SUPREME COURT OF QUEENSLAND

CITATION:	*Taske v Occupational & Medical Innovations Ltd* [2007] QSC 118
PARTIES:	**KEITH CLIFFTON TASKE** (plaintiff) V **OCCUPATIONAL & MEDICAL INNOVATIONS LIMITED ABN 11 091 192 871** (defendant)
FILE NO/S:	BS3393 of 2005
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	29 May 2007
DELIVERED AT:	Brisbane
HEARING DATE:	12, 13, 14, 15, 16, 19, 21 and 22 March 2007
JUDGE:	Moynihan J
ORDER:	**1. The plaintiff's damages be assessed at $158,483.30.** **2. The plaintiff is entitled to $36,042.58 interest on the damages.** **3. The defendant pay the plaintiff the total amount of damages in the sum of $194,525.88.**
CATCHWORDS:	EMPLOYMENT LAW – THE CONTRACT OF SERVICE AND RIGHTS, DUTIES AND LIABILITIES AS BETWEEN EMPLOYER AND EMPLOYEE – DISCHARGE AND BREACH – CIRCUMSTANCES JUSTIFYING DISMISSAL – MISCONDUCT - where misconduct of employee alleged – whether employer had right of summary dismissal. EMPLOYMENT LAW – THE CONTRACT OF SERVICE AND RIGHTS, DUTIES AND LIABILITIES AS BETWEEN EMPLOYER AND EMPLOYEE – DURATION AND TERMINATION OF EMPLOYMENT – TERMINABLE ON REASONABLE NOTICE – where summary dismissal not justified – whether employee entitled to reasonable notice. *Corporations Act 2001* (Cth) s 249D

Migration Act 1958 (Cth) s 140J s 140L
Causlan v Fisher and Paykel Finance Pty Ltd [2003] 1 Qd R 503 (CA), considered.
Opera House Investments Pty Ltd v Devon Buildings Pty Ltd (1936) 15 CLR 110, considered.
Randall v Aristocrat Leisure Ltd [2004] NSWLC 411, considered.
Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2007] NSWSC 104, considered.

COUNSEL: GC Martin SC for the plaintiff.
RA Perry SC for the defendant.

SOLICITORS: Hopgood Ganim for the plaintiff.
Clayton Utz for the defendant.

Introduction

[2] The *plaintiff* sues for wrongful dismissal from his position as joint chief executive officer of the *defendant*. The *defendant's* case is that the *plaintiff's* summary dismissal was justified by his serious misconduct.

[3] The *defendant* was in the business of designing, developing, manufacturing and selling medical equipment and selling the rights for others to manufacture and sell that equipment, notably retractable disposable hypodermic syringes and scalpels.

[4] The *plaintiff's* contract of employment was finalised on 27 November 2003 and he took up his employment at the *defendant's* business premises at Slacks Creek in Queensland on 1 December 2003.

[5] The formation of the contract and its terms were not controversial at the trial. The contract is partly written and partly oral with some terms express and some implied.[1]

[6] The *plaintiff's* salary was $200,000 inclusive of statutory superannuation and a fully maintained motor vehicle with unlimited private use. He became a director of the *defendant* and was paid a meeting fee of $2,000 in addition to his salary.

[7] There was an implied term that the contract was terminable on reasonable notice or without notice in the event of serious misconduct. The *defendant* purported to summarily determine it on the ground of serious misconduct by letter dated 23 December 2004.[2]

Background

[8] The *plaintiff* was born in 1941. He commenced his career as a primary school teacher with the Queensland Department of Education, a position he held for five

[1] Exhibit 42 - minutes report to the board of the *defendant* dated 31 October 2003; Exhibit 43 - minutes of resolution of directors of the *defendant* dated 31 October 2003; Exhibit 4 - job description for chief executive officer forwarded to the *plaintiff* and adopted at board meeting held on 24 November 2003 (Exhibit 44).
[2] Exhibit 1.

years. He then worked for Ampol Petroleum where he progressed from State Training Manager to District Manager.

[9] From 1968 to 1997 the *plaintiff* progressed through various managerial positions with different companies in the motor vehicle industry. His last position was as Dealer Principal and Managing Director of City Mitsubishi and Subaru City, Brisbane where he was responsible for all facets of the motor dealer operation.

[10] In the period 1998/1999 the *plaintiff* and his wife relocated from Brisbane to Jackson, Tennessee in the United States. It was not their intention to remain in the United States permanently but to develop and sell a business there and eventually retiring to Australia. It seems the *plaintiff* first contemplated acquiring a motor dealership in the area but the demographics did not support it. They purchased a residence in Jackson and acquired land on which they oversaw the construction and fitting out of a Corkey's Barbeque Restaurant franchise (the *restaurant*). They moved to Jackson in August 1999.

[11] The *plaintiff* and his wife were actively involved in the development, start up and ongoing operation of the *restaurant* until they returned to Australia for him to take up his employment with the *defendant* in late November 2003.

[12] There was an issue at the trial as to whether the *plaintiff* was specifically recruited by the *defendant* from settled domestic and business circumstances in Jackson to take up the position of joint chief executive officer or whether he did so predominantly in his own interest.

[13] It is fair to say that in 2002 the *restaurant* was struggling after three years of operation.[3] It was running at a loss or a little better than breaking even and was under performing in terms of the figures put forward in support of a loan obtained to set up, open and continue in business.

[14] The *plaintiff* and his wife had invested substantially in the restaurant. The *plaintiff's* brother John Edward Taske (*John Taske*) assisted with finance. He contributed about a quarter to a third of the money towards the purchase of the restaurant with further contributions as 'the business was getting up and running before it was profitable … to help the business over the initial stages of development'.[4]

[15] In 2002 problems had arisen with the administration and the operation of the *defendant*. Bruce Leigh Kiehne (*Kiehne*) and interests related or associated with him had a controlling interest in the *defendant*. Both the *plaintiff* and his brother had invested in it and *John Taske* chaired the board.

[16] The *plaintiff* and his brother *John Taske* knew *Kiehne* and had earlier investment involvement with him. In late 1998 the *plaintiff* had invested in a company, Jireh Tech with *Kiehne* and others.[5] There were further dealings between *Kiehne* and *John Taske* when *Kiehne* and *John Taske* visited the United States in late 1998 to explore the prosects of selling the *defendant's* medical equipment there.

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[3] Exhibit 22.
[4] Transcript of proceedings, p172, lines 30-40.
[5] Ibid, p16, lines 30-40.

