TAN LAY PENG

v.

RHB BANK BERHAD & ANOR

Federal Court, Putrajaya
Harmindar Singh Dhaliwal, Rhodzariah Bujang, Nordin Hassan FCJJ
[Civil Appeal No: 01(f)-10-04-2023(P)]
4 April 2024

Administrative Law: *Judicial review — Certiorari — Application for certiorari to quash Industrial Court's decision allowing claim for constructive dismissal — Whether Industrial Court applied wrong test of reasonableness rather than contract test in determining issue of constructive dismissal — Whether there was a difference in contract test or reasonable test in light of major developments in industrial jurisprudence*

Labour Law: *Employment — Dismissal — Judicial review — Application for certiorari to quash Industrial Court's decision allowing claim for constructive dismissal — Whether Industrial Court applied wrong test of reasonableness rather than contract test in determining issue of constructive dismissal — Whether there was a difference in contract test or reasonable test in light of major developments in industrial jurisprudence*

This appeal mainly concerned the applicable test concerning constructive dismissal which was claimed by one Tan Leong Huat ("Mr Tan"), an employee of the respondent, RHB Bank Berhad ("Bank"). Upon the demise of Mr Tan, the deceased was represented by the appellant as the administrator of Mr Tan's estate. The Industrial Court allowed Mr Tan's claim for constructive dismissal and awarded the sum of RM216,840.00. An application for judicial review by the Bank at the High Court for *certiorari* to quash the decision was dismissed. However, on appeal, the Court of Appeal decided that the Industrial Court had applied the wrong test of reasonableness rather than the contract test in determining Mr Tan's constructive dismissal. This pertinent issue was also not addressed by the High Court. As such, the Bank's appeal was allowed, an order for *certiorari* to quash the decision of the Industrial Court was granted, and the decision of the High Court was set aside. Thereafter, this Court allowed leave for the appellant to appeal on the following question of law: "Is there a difference in the contract test or reasonable test in light of major developments in industrial jurisprudence?"

Held (dismissing the appeal):

(1) It was a trite principle of law in Malaysia that the applicable test in constructive dismissal cases was the contract test and not the reasonableness test. The contract test was whether the conduct of the employer, in its action or series of actions, constituted a fundamental or repudiatory breach that went

to the root of the employment contract or where the employer had evinced an intention no longer to be bound by the express or implied terms of the contract. Constructive dismissal was where the employee claimed that he had been dismissed due to the employer's conduct. This could be said as "deeming dismissal" by the employer. The burden was on the employee to prove, on the balance of probabilities, that he had been constructively dismissed. (para 18)

(2) From the established case authorities, the reasonableness of the employer's conduct was not the legal test for constructive dismissal. However, it could be a factor to be taken into consideration in determining whether there was any fundamental breach of the contract of employment by the employer. Further, the reasonableness of the employer's conduct *per se* was insufficient in establishing constructive dismissal. Its assessment ought to relate to the contract of employment and its fundamental or repudiatory breach. (para 30)

(3) Having perused the Industrial Court's grounds of judgment in totality, this Court agreed with the finding of the Court of Appeal that the Industrial Court had adopted the reasonableness test and emphasised the lack of *bona fide* on the respondent's part. In the grounds of judgment, nothing was shown that the contract test was applied to the facts of the case. This was a fundamental error that affected the Industrial Court's decision which required the appellate court's intervention and was correctly done so by the Court of Appeal. The High Court also had failed to consider the failure of the Industrial Court to apply the contract test in its decision. (para 48)

(4) In the circumstances, the answer to the leave question was as follows: There was a difference between the contract test and the reasonableness test. The appropriate test for determining a constructive dismissal case was the contract test. The reasonableness of the employer's conduct was a factor that might be taken into consideration in determining whether there was any fundamental breach of the contract of employment or an intention no longer to be bound by the contract. (para 50)

Case(s) referred to:

7- Eleven Malaysia Sdn Bhd v. Ashvine Hari Krishnan [2023] 4 MLRA 252 (refd)

Buckland v. Bournemouth University Higher Education Corp [2010] 4 All ER 186 (refd)

Cheah Peng Hock v. Luzhou Bio-Chem Technology Limited [2013] 2 SLR 577 (refd)

CIMB Bank Berhad v. Ahmad Suhairi Mat Ali & Anor [2024] 1 MELR 145; *[2023] 6 MLRA 652 (refd)*

David Hill v. Pilbara Iron Company (Services) Pty Ltd [2023] FWCFB 140 (refd)

David M Potter v. New Brunswick Legal Aid Services Commission, A Statutory Body Corporate Pursuant To A Special Act Of The Province Of New Brunswick [2015] 1 SCR 500 (refd)

Easling v. Mahoney Insurance Brokers [2001] SASC 22 (refd)

Farber v. Royal Trust Co [1977] 1 SCR 846 (refd)

Johnson v. Unisys Ltd [2001] IRLR 279 (refd)

Keretapi Tanah Melayu Berhad v. Mohan Vythialingam & Anor And Another Appeal [2023] 3 MLRA 722 (refd)

Lennon v. State of South Australia [2010] SASC 272 (refd)

Librizzi v. Flower Power PTY Ltd [2000] FCA 971 (refd)

Matrix Global Education Sdn Bhd v. Felix Lee Eng Boon [2023] 2 MLRA 40 (refd)

Ng Teck Fay v. Mahkamah Perusahaan Malaysia & Anor [2021] 3 MELR 575; *[2022] 1 MLRA 82 (refd)*

Omilaju v. Waltham Forest London Borough Council [2004] EWCA Civ 1493 (refd)

Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik [2001] 1 MELR 39; *[2001] 1 MLRA 657 (refd)*

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 1 MELR 21; *[2003] 2 MLRA 114 (refd)*

