

**A **Girish Kumar a/l Gopalakrishnan v Kilang Kelapa Sawit Sri
Lingga Sdn Bhd & Anor****

**B INDUSTRIAL COURT (KUALA LUMPUR) — AWARD NO 1371 OF
(CASE NO 23(14)/4-3367 OF 2004)
KHADIJAH MAHMUD CH
27 OCTOBER 2010**

**C *Labour Law — Employment — Dismissal — Constructive dismissal — Transfer
— Assistant engineer promoted to acting mill manager — Position reverted back to
assistant engineer — Whether amounted to demotion — Whether company's
actions bona fide — Whether company committed fundamental breach that had
gone to root of contract of employment***

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**E The claimant, an assistant engineer, was employed by Syarikat Perusahaan
Kelapa Sawit vide a letter dated 13 July 1999 and his salary was RM3,600 per
month. He was placed at its palm oil mill, Kilang Kelapa Sawit Sri Lingga in
Yong Peng, Johor. As an assistant engineer, he assisted the mill manager in the
day to day running of the mill which includes its daily operations and
maintenance of the mill. He was confirmed in his position on 1 July 2000. Vide
a letter dated 10 April 2000 from BELL Management Sdn Bhd, the parent
company of Syarikat Perusahaan Kelapa Sawit, the claimant was appointed as
acting mill manager at Kilang Kelapa Sawit Sri Lingga. He was paid acting
allowance of RM400 per month from the date of his appointment as acting
mill manager effective from 1 January 2001. Subsequently, vide a letter dated
10 August 2001, BELL Management Sdn Bhd informed the claimant that
following a reshuffle on the group's operations, he would be transferred to
BELL Management Sdn Bhd as acting manager with a monthly salary of
RM3,670 and an allowance of RM400 with effect from 1 October 2000 and he
will be seconded to serve at Kilang Kelapa Sawit Sri Lingga. As acting mill
manager, the claimant was given a company car and was paid an allowance of
RM1,000 per month. After serving as acting mill manager for about two years
at Kilang Kelapa Sawit Sri Lingga, the companies issued three memorandums
to the claimant, all dated 29 June 2002 alleging, inter alia, the claimant's poor
performance. On 27 July 2002, BELL Management Services Sdn Bhd issued a
letter of transfer to the claimant to its mill, Kilang Sawit Batu Pahat, with effect
from 1 August 2002 as its assistant engineer. The claimant replied to the
transfer letter stating that the companies had demoted and transferred him to
Kilang Sawit Batu Pahat and he was unable to agree to go on transfer as
required. The claimant therefore considered himself dismissed by the
companies with immediate effect. The court herein had to consider, inter alia,**

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the issue whether there was a demotion when the claimant was transferred to Kilang Sawit Batu Pahat as assistant engineer. A

Held, allowing the claimant's claim:

- (1) The companies were satisfied with the claimant's performance as acting mill manager since the date of his appointment and the increase of his salary and allowance speaks for itself where his salary was increased from RM3,600 to RM3,670 and as late as April 2002, the claimant was given an increment of 9% of his salary and an additional increase of his allowance to RM1,000. Referring to the payment voucher dated 24 May 2002, the claimant was paid RM1,000 being payment as mill manager and RM1,000 as allowance (see para 27). B C
- (2) No evidence was tendered to justify that the companies' action was bona fide when the claimant was transferred to Kilang Sawit Batu Pahat mill as assistant engineer where the transfer had reduced the claimant's duties and responsibilities which he had assumed for almost two years as acting mill manager. Neither was there evidence to show that the companies were no longer in need of acting mill manager since they had found a suitable qualified candidate for that position as claimed by COW1 when the transfer exercise was done (see para 33). D E
- (3) The claimant had legitimate expectation that his appointment as acting mill manager was a promotion and his expectation to be retained in that position and subsequently promoted as mill manager. The companies' action during the claimant's tenure as acting mill manager did not in any way indicated that his appointment was a temporary arrangement. The fact that the claimant's allowance as acting mill manager was increased from RM400 to RM600 and later to RM1,000 within two years of his tenure as acting mill manager did not support the companies' contention that the appointment was not a promotion or that it was a temporary arrangement (see para 34). F G
- (4) The companies' decision in transferring the claimant to his former position as assistant engineer at Kilang Sawit Batu Pahat had put the claimant in an unfavourable position where he had to report to the mill manager and this action had damaged any confidence and trust between the parties involved. Based on the above, the transfer was a demotion in term of position, function, status and responsibilities as well as economic loss and benefit to the claimant (see para 37). H