[17] During the visit an American company was formed, OMI Inc to facilitate a projected listing of OMI shares on the New York Stock Exchange. The *plaintiff* was the resident director of this company. The company has not been active.[6]

[18] *Kiehne* decided that he wanted the *plaintiff* to return to Australia and take up a position as joint chief executive with *Kiehne* to resolve the *defendant's* problems. The *plaintiff* was the only person *Kiehne* 'could trust and work with'.[7]

[19] Throughout 2002 there were numerous telephone calls between *Kiehne* and the *plaintiff* urging the *plaintiff* to return to Australia and take up the position. The *plaintiff* was not receptive. *Kiehne's* phone calls became 'more pointed that [the *plaintiff*] would be coming back and when would [he] be coming back'.[8]

[20] *Kiehne* also pressed the *plaintiff's* wife about his returning to Australia. When *Kiehne* would telephone to speak to the *plaintiff* he would say to her 'have you sold the restaurant yet? When are you coming back? I want [the *plaintiff*] to run [the *defendant*]'.[9]

[21] In July 2001 the *plaintiff's* wife also recalls whilst driving *Kiehne* to Shiloh, a civil war battle ground, *Kiehne* having a discussion about the *plaintiff* returning to Australia to work for the *defendant* 'he was sort of feeling me out, I think, to get my idea'.[10]

[22] On another occasion *Kiehne* told the *plaintiff* that 'he had spoken to God about it and he was a believer and that God was working on it as well'.[11]

[23] On three occasions *Kiehne* visited the *plaintiff* in Jackson, Tennessee, the last being in August 2003 where *Kiehne* strongly pressed the *plaintiff* to return, stating that the position had to be filled by the end of the year or the beginning of the following year.[12]

[24] The *plaintiff's* wife gave evidence that although she missed her children and father she 'was really enjoying what [she] was doing over there. For the first time in [her] life [she] was doing something that was meaningful to [her]'.[13] She was involved with her husband in operating and developing the *restaurant*.

[25] *John Taske* supported *Kiehne's* efforts. In an email dated 20 January 2003 to the *plaintiff* he spoke of being between a rock and a hard place. A sale of the *restaurant* would result in a loss. The email went on that '[the *defendant*] must employ someone with business experience NOW, otherwise there is a real danger of the company imploding at a critical stage of its development'.[14]

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[6] Ibid, p17, lines 35-60.
[7] Ibid, p105, line 20; Ibid, p186, lines 10-20.
[8] Ibid, p18, line 30.
[9] Ibid, p204, lines 1-10.
[10] Ibid, p203, line 50.
[11] Ibid, p22, lines 1-10.
[12] Ibid, p22, lines 20-30.
[13] Ibid, p204, lines 10-20.
[14] Exhibit 24.

[26] In a telephone conversation with his brother, *John Taske* confirmed that *Kiehne* had told him that '[the *plaintiff*] was the only person that [*Kiehne*] was prepared to work with and the only person that he would trust'.[15]

The *plaintiff* returns to Australia and becomes joint chief executive of the *defendant*

[27] The *plaintiff* and his wife initially resisted these approaches before succumbing and returned to Australia. The *plaintiff* took up the position of joint chief executive officer with *Kiehne* of the *defendant* in late November 2003.

[28] In February 2002 the *plaintiff* had commenced investigating what was involved in leaving Jackson and returning to Australia. He approached the franchisor of the restaurant chain and had discussions with the owners of franchise restaurants in Jacksonville, Mississippi, Little Rock, Arkansas and Nashville with a view to seeing if anyone was interested in buying the franchise.[16]

[29] In June 2002 the *plaintiff* listed the *restaurant* with a broker who advised the *plaintiff* to obtain an appraisal. The following month he also listed the *restaurant* with another broker in Memphis.[17] No buyer was forthcoming and the *restaurant* was not sold.

[30] The *plaintiff* then entered into negotiations with a man named Homeyer. The outcome of those negotiations was that Homeyer was 'gifted' 49 per cent of the company operating the *restaurant* while the *plaintiff's* company held the remaining 51 per cent. Homeyer is the operating partner and he and his wife are solely responsible for the operation of the restaurant.[18]

[31] There is a buyout plan in place in which Homeyer can buy the *plaintiff's* interests out of profits within a three year time limit. To date there have not been sufficient profits for Homeyer to take advantage of this arrangement.[19]

[32] The land upon which the *restaurant* is sited was sold by the *plaintiff's* company in about September 2004 and there is currently a leaseback arrangement in place.[20] In about October 2003 the *plaintiff* placed his house in Jackson on the market.[21] The house did not sell and in September 2004 it was leased. The lease expires in 2008.[22]

[33] I accept that the *plaintiff's* decision to return to Australia prematurely, to a degree, reflects a concern to protect his and his brother's investment in the *defendant*. This premature return led to the unsatisfactory arrangements referred to in the preceding paragraphs.

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[15] Transcript of proceedings, p23, line 20; Transcript of proceedings, p174, line 28.
[16] Ibid, p23, lines 20-40.
[17] Ibid, p23, lines 35-45.
[18] Ibid, p25, lines 35-50.
[19] Ibid, p27, lines 10-20.
[20] Ibid, p25, lines 50-60 – p26, lines 1-10.
[21] Ibid, p28, lines 10-20.
[22] Ibid, p106, lines 40-55.

[34] The *plaintiff* and his wife returned to Australia in late November 2003 and he commenced work as joint chief executive officer of the *defendant* on 1 December of that year.

The *plaintiff* is dismissed

[35] As I have already said the *plaintiff* was appointed joint chief executive officer with *Kiehne*. It seems that the *plaintiff's* role focused on operational matters and *Kiehne's* on research and development but *Kiehne* was involved in other aspects of the *defendant's* activities.

[36] The evidence *Kiehne* 'would give if called' was opened in the *defendant's* case.[23] Matters were put to the *plaintiff* in cross examination apparently relating to matters involving *Kiehne*. In the event, *Kiehne* was not called.

[37] It is plain from the course of events that by late November 2004 the relationship between the *plaintiff* and *Kiehne* had substantially deteriorated. The reasons for this are not clear.

[38] The *plaintiff* attributes the breakdown to events on 13 October 2004 where *Kiehne* took offence at not being featured in a video presentation concerning the *defendant's* products and blamed the *plaintiff* for this. In my view it is unlikely but not impossible that that event alone explains the deterioration in the relationship and the course of events leading up to the *plaintiff's* dismissal.

[39] In late October 2004 a request was served in accordance with s 249D of the *Corporations Act 2001* (Cth) to the directors of the *defendant* following a general meeting.[24] The majority of the shareholders voted for the removal from office as a director of:

- John Edward Taske;
- Michael James Haynes;
- Lawrence James Litzow; and
- Keith Clifton Taske.

The *plaintiff* resigned his position as a director of the *defendant* on 22 November 2004, as did the other directors, as a result of this.

[40] A board acceptable to the majority shareholders was put in place including *Kiehne.* The following directors were*:*

- Ian Leslie Fraser (*Fraser*);
- Mark Rogers;
- Donald C Mackenzie;
- Bruce Leigh Kiehne; and
- Ken Stringer.

Fraser became the chairman and among other things took legal advice about a number of issues including the matters considered in these reasons.

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[23] Ibid, p250, lines 30-60 - p251, lines 1-30.
[24] Ibid, p266, lines 55-60.

[41] On 15 November 2004 *Kiehne* had emailed board members forwarding an email from Anthony Kirkham (*Kirkham*), the *defendant's* clinical sales support manager, to the *plaintiff* and referred to his disappointment with the *plaintiff's* conduct towards *Kirkham* raised by *Kirkham's* email.[25]

[42] *Kiehne's* email of 15 November 2004[26] called for an investigation by 'the professional people' and not the 'chairman investigating claims against his brother' of *Kirkham's* complaints. It concluded by saying that *Kiehne* held the board members 'personally responsible' and liable for the actions with the *plaintiff* and 'again' requested their immediate resignation.

