



DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mrs Kerri Trail

v

O'Brien Group Australia
(U2020/13105)

COMMISSIONER HUNT

BRISBANE, 14 JULY 2021

Application for unfair dismissal remedy – jurisdictional objection – does a resignation constitute a dismissal – dismissal found - whether a valid reason for dismissal – dismissal harsh unjust and unreasonable – application granted – compensation awarded

[1] On 2 October 2020, Mrs Kerri Trail made an application under s.394 of the *Fair Work Act 2009* (the Act) alleging that she had been dismissed from employment with O'Brien Group Australia (the Respondent) and that the dismissal was harsh, unjust or unreasonable.

[2] In its Form F3 – Employer Response to Unfair Dismissal Application, the Respondent raised a jurisdictional objection pursuant to s.368(1)(b) of the Act contending that Mrs Trail had resigned from her employment and was not forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

When has a person been unfairly dismissed?

[3] Section 385 of the Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

[4] As set out above in s.385 of the Act, only employees who have been dismissed are able to make an application for an unfair remedy application under the Act.

[5] Section 386(1) of the Act provides that a person has been dismissed if:

- (a) the person's employment with their employer has been terminated on the employer's initiative; or

(b) the person has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the employer.

[6] Mrs Trail resigned from her employment on 16 September 2020. Accordingly, it is necessary, in determining the jurisdictional objection, to conclude if Mrs Trail was forced to resign from her employment because of conduct, or a course of conduct engaged in by the Respondent.

Background

[7] The Respondent is a privately owned business, operating in Australia for 30 years. It has catering contracts with many major sporting and recreational stadiums including Suncorp Stadium, Metricon Stadium, the GABBA, and AAMI Park.

[8] Mr Michael O'Brien is a Director of the Respondent. His daughter, Ms Anne-Maree O'Brien is the Operations Director. Mr Simon Camp is employed by the Respondent as the Venue Catering Manager at Suncorp Stadium.

[9] Mrs Trail began working for the Respondent on 20 November 2015. At the time of the employment relationship ceasing, she was employed as a Venue Manager at Metricon Stadium on the Gold Coast.

[10] On 11 September 2020, Mr Simon Camp sent a First Letter of Warning to Mrs Trail which said:

“Dear Kerri

First Letter of Warning

The Venue Manager position is one of trust and operating in the best interests of the company.

We had a discussion on the phone last week where you categorically denied any knowledge of Aaron Sim working at Metricon Stadium under the influence of alcohol.

It has since been brought to my attention that you were clearly aware of the issues around Aaron and his conduct while working as the Executive Chef at Metricon Stadium.

The consequence of "turning a blind eye" to an act of gross misconduct is far reaching and could ultimately result in a criminal prosecution for the company as well as putting the catering contract at Metricon Stadium at risk.

In light of your inaction in dealing with such a serious matter I have no option but to issue you with a written warning.

This is a First Letter of Warning.

Yours faithfully

Simon Camp”

[11] On 16 September 2020, Mrs Trail was issued with a Second Letter of Warning dated 12 September 2020. This provided:

“Dear Kerri

Second Letter of Warning

During our meeting yesterday at Metricon Stadium you informed me that you had requested from the Gold Coast Suns two tickets for the Geelong v Richmond game played that night.

You also advised me that you had previously requested and received tickets for the Geelong v Port Adelaide game on the 14th August.

I asked if you had complied with the company's Gifts, Hospitality and Benefits Policy and Procedure to which you confirmed that you hadn't.

This is in direct conflict to Company Policies and Procedure and falls under the category of gross misconduct. The severity of this breach is heightened given that we are in the midst of delicate contractual negotiations with the Gold Coast Suns.

You should also be aware that over the past 9 years of the Catering Contract when others have requested tickets from Michael O'Brien to Metricon Stadium, he has personally purchased these tickets through the Ticketing Agency rather than request favours from the Gold Coast Suns.

In light of this I have no option but to issue you with a written warning. This is a Second Letter of Warning.

Yours faithfully

Simon Camp”

[12] On 16 September 2020, Mrs Trail tendered a resignation which read:

“After much angst and stress I have decided to tender my resignation as Venue Catering Manager. I have not made this decision lightly and I have discussed this at length with my family.

I have put in a lot of excessive hours over the past 5 years and have sacrificed quality of life to give my very best to O'Brien Group Australia.

Unfortunately, with the way some things have transpired over the last few weeks and months, I no longer have the capacity or ability to endure the workload, the stress levels and the ongoing indirect bullying that has been taking place.

- I have been excluded from meetings and email correspondence
- I have been excluded from financial discussions relating to the business that the Venue Manager role would normally be a part of
- I have been excluded from the redevelopment project
- I have continually had to find out about company decisions from direct reports or the Stadium General Manager which in itself is so unprofessional and embarrassing, not only for me but for OBGGA.

All of which the above 4 points constitutes Bullying and Harassment.

On the 26 August I was on the receiving end of information that advised the company could not afford to make a particular staff member redundant so it was important to ensure that any meetings were formalised, a witness was present and everything was documented so that this staff member could be performance managed out of the business.

In my 35 years of working life I have never received any form of disciplinary action however over the last 7 days I have received 2 written warnings and have been witness to the issuing of another one. In every instance company policy and procedure was not followed and there was a blatant disregard for due process to be followed:

- A formal meeting was not arranged
- There was no option or offer to have a support person present
- No evidence was presented
- An apparent investigation took place with statements taken from only selected staff members when it was well known that other staff members had a different version of events

All of the above has made it untenable for me to continue my employment with OBG, but also leads me to believe there is a concerted effort to have me performance managed out of the business to avoid a redundancy payment.

As required in my employment contract, I offer 4 weeks' notice from today, making my last day of work Wednesday 14th October.

I would also request that all days in lieu owing at the end of this time are paid in full. With the company ban put in place from March 2020, prohibiting days in lieu to be used, it would be reasonable to expect these to be paid out at the end of my employment.

Regards

Kerri Trail"

Hearing

[13] The matter was originally listed for a three-day telephone hearing on 19 and 20 January 2021 and 1 February 2021. As the matter progressed it became necessary to hear the matter for a further day on 9 February 2021.

[14] Mrs Trail appeared and gave evidence. She was supported by Mr Matthew Dakai throughout the hearing. Mr Dakai also gave evidence. Ms O'Brien represented the Respondent throughout the hearing and gave evidence. Her mother, Mrs Elizabeth O'Brien, shareholder and manager of the Respondent attended throughout the hearing.

[15] As a result of the parties being self-represented, it became necessary to recall witnesses throughout the four days of the hearing, causing the matter to blow-out the expected hearing time. In addition to the witnesses above, the following people gave evidence:

- Mr Aaron Sim, former Executive Chef of the Respondent;
- Mr Simon Camp, Venue Catering Manager for the Respondent at Suncorp Stadium;
- Mr Michael O'Brien, Director of the Respondent;

- Mr Bevan Campbell, Queensland O'Brien Group Executive Chef;
- Mr Elliot Scott, Venue Catering Manager for the Respondent at Metricon Stadium;
- Mr Ben Trevers-Grace, Operations Manager for the Respondent;
- Ms Kerri Bailey, former Venue Manager, Gabba Stadium and former Operations Manager, Suncorp Stadium;
- Mr Tim Carey, General Manager at Metricon Stadium for the Gold Coast Football Club;
- Mr Dan Smith, General Manager of the Respondent.

Preface

[16] In preparing this decision, I considered it necessary to include a very large amount of transcript from the proceedings. Regrettably, this has resulted in the decision being extraordinarily long.

[17] I considered it necessary to include a substantial amount of transcript on account of the evidence given by some of the Respondent's witnesses. When an application comes before the Commission and a person has resigned their employment, the hurdle is very much the Applicant's to overcome to demonstrate that there has been a dismissal. On the face of Mrs Trail's application, one might say that it would be very difficult for her to demonstrate that there has been a dismissal in accordance with the Act. However, after spending days with the Respondent's witnesses, and in particular, Ms O'Brien, the evidence of some of the Respondent's witnesses really must be read at some length to understand how it is Mrs Trail came to resign her employment.

[18] I will canvass in greater detail in Consideration the reasons why I have concluded the application in the manner that I have. In reading the evidence given by some of the Respondent's witnesses in these proceedings, there is, it appears to me, an unwavering sense of entitlement, arrogance and ineptness. No matter how questions were put to some of the witnesses, there was no moving from their righteous position. There appeared to me no independence of opinion, which I consider is regrettably, because the Respondent is a family-run organisation. It is my view that there is nobody senior enough in the business with relevant gravitas and independence to inform the O'Brien family that they are not, relevant to this matter, doing the correct thing. There is no independent legal thought or decent human resource practice given to performance management of employees, of which the Respondent employs thousands. It is, regrettably, the O'Brien way, and if you're in the tent, you're in the tent. If you're out, you're out.

Evidence of Mrs Trail

[19] In oral evidence Mrs Trail explained the role of a Venue Manager. She said that it encompassed a great deal including the financial success of the business, forecasting, stakeholder communication and engagement. The role is responsible for cost of goods, staffing, food and beverage, and information for all stakeholders. Mrs Trail was the most senior member of staff on-site at the Metricon Stadium.

[20] Mrs Trail stated that despite having worked for the Respondent since November 2015 without issue, in late April/early May 2020, she first raised her concerns of being bullied in a phone call with Mr Smith.

[21] During the hearing, Mrs Trail stated that while her contract stipulated that she was to report to Mr Smith, she was informed by Mr Camp that she had to follow his directions. It is her evidence that Mr Camp made it clear that when he was giving her directions it was directly from Mr O'Brien. Accordingly, Mrs Trail followed Mr Camp's directions.

Mr Camp's conduct

[22] As a result of being stood down from work as of 31 March 2020 due to COVID-19 closures, Mr Smith's directive had been that no staff were to attend for work, and if they were to enter the workplace, they needed to seek approval. Mrs Trail became entitled to JobKeeper payments. Her evidence is that Mr Camp called her numerous times during the period of time where she was directed not to attend for work, informing her that she was on JobKeeper and should be at work. He asked her questions that she did not have the answer to as she was not at work. She considered that Mr Camp was acting in contradiction to the directive issued by Mr Smith.

[23] Following this, Mrs Trail called Mr Smith in tears, reporting that Mr Camp had spoken to her in a direct, abrupt and rude manner. She informed him that she felt like she was being threatened and discriminated against for not being at work. Mrs Trail said that Mr Smith advised that there was no requirement for her to be at work and he would speak to Mr Camp. Mr Smith informed her that she was doing the right thing. Mr Smith asked if she wanted to take this matter further. Mrs Trail advised she did not wish to at that time as she did not want to antagonise Mr Camp, and she did not want to be on the receiving end of any more hostile phone calls.