Preston Corp Sdn Bhd v. Edward Leong Nim Fay & Ors [1982] 1 MLRA 120 (refd)

Rank Xerox v. Churchill [1988] IRLR 280 (refd)

Robinson v. HJ Heinz Company of Canada LP [2018] OJ No 3054 (refd)

The Post Office v. Roberts [1980] IRLR 347 (refd)

Wee Kim San Lawrence Bernard v. Robinson & Co (Singapore) Pte Ltd [2014] 4 SLR 357 (refd)

Western Excavating (ECC) Ltd v. Sharp [1978] IRLR 27 (refd)

White v. Reflecting Roadstuds Ltd [1991] IRLR 331 (refd)

Wilsons Solicitors LLP & Ors v. Roberts [2018] IRLR 1042 (refd)

Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd [1987] 1 MELR 32; *[1987] 1 MLRA 346 (refd)*

Legislation referred to:

Industrial Relations Act 1967, s 20

Counsel:

For the appellant: Jec Siose (K S Devanathan & Chen Hui Ken with him); M/s Jec Siose & Co

For the respondent: N Sivabalah (Jamie Goh Moon Hoong with him); M/s Shearn Delamore & Co

JUDGMENT

Nordin Hassan FCJ:

Introduction

[1] This appeal mainly concerns the applicable test concerning constructive dismissal which was claimed by one Tan Leong Huat, ("Mr Tan") an employee of RHB Bank Berhad (the respondent, and hereinafter referred to as "the Bank"). After the demise of Mr Tan on 15 March 2022, the deceased

was represented by Tan Lay Peng ("the appellant") as the administrator of the estate of the deceased.

[2] On 25 March 2019, the Industrial Court allowed Mr Tan's claim for constructive dismissal and awarded the sum of RM216,840.00. An application for judicial review by the Bank at the High Court for *certiorari* to quash the decision was dismissed on 26 June 2020. However, on appeal, the Court of Appeal, on 21 October 2021, allowed the appeal by the Bank, set aside the decision of the High Court and granted the *certiorari* to quash the decision of the Industrial Court.

[3] Thereafter, on 21 March 2023, this Court allowed leave for the appellant to appeal on the following question of law:

> "Is there a difference in the contract test or reasonable test in light of major developments in industrial jurisprudence?"

The Background Facts

[4] On 13 June 2011, Mr Tan was employed by the Bank as its Operations Head, Thailand Operations in Bangkok, the sole branch of the Bank at the material time. The terms of the employment were spelled out in the Offer of Employment letter dated 20 May 2011. He was required to report to the Head of Thailand Operations, Mr Thiti Musawan, and subsequently to the Thailand Country Head, Mr Wong Kee Poh.

[5] 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.

[6] By a letter dated 14 October 2014, the Bank issued a transfer order for Mr Tan to assume the role of Branch Manager of the Ayutthaya branch with effect from 20 October 2014. As stipulated in the transfer order, the assignment as the Ayutthaya Branch Manager is for a period not exceeding 9 months. Mr Tan complied with the transfer order and the Ayutthaya branch was opened in November 2014.

[7] Subsequently, the Bank appointed Ms Irin Chanonthiensink, a Thai national, as the Ayutthaya Branch Manager which commenced on 16 March 2015. In the circumstances, the Bank issued a transfer order by letter dated 13 February 2015 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. In the transfer order, Mr Tan was required to report to the Head of International Infrastructure, PMO, and Operations Support who will outline his duties and responsibilities, set his objectives, and manage his performance. His grade and terms and conditions of employment remain the same.

[8] Mr Tan objected to his repatriation to Malaysia as indicated in his letter dated 25 February 2015 to the Bank. In the said letter, it was said, amongst others, that his transfer to the International Infrastructure, PMO, and Operation Supports Division would 'kill his career' and was without reasonable justification.

[9] Mr Tan did not comply with the transfer order and instead by letter to the Bank dated 2 March 2015, he pleaded constructive dismissal by the Bank. The Bank refuted his allegation in a letter dated 6 March 2015 and directed Mr Tan to report to work immediately, failing which, the Bank would assume that Mr Tan had abandoned his employment. However, Mr Tan maintained that he was constructively dismissed in his letter of response dated 9 March 2015 to the Bank. Unable to resolve the dispute, Mr Tan filed a representation under s 20 of the Industrial Relations Act 1967 ("the IRA") which was then referred to the Industrial Court for adjudication.

[10] The Industrial Court gave an award in favour of Mr Tan where it was decided that he was constructively dismissed and the dismissal was without just cause or excuse and awarded the sum of RM216,840.00 as compensation to be paid by the Bank. At the High Court, the Bank application for *certiorari* to quash the decision of the Industrial Court was dismissed as the High Court Judge found that the Bank had failed to prove illegality, irrationality, or procedural impropriety in the decision of the Industrial Court. However, on appeal to the Court of Appeal, the Court of Appeal decided that the Industrial Court had applied the wrong test of reasonableness rather than the contract test in determining Mr Tan's constructive dismissal. This pertinent issue was also not addressed by the High Court. As such, the Bank's appeal was allowed, an order for *certiorari* to quash the decision of the Industrial Court was granted, and the decision of the High Court was set aside. Hence the present appeal before us.

The Appellant's Submission

[11] The learned counsel for the appellant submitted, in essence, that based on the series of actions by the Bank, the Bank had breached the fundamental terms, both express and implied of Mr Tan's contract of employment including the implied term of mutual trust and confidence and had evinced an intention of no longer wanting to be bound by the contract of employment.

