



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**ក្រុមប្រឹក្សាសវនកម្មជាតិ**

**THE ARBITRATION COUNCIL**

**Case number and name: 83/08-Le Grand Café**

**Date of Award: 29 July 2008**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRATION PANEL**

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

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

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

#### **DISPUTING PARTIES**

##### **Employer party:**

Name: **Le Grand Café Restaurant**

Address: Mundul 1 Village, Svay Dangcum Commune, Siem Reap, Siem Reap Province

Telephone: 017 680 119/012 447 316 Fax: N/A

Representative:

Mrs. Phan Sangvaly (General Manager and shareholder)

##### **Worker party:**

Name: **34 Staff from Le Grand Café Restaurant**

Address: Mundul 1 Village, Svay Dangcum Commune, Siem Reap, Siem Reap Province

Telephone: 012 729 296 Fax: N/A

Representative:

Mr. Sar Sovan Lawyer

#### **ISSUES IN DISPUTE**

(In the Non-Conciliation Report)

The four non-conciliation issues are:

1. The demand for Phan Sangvaly, the owner of the restaurant, comply with their employment contracts.
2. The workers demand the reinstatement of those workers who went on strike.
3. The workers demand that the restaurant pay their monthly wages for April and May 2008.
4. The workers demand to get the money saved for staff (their tip).

#### **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 because Mrs. Phan Sangvaly took a firm position that 1. the Restaurant does not have a contract with the 34 staff; 2. regarding the request for reinstatement, she is not able to reinstate them because she has recruited sufficient staff as the old staff did not agree to come back to work as requested; 3. regarding the demand for [payment of] wages in April and May, she states that wage in April was paid and in May the staff did not come to work so she cannot pay them; and 4. she said that saving [tip] is paid out once every two weeks thus she is not involved with this money. The non-conciliation report No. 480 MKBV, dated 27 June 2008 was submitted to the Secretariat of the Arbitration Council on 2 July 2008. Then the Secretariat of the Arbitration Council facilitated in selecting the Arbitration Panel which was formed on 4 July 2008. Because the three members of the Arbitration Panel were busy with their daily business, the date of the hearing was set on 15 July 2008 as mentioned below.*

#### **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:** 15 July 2008 (at 8:00am)

**Procedural issues:**

On 29 May 2008 the Department of Labour and Vocational Training at Siem Riep province received a complaint from two representatives of 30 staff (the two representatives' name are Han Chhun and Luo Sophea) who provided their thumbprints agreeing to strike over their dissatisfaction with Mrs. Phan Sangvaly, whom they said had threatened staff and

caused them to be unable to work like when [the café was under the management of] the former owner. They complained to the Department of Labour and Vocational Training to intervene to stop Mrs. Phan Sangvaly, whose position is only the temporary manager, from recruiting new [replacement] staff and [who] does not agree to solve the employment issues of former staff. There is also a complaint made directly by Han Chhun that on 25 April 2008 Phann Sanvaly brought the authorities in to search Le Grand Café Restaurant, terminated staff, and was not responsible for staff wages and tips and [he mentioned] the four non-conciliation issues. After receiving the complaint, the Department of Labour and Vocational Training at Siem Reap Province assigned an officer to request information from representatives of the workers (with participation from 14 staff of the restaurant) on 3 June 2008. On 05 June 2008 [the officer] requested information from the employer's representative, Mrs. Phan Sangvaly. After the Minister assigned the conciliator on 24 June 2008, the conciliator conducted and completed the conciliation for the parties in dispute at 11:00 a.m. on the same day (21 staff and Mrs. Phan Sangvaly participated) with a non-conciliation result on the four issues. The four non-conciliation issues were referred to the Secretariat of the Arbitration Council by the Department of Labour and Vocational Training of Siem Reap Province on 2 July 2008 through the collective labour dispute conciliation No. 480 MKBV, dated 27 June 2008.

After receipt of the case, the Secretariat of the Arbitration Council summoned the employer party and the staff involved in this dispute to the hearing and conciliation on the four non-conciliation issues on 15 July 2008 at 8:00 a.m. and the representatives of the two parties were present at the scheduled time.