[Bahasa Malaysia summary I

Penuntut, seorang pembantu jurutera, diambil bekerja oleh Syarikat Perusahaan Kelapa Sawit melalui surat bertarikh 13 Julai 1999 dan gajinya adalah RM3,600 sebulan. Dia ditempatkan di kilang minyak kelapa sawitnya, Kilang Kelapa Sawit Sri Lingga di Yong Peng, Johor. Sebagai pembantu

- A** jurutera, dia membantu pengurus kilang dalam perjalanan harian kilang tersebut yang termasuk operasi dan penyelenggaraan harian kilang tersebut. Dia disahkan ke dalam jawatannya pada 1 Julai 2000. Melalui surat yang bertarikh 10 April 2000 daripada BELL Management Sdn Bhd, syarikat induk Syarikat Perusahaan Kelapa Sawit, penuntut dilantik sebagai pemangku
- B** pengurus kilang di Kilang Kelapa Sawit Sri Lingga. Dia dibayar elaun pemangku sebanyak RM400 sebulan dari tarikh pelantikannya sebagai pemangku pengurus kilang bermula daripada 1 Januari 2001. Kemudian, melalui surat bertarikh 10 Ogos 2001, BELL Management Sdn Bhd memberitahu penuntut bahawa berikutan rombakan semula ke atas operasi
- C** kumpulan tersebut, dia akan dipindahkan ke BELL Management Sdn Bhd sebagai pemangku pengurus dengan gaji bulanan sebanyak RM3,670 dan elaun sebanyak RM400 bermula daripada 1 Oktober 2000 dan dia akan disokong untuk berkhidmat di Kilang Kelapa Sawit Sri Lingga. Sebagai pemangku pengurus kilang, penuntut telah diberikan kereta syarikat dan
- D** diberikan elaun RM1,000 sebulan. Selepas berkhidmat sebagai pemangku pengurus kilang untuk kira-kira dua tahun di Kilang Kelapa Sawit Sri Lingga, syarikat mengeluarkan tiga memorandum kepada penuntut, kesemuanya bertarikh 29 Jun 2002 mendakwa, antara lain, prestasi penuntut yang kurang memuaskan. Pada 27 Julai 2002, BELL Management Services Sdn Bhd
- E** mengeluarkan satu surat pemindahan kepada penuntut ke kilangnya, Kilang Sawit Batu Pahat, bermula daripada 1 Ogos 2002 sebagai pembantu jurutera. Penuntut menjawab surat pemindahan menyatakan bahawa syarikat telah menurunkan pangkatnya dan memindahkannya ke Kilang Sawit Batu Pahat dan dia tidak boleh bersetuju untuk pemindahan seperti yang diperlukan.
- F** Penuntut oleh itu menganggap dirinya diberhentikan oleh syarikat dengan serta merta. Mahkamah di sini perlu mempertimbangkan, antara lain, isu sama ada terdapat penurunan pangkat apabila penuntut dipindahkan ke Kilang Sawit Batu Pahat sebagai pembantu jurutera.
- G** **Diputuskan**, membenarkan permohonan penuntut:
- (1) Syarikat berpuas hati dengan prestasi penuntut sebagai pemangku pengurus syarikat semenjak tarikh pelantikannya dan kenaikan gaji dan elaunnya membuktikan perkara ini di mana gajinya dinaikkan daripada RM3,600 kepada RM3,670 dan selewat-lewatnya pada April 2002, penuntut diberikan kenaikan 9% daripada gajinya dan tambahan kenaikan elaunnya kepada RM1,000 (lihat perenggan 27).
 - (2) Tidak ada keterangan yang dikemukakan untuk menjustifikasi bahawa tindakan syarikat adalah bona fide apabila penuntut dipindahkan ke Kilang Sawit Batu Pahat Mill sebagai pembantu jurutera di mana pemindahan tersebut telah mengurangkan tugas dan tanggungjawab yang ditanggungnya selama hampir dua tahun sebagai pemangku pengurus syarikat. Juga tidak ada keterangan untuk menunjukkan bahawa syarikat tidak lagi memerlukan pengurus kilang pemangku
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kerana mereka telah mendapatkan calon yang berkeelayakan yang sesuai untuk jawatan itu seperti yang dinyatakan oleh COW1 apabila pelaksanaan pemindahan dibuat (lihat perenggan 33).

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- (3) Penuntut mempunyai jangkaan yang munasabah bahawa pelantikannya sebagai pemangku pengurus kilang adalah kenaikan pangkat dan harapannya untuk dikekalkan ke dalam jawatan itu dan kemudian dinaikkan pangkat sebagai pengurus kilang. Tindakan kilang sepanjang penuntut memegang jawatan sebagai pemangku pengurus kilang tidak dalam apa cara sekalipun menunjukkan bahawa pelantikannya adalah aturan sementara. Fakta bahawa elaun penuntut sebagai pemangku pengurus kilang dinaikkan daripada RM400 kepada RM600 dan kemudian RM1,000 dalam masa dua tahun sebagai pemangku pengurus kilang tidak menyokong hujahan syarikat bahawa pelantikan tersebut bukan kenaikan pangkat atau bahawa ia adalah aturan sementara (lihat perenggan 34).