[12] The appellant's contention of the breach of the appellant's contract of employment by the Bank on the basis that the appellant's repatriation to Malaysia:

(i) entails a total change of the nature of the appellant's employment which very much focuses on customer-related jobs;

(ii) amounts to victimization, done in bad faith or *mala fide* as it affects the appellant's career and future opportunities;

(iii) was grossly prejudicial, unjust, unfair, and oppressive against the appellant as the Bank had failed to indicate or inform the appellant of his new position, job scope, duties and responsibilities;

(iv) was a downgrade to the appellant's employment as he has been working as Head of Operations of the Bank in Thailand overseeing various banking departments and operations, an important role in the banking business.

[13] In answering the leave question, it was submitted that despite the differences between the contract test and the 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 the claim of constructive dismissal. In this regard, counsel for the appellant contended 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. It was then submitted that despite the contract test taking its priority in determining a claim for constructive dismissal, the reasonableness test does play an indirect role. The appellant further submitted that the court now had indirectly considered the reasonableness of the employer's conduct in determining the issue of constructive dismissal. Two Court of Appeal cases were referred to us in support of the said contention which are, *Ng Teck Fay v. Mahkamah Perusahaan Malaysia & Anor* [2021] 3 MELR 575;[2022] 1 MLRA 82 and *CIMB Bank Berhad v. Ahmad Suhairi Mat Ali & Anor* [2024] 1 MELR 145; [2023] 6 MLRA 652.

The Respondent's Submission

[14] The respondent, on the other hand, submitted that the sole and relevant test for constructive dismissal is the contract test and not the reasonableness test. This includes cases of breach of the implied duty of mutual trust and confidence between employer and employee. The landmark case of *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1987] 1 MELR 32; [1987] 1 MLRA 346 was among many other cases relied on by counsel for the respondent to support this contention.

[15] It was 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. Reference was also made to several English cases on this issue, among others as follows, *The Post Office v. Roberts* [1980] IRLR 347, *Johnson v. Unisys Ltd* [2001] IRLR 279, *Rank Xerox v. Churchill* [1988] IRLR 280, *White v. Reflecting Roadstuds Ltd* [1991] IRLR 331, and *Omilaju v. Waltham Forest London Borough Council* [2004] EWCA Civ 1493.

[16] The respondent then contended that Mr Tan's repatriation to Malaysia did not breach any express term of the contract of employment and in fact was in accordance with the transfer clause of the contract which states: "The Company is part of the Group. You may be transferred or seconded to any company within the Group depending on the needs of the Group, as may be determined by the Management". It was further submitted that any implied term cannot vary the express provisions of the contract of employment. In any event, the Industrial Court did not make any finding that there was any breach of the implied duty of trust and confidence.

[17] Counsel for the respondent further submitted that the Industrial Court had applied the wrong test and considered irrelevant matters in deciding that Mr Tan was constructively dismissed. The Industrial Court had applied the reasonableness test and questioned the *bona fide* of Mr Tan's transfer to Malaysia but failed to adopt the contract test.

Our Analysis And Decision

The Applicable Test In Constructive Dismissal Cases

[18] It is a trite principle of law in Malaysia that the applicable test in constructive dismissal cases is the contract test and not the reasonableness test. The contract test is whether the conduct of the employer, in its action or series of actions, constitutes a fundamental or repudiatory breach that goes to the root of the employment contract or where the employer has evinced an intention no longer to be bound by the express or implied terms of the contract. Constructive dismissal is where the employee claims that he has been dismissed due to the employer's conduct. This can be said as "deeming dismissal" by the employer. The burden is on the employee to prove, on the balance of probabilities, that he has been constructively dismissed.

[19] The landmark case on the applicable test to prove constructive dismissal is the Supreme Court case of *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1987] 1 MELR 32; [1987] 1 MLRA 346 where Salleh Abas LP (as he then was) refers to the Court of Appeal case in England, *Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27 which said this:

> "**The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer**. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression "constructive dismissal" was used. It must be observed that para (c) never used the words "constructive dismissal". This paragraph simply says that an employee is entitled to terminate the contract in circumstances entitling him to do so by reason of his employer's conduct. **But many thought, and a few decisions were made, that an employee**

in addition to his common law right could terminate the contract if his employer acted unreasonably. Lord Denning MR, with whom the other two Lord Justices in the case of *Western Excavating (supra)* reiterating an earlier decision of the Court of Appeal presided by him (see *Marriott v. Oxford and District Co-operative Society Ltd* [1969] 3 All ER 1126) rejected this test of unreasonableness. In no uncertain terms, the learned Master of the Rolls declared that the test of dismissal in respect of para (c) is a contract test. In his view, the Act draws a distinction between "dismissal", which is in one section, and "unfairness" which is in another section and moreover, the paragraph is using legal connotations, such as the words "notice" and "entitled".

Thus it is clear that even in England, **"constructive dismissal" does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relations**. Such proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier and goes no further. Alternative expression with the same meaning, such as "implied dismissal" or even "circumstantial dismissal" may well be coined and used. But all these could not go beyond the common law test.

Turning back to our case under appeal, it is not enough for the learned Judge in the Court below to say that constructive dismissal has no application to the interpretation of s 20 of the Industrial Relations Act. He must go further and say which of the two alternative views on constructive dismissal has no application and if so, why? Whilst **we think that "constructive dismissal" with unreasonableness test does not apply, it will be wrong for anyone to hold that "constructive dismissal" with contract test does not apply**. Perhaps in the context of our law, it is better that we do not use the terminology at all. When the Industrial Court is dealing with a reference under s 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concepts to the UK legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from para (c) of s 55(2) of the UK Employment Protection (Consolidation) Act 1978. **Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in UK should be introduced as an aid to the interpretation of the word "dismissal" in our s 20**. We think the word "dismissal" in this section should be interpreted with reference to the common law principle. **Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situation, the employee is entitled to regard the contract as terminated and himself as being dismissed**. (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd* [1970] Lloyd's LR 486).