## **EVIDENCE**

**Witnesses and experts:** *N/A*

### **Documents, Exhibits and other evidence considered by the Arbitration Council**

#### **Provided by the employer party:**

1. Request letter for the workers' representative to attend the hearing;
2. Letter dated 9 March 2008 regarding exclusive authorization to the agreement to rent the building to operate Le Grand Café Restaurant;
3. Partnership agreement to run the business at Le Grand Café Restaurant (in French);
4. Court Order of temporary arrangement, dated 10 April 2008, issued by the judge of Siem Reap- Udor Mean Chey Provincial Court;
5. Deika No. 194/2008, dated 22 April 2008, by the judge of Siem Reap- Udor Mean Chey Provincial Court (authorizing Phan Sangvaly to the temporary right to manage Le Grand Café Restaurant);

6. Minutes regarding transferring equipment and the café to Phan Sangvaly;
7. Complaint letter, dated 26 May 2008, by Mrs. Phan Sangvaly to the prosecutor of Siem Reap- Udor Mean Chey Provincial Court;
8. Statement regarding opening of bank account;
9. Report about Le Grand Café Restaurant, dated 27 April 2008, by Phan Sangvaly, the manager, regarding [those] staff did not come to [work] as usual and without any reason and without receiving permission; and the deika to temporarily close the restaurant until the return of staff;
10. Payroll [record] of the restaurant's staff for January to April 2008 (in English);
11. Statement to describe the incident, by Khem Sinoy, [member of] the new management of the restaurant (letter written on 14 July 2008).
12. Statement to describe the incident, by Lom Ya, security guard at the Restaurant (letter written on 13 July 2008).
13. Documents of employment contract;
14. Document about former staff.

Provided by the worker party:

1. Power of attorney by the staff representative to Mr. Sar Sovan, lawyer, to appear as their representative at the hearing, dated 8 July 2008;
2. Letter to request for the representative to attend the hearing.

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

1. Letters No. 480 MKBV, 481 MKBV and 483 MKBV, dated 27 June 2008 (report, statement and accompanying letter regarding collective labour dispute settlement at Le Grand Café Restaurant, Psa Chas, Siem Reap);
2. Minutes of collective labour dispute conciliation, dated 24 June 2008;
3. Minutes of query for information from the employer's representative, dated 5 June 2008;
4. Minutes of query for information from the workers' representatives, dated 3 June 2008;
5. Complaint letter by staff representatives, dated 29 May 2008.

Provided by the Secretariat of the Arbitration Council:

1. Letter No. 422 KB/AK/VK/LKA, dated 7 July 2008, to invite the worker party to attend the hearing;
2. Letter No. 421 KB/AK/VK/LKA, dated 7 July 2008, to invite the employer 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 the statement by the worker party;
- Having listened to the statement by the employer party.

### **The Arbitration Council finds that:**

- Le Grand Café Restaurant in Siem Reap commenced operation in mid 2004.
- Mr. Daniel Carabalona, the main shareholder of Le Grand Café Restaurant in Siem Riep, died in March 2008; a lawsuit was brought to the court by another shareholder who was still alive (Mrs. Phan Sangvaly) on 2 April 2008. An order of temporary arrangement dated 10 April 2008 [was issued by the court] and an order dated 22 April 2008 issued by the provincial court of Siem Riep-Udor Mean Chey, which ordered that an inventory of property in the café be made and Phan Sanvaly be allowed to manage and run the business temporarily (in the place of the general manager, Olivier Adrian). Following the court order, authority officers, including the Judge's Assistant [responsible for implementation of court orders], 2nd Deputy-Chief of Svay Dangkom 1, Chief of Mondol 1, police officer from the Svay Dangkom police station, and military police officer from Siem Riep province implemented the order by making an inventory of property of the café in front of the plaintiff and its lawyer and granted the café to Phan Sanvaly at 4:30 p.m. on 25 April 2008.
- Because of the temporary change of manager and the implementation of the court order, staff in the café were worried and there was confusion about their employment. However, Mrs. Phan Sanvaly who was the new owner (the temporary manager of the café) did not use illegal force or physical force to threaten staff at their work or threaten them not to come back to work.
- On 26 April 2008 (the day after the implementation of the court order by [relevant] authorities placing the café under temporary control of Mrs. Phan Sangvaly) all staff came to work normally and the new manager, Mrs. Phan Sangvaly, called all staff for a meeting to inform them about the change of owner and informed the staff that they could choose to leave the work or continue working with the new owner but the staff needed to state their intention clearly to whether they wanted to continue to work or not. During that meeting, all staff agreed that they would continue to work in the café without demanding any change in [their] employment condition.