[24] In her oral evidence, Mrs Trail stated that Mr Camp belittled her for not being at work when a clear direction had been given from Mr Smith not to attend work without his permission.¹ Mrs Trail further said that Mr Camp was questioning her about stock levels that she wasn't aware of and saying things like, "*You know that little virus that's going around, it's shut us down. You need to get rid of stock.*"²

[25] During cross-examination, Ms O'Brien put to Mrs Trail that it was fair of Mr Camp to be worried about the \$159,000 worth of stock sitting at Metricon Stadium at that time when the stadium was locked up; Mrs Trail replied, "*I guess so*". Mrs Trail remarked that Mr Camp was calling asking why she wasn't at work, but he did not direct or request her to attend work to perform a stocktake. Mrs Trail agreed that at a later date, employees in Queensland and Melbourne attended upon their respective stadiums and packaged items which were either sold at discounted rates (alcohol) or donated to the homeless (soft drink). The kegs of beer were returned to the supplier and food was already frozen.³

Not required to attend meeting with landlord

[26] On 8 July 2020, Mrs Trail was scheduled to attend a stadium meeting with Mr Camp, Mr Carey and Mr O'Brien via video conference. Mrs Trail said that Mr Carey had requested her attendance at the meeting and Mr O'Brien had confirmed by email that she would be at the meeting with Mr Camp. Approximately one hour prior to the meeting, Mr Camp called her and advised that Mr O'Brien did not want her in attendance and not to take this personally. She said that she felt excluded and felt that this would never happen to the Venue Managers from Suncorp Stadium or the Gabba. Mrs Trail could not understand why she would not be included in discussions that were relevant to the venue she managed.

[27] Prior to the meeting, Mrs Trail saw Mr Carey and he asked her, “*What the fuck is going on*”. Mr Carey informed her that Mr O’Brien had called him to let him know she would not be at the meeting. Mrs Trail said to Mr Carey that she could not comment as she did not know what was going on or why she was being excluded.

[28] Mr Carey told her that he would come and see her after the meeting had ended to fill her in on what had happened. After the meeting, Mr Carey came to her office and told her that there was no reason for her not to be in attendance. She said that she was really embarrassed to be put in that position and to be finding out information from the Stadium General Manager rather than her employer.

[29] When asked about this event in cross-examination, Mrs Trail stated:

“Tim Carey had called the meeting the meeting to begin with and he had asked for me to be included in the meeting. Simon had also called me and said he was coming down to the meeting and that I was to set up the videoconference for it. The meeting was due to start early in the morning and I was driving into that meeting when Simon Camp called me; not Michael O’Brien. Simon Camp called me to tell me, and his words were, try not to take this personally, but Michael doesn't want you at the meeting. I was literally sitting at the traffic lights turning to drive into the stadium when that happened. I was quite upset. I parked, I went into the stadium and as I was going in, I saw Tim Carey and he told me that Michael O’Brien had called him to tell him that I was no longer invited to the meeting. Tim was shocked. He said that he was the one who had invited me to the meeting. He wanted me there as Venue Manager because they had things that they wanted to discuss. Again, it's just - Michael called Simon to call me to tell me not to attend the meeting. But Michael called Tim to tell him that I had been uninvited.”⁴

Ostracised by Ms O’Brien

[30] Mrs Trail said that on 23 July 2020, Ms O’Brien and Mrs O’Brien came to Metricon and did a walk-around of the venue. Mrs Trail said that she was not invited on the walk-around. However, during this time they engaged Mr Dakai and Mr Elliot Scott to discuss venue improvements to the retail areas. She said that she was not included in these discussions and saw an email from Ms O’Brien sent the following day to Mr Dakai outlining updates/changes that needed to happen. Mrs Trail said that she felt incredibly stressed and anxious to learn that she was not included in these discussions or email correspondence.

[31] In cross-examination, Mrs Trail conceded that it was common practice for member of the O’Brien family to come in and walk-around and meet with different staff members on site, along with the Venue Managers.⁵ However, Mrs Trail further noted that she thought there was a pattern because there had been a substantial number of events held June to September 2020, and Ms O’Brien had not, on any occasion, specifically spoken to her on site. She noted that Ms O’Brien had met and spoken with Mr Dakai, Mr Sim, Mr Scott, and Mr Trevers-Grace.⁶

[32] Mrs Trail noted that Ms O’Brien asked her how she was on occasions but never discussed any work-related topics with her. She noted that Ms O’Brien would discuss more substantive issues with other staff members, with Mrs Trail being informed from those staff members at a later date.⁷

[33] In mid-August 2020, Mrs Trail participated in a conference call with other Venue Managers. At its conclusion she asked Mr Camp to stay on the call as she wanted to discuss her ongoing exclusion from emails and meetings that had been happening for a number of weeks. Mr Scott was present with her during this time. Mrs Trail advised Mr Camp that she was being excluded from meetings and discussions that she should be part of. She used an example of new menus or outlets being introduced to Suncorp Stadium, where Mr Camp works, and imagine him not being included in the discussion and planning. Mr Camp responded, “*It wouldn’t fucking happen. Point taken.*” Mrs Trail said that Mr Camp said that he would rectify this, however she continued to be excluded even after this conversation.

[34] On 22 August 2020, Mr Camp and Ms O’Brien attended Metricon Stadium to conduct a walk-around and discuss redevelopment. Mrs Trail was directed to arrange carparking passes and entry wristbands. Mr Dakai, one of her direct reports, was taken on the walk-around throughout the venue, including the corporate spaces, which are not part of Mr Dakai’s role. She said that Mr Daki advised her that he continually referred Mr Camp and Ms O’Brien back to her to discuss these areas as he was not across them and could not answer some of their queries. She said she was not included on the walk-around and was never asked any questions regarding any of the corporate areas.

[35] On 24 August 2020, Mrs Trail received a phone call from Mr Trevers-Grace and separate text messages from Mr Dakai advising that they had been having discussions with Ms O’Brien and Ms Caroline O’Brien (O’Brien Group Australia owner/director) regarding the redevelopment of Metricon and there was going to be a meeting held the following day. Mrs Trail said that she was not included in the discussions or invited to the meeting. She attended the meeting of her own volition as she believed that she needed to be across these important venue-related discussions. Mrs Trail was humiliated to find out about the meeting in the manner in which she did. She said she felt undermined, embarrassed, and quite worthless.

Concerns regarding the Head Chef – performance manage him out of the business

[36] On 26 August 2020, Mrs Trail had a meeting with Mr Aaron Sim and Mr Scott regarding a staff member, the Head Chef at Metricon Stadium. They further discussed some general game day feedback that she had received. Upon completion of this meeting, Mr Sim relayed the meeting details to Mr Camp and Mr Campbell. Mr Camp was at Metricon Stadium and he came into Mrs Trail’s office and questioned her about the meeting and the issues with the Head Chef. Her evidence is that Mr Camp stated that the company could not afford to make the Head Chef redundant, so it was important to ensure that any meetings with him were formalised, a witness was present, and everything was documented so that the Head Chef could be performance-managed out of the business.

[37] Mrs Trail stated that she advised Mr Camp that it was not a formal complaint; it was general game day feedback which she was following up and she was preparing to have a meeting with the Head Chef. Mr Camp directed her to call Mr Smith and advise him of the situation with the Head Chef. Mrs Trail said she advised Mr Smith of the process she intended to take, which was to discuss this feedback with the relevant employee, thereby bringing the feedback to his attention. She said that Mr Smith advised that he agreed with the process she was undertaking. Mrs Trail could not understand why Mr Camp had referred to a redundancy over a staff performance issue.

Mrs Trail left off emails

[38] On 1 September 2020, Mrs Trail was forwarded an email from Mr Trevers-Grace, who noted, “*He keeps leaving you off*”. Mr Camp had sent an email to Mr Trevers-Grace regarding point-of-sale allocation, and Mrs Trail said that she was embarrassed again to be left off an email and to have this brought to her attention by a co-worker. She said that she believed that everyone around her was aware of her being cut out of meetings and emails, and that she was being approached on a daily basis by other staff members asking her what was going on and why this was occurring. She responded with, “*I don’t know*” or “*I don’t know why.*”

[39] On 2 September 2020, Mr Camp sent an email which copied in Mr Dakai and Mr Scott but did not include Mrs Trail. The topic was regarding beer taps, which Mrs Trail considers had a direct impact on the venue she managed. She was upset that two of her direct reports were included in the email, and she was again left out. She said that she felt totally insignificant and was becoming more and more stressed about the implications of being omitted from communications.

2 September 2020 – secretly taped conversation

[40] Later that same day, Mr Camp called her and asked if she was somewhere private. She told him she was in the stadium meeting room heating up her lunch. Mr Camp informed her that she was on speaker phone with Ms O’Brien. During the course of the hearing it became clear the telephone conversation was recorded by Ms O’Brien without Mrs Trail’s knowledge. It is prudent to understand what was discussed during this conversation:

“Kerri Trail (“KT”): Hey Simon.

Simon Camp (“SC”): Hey Kerri. Uh, I’m here with Anne-Maree.

Anne-Maree O’Brien (“AMO”): Hi Kerri, how are you going?

KT: Hey Anne-Maree.

SC: Um, we just want to go over uh um a couple of things. Are you in an area where no one else can hear?

KT: Yes, I am.

SC: Ok.

KT: [inaudible]

SC: Ok so it’s about Aaron.

KT: Yep.

SC: Um are you aware of his uh alcohol consumption?

KT: As in, like, outside of work stuff?

SC: No, inside of work.

KT: No. I know, uh I think it was, maybe comm games or just after comm games, Kim asked me if I was aware of anything or had any

SC: Wait, sorry who did?

KT: Kim

SC: Tim Carey?

AMO: Kim, Kim, Kim [inaudible]

SC: Oh Kim

KT: Yes Kim, I think it was after comm games, um questioned me about it, um I had said back then that I had a couple of instances where I thought maybe he had um you know come to work, I would* say intoxicated, but I think she caught up with him um, at the time and had a discussion with him about it [*unclear if the word is would or wouldn't]

SC: Ok have you, have you noticed anything since then, like recently?

KT: The only time I guess I have, I haven't questioned him about it, but I wondered, was when he had his really bad foot, maybe about a month ago um and I asked him to go home. He said that he was on a lot of pain medication and antibiotics and that they were messing him up a little bit. So, I sent him home and in words he had indicated that he wasn't, I guess, himself and that he thought that he should go home as well, and he went, and I think he had four days off.

AMO: Could you sense alcohol was a part of it at that time?

KT: Uh I don't know. He just seemed, he seemed slurry and swaying on his feet um, I thought that maybe it could have been alcohol, I couldn't smell anything, but when I did question him, I didn't outrightly ask him if he had been drinking but I said that he didn't seem right and he seemed slurry and that's when he told me that he was on strong pain medication and antibiotics.

AMO: Mm yeah. Look, I had a chat to him on the weekend, which you might be aware of, but I, he said the same thing to me and obviously he had the limp and he has had the foot infection, and he is on all the medication. But I could very much smell the alcohol on him um, very, you know undoubtedly and so I did speak directly to him about it. Look, you know his performance was fine on the weekend and you know, there was no problems, but it was just something that, I thought I should say to him. But you know, I can tell, you know I know he's got a lot going on in his life um and that there are things he is going through the ups and downs of, which I can't imagine what he has really gone through with his kids and everything as well, but you know I guess we are just trying to understand how on a day to day basis um, you know you.. Has [name] said anything to you or any other staff, you know that?

