

**IN THE INDUSTRIAL COURT****CASE No. 8/4-442/17****BETWEEN****TANG KHENG SIONG ..... CLAIMANT****AND****SARAWAK SHELL BERHAD..... COMPANY****AWARD NO: 1048 OF 2020**

<b><u>CHAIRMAN</u></b>	:	Y.A. Puan Ani Ak Solep
<b><u>VENUE</u></b>	:	Pejabat Tenaga Kerja, Miri Sarawak
<b><u>DATE OF DISMISSAL</u></b>	:	31.05.2016
<b><u>DATE OF FILING</u></b>	:	27.05.2016
<b><u>DATE OF REFERENCE</u></b>	:	27.03.2017
<b><u>DATE OF MEDIATION</u></b>	:	11.04.2018
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## **REPRESENTATION**

For Claimant : Mr Gabriel Kok and Ms Chew Pei Yee  
Messrs Khoo & Co. Advocates

For Company : Mr Patrick Liaw  
Messrs Jimmy H.T. Wee & Co. Advocates

## **AWARD**

This is a Ministerial reference to the Industrial Court under section 20(3) of the Industrial Relations Act 1967 (IRA) made on 27<sup>th</sup> March, 2017 for an award in respect of the dismissal of Tang Kheng Siong (Claimant) by Sarawak Shell Berhad (Company) on 31<sup>st</sup> May, 2016.

### **A. Background facts**

Vide a letter dated 14.3.2002, the Claimant commenced employment with the Company as Senior Barge Engineer (Operations) for a fixed term duration from 14.3.2002 to 13.3.2004.

Sometime in 2010, the Claimant was offered an international assignment by Shell China Exploration and Production Co. Ltd ("Shell China"). The duration of the assignment was for a fixed term period of 3 years from 6.9.2010.

Sometime around March 2015, Shell China informed the Company that the Claimant's assignment in China will come to an end around May to June 2015. At that time, the Company tentatively identified a role for the Claimant in Malaysia.

Sometime in April 2015, the Company informed Shell China that the position identified for the Claimant was that of Fabrication Team Lead for the SK408 project.

Sometime in June 2015, Shell China wrote to the Company to request for an extension of the Claimant's last day on payroll in China until 30.11.2015.

Sometime between mid-2015 and 1.8.2015, the Company announced and implemented a restructuring exercise. The restructuring and reorganization exercise was known as Shell Malaysia Exploration & Production ("SMEP") Restructuring. According to the Company, the SMEP restructuring was implemented to right-size the organization in terms of structure and positions as well as increasing process efficiency and cost mindset via selected demonstrator (continuous improvement) projects. According to the Company, the contributing factors for the restructuring were the decline in oil prices, reduction in projects and adverse/challenging business conditions (decrease in revenue and profits), deficit in the Production unit, costs increase of 25% between 2011 and 2014.

The SMEP Restructuring impacted the Company's employees, including those who were on overseas assignments and due to return to the base

country i.e. Malaysia by 31.3.2016. The Claimant was impacted by the SMEP Restructuring as it included all expat Malaysians due to return to Malaysia by 31.3.2016.

The Company claimed to have various engagements with the impacted employees, including the Claimant, such as townhalls, email announcements to all impacted staff, including the setting up of a dedicated SMEP Restructuring Website, containing information on the SMEP Restructuring which is accessible to all impacted staff.

The Fabrication Lead role identified for the Claimant in April 2015 was also disestablished in the process.

Sometime in September 2015, the selection panel for Projects & Technology positions convened. Individuals who were considered in the selection panel were taken from a selection pool. The selection pool is then based on the individual's salary grade, performance and current estimated potential. The panel placed individuals into jobs by assessing their fit to selection criteria and job requirements. Eligible staff were selected based on primary skillpool and job skillpool. The selection criteria used were performance over the last 3 years (2014, 2013, 2012) for all the staff which is also known as IPF (individual performance factor and the ratings signify the performance of the individual) and CEP (current realistic estimate of the highest job that an individual will be able to perform in his or her future career within Shell) for staff who are salary grade 5 and above.

The Claimant was considered for all JG3 roles relevant to his skillpool however he was not successfully placed as his average past three years

IPF was lower in comparison to other selected candidates for the JG3 selection pool and he did not possess the necessary niche skills.

On or about 12.10.2015, the Claimant was verbally informed by Alaister Maiyor (COW3) that he was not selected for any position post-restructuring.

On or about 14.10.2015, the HR Services of the Company issued a letter to the Claimant informing him of his repatriation back to Malaysia and his assumption of the so-called Fabrication lead role in the SK408 project. The Company later claimed that the letter dated 14.10.2015 was issued in error.

On or about 20.10.2015, a separate repatriation notice was issued by Shell China to the Claimant informing him of his last day on payroll in China and that there is no role identified for him in the base country.

Kevin Au Wei Loon (COW1) was informed on 6.11.2015 that the repatriation letter dated 14.10.2015 was issued in error to the Claimant as the Fabrication Lead role was disestablished post-restructuring. On the same day, COW1 wrote to the Claimant informing him that the letter dated 14.10.2015 was wrongfully issued and explained that the Fabrication Lead role has been disestablished.

The Claimant responded to COW1 vide email dated 10.11.2015 stating that he maintained his position that the repatriation letter issued on 14.10.2015 is still in effect.

During a follow-up tele-conversation on 17.11.2015 between the Claimant, Carolyn Lim (HR Manager P&T), Gina Liao (Shell China HR) and COW1, the Claimant was informed that as a result of the said error the Company would give him a full 6 months' at risk notice commencing from the date he returned to Malaysia for him to try and secure a job in the Company in Malaysia. Normally, returning cross-postees without any identified role are given 3 months at risk notice prior to repatriation and a further 3 months after the issuance of redundancy notice after repatriation to try and secure a job. The full 6 months given to the Claimant was an exception given that his at risk notice should have commenced prior to his repatriation.

Vide email on 20.11.2015, the Claimant informed COW1 that he has chosen to return to Malaysia on 30.11.2015 as planned. The Claimant was given an option to stay on in China until 31.12.2015 but he declined.

The Claimant returned to Malaysia on 1.12.2015. The Company issued a Notice of at Risk to the Claimant dated 1.12.2015 informing him that the repatriation letter dated 14.10.2015 was issued in error as the Fabrication Lead role was disestablished post-restructuring. The Company also informed the Claimant that he is at the risk of redundancy unless he is able to secure a role within the Shell group of companies within Malaysia via the Open Resourcing process.

Sometime in January 2016, further to the Claimant's request COW3 assigned the Claimant a temporary assignment to assist in the Portfolio of Projects ("POP") team as the Claimant was not working on any tasks. The Company alleged that this assignment would have no impact on the Claimant's redundancy.

As at March 2016, the Claimant was not successful in securing an alternative role during the at risk period. On 1.3.2016, the Company issued a Notice of Redundancy to the Claimant and informed him that he still has 3 more months to try and secure an alternative role via the Open Resourcing process. The Company also notified the Claimant that his last day on payroll was on 31.5.2016.

The Claimant thereafter elected to go on garden leave effective 7.3.2016 vide his email of 3.3.2016.

As the Claimant was not successful in securing any roles via the Open Resourcing process, his last day on payroll was 31.5.2016.

The Claimant was confirmed at the time of his dismissal. His years of service to the Company was more than 14 years by the time he was terminated from employment. The Claimant's last drawn salary in the Company was RM31,460.00. His last drawn salary in Shell China was AUD17,514.94, the Claimant having opted to be paid in Australian dollars. Shortly after termination the Claimant secured a new job. At the time of the hearing of this case the Claimant was gainfully employed.

The Claimant was paid retrenchment benefits by the Company.

The Claimant avers that he was wrongfully dismissed by the Company on 31.05.2016 contrary to the principles of natural justice and/or industrial practice and/or in breach of the express and implied terms of the contract of employment and/or that his dismissal was without just cause or excuse.

The Claimant prays for reinstatement without any loss and benefits and service or compensation in lieu of reinstatement and backwages, compensation and/or other order or relief that the court deems fit and just.

The Company resists the Claimant's claim and contends, inter-alia, that the retrenchment of the Claimant was justified, bona fide and the ground of the retrenchment is true. The Company denies each and every allegation of fact contained in the Claimant's Statement of Case. The Company prays for the Claimant's case to be dismissed.

The following witnesses were called to testify:

By the Company:

- a) Kevin Au Wei Loon (COW1);
- b) Ng Gek Choo (COW2); and
- c) Alaister Maiyor (COW3)

By the Claimant

- a) The Claimant himself (CLW1)

## **B. Issue**

There is no dispute that the Claimant's employment with the Company was terminated on 31.05.2016.

The issue before the court is whether the Claimant's position and role is redundant to the requirements of the Company.

### **C. Company's case and submission**

The decision to relocate the Claimant back to Malaysia was pursuant to Shell China's notification that the Claimant's assignment in China would come to an end around May - June 2015. COW1 testified that following this notification from Shell China, the Company initially managed to tentatively identify at the material time a role suitable for the Claimant's skill set for him in Malaysia. Sometime in April 2015, the Company informed Shell China that the position identified for the Claimant was that of Fabrication Team Lead for the SK408 project. The Company pointed out the Claimant's expatriate assignment at the material time was impacted by the reorganisation in Shell China and that Shell China would not be able to host the Claimant beyond 2015.

#### **(I) Employees (MIMM) policy**

The Company's MIMM Policy at Tab 5 COBD1 serves as a guideline to help effectively manage expatriation opportunities for Malaysian employees. It also lists out the process of green card application for employees who intend to apply for international assignment.

The Company submitted that whilst the Company endeavours to assist a returning employee in securing a role, there is no guarantee that the Company would secure a job successfully for a returning employee as

this would depend on the availability of roles and the employee's suitability for the role.

On paragraph 2 at page 1 of Tab 5 COBD1 which provides, *"...and it offers support to overseas Malaysians in their search to secure their next job in the country"*, COW1 testified that in general, for Malaysia cross-postees who are outside Malaysia on international appointment, the Company, Base Country Malaysia will offer support where possible and applicable in assisting those cross-postees in identification of their next role when they are due to repatriate. COW1 further testified that it is not a guarantee that the Company will secure a job for the employees.

As for paragraph 3 at page 1 of Tab 5 COBD1 which provides *"...it also holds senior management in country accountable to ensuring stronger efforts are put into the creation of challenging jobs for returning expats"*, COW1 testified that specific to the Claimant, prior to the return of the Claimant in Malaysia the Claimant was informed that the Company would undergo SMEP restructuring involving the optimize organization structure resulting in challenging roles. The Claimant was included in the selection pool for those applicable roles during the selection panel.

It was put to COW1 that paragraph 6 at page 2 of the Claimant's At Risk letter which states *"the Company is under no obligation to offer you an alternative job position" is contrary to the MIMM policy"*. To this, COW1 disagreed and explained that the MIMM policy states that it is important for the country to provide good job for returning expatriates. That means that if an expatriate returns to the base country with a job. Therefore, it is the duty of the organisation that those jobs are relevant and challenging enough for those returning expatriates. COW1 testified that

there is no statement here in the MIMM policy to state that the Company guarantees any job for all returning expatriates and this aligns with the statement in the Claimant's at risk letter where the Company may and is not obliged to offer the Claimant a job.

The Company submitted that the contents of the MIMM above clearly illustrate that it is a guideline and the wordings therein are merely indicative of the steps to be taken by the Company to endeavour to help returning employees from overseas to look for a job. The Company submitted that there is nothing in the MIMM policy to state the consequence that will happen if the Company does not follow the guideline, a fact the Company alleged the Claimant conceded to in cross-examination.

#### Reasonable endeavours provision

Clause 14 of the letter of appointment issued by Shell China Exploration and Production Co. Ltd provides as follows,

*"If notified that your assignment (and employment under this contract) is to conclude, other than by reason of your resignation, and either as planned or prematurely through no fault of yours, your Parent will use reasonable endeavours to assist you in finding new employment with a company in the Shell Group, or one of the Shell Group's associated companies. You are required to use reasonable endeavours in assisting and cooperating with your Parent in identifying and securing other employment opportunities for you with a company in the Shell Group or one of the Shell Group's associated companies (in accordance with the*

*principles of the Open Resourcing system). Should no such alternative employment be found and secured for you, then your Base Company will notify you of the position that will apply and will legally represent the Parent.”*

The Claimant raised the issue that the Company guaranteed him a position when he returns to Malaysia by relying on the aforesaid Clause 14. The Company submitted that the Claimant's contention is misconceived. In this respect, COW1 testified during cross-examination that the said clause makes it clear that the employee is not guaranteed a position and confirmed that the said clause is consistent with the Company's MIMM policy and on Clause 14 COW1 testified and explained his interpretation of Clause 14 as follows,

*“As HR professional, my interpretation of this clause is that the word position does not mean job position but rather it means the approach that the Company will take. So reading the sentence in full, the clause meant that if the Claimant is unable to secure alternative employment then the base company will notify the Claimant of the approach that will be applicable to the Claimant. It is impossible to guarantee any returning expatriate a role upon their return and as a HR professional, I don't believe there are other external companies that will guarantee employees a role upon their return.”*

On this point, the Company referred to the case of **Alexander Jovcic v. Shell Global Solutions Malaysia (Award No. 1189 of 2019)** wherein the Industrial Court decided on the same provision in Clause 14 and ruled as follows,

*“[57] Based on this clause, on the completion of the Claimant’s international assignment the Company will use reasonable endeavours to assist the Claimant in finding new employment with a company in the Shell Group, or an associated company. The said clause does not state that the Claimant was to return to the Company, being his Base Company, to resume employment with the Company. Clearly reasonable endeavor is a mutual obligation, and accordingly the Claimant is also under an obligation to use his reasonable endeavours to identify and secure his next employment with a company in the Shell Group, or an associate company. So clearly this clause sets out that both the Company and the Claimant are obligated to try and find new employment for the Claimant within the Shell Group or its associated companies. This clause does not in any manner or form state that the Claimant is to return to the Base Company upon completion of his international assignment.*

*[58] In the event no alternative employment is found, the Company being the Base Company shall notify the Claimant of such situation and will thus legally represent the parent (namely Project and Technology)…”*

(II) Repatriation timeline

The Company’s policy for returning cross-postees was such that returning employees had 3 months before returning to Malaysia and then 3 months after return to Malaysia to secure a role. This would give the returning employee a total of 6 months to secure a role.

COW1 testified that in the normal circumstances, all Malaysians returning expat without roles are given 3 months to secure position but in this case the Claimant was given 6 months in total. COW1 explained that the Company would issue 2 letters to the Claimant whereby the first 3 months of At Risk inform the Claimant of the At Risk, if the Claimant is unable to secure a role at the end of the 3-month period, the Company will thereafter issue a Notice of Redundancy to inform the Claimant that he had a further 3 months to secure an alternative role.

In this case, given that there was a repatriation letter dated 14.11.2015, the Company issued the Notice of At Risk dated 1.12.2015 to the Claimant after he repatriated.

The Claimant asserted that he was deprived of 8.5 months of being in China to look for a role and that he lost out on the 8.5 months notice of repatriation. The following evidence would show that the Claimant's assertion is without basis:

- i. The Claimant wrote the email dated 23.2.2015 at Tab 4 CLBD1 to Simon Ong informing him that his position in Shell China was impacted by the Shell China re-organisation. This means that the Claimant would need to return to Malaysia in any event.
- ii. In June 2015, SMEP announced the re-organisation in Malaysia whereby the entire upstream organisation is to be restructured and all positions need to be redesigned for the new organisation. The Claimant was informed of the same and he confirmed this in his email to Simon Ong on 8.9.2015. This means that from 25.6.2015 onwards the Claimant could have looked into other options non-

upstream position in the organisation while awaiting the results of the selection panel

- iii. Around mid-October 2015, the Claimant was informed by COW3 that he was not successfully selected for an upstream position post-restructuring. Therefore, the Claimant could still continue to look into the OR system for non-upstream positions.
- iv. On 14.10.2015, the letter of offer for the Fabrication Lead position was wrongfully issued by HR Services to the Claimant. It is pertinent to note that the letter only came to COW1's attention on 6.11.2015 and COW1 immediately responded to the Claimant on the error explaining that the role did not exist in the new organisation and asked the Claimant to continue looking at other positions within the organisation.