- However, on the next day (27 April 2008), all relevant staff did not come to work. In the morning of 27 April 2008, Mrs. Phann Sangvaly asked a new staff manager named Khem Sinoy to use the café's landline phone to call all staff to ask them to come back to work. Some staff who could be reached by telephone asked for time until 3:00 p.m to consider [the matter]. Other staff did not answer the phone. Because there were no staff coming to work, at 6:00 p.m. on that day, the café's owner decided to close the restaurant temporarily. On 28 April 2008, Mrs. Phan Sangvaly and the new staff manager went to visit some staff at their homes and invited them to come to work. Some staff said that they would come but they did not show up at work.
- Mrs. Phan Sanvaly said that later on that same day on 28 April 2008, the new owner of the café requested permission from the court to close the café for a temporary period of time until the staff came back to work. Five days later, the staff did not come back to work and failed to provide any reason. Because she was worried about costs, the owner of the café asked for permission from court to re-open the restaurant and publicly advertised to recruit staff to work in the café.
- Mrs. Phan Sangvaly, the new owner, recruited staff gradually from day to day to operate the café and provide service to customers again. In the hearing she states that she gave more than a month of time to the old staff but there were only few of them who showed up and volunteered to return to work whom she allowed to come back to work normally.
- On 29 May 2008, representatives of 30 staff who did not come to work endorsed their thumbprint to go on strike and filed a complaint to the Department of Labour and Vocational Training in Siem Reap Province to demand the café's owner to follow their employment contract and reinstate them .
- On 5 June 2008, Mrs. Phan Sangvaly informed the officer, who came to conduct an investigation, that she did not have a contract with the staff and she could not reinstate them because she had recruited replacement staff because the old staff did not come back to work when invited.
- Mrs. Phan Sangvaly genuinely used all possible means to express her intention to offer employment contracts to all staff and invited relevant workers again and again to come back to work. However, the staff stayed at home and did not come to work and failed to provide any clear reason for their failure to come back to work. However, when Mrs. Phan Sanvaly recruited replacement staff, 30 people among the old staff who did not agree to come to work endorsed their thumbprint to go on strike.
- Workers in this café did not form a union.

- At the time the complaint was brought by the staff to the Department of Labour and Vocational Training in Siem Reap Province on 29 May 2008, there were approximately 40 workers who used to work for the café including those involved in this case; their names and detailed information is listed in the following table:

No.	Name of staff	Sex	Type of contract	Total length of duration of contract	Strike	Wage for April
1	អ៊ុក ជាតិ (Ouk Cheara)	F	FDC	12 months from 20/04/07	Participated	Received
2	ផង នា (Phang Near)	F	FDC	12 months from 20/04/07	Participated	Received
3	ដាំ ផល្លិកា (Dam Phalika)	F	FDC	12 months from 20/04/07	Participated	Received
4	ស៊ុន សុគិន/អ៊ុន សុគិន (Sorn Sokin/ Orn Sokhin)	F	FDC	12 months from 20/04/07	Participated	Received
5	នួន ស្រីពៅ (Noun Srey Pov)	F	FDC	12 months from 20/04/07	Participated	Received
6	លី ស្រីម៉ុំ (Ly Srey Mom)	F	FDC	12 months from 20/04/07	Participated	Received
7	លួង សុភា (Loung Sophea)	F	FDC	12 months from 20/04/07	Participated	Received
8	ម៉ៅ ដារី (Mao Dary)	F	FDC	12 months from 20/04/07	No	Received
9	ហាម ទន់ (Horm Torn)	F	FDC	12 months from 20/04/07	Participated	Received
10	យុន ស្រីម៉ុំ (Kun Srey Mom)	F	FDC	12 months from 20/04/07	Participated	Received
11	ហាន ឈុន (Han Chhun/ Chhunne)	M	FDC	12 months from 20/04/07	Participated	Received
12	ប្រាក់ សើរី (Prak Serey)	M	FDC	12 months from 20/04/07	Participated	Received
13	គឹម បុប្ផា (Kem Bopha)	F	FDC	12 months from 20/04/07	Participated	Received
14	Sang Sareoum	F	FDC	12 months from 20/04/07	No	No
15	សូរ ច័ន្ទា	F	FDC	12 months from	Participated	Received

	(So Chenda)			20/04/07		
16	<b>ចំរើន</b> (Chomroeun)	F	FDC	12 months from 20/04/07	Participated	Received
17	<b>រ៉ាត់ ដារី</b> (Rath Dary)	F	FDC	12 months from 20/04/07	Participated	Received
18	<b>ម៉ិច ចារីយ៉ា</b> (Mex Charya/ Chariya)	F	FDC	12 months from 20/04/07	Participated	Received
19	<b>ខារ សុភាត</b> (Khar Sopheap)	F	FDC	12 months from 20/04/07	Participated	Received
20	<b>សៀប គឹមសួរ</b> (Seab Kim Sour)	F	FDC	12 months from 20/04/07	Participated	Received
21	<b>វៃ សុភី</b> (Vay Sophy)	F	FDC	12 months from 20/04/07	Participated	No
22	<b>ឡុង សុផាត</b> (Lung Suphat)	F	FDC	12 months from 20/04/07	Participated	Received
23	<b>តែង ស្រីម៉ុំ</b> (Teng Srey Mom)	F	FDC	12 months from 20/04/07	Participated	Received
24	<b>រី ឆៃយ៉ូរី</b> (Youri)	F	FDC	12 months from 23/10/07	Participated	Received
25	<b>ហៀង ឈុនលី</b> (Heng Chunly)	F	FDC	12 months from 20/04/07	Participated	Received
26	<b>ចាន់ ប៊ូរី</b> (Chan Borey)	F	FDC	12 months from 20/04/07	Participated	Received
27	<b>សុខ នាត</b> (Sok Neath)	F	FDC	12 months from 20/04/07	Participated	Received
28	<b>ដន ឌុត</b> (Dot)		UDC	-	Participated	Received
29	<b>រ័ន ចាន់រិទ្ធ</b> (Chanrith)		UDC	-	Participated	Received
30	<b>ឡឹង សារិន</b> (Rin)		UDC	-	Participated	Received
31	<b>ចាប ហួយ</b> (Cheap Houy)		UDC	-	Participated	Received
32	<b>រាង លីណា</b>		UDC	-	Participated	Received