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- (4) Keputusan syarikat dalam memindahkan penuntut kepada jawatan sebelumnya sebagai pembantu jurutera di Kilan Sawit Batu Pahat telah meletakkan penuntut dalam kedudukan yang tidak memihak kepadanya di mana dia perlu melaporkan diri kepada pengurus syarikat dan tindakan ini telah menjejaskan keyakinan dan amanah di antara pihak-pihak yang terlibat. Berdasarkan kepada yang di atas, pemindahan tersebut adalah penurunan pangkat dalam terma kedudukan, fungsi, status dan tanggungjawab serta kerugian ekonomi dan faedah kepada penuntut (lihat perenggan 37).]

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Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 948–1000.

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Cases referred to

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92; [1988] 1 CLJ 45, SC (refd)

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Legislation referred to

Factories and Machinery Act 1967 s 29
Industrial Relations Act 1967 s 20(3)

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Daya Nair (Nik Saghir & Ismail) for the plaintiff.
David Gurupatham (David Gurupatham and Koay) for the defendant.

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REFERENCE

This is a reference made by the honourable Minister of Human Resources under s 20(3) of the Industrial Relations Act 1967 (the 'Act') dated 8 September 2004 relating to the dismissal of Encik A Girish Kumar a/l

A Gopalakrisnan (the 'claimant') by Kilang Kelapa Sawit Sri Lingga Sdn Bhd on 30 July 2002. Vide amended statement of claim dated 28 November 2008, BELL Management Sdn Bhd was made a party to this case.

Khadijah Mahmud Ch:

B BACKGROUND

C [1] The claimant commenced employment with the Syarikat Perusahaan Kelapa Sawit as assistant engineer on 18 July 1999 via an appointment letter dated 13 July 1999. Syarikat Perusahaan Kelapa Sawit is in the palm oil industry and has several palm oil mills. On 1 October 2000, the claimant was appointed as acting mill manager at Kilang Kelapa Sawit Sri Lingga. Vide a letter dated 27 July 2002, the claimant was transferred to Kilang Sawit Batu Pahat as its assistant engineer. The claimant did not accept the transfer and considered it as a demotion and vide a letter dated 30 July 2002 considered himself to be constructively dismissed.

THE CLAIMANT'S CASE

E [2] The claimant was employed by Syarikat Perusahaan Kelapa Sawit as an assistant engineer on 18 October 1999 vide letter of appointment dated 13 July 1999 (CLB1-6) with a monthly salary of RM3,600. He was placed at its palm oil mill, Kilang Kelapa Sawit Sri Lingga in Yong Peng, Johor and as assistant
F engineer, he assisted the mill manager in the day to day running of the mill which includes its daily operations and maintenance of the mill. He was confirmed in his position on 1 July 2000 vide letter of confirmation dated 15 July 2000 (CLB7).

G [3] Vide a letter dated 10 April 2000 (CLB8) from BELL Management Sdn Bhd, the parent company of Syarikat Perusahaan Kelapa Sawit, the claimant was appointed as acting mill manager at Kilang Kelapa Sawit Sri Lingga. He was paid acting allowance of RM400 per month from the date of his appointment as acting mill manager effective 1 January 2001. The claimant
H believed that this letter CLB8 was only formalising the arrangement as he had already been transferred to Kilang Kelapa Sawit Sri Lingga since October 2000 as acting mill manager.

I [4] Vide a letter dated 10 August 2001 (CLB9) issued by BELL Management Sdn Bhd, his employment was transferred to BELL Management Sdn Bhd, and that he was appointed as acting manager with effect from 1 October 2000 and his salary was to be RM3,670, with an allowance of RM400 per month backdated to 1 October 2000. He was also given a company car. The claimant claimed that BELL Management Sdn Bhd seconded him to work at Kilang

Kelapa Sawit Sri Lingga where he had already been the acting manager since 1 October 2000 ('companies'). In the claimant's opinion, the companies were satisfied with his performance and hence was appointed as acting manager.

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[5] According to claimant, during his tenure at Kilang Kelapa Sawit Sri Lingga, there was one engineer name Prabakaran who possessed a certificate of competency and when Prabakaran left in November 2001, a person by the name Joseph joined the company and he too possessed a steam certificate. As acting mill manager, the claimant claimed that he was responsible for the day to day running of the mill which include the receipt of raw materials and dispatch of the end products as well as in charge of the administration of the mill and welfare of its employees. According to him, the manager post is the most senior post in the mill.

