant loss in profit for the employer.
- The employer sent the notification to the Labour Inspector on 12 January 2011 and is currently awaiting the Labour Inspector's authorisation for the dismissal.
- The workers state that they did not, as alleged, turn off the electrical switch. In fact, the electricity went out automatically, as it has done in the past.

Issue 3: The workers demand that the employer maintain the workers' wages and benefits during the strike.

- The workers state that a strike occurred on 12, 13, and 14 January 2011. The employer deducted the daily wages and US$ 8 attendance bonuses of nearly 400 workers.
- The workers state that they are making this demand because it was the employer's mistakes which led to the strike; for instance, after the altercation between a mechanic and a worker in the cutting section, the employer dismissed only the mechanic. It also ordered a security guard to grab his collar and detain him. These actions prompted the workers to go on strike to support the mechanic.

- The employer states that it will not pay the wages and attendance bonuses of the striking workers; it will comply with the Labour Law.

Issue 6: The workers demand that the employer increase the meal allowance to 2,000 riel for workers who work overtime until 8:00 p.m. or later.

- The employer and the workers agree that overtime work is divided into two shifts: from 4:00 p.m. to 6:00 p.m. and from 6:00 p.m. to 8:00 p.m. or 8:30 p.m. Workers who volunteer to work the former shift are paid a 1,500 riel meal allowance and workers who volunteer to work the latter shift are paid an additional 1,500 riel meal allowance.
- The workers demand that the employer provide an additional 500 riel to workers who volunteer to work overtime during the latter shift, i.e. 2,000 riel.
- The workers claim that the law requires the employer to schedule overtime work [in shifts] of only two hours. Moreover, the price of consumer goods has increased. The increased allowance would provide an incentive for the workers.
- The employer states that its practice [of providing the above meal allowance] is more than is provided by the law and is better than any other factories. Moreover, the employer is unable to provide what the workers demand because it has recently increased the workers' main wages.
- The workers and the employer agree that based on union contribution fees, the Local Union of CWFDFU represents 324 workers. The Local Union of WFUF represents 43 workers and is requesting that the employer deduct union contribution fees from its members' wages.
- The workers state that the demand is made by the two unions. These two unions, the claimants in this case, do not have MRS.
- The employer states that there are three unions at the factory: the Cambodian Worker's Force Democratic Federation Union (CWFDFU), the Workers Freedom Union Federation (WFUF), and the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC). FTUWKC currently holds MRS.

Issue 12: The workers demand that the employer dismiss Chan Davuth and Bun Borin.

- The workers argue that Chan Davuth has never consulted workers' representatives when dismissing workers. He has threatened to dismiss workers who have taken a leave of absence of more than one day.
- At the hearing, the workers added that Ly Bunnarith's dismissal was the result of union discrimination, as the employer monitors union activity in both working and non-working hours.

- The employer rejects the workers' demand that it dismiss Chan Davuth and Bun Borin without valid reasons. The workers have not previously requested that the employer resolve their problem with the two staff members. If the workers filed a complaint against Chan Davuth and Bun Borin with the employer and it found that they had committed serious misconduct, it would dismiss them.
- The employer states that Chan Davuth and Bun Borin have not threatened any workers in the past.

REASONS FOR DECISION

Issue 1: The workers demand that the employer reinstate Nhget Morn and Yi Davy and back pay their wages from the date of termination to the date of reinstatement.

Case of Nhget Morn:

Nhget Morn demands that the employer reinstate him because he has not committed serious misconduct as alleged. The alleged misconduct included taking a photograph of Pum Muon and hitting him.

In this case, the employer dismissed Nhget Morn on the grounds that he committed serious misconduct by having an altercation with another worker.

Thus, the Arbitration Council considers whether Nhget Morn's dismissal was consistent with the law.

In the findings of fact, the Arbitration Council found that Nhget Morn held an undetermined duration contract.

With regards to undetermined duration contracts, Article 74 of the Labour Law states:

> The labour contract of unspecified 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.

Based on this article, the Arbitration Council considers that the employer is entitled to dismiss workers at will by giving the workers prior notice with proper reasons relating to their aptitude or behaviour based on the requirements of the operation of the enterprise, establishment, or group *(see Arbitral Awards 60/08-PCCS, issue 6 and 131/10-Leader's Industrial, issue 1)*.