[43] On 23 November 2004 *Fraser* met with the *plaintiff* and handed him a copy of a letter dated 22 November 2004.[27] This referred to 'serious allegations' regarding the *plaintiff's* conduct as joint chief executive officer made by *Kirkham*. It also referred to the new board undertaking a review of the company's operations.

[44] The letter notified the *plaintiff* that he was suspended on full pay pending investigation into the *Kirkham* allegation. No decision had been made nor would be made without the *plaintiff* being given a full and fair opportunity to respond and the investigations completed.

[45] In a letter of 16 December 2004[28] to the *plaintiff*, *Fraser* referred to a meeting of 30 November 2004.[29] The letter stated that the *defendant* had become aware of 'additional allegations' against the *plaintiff* impacting on 'the trust and confidence that the company [could] have in [his] continued employment'.

[46] The letter raised 'serious allegations of workplace, health and bullying made by *Kirkham* with particular reference to but not restricted to the events of 8 November 2004'. It also dealt with allegations of derogatory and demeaning conduct by the *plaintiff* to other employees 'similar to the contact alleged by *Kirkham*'; details were provided.

[47] The letter also raised an alleged incident which is said to have occurred on 11 October 2004 concerning another employee of the *defendant*, Wayne Harrison-Watt (*Harrison-Watt*) and went on more general terms to allegations of inappropriate and intimidatory management of staff.

[48] Under the heading 'Allegations in relation to the sponsorship of a foreign national' it went on to make allegations concerning the *plaintiff's* involvement in the company's sponsorship of a Chinese national. The letter reiterated that no decision had or would be made bearing on the matters and none would be made until investigations into the allegations had been finalised.

[49] On 22 December 2004 the *plaintiff* and his lawyer met with *Fraser* concerning the allegations made in the two letters for the purpose of *Fraser* hearing the *plaintiff's* response to the allegations against him. The solicitors asked for time for a written reply.

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[25] Exhibit 14.
[26] Ibid.
[27] Exhibit 9.
[28] Exhibit 10.
[29] This may be a mistake for 23 November – see Exhibit 9; Transcript of proceedings, p12, lines 25-30.

[50] In the event, the *plaintiff* was summarily dismissed by a letter of 23 December 2004.[30] This stated that the *defendant* was not satisfied with the *plaintiff's* responses to the earlier letters. The following allegations were said to be relevantly made out against the *plaintiff*:

> 1. You were aware or should have been aware of the degree to which you have placed the Company's manufacturing relationship in China at risk by the sponsorship of Ms Fang and your failure to comply with the ongoing sponsorship undertakings of the Department of Immigration and Multicultural and Indigenous Affairs (**"the Department").** I am satisfied that you were aware or should have been aware of the seriousness of this matter, having regard to the seniority of your position, particularly the fact that you signed the letter dated 22 April 2004, which states that the Company has '*assumed the sponsorship undertakings in regard to the proposed visa*' for Ms Fang.
>
> I am not satisfied with your excuse or explanation that you were unaware of the degree of specificity outlined in the application, having regard to the fact that you were responsible for supervising Mr Archibald and Mr Graham and signed the letter dated 22 April 2004, committing the Company to the undertakings. Similarly, having regard to the ongoing obligations outlined in the undertakings, I am satisfied that you were aware of the degree to which Ms Fang was providing services to the Company, from Mr Graham's reports to you and emails copied to you from China. This includes, having regard to your role in the Company, and the small number of employees employed by the Company, that Ms Fang:
>
> (i) has not provided any training or services to the Company;
> (ii) has provided no reports to the Company;
> (iii) is not fluent in English and has been studying English during her time in Australia;
> (iv) has not presented herself at the Company's premises, has had no contact with the Company, other than being visited and supported by Ben Graham, with your knowledge, acceptance and condonation.
>
> I am not satisfied that you have provided a reasonable explanation or excludes for this conduct, in light of its seriousness of the matter and your obligations to the Company.
>
> 2. You inappropriately touched Wayne Harrison Watt on the genitals on or about the week of 11 October 2004. You have admitted to the incident occurring, but responded that you did not touch his genitals, but rather his leg. I am not satisfied with your explanation, having regard to Mr Harrison Watt's unsolicited complaint and the seriousness of the incident itself. On either view, the matter is not acceptable workplace conduct or behaviour for a Joint CEO. I am not satisfied that your response regarding Mr Harrison Watt's frequent use of the words '*Fuck off*' in the office excuses or defends the conduct Mr Harrison Watt has complained of against you. Mr Harrison Watt denies stating those

[30] Exhibit 1.

> words at any time to you, other than in response to the incident in which you touched his genitals. In accordance with the undertaking that I gave at our meeting, I personally spoke with Mr Harrison Watt late yesterday and he confirmed the allegation and his willingness to give evidence in a Court of Law if necessary.
>
> 3. You have engaged in repetitive inappropriate and intimidatory behaviour to Anthony Kirkham and Paul Rea. I am not satisfied with your explanations regarding your use of the word '*Teflon 1*' and '*Telfon 2*' and the events of 8 November 2004. Your conduct and the letter provided to Mr Kirkham on 8 November 2004 were not appropriate workplace and have placed the Company at considerable risk having regard to the manner in which you conducted yourself. I am also not satisfied with your explanation regarding the Medica Schedule, particularly having regard to your own notes provided to Mr Rae, in which you suggest to him that you should attend, by requiring that he insert the words: '*I strongly request your attendance along with myself*'.[31]

[51] The letter of 23 December 2004 went on that the *defendant* was satisfied the matters were 'individually and collectively sufficiently serious' to justify summary determination. It continued that although it was 'not necessary for the purpose of determining [the *plaintiff's*] employment' the *defendant* was not satisfied that the *plaintiff* had provided a response to all of the allegations in the 16 December 2004 letter.

[52] The letter summarily dismissed the *plaintiff.* The decision to dismiss the *plaintiff* was made by the new board members, Messrs *Fraser*, Mackenzie and Rogers but not *Kiehne* and the letter was signed by *Fraser* as chairman.

The *defendant's* justification for summary dismissal

[53] In cases such as this there is an implied term that the parties act in good faith in a relationship of mutual trust and confidence.[32] The right to summarily dismiss in such circumstances is founded on the general contractual right of a party to the contract to accept the other party's conduct as repudiatory and electing to terminate the contract.

[54] The defendant bears the burden of proving repudiatory misconduct; *Randall v Aristocrat Leisure Ltd*[33] and following where Einstein J comprehensively reviews the authorities. The degree of misconduct justifying dismissal in circumstances such as this is a question of fact;[34]

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[31] Particulars of the *plaintiff's* serious misconduct were pleaded by paragraph 14(c)(i) of the Defence and Counter Claim (court file document 18) to be set out in the letter of termination of 23 December 2004 (Exhibit 1) and the Further and Better Particulars of 10 June 2005 (court file document 8).