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[6] The claimant stated that prior to the issuance of the three (3) memorandum CLB10, CLB11 and CLB12 to him, he had never received any complaint from the headquarters regarding the mill or his performance. The claimant contended that there was no complaint regarding his work performance from October 2000 until June 2002 when he suddenly received the three memorandums which were all issued on the same date stating that his performance was deteriorating and other issues. The claimant responded to the complaints and allegations via his memorandums dated 4 July 2002 (CLB13, CLB15 and CLB16) refuting the issues raised and also his performance. According to the claimant, the allegations and accusations against him vide these three memorandums dated 29 June 2002 eventually led to his dismissal.

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[7] The first memorandum dated 29 June 2002 (CLB10) from the company secretary accused the claimant of deteriorating performance which is below expectation and he was advised to take urgent and appropriate steps to improve his performance and meet the expectation.

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[8] The second memorandum dated 29 June 2002 issued by the special assistant to the CEO (CLB11) stated that the management was upset with the situation which only exists at the claimant's mill where there was no one around at the mill to provide the figures and details requested by the head office at 8 am every morning, production cannot commence at 8 am sharp as the head of the mill and his assistant are no where to be seen and inaccurate information given giving rise to distorted reporting. The claimant was also instructed to take immediate measure to rectify the disciplinary situation and problems at the mill.

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[9] The third memorandum issued by the CEO's special officer (CLB12) on the same day stated that discrepancy has been discovered in the mill daily production report on oil stored and requested the claimant to give an

A immediate written explanation. The claimant stated that he replied to the three memorandums vide CLB13, CLB15 and CLB16.

B [10] Vide a letter dated 27 July 2002 (CLB17), BELL Management Sdn Bhd advised the claimant of a transfer to another mill in Batu Pahat as an assistant engineer. According to the claimant, the said transfer removed duties, functions, responsibilities and reduced his income. The claimant did not accept the revised offer of employment as he considered it a demotion in that his designation was changed from acting mill manager to assistant engineer, his allowance of RM1,000 was withdrawn and the company vehicle was withdrawn. The claimant then replied to the letter CLB17 via a letter dated 30 July 2002 (CLB18) expressing his dissatisfaction, stating that he was unable to agree to go on transfer as required and that it is a clear indication that the companies are trying to drive him out of his employment and considered himself constructively dismissed. The companies issued another letter (CLB20) advising the claimant to comply with the transfer and to report for duty to the mill manager at Kilang Sawit Batu Pahat. The claimant replied via his letter dated 7 October 2002 (CLB21) stating that 'since the company has already dismissed me I do not see how it can unilaterally require me 'to report' on 15 August 2002 at KSBP Mill.'

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F [11] On the issue of the requirement of certificate of competency for a person to be appointed as mill manager, the claimant testified that during the entire duration he was the acting manager, there was always a subordinate who has the required certificate of competence to operate the boiler and there is no legal requirement that a mill manager has to have a certificate of competency. According to the claimant, when he was interviewed for his job in 1999, the companies knew that he did not have the steam certificate and that during his course of employment, he was never informed that he had to obtain a certificate of competency in order to be made mill manager. The claimant admitted making attempts to obtain second grade certificate of competency but did not get through.

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H [12] In cross-examination, the claimant stated that at the time he was appointed as acting manager, he did not think that it was a temporary appointment. The claimant testified that at no time he was informed that he would be acting as mill manager until the companies could find a suitable candidate to fill the post. He agreed that there were mill managers at the other four mills and he was not aware at that time of the advertisement put out by the companies for the position of a mill manager.

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[13] Based on the advertisement, the claimant agreed that he did not meet the companies' requirement for the position of mill manager where it requires 'steam certificate' preferable first grade for manager. As acting mill manager, the

claimant stated that he has a maintenance engineer and five non-executive staff under him and they were all efficient. The claimant contended that there is no specific requirement by Jabatan Keselamatan dan Kesihatan for a person to have a certificate of competency to be a mill manager. According to him, what Jabatan Keselamatan dan Kesihatan requires is someone with a steam certificate for a mill with a boiler. At the time he was the acting mill manager, there was an engineer named Mr Prabakaran who had this qualification and he was later replaced by one Mr Joseph who also possessed the qualification. The claimant contended that in spite of not having steam certificate, the companies had appointed him as acting mill manager since 1 October 2000.