In previous arbitral awards, the Arbitration Council has held that the termination of undetermined duration contracts must comply with Article 74 of the Labour Law and the employer must provide benefits to the workers in accordance with Articles 75, 89, 91, and 167 of the Labour Law *(see Arbitral Award 97-04-Grace Sun, issue 1)*.

In this case, the employer dismissed Nhget Morn for serious misconduct based on Article 83 of the Labour Law after his altercation with Pum Muon.

Thus, the Arbitration Council will consider whether Nhget Morn committed an act of serious misconduct:

Article 84, part B, point 4 of the Labour Law provides that "[t]hreat[s], abusive language or assault against the employer or other workers" are considered a serious offence on the part of the worker.

According to the findings of fact, Nhget Morn stated that at 7:40 a.m. on 7 January 2011 he was walking through Building A and took out his phone to look at the time before a meeting. Pum Muon suddenly rushed to take his phone, alleging that Nhget Morn had taken a photograph of him, leaving nail prints on Nhget Morn's body. Nhget Morn denied that he had taken a photograph, but the result of an investigation by the employer was that Nhget Morn had in fact taken a photograph of Pum Muon. [At the time of the incident] Pum Muon asked why he had taken a photograph of him and asked to see his phone, but Nhget Morn refused the request and grasped his collar and stabbed the back of his hand with a screwdriver. Pum Muon did not respond to these actions.

In relation to the cross examination of witnesses, the Arbitration Council considers their testimony as follows:

Ros Vannak's testimony did not confirm that he had seen the incident from the beginning. **Ros Vannak** only stated that he saw that the two workers were having an altercation. **Ros Vannak** stated that he saw Nhget Morn holding a screwdriver in his pocket, but did not see him use the screwdriver to stab Pum Muon. Hence, the Arbitration Council considers that the testimony only confirms the fact that *the workers were in fact having an altercation.*

Pat Samol, a witness who saw the incident from the beginning, affirmed that **Nhget Morn** took a photograph of **Pum Muon** and **Pum Muon** asked to see his phone, but he refused and then they had an altercation.

Based on the testimony and arguments of the parties, the Arbitration Council considers that the employer's allegation that Nhget Morn took a photograph of Pum Muon is compelling and credible. The witnesses for the worker party who testified before the Arbitration Council did not see the incident from the beginning; they only saw that the

workers were having an altercation, whereas the employer's witnesses, who saw the incident from the beginning, affirmed that they saw Nhget Morn take a photograph of Pum Muon. Nhget Morn also stated that he took his phone out of his pocket, which is consistent with the testimony of the employer's witnesses. Aside from the witnesses at the hearing, the employer presented additional witness statements to the Council, which describe seeing Nhget Morn use his phone to take a photograph of Pum Muon. Thus, the Arbitration Council is convinced that on the date of the incident Nhget Morn used his phone to take a photograph of Pum Muon.

In addition, regarding Nhget Morn's claim that he did not fight back when Pum Muon rushed to take his phone and the employer's claim that Pum Muon did not fight back when Nhget Morn grabbed his collar and used a screwdriver to stab the back of his hand, the Arbitration Council considers that when Pum Muon tried to take Nhget Morn's phone, they did in fact have a physical altercation. Both the employer and the workers' witnesses confirmed that they fought one another for the phone. Hence, the Arbitration Council considers that Nhget Morn and Pum Muon fought with one another.

At the hearing, the workers asked why the employer dismissed only Nhget Morn and not Pum Muon. The Arbitration Council considers that it was reasonable for the employer to dismiss Nhget Morn and give a warning to Pum Muon because the altercation stemmed from the fact that Nhget Morn used his phone to take a photograph of Pum Muon. Thus, Nhget Morn was the instigator and not Pum Muon. The Council concludes that the punishment for Nhget Morn should be more severe than that for Pum Muon.

In conclusion, the Arbitration Council considers that Nhget Morn did commit an act of serious misconduct in accordance with Article 83 of the Labour Law.

Therefore, the Arbitration Council rejects the workers' demand that the employer reinstate Nhget Morn.