[Emphasis Added]

[20] The application of the contract test for constructive dismissal in *Wong Chee Hong*'s case was endorsed by this Court in *Pan Global Textiles Bhd Pulau Pinang v. Ang Beng Teik* [2001] 1 MELR 39; [2001] 1 MLRA 657 and *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 1 MELR 21; [2003] 2 MLRA 114. In *Petroliam Nasional (supra)*, the Court made the following observation:

> In the instant case, on a careful perusal of the award given by the Industrial Court, I am unable to detect any substantial flaws in its reasoning or the conclusions therein. **In my view, the award contains a sound analysis of the law as to what constitutes constructive dismissal by an employer in line with the propositions postulated by Lord Denning MR in *Western Excavating (EEC) Ltd v. Sharp* [1978] 2 WLR 344 and by Tun Salleh Abbas LP in *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1987] 1 MELR 32; [1987] 1 MLRA 346. The Industrial Court had conducted a detailed review of all facts and evidence, both oral and documentary, presented by the disputing parties. It had drawn inferences from the conduct of the respondent and the relevant officers of the appellant. It then came to the conclusion that the appellant was not guilty of any breach which went to the root of the service contract nor had it evinced an intention not to be bound by it.**
>
> [Emphasis Added]

[21] The Courts, to date, have been applying the contract test for constructive dismissal and not the reasonableness test. This can be seen in the following cases, to wit, *Ng Teck Fay v. Mahkamah Perusahaan Malaysia & Anor* [2021] 3 MELR 575; [2022] 1 MLRA 82, *Keretapi Tanah Melayu Berhad v. Mohan Vythialingam & Anor And Another Appeal* [2023] 3 MLRA 722, *Matrix Global Education Sdn Bhd v. Felix Lee Eng Boon* [2023] 2 MLRA 40, *7- Eleven Malaysia Sdn Bhd v. Ashvine Hari Krishnan* [2023] 4 MLRA 252 and *CIMB Bank Berhad v. Ahmad Suhairi Mat Ali & Anor* [2024] 1 MELR 145; [2023] 6 MLRA 652.

[22] In the *7-Eleven Malaysia Sdn Bhd* case *(supra)*, the application of the contract test was reiterated where at p 271, this was said:

> "[28] As rightly observed by the judge at para [16] of the grounds of judgment, the plaintiff's claim is for constructive dismissal. The concept of "constructive dismissal" is of course well-established in Malaysia. The *locus classicus* on constructive dismissal is the Supreme Court case of *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1987] 1 MELR 32; [1987] 1 MLRA 346 ("*Wong Chee Hong v. Cathay*").
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> [29] In the recent case of *Matrix Global Education Sdn Bhd v. Felix Lee Eng Boon* [2023] 2 MLRA 40 ("*Matrix*"), the Court of Appeal considered the case of *Wong Chee Hong v. Cathay* and had the opportunity of examining the requisite legal test for constructive dismissal and the requirements in terms of the burden of proof. Essentially, the Court of Appeal in *Matrix* endorsed the trite proposition that the test for constructive dismissal is the "contract test" and not any unreasonable behaviour on the part of the employer. Thus, the conduct complained of must be repudiatory of the employment contract."

[23] Next, in *Keretapi Tanah Melayu Berhad (supra)*, the Court re-affirmed the contract test and said the following:

> "[36] Further, in determining the issue of constructive dismissal, **the contract test is applicable rather than the test of reasonableness**. In *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1997] 1 MELR 50; [1997] 2 MLRA 327, this court had re-affirmed the contract test in a constructive dismissal case and stated as follows:
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> > It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is **not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonable test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer be bound by the contract.**'
>
> [Emphasis Added]

[24] Thus, it is settled law that the applicable test for constructive dismissal cases is the contract test rather than the reasonableness test. On the issue of reasonableness, generally, what is reasonable is what a reasonable man considers fair and proper based on the particular facts and circumstances of the case.

[25] Salleh Abas FCJ (as he then was) had explained the test of reasonableness in *Preston Corp Sdn Bhd v. Edward Leong Nim Fay & Ors* [1982] 1 MLRA 120 in the following manner:

> **The test of reasonableness is what a reasonable, honest and right-minded person considers the usage concerned to be fair and proper**. A usage which outrages the sense of justice and common sense is not reasonable: *Produce Broker Co Ltd v. Olympia Oil and Cake Co Ltd.* **The test therefore is one which refers to the normal and ordinary value judgment of a reasonable man.**
>
> [Emphasis Added]

[26] Likewise, the reasonableness of an employer's conduct is very subjective and depends on the circumstances of the situation and other related factors. It is too wide and indefinite to be made as a legal requirement for a constructive dismissal case. The reasonableness of the employer's conduct could also be easily subject to different opinions by tribunals or courts. This would entail unsettled industrial relations.

[27] In *Wong Chee Hong*'s case *(supra)*, the Court opined as follows:

> "Thus, it is clear that even in England, "constructive dismissal" does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. **Indeed, if it were so, it is dangerous and can lead to abuse and unsettled industrial relation(s)**."
>
> [Emphasis Added]

[28] On the same issue of the reasonableness test, the comment by Lord Denning MR in *Western Excavating (supra)*, is instructive, who said this:

> "(v) The new **test of 'unreasonable conduct' of the employer is too indefinite by far**. It has led to acute differences of opinion between members of tribunals. Often they are majority opinions. **It has led to findings of 'constructive dismissal' on the most whimsical grounds**. The Employment Appeal Tribunals tell us so. **It is better to have the contract test of the common law. It is more certain**, as it can well be understood by intelligent laymen under the direction of a legal chairman.."
>
> [Emphasis Added]

[29] Next, in *Rank Xerox Ltd v. Churchill (supra)*, Justice Wood explained:

> "... the constructive dismissal provisions – decided that **the correct approach to the analysis of the terms and conditions of employment was through contract and not through the overall superimposition of the test of reasonableness**. In the present case, **the words of the contractual term are simple and clear, there is no room for any implication which would constitute a variation of clear and unambiguous words of the contract**."
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> ...
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> In our judgment, the implication of **the test of reasonableness and an attempt by the majority to introduce the test into the construction of a straightforward express term of the contract was an error in law.**
>
> [Emphasis Added]

[30] Clearly, from the discussion and authorities cited above, the reasonableness of the employer's conduct is not the legal test for constructive dismissal. However, it 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. Further, the reasonableness of the employer's conduct *per se* is insufficient in establishing constructive dismissal. Its assessment must relate to the contract of employment and its fundamental or repudiatory breach.