	(សូលីនណា) (Solina)					
33	សាង អានី (Anny)		UDC	-	Participated	Received
34	យន សង្វាត (Sangvat)		UDC	-	Participated	Received
35	ហម មាលា Horm Mealea		UDC	-	Participated	Received
36	ឡាង សុខណាន (Lang Soklean)		UDC	-	No	Received
37	ស៊ីន សុភី (សុខ សុភី) (Sok Sophy)		UDC	-	No	Received

- Among these staff, 30 of them agreed to go on strike and 4 did not agree to it or did not join the strike but participated in the meeting to provide information regarding the collective labour dispute [and] in the conciliation while the other three people did not join the strike or participate in the meeting to provide information regarding the collective labour dispute or in the conciliation. Up to the hearing date, there are 27 staff working [for the café] including some old staff.

**Issue 1: The demand for the owner, Phan Sangvaly, to comply with the [workers'] employment contracts**

- The worker party demanded that the new owner of the café, Mrs. Phan Sangvaly, comply with their employment contracts claiming that some of the staff contracts are fixed duration contracts and some are undetermined duration contracts. In addition, they claim that the staff agreed to continue their fixed duration and undetermined duration contracts which are still valid. The workers' lawyer claims that the workers did not come to work because they were afraid of the threats made by Mrs. Phan Sangvaly who used military personnel to search the café.
- The employer who is the new owner of the café claims that at first she agreed to continue the workers' contracts but she required that the staff provide a clear response and she tried her best to invite the staff back to work. However, the staff involved did not agree to come back to work as promised; therefore the café owner decided to close the café temporarily because there were no staff to work; and she decided to reopen the café and recruit new staff to replace the old staff who had refused to come back to work for many weeks. Thus, the owner of the café considered that she was not bound by any contract with the old staff because their

contract had expired on 20 April 2008. The employer did not agree to the claim that she threatened any staff.

- The Arbitration Council found that among the staff involved in this collective dispute, 27 of them were employed on fixed duration contracts, with an expiry date of 20 April 2008 (26 workers) and 20 October 2008 (one worker). However, the staff whose contracts were due to expire on 20 April 2008 did not receive prior notice from the employer regarding the expiration of the contract or the non-renewal of the contract in accordance with the Labour Law. The employer did not provide evidence of the employment contracts of the other 10 workers to the Arbitration Council. Therefore, the Arbitration Council considers that they have unwritten undetermined duration contracts. The new employer did not threaten staff.

**Issue 2: The workers demand the reinstatement of those workers who went on strike.**

- There were 30 staff who endorsed their thumbprint to go on strike and did not come to work when invited by the new owner. These staff are:

1- Long Sphat	11- Teng Sreymom	21- Khun Sreymom
2- So Chenda	12- Nuon Srey Pov	22- Mech Charya
3- Kim Bopha	13- Oun Sokin (Sun Sokin)	23- Luong Sophea
4- Vey Sophy	14- Horm Tun	24- Khorn Sangvat
5- Han Chhun	15- Don Dut	25- Ouk Cheara
6- Vorn Chanrith	16- Leng Sarin	26- Phong Nea
7- Ry Phaiyoury	17- Rat Dary	27- Horm Mealea
8- Prak Serei	18- Heang Chhunly	28- Seap Kimsuo
9- Chamroeun	19- Chhang Lyna (Solina)	29- Chab Huoy
10- Sok Neat	20- Sang Anny	30- Chan Borei

- There are some other workers who did not endorse their thumbprint on the list, attached to the complaint, to agree to join the strike but were listed in the attendance list as having provided information about the labour dispute on 3 June 2008 or in the attendance list as having provided information about the labour dispute on 24 June 2008. They are: **1. Ly Sreymom, 2. Dam Phally, 3. Kha Sopheap, 4. Lay Soklean, and 5. Soun Sophy (Sok Sophy).** The other three workers --**Mao Dary, Lay Soklean and Sang Sareoum**-- did not endorse their thumbprints to agree to the strike, did not give information about the labour dispute or participate in the conciliation and, thus, the Arbitration Council considers that they are not involved in this collective labour dispute.
- However, the new owner (the employer) does not agree to reinstate them because she has recruited sufficient staff to replace them.