KT: Um, Matt and I have discussed it. Um [name] has never said anything to me. Matt and I have talked about it. Um, Matt has said that he doesn't know, he hasn't had a conversation with Aaron, but that, would indicate anything, but we have both been I guess a little bit concerned about it, whether he's, I don't know if he is having

anything to drink during the day, I can't say, but whether or not he is having it at night and then coming into work in the morning and still um potentially being affected by it.

AMO: Yeah so, I mean you're saying you don't smell it on it him during the day?

KT: I can't say I have Anne-Maree and look when I am talking around comm games time, um, yes, probably I could have but I also put that down to whatever he was having overnight and then coming to work still smelling of alcohol.

AMO: How do you think he is, obviously he is going through a lot of stuff, how do you think he is?... people like [name] and that who work very closely with him everyday, they, um, I mean to me, when I was even in the kitchen I would have thought, the other night Joe was working very closely with him you know how could he....like you know they must be all aware of it, because when you're working so close, I mean I'm just there for a few hours and it was um, profoundly obvious. You know that I would have thought all chefs who were moving around in the kitchen with him and you guys in the office, would have seen signs of it.

KT: Yeah well [name] has never ever mentioned anything to me aside from the day we sent him home um and [name] did not indicate that he thought he had been drinking, he just said that he was a bit of a hazard, were his words to me, he was a hazard waiting to happen and he needs to go home.

AMO: Yep

SC: So um you've never had a conversation with him about alcohol?

KT: No I haven't. The only one, I know Kim did and maybe Kerri Bailey but, she never shared that with me.

AMO: Yep, what do you think Kim said to him when they spoke?

KT: Well Kim spoke to me after um she'd met with Aaron and she told me that he, he had denied it and said that he definitely wasn't drinking at work and he got quite I guess, angry at her, um, but assured her that that wasn't the case that nothing was happening.

AMO: Mm, yeah Dad had an open conversation with him about 18 months ago and Aaron said yes he did have a problem. For us, it is easier if we could just talk about it and we could at least, you know, get him help and you know all that kind of thing.

KT: Yeah, yeah look I know he does drink a lot, he certainly tries it on most nights, I would think. A few times where I have had to contact him outside of hours, I mean you can tell that he has been drinking, but I mean I suppose outside of hours, you know not sure what you can do there but um

AMO: Yeah

KT: Yeah uh, look there are days probably where I sort of thought I am not sure. But yeah, I don't know, I certainly never seen him do anything at work, from an alcohol perspective, that would make me think that he was drinking here but

AMO: Yeah no look his performance, I mean on the weekend, his food is fantastic, and I just think that he uh, has pulled it together, but if there is an ongoing issue, prefer to um, you know but Dad did say he would prefer to get him the help that he needs to carry

on. Rather than... We just don't want to brush it under the carpet either. We don't think it's right for him, we feel a duty of care to him, to, to help him through it.

KT: Yeah, yeah and that's um, I don't really know what else to sort of share with you. I think I know, when I was away, when I wasn't here, cos Maria and I um have been quite close, Maria had said to me a few times that she thought that he had been drinking, or was intoxicated, but I wasn't here at that time but that is what she had said, then Kim had raised it with me, so it sort of..

SC: So, it has been going on a long time?

AMO: Yeah

KT: Well certainly since that I'm aware, since comm games.

AMO: And it was around that time, that he had started to have problems with his family and things, would you say it coincided around that time?

KT: Well, yeah I mean um it was probably around that time that [child] was born um

AMO: Yeah, yeah, special needs, yeah

KT: which you know had a lot of trouble ongoing with him and his um, health

AMO: Yeah look um, hearing those stories then, wow, it was so challenging what he was going through and everything, like it was um, full on

KT: Yeah and I think, he is having a lot of, I mean I know he is having a lot of trouble now with his umm wife and not being given access to the kids, and um there is a bit of a battle going on, because um I know it is causing him a lot of upset

AMO: Yeah, yeah, and then financially, the strain, on it as well, it would be pretty hard

KT: mm yeah, so

AMO: Ok well that's good, well thank you

SC: Just on [name], you know I was there last week, and you said those staff had put that complaint in, what happened with that?

KT: Well I called Dan

SC: Oh, right

KT: and spoke to Dan about it and I told him that I had spoken to you and that you said to involve him, um so when I explained it all to Dan, Dan just said to basically sit down with him and have an informal chat with him and let him know what the expectations are you know, with dealing with front of house and um you know just remind him of how he needs to behave so

SC: So, did you do that?

KT: That's on today, between us we have had different days off, and that, so I am going to chat with him today

SC: Are you going to have a witness in there?

KT: I can do

AMO: And just make a note of it as well.

SC: You need to document the whole thing um you need a witness. A third party.

KT: Well, what I might do then is maybe wait until tomorrow when Elliot is back.

SC: Ok

AMO: What was the complaints Kerri?

KT: Well, it was uh quite informal I guess, in the sense um, I was talking to Victoria and Taylah just about sweets and set up and things like that and they both commented that they were struggling to deal with [name] from a front of house perspective, the way that he was speaking to them, not acknowledging them um.

You know they had Chrissy, from Suncorp there, and they just sort of said when she is in the kitchen, it's smooth, it's you know, its easy to work. If something changes she goes with the flow but if something happens, if you get a dietary or packs change um, [name] he just he will throw things around, he'll swear, um, you know just really I guess making it a little bit difficult for them and them not wanting to go into kitchen and have to discuss things with him because they are scared they are going to get you know their head bitten off.

I've spoken to Aaron about it and just said that we needed to follow up and half a chat with him. And then.. um Aaron spoke to Simon and yeah then I spoke to Dan so Dan just said to have a chat about it and just remind him of the expectations and how he needs to be talking to people and you know, that it is not an old school chefs kitchen and that he's gotta, so

AMO: Yeah, yeah the old day chefs used to talk to people its gladly not accepted anymore

SC: Yes this definitely needs a third party and the whole thing needs to be documented um, so we've got a record of it

KT: Ok well I can just move it to tomorrow, cos Elliot's back, because I prefer, I don't just want to bring in anybody

SC: Elliot is a good call

KT: So, I will just reschedule it to tomorrow and get Elliot to come along

SC: Ok, alright

AMO: Great ok thanks Kerri, thanks for your time

KT: Let me know if you need anything else

AMO: Thank you

SC: Alright, bye."

Warning letter issued to Mr Sim

[41] The following day, Mr Camp called Mrs Trail and informed her that she would need to attend a meeting with Mr Camp via Zoom, and she would need to bring Mr Sim with her so that Mr Sim would be issued with a warning. Mr Camp instructed her not to give Mr Sim a “heads up” as to what the meeting was about. Mr Camp instructed Mrs Trail to print off the warning letter and to attend the meeting.

[42] Mrs Trail felt very uncomfortable about this course of action. It was her understanding that the Respondent’s Disciplinary Action and Warnings Procedure Section 4.2 Written Warnings, required certain processes to be followed before issuing an employee a written warning. She said that there was no formal meeting notice, no support person for Mr Sim and he was not aware of what the meeting was about until Mr Camp called in via Zoom. Furthermore, she said that she was Mr Sim’s direct report and had only been made aware of this at the time she was called to print out the letter.

[43] The written warning issued to Mr Sim stated the following:

“Dear Aaron

First Letter of Warning

Over the past few months it has been brought to my attention that on several occasions you are dealing with a personal issue with regards to alcohol which is affecting your performance in regards to your role at O’Brien Group Australia.

Given that you’re a Senior Team Member of the Gold Coast team, this concerning behaviour is not acceptable.

As a reminder, please refer to our Company Policy in relation to alcohol.

6.3. Testing for alcohol and other drugs

O’Brien Group does not operate a blanket testing program for drugs and alcohol however where the Company has reason to suspect that a person is under the influence of Alcohol or Drugs in possible contravention of this policy, the company may direct the person to undergo an Alcohol and / or Drug test.

If a person is directed to participate in an Alcohol and / or Drug test and he or she refuses to undergo such a test, this shall be considered to be refusal of a reasonable and lawful direction. It may also lead to an inference that the person is under the influence of Alcohol and / or Drugs. As such, the person will be subject to disciplinary action which may include termination of employment or services for refusal to obey a lawful and reasonable direction.

Testing may be carried out by the following:

- Medical practitioner
- Police officer
- Service provider appointed by O’Brien Group.

Working under the influence of alcohol clearly affects and is detrimental to delivering quality leadership and performance at Metricon Stadium. You're letting our company and yourself down.

It is my understanding that at last Saturday night's match between Gold Coast and North Melbourne, it was evident you weren't fully focussed and not delivering a first class outcome for our Landlord and customers as a consequence of alcohol.

I'm personally committed to ensuring that you take appropriate remedial action to address this issue.

This is a First Letter of Warning

Yours faithfully

Simon Camp"

[44] In issuing the warning letter to Mr Sim, and conducting the meeting in the manner in which it was conducted, Mrs Trail considered that it was Mr Camp's intention was to ambush Mr Sim and not to give him any time to prepare a response. After the call ended, she apologised to Mr Sim as she felt that he was not given a fair opportunity, nor did she consider that due process had been followed.

[45] Mrs Trail said that Mr Sim was terribly upset and angry to be put in this position when no official investigation had taken place. She said that in the letter it states, "*as a reminder, there is a policy regarding testing for alcohol and other drugs*". Mrs Trail confirmed that Mr Sim was not requested to undertake a drug or alcohol test, therefore she was mortified that disciplinary action could be enforced and sustained.

[46] Mrs Trail stated that not long after the meeting with Mr Sim, Mr Camp called her and asked how Mr Sim was, following the meeting. She informed Mr Camp that Mr Sim was very upset and angry. Mr Camp responded, "*That is disappointing as by not accepting the written warning, Aaron was implying that Anne-Maree was lying*". He further said, "*Michael O'Brien would not take too kindly to his daughter being called a liar*". Mr Camp then went on to say that Ms O'Brien was a Harvard graduated Barrister, did not drink or smoke, and would know if someone was intoxicated.

Mr Camp removing Mrs Trail from emails

[47] On 11 September 2020, a supplier to the Respondent, Unilever, sent an email to Mr Smith, including Mrs Trail and others, notifying of a price increase to products. Mr Camp was included in that email. When Mr Camp then forwarded that email to all other recipients to discuss it internally, describing the proposed price increase as ridiculous, he did not naturally reply to the Unilever account manager. He did, however, go out of his way to remove Mrs Trail from the ongoing emails discussing the price increase and his proposal to consider a competitor. She was the only Respondent employee to be removed from the email. The email included her direct reports, Mr Dakai, Mr Trevers-Grace and Mr Scott. Mr Camp in fact added Mr Scott to the email as he had not been earlier included in the email.