[31] On the same issue, reference to the case of *Buckland v. Bournemouth University Higher Education Corp* [2010] 4 All ER 186 is instructive, where Sidley LJ explained as follows:

> "[28] It is nevertheless arguable, I would accept, that **reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach**. There are likely to be cases in which it is useful. **But it cannot be a legal requirement.**"
>
> [Emphasis Added]

[32] In this regard, counsel for the appellant cited two Court of Appeal cases and submitted that the courts now have considered reasonableness

in determining constructive dismissal cases. The first case is *Ng Teck Fay v. Mahkamah Perusahaan Malaysia & Anor (supra)*. Having perused the grounds of judgment of that case, it is crystal clear that the Court of Appeal applied only one test, which is the contract test, contrary to the submission by the appellant that the Court of Appeal had indirectly adopted both the contract test and the reasonableness test. This is reflected at paras 24, 25, and 31 of the grounds of judgment that states:

> "[24] The decision of the High Court in the case of *Bayer (M) Sdn Bhd v. Anwar Abd Rahim* [1995] 4 MLRH 53 which was subsequently upheld by the Court of Appeal in *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1997] 1 MELR 50; [1997] 2 MLRA 327 laid down essentially four conditions that have to be met in order for the appellant to be able to successfully claim constructive dismissal by the 1st respondent. They are as follows:
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> (i) there must be a breach of contract by the employer;
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> (ii) that breach must be sufficiently important to justify the employee resigning
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> (iii) the employee must leave in response to the breach and not for some other unconnected reason; and
>
> (iv) the employee must not occasion any undue delay in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract.
>
> [25] **It is trite that if an employee leaves the employment of the employer, without the above conditions, being fulfilled, he will be deemed to have resigned and there will be no dismissal within the meaning of the relevant legislation at all. (See *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1987] 1 MELR 32; [1987] 1 MLRA 346**)."
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> ....
>
> [31] We find that the learned chairman ought to have considered whether the 2nd respondent's act of demoting and re-grading the appellant from the position of assistant general manager (job grade 3) to senior manager (job grade 4), **is a breach of a fundamental term which goes to the root of the appellant's contract of employment**. Thus, in this respect, it is our considered view that the 1st respondent failed to take into account the relevant consideration and acted contrary to the evidence."
>
> [Emphasis Added]

[33] Counsel for the appellant in his submission, relied on para 49 of the grounds of judgment of the Court of Appeal to conclude that the reasonableness test was indirectly adopted by the court. Paragraph 49 is as follows:

> "[49] Even though the learned High Court Judge found that the appellant had accepted without objection of the new re-grading on 23 May 2014, we find that the appellant is entitled to change his mind bearing in mind that at the meeting with the 2nd respondent's General Manager of Human Resources in

> the presence of the Group Managing Director, the appellant was threatened that either he accepted the re-grading or resign. **We further find that it is perfectly reasonable for the appellant after being confronted with such threats and being deprived of legal advice and time to consider the offers, was entitled to change his mind, four days later**."
>
> [Emphasis Added]

[34] Here, we do not see the observation by the Court of Appeal that it was reasonable for the appellant to change his mind not to accept the downgrading position of a Senior Manager from the post of Assistant General Manager as indirectly adopting the reasonableness test. Further, the reasonableness here concerned the appellant and not the employer's conduct. As such, the appellant's contention is devoid of any merits.

[35] Likewise in the second case relied upon by the appellant, *CIMB Bank Berhad v. Ahmad Suhairi Mat Ali & Anor (supra)*. The Court of Appeal also applied the contract test rather than the reasonableness test as expressly stated at para 17 of the grounds of judgments. This is what the court explained:

> "[17] Consequently, that **the relevant test for constructive dismissal is the "contract" test and not the "unreasonableness" test**. In this context, the Supreme Court in *Wong Chee Hong (supra)*, stated:
>
> > Constructive dismissal does not mean that an employee can automatically terminate the contract when his employee act or behaves unreasonably towards him. Indeed, if it were so, it is dangerous and can lead to abuse and unsettled industrial relations."
>
> [Emphasis Added]

[36] Regarding this *CIMB Bank* case, counsel for the appellant contended that the Court had also, indirectly, taken into consideration the reasonableness from the employee's side on whether there was any delay from the employee to take any action after the conduct of the employer's breach. Reference was made to para 19 of the Court's grounds of judgment which is as follows:

> "[19] Thus, two questions arise for consideration in determining whether a claim based on constructive dismissal can succeed. The first question is – did the employer's conduct amount to a breach of the contract of employment going to the root of the contract, (ie, "fundamental breach")? The second question is – **did the employee make up his mind and act at the appropriate point in time soon after the conduct of which he had complained had taken place? This takes us to the question of delay on the part of the employee**."
>
> [Emphasis Added]

[37] Having considered the grounds of judgment in totality and including para 19 above, we find that the Court did not directly or indirectly adopt the reasonableness test to conclude that there was constructive dismissal in that case. What the Court decided was that the delay by the respondent to

take immediate action, in the circumstances, was justified. The paramount consideration by the court in deciding that there was a constructive dismissal was whether the employer's conduct was repudiatory of the contract of employment. This is reflected at paras 75 and 76 of the grounds of judgment.