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[14] The claimant claimed that when he was made acting mill manager for almost two years, there was no complaint made against him and the companies rewarded him with an increase in allowance together with an increase in his salary as late as April 2002. Over and above, the claimant argued that he was paid bonus and therefore he has legitimate expectation he would be retained in that position. According to the claimant, he has been reporting to the executive director (Lee Tiang Hock) of the companies. He testified that he would not have objected to the transfer if he were made acting manager. He however objected to the transfer because it was not only his position that was demoted, the benefit ie the allowance and company car that came along with the post were also withdrawn. The claimant avers that the companies had by its actions breached the fundamental terms of his employment, entitling him to plead that he has been constructively dismissed.

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THE COMPANIES' CASE

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[15] The companies denied that the claimant was dismissed on 30 July 2002. The companies averred that the claimant was well aware that the parent company is BELL Management Sdn Bhd and its subsidiary companies included the various mills that the claimant worked at and/or was required to work at. The companies referred to cl 7 of the claimant's employment contract (CLB1-6) which clearly and unequivocally reserved the companies' right to require the claimant to serve the companies anywhere in Malaysia. It was also contended by the companies that in the companies' handbook the management's right to transfer the claimant within the group.

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[16] The companies stated that the claimant accepted the parent company's right to transfer as evidenced in the claimant's own exh CLB8 when he did not complain when he was transferred then. According to the companies, due to a reshuffle of the groups' operation, the claimant was transferred to the parent company and seconded to Kilang Kelapa Sawit Sri Lingga vide a letter dated 10 August 2001 with a monthly salary of RM3,670 and an allowance of RM400 and the claimant accepted these terms and appended his signature thereto. The

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A companies contended that the letter dated 10 August 2001 was a variation and addition to the claimant's terms and conditions of employment which was clearly accepted by the claimant without a complaint.

B [17] The companies claimed that the claimant was well aware that he cannot be appointed as mill manager by operation of law as he does not possess a Grade Two (steam) Engineering Certificate. The companies contended that the claimant was appointed as a temporary 'acting' mill manager and he was given a temporary allowance of RM1,000 due to this additional burden. The companies stated that the phrase 'acting' connote that it was only temporary appointment until that position is filled-up by a suitable qualified person. The companies claimed that the claimant's appointment as acting manager was never a promotion and the claimant was well aware that he was merely given a temporary designation and adequately compensated for it. According to the companies, they managed to find a suitable qualified candidate for that position and was no longer in need of an acting mill manager. Thus there was no demotion whatsoever as claimed by the claimant.

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E [18] The chairman of BELL Management Sdn Bhd (COW1) explained that a manager is in charge of the overall running of the factory or he is the head of the mill where he is responsible for the technical and non-technical management of the mill. The manager is assisted by an assistant manager and according to COW1, an assistant engineer is involved in the whole process and engineering and not so much in administration. COW1 cannot remember who was the assistant manager or whether there was an assistant manager when Lee Yew Chong was the manager at Kilang Kelapa Sawit Sri Lingga. COW1 testified that when the manager is absent, either the general manager or executive manager or COW1 himself would be in charge of the mill.

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G [19] According to COW1, the claimant was appointed as acting manager because there was no manager at that time and his duty as acting manager was to perform the role of a manager and to take care of the mill. As acting manager, the claimant was partially in charge of the administration with the assistance of the group manager. When further cross-examined, COW1 agreed that the claimant was responsible fully of the operation of the mill and the administration of the mill. He further agreed that as acting manager, the claimant is acting on behalf of the manager and is expected to do everything that needs to be done in the mill. COW1 stated that there are certain things that the claimant cannot do because he has no steam certificate and he is not sure whether there was someone with a steam certificate at that mill during the time the claimant was the acting manager.

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[20] Vide a letter dated 27 July 2002, BELL Management Sdn Bhd informed the claimant of his transfer to Kilang Sawit Batu Pahat as assistant

engineer since there was a requirement then for the claimant to work there. When the claimant failed to report to work, the companies had no alternative but to terminate his services on 9 August 2002. The companies contended that the claimant was not dismissed unfairly or that they were in breach of fair labour practice and/or natural justice.

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EVALUATION AND FINDINGS

[21] The claimant had been employed as an assistant engineer by Syarikat Perusahaan Kelapa Sawit vide a letter dated 13 July 1999 (CLB1–6) and his salary was RM3,600 per month. The companies' standard terms of service for managerial staff was also attached to the letter CLB1. The claimant accepted the position and commenced his duties on 18 October 1999. The claimant was confirmed on 1 July 2000 vide letter of confirmation dated 15 July 2000 (CLB7).