In summary, the Claimant could have looked at positions within the organisation from the period of 25.6.2015 onwards until 14.10.2015 when the error occurred. After COW1 picked up on the error, the Claimant could have also looked at alternative position from 7.11.2015 onwards.

In view of the error of the letter that was wrongfully issued and that expatriates are normally given a total of 6 months to secure an alternative job (3 months at base and 3 months in host country), the Company had granted a special exception to re-set the Claimant's at risk period when he returned to Malaysia where he was given the full 6

months period effective 1.12.2015 instead of 3 months given to other returning expatriates.

The Company alleged that in fact, the Claimant confirmed that the Company had given him 6 months in Malaysia to look for a job. It was also put to COW1 that the signed repatriation notice on 17.11.2015 which repatriated the Claimant back 13 days later had deprived the Claimant of 8.5 months expatriate salary. To this, COW1 disagreed and explained it was Shell China decision that they were not able to keep the Claimant in China beyond 2015 but he had written to the Claimant to say that the Company was fine for the Claimant to even stay beyond 2015 if China agreed. COW1 testified that with regards to expatriate pay, it is only logical that an employee is paid an expatriate salary when they are overseas. When they return to their home country, they should be paid local salary, similar to other local employees. There is no intent to deprive him of any expatriate pay as it was Shell China who could not keep him in China due to their restructuring as written by the Claimant to his sponsoring GM.

### (III) GREEN CARD

- C. Based on Shell's MIMM policy, assignments will need to be supported by a green card before an employee can be considered for international assignments. The policy states, *"Assignments (except for STIA) will be supported by Green Card, which allows staff to be considered for international assignments"*.

- D. The process for a green card application is reflected at page 2 of Tab 5 COBD1. According to the diagram, the employee would need to submit a request for the green card before applying for international assignment.

The email dated 3.3.2016 wherein the Company's HR Expat Management instructed the Claimant to withdraw his MOR application(s) for roles outside of Malaysia as the Claimant needs to secure a green card beforehand.

COW1 testified that the Claimant did not have a green card as the Claimant had not requested for it either from the Claimant's line manager or the Claimant's business general manager. As such, the automated email at Tab 25 CLBD1 was sent to the Claimant. COW1 further testified that it is stated very clearly in the email that the Claimant needs to request for a green card before he applies for positions outside Malaysia.

After the email at Tab 25 CLBD1 was sent out, COW1 testified that he spoke to the Claimant and reminded the Claimant that he needs a green card if he is keen to apply for roles outside of Malaysia.

COW3 also confirmed that a green card is required in order to apply for an overseas job and in this instance the Claimant did not apply for a green card from him.

In respect of the Claimant's assertion that he did not know of green card permission, the Company submitted that this is an afterthought. In fact,

it was the Claimant himself who chose not to ask COW1, COW3 or Carolyn Lim about the green card procedure/permission after the Company told Shell Brunei to withdraw his application. The Company pointed out that he did apply to Kevin Au and Alaister for green card permission because he was very disappointed with them. He bypassed them and went straight to his sponsoring GM, Mr Simon Ong. The Claimant did not ask Carolyn Lim he was not in the right frame of mind to ask these people in HR. He was upset with Kevin Au. The Claimant was unable to show any evidence that he applied for a green card from Simon Ong.

The Company submitted that the Claimant was aware at all material times of the existence of the green card and the requirement to apply for a green card before applying for overseas jobs. The Claimant's responses during cross-examination:

*"Q. Refer to Tab 12 CLBD, your email dated 10/11/2015 @ 8:17 to Kevin. Am I correct to say that you were aware that you were required to obtain a green card before you can apply for an overseas job?"*

*A. Yes, I am aware...*

*Q. Put, you are aware that in order to apply for an overseas job in the organization you would need a green card*

*A. Yes"*

In any event, submitted the Company, even if the Claimant was not aware of the existence of the green card before, the Claimant did not apply for a green card even after he had been made aware. Assuming that the Shell Brunei and Shell Kuwait were real possibilities (which is denied), the Claimant should have applied for a green card after he was made aware that he needs to apply for the same. There is no evidence that the Claimant did so.

#### Justification for the retrenchment exercise

The Company had genuine and bona fide reasons to embark on the restructuring exercise which led to the redundancy of the Claimant.

In this respect, COW2 testified that the Brent oil prices suffered a decline since 2012. COW2 explained that the decline in the Company's revenue started in 2014 and deteriorated further in 2015. There was also an increase in staff costs since 2013 and staff costs formed 49% of the total costs in 2015. In terms of profit, although there was an increase between the years 2013 and 2014, the Company suffered a steep decline in profits and recorded a loss of RM38,495,000 for the year 2015. COW2 testified as follows,

*"From the summary of the average Brent oil prices above, it can be seen that in 2015 the oil prices declined by 53% since 2012.*

*In relation to total costs, revenue and profit, the following comparison table is instructive (the figures are reflected at Tab 2 COBD2):*

	2011	2012	2013	2014	2015	2016
<u>RM '000</u>						
Revenue	6,340,060	6,407,071	7,247,703	7,775,061	6,240,536	3,579,447
Staff Costs	646,488	589,796	684,158	843,573	1,163,590	982,192
Total Costs (made up of: a) Staff costs; b) Exploration expenses; c) Decommissioning and site restoration charge; d) Production and maintenance expenses (including feasibility expenses))	1,153,975	1,674,604	1,703,742	1,857,589	2,361,371	1,527,200
Profit/(Loss)	1,714,630	1,545,394	1,070,449	1,422,778	(38,495)	(420,166)

*From the above, it can be seen that:*

- *In 2015, revenue declined by approximately 20% from 2014*
- *In 2015, staff costs increased by approximately 70% from 2013. In 2015, staff costs made up 49% of the total costs*
- *In 2015, profit declined by approximately 103% to a loss from 2014”*

The Company had produced its directors’ report and audited financial statements for the years ended 31<sup>st</sup> December 2012 through 31<sup>st</sup> December 2016 which contains key information on the Company’s financial performance for the respective years. A summary of the foregoing statutory accounts can be found on Ex. COBD2 Tab 2 which

also contains a copy of the comparison table of Sarawak Shell's financial position for the years 2011 through 2016.

COW1 testified that the SMEP restructuring was implemented to right-size the organization in terms of structure and positions as well as increasing process efficiency and cost mindset via selected demonstrator (continuous improvement) projects. The contributing factors for the restructuring were the decline in oil prices, reduction in projects and adverse/challenging business conditions (decrease in revenue and profits), deficit in the Production unit, costs increase of 25% between 2011 and 2014.

The SMEP Restructuring exercise adopted the placement panels approach whereby staff is selected into positions based on skillpool fit, performance, potential and leadership attributes. The placement panels are conducted in a cluster, cascading approach i.e. 1) GM, 2) GM-1 (JG1, JG2 and JG3 positions with leadership accountability) 3) Certain GM-2 positions 4) All remaining positions at GM-1, GM-2, GM-3 and below (refer to tab 4 of COBD2 for a copy of the SMEP Restructuring – People FAQ Version 5.0 (last updated on 15.7.2015))

The Claimant was redundant and surplus to the requirements of the company

## RESTRUCTURING PROCESS

(I) Applicable FAQ during the selection process

E. COW1 explained the relationship between the FAQs for the SMEP Restructuring at Tab 4 COBD2 and Tab 52 CLBD4 as follows,

*“Tab 4 of COBD2 is the FAQ for the SMEP restructuring completed on 15/7/2015. This document elaborates more on the resourcing approach and the selection criteria to the employees so that they are fully aware of it before the selection panel happened in September 2015.*

*Tab 52 CLBD4 is also the FAQ for the SMEP restructuring updated on 3/11/2015 after the selection has been completed and communicated focusing mainly on the next steps after the organisation goes live.*

*On Tab 4 of COBD2, given that the document was published before selection is done, there is a more detailed information on the selection criteria for employee information compared to Tab 52 of CLBD4 as that document was updated after the selection has been completed.”*

COW3 testified that during the selection panel, the relevant FAQ is the one dated 15.7.2015 at Tab 4 COBD2.

## (II) Selection Criteria & Process

The Company had called upon COW3 to explain the processes involved in the Placement Panel Resourcing. COW3 was one of the members of the Projects & Technology Projects selection panel during the Placement Panel Resourcing Process which sat on 25.9.2015 that decided on whether an individual should be retained in the new organization pursuant to the SMEP Restructuring.

On the Placement Panel Resourcing Process, COW3 testified that individuals who would be considered in the panel will be taken from a selection pool. The selection is then based on the individual's salary grade, performance and current estimated potential. The panel would place individuals into jobs by assessing their fit to selection criteria and job requirements. COW3 further testified that eligible staff will be selected based on primary skillpool and job skillpool. The selection criteria used are performance over the last 3 years (2014, 2013, 2012) for all the staff which is also known as IPF and CEP for staff who are salary grade 5 and above. IPF refers to individual performance factor and the ratings signify the performance of the individual. This is an annual assessment of performance based on the employee's goals for a particular year. CEP refers to the current realistic estimate of the highest job that an individual will be able to perform in his or her future career within Shell. This is a forward-looking assessment on an employee's maximum potential and is undertaken at 2 year intervals.

COW3 explained that in the event that an individual is not placed in the new organization following the resourcing phase, the individual would be given an opportunity to apply for alternative and/or positions within Malaysia via the Company's Open Resourcing system during his/her notice period. The Open Resourcing system is the simultaneous posting of positions across businesses or countries. It is not automatic that the employee would get the position he/she applied for as it is subject to the approval of hiring managers.

Based on the selection criteria stated at page 2 Tab 4 COBD2, COW1 testified that there are 3 factors to look at as far as where the category of the Claimant and other similar employees are concerned namely, (i) the

employee's primary skill pool and job skill pool, (ii) the employee's Individual Performance Factor (IPF) over the last 3 years and (iii) the employee's Current Estimated Potential (CEP) which depends on niche skill, e.g. primary skill pool. Project Engineering is a broad skill pool. Under Project Engineering skill pool there are also multiple sub-skill pools categorized, which is categorized under project skill pool under Shell Engineering definition.

COW3 testified that on 25.9.2015, the selection panel deliberated on the selection of the roles into the new organization. The panel looked at the jobs post-restructuring design that need to be resourced and looked at the available candidates in the selection pool. Thereafter they deliberated and decided on the best candidates for the jobs based on the selection criteria. In this respect, the Claimant was considered for the JG3 jobs available in the new organization. COW-3 referred to Tab 3 of COBD2 and testified that the Claimant was not selected for a role as his IPF record was lower than his peers and he did not have the necessary niche skills which justified his retention. The Claimant's past 3 years IPF was 0.93, which was lower in comparison to the other selected candidates for the JG3 selection pool.

The Company submitted that the entire selection process was done in compliance with the Company's selection criteria.

The Company submitted that Tab 3 COBD2 provides the panel with the power to consider the exceptional reasons in retaining the individuals concerned. The salient provisions of Tab 3 COBD2 as follows,

## **“RESOURCING APPROACH**

*...Staff will be selected into positions based on skillpool fit, performance, potential and leadership attributes.*

## **SELECTION CRITERIA**

*Eligible Staff will be selected based on primary skillpool and job skillpool.*

*Selection criteria which will be used are:*

- ☐ *Performance over the last 3 years (2014, 2013, 2012)  
(for all staff)*
- ☐ *CEP 2014 (for staff who are Salary Grade (SG) 5 and above)*

*Secondary selection criteria used for leadership positions:*

- ☐ *Leadership Attribute (as per Shell Group expected proficiency)*

## **THE FOLLOWING ARE WORTH NOTING**

- ☐ *Shell Malaysia staff currently employed by other Shell Malaysia entities, who are available now until end Q1 2016, will only be considered in the event no suitable SSB/SSPC staff can be placed in the new organization*
- ☐ *Shell Fixed Term Contract (FTC)/Shell Short Term Contract (STC) staff is considered if no suitable permanent staff can fill positions in the new organization*
- ☐ *In a tie-breaker situation, due regard will be given to disciplinary records and length of service*

- ❑ *Consideration will also be given to Diversity and Inclusion (D&I) balances; provided the business does not suffer*
- ❑ *In matching individuals to positions considerations such as minimising dislocation and preserving business continuity where appropriate will be given*

### **PLACEMENT PANEL RESOURCING PROCESS**

...

*The leadership resourcing panel will be organized by layer, individuals who will be considered in the panel are taken from the selection pool. They qualify for the panel based on their Salary Grade (SG LC, SG1, SG2 and SG3) and CEP (CEP LC, CEP SE, CEP 1-2). The panel will place individuals into jobs by assessing their fit to selection criteria and job requirements..."*

The Company addressed the issues raised by the Claimant in relation to the individuals who were selected for the new organization.

The Company submitted that the Company has the prerogative to restructure and or reorganize its establishment based on its commercial and financial position.

In the case of ***Tuan Syed Hashim Bin Tuan Long v. Esso Production Malaysia Inc*** [1997] 1 LNS 99, it was stated that the right to reorganize the company is the prerogative of the management to achieve maximum efficiency and effectiveness. This prerogative belongs to the company provided it is done *bona fide*. If in the process some workmen had to be

laid off, there is ample provision in the law to provide them with retrenchment benefits.

(III) Individuals who scored lower IPF average than the Claimant

(a) Tony Tan

Based on Tab 3 COBD2, the Claimant's average IPF was 0.93 whereas Tony Tan's average IPF was 0.83.

COW1 testified the reason why Tony Tan was selected in preference to the Claimant although he had an inferior IPF and CEP as follows,

*"...as per the selection criteria listed in the Tab 4 COBD2. Look at "business continuity", Peoples Principle and Business Consideration. Tony Tan was selected into his existing role and not into the new role. The project he was supporting was Malikai, it is already at the tail end at that point in time and the role already had another approximate 12 months before it ends. Hence, it was not a permanent position. The reason Tony is selected is to ensure business continuity and to complete and close off his task at its final phase."*

This is confirmed by COW3 Who testified as follows:

*"The role that Tony was holding was an ongoing project that was about to be completed within 12 months. He was already in the fabrication yard. It was based on continuity. It was the best thing to do, not to disrupt the project. Tony Tan is the best person to continue because he has the best background for the project which is less than 12 months."*

(b) Umi Kalsum

Based on Tab 3 COBD2, the Claimant's average IPF was 0.93 whereas Umi Kalsum's average IPF was 0.9.

COW3 testified that although Umi Kalsum's IPF and CEP scores were lower than the Claimant's, Umi Kalsum was selected during the selection process because of her niche skill relating to regulatory compliance which the Claimant does not have.

(IV) Individual who was given the role of Senior Project Engineer

(a) Samuel Kong

COW1 testified that Samuel Kong was a Job Group 3 permanent employee of the Company who was initially unplaced post the outcome of the SMEP restructuring selection. However, during the selection panel Samuel Kong was already identified as the back-up candidate for the position of Senior Project Engineer in the event the selected employee for that position goes on secondment.

The Claimant was considered for the role of Senior Project Engineer however as testified by COW3, Samuel Kong was selected because, among other reasons, his IPF was higher than the Claimant at 1.07 whereas the Claimant's was 0.93.

(V) SK408 Project roles

The Claimant asserted that based on the organisation chart of the SK408 project post-restructuring October 2015 at Tab 3 COBD1, the Claimant was qualified and had the skills and experience for the following 4 roles:

- i) Execution Lead
- ii) Project Engineer
- iii) HUC Engineer
- iv) Field Engineer

COW1 testified that the only role suitable for the Claimant was Execution Lead as the rest of the 3 roles were of lower job grades than the Claimant's i.e. Job Group 4. Given that the rest of the 3 roles were of lower job grades than the Claimant's, their suitability for the Claimant's skill set were never discussed in the selection panel - refer to pages 99 - 100 of the Industrial Court's Notes of Proceedings. This was also confirmed by COW-3 - page 131 of the Industrial Court's Notes of Proceedings.