> "[75] In particular, it is not the employer's unreasonable conduct which is in focus. Rather, the first question is **whether the employer's conduct is "repudiatory" of the contract of employment – the "contract test". As such, what is in focus in this concept is the "employer's conduct" with respect to the particular employee concerned against the backdrop of the employee's contract of employment. Where the employer's conduct is such that it constitutes a significant breach going to the root of a contract of employment and it shows that the employer no longer intends to be bound by one or more of the essential (express or implied) terms of the contract,** an employee is entitled to walk out and treat himself as discharged from any further performance of his obligations, on the ground that he has been "constructively dismissed"
>
> [76] Hence, it is clear that **what is in contemplation within the concept of constructive dismissal is a breach of a fundamental or essential (express or implied) term of the contract of employment. In this context, fundamental breach of contract is also regarded as "repudiatory conduct" which goes to the root of the contract of employment**."
>
> [Emphasis Added]

[38] The Court in the *CIMB Bank* case addressed the issue of the respondent's delay in taking immediate action as undue delay to act upon the repudiatory breach of the contract of employment because in constructive dismissal cases, it is essential to take such an immediate action, failing which, the employee can be considered to have accepted the employer's conduct. The Court in that case agreed with the finding of the High Court that there was no undue delay or acquiescence by the respondent in respect of the delay of one month and 18 days before leaving the employment.

[39] In any event, as alluded to earlier, the unreasonableness of the employer's conduct can be a factor to be considered in deciding whether there is any fundamental breach of the contract of employment or an intention no longer to be bound by the contract, but not as a legal requirement in constructive dismissal cases.

The Test In Other Jurisdictions

[40] Malaysia is not the only jurisdiction that applies the contract test and not the reasonableness test in determining the case of constructive dismissal. As discussed earlier, in England, the contract test was adopted rather than the reasonableness test. Besides the *locus classicus* case of *Western Excavating (ECC) Ltd v. Sharp (supra),* the other English cases that endorsed the contract test, among others, are *The Post Office v. Roberts* [1980] IRLR 347, *Rank Xerox v. Churchill (supra)*, *White v. Reflecting Roadstuds Ltd* [1991] IRLR 331, *Johnson v.*

Unisys Ltd [2001] IRLR 279, *Wilsons Solicitors LLP & Ors v. Roberts* [2018] IRLR 1042.

[41] Similarly in our neighbouring country, Singapore, the contract test was applied. In *Wee Kim San Lawrence Bernard v. Robinson & Co (Singapore) Pte Ltd* [2014] 4 SLR 357, Sundaresh Menon CJ said this:

> "[23] The concept of constructive dismissal and the implied term of mutual trust and confidence in an employment contract are distinct but closely related. "Constructive dismissal" refers to the situation where the employer's repudiatory breach entitles the employee to treat himself as discharged from the employment contract; although it is the employee himself who terminates the contract, he is considered as having been "constructively" dismissed by the employer. It is as though the employer had effectively terminated the contract by manifesting an intention no longer to be bound by the contract, which position is then accepted by the employee. The concept was explained thus by Lord Denning in the English Court of Appeal decision of *Western Excavating (ECC) Ltd v. Sharp* [1978] QB 761.."

(See also *Cheah Peng Hock v. Luzhou Bio-Chem Technology Limited* [2013] 2 SLR 577)

[42] In Australia, the position is the same that the contract test is applied in determining constructive dismissal cases. The Federal Court of Australia in *Librizzi v. Flower Power PTY Ltd* [2000] FCA 971 endorsed the contract test in *Western Excavating (supra)* and stated this:

> "[40] The term "constructive dismissal" was explained by Lord Denning MR in *Western Excavating (ECC) Ltd v. Sharp*, above, at 769:
>
> > "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having to affirm the contract.
>
> [41] It is immediately clear that the facts of this case as found by the commission do not meet all of these criteria."

(See also *Easling v. Mahoney Insurance Brokers* [2001] SASC 22, *Lennon v. State of South Australia* [2010] SASC 272, and *David Hill v. Pilbara Iron Company (Services) Pty Ltd* [2023] FWCFB 140)

[43] Next, we move to Canada, the position there is also similar in that the contract test is the test applicable in constructive dismissal cases. More interestingly, the court made it clear that reasonableness is only to be used as a consideration to determine whether there is any fundamental breach of the contract of employment.

[44] In *David M Potter v. New Brunswick Legal Aid Services Commission, A Statutory Body Corporate Pursuant To A Special Act Of The Province Of New Brunswick* [2015] 1 SCR 500 Wagner J explained as follows:

> "[34] The first branch of the test for constructive dismissal, the one that requires a review of specific terms of the contract, has two steps: first, **the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to be substantially alter an essential term of the contract…**"
>
> [35]...The standard nevertheless remains unchanged – a finding of constructive dismissal requires that **the employer's acts and conduct "evince an intention no longer to be bound by the contract**"..."
>
> .....
>
> [39] Once it has been objectively established that a breach has occurred, the court must turn to the second step of the analysis and ask whether, "**at the time the breach occurred, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were substantially changed" (***Farber,* **at para 26). A breach that is minor in that it could not be perceived as having substantially changed an essential term of the contract does not amount to constructive dismissal**."
>
> [Emphasis Added]

(See also *Farber v. Royal Trust Co* [1977] 1 SCR 846 and *Robinson v. HJ Heinz Company of Canada LP* [2018] OJ No 3054.)