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[22] BELL Management Sdn Bhd then issued a letter dated 10 April 2001 appointing the claimant as acting mill manager of Kilang Kelapa Sawit Sri Lingga in Yong Peng Johor with effect from 1 January 2001 (CLB8). The letter CLB8 stated that the claimant will be paid an acting allowance of RM400 per month. Subsequently vide a letter dated 10 August 2001 (CLB9), BELL Management Sdn Bhd informed the claimant that following a reshuffle on the group's operations, he will be transferred to BELL Management Sdn Bhd as acting manager with a monthly salary of RM3,670 and an allowance of RM400 with effect from 1 October 2000 and he will be seconded to serve at Kilang Kelapa Sawit Sri Lingga.

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[23] After serving as acting mill manager for about two years at Kilang Kelapa Sawit Sri Lingga, the companies issued the following three memorandums, all dated 29 June 2002, to the claimant:

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- (a) Memo CLB10 on performance from company secretary stated that the management note that the claimant performance is deteriorating and below what is expected of him and advised the claimant to take urgent and appropriate steps to improve his performance and to meet expectations;
- (b) Memo CLB11 on discipline at the mill from CEO special assistant raise the situation at the mill which no one was around at the mill at 8am; and
- (c) Memo CLB12 on discrepancy in the mill daily production report from CEO special assistant concerning discrepancy discovered in the mill daily report on oil stored.

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A [24] The claimant responded to the three memorandums above explaining each matter raised via his memo (CLB13, CLB15 and CLB16). Thereafter, there was no further communication between the parties regarding the matter raised in the three memorandum by the companies until BELL Management Services Sdn Bhd issued a letter dated 27 July 2002 (CLB17) transferring the claimant to its mill in Kilang Sawit Batu Pahat with effect from 1 August 2002 as its assistant engineer. The claimant replied to the transfer letter stating that the companies have now demoted and transferred him to Kilang Sawit Batu Pahat and he was unable to agree to go on with the transfer as required. The claimant therefore considered himself dismissed by the companies with immediate effect. The companies issued another letter dated 1 August 2002 (CLB20) giving the claimant another opportunity to comply with the directive, failing which disciplinary action will be taken against the claimant which may include his instant dismissal.

D [25] The claimant in this case claimed that he was constructively dismissed by the companies on 30 July 2002. In claims of constructive dismissal, the burden of proof is upon the claimant to prove on a balance of probability. 'The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such a breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound any longer. It was in an attempt to enlarge the right of an employee to unilateral termination of his contract beyond the perimeter of the common law due to unreasonable conduct of his employer, that the expression 'constructive dismissal' was used'. Case: *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92; [1988] 1 CLJ 45. Also in this case, the Supreme Court stated

G In our judgement, the transfer which relegated the applicant to a position of lesser responsibilities, albeit on the same terms and conditions of service, but which the applicant refused to accept, is a dismissal. Such relegation of responsibility with its consequent humiliation, frustration and loss of estimation amongst his fellow employees made it impossible for the appellant to carry on being employed under the respondent organisation. In other words, he had been driven out of his employment. This is therefore a dismissal.

I [26] From the facts presented to this court, it shows the claimant was appointed as acting mill manager of Kilang Kelapa Sawit Sri Lingga with effect from 1 January 2001 vide a letter dated 10 April 2001 (CLB8) issued by BELL Management Sdn Bhd and he was paid an allowance of RM400 per month. Subsequently, via a letter dated 10 August 2001 (CLB9) also issued by BELL Management Sdn Bhd, the claimant was transferred to BELL Management Sdn Bhd as acting manager with a monthly salary of RM3,670 and an allowance of RM400 with effect from 1 October 2000 and he was seconded to

serve at Kilang Kelapa Sawit Sri Lingga. From these letters, it is clear that the claimant was appointed as acting manager from 1 October 2000, that was three months after he was confirmed in his employment. As acting mill manager, the claimant was given a company car to use and was paid an allowance of RM1,000 per month at the time he considered himself constructively dismissed. These benefit accorded to the claimant was not disputed by the companies and was confirmed in the transfer letter dated 27 July 2002 (CLB17).

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[27] On the claimant's performance as acting mill manager, the court finds that the companies have no complaint on his performance since his appointment to that position on 1 January 2001, which later was back dated to 1 October 2000, until the date when he was issued with three (3) memorandums dated 29 June 2002 (CLB10, CLB11 and CLB12). The claimant responded to the memorandums where in his memo dated 4 July 2002 (CLB13) at para 4, he stated that 'as late as April 2002 a decision made by chief executive officer to accord the undersigned an increment of 9% of his salary with an additional RM1,000 as acting mill manager allowance from the previous allowance in view of the undersigned performance' and this statement was not disputed by the companies. From the testimonies of the parties, it is shown that the claimant was assisted by a group of managers or senior officials based at the head office. The companies' witness explained that when the manager is absent, either the general manager or executive manager or he himself would be in charge of the mill. According to the claimant, the production report raised by the companies was prepared in standard format which was not disputed by the companies. Having considered the evidence, the court has doubt as to the companies' action of questioning the production report which was prepared in the companies' standard format and the claimant's ability as acting mill manager after two years performing his duty. The court concludes that the companies are satisfied with the claimant's performance as acting mill manager since the date of his appointment and the increase of his salary and allowance speaks for itself where his salary was increased from RM3,600 to RM3,670 and as late as April 2002, the claimant was given an increment of 9% of his salary and an additional increase of his allowance to RM1,000. Referring to the payment voucher dated 24 May 2002 (CLB22), the claimant was paid RM1,000 being payment as mill manager and RM1,000 as allowance.