[48] This email was again brought to Mrs Trail's attention by her direct report who asked her if she had seen Mr Camp's response. Mrs Trail said that she was absolutely shocked and

disheartened to see that she had been removed from this communication which related to price increases at the venue which she needed to be across.

[49] Approximately two hours later, Ms O'Brien sent an email to various Venue Managers, and to Mr Dakai regarding a preferred signage and sticker supplier. Mrs Trail was not included in the email, yet Mr Dakai, the Regional Catering Operations Manager was. Mr Dakai forwarded the email to Mrs Trail, noting orally, "*Another email you've not been included in.*" Mrs Trail stated that she was close to tears and feeling extremely vulnerable about her position and what she considered to be the ongoing and purposeful exclusion that was taking place.

First written warning issued without notice

[50] Around four hours later that same day, at 3:30pm, the following occurred as described by Mrs Trail:

- A formal meeting was not arranged and no notice of meeting was issued.
- Mr Camp walked into the office that she shared with other team members. He asked them to leave the room as he needed to have a private discussion with her. He asked Mr Scott to remain as a witness. Mr Scott was one of her direct reports, which made her feel totally uncomfortable and embarrassed to have a direct report who she managed on a daily basis, sitting in a room witnessing her being issued with a written warning.
- There was no option or offer for her to have a support person present and no evidence was presented.
- She was advised by Mr Camp that statements had been taken although she didn't know who provided the statements and nothing was shown to her at the time (or since). She was not asked to provide a written statement. Mr Scott and Mr Dakai, who had been questioned about the incident, were also not asked to provide written statements.
- During this disciplinary action there was a conversation around providing tickets to a former employee, Kerri Bailey (former Venue Manager, Gabba Stadium and former Operations Manager, Suncorp Stadium). Mrs Trail confirmed that she did provide Kerri Bailey tickets, however, she was not aware that sporting tickets needed to be entered into a gift registry or that she had to seek approval from Mr O'Brien.

[51] The warning letter issued to Mrs Trail is reproduced at [10].

Mrs Trail requests the warning letter be reviewed

[52] On 12 September 2020, Mrs Trail sent an email to Mr Camp, responding to the first written warning. The email is reproduced below:

"Dear Simon

I wish to follow up on the written warning that was issued to me yesterday as I do not agree with the context of the letter or some of the statements made.

1. I did not categorically deny any knowledge of Aaron Sim working under the influence of alcohol. You asked me if I thought/knew Aaron was intoxicated whilst at work on Sunday (30 August 2020). I expressed to you that I was not aware of this and that Aaron did not exhibit any behavior on the night that would lead me to believe he was intoxicated. My biggest frustration on the night was the delay in getting main course out in Chairman's room. Whilst observing Aaron in the kitchen during this time he did not appear to be intoxicated.
2. I advised you on the phone that on an occasion I had sent Aaron home from work (16 August 2020) as I initially was concerned that he could have been intoxicated. He seemed what I would term as "groggy". When I spoke to him he advised that he was on strong pain killers and antibiotics for his foot (he had been limping for a couple of days) and these were causing him to be drowsy. I advised him that he needed to go home until his foot was better and he was finished with the pain killers. Aaron remained off work for the following 4 days.
3. I also told you that sometime in 2018, either during or after the Commonwealth Games that Kim Gerhardt told me she was going to speak to Aaron about rumors she had heard about him being intoxicated at work. I believe at the time Kim met with Aaron to discuss this but I was not privy to the discussion or the outcome.

In regards to point 1, I was made aware at a later date, that on the night, both Matt Dakai and Elliott Scott were questioned and asked if Aaron appeared to be intoxicated. Matt and Elliott, in their opinions, both advised that they did not think Aaron was intoxicated. Elliott worked in Chairman's kitchen from gates through until main course was served and commented that he didn't notice anything.

In regards to point 2, since the events that transpired earlier in the week around Aaron's resignation, I have been told by yourself and Dan Smith, that discussions had taken place directly with Aaron, over a period of time, regarding concerns about him being intoxicated or having an alcohol dependency problem, and there were discussions with other senior managers about these same concerns but to my knowledge no action was taken. At no point in time was this information shared with me, or was I alerted that there was a concern regarding Aaron. If I was aware of this then my actions relating to point 2 would have been very different and I would not have just taken Aaron's word that he was on pain killers. I most certainly would have escalated my concerns to yourself or Dan.

I understand that the allegations of Aaron being intoxicated at work are severe and could have wide reaching implications. I would never intentionally do anything to put this company at risk in any way. I have very high personal ethics and morals and am devastated to have been put in this position where I am accused of gross misconduct. I am extremely distraught that the company, Michael, and everyone else involved has also been put in this position.

I accept that as Venue Manager I have a large responsibility of trust and I will always operate in the best interest of the company. If I have breached that trust then I am truly sorry. I would ask that you consider the abovementioned details and review the written warning and the statements made.

Sincerely

Kerri Trail"

[53] Within two hours Mr Camp responded:

“Kerri

I have gone through my notes, I am not prepared to review your decision and the warning stands.

I also have 3 written statements from senior members of staff confirming my position.”

[54] Mrs Trail stated that she was shocked that Mr Camp’s response was returned in less than two hours and she could not understand how a review could have been conducted in this timeframe or be compliant with the Disciplinary Action and Warnings: Policy and Procedure.

Disciplinary Action and Warnings: Policy and Procedure

[55] The Policy and Procedure is reproduced below. It is lengthy. It is Mrs Trail’s contention that the Respondent has elected not to follow it relevant to the matters contained in the two warning letters issued to her, and also in the way it went about providing a written warning to Mr Sim:

“DISCIPLINARY ACTION AND WARNINGS: POLICY AND PROCEDURE

1. Application

This Policy and Procedure applies to all O'Brien Group team members, including employees, contractors, volunteers and work experience staff. All team members are required to comply with and are responsible for knowing and understanding the policy and procedure.

2. Purpose

O'Brien Group acknowledges that, from time to time, employee behaviour and performance may fall below the expected standards as detailed in the specific job description and orientation / induction processes. The purpose of this policy is to establish an equitable and consistent approach to addressing unsatisfactory work performance and/ or conduct by:

- Ensuring counselling takes place to reinforce the expected performance or conduct standards; Establishing a process under which warnings may be issued and discussed; and
- Providing for disciplinary action when performance or conduct does not improve.

3. Policy Statement

It is the Policy of O'Brien Group to ensure that when action needs to be taken against an employee for unsatisfactory performance, misconduct or breach of company policy, such action will be appropriate, reasonable and in compliance with O'Brien Group process, Fair Work guidelines and procedural fairness principles.

4. Procedure Statement

4.1 Counselling and Disciplinary Procedures

OBGA counselling and disciplinary procedures have three distinct, but not necessarily sequential components:

- Informal counselling (face-to-face feedback);
- Formal counselling; and
- Disciplinary procedures (including warnings).

The decision as to which of the three components initially apply will be based on the seriousness of the employee's behaviour and/ or performance and will depend on the facts and circumstances as identified by, or conveyed to, the relevant O'Brien Group manager.

4.1.1 Informal counselling

Informal counselling and/or face-to-face feedback will normally occur when, in the manager' s opinion, the employee's behaviour is such that formal disciplinary action is not appropriate. Where it is established during the informal discussion that the behaviour expectations have not been met, feedback given must be constructive and delivered to encourage the employee to achieve and maintain expected behaviour/performance standards.

If the discussion confirms that misconduct has occurred, the employee should be:

- Advised of how the behaviour and/or performance is inconsistent with O'Brien Group expectations and their employment contractual obligations;
- Provided with an opportunity to respond to the concern and to raise any other matter that they consider relevant; and
- Engaged in jointly identifying a plan of action to improve performance standards or outline the appropriate conduct expected.
- After the informal counselling session the manager will keep a diary note of the discussion and where appropriate , plan a subsequent discussion with the employee to review the behaviour or performance.

4.1.2 Formal counselling

Formal counselling will normally occur when:

- The employee has previously been counselled informally but behaviour has not improved to the expected standard (unacceptable performance);
- The employee's misconduct is such that, in the opinion of the manager, formal counselling is appropriate.
- The formal counselling session will take place as soon as possible after the behaviour and/or performance issue is identified with the employee being advised in writing of:
 - When and where the interview will take place;
 - The matter/s that will be discussed (i.e. specific details of the alleged unacceptable performance/misconduct);
 - Their opportunity to respond; and
 - The opportunity for them to bring a support person/observer to the interview.

At the meeting the coordinator and employee will review and discuss the allegations and their responses to these allegations as well as any additional incidents, information and prior relevant corrective action plans.

At the conclusion of the formal counselling session a written record of the meeting will be provided to the employee confirming:

- The issue of concern;
- The agreed actions and timelines;
- Any assistance/support to be provided (if relevant);
- Date and time for any subsequent meeting; and
- Disciplinary action taken with the possibility of further action should the required expectations for behaviour and/or performance not be achieved.

The employee should sign the record to acknowledge it is an accurate record of the meeting and their acknowledgement they have understood the issues raised . The record should be kept in the employee's personnel file.

4.1.3 Disciplinary action

Disciplinary action may be taken where the alleged misconduct and / or unacceptable performance continues, or is of a serious nature. Disciplinary action may include written warnings and/ or termination of employment.

4.2 Written warnings

The purpose of a written warning is to emphasise to the employee that their misconduct or performance is unacceptable and to make clear that further disciplinary action may be taken. A written warning may be given to an employee when:

- The employee has previously been through the formal counselling process and has not met the required standards or expectations; or
- The employee's performance or misconduct is of a serious nature and requires immediate action .

Written warnings must also detail the support and/or training to be provided to the employee as well as the expected timeframes for review of the identified issue/s.

There is no set number of written warnings an employee should or can receive. For many employees just receiving one warning is enough for them to improve their performance or change their behaviour. Other employees may require multiple warnings and even then they may not address the concerns raised.

Warning Process

- Arrange a formal meeting with the team member;
- Advise the team member that they have the option to have a support person to assist with any discussions relating to their performance/ conduct . The support person is of their choice; however, the person must NOT be acting in a professional capacity (such as a lawyer) and is there only to support the team member and not to participate in the discussion;
- Outline the reasons for the warning, including presentation of any evidence to support the allegation/s;
- Outline the expected standards of behaviour or performance and an explanation of how the employees' actions or behaviours breached O'Brien Group policy;
- Detail any history of counselling (previous related matters);

- Detail any action required to rectify the performance/conduct. This may include counselling, training, workload adjustments or improved performance (give specific examples of where the improvement is required);
- Give the team member the opportunity to respond to allegations;
- Consider the team member's response to the allegations. If the facts are in dispute or the employee provides a credible explanation the manager may decide to withdraw the warning;
- Advise the team member of the consequences that, if there is no improvement within the required timeframe, or a repeat of issues in the case of misconduct, further disciplinary action may be taken, up to and including termination of employment;
- Document the discussion. The team member should sign the documentation to confirm their understanding of the discussion;
- Keep a copy on the team member's file.