(b) Execution Lead - Ivy Yap

Based on Tab 3 of COBD2, Ivy Yap's average IPF was 1.07 whereas the Claimant's average IPF was 0.93.

COW-3 testified that Ivy Yap was chosen over the Claimant for the role of Execution Lead because her IPF was higher than the

Claimant's - refer to page 272 of the Industrial Court's Notes of Proceedings.

(c) HUC Engineers - Phua Sin Wei & Paul Tiong

COW-3 testified that the Claimant was not considered for the role of HUC Engineer for the SK408 project that was assigned to Phua Sin Wei as the said role was of a lower job group.

COW-3 testified that based on Tab 3 COBD2, the HUC Engineer role shown against Paul Tiong was a previous job and that in the old organization, HUC Engineers are at Job Group 3. After the restructuring, HUC engineers for SK408 are Job Group 4 or 5. Given that the Claimant is in Job Group 3, he would not have been considered in the Job Group 4 skillpool. The Company submitted that if the Claimant were to have been considered in the Job Group 4 skillpool, this would be unfair and deprive those in the Job Group 4 skillpool from a role.

C. Post- SmeP Restructuring

(I) Disestablishment Of Fabrication Lead Role

COW1 confirmed that the Fabrication Lead role identified for the Claimant in April 2015 did not exist anymore after the SMEP restructuring. COW3 testified that the Company disestablished the Fabrication Team Lead job function during the organization design for SMEP Restructuring. COW3 explained that the Fabrication

Team Lead job was disestablished because they wanted to leverage more on the fabrication industry in Malaysia. This was also in line with the objective of the restructuring process that is to make the organization leaner and more efficient. COW-3 confirmed that based on the chart at Tab 3 COBD1, Fabrication Lead was not renamed to Execution Lead, Project Engineer and HUC Engineer.

- (a) Letter dated 14.10.2015 to the Claimant informing him of his new role as Fabrication Lead post SMEP restructuring was issued in error.

After the Claimant was verbally informed by COW-3 on or about 12.10.2015 that he was not selected for any position post-restructuring, the Claimant received a letter issued in error on or about 14.10.2015 informing him of his assumption of the Fabrication Lead role in the SK408 project (refer to Tab 8 CLBD1).

To understand the reasons as to why the said letter was erroneously issued, it is pertinent to appreciate the interplay between HR Services and HR Account Managers in the Company. COW-1 explained at A23 COW1WS as follows,

*“To explain very simply, our HR department consists of, on the one hand, a division of HR account managers who deal and liaise directly and have face-to-face interaction with employees on any employment issues or matters. There is another division called HR Services, a back-office function, supporting the HR account managers. The HR Services is based in a separate*

*location and is a shared service center supporting HR Services in Asia Pacific countries including Malaysia.*

*The role of HR Services includes providing administrative and transactional support to the HR account managers. For example, when a new employee is hired or going on an overseas assignment, HR Services will be the party drawing up the documentation and attending to the administrative details to ensure that all necessary requirements are in place. The role of HR Services is therefore transactional – when they receive a form to activate a certain HR process, eg new employment or repatriation, they will proceed without necessarily enquiring or looking into the underlying request in the form.”*

In the Claimant’s case, when HR Malaysia was able to identify a suitable role for the Claimant in April 2015 for his repatriation to Malaysia before the announcement of the SMEP Restructuring, HR Malaysia had activated the process of repatriation and re-assignment. However, in the middle of this, the SMEP Restructuring in Malaysia occurred, which was handled by another section of HR. The repatriation process was not deactivated by the repatriation team after the SMEP Restructuring came into play, which was why the said letter was erroneously issued. Meanwhile, the HR team involved in the restructuring process was only able to finalise the selection lists by the end of October 2015 hence, the delay in the issuance of letters to those who were not successful in the restructuring.

COW1 explained on the phases involved in the SMEP Restructuring as follows,

*“The restructuring consists of multiple phases. The 1st phase is to inform the staff of the intent to restructure. The project team would then start working on the structure and design of the new organisation. If I can recall correctly, the design of the new organisation would have been completed around end August or early September. Thereafter, the selection panel would convene to select employees into position of the new organisation design based on the selection criteria. Given that there are hundreds of jobs that need to be resourced, the selection panel, I believe completed the selection around early October. The communication of the outcome to employee then began in mid-October and should be completed by end of 3rd week of October. Only then HR will consolidate the list of offer and acceptance by employees based on the communication outcome and sent to our HR services team in Cyberjaya to issue the job offer letters to employees in November...”*

To summarize, the letter informing the Claimant of his new role as Fabrication Lead in Malaysia dated 14.10.2015 was erroneously issued as the Company’s restructuring team has yet to provide the consolidated list to the HR Services team to issue to the employees due to timing issues. The letter was issued by the HR Services Team based on the earlier advice to them in April 2015 where the Claimant was originally identified a position in the SK408 project.

The Company submitted that once the Company became aware that the letter dated 14.10.2015 was issued to the Claimant in error, it took prompt action into the matter. COW-1 testified he was only informed on 6.11.2015 that the Claimant was wrongly issued a repatriation letter dated 14.10.2015. Once COW-1 was made aware of the mistake, he

then wrote the email dated 6.11.2015 at Tab 12 CLBD1 to inform the Claimant that the letter dated 14.10.2015 was issued in error.

(II) Interim Support For Portfolio of Projects Team

Based on the email at Tab 16 CLBD1 dated 18.12.2015, COW3 wrote to the Claimant to inform the Claimant that he had spoken to a colleague, Gabriel Yii, who suggested that the Claimant provide interim support to his (Gabriel Yii's) team. The Claimant was then assigned to assist with the F23 ESDV Valve Relocation and the E11 Nitrogen punchlist commissioning projects.

Contrary to the Claimant's contention that he secured a role as Senior Project Engineer, the Company submitted that the Claimant's contention is misconceived due to the following reasons:

It will be noted that COW1 sent an email at Tab 19 CLBD1 dated 29.1.2016 to the Claimant to clarify that his At Risk Notice will still be applicable during his temporary assignment with the Portfolio of Projects team. COW-1 testified that the At Risk for the Claimant continued to be in force unless there is a valid job offer via 2 routes, 1 - official offer letter by the Company, 2 - official job offer on the OR system

The Senior Project Engineer position which was assumed by the Claimant on a temporary basis during his At Risk period was not an actual position as it was not required by the Company. To this end COW1 testified as follows,

*"The Claimant did not secure a role as Senior Project Engineer on his own. I believe he approached his Line Manager, Alaister*

*Maiyor to offer his services while he continues to search for alternative roles within the Company during his At Risk period. My colleague, Alaister will be able to share this in full detail. However, the Senior Project Engineer position which was assumed by the Claimant on a temporary basis during his At Risk period was not an actual position as it was not required by the Company. After the Claimant left the organization, there was no additional headcount or Senior Project Engineer position that was removed to replace the Claimant. He was only assigned to the Portfolio of Projects team to provide assistance during his At Risk period as he was available and that he had requested to provide support for which Alaister would be able to provide further details.”*

For all returning expatriates, they will be given a generic title and this was done for the Claimant as he has not secured a role yet.

COW3, the Claimant's line manager at that time, confirmed that the Claimant did not secure the role of Senior Project Engineer. COW-3 further confirmed that the Claimant held the temporary role of Senior Project Engineer in Gabriel Yii's department from 4.1.2016 onwards to help out and the work is meant to be completed by Lee Wei Zhan. COW3 testified that when the Claimant asked me to find work to keep him busy during his time at risk, COW3 reached out to Portfolio Projects to see if he could help. His name appeared at column 3 on line 3 says that he is part of that help. And also has Lee Wei Zhan's name in taking care of that project.

Gabriel Yii's email dated 26.2.2016 to the Claimant at Tab 21 CLBD1 clearly states that the Claimant's assignment in his team is on a short-term basis for approximately 6 months.

It will be further noted that Gabriel Yii clarified that the 2 projects were originally assigned to Lee Wei Zhan and that the Claimant's role was only to help out on a temporary basis as per his email dated 2.3.2016 at Tab 29 CLBD1 as follows, *"When Alaister mentioned that you are available to help out in December 2015, I assigned you to assist Wei Zhan on the 2 projects on a temporary basis"*.

There was no job offer or any official letter issued by the Company for the period when the Claimant was assisting the Portfolio of Projects team.

COW1 testified that if it was really a valid assignment and that a resource is really required for a 6-months duration, the Company would not have allowed any gardening leave.

The Claimant asserted that his emplacement on the Portfolio Projects team was not temporary as he was asked to prepare a Goals and Performance Appraisal ("GPA") report and also sought to rely on other factors such as the Company issuing him with a Company credit card, sending him for medical check-up and safety training. The Company submitted that the factors relied on by the Claimant do not prove that his role on the Portfolio Projects was permanent.

(a) GPA Report

The GPA sets out the targets and/or goals for an employee when they are in service with the Company during the specified year for the

purpose of assessing the employee's achievement during the particular year.

The Company submitted that the GPA has neither contractual force nor is a guarantee of employment.

COW1 testified that any employee who is still on the Company's payroll as of February of the year is required to submit the GPA regardless of whether they have a role or no role at that point in time in order to allow the line manager to assign a rating or for the purposes of bonus calculation. COW-3 also confirmed that the GPA is created at the beginning of the year and over the year the contents can be changed.

It will further be noted that COW-1 testified that the GPA report at Tab 22 of CLBD1 is not a finalized GPA report for the Claimant for 2016.

COW3 confirmed that the GPA report at Tab 22 of CLBD1 was unfinalized and that it was he as the Claimant's direct supervisor who finalizes the GPA report.

(b) Issuance of Company credit card, medical check-up and safety training

The Claimant asserted that he was assigned a substantial role and for the long-run on the Portfolio Projects team by virtue of the Company issuing him with a Company credit card, sending him for medical check-up on 16.1.2016 and for safety training for offshore work on 20.1.2016. To this, COW-3 disagreed and testified as follows,

(i) Credit card

*“We don’t discriminate against staff who are at risk and they are still searching for job and they are still staff...”*

(ii) Medical check-up

*“Having a valid medical is predominantly meant for offshore without clearing the medical, you cannot go offshore...”*

(iii) Safety Training

*“Because over that short period, he may be needed to go offshore to assist LWZ. That is why I disagreed that it is long term requirement...”*

*...Safety course is a request by the Claimant...”*

D. ALTERNATIVE JOB POSITIONS

COW1 testified that he wrote the email dated 3.5.2016 at Tab 29 CLBD1 to the Claimant highlighting available internal opportunities at that point in time to assist the Claimant in case he is not aware of the positions in the OR system.

It was also put to COW-3 that there is nothing in the GPA report at Tab 22 of CLBD1 that the Claimant is to work on the project handled by Lee Wei Zhan. In response, COW-3 testified that Tab 22 is unfinalized and that it is still a draft.

The available internal opportunities at that time were Senior Technical Advisor – MMI, Senior Technical Advisor – E&I & PACO and Global Process Lead – R&I/ME/AIM. The Company submitted that the Company's actions were consistent with the MIMM policy in that the Company did use reasonable endeavours to assist the Claimant in obtaining a job during a difficult period.

As for the SK408 Project, COW1 testified that there were no vacancies in SK408 after the completion of the selection panel and if there are any vacancies, it would be posted on the OR if it is not part of the roles that were resourced during the SMEP restructuring selection panel. COW1 explained that the SMEP restructuring involved the upstream business and its supporting function and that in Shell Malaysia they have other business that are not part of the SMEP restructuring e.g. downstream hence if there are vacancies in those departments, it would be posted on the OR system which the Claimant has full access to and can apply if he wished to.

The Claimant was well-aware of the situation having written to Simon Ong as early as 8.9.2015 (refer to Tab 7 CLBD1) and it will be noted that the relevant extract of the Claimant's email reads as follows,

*"Dear Simon,*

*How are you? I am writing to update Sponsor GM on my situation and hope to obtain some updates on post GM-2 restructuring exercise.*

*Prior to restructuring announcement on 25-Jun, I was identified to join SK408 team on 1-Dec-2015. Subsequently my transfer was activated by HR on 27-Jul-2015.*

*With now not sure about validity of pre-restructuring arrangement, I would like to take this opportunity to express my desire to re-join SSB and continue serving the company...”*

(a) The Claimant did not attempt to look for alternative positions

The Company submitted that the Claimant was the one who did not take any steps to look for a role after he knew that the Fabrication Lead role was disestablished.

The Claimant claimed that he did not know that the Company's website published the new structure/design on 25.9.2015 as he did not access the website and that he considered that he was already in safe hands by virtue of Simon Ong's reply to his email on 8.9.2015. The Company said, the Claimant's claim is without basis. The Company highlighted that the Claimant confirmed during cross-examination that the July version of the FAQ at Tab 4 COBD2 does not state that once an employee is earmarked for a role he will be guaranteed the earmarked role.

The Company submitted that the Claimant's assertion that since he had been earmarked for the Fabrication Lead role since April 2015, he did not need to look for a job whether in June 2015 or any other month is ludicrous given that roles/positions would be in a state of flux during a restructuring. In fact, the Claimant expressed his concern over the uncertainty of the purported earmarked position vide his email at Tab 5 CLBD1 to Simon Ong. It is also pertinent to note COW3's testimony as follows,

*“Over that period, it was common knowledge since June 2015 that we were undergoing restructuring. Any earmarked or information like that is expected to change and reading through some of the documents here, if I refer to Tab 5 CLBD1 written by Tang, Claimant to Simon Ong at 4:23 am 3rd line “With now not sure about the validity of pre-structuring arrangement, I would like to take this opportunity to express my desire to re-join SSB and continue serving the Company”. Looking at this document even the Claimant do acknowledge the uncertainty of the so-called earmarked position and in the same email he also references the restructuring email on 25 June. Therefore, he could have started finding a job.”*

It will be noted that the Claimant confirmed during cross-examination that he was unsure whether the Fabrication Lead role would still be available for him on 8.9.2015

The Company submitted that there is no basis for the Claimant’s belief that the offer letter dated 14.10.2015 was legally binding in view of the fact that the Claimant was already aware of the disestablishment of the Fabrication Lead role on 12.10.2015.

#### No Victimization of The Claimant

As submitted above, there was a need for the Company to undertake the SMEP restructuring due to the decline in oil prices, reduction in projects and adverse/challenging business conditions (decrease in revenue and

profits), deficit in the Production unit, costs increase of 25% between 2011 and 2014.

Hundreds of employees were impacted by the SMEP restructuring and the Claimant was no exception. The Company submitted that the Company had done its level best in trying to obtain alternative positions for the Claimant. On this point, COW1 and COW3 testified as follow,

*“...I don’t think that any other companies can guarantee a return role for their returning expatriates. In the period of 2015, there was a huge downturn in the oil price impacting the oil and gas industry resulting in the SMEP restructuring. There were hundreds of Shell employees impacted by the reorganisation which is unfortunate. Hence, the Claimant was not the only one who was impacted. There was certainly no victimisation as we even reset his at risk period to give him the full 6 months when he returns to Malaysia. So everything was done in good faith.”*

### COW3

*“In general, it could have been better for him but unfortunately he was not alone during this time. I believe we have tried hard to find a job for him but over that period it was difficult.”*

*“I don’t believe so. He was not the only person who was released. It was a difficult time. We tried to find a place and put him in the selection pool like any other staff and taken care of his well being during his time with us. So I don’t believe he was victimized.”*

The Claimant contended that the Company should have offered him the jobs which were lower grade than his. The Company submitted that this is not a viable option as the Company has a duty to be fair to its employees. COW1 testified the role of HUC Engineer was offered to Phua Sin Wei but not to the Claimant. There are many other employees at that lower job grade of JG4 who were also affected and did not have a role as an outcome of the SMEP restructuring. Therefore, if the role is offered to the Claimant who was of higher job grade, it means that Phua Sin Wei and other employees at JG4 who did not secure a role would not be fairly treated by the Company as they would also lose out as the opportunity to secure that job which is at their job grade.