Case of Yi Davy:

According to the findings of fact, the employer dismissed Yi Davy because he shouted at the workers to stop working, which is a serious offence under Article 83, part B, point 5, of the Labour Law, "inciting other workers to commit serious offences". Yi Davy demands that the employer reinstate him because, he states, he did not call for other workers to stop working as alleged. Thus, the Arbitration Council will consider whether his dismissal was consistent with the law.

According to the findings of fact, Yi Davy held an undetermined duration contract.

Article 74 of the Labour Law states:

> The labour contract of unspecified 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.

Based on this article, the Arbitration Council considers that the employer is entitled to dismiss workers at will by giving the workers prior notice with proper reasons relating to their aptitude or behaviour based on the requirements of the operation of the enterprise, establishment or group *(see Arbitral Awards 60/08-PCCS, issue 6 and 131/10-Leader's Industrial, issue 1)*.

In previous arbitral awards, the Arbitration Council has held that the termination of undetermined duration contracts must comply with Article 74 of the Labour Law and the employer must provide benefits to the workers in accordance with Articles 75, 89, 91, and 167 of the Labour Law *(see Arbitral Award 97-04-Grace Sun, issue 1)*.

In this case, Yi Davy's dismissal by the employer was based on Article 83 of the Labour Law, which concerns serious misconduct, i.e. inciting other workers to commit serious offences. Therefore, the Arbitration Council will consider whether Yi Davy committed serious misconduct.

Article 83, part B, point 5 of the Labour Law provides that "[i]nciting other workers to commit serious offences" is considered a serious offence on the part of the worker

According to the findings of fact, Yi Davy stated that on 10 January 2011 the employer took Nhget Morn to the security post. After seeing this, he went to work and was asked by female workers, "what is happening?" He told them that Nhget Morn had been dismissed and then he went to work as usual. He reaffirmed that he did not call to other workers or waive his hands for other workers to stop working.

Based on the testimony of the witnesses of the employer and the workers, the Arbitration Council considers that it is credible that on 10 January 2011 there was a call for other workers to stop working after Nhget Morn was dismissed. Based on the testimony of both parties' witnesses, Yi Davy was with a union representative trying to resolve Nhget Morn's issue [with the employer]. The workers' witnesses did not confirm that Yi Davy went to work as usual. Thus, the Arbitration Council is convinced that Yi Davy, along with other

workers, did call for the workers to stop working. **However, the Council will consider whether calling for other workers to stop working is serious misconduct.**

According to the employer, a stoppage of work by workers who are required to work is serious misconduct; therefore, Yi Davy's act of calling for other workers to stop working is considered inciting other workers to commit serious misconduct. After he committed this act, other workers stopped working.

Article 318, paragraph one of the Labour Law states that "[a] strike is a concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining the satisfaction for their demand from the employer as a condition of their return to work."

The workers' stoppage of work when Nhget Morn was dismissed is considered a strike according to the definition contained in Article 318.

In previous arbitral awards, the Arbitration Council has held that "participation in a strike is not considered as serious misconduct" *(see Arbitral Awards 76/04-M & V, issue 3; 70/04-Hanna, issue 1; and 125/09-Wincam Corporation, issue 1)*.

The Arbitration Council agrees in this case with the abovementioned interpretation. Thus, the employer's statement that the workers' act of stopping work is considered serious misconduct is inaccurate. Yi Davy did not incite other workers to commit serious misconduct because participation in a strike is not considered serious misconduct.

Article 330 of the Labour Law states that "[a] strike must be peaceful. Committing violent acts during a strike is considered to be serious misconduct that could be punished, including work suspension or disciplinary layoff."

In addition, in Arbitral Award 20/05-Fortune, issue 2, the Arbitration Council held that Article 83, part B, point 5 "shall not apply to inciting or calling workers to go on strike even if the strike did not follow the proper legal procedures *(see case 08/05-Winner Knitting dated June 23, 2005)* unless the employer has evidence to prove that Sok Vy incited workers to use violence during the strike."

In this case, the employer did not prove that Yi Davy incited other workers to use violence during the strike.

In conclusion, the Arbitration Council considers that it was incorrect to dismiss Yi Davy based on serious misconduct.