An employee being given a warning should be reassured that the warning does not mean that their employment will be terminated. The warning does not need to define the employee and they should take it as an opportunity to improve their performance or change their behaviour. The employee should however understand that a formal written warning is serious and they should ensure that they follow any agreed actions or instructions otherwise they may face further disciplinary actions including additional warnings and up to termination of employment.

4.3 Termination

Employees do not have to be given a specific number of warnings (i.e. three warnings) before they can be dismissed, however if the manager decides that the employee should be terminated it is important to follow the correct process to avoid any claim or action by the employee relating to the dismissal.

4.3.1 Show cause meeting

The purpose of this meeting is to ask the employee to show cause as to why their employment should not be terminated. Depending on the circumstances, the employee may be stood down on full pay until a meeting is scheduled. Employees will be required to respond, in writing and prior to the scheduled meeting, addressing the allegations and their reasons why employment should not be terminated .

Requests for an employee to attend a show cause meeting shall be made in writing outlining:

- When and where the meeting will take place;
- Who else will be involved in the meeting (i.e. Management representative)
- The specific issue that will be discussed (i.e. alleged unacceptable performance/misconduct);
- Their opportunity to respond; and
- The opportunity for them to bring a support person/observer to the meeting.

At the meeting the manager and employee should review and discuss the allegations and their responses to these allegations as well as any additional incidents, information and prior relevant corrective action plans. A decision surrounding the employee's continued employment will be made at this meeting.

4.3.2 Notice and Final Pay

Employees terminated as a result of misconduct or unacceptable performance will be given notice as per their Industrial Award and will receive any outstanding leave and/or TOIL entitlements (if applicable). Terminated employees will be issued with a Statement of Service.

4.4 Instant dismissal (Serious Misconduct)

A team member who has committed serious misconduct can be dismissed without notice following the substantiation of allegations .

Serious misconduct includes, in the course of employment, the team member engaging in theft, fraud, assault, intoxication at work, a serious breach of policies and procedures or conduct that causes serious and imminent risk to the health or safety of a person or the reputation, viability or profitability of the employer's business.

Immediately arrange a meeting with the team member when you become aware of the team member's suspected misconduct:

- Advise the employee of the allegations
- Advise them of the process to be followed
- If necessary, stand down the team member with full pay while the employer investigates the allegation
- Alternatives to stand down include placing the team member on supervised shifts, or other interventions that minimise the potential risk of the person remaining in the environment at that time (for example, if someone is accused of assaulting a client, it would be unwise to leave them in an unsupervised environment whilst the matters are unresolved or unclear).

Ensure you:

- Give the team member an opportunity to respond to the allegations during the process
- Document all conversations & findings of the investigation (This may include statements from other team members, clients etc.) On completion of an investigation, arrange a meeting with the team member to discuss findings
- Advise the team member they have the option to have a support person present to assist with any discussions relating to their performance/conduct. The support person is of their choice; however, the person is NOT to act in a professional capacity (such as a lawyer) and is there only to support the team member and not to participate in the discussion.
- Discuss the findings of the investigation with the team member and allow them to see any evidence, documentation, witness statements etc., and consider the team member's response.
- Consider the team member's further response to the investigation. If not satisfactory, the team member can be terminated immediately.
- Provide the team member with the reason for the termination in writing.
- Arrange to pay the team member any outstanding wages and entitlements.

4.5 Human Resources

Where time and circumstances permit, the manager should brief the Human Resources Manager (either via email or verbally) before commencing any formal disciplinary action procedure such as issuing warnings or terminating employment . The Human Resources Manager can provide advice and assistance on how to manage the process.

They may also make themselves available to attend any of the scheduled meetings, conduct the process themselves and/ or assist with the preparation of any related documentation .

Where time permits, any proposed written warning should be sent to the Human Resources Manager before being issued to the employee to ensure it is worded correctly, is clear and unambiguous and complies with O'Brien Group policy and Fair Work guidelines.

A copy of any written warnings issued to an employee should also be sent to the Human Resources Manager.

The Human Resources Manager should be notified as soon as possible if an employee is terminated instantly. The manager should provide to the Human Resources Manager a summary of the circumstances, any conversations with the employee and any documentation or other evidence relating to the issue or incident.

4.6 Procedural Fairness

All actions under this Policy and Procedure will be conducted following the principles of Procedural Fairness. Maintaining Procedural Fairness is important to ensure that:

- (a) The interests of the parties are protected;
- (b) The credibility of the process is maintained;
- (c) Any investigation and findings can be relied upon when making employment and disciplinary decisions.

To that end, O'Brien Group will ensure that:

- The respondent is aware of all of the allegations made against them in sufficient detail;
- The respondent is allowed a reasonable opportunity, including adequate time, to respond to each of the allegations;
- Investigations are carried out in a reasonable timeframe ;
- All participants are given the opportunity to have a support person attend interviews pertaining to the investigation; All participants are required to maintain strict confidentiality;
- All participants are given the opportunity to respond to any contradictory evidence.

5. Definitions

Procedural Fairness	means acting fairly in administrative decision making. It relates to the fairness of the procedure by which a decision is made, and not the perceived fairness of that decision.
Disciplinary Action	is a process for dealing with job-related behaviour that does not meet expected and communicated performance standards.
Misconduct	unacceptable or improper behaviour

6. Legislation

Not Applicable

7. Other References

HR.012 Workplace Grievance and Complaints Policy and Procedure
HR.014 Abandonment of Employment Policy and Procedure
HR.017 Separation (Ending Employment) Policy and Procedure
HR.027 Performance Management Policy and Procedure
HR.0 28 Performance Review Policy and Procedure ADM .011 Privacy Policy.”

[56] Noting that she had been issued a written warning without any form of allegation having been put to her, Mrs Trail felt bullied and harassed by Mr Camp. She considered that this was the manner in which the Respondent would intend to performance manager her out of the business.

“This is the O’Brien way”

[57] On 14 September 2020, Mrs Trail had a 40 minute Zoom call with Mr Smith regarding the written warning, and the exclusion from meetings and emails. She informed him that she felt she was being bullied and the goal of the company was to performance manage her out.

[58] She said that during this phone call she was crying, shaking and had difficulty breathing. She told Mr Smith that she knew having this conversation with him was going to cause her grief with Mr Camp and the O’Brien’s. Mrs Trail stated she felt this way because she thought it could further jeopardise her employment and they could retaliate against her and make her life more difficult than what they had already made it.

[59] Mrs Trail said that Mr Smith advised her, *“This is the O’Brien way”* and not to take it personally as this is how they operate. Mr Smith said that he knew this was not a justification for the company’s behaviour, but it is just how they work. She asked Mr Smith to be honest with her, and he should inform her what was happening with her role. She said to him that she had worked extremely hard for the company, and if she was no longer wanted, the company should do the right thing and offer her a redundancy. She informed him it was not appropriate for the business to performance manage her out or find ways to get rid of her.

[60] Mrs Trail told Mr Smith that everything that was happening to her constituted bullying, and she was being singled out and picked on and she could not understand why. She said that Mr Smith informed her that he had a meeting scheduled with Mr Camp for later in the afternoon and he would speak to him about this, however he would try not to expose her in the conversation in order to not receive further exclusion.

[61] Mrs Trail said that Mr Camp called her on the same day and asked when she would be back at work as he needed to follow up on another matter. She advised Mr Camp that she would be back at work on 16 September 2020.

Second written warning issued without notice

[62] At approximately 8:30am on 16 September 2020, Mrs Trail received a telephone call from Mr Camp. He asked her if she was at work, to which she responded, *“Yes”*. He advised her she was on speaker phone and Ms Samantha Ryan, Corporate Operations Manager at Suncorp Stadium was present with him at his office. Ms Ryan was one of Mr Camp’s direct reports.

[63] During this conversation, Mr Camp informed her she was to receive a second written warning, reproduced at [11]. Mrs Trail's evidence is that she was further humiliated to be issued a second written warning in this manner, with no due process, no time to prepare and no support person. She noted that this was witnessed by a direct report of Mr Camp, all whilst being in her office which is a shared space with other employees.

[64] Mrs Trail said that during this phone call she was advised that during the telephone call she had with Mr Camp and Ms O'Brien on 2 September 2020, Ms O'Brien had recorded the telephone call, and that there was a transcript of the conversation. Mrs Trail noted in evidence that Ms O'Brien had not informed her that the conversation was being recorded.

[65] During the telephone call where she was issued the second written warning, Mr Camp stated on three occasions that Ms O'Brien was a Harvard graduated barrister. Mrs Trail considered that Mr Camp was making this statement (which is incorrect) to suggest that Ms O'Brien would know if someone was intoxicated or not. She felt like he was trying to intimidate her into accepting the first written warning.

[66] During this phone call, Mrs Trail was becoming increasingly upset. She considered that whether Ms O'Brien can tell if somebody is intoxicated or not, or if they are a Harvard graduated barrister (which Ms O'Brien is not), Mrs Trail wanted the law and procedural fairness to be followed. She considered that the Respondent had blatantly disregarded its own Policy and Procedure yet again.

[67] Mrs Trail stated that this just solidified the ongoing bullying, exclusion and intimidation that had been repeatedly happening over the last couple of months.

Discussion with Mr Smith

[68] Approximately 30 minutes after the meeting was held and she was issued with a second written warning dated 12 September 2020, Mrs Trail called Mr Smith. She was distraught and shocked as to what had just occurred. She asked Mr Smith if he knew that she had received the second written warning; he advised that he only just found out in the last few minutes when Mr Camp had emailed him a copy of the warning. Mrs Trail tried to the best of her ability to repeat the conversation that had taken place with Mr Camp. When she referred to the multiple comments regarding Ms O'Brien being a Harvard graduate barrister, Mr Smith's response was, "Tell me he didn't say that." Mrs Trail stated, "Yes, he did, on multiple occasions." She told Mr Smith that it was bullying, and she wouldn't take it anymore.

[69] Mrs Trail informed Mr Smith that she was too distraught to stay at work and needed to go home and think things through. She again reiterated to Mr Smith that she felt she was being performance managed out of the business and that the company should do the right thing and make her redundant if they didn't want her to be there anymore. Mr Smith advised her that her mental health was a priority and she should go home; he would follow up with Mr Camp.

[70] At approximately 9:55am on 16 September 2020, Mr Camp attempted to call Mrs Trail, but she did not answer his call as she was still extremely distraught, shaking and could barely speak. Mr Camp sent her a text message asking her to call him. Once she had calmed

down, she called Mr Camp back. He advised that he wanted to have an “off the record” chat without any witnesses. Mr Camp said he apologised if she felt that she was being left off emails as that was not his intention. He stated that regarding the Unilever email he had removed Mrs Trail and Kevin Baker (Venue Manager at Gabba Stadium) as he did not feel that they needed to be on this type of correspondence. At the time of this conversation, Mrs Trail did not respond to this assertion made by Mr Camp, but now, having had the opportunity to review the email, Mr Baker was never on the original email, so Mr Camp was not correct. Further, while she was the only Respondent employee removed from the email, Mr Scott was added in.