Contrary to the Claimant's allegation that the Company had victimized him, the Company submitted that the following evidence is clear that the Company handled the Claimant's case in a transparent and consistent manner, went to great lengths to accommodate the Claimant, provided the Claimant sufficient time to search for alternative positions and expended its own efforts in looking for alternative positions for the Claimant:

- i. When Shell China informed Shell Malaysia that the Claimant's assignment in China will be coming to an end in early 2015, COW1 had proactively helped the Claimant secure a role as Fabrication Lead in the SK408 project;
- ii. When Shell China requested for an extension in the Claimant's repatriation date until end of 2015, Shell Malaysia approved the request. Otherwise, the Claimant would have repatriated much sooner;

- iii. When the SMEP restructuring was announced at the end of May 2015, all employees including COW1 were only informed at that time. COW1 informed the Claimant that they were not sure what the new organisation would be like and whether the Fabrication Lead role will continue to exist but COW-1 assured the Claimant that he would be considered for all jobs relevant to his skill pool and job grade in the selection panel;
- iv. The Claimant was treated the same as all returning cross-postees and had access to all the documents and FAQ relating to the SMEP restructuring; the Claimant was included in the selection panel for consideration for available upstream positions;
- v. During the selection panel, COW1 ensured that the criteria listed in the FAQ relating to the SMEP restructuring were applied consistently to the Claimant and that he was treated fairly;
- vi. The communication of the outcome of the selection panel to the Claimant was done in a consistent timeline similar to everyone else where he was informed that he was not successfully placed in any roles;
- vii. When COW1 became aware that HR Services issued the Claimant the Fabrication Lead offer letter in November 2015, he immediately on the same day wrote to the Claimant on 6.11.2015 to explain the situation to the Claimant;
- viii. As the Claimant's HR focal point, COW1 had always responded to the Claimant on time, speedily on weekends and late nights without delay and had never once refused or

rejected his request to speak or to attend to his queries and his situation;

- ix. Both COW1 and COW3 explored alternative opportunities for the Claimant;
- x. COW1 also informed the Claimant that the Company would be supportive of him extending his assignment in China until the end of 2016 provided that the Claimant is able to secure the approval of his line manager in China at the time - refer to page 3 Tab 12 CLBD1;
- xi. For all returning cross-postees Malaysia expatriates, the Company officially provides them with a total period of 3 months in the host country to look for a role and another 3 months in the base country to look for a role upon repatriation. As the Claimant did not receive a full 3 months in China to look for a role, the Company gave him the full 6 months in Malaysia;
- xii. The Claimant was given a choice either to repatriate in November or December 2015 but he opted for November 2015;
- xiii. When the Claimant returned to Malaysia, he spoke to COW-3 to request to make himself useful and COW-3 helped him out with the Portfolio of Projects work while he searched for an alternative role;
- xiv. During the 6 months when the Claimant was in Malaysia, COW1 had proactively look into the OR system for any technical roles that is as per the Claimant's job grade and surfaced to him for his own consideration if he is keen to apply, just in case the Claimant was not aware of it;

- xv. At the meeting with COW1, COW3 and Gabriel Yii on 1.3.2016 when the Claimant disagreed that he continued to be At Risk of redundancy and said that he was working under protest, the Company gave him options as to whether he would like to continue with helping in the Portfolio of Projects team until his last day of payroll or to go on garden leave.

The Company highlighted that COW1 wrote the email dated 8.11.2015 to the Claimant to update the Claimant on the efforts that COW1 and COW3 had been trying to explore for the Claimant. It is pertinent to note that in his email dated 9.11.2015, the Claimant replied to COW1's email and stated that he was appreciative of the efforts that COW1 and COW3 have provided to help him explore the opportunities.

## E. OTHER ISSUES

### (I) Confidentiality of Selection Panel's Deliberations

COW1 testified that the selection panel does not publish its reasons on why any employee is selected or not selected as it contains confidential information such as employees reference, track record and the Company has to respect data privacy. If an employee is not selected, the employee will be informed that they are not competitive based on the selection criteria but the Company would never reveal or make reference or comparison against other selected employees by revealing their confidential

information such as the performance history because it is not ethical and because of data privacy.

The summary at Tab 3 COBD2 sets out the candidate pool and remarks as to why employees with lower IPF and/or CEP were selected. As to the reason the remarks column for employees with higher IPF and/or CEP were blank, COW-1 explained this is because the IPF and CEP of employees who were selected are higher compared to the Claimant hence it is clear that they have met the selection criteria.

(II) IT System screenshots

The Claimant contended that the role of Ivy Yap as Execution Lead was only filled between 15.1.2016 - 19.2.2016 based on Tabs 18 and 20 of CLBD1. To this, COW1 disagreed and explained that in Tab 1 COBD3, Ivy Yap started as the Execution Lead on 1/11/2015. This is the HR record and is the most accurate and updated record. Tab 18 and 20 of CLBD1 is actually the Company's email and IT system data which takes time to update and is not always the most accurate. Since the IT system relies on the HR system to obtain the most updated information. COW1 did not know why the IT system was not yet updated in November 2015 as he did not take care of the IT system but he assured and confirmed that employees record are always based on the HR system which he could confirm that Ivy Yap started a role on 1.11.2015.

(III) Overseas Job Applications (Shell Brunei Issue)

The Claimant produced emails entitled “OR - My application for Job: 3035/394105 (*Project Delivery Lead*)” (Tab 50) and “OR - My application for Job: 3035/392961 (*Construction HSE Advisor*)” (Tab 51) in CLBD3.

On these emails, COW3 testified that these are system generated emails notifying the applications by the Claimant. However, the Claimant did not follow-up with COW3 personally on these emails. COW3 further testified that in the event that the Claimant wishes to apply for jobs the Claimant should inform COW3 for him to check whether the job is available and if there is an overseas job to apply and ask for a green card

The Claimant asserted that based on the email from Hj Omar Marzalenie dated 19.2.2016 at Tab 41 CLBD2, he managed to secure a promising potential job inquiry with Shell Brunei. The Claimant contended that he was victimized when he was instructed to withdraw his application premised on the reason that he had not obtained green card permission. If indeed the Claimant had really managed to secure a promising potential job inquiry with Shell Brunei, why did the Claimant not pursue the same by applying for a green card? Even assuming the Claimant was not aware of the green card requirement earlier (which is denied), he could have applied for a green card at this juncture but he did not do so.

The Company submitted that Tab 41 CLBD2 does not constitute evidence that the Claimant was shortlisted by Shell Brunei. The email at Tab 41 CLBD2 merely requested the Claimant for his latest IDP with up

to date information of Shell People Number, last 3 years IPF, CEP and current salary grade.

Based on the foregoing, the Company submitted that the Company has clearly proven that there was a redundancy situation which justified the cessation of employment of the Claimant.

The Company submitted that the Claimant's dismissal was with just cause and excuse and prayed that the Claimant's claims be dismissed.

#### **D. The Claimant's case and submission**

The framework of the Claimant's submissions are on the facts, evidence and circumstances of this case; to show that the manner in which the Claimant was treated in each of the 3 periods, leading up his dismissal:

- (i) from the time when he was on expatriate assignment in China and was to be repatriated back to Malaysia;
- (ii) back in Malaysia in his effort to find an alternate role in Malaysia; and
- (iii) his efforts to find an alternate role in Shell Brunei and Shell Kuwait; against the backdrop of the purported reasons of restructuring and redundancy proffered by the Company of:
  - (a) low crude oil prices;
  - (b) the Company's financial hardship; and
  - (c) the Claimant's earmarked position was no longer available and that there were no other available roles for the Claimant:

were all made wrongfully, not bona fide, misconceived, unfair, unreasonable, disproportionate, irresponsibly and/or without any basis such that the Claimant's dismissal on 31.5.2016 was without just cause or excuse.

The Claimant submitted on the documentary evidence which will show as follows:

- (i) The Claimant was not given the additional 6 months to stay in China to look for a new role when he was informed (after he signed the Company's letter of offer for his earmarked role back in Malaysia) that the earmarked role was offered in error; but was given only 2 weeks to repatriate back to Malaysia; when on his first day of reporting for work on 1.12.2015, he was served with a letter giving notice of at risk of redundancy.
- (ii) Even back in Malaysia, when he secured another role of an approximately 6 months assignment (starting 4.1.2016), the Company took away that role before completion of the 6 months and made him redundant on 31.5.2016 without offering him further time to look for a role, or to allow him to complete the 6 months assignment or to even offer him available roles left vacant by the Company for which the Claimant was qualified for.
- (iii) Further, the retrenchment exercise affecting the Claimant was not bona fide as the purported reasons were found to be illusory; and available roles in the Company suitable for the Claimant were not offered to him.

- (iv) The Company also blocked the Claimant's attempt to follow a promising lead for a role in their overseas group of Shell companies including in Shell Kuwait and in Shell Brunei (in fact shortlisted by Shell Brunei) even though (a) the Company's stance was that there was no roles for him in Sarawak Shell Berhad, (b) his salary would have been paid by Shell Brunei and (c) the misconceived reason of (lack of) green card does not apply to the Claimant.

The Claimant's submissions referred extensively to the Company's own contemporaneous documents which the Company in these proceedings were attempting to argue against.

#### Claimant's expatriate assignment to China

1. After he joined the Company, the Claimant was progressively promoted over the years. In year 2010, the Claimant applied for an overseas posting and was assigned by the Company to work in Shell China as a Malaysian expatriate. It was not disputed that when the Claimant applied for his overseas Shell China expatriate assignment, it was without a "*green card*". Apparently, the green card system is a subsequent permission based system of the Company whereby the Company states that before an employee is allowed to apply for overseas job, he/she needs a "green card" from the Company. The Company made an issue of this green card during the trial of this matter; hence the Claimant bring this reference in at the outset of this submissions.

Whilst on his expatriate assignment in Shell China, the Claimant claimed he was guided by three (3) relevant documents issued by the Company as to how he is to be managed overseas and how he is to be repatriated back:

- 1.1 letter from Shell China of his long term international assignment effective 6.9.2010 (Tab 2 of CLBD1);
- 1.2 Management of Internationally Mobile Malaysian Employees (“MIMM”) guidelines issued by the Company (Tab 3 of CLBD1); and
- 1.3 HR Online - Repatriation and Severance Timeline issued by the Company’s HR (Tab 53 of CLBD4).

In respect of the MIMM guidelines, the Company had another version of its MIMM guidelines at Tab 5 of COBD1. However, the Claimant emphasized that it is the MIMM version at Tab 3 of CLBD1 (and not the MIMM version at Tab 5 of COBD1) which was and is applicable him. .

The Claimant brought this up because the MIMM guidelines applicable to the Claimant (at Tab 3 of CLBD1) did not have any reference to “*green card*” nor any green card application procedure therein; as opposed to the MIMM guidelines at Tab 5 of COBD1 which has the green card procedures therein.

2. The pertinent points to note about each of the abovementioned 3 documents are these:

- 2.1 Letter of long term international assignment (Tab 2 of CLBD1)

From Clause 14 at page 5 of Tab 2 of CLBD1; “*Your Base Company is Sarawak Shell Bhd and your Parent is Upstream International. ... If*

*notified that your assignment (and employment under this contract) is to conclude, other than by reason of your resignation, and either as planned or prematurely through no fault of yours, your Parent will use reasonable endeavours to assist you in finding new employment with a company in the Shell group or one of the Shell's group's associated companies. ... Should no such alternative employment be found and secured for you, then your Base Company will notify you of the position that will apply and will legally represent the Parent".*

This contractual term sets out that if the Claimant cannot find or secure alternative employment at the end of the overseas expatriate assignment, the Base Company i.e. Sarawak Shell Berhad will notify of the *position* that will apply. This means the Company will place the Claimant in a role back in Malaysia.

2.2 MIMM (Tab 3 of CLBD1) a similar copy was sent by email by the Company's HR to the Claimant is at (Tab 37 of CLBD2)

At page 1 of this MIMM document, it states expressly that the Company "*offers support to overseas Malaysian in their search to secure their next job in country*" and that "*It also holds senior management in country accountable to ensuring stronger efforts are put into the creation of challenging jobs for returning expats*".

Also, it is stated, inter alia:- 2. *It is our aspiration to bring home Malaysian employees after one assignment*".

"5. ... *the extension of an expat assignment cannot be made without the approval of country HR and the sponsoring GM*".

*“6. It is important for the country to provide good jobs for returning expatriates”.*

And at page 2 of the MIMM, *“a. All employees going or currently on an expat assignment will have a sponsoring GM who will be responsible to stay in touch with an expatriate during their assignment”.* This means that when the expatriate is on assignment overseas, the Company, Sarawak Shell keeps in touch with the Claimant through a sponsoring GM in Malaysia. It is to be noted that the Claimant’s sponsoring GM who was responsible to stay in touch with the Claimant was Mr. Simon Ong.

### 2.3 HR Online - Repatriation and Severance Timeline (Tab 53 of CLBD4)

The Company also has a HR online policy document for expatriates called the Repatriation and Severance Timeline setting out the timeline and milestone events for an expatriate to repatriate back to his/her home country at the end of the overseas assignment. It sets out the timelines clearly, starting at 3-6 months prior to planned availability date (i.e. end of assignment date), there will be discussions on the next role for the expatriate employee. This Company HR document is at Tab 53 of CLBD4 and the timeline is at page 3 thereof.

In the Company’s HR Online’s Repatriation and Severance Timeline (at page 3 of Tab 53 of CLBD4), the Company’s HR and timeline to repatriate and the severance of a returning expatriate is at page 3 thereof (The word *“policy”* is used in page 1 of Tab 53 of CLBD4. The Company’s stance during this trial is that the timeline set out at page 3 of the Company’s document at Tab 53 of CLBD4 is *“just an example”*.).