Therefore, the Arbitration Council orders the employer to reinstate Yi Davy and back pay his wages from the date of dismissal to the date of reinstatement.

Issue 2: The workers demand that the employer reinstate Ly Bunnarith, Suong Won, Plork Bunly, Oeun Sarath, and Thok Senghun.

According to the findings of fact, Ly Bunnarith is President of the Local Union of CWFDFU, Suong Won is Vice-President, and Plork Bunly is Secretary. Thok Senghun is Vice-President of the Local Union of WFUF and Oeun Sarath is Secretary.

Article 293, paragraph one of the Labour Law states that "[t]he dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector."

Paragraph 2 of the same article states that "[t]he Labour Inspector, who has been referred a request to authorise the dismissal of a worker covered by the present article, shall give his decision to the employer and to the worker in question…within one month at the latest upon receipt of the case."

The [protection in] this article is extended to union leaders by Clause 4 of *Prakas* No. 305 SKBY dated 22 November 2001, which states that "this protection shall be provided to the three union leaders pursuant to the conditions stipulated in Articles 282 and 293 of the Labour Law."

Based on Article 293 of the Labour Law, the Labour Inspector has a responsibility to consider, investigate, and either approve or reject an employer's request to dismiss union leaders.

In this case, **Ly Bunnarith, Suong Won, Plork Bunly, Oeun Sarath,** and **Thok Senghun** are union leaders and are therefore entitled to legal protection. The Arbitration Council finds that the employer suspended the five workers and on 12 January 2011 it sent the Labour Inspector a request for approval to dismiss them. As yet, the employer's request has not been approved by the Labour Inspector.

In Arbitral Award 79/06-Woosu, the Arbitration Council held that "the case shall be decided by the Labour Inspector first before being submitted to the Arbitration Council" *(see Arbitral Award 79/06-Woosu, issue 1)*.

Thus, the Arbitration Council rejects the workers' demand that the employer reinstate the five workers because the issue is still under the jurisdiction of the Labour Inspector.

Issue 3: The workers demand that the employer maintain the workers' wages and benefits during the strike.

According to the findings of fact, 400 workers went on a three day strike on 12, 13, and 14 January 2011. In this case, the workers demand that the employer back pay their wages and benefits for the duration of the strike. The workers allege that the employer's actions caused them to go on strike.

Therefore, the Arbitration Council will consider the case as follows:

Case for wages:

Article 332, paragraph one of the Labour Law states that "[a] strike suspends the labour contract. During a strike, the allowance for work is not provided and the salary is not paid."

Article 72(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.

Based on Articles 332 and 72(1) set out above, the Arbitration Council considers that regardless of the day or month on which a strike takes place and even whether or not the strike is lawful, the law does not require the employer to provide wages or attendance bonuses to workers for the period in which the strike takes place. Thus, the Arbitration Council considers that the employer is not obliged to provide wages to the striking workers for the period of the strike.

In previous arbitral awards, the Arbitration Council has noted that Article 332 means that striking workers are not entitled to wages during a strike regardless of whether or not the strike is lawful *(see Arbitral Award 49/05-Ocean Garment, issue 3)*.

Article 324 of the Labour Law states that "[a] strike must be preceded by prior notice of at least seven working days and be filed with the enterprise or establishment."

Article 320, paragraph four of the Labour Law states that "[t]he right to strike can be exercised only when all peaceful methods for settling the dispute with the employer have already been tried out."

In previous arbitral awards, the Arbitration Council has interpreted Article 320, paragraph four of the Labour Law as follows:

> In this case, the workers did not try all means of settling the dispute in accordance with Article 320, paragraph 4 because the workers went on strike before utilising the procedures for settling disputes, such as negotiation by the Labour Inspector and via the Arbitration Council, the institution where collective labour disputes are settled in a peaceful manner. On the contrary, the workers went on strike without complying with the Labour Law. The workers went on strike at their own will *(see Arbitral Award 110/07-Now Corp., issue 3)*.