**Issue 3: The workers demand that the restaurant pay their monthly wages for April and May 2008.**

- The worker party claims that they have not received their wages for April and they also make a demand for payment of their wages for May. The workers involved in this case do not make a demand for payment of wages for June and July.
- The employer party provided the payroll list for April [to the Arbitration Council] as evidence and the lawyer who was present at the hearing on behalf of the workers did not make any objection to it. However, on behalf of workers, he continues to demand the workers' wages for May. There was no payment to workers involved in this case in May because the owner of the café considers that they did not work.

**Issue 4: The staff demand to get the money saved for staff (their tip)**

- At first, in the conciliation meeting the workers claimed that the saving (tip) was US\$ 1,500 (one thousand five hundred dollars). However, in the hearing the lawyer who represented the workers stated that the workers demanded that the owner pay only US\$ 700 (seven hundred dollar) of the saving (tip).
- The workers' lawyer did not provide any evidence to prove the amount of the tip, what period it covered, and how it should be divided.
- The employer claims that she does not know how much the saving (tip) was but she did not believe the staff received that large a saving (tip). She claims that the employer was not involved with the saving (tip) because the employer was not the one to manage or keep the saving (tip) for the staff.

**REASONS FOR DECISION**

**Issue of Jurisdiction of the Arbitration Council**

According to Chapter 12, section 2, Article 309 and 312 of the Labour Law and Clause 32 and 33 of the Prakas on the Arbitration Council No. 099 SKBY, dated 21 April 2004, the Arbitration Council has jurisdiction over collective labour disputes and has authority to consider the issues listed in the non-conciliation report or any matters which arise after the non-conciliation report and are a direct consequence of the dispute.

*“A collective labour dispute is any dispute that arises between one or more employers and a certain number of their staff over working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardize the effective operation of the enterprise or social peace.*

In previous cases such as 24/07, 45/07 and 54/07, the Arbitration Council held that:

*“In order to decide if a dispute is a collective dispute, the dispute must fulfill three necessary conditions: (a) It is a dispute which arises between a number of workers and one or more employer; (b) The dispute concerns working condition, the exercise of the recognized rights of professional organizations, the recognition of professional organizations*

*within the enterprise, and issues regarding relations between employers and workers and (c) This dispute could jeopardize the effective operation of the enterprise or social peacefulness.”*

Moreover, in cases such as 57/06, 77/06, 81/06, 103/06, 119/06, 24/07 and other cases, the Arbitration Council held that:

*In principle, the Labour Inspector and the Minister of Labour have the duty to decide if a dispute is an individual dispute or a collective labour dispute before referring it to the Arbitration Council. Therefore, normally the Arbitration Council will abide by the decision of the Labour Inspector and the Minister of Labour, if there is no obvious reason to reconsider.*

In this current case, the Arbitration Council follows the Arbitration Council in previous cases without any departure.

Based on the facts in this case (a dispute between over 30 staff (almost all the staff in the café) and Mrs. Phan Sangvaly, whom the court granted temporary rights to manage the café and was therefore the employer when the dispute occurred) this dispute is related to the implementation of [workers'] employment contracts and the relationship between the employer (Mrs. Phan Sangvaly) and workers (relevant staff who did not come to work and then went on strike). This dispute led to a temporary closure of the café as no staff came to work which means it could cause jeopardise the effective operations of the enterprise (the café) and social security. In conclusion, although this dispute is not brought by a union because there is no union in the café, the dispute fulfills the three conditions of a collective labour dispute. Moreover, without it being necessary to address the point as the dispute fulfills the conditions of a collective labour dispute, the Arbitration Council considers this is a collective labour dispute because it was referred to the Arbitration Council by the Labour Inspector and the Minister of Labour and none of the parties raised an objection to the jurisdiction of the Arbitration Council.

Therefore, the Arbitration Council considers that it has full authority and jurisdiction to settle this dispute according to the procedures in effect.