[32] These implied terms have been examined and re-examined in a large number of cases. See for example the decisions by Rothman J in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104 and Einstein J in *Randall v Aristocrat Leisure Ltd* [2004] NSWLC 411.

[33] [2004] NSWLC 411, 446.

[34] *Blythe Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 73.

[55] Misconduct means:

> substantial wrongful conduct such as to constitute an act of repudiation of the employment contract, being conduct inconsistent with the fulfilment of the employee's obligation. In that regard … intentions … in relation to the matters the subject of dispute are important to the determination or otherwise of misconduct.[35]

[56] In *Blythe Chemicals Ltd v Bushnell*[36] Dixon and McTiernan JJ referred to:

> conduct which in respect of important matters is incompatible with the performance of the employee's duty, or involves an opposition, or conflict between his interests and his duty to the employer or impedes the faithful performance of obligations, or is destructive of the necessary confidence between employer and employee.

They went on to say that on the view they took of the circumstances the employee's motives and intentions 'for the significance and sufficiency as a justification of the other items of misconduct relied on appear to depend on the truth of his explanation or the *bona fides* of his acts'.[37]

[57] What I have referred to as repudiatory conduct makes it impossible for the relationship of employer and employee to continue on its former basis. This can arise if all necessary confidence between the parties has been destroyed by the employee, where essential conditions of service are disregarded or no intention to be bound evidenced by the employee.[38]

[58] The *defendant's* justification is conveniently dealt with under the following headings:

- Allegations concerning the *plaintiff's* treatment of *Kirkham* on 8 November 2004 (*the Kirkham allegations*).
- Allegations arising out of an incident involving *Harrison-Watt* (*the Harrison-Watt allegations*).
- General allegations of improper conduct involving *Kirkham, Harrison-Watt* and other staff (*general allegations of misconduct*).
- Jeopardising relations with the Chinese manufacturer of equipment involving the sponsorship of a Chinese employee (*the sponsorship issues*).

The *Kirkham* allegations

[59] *Kirkham* joined the *defendant* in April 2004 as clinical sales support manager. He left its employ in April 2005. In late 2004 the *plaintiff* became concerned that *Kirkham* was relaying information he had gained by overhearing telephone calls or conversations the *plaintiff* was conducting in his office to other people.

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[35] *Randall v Aristocrat Leisure Ltd* [2004] NSWLC 411, 452.
[36] (1933) 49 CLR 66, 81.
[37] Ibid, 83.
[38] *Randall v Aristocrat Leisure Ltd* [2004] NSWLC 411, 448.

[60] In my view it is unnecessary to determine whether *Kirkham* in fact acted in this way although I am inclined to accept that he did. It is sufficient that it was reasonably open to the *plaintiff* to reach that conclusion; he did so, was justifiably concerned about it and took steps to address the basis of his concerns.

[61] As a consequence of forming this view after the issue was drawn to his attention by another employee the *plaintiff* asked Paul Douglas Rea (*Rea*) (the *defendant's* international business manager until August 2006) to accompany *Kirkham* into his (the *plaintiff's*) office with a view to handing *Kirkham* a warning letter and having him sign an acknowledgement that it had been received.[39] *Kirkham* was called and gave evidence at the trial.

[62] *Kirkham* refused to sign the letter and wanted to know who had told the *plaintiff*. The *plaintiff* refused to provide the details *Kirkham* sought and pressed him to sign the letter.[40] The situation became heated although *Kirkham* said he wasn't agitated or angry but was 'more concerned and confused - a little bit upset but more confused'.[41] *Kirkham* said he wished to obtain legal advice and the *plaintiff* acknowledged that he could do so.[42]

[63] It is clear that at the time *Kirkham* thought he was being required to sign an acknowledgement that he had engaged in the conduct complained of. He acknowledged in evidence that this was not the case and that the signature was merely an acknowledgement of receiving the letter;[43] it is apparent from the terms of the document.

[64] *Kirkham* also spoke of a discussion on 8 November 2004 about his moving to what was described as 'Mr *Kiehne's* office'. He asked why and the *plaintiff* told him it was company security. *Kirkham* says he may have asked for elaboration but could not remember whether he had and said he would need to find out from *Kiehne* first whether it was okay to move into his office.[44] He apparently did so and moved.

[65] On 15 November 2004 *Kirkham* sent the email to *Kiehne*[45] complaining about the *plaintiff's* conduct and enclosing a copy of the email that he had sent to the *plaintiff*. This stated to the effect that *Kirkham* was unable to carry out his duties to the best of his ability in the hostile work environment and was taking stress leave for some days.

[66] *Fraser's* letter of 16 December 2004 to the *plaintiff*[46] under the headings 'Allegation of workplace harassment and bullying by Anthony Kirkham' and 'Allegations relating to your conduct on 8 November 2004' raised a number of allegations against the *plaintiff* and the matter was also dealt with in the letter of dismissal of 23 November 2004[47] and in the further and better particulars of 10 June 2005.[48]

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[39] Exhibit 13 - letter dated 8 November 2004.
[40] Transcript of proceedings, p55, lines 20–40.
[41] Ibid, p314, lines 55-60.
[42] Ibid, p315, line 20.
[43] Ibid, p314, lines 35-45.
[44] Ibid, p313, lines 40-50.
[45] Exhibit 14 - referred to in paras [41]-[42].
[46] Exhibit 10.
[47] Exhibit 1.
[48] Court file document 8.

[67] *Kirkham* gave little or no evidence in support of the other allegations concerning conduct directed towards him contained in the letter of 16 December 2004[49] or the further and better particulars of 10 June 2005.[50]

[68] So far as the events surrounding the letter of warning are concerned the *plaintiff* acted properly in the *defendant's* interest. *Kirkham* misunderstood what was being asked of him in respect of the letter.

The *Harrison-Watt* incident

[69] *Harrison-Watt* is *Kiehne's* brother in law. He was first employed by the *defendant* in August 2000 and remained in that employment at the time he gave evidence at the trial.

[70] *Harrison-Watt* gave evidence of an incident which occurred in late September or early October of 2004. He had injured his leg while jet skiing and in the course of a conversation about this injury the *plaintiff* said he had an old football injury and gestured to his right shoulder. *Harrison-Watt* raised his hand and lent forward to feel the shoulder. The *plaintiff's* right hand came down and touched him on the genitals in what *Harrison-Watt* described as a 'grab'.[51]

[71] The *plaintiff* described this as what he called 'a joke of deception and surprise'. He said in evidence it was 'a bit of horseplay … but inappropriate'.[52] He maintained that he neither intended to nor touched *Harrison-Watt's* genitals.[53]

[72] *Harrison-Watt* told the *plaintiff* to 'fuck off' and went back to his office but did not complain to anyone at the time, he was upset and emotional. He avoided contact so far as possible with the *plaintiff* but subsequently participated in a fishing trip as a deckhand on *Kiehne's* boat when the *plaintiff* and others were fishing with visitors from China.