In this case, the strike by the workers at Cambo Handsome Ltd. was illegal because it was staged without the workers giving prior notice and without trying all means to settle the

labour dispute in accordance with Article 320, paragraph four of the Labour Law. The workers also went on strike prior to attending the Arbitration Council's settlement mechanism, a mandatory mechanism for the parties to use to resolve collective labour disputes in a peaceful manner. Therefore, the Arbitration Council considers that the employer is not obliged to provide wages to the workers for the strike period.

Case for attendance bonus:

Point 3 of Notification No. 017 SKBY dated 18 July 2000 states that "workers who attend work regularly in accordance with the number of working days in each month will receive a bonus of at least US$ 5 per month."

In previous arbitral awards, the Arbitration Council has held that workers who participate in illegal strikes are not entitled to receive their wages and attendance bonuses *(see Arbitral Awards 03/05-Flying Dragon, issue 3; 63/07-Phnom Penh Garment; 110/07-Now Corp., issue 3; and 81/08-Global Apparel, issues 1 and 2)*.

The Arbitration Council agrees in this case with the abovementioned interpretation, that workers who participate in illegal strikes are not entitled to an attendance bonus. In this case, the workers went on strike on 12, 13, and 14 January [2011] without following the legal procedure. Therefore, the Arbitration Council considers that those workers who participated in the illegal strike are not entitled to an attendance bonus.

In conclusion, the Arbitration Council rejects the workers' demand that the employer provide wages and attendance bonuses to those workers who went on a three day strike on 12, 13, and 14 January 2011.

Issue 6: The workers demand that the employer increase the meal allowance to 2,000 riel for workers who work overtime until 8:00 p.m. or later.

The employer's practice is that when workers volunteer to continue to work overtime from 6:00 p.m. to 8:00 or 8:30 p.m., it provides them with a 1,500 riel meal allowance. In this case, the workers demand that the employer provide an additional 500 riel to make a total of 2,000 riel when they volunteer to work overtime.

Thus, the Arbitration Council will consider this case as follows:

Point 4 of Notification No. 049/10 KB/SCN from the Ministry of Labour and Vocational Training, dated 9 July 2010, states that "[o]ther benefits to which workers are entitled in accordance with points 3, 4, 5, and 6 of Notification No. 017 SKBY dated 18 July 2000 must be retained and enforceable." Point 4 of Notification No. 017 SKBY dated 18 July 2000 states that "workers who volunteer to work overtime at the employer's request will receive a 1,000 riel meal allowance per day or be provided with a free meal."

The Arbitration Council considers that point 4 of the said notification means that if workers work overtime at the employer's request, they will be provided with a 1,000 riel meal allowance each day or a free meal. However, the notification does not specify the length of overtime that must be worked before workers will receive the said benefits *(see Arbitral Award 25/10-High Born)*.

The Arbitration Council agrees in this case with the abovementioned interpretation, that if workers volunteer to work overtime they are entitled to receive a 1,000 riel meal allowance.

According to the findings of fact, the employer provides a 1,500 riel meal allowance to workers when they agree to work overtime from 6:00 p.m. to 8:00 or 8:30 p.m. In this case, the workers demand that the employer provide them with an additional 500 riel meal allowance because the law limits overtime to only two hours. In addition, the price of consumer goods has increased and it will provide an incentive for the workers if the employer agrees to their demand.

The Arbitration Council considers that based on Notification No. 017, the workers are entitled to receive only a 1,000 riel meal allowance and in this case the employer provides them with 1,500 riel when they volunteer to work overtime. This practice is subject to an agreement between the employer and the workers. Therefore, the Arbitration Council considers that the workers' demand is more than the law provides, making this an interests dispute.

In relation to interests disputes, the Arbitration Council has in previous arbitral awards considered whether the claimant union has MRS. The Arbitration Council considers that a union which does not yet have MRS does not have legal standing to represent workers to resolve a dispute concerning the collective benefits of the workers at an enterprise *(see Arbitral Award 42/09-River Rich, issue 2)*.

Clause 43 of *Prakas* No. 099 SKBY dated 21 April 2004 states that

> An arbitral award which settles an interest dispute takes the place of a collective bargaining agreement and shall remain in effect for one year from the date on which it becomes final unless the parties agree to make a new collective bargaining agreement replacing the award.