Resignation letter sent that day

[71] Later that same day, at 4:40pm, Mrs Trail emailed her resignation letter to Mr Smith. Mr Smith responded via email at 8.30pm that night advising that her resignation had been accepted and acknowledged that she had provided four weeks’ notice but proposed that her resignation be effective immediately. She said that this only reiterated to her that the company did not want her and had achieved the outcome they were after which was to force her out either by resigning or performance management.

Exclusionary behaviour

[72] Mrs Trail stated that in the three months leading up to her resignation she had been subjected to blatant bullying and intimidation, exclusion from workplace meetings and emails that were required for her to do her job. She said that she has had direct reports continually questioning her about her position within the company and asking why she has been excluded. Mrs Trail stated that she had also had Mr Carey approach her on several occasions asking the same questions and also forwarding her emails from Mr Camp and Mr O’Brien to ensure she was kept in the loop on discussions taking place, that as Venue Manager she should have been across. She said that Mr Carey also raised his concerns with her about who he should be communicating with and why she was being removed from important venue related meetings. She said that this was embarrassing to her and made her feel like she was not valued as an employee and was purposefully being excluded.

[73] Mrs Trail stated that she had been deliberately denied access to venue related information, demonstrated within the emails she has provided in her evidence. She stated that she was aware there are more emails and meetings that she was also excluded from, however she no longer has access to obtain copies of this information.

Failure of company to follow its policies and procedures

[74] Mrs Trail said that she has been put through three disciplinary meetings, where at no time was the company policy and procedure followed or adhered to. She said that in addition to this, when she disputed the version of events that took place for the first written warning, the company’s Workplace Grievance and Complaints Policy and Procedure (not reproduced in this decision) was also not adhered to.

[75] It is Mrs Trail’s contention that the Respondent tried to intimidate her because she would not accept the version of events that were put forward. She said she felt totally belittled by the whole process. There was no formal investigation, no evidence and no proper review carried out.

Failure of company to inquire regarding her well-being

[76] Mrs Trail stated that despite her assertions that she was being bullied, nobody from the business bothered to get in touch with her to investigate or check on her well-being. She said despite informing Mr Smith on several occasions how distraught she was regarding this matter, and how much stress and angst it was causing her, there was no attempt to check on her welfare or mental state. She said that in stark contrast to this, she has had multiple welfare calls directly from the Metricon Stadium team, the landlord's staff, offering support and assistance through this traumatic time.

[77] Mrs Trail stated that the company policy on Workplace Investigation (Non Injury) clearly states that workplace bullying requires an investigation to take place. She said that this did not happen and since 16 September 2020, no-one from O'Brien Group Australia has been in touch with her to follow up on her reported bullying. She said that the company policy on Workplace Bullying has also been totally disregarded.

[78] Mrs Trail stated that she has been humiliated and embarrassed in front of her team, co-workers, and stakeholders. She said that her confidence has been eroded and she has become physically ill when she thinks about the way she has been treated. Mrs Trail stated that this has impacted not only her work life but her home life as well. She has not been able to sleep. She stated that she is constantly tearful and anxious and is emotionally devastated by everything that has happened.

Discoveries following resignation

[79] Mrs Trail stated that on 17 September 2020, after her forced resignation, she had a conversation with Ms Bailey, whom she had given tickets to. It is her evidence that Ms Bailey was extremely shocked that Mrs Trail had received a written warning for this, as it was common practice throughout O'Brien Group. She stated that Ms Bailey advised her that on numerous occasions she received tickets to several sporting events and concerts, and that many other staff members had also received free tickets from Venue Managers or various stadium stakeholders.

Cross-examination

[80] Relevant to the meeting Mrs Trail was excluded from on 8 July 2020, Mrs Trail conceded that she was not privy to commercial-in-confidence information regarding how much the Respondent pays to its landlords at each stadium. She accepted that this might have been discussed by Mr O'Brien at this meeting, however she repeated her grievance that she had originally been invited and was then informed by Mr Camp, and not Mr O'Brien that she was no longer invited to the meeting.⁸

[81] Mrs Trail was asked questions in cross-examination regarding her contention that Ms O'Brien was excluding her from various meetings and conversations. Mrs Trail gave the following evidence:⁹

Ms O'Brien: So, your preferred way of operating is to be involved in every discussion that I have with all the staff at Metricon stadium, every phone call and email that I'm asking, even when it's not even discussing expenditure, but their

ideas? Are you saying that you feel bullied because you weren't involved in every one of those conversations?

Mrs Trail: It was being excluded. How can I perform my duty as a Venue Manager, when I don't even know what's happening, when what decisions are going to be made or things that are going to be thrown out there and ideas. And if you can call Aaron and you can call Matt, would I not have relevant input as a Venue Manager, as well, as to the sale mix of items, the cost of goods, what sold well, what didn't?

[82] Regarding Mr Sim's alleged alcohol consumption while at work on 30 August 2020, the following questions were put and answered:¹⁰

Ms O'Brien: In your opinion, who should have I and Simon Camp have gone to, when I had serious concerns about Aaron's alcohol consumption on the night of the game? Who do you think in the company we should have gone to, to ask?

Mrs Trail: On the Sunday?

Ms O'Brien: Just following the events of that, and my concern, what do you think I should have done? Who do you think I should have spoken to, to find out if there was a problem that we had to solve?

Mrs Trail: Well, on the Sunday, when you thought there was an issue, you should have come and spoken to me.

Ms O'Brien: So, you're saying it's a problem I didn't question you on that night, if you thought that he was drunk, though I hadn't seen you at the time, but I saw the other staff. You're saying it's a problem that you were called three days later?

Mrs Trail: Well, you did see me on the night, because we were both in Chairman's kitchen during the plate-up and service of entrée and main, so we were both in there. We were there the entire time that entrees and mains went out. So, I was there; you did see me.

Ms O'Brien: In your view, was it incorrect for us to call and ask you if you knew anything when we were trying to work out if there was a problem with his drinking? Whilst working for O'Brien Group at Metricon, were we incorrect to call you and ask? Would you prefer that we didn't call you and ask?

Mrs Trail: No, yes you should have called me and asked. But you should also have addressed it with me on the evening when you knew I had worked with Aaron. You had been there; we had been in the kitchen. You're saying you didn't see me. We stood in the kitchen, literally side by side. I was wiping plates, as were you and Aaron was on the opposite side of us with Elliott.

Ms O'Brien: With Aaron standing opposite us, you wanted me to ask you if you thought he was drunk. You wanted me to ask you in front of Aaron in the kitchen? Is that correct?

Mrs Trail: No, at the conclusion, when main course had been done, you could have asked. You could have called me. You could have seen me at any point, but you chose not to.

Ms O'Brien: At the conclusion of the main course, that is when I spoke to Aaron himself and asked him if he was drunk; I asked him directly. I know your statement says it was after main course I questioned him personally if he had been drinking?

Mrs Trail: But you said you noticed it as soon as you arrived and that you could smell it on him.

Ms O'Brien: That's correct - walking around by himself?

Mrs Trail: And you asked Matt, and you asked Elliott before main course.

.....
.....

Ms O'Brien:Anyway, moving forward, are you aware of O'Brien Group's responsibility if something had gone wrong that night or on any occasion as Aaron having this drinking problem, which seems to have existed for quite some time? Are you aware of the position O'Brien Group would be in, such as the MCG when there was a Chef that on ANZAC day a couple of years ago, served detergent to customers and 30 of them were vomiting in the Chairman's room? Are you aware of the stories in the past years on the Gold Coast where a Chef served dish drainer to someone and she's then had 40 operations on her oesophagus and lining because of the Chef there? Are you aware of stories like that, that do happen and are real and are a real liability for the O'Brien Group and the responsibility we hold? Are you aware of that seriousness that O'Brien takes?

Mrs Trail: I wasn't aware of those stores that you've just relayed, but I'm certainly aware of the food safety side of things and how it's paramount to what we were doing.

Commissioner: Ms O'Brien, the one at the MCG that you're referring to, is that the one where everyone was throwing - I recall everyone was throwing up in the dining room?

Ms O'Brien: Yes.

Commissioner: That was food poisoning, wasn't it?

Ms O'Brien: It never said exactly what it was, but there were stories that – [redacted] But it was never proven that it was - - -

Commissioner: Yes, I remember the ghastly scenes of people very well dressed, all throwing up at the tables, yes.

Ms O'Brien: Yes, and they remain horror stories to anyone in the industry, which we try our best to never be in that situation. Of course, it's always something that we're very cognisant of, as our responsibility to make sure that that doesn't happen. I must say, Commissioner, that going through this case and the actions we have taken, I certainly do not regret that O'Brien Group hold their responsibility extremely high and I would hate to be in a case right now where a child got poisoned from our responsibility of a drunk Chef and that we hadn't acted.

I don't shy away from the fact that we take it all very seriously and my father often repeats to us the seriousness of our role; it's not just parties and events, it's a serious responsibility we carry, and duty of care to our customers.

Commissioner: Well, you walked around with him for two hours. If you thought he was drunk, wouldn't you have stood him down?

Ms O'Brien: Pardon, Commissioner?

Commissioner: It's for you, Ms O'Brien.

Ms O'Brien: Yes.

Commissioner: If you walked around with him for two hours, if you thought he was drunk, why wouldn't you have stood him aside; stood him down? Had your next best Chef do the work.

Ms O'Brien: Yes. No, at the time, I could see that he - I could smell that he smelt incredibly strong of alcohol and my father said to me - and he was still - he wasn't stumbling all over the place, but the smell was the profound sign of concern for me. I am, I must say, an asthmatic that's allergic to everything and can smell everything a mile off, more than normal person could. So, I didn't doubt my sense of smell and I said to my father before service, what should I do when I was concerned. He said wait till after service; don't rattle him. If he seems like he's holding it together, then speak to him after main service, which I did.

But I was concerned, and I did think to do exactly what you're saying, Commissioner, during main course service, when he was struggling to get the food out on time, but I was at that time, thinking should I run to another kitchen and get another Chef to help him. I asked Aaron, do you want help and I was about to join the line of food service myself to help him, but he assured me that it was fine and the other Chefs did support him to bring it together. But the biggest concern of the night was the sense of smell, of alcohol, that did not disappear for the two hours that I walked around with him.

Commissioner: Well, I know what I would do if I suspected somebody smelling of alcohol. I wouldn't let them work for the next two hours.....

[83] Ms O'Brien referred Mrs Trail to text messages sent between herself and Ms Bailey on 14 August 2020. Mr Sim had worked the night at Metricon Stadium and after service, went across the road to the golf club where he met Ms Bailey. The messages read:

Mrs Trail: So good to see you!!
I might come over. Corporate still packing up and resetting suites for tomorrow.

Ms Bailey: Ummm, is Aaron ok???

Mrs Trail: Definitely not. Is he with you?

Ms Bailey: He just left. He was super drunk is ridiculously skinny and doesn't seem to be in a good head space. He messaged me only an hour ago saying he was across the road. Is he drinking at work again?

Mrs Trail: I spoke to him just before he left and I thought he was slurry. I haven't seen him like that for a while.