[73] *Harrison-Watt's* evidence is he disclosed the incident in response to a direct question after the new board had been appointed but was unable to recollect who had made the inquiry; he thought it was a solicitor from Clayton Utz.[54] The further and better particulars of 10 June 2005[55] at paragraph 10 say that an 'unsolicited complaint' was made orally to *Kiehne* in mid to late October 2004.

[74] *Harrison-Watt* was adamant in evidence that there was a 'grab' of or at least for his genitals. I accept *Harrison-Watt* may well now be persuaded there was but I am not satisfied there was an intentional grab or touch of the genitals.

[75] Put shortly there was a misconceived, ill judged incident of horseplay by the *plaintiff* which caused *Harrison-Watt* distress and embarrassment. It was not conduct justifying summary dismissal.

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[49] Exhibit 10.
[50] Court file document 8.
[51] Transcript of proceedings, p253, lines 30-45.
[52] Ibid, p257, lines 20-25.
[53] Ibid, p50, lines 15-20.
[54] Ibid, p254, lines 35 - p255, lines 1-10.
[55] Court file document 8.

General allegations of misconduct

[76] In addition to the specific allegations concerning *Kirkham* and *Harrison-Watt* which were dealt with earlier there are more general allegations made in the letters of 16 December 2004,[56] 22 December 2004[57] and the further and better particulars of 10 June 2005.[58]

[77] Of those raised in the further and better particulars Ben Leigh Graham (*Graham*), *Harrison-Watt*, *Kirkham*, *Rea* and Wayne Leigh Archibald (*Archibald*) gave evidence.

[78] To the extent to which the allegations were put and accepted by the *plaintiff* in cross examination in my view he acceptably justified or explained them in the context of his responsibilities and role as joint chief executive officer. He gave explanations, for example, as to responses to concerns raised by clients, restricting unnecessary participation or presence at meetings and budgetary considerations.

[79] The *plaintiff* said that he did not refuse *Kirkham* and *Rea* permission to meet together with customers[59] but had suggested there was not a need for dual calling.[60] He went on to explain that it had become a practice that an appointment would be made after two o'clock in the afternoon and neither of the two men would come back to work that day.[61]

[80] Another example is there were budgetary constraints reflected in only allowing one person to attend a conference and *Kirkham* not being given permission to attend.[62] *Rea's* recollection was this was 'obviously' for budgetary reasons.

[81] *Rea*, to whom *Kirkham* reported gave evidence of the *plaintiff* speaking of his concern of the effect that a previous employee (Moylan) had had on *Kirkham* who the *plaintiff* thought was over confident and egotistical to alert him to difficulties he might have.

[82] *Rea* accepted that the *plaintiff* also said that *Kirkham* would be 'of real value' and that he (Rea) would benefit from *Kirkham's* experience and that *Kirkham* had 'solid qualities'.

[83] The *plaintiff* dealt with the issues about Personna raised in the letters and further and better particulars[63] and the exclusion of *Kirkham* and *Rea* on the basis of there being two reasons. First was Personna, the US distributor of the *defendant's* scalpel in that country. There were difficulties about the rejection of scalpels for reasons of quality and function and they were not *Kirkham* or *Rea's* areas of knowledge, experience or expertise. The problem was not sales but function and quality.[64]

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[56] Exhibit 10.
[57] Exhibit 1.
[58] Court file document 8.
[59] see Exhibit 1 - letter of 23 December 2004.
[60] Transcript of proceedings, p156, lines 10-15.
[61] Ibid, p156, lines 1-15.
[62] Ibid, p53, lines 1-10.
[63] Exhibit 10, para (c)(iii); Court file document 8 - Further and better particulars, para C(3).
[64] Transcript of proceedings, p155.

[84] Secondly, a senior executive of Personna had indicated that company's concerns about a contact by the *defendant's* employee Moylan earlier. The *plaintiff* was asked to limit the number of persons to have direct contact to the operations manager, the person in charge of quality control and himself.

[85] *Kirkham* gave no evidence to support the serious allegation the *plaintiff* directed him to change clinical observations in reports.[65] The allegation was abandoned by the amended defence.

[86] *Rea* gave no evidence in support of the allegations particularised in paragraph 3.2 of Exhibit 10 that he was forced by the *plaintiff* to submit information despite his concerns as to its accuracy.[66]

[87] Put shortly, I am not satisfied the *defendant* engaged in conduct which was 'bullying', 'offending', 'work place harassment', 'less favourable treatment', 'less favourable', 'undermining', 'excluding from' or 'interfering with'[67] *Kirkham* or *Rea* in the performance of their duties.

The Sponsorship Issue

[88] The *defendant* had a relationship with a Chinese company, China Medical Group Inc (*China Medical*). A Mr Li (*Li*) was the principal of *China Medical* and was regarded by the board and senior executives of the *defendant* as important to the successful development of its business in China through *China Medical*.

[89] On 28 October 2003 the *defendant* and OMI Manufacturing Pty Ltd a company associated with it and *Kiehne* had entered into a manufacturing and distribution agreement with *China Medical*.[68] The agreement gave *China Medical* exclusive rights to manufacture the *defendant's* retractable syringe worldwide and to distribute the product in China. These were, particularly the exclusive manufacturing rights, valuable rights for *China Medical*.

[90] In early 2004 an intermediary made it known to the *plaintiff* and *Archibald*, the then general manager of the *defendant*, that *Li* had a daughter by his mistress Michelle Fang Jun (*Fang*). This situation had become embarrassing to *Li*.

[91] It would therefore be appreciated by *Li* if the *defendant* could arrange employment for *Fang* in Australia so that a long stay temporary business visa could be obtained for her and the child to reside here. This was to be until arrangements could be put in place for them to enter the United States in about 12 months.

[92] It is clear that the board of the *defendant* and senior management regarded this approach as a welcome opportunity to strengthen connections with *China Medical* to the *defendant's* advantage.

[93] The letter of dismissal of 23 December 2004[69] alleges that the *plaintiff* put the *defendant's* 'manufacturing relationship with [*China Medical*]' at risk by the

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[65] Exhibit 10, para 1.3(iv)B; Court file document 8 – further and better particulars, para 13.
[66] Court file document 8 – further and better particulars, para 13C(c)(ii)(4).
[67] These are a selection of the phrases contained in Exhibit 1, other letters and court file document 8 – further and better particulars of 10 June 2005.
[68] Exhibit 52.
[69] Exhibit 1.

sponsorship of *Fang* and also 'by failing to comply with ongoing sponsorship undertakings'.

[94] The further and better particulars[70] gave particulars of the 'risk' and of the 'failure to comply' as set out in paragraph 3(a)(iii) and (b)(i), (ii) and (iii):

> 3(a)(iii) as a consequence of the matters pleaded in subparagraph 2(f) herein, the defendant did not comply with DIMIA requirements with respect to the sponsorship of Ms Fang and, as a result, Ms Fang was at risk of having her temporary Australia Visa cancelled;
>
> (b) as to subparagraph (b), the nature of the "risk" was that as a result of the matters pleaded in subparagraph 2(a)(iii) herein, as the request was made on behalf of CMG there was the prospect of:
>
> (i) a dispute between the defendant and CMG affecting the manufacture of the defendant's retractable syringe product;
>
> (ii) a deterioration in the commercial relationship between the defendant and the sole manufacturer of the defendant's retractable syringe product;
>
> (iii) the manufacturing relationship being terminated by CMG, leaving the defendant without a manufacturer for its retractable syringe product.