The Arbitration Council finds that the Local Union of CWFDFU and the Local Union of WFUF, the co-claimants, do not have MRS. The Arbitration Council finds that the Local Union of Free Trade of the Workers of the Kingdom of Cambodia, a non-claimant, has a certificate of MRS registered at the Ministry of Labour and Vocational Training which is still in effect. The Arbitration Council considers that holding MRS gives a union the legal capacity to

negotiate a collective bargaining agreement with an employer and legal standing to bring an interests dispute to the Arbitration Council for resolution.

Thus, as neither of the two unions have MRS, neither union has legal standing to bring an interests dispute to the Arbitration Council on behalf of the workers.

In conclusion, the Arbitration Council rejects the workers' demand that the employer increase the overtime meal allowance to 2,000 riel for each worker working the shift from 6:00 to 8:00 or 8:30 p.m.

Issue 12: the workers demand that the employer dismiss Chan Davuth and Bun Borin.

The Arbitration Council considers this case as follows:

Article 65, paragraph one of the Labour Law states that "[a] labour contract establishes working relations between the worker and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties."

Article 1 of Decree 38 on Contract and Other Liabilities, dated 28 October 1988, states that "[a] contract is an agreement between two or more persons to create, change or terminate one or more obligations which bind them."

Based on these articles, the Arbitration Council considers that only parties to a contract, that is the employer and worker, are able to terminate the contract. Third parties are not entitled to terminate a contract between an employer and a worker *(see Arbitral Awards 116/10-Whitex, issue 1 and 124/10-June Textile)*.

In previous arbitral awards, the Arbitration Council has noted that:

> Generally, the Arbitration Council considers that workers do not have the right to demand that the employer dismiss any worker unless they can prove that the worker is a dangerous person who should not be employed in the establishment or factory, and that keeping the person would threaten security in the workplace *(see Arbitral Awards 14/03–Chu Hsing, issue 1; 17/03 and 18/03–Ho Hing, issue 4; 87/04–Noble Apparel, issue 2; 116/07–Grace Sun, issue 3; 54/08-Zhong Yov, issue 5; and 124/10–June Textile)*.

In this case, the Arbitration Council agrees with the interpretation determined by previous [arbitral] panels. The Arbitration Council cannot make a decision on this issue unless the workers have evidence proving that the staff [in question] may endanger the safety of other workers.

According to the findings of fact, the workers argue that Chan Davuth, a member of the administration staff, has dismissed workers without discussing the dismissal with the worker's representative. Moreover, he has threatened to dismiss workers for taking a leave of absence for longer than the authorised number of days. Bun Borin, a member of the legal

staff, has discriminated against the union by monitoring union activity both inside and outside working hours. The Arbitration Council considers that the workers' arguments do not specify any possible danger [to the safety of the workplace] posed by Chan Davuth and Bon Borin.

The Arbitration Council finds that the employer has not received any direct complaints from the workers, nor has it received any complaints from other workers against the two staff members.

Based on the foregoing, the Arbitration Council finds that there is no evidence proving that Chan Davuth and Bun Borin are dangerous persons or threaten the security of the workplace or cause damage to the workers at the factory. Therefore, the Arbitration Council rejects the workers' demand that the employer dismiss Chan Davuth and Bun Borin.

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

DECISION AND ORDER

Issue 1:

- Reject the workers' demand that the employer reinstate Nhget Morn.
- Order the employer to reinstate Yi Davy and back pay his wages from the date of his dismissal to the date of reinstatement.

Issue 2: Reject the workers' demand that the employer reinstate **Ly Bunnarith, Suong Won, Plork Bunly, Oeun Sarath, and Thok Senghun.**

Issue 3: Reject the workers' demand that the employer pay the wages and attendance bonuses of the workers who went on a three day strike on 12, 13, and 14 January 2011.

Issue 6: Reject the workers' demand that the employer increase the overtime meal allowance to 2,000 riel for each worker working the overtime shift from 6:00 to 8:00 or 8:30 p.m.

Issue 12: Reject the workers' demand that the employer dismiss Chan Davuth and Bun Borin.

Type of award: binding award

This award will be binding immediately and enforceable by the parties upon its issuance as the parties agreed to binding arbitration [of rights and interests disputes] on 1 February 2011.

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature: .....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....