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[28] The next question is whether there was a demotion when the claimant was transferred to Kilang Sawit Batu Pahat as assistant engineer. The claimant contended that his appointment as acting mill manager was a promotion while the companies claimed that it was a temporary arrangement and not a promotion pending the post being filled up by a qualified person. The claimant

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A submitted that he has legitimate expectation when he was appointed as acting mill manager and according to him, the appointment was a promotion.

[29] The companies claimed that the claimant's appointment as acting mill manager was a temporary measure. The companies stated that the claimant was not qualified to be made mill manager because he did not have the competency certificate that is a first grade steam certificate. The companies tendered copies of the companies' newspaper advertisement to show that the companies were looking for candidate to fill up the manager position and the qualification as stated in the advertisement was:

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- C**
- Possess Degree/Diploma in Mechanical Engineering.
 - Preferably with a First Grade Steam Certificate'
 - Minimum 4 years experience in a palm oil mill.
- D**
- Strong leadership qualities and ability to oversee maintenance and operation of a mill.

E **[30]** The companies' witness COW1, testified that it is the companies' policy that the mill manager must have a steam certificate. Except for COW1's testimony and copies of advertisement, there was no other evidence produced to substantiate this requirement claimed by the companies is a mandatory requirement. Having perused the advertisement, the court noted that the advertisement stated 'preferably with a first grade steam certificate' which implies that the competency certificate is a preferable qualification, not a mandatory requirement for the manager position. The advertisement reads 'An established and diversified group of companies located in Subang Jaya have immediate vacancies for the following positions: PALM OIL MILLING DIVISION ...' According to the companies, they have a number of mills and

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G COW1 claimed that the advertisement was for the position of mill manager at Kilang Kelapa Sawit Sri Lingga. However, there was no evidence tendered to substantiate this claim. Also no evidence was produced to show that the companies had appointed or employed a qualified mill manager for Kilang Kelapa Sawit Sri Lingga as claimed by COW1 at the time the claimant's

H transfer to Kilang Sawit Batu Pahat was issued.

I **[31]** The companies then referred to the Factories and Machinery Act 1967 to support their contention that the claimant was not qualified to be appointed as mill manager. The court was however inclined to agree with the claimant's counsel submission that no where in Factories and Machinery Act 1967 provides that a person must possess steam certificate to be appointed as mill manager. Section 29 of Factories and Machinery Act 1967 provides that 'any person shall take charge of any machinery which is prescribed to be under the charge of a certificated engineer, dredgemaster or driver, as the case maybe,

unless (a) he holds a certificate of competency as an engineer, dredgemaster or driver; or (b) he has a written authority issued by the chief inspector.' Having considered the provisions in the Act, the court finds that the requirement of certificate of competency for the position of mill manager was a condition imposed by the companies and not by operation of law.

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[32] The court accepted that the right to transfer an employee from one company to another within the organisation is the prerogative of the employer. The court also recognised that it is the prerogative of an employer to organise his business in the way he likes for the purpose of economy or convenience, provided his action is bona fide and in the interest of its business. However when exercising this right, the employer should not actuate any indirect motive of any kind of mala fide and there should be nothing to the contrary in the employee's employment contract.

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[33] The transfer letter dated 27 July 2002 (CLB17) gives no clue as to the reason the claimant was transferred to Kilang Sawit Batu Pahat as an assistant engineer. The transfer letter dated 27 July 2002 merely stated that '... you will be transferred to our mill at KSBP ...'. The court observes that in the earlier transfer letter issued to the claimant titled 'transfer of employment to BELL Management Sdn Bhd' dated 10 August 2001 (CL4), the companies had gave reason of the claimant's transfer, which was because of 'a reshuffle of the the group operation' and in letter dated 10 April 2001, it was stated that 'the exco of BELL Management Sdn Bhd has approved your appointment as the acting mill manager ...'. The court finds no evidence tendered to justify the companies' action was bona fide when the claimant was transferred to Kilang Sawit Batu Pahat Mill as assistant engineer where the transfer has reduced the claimant's duties and responsibilities which he had assumed for almost two years as acting mill manager. Neither was there evidence to show that the companies was no longer in need of acting mill manager since they have found a suitable qualified candidate for that position as claimed by COW1 when the transfer exercise was done.