[95] The *plaintiff*, who had only been employed for a short time, raised the proposal concerning *Fang* with *Kiehne* who said 'if we don't accede to assist in this regard it could only damage our relationship [with *China Medical* and *Li*] whereas if we did accede to the request it would only help to further strengthen our business relationships ongoing'.[71]

[96] *Fraser*, who joined the board and became chairman on 23 November 2004**,** after the sponsorship arrangements were made, accepted that the sponsorship had been a 'sensible thing to do' and that 'it didn't place relationships at risk';[72] he was not there are the time but that 'having said that, I probably [would have done] the same myself'.

[97] As *Fraser* accepted, in paragraph [96] above, the request for sponsorship did not place the relationship with *China Medical* and *Li* at risk. To the contrary, it is difficult to see how it could ever be said the sponsorship placed the relationship at risk. If there was a risk it apparently lay in not responding favourably to the approach.

[98] The risks to the *defendant's* manufacturing relationship in China by failure to comply with the sponsorship undertakings are particularised in paragraph [94]. These are essentially assertions and in my view are not supported by acceptable evidence.

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[70] Court file document 8.
[71] Transcript of proceedings, p276, lines 30-50.
[72] Ibid, p323, lines 55-60 - p324, lines 1-10.

[99] As to 3(a)(iii) my attention was directed to ss 140J and L of the *Migration Act 1958* (Cth) which provides that if a sponsor breaches an undertaking the Minister may cancel the sponsor's approval for temporary visas and bar the sponsoring of further people or making further applications for approval.

[100] The evidence does not substantiate a real risk of *Fang's* visa being cancelled. The Department of Immigration and Multicultural and Indigenous Affairs' (*DIMIA*) response to *Fraser's* approach to address issues about the undertaking after he became chairman indicate it is unlikely that this would have happened.

[101] In any event that the relationship with *China Medical* would have been endangered by cancellation of the visa is no more than speculation. *Li* or *China Medical* had the valuable manufacturing rights and the evidence does not found a conclusion that he or anyone else associated with *China Medical* might have acted adversely to the *defendant's* interests alleged in the particulars.

[102] The *defendant* decided to accede to the request and apply for a visa for *Fang* to enter Australia to work for the company. The matter was not dealt with formally at a board meeting but was mentioned by the *plaintiff* as board members were packing up to leave. The evidence is not clear as to who was present at the meeting.

[103] In terms of the division of responsibility between the *plaintiff* and *Kiehne*, implementing the proposal lay within the *plaintiff's* area. He allocated the task to *Archibald* who in turn delegated the day to day workings of the matter to *Graham*, the office administration manager. These were appropriate arrangements.

[104] Michael James Hayne (*Hayne*) a member of the board recalls this mentioned and *Hayne s*aid words to the effect that 'we've got to be sure we do this properly' and asked for more information but apparently took the matter no further.[73]

[105] As I have said there is no doubt that the board and senior management (including the *plaintiff* and *Kiehne*) thought it was in the *defendant's* interest to accede to the requests; knew that it had and that steps were put in train to obtain the necessary visa. I do not suggest that each of them was familiar with the detail of what was being done.

[106] The arrangements between *China Medical* (or *Li*) for *Fang* and her child to come to Australia involved the *defendant* being reimbursed for any expenditure on *Fang* including salary, rent, domestic assistance, and childcare expenses. Arrangements were made for the leasing of an apartment, finding a suitable kindergarten or childcare centre and English lessons for *Fang*.

[107] The *defendant* was of the view that work could be found for *Fang*. There were, for example, quality control issues with the product manufactured in China. It would be helpful to have someone to translate documents including technical specifications from English to Chinese and trained how to support quality control of the manufacturing process in China. It would also be useful to have someone to translate communications to and from China.

[108] On 11 March 2004 the *plaintiff* received an email from Pan Hai (*Pan Hai*) who appears to have been *Li's* executive assistant.[74] This expressed *Pan Hai's* 'hope for

[73] Ibid, p195, lines 35-40.

good co-operation in [the] future' and sought information about the visa application and processing requirements.

[109] An extensive and extended exchange of communications, mainly by email, then followed between *Pan Hai*, *Archibald*, *Graham*, the *plaintiff*, on occasion *Kiehne* and *DIMIA*. The content of these communications is not controversial and it is unnecessary to canvas them in detail. As will emerge a visa was obtained and *Fang* and her child came to Australia and took up residence in the apartment secured by the *defendant*.

[110] A Form 1196 'Sponsoring temporary overseas employees to Australia' was completed by *Archibald* on 8 April 2004.[75] This dealt with salary arrangements, the position being responsible for ensuring manufacturing in China complied with the *defendant's* requirements and included under the heading 'Essential Skills', 'Fluency in English'.

[111] In a letter of 22 April 2004 to *DIMIA* signed by *Graham*,[76] the *plaintiff* dealt with outstanding issues concerning the application to sponsor a temporary overseas employee – *Fang* and enclosed a letter signed by the *plaintiff* confirming the *defendant* had assumed the sponsorship undertakings from OMI Research Pty Ltd.[77] It also referred to an increase in salary from $30,000 to $37,720 plus nine per cent superannuation. This apparently reflected a concern raised by *DIMIA* that the $30,000 salary referred to in the original application did not reflect the job description requirements.

[112] It is convenient to set out the undertakings in full rather than try to summarise them:

> The business undertakes to do the following in relation to sponsored persons and dependants while in Australia, unless the person has, with agreement from *DIMIA*, subsequently been sponsored or nominated by another employer who has been (sic) become responsible for that person.
>
> - Accept responsibility for obligations to the Commonwealth. For example:
> - ensure that tax instalments are deducted from salary or wages, eligible termination payments and Fringe Benefits Tax;
> - make superannuation contributions; pay debts owed to the Commonwealth as a result of a sponsored person and/or dependants receiving or using Commonwealth benefits or services to which they have no entitlement, eg. Medicare, social security benefits;
> - comply with Australian industrial relations laws, Australian levels of remuneration and conditions of employment;
> - accept financial responsibility directly or through acceptable medical insurance arrangements, for all medical and hospital costs incurred in Australia by sponsored persons and their dependants;
> - ensure that sponsored persons hold the necessary license, registration or membership where it is mandatory for work of the kind proposed in Australia;

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[74] Exhibit 27.
[75] Exhibit 11.
[76] Exhibit 48.
[77] This is relied on in Exhibit 1.

- be responsible for repatriation costs for sponsored persons and their dependants;
- inform *DIMIA* immediately if the sponsored person ceases to be in the business's service;
- comply with immigration requirements;
- cooperate fully with *DIMIA* in monitoring sponsored persons, including providing monitoring reports as required by the Minister;
- cooperate fully in any audit checking relating to the employment of persons from overseas;
- notify *DIMIA* of any change in circumstances that may affect the business's capacity to honour its sponsorship obligations, or any change to the information provided on the sponsorship form;

and for business operating in Australia:

- accept as good practice the desirability of crating appropriate career opportunities for Australian citizens and permanent residents both in Australia and, where the business operates internationally, overseas; and
- accept that the recruitment of labour from overseas must not counter Government training policies and objectives of producing a highly skilled and flexible Australian workforce.