[45] Considering the current position of the law on constructive dismissal in Malaysia and other jurisdictions as alluded to above, as well as the discussion earlier, it is clear that the contract test in determining constructive dismissal is a good law and there is no reason to depart from the said position. To use the reasonableness test as the legal requirement or interchangeably with the contract test would only entail uncertainty and confusion in industrial relations. At the risk of repetition, we emphasize here that in Malaysia, the test for determining constructive dismissal of an employee is the contract test.

[46] As mentioned at the outset of this judgment, the appeal essentially concerned the applicable test in determining constructive dismissal. The Court of Appeal found that the Industrial Court had applied the wrong test of reasonableness rather than the contract test in deciding the constructive dismissal of Mr Tan. As such, the respondent's appeal was allowed. At para 45 of the Court of Appeal's grounds of judgment, this was said:

"[45] Based on its reasoning above, **the Industrial Court had clearly gone in the *bona fide* and reasonableness of the appellant's conduct instead of considering whether there was a breach of contract** when the appellant was transferred by the respondent to GIB.

[46] In the light of the authorities which we have already referred to above, we are satisfied that **the Industrial Court had erred in law in failing to apply the proper legal test in a case of constructive dismissal.**"

[Emphasis Added]

[47] In this regard, it is apposite to sieve through the grounds of judgment of the Industrial Court in totality, to determine what was the actual test adopted in deciding that Mr Tan was constructively dismissed. The relevant parts of the judgment are as follows:

"[24] The Court also finds that having assigned the Claimant to the Ayutthaya Branch, **the respondent had not justified to this Court why the Claimant was removed in unholy haste**. The Claimant was given a notice of two weeks to report at the headquarters on 2 March 2015. **No reasons were proferred**. The Court is ever mindful that the transfers are management prerogatives. However, when an employee complains of unfair exercise of that management prerogative, the Court has a duty to inquire..."

[25] The Court however finds that in the evidence of COW1, it was only after the claimant was ordered to be repatriated that one Irin Chanonthiensink ("I") was appointed as Branch Manager of the Ayutthaya Branch on 16 March 2015. **Even that appointment was about a month after the order to transfer. There are no instructions in the letter of 13 February 2015 for the Claimant to hand over duties to any responsible staff at the branch given that it is a bank. The Court finds this odd as the branch was bereft of a Manager in the interim whilst the Claimant was abruptly ordered home.** This is antithetical to the situation where the Claimant had previously taught Marina at the Bangkok Branch when she took over. It was not the case this time around. This is also notwithstanding the fact that the transfer had nothing to do with any issues of misconduct of performance. In fact, COW1 deposed the following "...The Claimant's performance was overall satisfactory and no one made an issue of this and neither was it the reason for the 1st or 2nd transfer Order.." COW2 had also confirmed this fact when he testified that there were no issues of performance with the Claimant at the Ayutthaya Branch.

[26] The respondent took pains to stress that the assignment was for a limited period only but did not deem it fit to put the Claimant on notice that his sojourn in Ayutthaya was pending the recruitment of a local Thai Branch Manager. Neither was evidence led by the respondent to show that Irin had already been shortlisted and with her impending appointment, the Claimant would have no place in the Thai operations. **So this begs question; why the unholy haste? Were there any other reasons? Any decision taken by the management must be above suspicion to satisfy the Court that such exercise was devoid of bad faith**.

> [27]...**The Claimant's post was not clearly stipulated. This again shows that the respondent had not demonstrated *bona fide* in exercising its management prerogative**. The Claimant is considered to be fairly senior position in the bank holding the grade of a Vice President (PG6). **Taking the events cumulatively, the Court is of the considered view that the Claimant was driven out of his employment**.
>
> ....
>
> [33]...The Court finds that although it is a managerial prerogative, it must be exercised in good faith. None appears to be present. **The Court finds that the Claimant had proven that the acts of transferring him were not done *bona fide*...**"
>
> [Emphasis Added]

[48] Having perused the Industrial Court's grounds of judgment in totality and in particular the paragraphs cited above, we agree with the finding of the Court of Appeal that the Industrial Court had adopted the reasonableness test and emphasized the lack of *bona fide* on the respondent's part concerning Mr Tan's repatriation to Malaysia. In the grounds of judgment, nothing was shown that the contract test was applied to the facts of the case. This is a fundamental error that affects the Industrial Court's decision which requires the appellate court's intervention and was correctly done so by the Court of Appeal. The High Court also had failed to consider the failure of the Industrial Court to apply the contract test in its decision.

[49] In the *Western Excavating* case, the decision of the industrial tribunal was also set aside on the ground that the tribunal adopted the wrong test of reasonableness. In that case, Lord Denning MR concluded as follows:

> "Conclusion
>
> **The present case is a good illustration of a 'whimsical decision'. Applying the test of unreasonable conduct'**, the industrial tribunal decided by a majority of two to one in favour of the man. The Employment Appeal Tribunal would, all three of them, have decided in favour of the employer, but felt that it was a matter of fact on which they could not reverse the industrial tribunal. So, counting head, it was four to two in favour of the employers, **but yet the case was decided against them, because of the test of 'unreasonable conduct'**.
>
> **If the 'contract test had been applied, the result would have been plain. There was no dismissal, constructive or otherwise, by the company. The company was not in breach at all. Nor had they repudiated the contract at all**. Mr Sharp left of his own accord without anything wrong done by the company. His claim should have been rejected. The decision against the company was most unjust to them. **I would allow the appeal accordingly**."
>
> [Emphasis Added]

[50] In the circumstances and based on reasons alluded to earlier, the answer to the leave question is as follows:

> There is a difference between the contract test and the reasonableness test. The appropriate test for determining a constructive dismissal case is the contract test. The reasonableness of the employer's conduct is a factor that may be taken into consideration in determining whether there is any fundamental breach of the contract of employment or an intention no longer to be bound by the contract.