**Issue about the representative of the workers:**

Clause 19 of Prakas 099 SKBY, dated 21 April 2004 [regarding] the hearing of the Arbitration Council, *“A party may appear before the arbitration panel in person, be represented by a lawyer who is a member of the Bar Association of the Kingdom of Cambodia, or be represented by any other person expressly authorized in writing by that party.”*

In the hearing of this case the employer party was represented by Mrs. Phan Sangvaly, the new owner of the restaurant who participated in person. The workers, on the other hand, did not come to the hearing in person but were represented by a lawyer [named]

Sar Sovan (a member of the Bar Association of the Kingdom of Cambodia) through an authorization letter [signed by] Han Chhun, Luong Sophea and Vorn Chanrith who claim that they represent the staff in the Café. Two of them filed a complaint to the Department of Labour on behalf of all the relevant staff but they do not have any letter to prove that they were authorized to represent all the staff. The Arbitration Council raised [a question] about the unclear nature of the representative status of the three workers as well as of lawyer Sar Sovan at the beginning of the hearing and requested the lawyer to provide documents after the deadline (by 23 July 2008) to prove his right to represent [the workers] and make an authority. The documents to prove the right to represent the workers were not provided by the deadline as the staff did not come to work for many days and were thus all in separate [places] and could not be contacted to come to sign the letter.

In general, for such cases as described above, the Arbitration Council has the right to reject the representative status [of the party]. However, considering that 1.) none of the relevant staff objected to the lawyer Sar Sovan's representation in this dispute case, 2.) Lawyer Sar Sovan has been involved in protecting the workers' right since the [Ministry] came to collect information regarding the collective labour dispute and the conciliation by the Department of Labour and Vocational Training, 3.) the staff did not form a union and relevant workers had stopped coming to work for than two months and are in separate places which makes it difficult to contact them to confirm their agreement to authorise the representative, 4.) following the complaint letter made by Han Chhun and Luon Sophea, over 20 staff participated in the investigation by the officer of the Department of Labour and Vocational Training of Siem Reap Province and provided information regarding the collective labour dispute or [participated in] in the collective labour dispute conciliation and 5.) the employer party did not make an objection to the right of lawyer Sar Sovan to represent the worker party even though the Arbitration Council asked in the hearing if she had any objection to this; [Therefore] the Arbitration Council decides to consider that all the relevant staff had verbally or implicitly agreed to authorize this representation. Thus, the Arbitration Council considers that both parties participated in the hearing.

**Issue 1 & 2: The staff demand that the owner, Phan Sangvaly, comply with their employment contracts and reinstate them (those staff who went on strike request to go back to work)**

In issue 1 the staff demanded that the owner, Phan Sangvaly, comply with their employment contracts but did not raise any specific clause in the contract which they want the employer to comply with; and their demand in issue 2 is directly related to the existence of the employment contract and their strike, [therefore] the Arbitration Council decides to combine the two issues.

Firstly, the Arbitration Council needs to examine and decide whether the employment contracts of the relevant staff are fixed duration contracts or undetermined duration contracts; whether they still have employment contracts; and whether the fact that the new employer recruited new staff to replace the old staff, who did not come to work for a period of time before they went on strike, means the staff who went on strike have the legal right to be reinstated.

Article 67 of the Labour Law states:

*8. When a contract is signed for a fixed period of or less than two years, but the work tacitly and quietly continues after the end of the fixed period, the contract becomes a labour contract of undetermined duration contract.*

In addition, Article 73, paragraph 5 of the Labour Law states:

*If the contract has a duration of more than six months, the workers must be informed of the expiration of the contract or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have been days for contracts that have a duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67.*

Article 87, paragraph 1, of the Labour Law states:

*If a change occurs in the legal status of the employer, particularly by succession or inheritance, sale, merger or transfer of fund to form a company, all labour contracts in effect on the day of the change remain binding between the new employer and the workers of the former enterprise.*

Based on the findings of fact, the Arbitration Council considers that staff were employed on fixed duration contracts, commencing 20 April 2007 (except one staff member named Ry Phay Youry whose 12 months fixed duration contract commenced on 20 October 2007 and should have expired on 20 October 2008); however the wording in the contract means that the [workers'] contracts can be renewed with the agreement of the parties at least one month before the expiration date; [in this case] in March 2008 the owner, Daniel Carabalona died and the [former] general manger, Olivier Adrian did not inform [workers] about the expiration of their contracts or the non-renewal of the fixed duration contracts and the staff continued to work until 25 April 2008 (five days after the expiration date); therefore the workers contracts, are considered to have been renewed for one year until 20 April 2009.

Furthermore, the Arbitration Council found that the new manager, Mrs. Phan Sangvaly, followed Article 87 of the Labour and maintained all employment conditions and benefits for all workers as she called for a meeting with all staff and informed them that she agreed to continue their employment contracts under the same conditions and none of the staff object to the continuation of the contract.

Therefore, the Arbitration Council finds that both the fixed duration contracts and the undetermined duration contracts of the staff are still valid until they were terminated as a result of serious misconduct caused by [improper] staff behaviour.

