

Federal Court Affirms the Applicability of the “*Contract Test*” in Constructive Dismissal cases

In the case of **Tan Lay Peng (in her capacity as the administratrix of the estate of Tan Leong Huat) v. RHB Bank Berhad (Civil Appeal No.01(f)-10-04/2023(P))**, which was decided on 9 February 2024, the Federal Court unanimously affirmed the “*contract test*” as the appropriate test for determining a constructive dismissal case.

A former employee of RHB Bank Berhad (“the Bank/Respondent”), Tan Leong Huat (“Mr. Tan/Appellant”), was employed by the Bank as its Operations Head, Thailand Operations in Bangkok, the sole branch of the Bank at the material time.

In November 2013, the Bank opened its second branch in Sri Racha which was placed under the supervision of Mr. Tan. In June 2014, the Bank appointed Ms. Marina Chin Yoke Fong as the Head of Thailand Operations to oversee the operations of the Bangkok, Sri Racha, and the intended Ayutthaya branches.

In 2014, the Bank issued a transfer order for Mr. Tan to assume the role of Branch Manager of the Ayutthaya branch. The transfer order stipulated that his assignment is for a period of nine months. Mr. Tan complied with the transfer order and the Ayutthaya branch was opened in November 2014.

Subsequently, the Bank appointed a Thai national, Ms. Irin Chanonthiensink, as the Ayutthaya Branch Manager. In the circumstances, the Bank issued a transfer order for the transfer of Mr. Tan to the International Infrastructure, PMO and Operation Support, Group International Business in Malaysia with effect from 1 March 2015. Mr. Tan objected to his repatriation to Malaysia, refused to report for duty and pleaded constructive dismissal.

The Industrial Court found in favour of Mr. Tan and awarded him the sum of RM216,840 as compensation in lieu of reinstatement. The Bank’s application for judicial review was dismissed by the High Court. However, on appeal to the Court

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of Appeal, the Court of Appeal decided that the Industrial Court had applied the wrong test in determining whether Mr. Tan was constructively dismissed, giving rise to the appeal before the Federal Court.

The question of law before the Federal Court was as follows:

“Is there a difference in the contract test or reasonableness test in light of major developments in industrial jurisprudence?”

In answering the foregoing question, the Appellant submitted that despite the differences between the contract and reasonableness test, both tests have similar characteristics and/or approaches, and as such they can be used and/or must be used interchangeably when determining a claim of constructive dismissal.

The Respondent submitted that the sole and relevant test for constructive dismissal is the contract test and not the reasonableness test. The Respondent further submitted that the development of the implied duty of trust and confidence does not displace the contract test with any other test including the reasonableness test and that the unreasonable conduct of an employer is insufficient to sustain a claim of constructive dismissal. The Respondent contended that Mr. Tan’s repatriation was in accordance with the transfer clause in his contract of employment.

The Federal Court ruled in favour of the Respondent and emphasised that the applicable test for constructive dismissal cases is the contract test. In arriving at its decision, the Federal Court considered the current position of the law on constructive dismissal in Malaysia and other jurisdictions (England, Singapore, Australia and Canada), and concluded that the contract test in determining constructive dismissal is good law and there is no reason to depart from the said position.

The Federal Court resoundingly rejected the Appellant’s contention that there is a need to consider the breach of reasonableness, fairness, good faith and *bona fide* act of the employer’s action in deciding whether there was any fundamental breach in the terms of the employment.

Whilst the reasonableness of the employer’s conduct can be a factor to be taken into consideration in determining whether there is any fundamental breach of the contract of employment by the employer, this is insufficient in establishing constructive dismissal. The Federal Court held that to use the reasonableness test as the legal requirement or interchangeably with the contract test would only entail uncertainty and confusion in industrial relations.

The Federal Court's decision is an important, sensible and timely reminder of the test to be adopted by the Courts in Malaysia when assessing a claim of constructive dismissal.

The Bank was represented by N. Sivabalah and Jamie Goh.

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