An examination and perusal of this HR policy document reveals the following:

On page 1 of Tab 53 of CLBD4, the Company's states that:

*"Who does this policy apply to?"*

*This policy applies to all permanent employees who are on a Long Term International Assignment. It does not apply to Fixed Term Contract expatriates or assignments that are covered by the International Relocation on Local Terms only."*

On page 2 of Tab 53 of CLBD4, the Company's HR states:

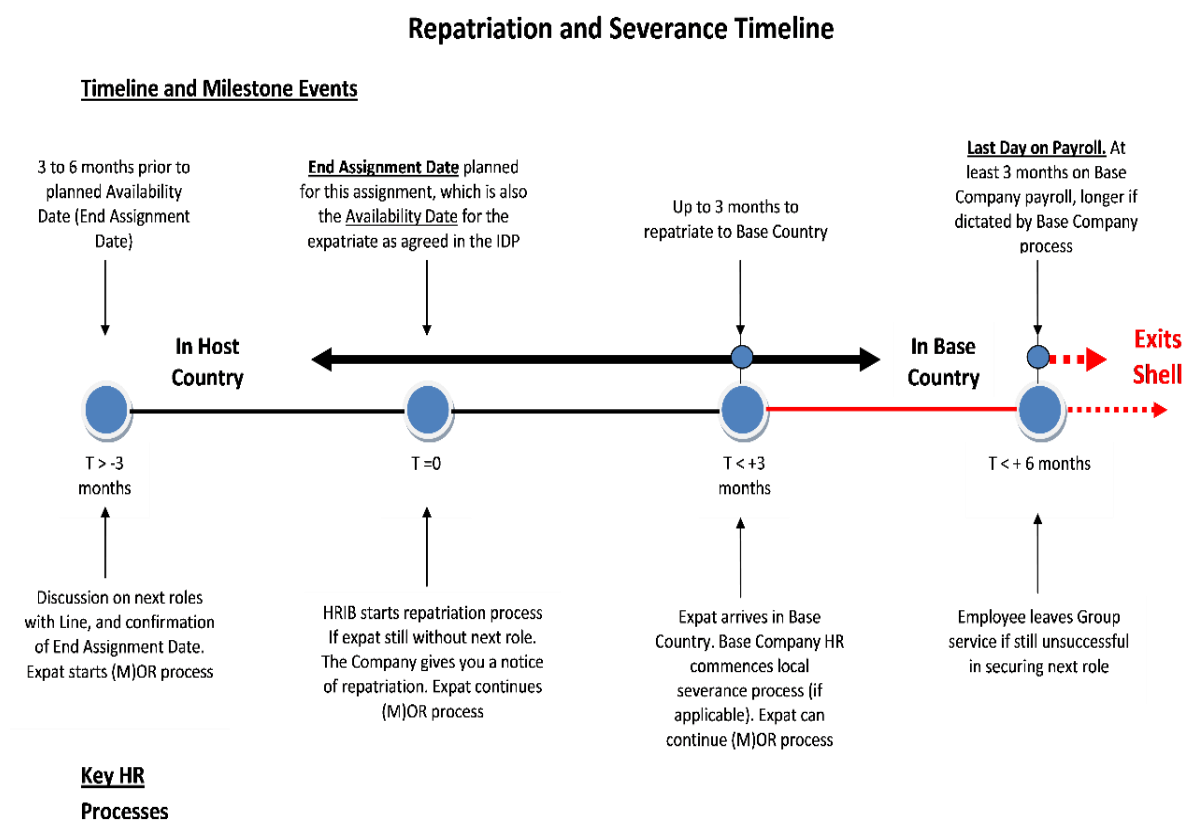
*"How much notice will I be given before I am repatriated to my Base Country?"*

*You will be given formal notice to end your employment contract (in line with the requirements of the contract), which was in place for the purpose and duration of your LTA. Your repatriation will consist of three steps:*

- 1. Towards the end of your assignment, your line manager will discuss alternative roles with you and give you sufficient time to search for alternative employment within the Group.*
- 2. After these discussions about alternative employment in the Group, and if you will be repatriating to Base Country then you will have a maximum of three months to physically repatriate and complete all aspects of your repatriation process.*
- 3. You should then expect to be back on the Base Company payroll within three months. If you have not found a role within the Group*

*upon your repatriation to the Base Country the Base Company will typically confirm that your employment with it is “at risk”.*

And on page 3 of Tab 53 of CLBD4, the Company’s charts out the Repatriation and Severance Timeline giving a chart of Timeline and Milestone Events as the Claimant reproduced below:



Therefore, Company’s HR policy applicable to permanent employees on Long Term International Assignment, like the Claimant, provides:

- 2.3.1 3 to 6 months prior to planned Availability Date (End of Assignment Date) in the Host Country (i.e. in China for the Claimant herein), there will be discussion on next roles, and the expat starts to look for new roles on the

(M)OR process (i.e. Managed Open Resourcing which is the Company's online platform to look for available roles published by Shell companies group).

- 2.3.2 at the End of Assignment Date, the repatriation process is started by HR. If by now (i.e. after the 3-6 months referred to above), if the expat is still without next role, then the Company gives Notice of Repatriation where the expat is given up to 3 months to repatriate to Base Country. During these 3 months of Notice of Repatriation, the expat is in the Host Country (i.e. China) and continues to look for roles in the (M)OR process.
- 2.3.3 Thereafter, upon repatriation to Base Country, the expat arrives and if at that point he still does not have a role, then Base Company commences local severance process and notices in the Base Country (i.e. in Malaysia). The expat can continue to look for a job.
- 2.3.4 In the Base Country, the timeline is stated at Tab 53 of CLBD4 as that of at least 3 months and not more than 6 months (i.e. at the HR chart where it states  $T < +6$  months).

It is therefore abundantly clear from the Company's own HR document above that the expatriate employee as a matter of policy, is given a number of specified months to start discussion on his next role, then next to look for a new role before repatriation at the end of overseas assignment and given 3 months to repatriate; and even upon repatriation

back to Malaysia, still given a number of months to look for a new role. Once repatriated back in Malaysia, the evidence is that the Company practises the giving of notices leading to redundancy in Malaysia in 2 stages (i) a Notice of At Risk of Redundancy of 3 months, and if no role is found then (ii) a Notice of Redundancy of another 3 months. Thereafter, the employee leaves service if still unsuccessful in securing a role.

Throughout the trial, the Claimant referred to the Company's own contemporaneous documents and also the acts of its own staff. And throughout the trial, the Company also sought to dispute its own documents, ranging from stating outright that their document was in error or that their document was not updated or that their document has a different meaning etc. This was a central theme by the Company in these proceedings.

The Claimant's assignment in China started from 6.9.2010 extended to a little over 5 years; this is not an issue. In early 2015, the Claimant's repatriation back to the Base Company (i.e. Sarawak Shell Berhad in Malaysia) was triggered and the search for new roles back to Malaysia begins. This can be seen in the contemporaneous email chain at Tab 6 of CLBD1 :

2.4 On 20.4.2015 at 10.41 am (at page 2 of Tab 6 of CLBD1), a Ms Joselyn Yeap of the Company's HR sent an email to Gina Liao of Shell China (with the same email copied to Kevin Au and Carolyn Lim both of the Company's HR). This email states that we (i.e. the Base Company) have "*identified roles for Chan Kheng Boo and Tang Kheng Siong*" (i.e. the Claimant). "*Timing wise on when they are needed back - we will be able to firm*

*this up in 2 weeks time. For Ong Wah Chong - we are still looking for roles for him”.*

2.5 Then, a week later on 27.4.2015 at 5.21 pm, an email was sent by the Company’s Muhtar Suhaili to Kevin Au of the Company’s HR (and copied to Jocelyn Yeap and to Lo Su Fook) telling Kevin Au of HR that the Claimant, *“Tang Kheng Siong has the position of Fabrication Lead earmarked for him, which will be required at the 1<sup>st</sup> quarter of 2016 earliest”.*

2.6 Kevin Au then replied in an email almost immediately at 5.22 pm and copied to Lo Su Fook as well, verbatim as follows:

*“Hi Muhtar,*

*As China need to repatriate them earlier, can we absorb Tang first and utilize him for some scope of work within the SK408 project and then move him to officially lead the fabrication team in 2016?*

*Kevin”*

3. It is therefore clear that the Claimant was earmarked for the role of Fabrication Team Lead on the SK408 project upon his repatriation. And also that the Company would absorb him and utilise him for some scope of work first. This role was discussed and known to Kevin Au (COW1). In fact, Kevin Au took credit for this securing of the Claimant’s earmarked Fabrication Lead role in the SK408 project in his (COW1) re-examination on 11.10.2018.

4. In Tab 5 of CLBD1, an email of 23.2.2015 from the Claimant to his sponsoring GM, Mr. Simon Ong shows the fact that the Claimant

started discussion and secured a role in end April 2015 ties in with the timeline that 6 months before EOAD (then anticipated in September 2015), he is to start looking for new roles. As will be evident later, the Claimant received his Repatriation Notice on 17.11.2015.

5. Thus, by end April 2015, the Claimant having been in these discussions (since 23.2.2015), was informed that he has been earmarked for the role of Fabrication Lead for the Company's SK408 project when he repatriates back to the Company from Shell China.
6. So, from end April 2015 onwards, the Claimant was secured with knowledge that when he repatriated later that year (in 2015), he would come back to his Base Company (i.e. Sarawak Shell Berhad) and his Parent (i.e. Upstream International) to the earmarked role of Fabrication Lead for the SK408 project. He need not bother anymore with the Repatriation and Severance Timeline of 6 months EOAD plus 3 months in China nor the 3 months + 3 months thereafter in Malaysia (T < + 6 months); to look for a role in Malaysia, as he has already secured the said earmarked role.

### Company's restructuring

In July 2015 whilst still in China, the Claimant heard that the Company announced a restructuring exercise. The Company also released a document on 15.7.201 on the principles, guidelines and FAQ of the restructuring exercise (Tab 4 of COBD2).

This restructuring was labelled as the SMEP Restructuring by the Company. The employees of the Company (local and overseas assignment) impacted were the Upstream part of the Company's business that was restructured (i.e. the Claimant's Upstream parent).

The witness statement of Alaister Maiyor (COW3), COW3WS gave an insight on the restructuring's selection process of these upstream employees. There was a selection panel. It consisted of Simon Ong (who headed the panel), Kevin Au (COW1), Alaister Maiyor (COW3) and a few others like Ian Lim and Richard Kho. The selection panel sat for "one or two days" on 25.9.2015. They looked at the new organisation, at the jobs post-restructuring and they placed employees into the restructured organisation. All upstream employees, Alaister Maiyor (COW3) testified, were placed into the pool of employees for consideration and for selection. The approach by the selection panel is that they select and they place; it is not for any employee to apply. (See: Q&A 12 of COW3WS(S)) "It is not for him to apply, we select. It is a placement approach. There's no avenue for them to apply. After November 2015, the job has been filled".) And this is confirmed in the SMEP FAQ No. 11 as discussed below, it is a selection and placement approach; there is no avenue for impacted employees to apply for jobs during the restructuring process. There was no information posted on the jobs available.

And yet, during the duration of the entire trial of this matter, Kevin Au (COW1) and Alaister Maiyor (COW3) constantly insisted that since the Claimant knew in July 2015 that the Company was restructuring and that all jobs were impacted; the Claimant could and should have started applying for job then since July 2015.

That is, the selection criteria is based on 3 criteria:- the IPF, CEP and skill pool. This is admitted by the Company's pleadings at paragraph 17.2 of its Statement in Reply.

The Claimant referred to FAQ No.26 above in this submission because the Company during trial used the mention of "*green card*" in FAQ No.26 to immediately point out that green card applies to the Claimant during the restructuring. With respect, this is an overly simplistic and intentionally wrong reading of FAQ No.26. This FAQ No.26 is addressed to "*if you are an existing green card holder*" and to their "*green card sponsoring GM*" informing them that the MIMM policy continues to apply during the restructuring exercise. For the Claimant, at all material times during his expatriate assignment in China, he was not an existing green card holder, nor did he have a green card sponsoring GM and neither did the MIMM policy version applicable to him have any green card policy spelt out.

What was applicable to the Claimant during the restructuring was his MIMM version (Tab 3 of CLBD1) and where FAQ No.27 of the SMEP FAQ states the MIMM policy continues to apply; and that "*you will be considered in the selection pool as part of the SMEP Restructuring resourcing process. You are encouraged to contact your sponsoring GM.*"

And this is exactly what the Claimant did, he contacted his sponsoring GM.

The Claimant contacted his sponsoring GM, Mr. Simon Ong (who was also the head of the selection panel but who was not called by the Company to testify during this trial), by email on 8.9.2015 at 4.23 am.

This email is at Tab 4 of CLBD1. The Company's witnesses had referred to this email by the Claimant to Simon Ong to cynically allege that this email shows that the Claimant knew in September 2015 that he was not sure of the pre-restructuring arrangement of his earmarked role, the Claimant ought to have started applying for new roles.

Again, this line of argument by the Company is disingenuous and misconceived. Firstly, the Claimant was not able to apply for any job during the restructuring. At the risk of sounding repetitive, it was a selection and placement. FAQ 11 at Tab 4 of COBD2 stated, "*We will be resourcing via a placement approach. This means you will not have to apply for your jobs (jobs will not be posted on Open Resourcing)*" and even Q&A 12 of COW3WS(S) testifies in chief "*It is not for him to apply, we select. It's a placement approach. There's no avenue for them to apply ...*". Secondly, the Claimant in emailing Simon Ong was doing exactly what the Company's FAQ asked him to do as a Malaysian currently on overseas assignment. FAQ 27 at Tab 4 of COBD2 states, "*You are encouraged to contact your sponsoring GM.*" In fact, the Claimant cut and pasted the entire FAQ verbatim at the bottom of his email to Simon Ong on 8.9.2015 at 4.23 am (Tab 3 of CLBD1).

In the Claimant's email of 8.9.2015 to Simon Ong, he updated Simon Ong that he (the Claimant) was identified to join the SK408 team on 1.12.2015; and that he expressed his desire to rejoin the Company and continue to serve the Company. This email is plain and easy to see, without the need for the Company's witness to embellish and read into it anything else that is not there. Now, Simon Ong replied nearly a week later, stating succinctly "*Thanks Kheng Siong. Your wish is noted*". Nowhere in Simon Ong's reply email did he say or even intimated that

the Claimant should start looking for a new role. The Claimant was cross examined on what Simon Ong meant when he replied “*Your wish is noted*”, and put that this does not amount to any assurance and that which “*wish*” was referred to.

Again, it is pertinent to note that Simon Ong, the head of the selection panel and also the Claimant’s sponsoring GM was not called by the Company to testify at all. Besides clarifying what he meant by “*Your wish is noted*” as been repeatedly PUT in cross examination to the Claimant, Simon Ong would also have been most qualified to testify on the timeline or repatriation process (as sponsoring GM) and the selection process (as he was the head of the selection panel).

The Company’s MD sent out emails upon the concluding of the restructuring exercise. The selection panel chaired by Simon Ong (and with Kevin Au (COW1) and Alaister Maiyor (COW3) also as members) sat on 25.9.2015 for “*one or two days*” (as Alaister Maiyor (COW3) testifies) for the selection and placement process. On the same day, of 25.9.2015, the Managing Director (Iain Lo) wrote an email to all SMEP P&T staff (at this stage on 25.9.2015, the Claimant was still with Shell China). Iain Lo’s email of 25.9.2015 at page 2 of Tab 6 of COBD1 states:

*“Dear Colleagues,*

*As part of my commitment to share information as soon as possible, the full SMEP organisation structure is now available on the web”.*

And 2 weeks later, on 8.10.2015, the Managing Director, Iain Lo sent another email to all SMEP and P&T staff (at page 1 of Tab 6 of COBD1),

*“Dear Colleagues,*

*We have concluded the resourcing of the organisation, and staff notification will begin tomorrow. Due to the size of the organisation, notification will take place over a few days until 16<sup>th</sup> October 2015”.*

The email of 8.10.2015 from the Company’s Managing Director confirming clearly that selection is concluded, and that notification to staff will take place over a few days (from 8.10.2015 until 16.10.2015). At this time, the Claimant was still in Shell China on expatriate assignment. On 12.10.2015, he received a telephone call from Alaister Maiyor (COW3) who at that point in time was neither the Claimant’s sponsoring GM nor was he of HR. Alaister Maiyor (COW3) admitted it was an informal telephone call.

It was not disputed that in the “*informal*” telephone call from COW3 to the Claimant on 12.10.2015; Alaister Maiyor (COW3) told the Claimant that he was not selected or placed in the restructuring. It is also not disputed that the Claimant said back to Alaister Maiyor (COW3) that this cannot be true for he had been earmarked for the Fabrication Lead role for SK408 when he repatriates from China to Malaysia. The Claimant asked for a formal notification on this, and also asked Alaister Maiyor (COW3) to help him out. Alaister Maiyor (COW3) also admitted that there was no formal letter or official letter on this.

And 2 days later after the informal telephone call (and within the 16.10.2015 timeline given in the email by the Company’s Managing Director), on 14.10.2015, the Claimant received Tab 8 of CLBD1; this is the Letter of Offer dated 14.10.2015 from the Company (signed by the HR Manager, Carolyn Lim) to the Claimant confirming that his Shell

China assignment “*will cease on 30<sup>th</sup> November 2015. You will be repatriated back to Sarawak Shell Berhad on 1<sup>st</sup> December 2015 to assume the position of Fabrication Lead*”.

The Claimant signed the letter of 14.10.2015 on 16.10.2015 and returned it to the Company.