[84] The following was discussed in cross-examination¹¹:

Ms O'Brien: Could you please explain to us, when you say you haven't seen him like this for a while, what you're referring to?

Mrs Trail: That he seemed slurry and it had been a very very long time since I had seen him like that, probably it would have - if I had seen him like that previously, it was at, maybe it was the com-games Christmas party or one of the gatherings that we had, maybe Matt's farewell. I don't recall the last time I had seen him like that. But he seemed to me to be slurry, yes.

Ms O'Brien: And I'm correct - am I correct by saying that Kerri Bailey was explicit in saying that she was referring to him being under the influence in alcohol, and the effects of that is why he was slurry?

Mrs Trail: Yes, he was over at Emerald Lakes Golf Club with her. The text message that she sent to me was "How was he after he finished work?" So, I don't know what she saw or what state he was in at that point.

Commissioner: So, Ms Trail, why did you write, definitely not, when asked is he okay?

Mrs Trail: Because it was at the time where he was going through a quite a terrible break-up with his wife. His children were not well, he was looking for accommodation, he had an infected foot and he was limping around quite a lot. I guess in all, he wasn't in a good head space.

Commissioner: So, you knew that he was drinking with her that night, did you?

Mrs Trail: He'd left work at that point and had gone across the road and met her for drinks after work.

Commissioner: What time did he leave work?

Mrs Trail: I couldn't be sure; possibly around 9 o'clock. I don't know exactly.

Commissioner: 9 o'clock after an AFL game?

Mrs Trail: It would have been around that. I don't know Commissioner. I don't recall the time that it was, but it was a game that may have started, you know, in the evening. The Chefs normally left just after half time when it was food service finished. The rest of us normally stay through till round about an hour, hour and a half after the game finished.

[85] The questioning on this issue continued¹²:

Ms O'Brien: Kerri, further question regards that you sent your text message at 11.19 pm. I spoke to him just before he left and I thought he was slurry?

- Mrs Trail: Yes.
- Ms O'Brien: What did you believe when Kerri Bailey has just said that he was super drunk and when you responded by saying you thought he was slurry, am I right to assume that you were both referring to affects of alcohol?
- Mrs Trail: No, no. He seemed to me to be a bit slurry. I didn't know what it was to do with, but it was that same weekend that I questioned him about his grogginess, is what I put it down to and that's when he told me that he was on strong pain killers and antibiotics, and it was the same weekend that I sent him home and said that he couldn't return to work until he had finished that medication.
- Ms O'Brien: So, you're saying, despite the text message conversation between Kerri Bailey and yourself, that you didn't have any concerns in regards to alcohol at all, that night, with Aaron, when you said he was slurry at work?
- Mrs Trail: No, I didn't believe that he was intoxicated at work, no.
- Ms O'Brien: I've got to say, I find that very confusing, looking at the phone conversation where Kerri Bailey was very clear, to requote, "He was super drunk. Is he drinking at work again?" Were you surprised by the question "Is he drinking at work again"?
- Mrs Trail: Not coming from Kerri Bailey, no.
- Ms O'Brien: Why did you question her when she said "Is he drinking at work again?" If you'd never known him to drink at work before, why did you not question her when she said is he drinking at work again, but simply - it seems the conversation is disagreeable to understanding what she's talking about?
- Mrs Trail: I'd never known him to be drinking at work. Kerri Bailey often made disparaging comments, I guess, about different people for different reasons. One of them was commentary around Aaron. You know, Aaron's been drunk, or Aaron being intoxicated, that I took with a grain of salt, and that's because I had no proof; I had never seen any evidence of him drinking at work. I never thought that he was intoxicated and the comments to me from Kerri, was part and parcel of the sort of things that she said.
- Ms O'Brien: Just to confirm, Kerri, you're saying that you never had any knowledge of Aaron being drunk at work, despite that text message conversation with Kerri Bailey?
- Mrs Trail: Like I've said quite a few times, Kim Gerard has raised it with me back in - around the com-games, earlier and I had also sent him home on a weekend where initially I had suspicions, but when he told me that he was on the medication and taking antibiotics, I sent him home; that's what I put it down to.
- Ms O'Brien: You didn't dispute it the same time when Kerri Bailey text you saying it was in regards to alcohol? You didn't clarify there was medication to Kerri?

Mrs Trail: No, at the time I was still at work, trying to wrap up the game. Kerri was asking whether I was going to meet her for drinks. I wasn't getting into any further text messages; I just wanted to finish and go home.

Ms O'Brien: I must say I find that a contradiction of the text message we can all see in front of us, that clearly states an understanding and knowledge of what Kerri Bailey was talking about and agreeance and understanding that alcohol was a problem with Aaron Sim that night. We, as a company, find great concerns that you turned a blind eye to such obvious conversations about someone who you were responsible for managing at Metricon stadium on behalf of the O'Brien Group?

Mrs Trail: I disagree with you.

[86] Relevant to the tickets Mrs Trail procured for others, the following was discussed in cross-examination¹³:

Ms O'Brien: Moving on to the next conversation. The next topic we visit. You were provided a written warning and that says - the knowledge of Aaron's alcohol problem and when you were provided with that, you admitted to giving free tickets to Kerri Bailey on the night of the text message conversation and you elicited those tickets for free from our landlord, the Gold Coast Suns. Is that correct?

Mrs Trail: That's correct.

Ms O'Brien: Following, when you told Simon Camp that you had given Kerri Bailey those tickets for free, against company policy, Simon asked if you had ever received or solicited free tickets from our landlord previously, and what did you say to him when he asked you?

Mrs Trail: Sorry, are you referring to when he was giving me the written warning for Aaron, at that point in time, what he asked me?

Ms O'Brien: And he asked you about - you told him that you gave free tickets to Kerri Bailey via the Gold Coast Suns, our landlord. Simon asked you if there was any other occasion in addition to giving out the tickets to Kerri Bailey, if you had given or solicited tickets on any other occasions in addition to that? When Simon asked you if there were was any other instances when you had given out any other free tickets, what did you say to him?

Mrs Trail: I told him that I hadn't.

Ms O'Brien: After you resigned, emails came to light from your email that you had deleted from your mailbox, that shows that you had in fact given free tickets and solicited them from the Gold Coast Suns, our landlord, and given them to Maria Moshavic, a former O'Brien Group staff member and close friend of yours. Why did you delete the emails?

Mrs Trail: As I've stated in my response, I was given permission to go back into work by Dan Smith and tidy up. I went through my inbox and I moved all my emails that obviously weren't going to be actioned into relevant folders and in my deleted folders, I deleted everything. I didn't specifically go through and pick out items to delete; I went through and tidied up. They were already in the

deleted folder. I didn't delete sent items, I didn't delete any folders that were relevant to the company or to Simon, or anything. I wasn't trying to hide anything. I would also like to add to that, that had Simon Camp issued me with formal notice of meeting for the second written warning, and given me details of what we were going to discuss, and offered a support person, I would have had time and not been under the stress and pressure I was, whilst receiving the first written warning, without formal notice of meeting, without a support person, I would have happily admitted to giving the tickets to Maria. As I put in my reply, I also recall two other instances where I arranged tickets for people that I also would have happily shared that information and none of that information has been deleted from anywhere. When you're put into these situations and not given time to think and it's stressful and you say things at the time and I recalled afterwards that I had got the tickets for Maria. So, there was no intent on my behalf to be deceitful or do anything wrong. I openly admitted to getting the tickets for Kerri Bailey. I'm not trying to hide that; I did do that.

Commissioner: When did you recall getting the tickets for Maria?

Mrs Trail: I couldn't tell you the exact time. I would have been days - I don't know, hours - I don't know. That entire week is gone.

Commissioner: So, after you were issued the second warning, or before you were issued the second warnings you recalling having obtained tickets for Maria?

Mrs Trail: I possibly - I can't say. I honestly don't remember. It was certainly after the first written warning; maybe after the second.

Commissioner: So, you were issued with a second written warning, which you don't like receiving, because you think it hasn't been given properly and there hasn't been a proper investigation, the procedure hasn't been followed. Then you also recall, do you, the tickets that you gave to Maria?

Mrs Trail: Yes, along with a couple of other times that I had arranged tickets.

Commissioner: Did you then tell your employer about that?

Mrs Trail: I'd resigned on the same day.

Commissioner: On the same day as what?

Mrs Trail: The second written warning.

Commissioner: The second written warning?

Mrs Trail: Yes.

Commissioner: So, you get the written warning, you either resign and then recall, or recall and then resign?

Mrs Trail: I can't say which one it was. I believe - whichever one I say; I can't be sure. I don't want to say one, and then it's the other.

Commissioner: No?

- Mrs Trail: Just I do recall and at the time - it's since then, since this process has started, I recall two other times which I put into my statement.
- Commissioner: I understand that, but I thought your evidence necessarily was that you recalled it on the day?
- Mrs Trail: For the tickets for Maria?
- Commissioner: On the day that you were issued with the second written warning, you recalled at least the tickets that you obtained for Maria and did you also recall the other two occasions on that day?
- Mrs Trail: No, not on that day. It was much later. It was whilst going through all this process and this application and trying to put things in date order and what had happened that I recall that I arranged tickets for two other people.
- Commissioner: Is it true to say that the first party to tell the Commission about Maria's tickets is the respondent?
- Mrs Trail: I think it might have been in my original submission. I'd have to go and have a look at that.
- Commissioner: It wasn't in your F2, was it?
- Mrs Trail: I'm not sure; I'm just looking.
- Ms O'Brien: Commissioner, from our side, we were, as the respondent, the first to raise this in the documentation presented to the Commission.
- Commissioner: Well, when did you raise it? Is it in the F3, where you talked about some [poor] behaviour? You don't say those things until your submissions, do you?
- Mrs Trail: Yes, I'm just trying to go through it.
- Commissioner: What you're getting in the second written warning is a statement there from Mr Camp, trying to address with you the seriousness of it, that even Mr Michael O'Brien doesn't ask for these things. He pays cash. Did that - what did you think when you read that?
- Mrs Trail: It's difficult because I don't have the other evidence, I guess, to prove that yet, but Kerri Bailey has, you know, arranged tickets for people and food and beverage vouchers for Simon Camp, and that would be questions that I was going to ask of them. It just - I'm not denying that I did it; I did. Because it's common practice throughout the company that it happens. So, I didn't think of it, I just did it.
- Commissioner: Are there occasions when the landlords, whoever they are, would have surplus tickets and then say look, I'm happy for these to be distributed. I mean that's within policy, isn't it, as long as it's then declared?---
- Ms O'Brien: Commissioner, our policy is - - -
- Commissioner: No, no, no, not a question for you, Ms O'Brien. It's a question for Ms Trail?