Article 69 of the Labour Law states:

*“Within the framework of his contract, the worker shall perform all of his professional activities for the enterprise. Primarily, he must do the work for which he is hired, and perform it by himself with due care and attention...”*

*A labour contract of specific duration normally terminates at the specified ending date*

....

*If both parties do not agree, a contract of specified duration can be cancelled before its termination date only in the event of serious misconducts or acts of God ...*

Moreover, Article 83 of the Labour Law states:

*The following are considered to be serious offense on the part of the worker:*

*2. Fraudulent acts committed at the time of signing (presentation of false documentation) or during employment (sabotage, refusal to comply with the terms of the employment contract, divulging professional confidentiality).*

Regarding the 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.*

Article 77 of the Labour Law states,

*The termination of a labour contract at will on the part of the employer alone, without prior notice or without compliance with the prior notice period, entails the obligation of the employer to compensate the worker the amount equal to the wages and all kinds of benefits that the worker would have received during the official notice period.*

Based on the findings of fact, on the day after the meeting in which it was agreed that workers would continue at work and the employer would recognize their employment contracts, staff involved in this collective labour dispute did not come to work for many days (failed to fulfill their obligation) without providing prior notice or any reason. In addition, they inappropriately interfered in the management of the café, which was under the authority of the café’s owner. Thus, the Arbitration Council considers that the behaviour of the staff involved constitutes a refusal to implement the terms of the employment contract, an act of sabotage which show their inappropriate attitude and was amounted to serious misconduct

which gave Mr. Phan Sangvaly (the new employer) the legal right to terminate the employment contracts of the relevant staff.

In relation to the strike and the recruitment of new staff to replace those who [workers] who did not come to work, Article 318 of the Labour Law states:

*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.*

Article 332 of the Labour Law states,

*A strike suspends the labour contract. During a strike, the allowance for work is not provided and the salary is not paid.*

*The worker shall be reinstated in his job at the end of the strike.*

Based on the finding of facts, the staff involved in this case did not come to work for many days without providing notification or giving specific reasons to the employer and the intention of the staff in not coming to work was not related to their employment conditions, as stated in Article 318 of the Labour Law. On the other hand, it was because the staff were provoked into not coming to work with the new temporary owner; therefore the Arbitration Council considers this is not a strike from the beginning.

Generally, workers who strike are entitled to demand that they be reinstatement if the employer terminates them and recruits replacement staff. However, the current case is exceptional because, without having to take into consideration the legality of the strike, the relevant staff interfered in the management affairs of the employer and engaged in inappropriate behaviour because they did not come to work to fulfill their [employment contract], which amounted to serious misconduct and led the employer to legally terminate them and not agree to their reinstatement. [For that reason] they went on strike and made a complaint to the Department of Labour and Vocational training. In this case, they should not be entitled to protection according to Article 332 of the Labour Law.

The Arbitration Council considers that these staff do not have right to demand that the employer reinstate them because they did not have [valid] employment contract at the time they went on strike and the fact that the employer recruited new staff to replace them was appropriate and legal.

Therefore, the Arbitration Council can reject the workers' demand in issues 1 and 2.

### **Issue 3: The staff demand payment of their wages for April and May 2008**

The Arbitration Council divides this issue into two parts in order to examine and decide:

1. Did the staff receive their wage for April?

2. According to the law, are the 34 old staff entitled to their wage for May when they did not work?

**Part 1: The demand for a wage [payment] for April**

In general the claimant has a burden to provide evidence to support its demand and the Arbitration Council can reject the demand if there is insufficient evidence to support the demand. However, Article 118 of the Labour Law states:

*In the event of disputes over the payment of wages, the employer has the duty to prove that he has made the payment. This proof can be derived from the signature of the worker concerned or those of two witnesses if he is illiterate, on the payroll ledger that the employer is required to keep.*

According to the Article above, the employer should provide the evidence to prove that it already paid the wage.

In this case, the employer party submitted a payroll list for April with signatures of 34 staff and the lawyer who was present in the hearing on behalf of the staff did not object to the payroll list although he asked for confirmation by the Arbitration Council.

The Arbitration Council finds that the employer paid wages the month of April to all relevant staff except for two workers: **Vey Sophy** and **Horm Mealea**. Therefore, the Arbitration Council rejects the workers' demand for payment of wages for April except for [payment to] two workers named **Vey Sophy** and **Horm Mealea**.