The Claimant submitted that Alaister Maiyor (COW3), even though he took the stance that the letter of offer for the Claimant’s earmarked role of Fabrication Lead was wrongly issued, there was an official offer and an official acceptance and therefore officially a contract entered into between the Company and the Claimant on 16.10.2015. And that the offer letter was a mistake of HR, the same HR who had a representative on the selection panel; and that there was no subsequent formal letter to retract the Fabrication Lead role offered and already accepted. The Head of the selection panel (Simon Ong) and HR (Kevin Au (COW1)) as part of the selection panel knew at all times of the Claimant’s earmarked role. It also made no sense as to why Simon Ong was not a Company’s witness; unless for the reason that his testimony would be detrimental to the Company.

The purported explanation of Kevin Au (COW1) about the Claimant not being selected and the letter of offer of 14.10.2015 was wrongly issued in error makes no sense because:

- (i) Kevin Au (COW1) was involved in the discussion in April 2015 about the Claimant’s Fabrication Lead. In fact, Kevin Au (COW1) went as far as testifying that he “*proactively helped*” the Claimant to secure the Fabrication Lead role.

- (ii) Kevin Au (COW1) was part of the selection panel, together with the head of the selection panel, Simon Ong who was also the Claimant's sponsoring GM.
- (iii) After the Claimant wrote to Simon Ong to appraise him of his earmarked role in September 2015 in SK408, Simon Ong replied on 14.9.2015 (10 days before the selection panel sat) to state that "*Your wish is noted*".
- (iv) 10 days after Simon Ong replied to the Claimant (that "*Your wish is noted*"), Simon Ong headed the selection panel that included Kevin Au (COW1) of HR. Alaister Maiyor (COW3) testified as to the immediate nature that HR records was updated of the result of the selection panel.

Therefore, it could not have been an error when the Company's HR offered the Claimant his earmarked role after the selection panel sat. Kevin Au (COW1) blames HR services for the error, stating that the HR services team is not part of the SMEP Restructuring. This is a hollow empty excuse. He himself is of HR and he was part of the restructuring and also in the exchange of emails when the Claimant was earmarked for the SK408 Fabrication Lead. Carolyn Lim was also of HR and it was she who signed the Letter of Offer of 14.10.2015. And Alaister Maiyor (COW3) testified that the results of the selection panel would have been updated in the HR records "*almost immediately*".

Alaister Maiyor (COW3) admitted that his telephone call to the Claimant in China that the Claimant was not selected was an informal one. There was no formal notification that the Claimant was not selected. And it was not Alaister Maiyor (COW3)'s job to keep in touch with the Claimant. That role is with the sponsoring GM, Simon Ong. The Company during

trial wishes to make COW3's informal telephone call an issue. The Claimant submitted that during the material time, the Claimant was on Long Term International Assignment in China; matters like earmarked jobs upon repatriation ought to be issued formally and not tossed around in informal telephone calls especially in an organisation like Shell. But in any event, 2 days after the informal telephone call, the Company did make a formal official letter of offer. This was issued officially and formally by the official department to do so i.e. the HR department and signed by Carolyn Lim.

And, the Company's Managing Director, Iain Lo had sent his 8.10.2015 email to inform staff (Tab 6 of COBD1) that notification of the concluded selection will take place over a few days until 16.10.2015. The letter of offer by the Company's HR was indeed notified to the Claimant on 14.10.2015, within that time frame stated by the Managing Director.

By all contemporaneous events, it points unequivocally to the fact that the Letter of Offer of 14.10.2015 from the Company to the Claimant for the Fabrication Lead role (Tab 8 of CLBD1) and accepted by the Claimant on 16.10.2015 was not issued in error. The Letter of Offer was issued in accordance with the contemporaneous timelines. Yet, 3 weeks later on 6.11.2015 (Tab 11 of CLBD1), Kevin Au (COW1) sent an email to the Claimant to say that the letter for the Fabrication Lead role for SK408 (already accepted by the Claimant) has been wrongly issued. There was no formal letter to retract the accepted Letter of Offer. The Claimant received next some eleven days later, a signed Notice of Repatriation on 17.11.2015 to repatriate in 2 weeks on 30.11.2015. Only on 1.12.2015, on the first day when the Claimant reported back in Miri for duty was there a formal letter from HR to say that the letter of

14.10.2015 was an error. On the same first day back to Malaysia on 1.12.2015, the Claimant was given the Notice of At Risk of Redundancy to run for 3 months from 1.12.2015 to 28.2.2016.

Even during the trial of this matter, the Company made the suggestion to the Claimant that after he received the formal letter of offer of 14.10.2015 from the Company's HR, that he should have clarified with Simon Ong or Alaister Maiyor (COW3) or with the Company whether it was issued in error. With respect, this is a ridiculous suggestion. The Claimant had been earmarked months before for the exact same role now offered to him. During restructuring, he was told there is to be no application for jobs, he would be selected/placed. And 2 days before 14.10.2015, Alaister Maiyor (COW3) (who was not his sponsoring GM) made an informal telephone call to the Claimant in China telling him that he was not selected but promised to help him. And 2 days later on 14.10.2015, the formal letter of offer signed by HR arrived. Any reasonable employee would be very happy to have received such a letter of offer in the circumstances; and would not go ask his GM or anyone else in the Company, "*Is this an error?*".

The above clearly shows how the Claimant was treated after he had accepted an offered role already earlier earmarked for him; and then told by an email it was a mistake; and then told that he had to repatriate back to Malaysia within 2 weeks, to repatriate on 30.11.2015 to report back on 1.12.2015. We respectfully submit that the Company ought to have the decency, respect, consideration and a legal duty to stick to its Repatriation Timeline (Tab 53 of CLBD4) since they made "*an error*" to allow the Claimant to reset the timeline process of looking for a new role.

When the Claimant was told by Kevin Au (COW1) by email on 6.11.2015 that his role of Fabrication Lead was in error on 6.11.2015, the Claimant ought to have been given time afresh to reset the timeline for him to look for a new role whilst still in China, i.e. to reset the Repatriation and Severance Timeline to start again thus giving the Claimant 6 months EOAD plus 3 months before repatriation from China to look for a new role. But this wasn't so, as on 17.11.2015 (Tab 46 of CLBD3) the Claimant, after Kevin Au (COW1) emailed him to say that the offer was "*an error*", received a signed notice to repatriate in less than 2 weeks' time to Malaysia (by 30.11.2015). Thus the Claimant was deprived of the reset/afresh period of 8½ months (6 plus 3 months in China less 2 weeks). This was a painful and stressful time for the Claimant, having gone through a roller coaster of emotions from joy and elation to doubt and disappointment.

Kevin Au (COW1) testified that he could have offered the Claimant an extra month in China until 31.12.2015. This goes to show that even Kevin Au (COW1) was of the view then that the Claimant should be given time in China to look for a new role, but it is misconceived and insensitive. Firstly, Kevin Au (COW1) is not the sponsoring GM and has no authority to extend any overseas assignment (See: the MIMM (Tab 3 of CLBD1). Only the sponsoring GM has the authority to extend an expatriate assignment. Secondly, it is only natural for any employee like the Claimant to choose between one extra month in China or to come back to Miri to sort out the mess created by the Company's HR in respect of his earmarked role in Miri. Thirdly, the Claimant was issued a formal order in the notice to repatriate back dated 17.11.2015 in less than 2 weeks time on 30.11.2015. As it turned out, on the first day back

on 1.12.2015, the Company issued him with a Notice of At Risk of Redundancy.

The Claimant's roller coaster ride from China to Miri was not ending; it was set to continue as his quest to find a role on OR/MOR was impede at every turn.

### Company's purported reasons for the restructuring

The Claimant's learned counsel proceeded to examine the purported reasons for the restructuring. The reasons given by the Company was that it was because of the decline in Brent crude oil price and the drop in the Company's profits. The decided authorities are clear that if these reasons or excuses given are not made out, then the inevitable conclusion must be that the termination was without just cause or excuse. Kevin Au (COW1) had testified in his COW1WS about the reasons for the 2015 restructuring, at Q&A9 to Q&A 11. At Q&A 11 of COW1WS, he testified as follows:

### Witness statement of Kevin Au (COW1), COW1WS

*Q11. Why was there a need for the Company to undertake the SMEP Restructuring?*

*A11. The Brent oil prices suffered a decline since 2012. The decline in the Company's revenue started in 2014 and deteriorated further in 2015. There was also an increase in staff costs since 2013. Staff costs formed 49% of the total costs in 2015.*

*In terms of profit, although there was an increase between*

*the years 2013 and 2014, the Company suffered a steep decline in profits and recorded a loss of RM38,495,000 for the year 2015.*

Cross examination of Kevin Au (COW1) on 19.9.2018

60. Q: *In your COW1 WS, you have attempted to justify the Company's restructuring on the decline of Brent crude oil prices and the loss the Company was making in 2015/2016.*

A: Yes.

The Company called Ng Gek Choo (COW2) who was the Company's Malaysia Controller; she looked after the accounting and reporting of all the Shell entities in Malaysia. She was with the Company until 30.8.2019, and is now a secondee to a Shell joint venture company in Kazakhstan.

She gave evidence that the Company is in oil and gas exploration and production, and the Company is a subsidiary of Royal Dutch Shell. Ng Gek Choo (COW2) presented the audited financial statements and directors' report of the Company for financial years 2012 to 2016. She also presented figures extracted from the Company's audited accounts, she says these were prepared by the Company's Finance Department.

Against the figures of the Company's audited accounts from 2012 to 2016; she compared these to Brent Oil Prices. Ng Gek Choo presented a summary of average Brent oil price (in USD per barrel of Brent) from year 2012 to 2016; showing a decline in Brent oil price (from USD111.67

to USD43.73). She testified that she extracted the oil price of Brent from the Shell group's website.

In comparing the summary in the drop in Brent oil price with the summary in the drop in the profit of the Company, Ng Gek Choo was the Company's witness in its attempt to link the fall in the Company's profits to the drop in the Brent oil price and also due to an increase in costs of the Company.

The Claimant accused the Company of creative accounting to show loss. They can choose to pay a dividend of RM250 million to a foreign parent company (Shell Holdings (Bermuda) Ltd) in a year where loss is reported at RM420 million. Further, in respect of the shareholding of the Company (See: CCM Search of the Company (EX.CL1)), there are 6 shareholders and yet the Company for reasons best known to themselves only paid dividends to one shareholder, Shell Holdings (Bermuda) Ltd only and not to the other shareholders. To give evidence that the restructuring (and the retrenchment of the Claimant as a result) is a due to declining Brent oil price, declining revenue and losses has been proven to be all a smoke screen by the Company's own witness' testimony.

As for the depletion, depreciation and amortisation expenses of RM2.247 billion in 2016 (this amount is from the Company's own audited financial statement. See: page 12 of Tab 7 of COBD1), if these were taken out of the equation, then there is no trading loss or operation loss. From the decided cases cited by the Claimant in this submission, it has been held that in ascertaining what a trading loss/operating loss is to justify retrenchment, depreciation cannot by any stretch of the

imagination be described as trading loss. The law is that if the Company offers its audited statements to be analysed as a reason for retrenchment, the Court will scrutinise the same. Herein, the Company in year 2016 claimed depreciation and amortisation of RM2.247 billion. If this RM2.247 billion is deducted from the loss of RM420 million; the Company for year 2016 actually yielded a trading profit.

The Claimant submitted that not only did the Company fail to satisfy the burden to prove the purported reasons for the restructuring, their own audited accounts and witnesses prove to the contrary. Our appellate court's decisions are clear on this: as the Company chooses to give reason for its actions of restructuring, and since these reasons or excuse have not been made out, then the inevitable conclusion must be that the termination was without just cause or excuse.

The selection/placement process of the selection panel for JG3 Project Engineering skill pool

The Claimant went next to the Company's selection/placement process by Simon Ong's selection panel during the September 2015 restructuring. It is be recalled that the criteria for selection is based upon (as ascertained from page 2 of Tab 4 of COBD2 – SMEP Restructuring FAQ)

- (i) primary skill pool and job skill pool
- (ii) CEP (i.e. employee's potential to reach a higher job group)
- (iii) average IPF (individual performance factor)

Contemporaneous emails from the Company for e.g. the email from Kevin Au (COW1) to the Claimant on 2.3.2016 at 2:58 p.m. (Tab 24 of CLBD1) states of paragraph 2, 3<sup>rd</sup> line therein:

*“All employees in the selection pool were subjected to the same criteria (i.e. CEP and average 3 years IPF)”.*

It is the Company’s stance that the Claimant was not placed/selected based on the above criteria.

But even with the benefit of producing a self-serving Tab 3 of COBD2 with large parts of its contents blanked out (and without producing its source or master document), the information offered in Tab 3 of COBD2 does not stand up to closer scrutiny when compared the Claimant and other employees in this JG3 skill pool of Project Engineering.

The Claimant had issue with the Company’s successful candidates like Ivy Yap and Paul Tiong.

#### Vacant roles not offered to the Claimant

Next, the post restructuring organisation chart of SK408 at Tab 3 of COBD1 shows that post restructuring the 2 roles in the SK408 organisation; of Project Engineer and Field Engineer (amongst others) were vacant. The Claimant was qualified for both roles. But these roles were not offered to the Claimant, rather they were left vacant. This goes against ***Samling Timber Sdn Bhd v Siaw Fong Fee [1994] 2 ILR 20.*** Faced with the black letter of Tab 3 of COBD1, Alaister

Maiyor (COW3) again states it is not an updated chart. But he admits that this chart was submitted to Petronas. If this was so, it means that the Company submitted outdated documents to Petronas and more importantly the Company failed to submit an updated chart to the court. Tab 3 of COBD1 in the Company's Bundle of Documents would seem as an updated document when the Company relies upon it but it is not an updated document when the Claimant refers to it.

Therefore, the fact is that there were vacant roles in SK408, for Project Engineer and Field Engineer, COW3 testified that although the Claimant had the qualification and experience for the roles, they were not appropriate for the Claimant's level.

To summarise, the fact is that the evidence shows that the Company has been caught out by their own Tab 3 of COBD1.

- (i) Tab 3 of COBD1 purports to show Ivy Yap and Phua Sin Wei as being in the SK408 organisation post restructuring October 2015, when the fact of the Company's IT records show both to be only appointed after 15.1.2016.
- (ii) Tab 3 of COBD1 shows vacant roles were still available in SK408 post restructuring; roles that suited the Claimant's job skills set, but were not offered nor placed to the Claimant.
- i. In addition to Ivy Yap being selected after 15.1.2016, Ivy Yap was selected over the Claimant in breach of the LIFO rule when she is of less seniority (i.e. she joined the Company on 30.6.2006) than the Claimant (i.e. he joined the Company on 14.3.2002) as evidenced

by their respective IDP. Alaister Maiyor (COW3) testified in cross examination on 20.3.2019 at Page 201 of NOP that:-

176. PUT: *The Claimant had a longer length of service than Ivy yap.*

A: *Probably.*

Claimant back to the Company on 1.12.2015 and his role in Gabriel Yii's Portfolio of Projects (PoP) team as Senior Project Engineer from 4.1.2016

On his first day back to work at the Company, the Claimant was issued with a Notice of Risk of Redundancy on 1.12.2015 (Tab 14 of CLBD1). He was told that he must secure a role otherwise he would be made redundant. This was a constant theme when the Claimant came back. In the signed Repatriation Notice of 17.11.2015 (Tab 46 of CLBD3), "*When in Sarawak Shell Berhad you are encouraged to continue to use MOR/OR as available*". Even on 12.5.2016 at 4:54pm, Carolyn Lim of the HR sent the email to the Claimant (copied to Kevin Au (COW1) and Alaister Maiyor (COW3) at Tab 1 of COBD1 that "*I would encourage you to continue to look for roles in the OR/MOR*".

Alaister Maiyor (COW3) in his Supplementary Witness Statement, COW3WS(S) at Q&A32 testified that there were no job opening after the restructuring.

Q32: *Did you help to look for a job for the Claimant after the restructuring?*

A32: *We kept an eye for any opening but unfortunately there's none.*

But apart from the fact that there were in fact roles in SK408 still vacant but not offered to the Claimant; the other fact was that the Claimant did manage to secure a role. At Tab 17 CLBD1, the email of 26.2.2016 at 11.04 am shows that Gabriel Yii, the Manager of the Portfolio of Projects confirmed to the Claimant that *"your assignment in my team is on short term basis (approx. 6 months)"*.