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[34] During his tenure as acting mill manager, the claimant was given salary increment, bonus and increase in his allowance as well as praise for his good work until the date when the companies issued three memorandum to him within one day. The claimant accordingly responded to the memorandum and there was no further communication until a transfer order was issued to the claimant where no reason or cause was given as to why he was transferred. The companies did not deny claimant's contention that he has turn around a deteriorating mill to a profitable mill, without a slightest indication of dissatisfaction. After diligently discharging his duties and responsibilities entrusted to him for two years without any complaint from the company, the court agree that the claimant has legitimate expectation that his appointment

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- A** as acting mill manager was promotion and his expectation to be retained in that position and subsequently promoted as mill manager. The companies' action during the claimant's tenure as acting mill manager did not in any way indicate that his appointment was a temporary arrangement. The fact that the claimant's allowance as acting mill manager was increased from
- B** RM400–RM600 and later to RM1,000 within two years of his tenure as acting mill manager did not support the companies' contention that the appointment was not a promotion or that it was a temporary arrangement.
- C** [35] The court finds that the transfer to Kilang Sawit Batu Pahat will reduce the claimant's duties and responsibilities where as acting mill manager at Kilang Kelapa Sawit Sri Lingga, he is the head of the mill, whereas as assistant engineer, the claimant will be reporting to the mill manager of Kilang Sawit Batu Pahat as stated in the letter dated 1 August 2002 (CLB20). Also the transfer will cause economic loss and benefit to the claimant where it was stated in CLB17 that his
- D** allowance of RM1,000 per month as acting mill manager will be withdrawn and the mill manager's vehicle is to remain at Kilang Kelapa Sawit Sri Lingga.
- E** [36] On the companies' submission that the word 'acting' connotes and is understood by the world at large to mean temporary and comparing claimant's appointment to that of the deputy prime minister who becomes acting prime minister when the prime minister goes oversea or is indisposed, the court is unable to agree with this argument. In the case before this court, there is no evidence tendered by the companies to support its contention that the
- F** appointment of the claimant as acting mill manager was in anyway meant or understood to be temporary. In Malaysia, in the absence of the Prime Minister in the country or is indisposed, the Deputy Prime Minister was empowered to exercise the functions of Prime Minister for a specific period and not appointed as acting Prime Minister.
- G** [37] Having considered at the companies' conduct as a whole, it shows that the companies' decision of transferring the claimant to his former position as assistant engineer at Kilang Sawit Batu Pahat had put him in an unfavorable position where he has to report to the mill manager and this action had
- H** damaged any confidence and trust between the parties involved. Based on the above, the court held that this transfer was a demotion in terms of position, function, status and responsibilities as well as economic loss and benefit to the claimant.
- I** [38] No doubt the court is not bound by technical rules, but as a court of equity and good conscious, the court needs to consider the substantive rules which form part of the principle of natural justice. Having perused the evidence presented, the court finds that the claimant has discharged his onus of proving, on a balance of probability, that he was constructively dismissed on

30 July 2002.

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REMEDY AND AWARD

[39] The claimant pleaded that he be reinstated to his former position without loss of all salary and benefit together with arrears from the date of dismissal to the date of reinstatement. On the facts of the case, reinstatement, in the court's view, will be inappropriate as it is clear that the claimant and the companies are not on good terms towards the end of his employment with the companies. The court is inclined towards awarding a sum of compensation that is fair and just.

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[40] In this case, the claimant had been with the companies for about three years and based on his salary statement for the month of May 2002 (CLB22), the claimant's salary was RM5,000. The court will therefore award compensation in the form of backwages limited to 24 months last drawn salary. According to the claimant, he has been self-employed as an insurance agent since 2003. Since the claimant have had some income since the time of his dismissal, it would be fair to deduct ten percent (10%) from the backwages to be awarded. In lieu of reinstatement, the court will award one month's salary for the one complete year of service he had put in. The claimant will be awarded as follows:

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|---|------------|
| Backwages RM5,000 last drawn salary X 24 months | RM 120,000 |
| Less 10% deduction | RM12,000 |
| | RM108,000 |
| In lieu of reinstatement, RM5,000 X 3 months | RM 15,000 |

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[41] The said sum of RM123,000 shall be paid by the companies to the claimant's solicitor within 30 days of the award to be released to the claimant after income tax clearance.

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Claimant's claim allowed.

Reported by Ashgar Ali Ali Mohamed

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