[113] The further and better particulars[78] gave particulars of the breach of undertaking relied on set out in paragraph 2(f)(i) and (ii):

> 2(f) as to subparagraph 2(f), the plaintiff:
>
> (i) failed to ensure the defendant complied with the undertaking to "inform DIMIA immediately if the sponsored person ceased to be in the business' service" in circumstances where the plaintiff knew, or ought to have known, that Ms Fang did not provide services tot eh defendant as represented in the form 1196, or at all;
>
> (ii) failed to ensure the defendant complied with the undertaking to *"notify DIMIA of any change in circumstances that may affect the business' capacity to honour its sponsorship obligations, or any change to the information provided on the sponsorship form"* by:
>
> A. failing to notify DIMIA that Ms Fang would not commence, or had not at any relevant time commenced, in the position of Production Quality Manager as represented in the sponsorship form;
>
> B. failing to notify DIMIA that Ms Fang was not fluent in English which was represented as one of the essential skills of the role in the sponsorship form.

[114] As I have said the visa was obtained and on 3 October 2004 *Li*, *Pan Hai*, *Fang* and her daughter arrived in Australia. It is pertinent to note in considering the events

[78] Court file document 8.

which follow that the *plaintiff* was suspended on 23 November 2004[79] and dismissed on 23 December 2004.[80] It may also be inferred that there were increasing tensions in relation to the funding of the *defendant's* interest and *Kiehne*, culminating on the 'sacking' of the board.

[115] The *plaintiff's* evidence is that when *Fang* arrived *Kiehne* told him that *Pan Hai* had asked if 'we' could organise arrangements for her to have the abortion of another baby. *Kiehne* asked him whether he would make inquiries. The *plaintiff* said he would have nothing to do with it but would make an inquiry of his brother, *John Taske*. *Kiehne*, the *plaintiff* and *John Taske* were opposed to abortion and did not want to assist.

[116] The *plaintiff* provided the address of a family planning clinic opposite the Royal Brisbane Hospital and had no further involvement.[81] In the event *Fang* had an abortion on 11 October 2004. The evidence is silent as to how the arrangements for that were made and by whom and I have not reached any conclusion about it.

[117] It appears that there were concerns about *Fang's* English reading and fluency skills after she arrived. That is reflected in the arrangement to enrol her in English lessons before she arrived in Australia. The evidence is not clear as to her level of competence. It is for example suggested that she could comprehend spoken English but was not fluent in speaking it.

[118] It seems clear that her level of competency to read and speak English was initially not at the level necessary for her to carry out the duties contemplated that she would carry out although it appears that it improved. She was initially not fluent in English.

[119] *Fang* finally 'commenced working' for the *defendant* in late March/early April 2005 in the sense of carrying out duties. The evidence is not clear as to why there was such a delay although it is likely that there was initially a delay while she was recovering from the abortion and then until her English language competency improved.

[120] *Fang* commenced work initially three days a week at the office and one day at home before progressing to four days in the office and one day at home until she returned to China in December 2005 apparently because of a family illness. Clearly her work was considered useful to the *defendant*. It is not to my mind clear that in the circumstances that *Fang* 'ceased in [the *defendant's*] service' of the proposed arrangements in terms of the undertaking so as to call for notification.[82]

[121] *Archibald* raised misgivings about the probity.[83] His concerns included:

- the request was for a personal favour entirely divorced from any business or commercial aspects;
- the personal nature of the request;

[79] Exhibit 9.
[80] Exhibit 1.
[81] Transcript of proceedings, p46, lines 40-50; Transcript of proceedings, p145, lines 35-55.
[82] Exhibit 11.
[83] Ibid, p291-294.

- the funding arrangement;
- the need for English lessons;
- the position did not then exist and many of the functions in Exhibit 11 were being carried out by another employee;
- the disparity in skills between the visa application by *Fang* and those in this documentation.

These concerns are not without justification. It may also be the case that others raised issues with the *plaintiff* that the arrangement had to be done lawfully.

[122] It is however not pleaded nor proven that either the *plaintiff* or the *defendant* (including its employees) did anything illegal in connection with the provision of the visa for *Fang* to enter Australia.

[123] As I have previously said, *Fraser* became a member of the board and chairman on 23 November 2004 and remained in that position until he resigned from the board on 31 January 2006. He became aware that *Fang* was attending English lessons because her English was poor. He 'formally assigned *Kiehne* to ensure that the English lessons were pursued and consulted [the *defendant's*] lawyers on the undertakings'.[84]

[124] *DIMIA* was told of *Fang's* lack of English and that she had not commenced work until mid March 2005. At a formal meeting on 1 April 2005 the full position was explained to the department and 'they accepted it'. It was noted at a March board meeting that *Fang* was now at a suitable standard of English for her to commence work and that she must start as soon as possible.[85]

[125] On 7 April 2005 *Fraser* wrote to *DIMIA*[86] referring to the meeting on 1 April 2005 and the advice to write to the department about the circumstances surrounding the employment of *Fang*.

[126] The letter referred to *Fraser* being appointed to chairman of a new board on 26 November 2004 and that consequently some of the information set out had come from third parties. It went on that the *defendant* required *Fang* to work 'in regulatory and quality assurances so that she can gain a thorough understanding of these matters' and be relocated to China to oversee aspects of manufacturing in China.

[127] The letter referred to the job specification that formed part of the sponsorship application and listed fluency in English as a requirement and that he was told that when she arrived in Australia her English was 'extremely poor'. The situation came to *Fraser's* attention in early December 2004 and he immediately made inquiries and found that she had not come into the office regularly and was undertaking English tuition.

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[84] Ibid, p260, lines 5-15.
[85] Ibid, p260, lines 20-30.
[86] Exhibit 54.

[128] The letter stated that *Fang* had been paid by the *defendant* since her arrival in accordance with the undertaking given in the sponsorship arrangement and that the board had been advised that she would be able to commence full time work in early April 2005.

[129] The letter went on to state that *Fraser* now realised that the *defendant* should have contacted the department to inform it of the education processes etc but that this had not happened.

[130] *Fraser* reiterated his intention that *Fang* be trained as quickly as possible and return to China to engage in a critical role. The letter concluded by saying that while the *defendant* may have handled the issue more efficiently the department was requested to take into account the issues set out in the letter.

[131] *DIMIA* acknowledged receipt of the letter and sought written confirmation that the proposals canvassed in the letter of 7 April 2005 had been put in place; that was dated 9 May 2005.[87]

[132] *Fraser* responded by a letter of 26 May 2005 confirming that the *defendant* remained in dispute with the *plaintiff* and that the circumstances of the termination of his employment included his compliance with the sponsorship undertakings.[88] It was therefore not possible to obtain information from him.