This email at Tab 17 of CLBD1 was a trail from the day before, 25.2.2016 at 8.40 am where the Claimant emailed Gabriel Yii to thank him for appointing the Claimant to assume the role of Senior Project Engineer in Gabriel Yii's department on 4.1.2016, responsible for the delivery of the F23 and E11 projects. The Claimant also attached his GPA for Gabriel Yii's review and feedback. Gabriel Yii replied a few hours later also on 25.2.2016; without dispute as to the details of the Claimant's email and further asking the Claimant *"as per our GPA discussion, please:"* to delete certain items and that the rest of the GPA is ok.

The Claimant testified in his witness statement, CLW1WS, at Q&A28 that he was handed the F23 and E11 projects in respect of his role with Gabriel Yii's PoP team.

### The Claimant's Goals and Performance Appraisal (GPA) issued by the Company

The Goals and Performance Appraisal (GPA) is main central document of the Company in respect of the Claimant's role with Gabriel Yii's team;

issued to the Claimant. This is at Tab 22 of CLBD1. Now, Kevin Au (COW1) attempted to denigrate and water down the Claimant's role with Gabriel Yii's team; ranging from saying there was no formal letter of offer for the role in Gabriel Yii's team to that this was "*the so-called assignment*" and that the term "*Senior Project Engineer*" was a generic term. Alaister Maiyor (COW3) by comparison was somewhat more gracious about the Claimant's role with Gabriel Yii.

It is to be noted that the term "*temporary role*" was characterised during trial but the contemporaneous characterisation of the Claimant's role in Gabriel Yii's PoP team was that "*Your assignment in my team is on a short term basis (approx. 6 months)*".

The Company issues its Goals and Performance Appraisal (GPA) document to employees to set out what their goals for that particular stated period; and at the end of that period, the employee is appraised to ascertain as to whether those goals have been achieved. It was Gabriel Yii who finalised the Claimant's GPA, Alaister Maiyor (COW3) testified that it should have been him (COW3) that approves and finalises the Claimant's GPA but admitted it was okay to him (COW3) for Gabriel Yii to record the Claimant's GPA.

The fact remains, the Claimant's role as Senior Project Engineer in Gabriel Yii's PoP team is clearly spelt out in the GPA assigned to the Claimant by the Company.

But the GPA itself was not the only clear indication of the extent of the Claimant's role and goals back in the Company. Additionally, to back up

the Claimant's role back with the Company, the Claimant also had the following:

- (i) the Claimant's supervisor, Alaister Maiyor (COW3) signed off the approval for Shell Corporate Credit Card with Citibank with a credit limit of RM35,000.00, on 6.1.2016.
- (ii) the Company also sent the Claimant to do a medical examination, using the Shell proforma checklist on 16.1.2016.
- (iii) the Company also sent, and at the Company's expense, the Claimant for Offshore Safety Training on 20.1.2016. Again, the safety training was approved by the Company, paid for by the Company and is a prerequisite for the Claimant's role in Gabriel Yii's PoP team.

All these, together with the clear contents of the GPA approved by Gabriel Yii shows that the Claimant had secured a role of approximately 6 months from 4.1.2016 with Gabriel Yii's team to deliver the projects and goals as set out clearly in the GPA.

#### The Notice of Redundancy dated 1.3.2016

- (i) It was thus obvious that when the Notice of Redundancy was issued by the Company on 1.3.2016; the Claimant was still within the time frame of his role with Gabriel Yii's Portfolio of Projects team. Recall that this role was to be from 4.1.2016 to 4.7.2016 (i.e. approximately 6 months). As the Claimant's last day on payroll was stated on the Redundancy Notice to be on 31.5.2016; it was not necessary for Gabriel Yii to immediately terminate the Claimant's role on the

Portfolio of Projects team on 2.3.2016 the reason given by him was that of “*in view of the Redundancy Notice*” (See: Tab 29 of CLBD1, 2<sup>nd</sup> page email of Gabriel Yii to the Claimant on 2.3.2016 at 4.35 pm).

- (ii) Gabriel Yii’s email to the Claimant of 2.3.2016 (at Tab 29 of CLBD1) is extremely telling; for it admits that “*in view of the Redundancy Notice*”, the Claimant’s role in his team was terminated immediately. That is, Gabriel Yii would not have terminated the Claimant’s role with him if not for the fact that the Redundancy Notice was issued.

In summary, this part: when the Claimant repatriated back from China, he was immediately put At Risk of Redundancy on the first day (i.e. 1.12.2015) by the Company stating that he was to find a job within 3 months. And the Claimant did, it was a role starting on 4.1.2016 (well within the 3 months deadline to find a role) with Gabriel Yii’s PoP team as Senior Project Engineer with the responsibilities and goals set out in the GPA and with the Company Corporate Credit Card and medical and safety training certificates issued at the Company’s expense. This Senior Project Engineer role with the PoP team would and should have ended on 4.7.2016. Instead, the role was terminated on 1.3.2016 when the Company issued a Redundancy Notice stating that the Claimant’s last day on payroll to be on 31.5.2016. This was all wrongful on the part of the Company. What the Company should have rightly and correctly done is to wait until the Claimant’s role with Gabriel Yii’s Portfolio of Projects team to finish on 4.7.2016, and if the Claimant did not have another role then to issue him with an At Risk notice of 3 months from 4.7.2016; and if no role was still secured at the end of that 3 months from 4.7.2016 (i.e. by 4.10.2016) then a Redundancy Notice (of 3 months) that his last day

on the Company's payroll would be 4.1.2017. That is, once the Claimant found a role (on 4.1.2016), he was no longer at risk of redundancy and the time period in the Notice of At Risk of redundancy stops ticking. Instead, the Company by making the Claimant redundant on 31.5.2016 (instead of which should have been at the earliest 4.1.2017), assuming that he was unable to find a role by then, this deprived the Claimant of an additional 7 months and 4 days to continue to be on the Company's payroll. The termination of the Claimant on 31.5.2016 was therefore premature and wrongful.

### Jobs outside of Malaysia on the MOR

The third and final period in how the Claimant was treated by the Company is where he tried to look for jobs in Shell companies outside of Malaysia when he repatriated back to Malaysia. Recall Alaister Maiyor (COW3)'s testimony (at Q&A32 of his Witness Statement, COW3WS(S)) that at the material time that there were no jobs in the Company in Malaysia (notwithstanding their own SK408 organisation chart shows available vacant roles and that the Claimant did manage to secure the role with Gabriel Yii's Portfolio of Projects team for approximately 6 months starting 4.1.2016, but which was abruptly taken away on 2.3.2016). Recall also the exhortations from the Company that the Claimant has to look for a role otherwise he would be made redundant. For eg. Carolyn Lim of HR's email to the Claimant at Tab 1 of COBD1 where she wrote in the last line, *"I would encourage that you continue to look for roles in the OR/MOR"* and in Tab 46 of CLBD3, *"When in Sarawak Shell Berhad you are encouraged to continue to use OR/MOR as available"*.

The Claimant applied for Shell overseas roles on MOR

- (i) On 19.2.2016, the Claimant applied for the role of Project Delivery Lead under job application no. 3035/394105 with Shell Brunei LNG. The application was sent to Marzalenie Hj Omar of Brunei; and also to Alaister Maiyor (COW3)
- (ii) On 19.2.2016, the Claimant applied for the role of HSE Advisor under job application no. 3035/392961 with Shell Kuwait. This application was sent to Ahmed Maher of Kuwait and also to Alaister Maiyor (COW3).

Shell Kuwait did not reply or had a chance to reply; for the reason in the paragraph 122 below. But Marzalenie Omar of Shell Brunei LNG replied the same day to the Claimant *“To assist the line during the selection process”* asking for the Claimant’s latest IDP and for up to date information on

- *Your Shell People number*
- *Last three years IPF (2015, 2014, 2013)*
- *CEP and*
- *Current SG”*. (See: Tab 41 of CLBD2 (EX.CLBD2 Tab 41))

These are exactly the same type of information (IPF and CEP) that the Company’s selection panel had used the year before for its placement process during restructuring.

But the Company in this trial proceedings dispute all these documents; the Company stance is that there are no such documents at Tabs 50 and 51 of CLBD3. In respect of Tabs 50 and 51 of CLBD3 (the

Claimant's MOR application to Shell Brunei and Shell Kuwait), Alaister Maiyor (COW3) testified that his computer crashed and he did not back up his data for the relevant period of 19.2.2016. So he is unable to ascertain whether he did in fact receive these 2 emails. For Tab 41 of CLBD2 (the reply from Shell Brunei LNG), both Kevin Au (COW1) and Alaister Maiyor (COW3) dispute this email from Shell Brunei LNG. They point to the last paragraph of Tab 41 of CLBD2 where it states "*On 19 Feb 2016, at 9.51, Tang, Kheng-Siong SARAWAK-PTP/O/PD <Kheng-Siong.Tang@Shell.com> wrote:*", there is no indication of who this email was sent to. So, this email at Tab 41 of CLBD2 from Shell Brunei is suspicious, according to Kevin Au (COW1) and Alaister Maiyor (COW3).

But when the Claimant referred the Company's witness to an example of the Company's own email and put that it shows a similar set up; the Company's witness had no answer. This is the email chain at Tab 12 of CLBD12 on the 2<sup>nd</sup> page; where on 9.11.2015 at 12.01 pm, the Claimant wrote to "*Dear Kevin*" without any indication therein that this email was sent to Kevin Au (COW1). Yet, on the same day of 9.11.2015 at 8.37 pm, it can be seen that Kevin Au (COW1) replied to this "*Dear Kevin*" email. The setup of the Company's email in reply to an earlier email does not show whom the earlier email was sent to in the first place. It is submitted that the Company is grasping at invisible straws to dispute the email from Shell Brunei to the Claimant at Tab 41 of CLBD2.

The fact the Claimant did make MOR applications for roles outside of Malaysia is proven conclusively by the email dated 3.3.2016 from Shell HR Expat Management to the Claimant; and copied to Kevin Au (COW1). This is at Tab 25 of CLBD1. It states:

*“Hi,*

*We were made aware that you have submitted MOR application(s) for roles outside of Malaysia and you do not have a valid Green Card. ... In view of the above - you will need to officially withdraw your application from the system. Please let us know if the role you are applying for is a virtual role which can be done from Malaysia. We will be notifying the relevant GPSM and Broadcast Coordinator .to disregard your application for this role”.*

### The green card reason

It is thus patently clear that the Claimant submitted MOR applications for roles outside of Malaysia. It is also patently clear that the Claimant was asked to withdraw his applications for roles outside of Malaysia and Shell HR also notified the relevant broadcaster to disregard the Claimant's application for the roles. The reason given was that *“you do not have a valid green card”* and *“need to secure a green card beforehand”*. This *“green card”* reason was the reason given as to why the Company treated the Claimant's MOR applications in this way.

The Company's MIMM version at Tab 5 of COBD1 sets out the Green Card Criteria and Application Process. (Recall that the MIMM version applicable to the Claimant at Tab 3 of CLBD1 had no such Green Card Criteria and Application Process). Alaister Maiyor (COW3) testified in cross examination that one of the reasons for the green card is so that the Company can control its employees such that it is not disruptive on the Company's business to have employees applying for the more rewarding expatriate assignments on MOR.

The Claimant submitted that the Company overreached itself when it disallowed the Claimant's job applications to Shell Brunei and Shell Kuwait for reasons that are misconceived, i.e. as non-existent (that there being no green card criteria in the Claimant's MIMM policy) and contrary to its own FAQ Q2&A2 (that there is nothing from a system point of view to prevent the Claimant of Base Country Malaysia to apply for an expatriate assignment).

The Company's insistence on a green card and the Company's action in asking the Claimant to withdraw his MOR applications, and to ask the MOR broadcaster to disregard the Claimant's MOR applications are therefore wrongful, male fide, misconceived and/or disproportionate.

The Claimant did approach his sponsoring GM to orally ask for a green card, after being told to withdraw his MOR applications. Simon Ong merely replied the MIMM is not applicable. Even if Simon Ong had given the Claimant a green card, it was already too late to apply on MOR again. Recall that the MOR is in 4 batches each year; and each batch is open only for 10 days. The next batch after the Claimant's (withdrawn application) was in June 2016; but the Claimant's last day on payroll was 31.5.2016.

In the circumstances, the Claimant was prevented from following on a promising lead from Shell Brunei. The Company will say that there was never an offer from Shell Brunei. This is true; but it is also true that there was no chance for Shell Brunei to proceed further. Alaister Maiyor (COW3) admitted in his re-examination by the Company's learned counsel that Shell Brunei's email to the Claimant seeking for documents

and information meant that the Claimant has been “shortlisted” by Shell Brunei.

The Company’s HR made sure that the Shell Brunei’s consideration of the Claimant’s application was terminated abruptly; when it asked the Claimant to withdraw his MOR applications and for the broadcasters to disregard the Claimant’s MOR applications. The Company HR on the one hand asking the Claimant to look for roles on OR/MOR and saying that there are no available roles in Malaysia; acted male fide, wrongfully and/or disproportionally when on the other hand prevents the Claimant from proceeding with MOR application overseas when the purported reason of a lack of green card was misconceived, wrong and illegal.

The Claimant’s learned counsel summarized below every stage of the way where the Claimant was victimised by the Company in their mala fide actions:

- a. In Shell China, where the Claimant having been earmarked in April 2015 for the Fabrication Lead role, such role having been secured within the 3 months plus 6 months EOAD plus 3 months’ time prior to repatriation; and with an offer and acceptance of a Letter of Offer on 16.10.2015 for the same, only to be sent an email on 6.11.2015 that the Letter of Offer was wrongly issued and then receiving a signed Notice of Repatriation on 17.11.2015 to repatriate back to Malaysia in 13 days on 30.11.2015 without being offered a fresh 6 months EOAD plus 3 months to start again to look for a role in China. The Claimant was therefore deprived of an additional of 8½ months’ time in China to look afresh for a

role as a result; and therefore deprived of 8½ months of expatriate pay.

- b. The Claimant was not considered for roles during restructuring in September 2015 that went to Ivy Yap and Phua Sin Wei and even though the evidence of the Company's IT records show these roles went to Ivy Yap and Phua Sin Wei after the restructuring; as these roles were only filled after 15.1.2016 as shown in the Company's own IT records.
- c. The Claimant was not placed for roles in SK408 that he prevailed over other candidates upon the Company's own selection criteria (Umi Kalsum and Tony Tan).
- d. The Claimant was not placed for a role in Project Engineering which is his job skill pool and primary skill pool; the role going to Samuel Kong who was of neither skill pool and where the purported reasons for Samuel Kong's placement were without basis (i.e. to replace Mr. Zainuddin who was said on secondment, when the Company's own IT records showed he was not).
- e. The Claimant was not placed for the vacant roles in SK408 project left vacant during the restructuring even though he was able and willing and had the experience to perform these roles.
- f. The Claimant was prematurely and wrongfully made redundant on 31.5.2016 when he was still within the time frame of his Senior Project Engineer role with Gabriel Yii's

Portfolio of Projects team scheduled to end on 4.7.2016 to manage and deliver these projects as listed in the goals in his Goals and Performance Appraisal Report (GPA). If the Company had kept to its timeline of issuing firstly Notice of At Risk of Redundancy of 3 months, followed by secondly a Notice of Redundancy of another 3 months; the earliest the Claimant would have exited the Company (assuming that he could not secure another role during these 3 months plus 3 months of Notice of At Risk and Notice of Redundancy) would have been 4.1.2017 instead of 31.5.2016 as what happened. The Claimant was therefore deprived of 7 months and 4 days of local remuneration.