Conclusion

[51] In the upshot, there is no merit in this appeal and as such, the appeal is dismissed and the decision of the Court of Appeal is affirmed with no order as to costs.

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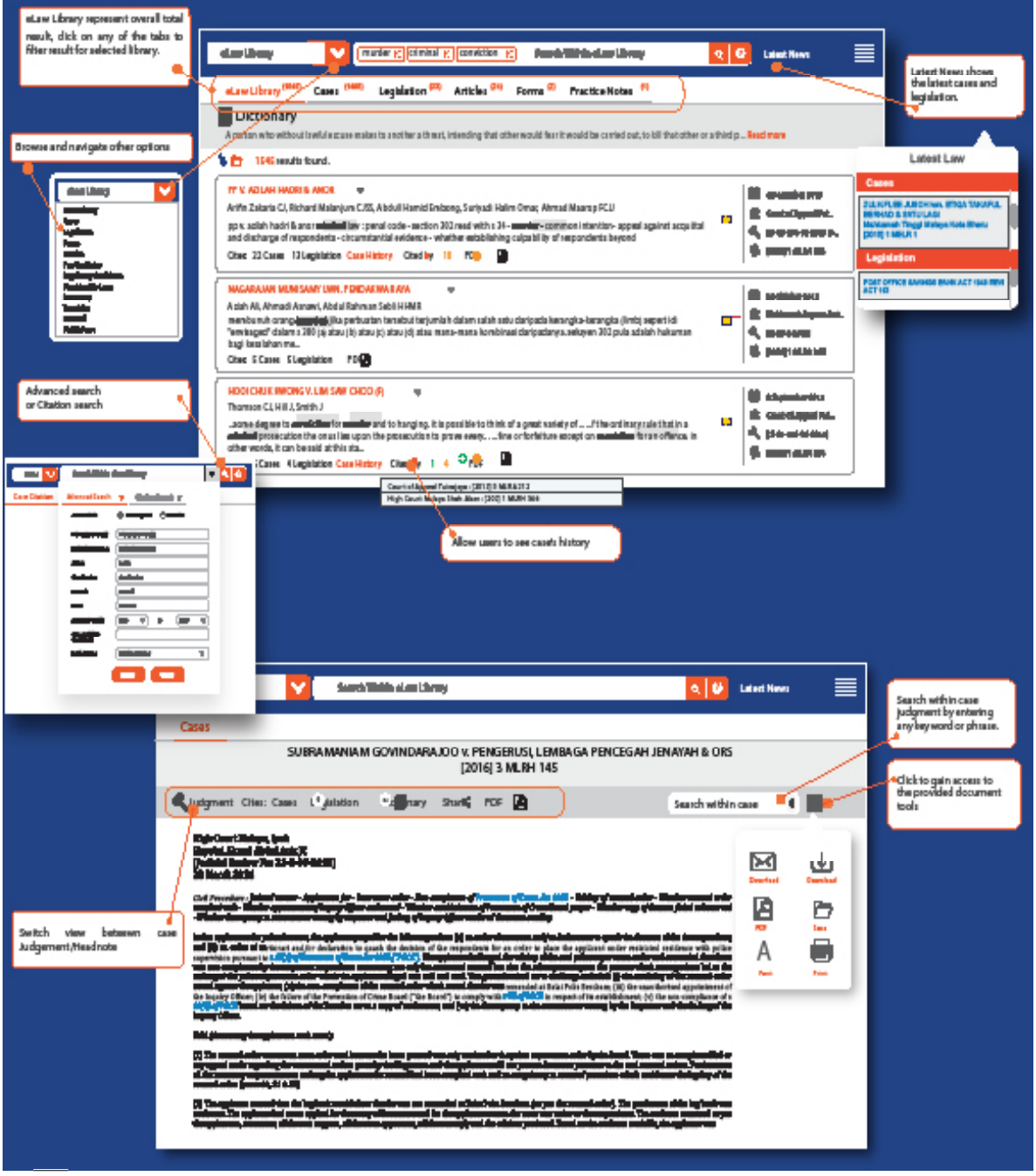

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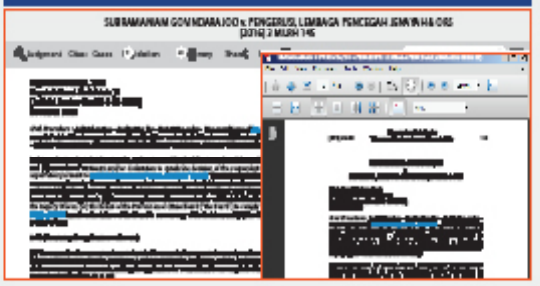

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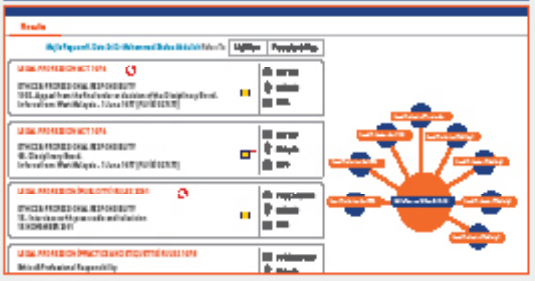

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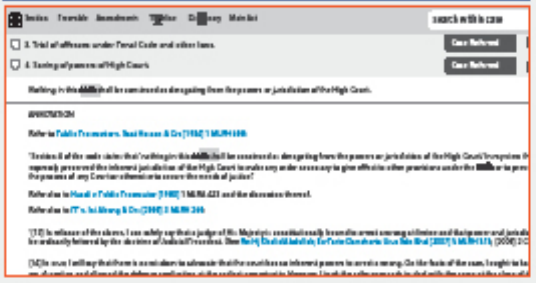

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