**Part 2: The demand for wages for May**

Article 332 of the Labour Law states,

*A strike suspends the labour contract. During a strike, the allowance for work is not provided and the salary is not paid.*

*The workers shall be reinstated in his job at the end of the strike.*

*The mandate of workers' representatives shall not be suspended during the strike so that they can maintain contact with representatives of the employer.*

Article 334 of the Labour Law states,

*During a strike, the employer is prohibited from recruiting new workers for a replacement for the strikers except to maintain minimum service provided for in Article 326 and 328 if the workers who are required to provide such service do not appear for work. Any violation of this rule obligates the employer to pay the salaries of the striking workers for the duration of the strike.*

In previous cases, for example 58/06, 69/06, 80/06 and other cases, the Arbitration Council held that:

*The workers cannot receive the wages during strike whether the strike was legal or illegal. However, according to Article 334 of the Labour Law, if the company had recruited*

*new workers to replace old ones during this strike, the employer should pay wage to all workers during this strike.*

In this current case, the Arbitration Council follows the Arbitration Council in previous cases without any departure.

However, based on the findings of fact and the interpretation in issues 1 and 2 above, the old staff were no longer employed by the café's staff from May because their contracts were legally terminated before the strike and they no longer worked for the Café so the measure described above is not applicable to them. Thus, even though the employer recruited new staff to replace the [workers] before and during their strike, the staff are not entitled to any wage [for May].

Therefore, the Arbitration Council rejects the demand of the relevant staff for [payment of their] wages for May.

#### **Issue 4: The staff demand to get the money saved for them (their tip)**

In general, when parties enter into an employment contract, the employer has an obligation to pay wages to workers as stated in the contract and in accordance with the provisions in the Labour Law.

Article 102 of the Labour Law states:

*For the purpose of this law, the term “wage”, irrespective of what the determination or the method of calculation is, means the remuneration for the employment or service that is convertible in cash or set by agreement or by the national legislation, and that shall be given to a worker by an employer, by virtue of a written or verbal contract of employment or service, either for work already done or to be done or for services already rendered or to be rendered.*

Article 134 of the Labour Law states:

*Tips are remuneration made by clients to personnel of certain establishments such as hotels, restaurants, cafés, bars, and hair salons, and received by the employer as a mandatory percentage added to the client's bill with a note “service charge”. These tips must be collected by the employer and distributed in full to the personnel in contact with the clientele.”*

Based on the findings of fact, the tips (or savings) the workers are demanding from the employer in this case is [different to] tips [mentioned in Article above] because it is not a mandatory percentage received from clients with a note that it is a service charge.

However, Article 103 of the Labour Law states,

*Wage includes, in particular:*

- *actual wage or remuneration;*
- *overtime payments;*

- *commissions;*
- *bonuses and indemnities;*
- *profit sharing;*
- *gratuities;*
- *the value of benefits in kind;*
- *family allowance in excess of the legally prescribed amount;*
- *holiday pay or compensatory holiday; and*
- *amount of money paid by the employer to the workers during disability and maternity leave.*

The Arbitration Council considers that **wage** is not limited only to what is described in Article 103 of the Labour Law and the **tip** (money given by clients to staff but not included in the bill) can be considered part of the wage the employer should pay to workers if it is clearly mentioned in the [workers'] contract or the general practice at the company is for the employer to keep the money on behalf of staff and share it amongst the staff at a specific time each month.

In the employment contract made between most of the staff and the owner of the Café, point 8(a) of the contract<sup>1</sup> states, *“each staff will receive a share of the tip on every 15<sup>th</sup> of each month which is equally divided with all staff of the restaurant.”*

As such, the Arbitration Council considers that the **tip** is a part of workers' wage in this café and the employer has an obligation to control it and ensure it is distributed appropriately amongst all workers at the time specified.

However, generally a claimant for wages has a burden to provide evidence to support the demand and the Arbitration Council can reject the demand if there is insufficient evidence to support the demand.

In this case, the workers do not provide any evidence to prove the amount of the tips received from clients and not yet distributed to staff, the method for division amongst the staff and for which specific period [the tips were received].

Therefore, the Arbitration Council rejects the demand in issue 4.

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

## **DECISION**

**Issues 1 and 2:** Reject the demand of the worker party for the new owner (Mrs. Phan Sangvaly) to comply with their employment contracts and reinstate them.

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<sup>1</sup> This employment contract was made in English without translation into Khmer. However, because the Arbitration Council considers that representatives of the parties could understand English and all the Arbitration Panel members can understand English, we agree to translate this sentence of the contract into Khmer.

**Issue 3:**

- Reject the demand of the relevant workers (except Vey Sophy and Horm Mealea) for the new owner to pay their wages for April.
- Order the employer to immediately pay wages for April to Vey Sophy and Horm Mealea.
- Reject the demand of the relevant workers for the employer to pay their wages for May.

**Issue 4:** Reject the demand of the worker party for the new owner to pay their tips (savings).

**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: **Seng Vuoch Hun**

Signature: .....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Nhean So Munin**

Signature: .....