- g. The Claimant was victimised by the Company, and the Company was acting wrongfully, mala fide, misconceived and/or disproportionately which the Company asked the Claimant to withdraw his overseas job applications on MOR and when the Company asked the overseas job broadcasters to disregard the Claimant's MOR applications. The purported reason of lack of green card was misconceived, without basis, wrong, not bona fide, misconceived and/or disproportionate. The Company was about to make the Claimant redundant. If the Claimant managed to get an overseas job, his salary would be paid by the overseas employer (and not by the Company). Yet the Company refused to let the Claimant follow up on this; citing green card technical administrative reasons which in any case were misconceived.

The Company acted the way it did, a mixture of mala fide, misconceived notions, over zealousness and strong-arm tactics on the Company's staff in positions of authority. And this behaviour and attitude extended to this trial. Witnesses that ought to have testified for the Company were not called, clear unambiguous documents of the Company's own authorship and own IT Department were argued against by the Company during trial, documents of the Company that were relevant and pertinent were not disclosed. The Company's documents tendered by the Company were fabricated, blanked out and outright admitted not to be updated document. Even the proffered reasons for the SMEP restructuring were riddled with inconsistencies, irrelevance and shown not to be true.

Kevin Au (COW1), on the last day of his re-examination gave us a slight glimpse of the mindset of the Company's HR in the 2 questions before his re-examination concluded, where he was asked in re-examination and answered as follows :-

Re-examination of Kevin Au (COW1) on 19.3.2019 (noon) (Page 171 of NOP)

*Q: You were put question 10(a) (the Claimant was victimised by the Company with aim to terminate his employment prematurely) Why you disagree?*

*A: The Claimant was included in the selection panel for consideration for available upstream positions. Secondly, he was given sufficient time to search for alternative positions including his at risk period when he repatriated back to Malaysia*

*Thirdly, on my own initiative I even tried to highlight available position for the Claimant in case he was not aware.*

*Fourthly, if you refer to all the email communication between myself and the Claimant I always responded to him promptly without delay as I understand his case and I always treated it with outmost priority.*

*Fifthly, I even informed him that we are okay for him to remain in Shell China until end of 2016 provided he is able to secure approval of his line manager there in China as we had no intention of requesting his return as that was a Shell China decision.*

In all the above circumstances, the Claimant's retrenchment on the ground of redundancy and termination from employment was wrong. The Claimant seeks reinstatement without any loss and benefits and service as pleaded. If that is not possible, then in lieu of reinstatement, the Claimant will submit that the following is payable:

- (a) Compensation *in lieu* of reinstatement; and
- (b) Backwages in respect of the Claimant's basic salary of RM31,460.000 per month and all other contractual and/or fixed benefits and/or privileges and/or allowances that the Claimant would have been entitled to while in continued employment with the Company; and/or
- (c) Exemplary and/or punitive compensation.

## E. Evaluation of evidence and findings

The ground relied on by the Company for the termination of the Claimant's services on 31.5.2016 is that the Claimant's position and role is redundant to the requirements of the Company.

As rightly stated by the Claimant's learned counsel, the basic legal principles, the employer bears the burden to have concrete proof of actual redundancy and the retrenchment exercise must be done bona fide. When an employee challenges his/her dismissal by the employer, it is incumbent upon the employer to prove that the employer had just cause or excuse to do so. The standard of proof required is on a balance of probabilities. The same principles apply to redundancy. ***Bayer (M) Sdn Bhd v Ng Hong Pau [1999] 4 CLJ 155*** held that the burden is on the employer to come to court with concrete proof to prove actual redundancy on which the dismissal was grounded.

Raja Azlan Shah CJ in ***Goon Kwee Phoy v. J. & P. Coats (M) Sdn. Bhd. [1981] 2 MLJ 129*** held that, "*If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether the excuse or reason has or has not been made out. If it finds as fact it has not been proved, then the inevitable conclusion must be that the termination was without just cause or excuse. The proper inquiry of the Court is the reason advanced by it ...*"

Retrenchment has been held by our Court of Appeal to mean the discharge of surplus of staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by reason of disciplinary action.

See: ***William Jacks & Co (M) Bhd v S Balasingam* [1997] 3 CLJ 235**, which states that retrenchment connotes that the business itself is being continued but that a portion of the staff or labour force is discharged as surplusage.

Gopal Sri Ram JCA in ***William Jacks & Co (M) Sdn. Bhd v S Balasingam* [1997] 3 CLJ 235** put it as follows, “*Whether the retrenchment exercise in a particular case is bona fide or otherwise, is a question of fact and degree depending on a particular circumstances of the case. It is well settled that the employer is entitled to organize his business in the manner he considers best. So long as the managerial power is exercised bona fide, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound to investigate the facts and circumstances of the case to determine whether the exercise of power is in fact bona fide*”.

It is not in dispute that the Company announced and implemented restructuring exercise known as Shell Malaysia Exploration & Production (SMEP) Restructuring between mid-2015 and 1.8.2015. The restructuring impacted the Company’s employees, about 500 employees both home based and those on expatriate assignment and due to return to the base by 31.3.2016. The Claimant was one of the employees impacted.

When Shell China in around March 2015 informed the Company that the Claimant’s assignment would end around May to June 2015, the Company identified for the Claimant the Fabrication Team Lead role for SK408 project. Shell China then extended the Claimant’s payroll until

30.11.2015. The role of Fabrication Team Lead was later disestablished. After the selection panel for Projects and Technology convened in September 2015, COW3 who was a panel member informed the Claimant that the Claimant was not selected for any position post-restructuring. However, on 14.10.2015 HR Services of the Company issued a letter to the Claimant informing him of his repatriation and his assumption of the so-called Fabrication Lead role. The Company was to say later that the letter dated 14.10.2015 was issued in error.

On 20.10.2015 a separate repatriation notice was issued by Shell China informing him of his last day on payroll in China and there was no role identified for him in the base country. The Claimant was repatriated on 1.12.2015.

The repatriation of the Claimant on 1.12.2015 later became an issue because according to the Claimant, relying on the Company's Repatriation and Severance Timeline giving a chart of Timeline and Mile Stone Events, the Claimant should have been given 15 months to exit the Company if he could not find a role. The Claimant alleged that he should be allowed 3 to 6 months prior to planned Availability Date in China. This is relevant because the Claimant is claiming for the pay he would have received as an expatriate if he had been allowed 3 to 6 months in China prior to planned Availability Date in China. The Claimant has stated in his submission how he arrived at the 15 months to exit the Company if he could not find a role.

In a telephone conversation on 17.11.2015, the Claimant was informed that because the letter dated 14.10.2015 was issued in error, the

Company would allow him to serve the full 6 months' at risk notice commencing from the date he returned to Malaysia for him to try to secure a job in the Company in Malaysia. Cross-postees without any role are given 3 months at risk prior to repatriation and a further 3 months after the issuance of redundancy notice after repatriation to try to secure a job. The Company's witness COW1 as Manager of HR Account Manager would be familiar with Company's practice of the period given to the employees without a role to secure a new role. The Claimant did not cite an instance where an employee was allowed 15 months by the Company to look for a new role.

Having considered both the Claimant and the Company's evidence and submission the court rules that the period for the Claimant to secure a new role in the Company is 6 months and not 15 months. The 3 months at risk prior to repatriation should ideally be served by the Claimant in China but in the Claimant's case China could not host him beyond 31.11.2015 and as submitted by the Company the Claimant would be sent home to the base Company in any event and therefore, the Claimant did not lose out in terms of time or in terms of expatriate pay in China. The Claimant's demand for what he allegedly lost as expatriate pay in China is regretfully declined.

Next, the issue of whether the Claimant was to come home to assume Fabrication Lead role as stated by the letter dated 14.10.2015 or whether the said letter was issued in error as claimed by the Company. Although the Claimant was informed that he had the Fabrication Lead role identified for him in April 2015, he must have been aware that the Company was undergoing restructuring when the Company held events such as townhalls, email announcements and SMEP Restructuring

website set up after April 2015. An employee should be curious enough to enquire whether a role identified pre-restructuring would still be available post-restructuring. After the Selection Panel for Projects and Technology sat sometime in September 2015, the Claimant was verbally informed by COW3, a panel member that he did not have a role post-restructuring. COW1 testified that the letter dated 14.10.2015 was issued by HR Services, a unit under COW1. COW1 immediately acted on the error once it came to his attention writing on the same day to the Claimant that the letter was issued in error and that the Fabrication Lead role was disestablished post-restructuring. Looking at the content of the letter dated 14.10.2015, it appears to have been drafted to facilitate the repatriation of the Claimant and it is possible that the writer did not have an up to date knowledge of the Fabrication Lead role being disestablished post-restructuring. Because of COW3's telephone call to the Claimant on 12.10.2015 informing the Claimant that he was not selected for any position post-restructuring, it is probable that the letter dated 14.10.2015 was issued in error and indeed the Fabrication Lead role identified for the Claimant in April 2015 was being disestablished post-restructuring. The Company has adduced evidence that Fabrication Lead Role was indeed disestablished post-restructuring.

When the selection panel sat in September 2015 where individuals who were considered in the selection panel were taken from the selection pool. The selection pool was based on the individual's salary grade, performance and current estimated potential. The selection was done by way of placements and the candidates did not apply for the new role. Both COW1 and COW3 were in the selection panel. Simon Ong was also in the panel.

The Company's stance was that the Claimant was put in the selection pool but was not selected as there were others who prevail over him. Let us look at the candidates in the selection pool who were the Claimant's competitors and why they were selected. The Company said that Ivy Yap was selected because she had higher IPF than the Claimant. Her IPF was 1.07 against the Claimant's 0.93. Paul Tiong and Samuel Kong had higher IPF than the Claimant. Zainuddin bin Mohamad Saiee was on secondment. Umi Kalsum bin Jawawi had a slightly lower IPF than the Claimant at 0.90 and she did not even have any CEP. However, she was selected for a Regulatory Compliance role as she had a niche skill which the Claimant did not have. The other contender was Tony Tan who lost out to the Claimant on both IPF and CEP criteria but was selected. COW1 and COW3 testified that Tony Tan was retained because he was already in an existing role which is a transition role to be disestablished in about 12 months. Tony Tan was retained for business continuity according to COW3. The other roles were lower than JG3 which was the job group of the Claimant and he was not selected or offered any role lower than JG3 because the Company felt it would be unfair to those in the lower job group and also disrespectful to the Claimant who was in JG3. The Claimant complained that niche skill, preserving business continuity are not selection criteria and the Company applied double standard and the selection panel justified their selection on successful candidates on consideration outside of the selection criteria and arbitrarily. The successful candidates had higher IPF than the Claimant except for Umi Kalsum and Tony Tan. Umi's IPF is only slightly lower than the Claimant's but her advantage is that she had niche skill which seemed to tilt the scale in her favour compared to the Claimant's slightly higher IPF. Tony Tan was already in the role which was to be disestablished in

about 12 months. Therefore, the court is of the considered opinion that it was justified of the Company to retain Tony Tan for business continuity rather than taking a new person like the Claimant. Afterall, the role was for a brief duration only. The Company is able to justify Umi's selection as well, she has niche skill in regulatory compliance. The other successful candidates IPF score was higher than the Claimant's. The selection of candidate appears fair and generally complied with the Company's selection criteria.

The Claimant complained that his role in Gabriel Yii's Portfolio of Project (PoP) team as Senior Project Engineer from 4.1.2016, this to the Claimant is that he managed to secure a role. However, evidence shows that the Claimant was placed in the PoP team because he wanted to make himself useful and according to COW3 it was a temporary role. Having considered the evidence, the role in the PoP team was meant to be temporary for the Claimant as he wanted to make himself useful while at risk and documentary and evidence suggests that he was there to assist Lee Wei Zhan and his role in PoP was not meant to be permanent.

On the jobs outside Malaysia that the Claimant applied on MOR the court agrees that the Company's MMIM version Tab 3 of CLBD should apply to the Claimant because when he went to China he was without a green card. The Claimant was at risk and there was no job in the Company for him when he applied for overseas assignment in Brunei and Kuwait and the Company should not make a fuss about the green card and forced him to withdraw his application. The Claimant on the other hand was also to blame as he did not get a written green card from Simon Ong after he became aware of the green card requirement. So

he could secure the Brunei job. If he had such a promising lead from Brunei Shell he should have gotten the green card from Simon Ong immediately and pursued the Brunei application afresh. After all, the green card is a mere formality.

On the GPA, evidence adduced does not indicate that GPA is proof of a permanent role has been secured by the Claimant. GPA report was required for an employee and filled at the beginning of the year regardless of whether the employee was at risk or not. The Claimant's role under Gabriel Yii was temporary as clearly indicated in email dated 26.2.2016.

COW2 and COW1 testified on why the Company need to restructure. The restructuring was to rightsize the organisation in terms of structure and positions. Among the contributing factors for restructuring were the decline in oil price, reduction in projects and adverse/challenging business conditions (decrease in revenue and profit), deficit in Production unit, costs increase of 25% between 2011 and 2014. The Company especially in the person of COW2 did manage to prove to the court in facts and figures for the contributing factors for restructuring and I do not intend to repeat her evidence here. The Company had every right to reorganise and authorities have held that the Company need not be in the red to restructure.

In the case of ***Tuan Syed Hashim Bin Tuan Long v. Esso Production Malaysia Inc*** [1997] 1 LNS 99, it was stated that the right to reorganize the company is the prerogative of the management to achieve maximum efficiency and effectiveness. This prerogative belongs to the company provided it is done *bona fide*. If in the process some

workmen had to be laid off, there is ample provision in the law to provide them with retrenchment benefits.

In the case of ***Credit Corporation (M) Bhd. v. Choo Kam Sing & Anor*** [1999] 8 CLJ 86, it was held that:

*“In examining the reason for reorganization of the company and the resulting termination of the Claimant by reason of redundancy the court does not conduct a detailed examination of the propriety of the scheme or reorganization. The court is only concerned that such scheme is carried out bona fide.”*

On the totality of evidence adduced, both oral and documentary and the parties submission and the law, the court is of the considered opinion that the Company had established on the balance of probabilities that a redundancy situation exist in the Company and that the position and role of the Claimant was redundant to the requirements of the Company. The Company has proved on the balance of probabilities that the termination of the Claimant's employment with the Company was with just cause and excuse. The Company's restructuring exercise was bona fide. The Claimant did not manage to find a new role in the Company within the at risk period of 6 months and the Company could not offer him any role. His position and role is redundant to the requirement of the Company.

The Claimant is alleging that the Company victimised him. The court having considered the totality of evidence adduced, both oral and documentary and the parties' submission and the law, is of the considered opinion that the Claimant was not victimised by the

Company and that the Company had treated the Claimant fairly in the circumstance. The issues raised by the Claimant to substantiate his grounds of victimisation has been addressed by the court above. Except for his treatment as regards the green card there was hardly any evidence to suggest that the Company had victimised the Claimant post-restructuring. Even in respect of the green card he was advised by the Company to apply but he did not because he claimed to have been disappointed and upset with COW1 and COW3. The Company even issued the Claimant credit card with very sizeable limit, medical, safety training and other benefits even when he was at risk, another indication that the Claimant was not victimised. Clause 14 of the letter of appointment issued by Shell China does not mean that the Claimant was guaranteed a job upon repatriation. The court agrees with the Company's stance that "position" means the Company will take the approach as interpreted by COW1.

### **Decision**

On the totality of evidence adduced both through oral and documentary evidence and having considered the parties' respective submissions and bearing in mind section 30(5) of the IRA, to act according to equity and good conscience and the substantial justice of the case, this court finds that the Company has, on the balance of probability, established that the Claimant's services was terminated with just cause and excuse. The restructuring exercise was carried out by the Company bona fide and the Claimant was not in anyway victimized by the Company. The Company has established that, on the balance of probabilities, the

Claimant's position and role is redundant to the requirement of the Company. Accordingly, this court holds that the termination or cessation of the Claimant services with the Company on 31<sup>st</sup> May, 2015 was with just cause and excuse.

Consequently, the Claimant's claim is dismissed.

Dated this 30<sup>th</sup> day of July, 2020.

*signed*  
**[ANI AK SOLEP]**  
CHAIRMAN  
SARAWAK