[133] The letter confirmed that *Fang* was working three days in the office and one day at home in the translation of documents, was currently on leave with her daughter in China but on her return on 6 June 2005 she would work four days a week in the office and one at home. The increased hours were necessary in light of the increasing need for her skills and knowledge of manufacture in China but she continued to receive two hours of English tutoring a week which did not inhibit her workplace duties.

[134] The letter concluded by emphasising the importance of *Fang's* knowledge and language skill to the company. So far as the evidence revealed that appears to be the end of the episode so far as *DIMIA* is concerned.

[135] *Fang* and her child returned to China in December 2005 apparently for family reasons i.e. reasons unrelated to any breach of visa conditions or any undertaking by the *plaintiff*.

[136] In my view which I have called the events which I have called *the sponsorship issue* do not provide a justification for the *plaintiff's* summary dismissal.

Conclusion

[137] In my view the matters relied on by the *defendant* as justifying the *plaintiff's* summary dismissal, either separately or in combination, do not found misconduct justifying summary dismissal, and were not repudiatory in the sense referred to earlier.

[138] Although it is unnecessary to do so in order to arrive at that conclusion it is, in my view, appropriate to comment that the justifications relied on to support the

[87] Exhibit 55.
[88] Exhibit 56.

plaintiff's summary dismissal have a flavour of setting out, in circumstances where the decision had been based on other considerations, to justify the *plaintiff's* dismissal on the ground of misconduct.

The *plaintiff's* credibility

[139] It will be apparent that I have accepted the *plaintiff's* evidence on crucial issues in this case. I do not accept the *defendant's* submission that the *plaintiff* was not a witness of credit or that his demeanour in giving evidence was unimpressive and his answers were non-responsive to the degree that his evidence should be rejected as not credible.

[140] As I have observed earlier the *defendant* in the event did not rely on, or abandoned, issues raised as justifying the summary dismissal. It did not lead evidence in respect of others and its witnesses did not come up to proof in a number of respects. Aspects of matters relied on to justify summary dismissal were put to the *plaintiff* in cross examination. To the extent to which he denied or explained what was put, his evidence is uncontraverted.

[141] My impression of *Kirkham* and *Harrison-Watt's* evidence is that it did not come up to the expectations raised by the correspondence and the further and better particulars.[89]

[142] It is the case that paragraph 3.14 of Exhibit 26 asserted that the Jackson *restaurant* business was trading profitably and the future prospects for it were nothing but positive and that *Kiehne's* persistent insistence led to the *plaintiff* returning to Australia and making the arrangements about the Jackson business which he did.

[143] The letter is to be taken as written with the *plaintiff's* instructions. As I have already said the *plaintiff* was, perhaps unduly optimistic at the *restaurant's* prospects and maintained that position at trial – he genuinely believed his and his wife's hard work would succeed in turning the *restaurant* into a successful business.

[144] *Kiehne's* 'persistent insistence' contributed significantly to the *plaintiff's* return to Australia. Moreover, Exhibit 26 must be considered in the forensic context in which it was written; the *plaintiff's* then solicitors seeking to take a strong stance in respect of his persistence.

[145] I am not persuaded that the statement in the letter justifies rejecting the *plaintiff's* evidence as not credible when it is put in the context of the whole of the evidence.

[146] Put shortly I have taken the *defendant's* submissions into account. They are not without some basis in some respects but I am not persuaded they are such that I should reject the *plaintiff's* evidence as not creditable.

Reasonable notice

[147] It was not in issue that in the circumstances as I have found them the *plaintiff* was entitled to reasonable notice before his employment could be terminated lawfully and that he did not receive such notice.

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[89] Court file document 8.

[148] The case proceeded on the basis that I should determine the period of notice and the parties would either agree in that event damages or narrow the issues to be determined in respect of them.

[149] What constitutes reasonable notice is a question of the exercise of a discretion reflecting the particular circumstances of the case, reasonable is a relative term depending on a number of interrelated factors; *Causlan v Fisher and Paykel Finance Pty Ltd*;[90] *Opera House Investments Pty Ltd v Devon Buildings Pty Ltd*.[91]

[150] In this case the *defendant* admits that the position of joint chief executive officer was a senior position with remuneration at a high level having regard to the size of the *defendant*. It further admits that the *plaintiff's* age, qualifications and experience were such that he had limited prospect of obtaining an equivalent position in a company conducting a business of the kind conducted by the *defendant*.

[151] The *plaintiff* had gone to the United States with a view to setting up and developing a business there, operating it for some years before selling it and returning to Australia. He was born on 5 December 1941 and it is unlikely he would have worked, at least full time, after that.

[152] The *plaintiff* considered a motor vehicle franchise but the demographics of the Jackson area were not favourable to that and so settled on the *restaurant* franchise. He and his wife were working hard to making it successful. Although the *restaurant* might be said to have been struggling financially the *plaintiff* was, perhaps unjustifiably, confident it had turned the corner and would become a profitable venture.

[153] The *plaintiff's* decision to take up the position was not on the spur of the moment. He was first approached some 18 months before he took up his position with the *defendant*. During that time *Kiehne* importuned him to take up the position with the *defendant* on the basis that the *defendant* needed more effective administrative arrangements to build its success and that *Kiehne* would not accept anybody else in the position.

[154] The *plaintiff* was not able to dispose of the *restaurant* and was obliged to maintain an interest. This was not a particularly satisfactory arrangement. It may well be that there was an element of self interest in the *plaintiff's* taking up the position and returning to Australia to build up the *defendant's* business and hence the value of his and his brother's investment in it but that was by no means the sole determinant.

[155] In my view the major factor to accept the position with the *defendant* was *Kiehne's* position that the *plaintiff* was the only person he would accept as joint chief executive officer and that *Kiehne's* continued involvement was necessary for the *defendant* to flourish.

[156] It is difficult to arrive at a conclusion as to how long, apart from dismissal, the *plaintiff* was likely to have continued his employment with the *defendant*. The contract did not provide for a fixed term. Given that he had relinquished, as far as

[90] [2003] 1 Qd R 503 (CA).
[91] (1936) 15 CLR 110, 117.

he could, his United States interests to further the *defendant* it is likely to have been for perhaps some years, he had served a year.

[157] After his contract was terminated the *plaintiff* was employed by Event Com Marketing Pty Ltd (*Event Com*) as general manager, planning and projects from 20 June 2006. His salary was $80,000 per annum up to December 2006 and then $100,000. Payment of remuneration was deferred until 20 September 2006 after which interest accrued at 10 per cent per annum on the amount owing.

[158] The *plaintiff* has never been paid. On 5 January 2007 he sued *Event Com* in the District Court to recover the amount owing under that agreement.[92] The defence has been filed and the action has not been resolved.[93] On 28 February 2007 *Event Com* terminated the *plaintiff's* employment. The *plaintiff* also assumed a directorship with Orynx in January 2006.[94]

[159] Taking the various considerations into account I find nine months was the period of reasonable notice in the circumstances of this case.

[160] If the parties cannot agree damages they should exchange outlines and approach my associate to fix a date.

[92] Exhibit 17.
[93] Exhibit 18.
[94] Transcript of proceedings, p163, lines 10-13.