- Mrs Trail: Well, it has happened in the past with things like the trial opening ceremony of the Commonwealth Games. They had hundreds of tickets available and offered them to staff. Certainly, when other staff had departed the business, the landlords who developed their own relationship with those people have offered them tickets and said, you know, give us a call anytime you want to come to a game. The fact that those people came to me, I didn't see anything wrong, I guess, at the time of following up on those offers and requesting tickets when it's not a full house. I certainly, you know, it wasn't an ongoing thing.
- Commissioner: Can you tell me your understanding about the policy? The policy is very clear that you must not solicit?
- Mrs Trail: Yes, yes.
- Commissioner: So, when you go and ask, that's soliciting. So, did you know about the policy?
- Mrs Trail: I knew a policy existed, yes. I just didn't - I guess when you have a working relationship with these people and you talk with them every day and it wasn't something that was at the forefront of my mind when these conversations took place. They had very good working relationship with Kerri Bailey, with Maria. You know, when they say to you, you know Maria's a supporter of Richmond, is she coming to the game, do you need any tickets, it's just conversation that took place and yes, I knew there was a policy, but I just didn't put them together like that, I guess.
- Commissioner: Well, you breached the policy. Is that fair to say?
- Mrs Trail: Yes.
- Commissioner: So, even if Mr Camp or others in the business had sat you down, said we're thinking about issuing with a written warning about this, what do you want to say about it, at the end of the day, this is where you end, isn't it? That you agree that you've breached the policy?
- Mrs Trail: Yes.
- Commissioner: So, they issue you with a written warning that says things like Mr Michael O'Brien, the head of this company, he even still pays for stuff. So, I mean, is it the case that you would have received a written warning anyway?
- Mrs Trail: Yes, I expected that that would happen. I guess the point I've been trying to make is that - Anne-Maree is trying to say that I was deceitful and hid the fact that I got the tickets and things like that, and that was never my intention. This was brought upon me during another issuing of a written warning where I was clearly upset, there was so many things going on, we had a game that night. There was just so much happening and then I get a phone call to say that I'm being issued with a written warning and then it's emailed to me. Had a process been followed and things done correctly, I could have sat down and said yes, you know, I've had time to think about it, I understand, and I did get tickets for Maria. Now, actually, I've got tickets for other people as well. Like, I'm just - I was actually trying to be honest about it.

- Commissioner: So, you get a written warning for the two occasions, but if you had - if the company had followed its own process, it would, in its discussions with you, have discovered that there were an additional three more occasions?
- Mrs Trail: An additional two. Well, Maria yes, and two more, yes.
- Commissioner: Right, so there's five occasions?
- Mrs Trail: Four. The ones that I got for Kerri, plus the ones for Maria, and then I recall two more occasions.
- Commissioner: All right, well, so the warning letter talks about the one, the Geelong Richmond game and that it says, you also advised me that you had previously requested and received tickets to the Geelong Port Adelaide game on 14 August. So, who's that for?
- Mrs Trail: That's the - they were both for Kerri Bailey, yes.
- Commissioner: Right, so the two Geelong games are for Kerri?
- Mrs Trail: Yes.
- Commissioner: Then we have one for Maria?
- Mrs Trail: Yes.
- Commissioner: Which you don't get a warning for, because they don't know about it, and then there's plus two occasions?
- Mrs Trail: Yes, yes, that's correct.
- Commissioner: Right, so if there had been an investigation, you would have, in the time permitted, then recalled these other three occasions?
- Mrs Trail: Yes.
- Commissioner: You accept that you probably would have been warned for that, because you've breached the policy, and you aware of the policy?
- Mrs Trail: Yes, I guess - in around - yes.
- Commissioner: Right, so, I could, after I hear everything, say that the way they went about the written warning probably breached their policy. But at the end of the day, would you have received a second written warning? Perhaps you might, and that leaves you with still a second written warning, but you would have perhaps felt, is it, that you would be less hurt, because more time would have elapsed, you would have been heard. That you would have also given up three more occasions, or something. It would have been an even more serious warning, wouldn't it?
- Mrs Trail: Maybe so. Maybe so, but the position that I was placed in, didn't allow me to be, I guess, be honest at that time with it, because I didn't recall.

Commissioner: So, if you didn't get a written warning on 2 September, but you got one a few days later, after they followed their processes, then what? Does it leave you still in a position where you say that you have to resign?

Mrs Trail: I feel that they were continually - there was no procedural fairness. They weren't following their own policies. It was clear that they had done it to Aaron, they weren't following their investigation policy, they weren't following their disciplinary action policy.

Commissioner: Okay, but remember what I said, if you don't get a written warning on the 12th and they follow their policies and it takes a few days longer and you validly get a written warning, on let's call it the 15th or the 16th of September?

Mrs Trail: Hm-mm.

Commissioner: And, you know, maybe it was deserved; maybe it would have been validly given after that. Then would you still needed to have resigned, would you?

Mrs Trail: Possibly not. I guess it's what if's. I don't know, if they had done the right thing and followed the correct policies and procedures and you know, maybe I wouldn't have. But I felt like I was being treated unfairly on multiple occasions; not just this one.

Commissioner: Well, it's clear that I have an issue with the respondent's failure, on the face of it, prima facie, to not follow its procedures. It's one of the first things I discussed this morning. But, but, that's not what all these matters just, you know, solely hang on. They also hang on other issues. Like I discounted what Ms O'Brien had to say with, it's the law. It's not just the law, it's the whole package?

Mrs Trail: Yes.

Commissioner: So, at the end of the day, might you have been validly given a written warning for the breach of the policy, if it wasn't the 12th maybe a few days later?

Mrs Trail: Yes.

Commissioner: So, where am I left with that?

Mrs Trail: Yes, I agree with you that that - - -

Commissioner: We're going to hear from Mr O'Brien, horrified to learn that you're out there soliciting for former employees to come to games, when he puts his hand in his own pocket, which I imagine is very deep, compared to yours, but that's what he does?

Mrs Trail: Yes. I guess - and I agree. And I feel like there's nothing I can say, because it is fairly black and white, that I did breach the policy. But I guess, when it happens across the board and it seems like a common practice and you have that relationship with the people that you're working with, at the time, it didn't seem like that. It didn't - when the landlord who you see on a daily basis, going you know, if you want tickets, just let me know, or if you want to come to the game, let us know. That's just I guess the context of how it was.

- Commissioner: Well, who's saying these things to you?
- Mrs Trail: Tim Carey, the General Manager of the stadium, who is - - -
- Commissioner: Right, he's the only one we're going to hear from. So, the company I expect, Ms O'Brien doesn't have a problem if there are surplus tickets and they're offered by your landlord, but there's a prohibition on solicitation, is that right?
- Ms O'Brien: Is that to me?
- Commissioner: Yes, Ms O'Brien.
- Ms O'Brien: Commissioner, our policy states that we ask for any tickets to not be solicited or requested from venues, and that if any are, that they are declared. This is a particularly sensitive topic at the Gold Coast stadium, when we are in the middle of negotiations for an entirely new contract.
- Commissioner: Yes, but if Mr Carey comes and says I've got 10 tickets, hand them out, do what you like with them. That's okay, but the people still need to declare them, right?
- Ms O'Brien: We still do have - we still do not disagree - not agree fully with that circumstances, because in most times, if a staff member at any of the clubs comes to you and says I've got free tickets, in return most of the time, they want free food. So, it's never a free ticket for O'Brien Group. It might be for Kerri Trails or for her friends, but there's always a cost for O'Brien Group. So, we do not agree with any tickets going - - -
- Commissioner: Is this what you want me write in the decision, is it? That there's quid pro quo. I've got some tickets, give me free food. Is this - free food? What, hamburger or a hot dog or something in exchange for free tickets.
- Ms O'Brien: Or alcohol. It can be, it can be, and it is at times, a big problem that does need to be controlled within the company. There's concert tickets, alcohol, food, going in all directions and if there's agreements between friends and landlords, ultimately, it does affect us. One day the landlord comes to us and say, well do you know we give all your staff free tickets to every game, when we're unaware of it. It doesn't help, when you're coming to do contract negotiations or pricing negotiations.
- Commissioner: No, your policy says that they must then declare it.
- Ms O'Brien: Correct, and Kerri was questioned about that and chose to lie and says that because she didn't have notice that that was the reason for lying about when questioned about the tickets that, in this case, wasn't offered but solicited from the Gold Coast Suns.
- Commissioner: So, you want me in a decision to write that it's a particular problem because if they're even gifted, there could be corruption?
- Ms O'Brien: That's correct. That is entirely correct, Commissioner.
- Commissioner: I'm glad that your landlords are going to read this in a decision.

Ms O'Brien: It is, wholeheartedly the - we've got tickets to games, there's concerts all the time happening, there's suites that could easily be handed over to people that you're not aware of. All of this has, in the history of our company, absolutely been real stories that happens at venues.

[87] On the afternoon of 16 September 2020, after Mrs Trail had received the second written warning, Ms O'Brien sent the following email to her, copying in Mr O'Brien:

“Hi Kerri,

Another reminder, if you could please send me the post match reports and sales figures from every game at Metricon.

The last report I received from you was on the 31st August.

This is the 3rd time I have asked you to send these reports after every game.

Please ensure you don't forget moving forward.

Regards

Anne-Maree”

[88] In cross-examination, Ms O'Brien asked Mrs Trail why Mrs Trail left Ms O'Brien off financial and reporting emails. The following was discussed¹⁴:

Ms O'Brien: Could I ask, as reference in the attachments, you referred to, as we mentioned with Matt, the straw that broke the camels back, which was an email from myself asking Kerri, this is the third time I've asked you, could you please send me the financials after the Metricon game, sales report. You would regularly distribute these to me after every game, as the group of management in our company. However, on three occasions, you decided to send it to everyone else but not me, and on each occasion, I had to ask, following the event, and having not received them, if you could please send it to me. Could you please let me know why you chose to exclude me from those emails on those occasions?

Mrs Trail: I didn't choose to exclude you. I'd been in that role for I don't know how long, and originally, I was only sending those emails to - I believe it was Dan, Lee and Michael. Then, earlier in the piece, I don't know, around June or July, Michael asked me to start copying him and Simon Camp, which I did. And then at some point Kevin and I were talking and Kevin asked me to include him which I tried to do. And then you came on the scene and you asked me to include you on the emails, as well, which I did. It was just literally the amount of games that we were doing, as already mentioned. It was like 42 games in three months where we would normally do twelve a year. And every single day I was sending forecasts, re-forecasts, sales reports, interim reports, reports to the stadium, and yes, when you sent me that email I realised I had left you off but then at the time I also knew if you wanted to, you could have just opened up and read the sales reports that were in the folder.

Ms O'Brien: And I would understand if it had happened on one occasion where I only had to email once but it was the third time successively that I had to ask you to

forward me the emails that you still forwarded to everyone else. Was it an accident to exclude me on three occasions from those emails?

Mrs Trail: It certainly wasn't on purpose but at the time, like I said, it's - they're long days, they're 14, 15 hour days. We were doing 80 hours, 90 hours a week trying to get through these games. There was so much work it was exhausting, and it certainly wasn't my intention to leave anybody off the emails.

Ms O'Brien: Do you think I had a right to ask you to forward me those emails and it was fair for me to ask - to follow up when I hadn't received them for you to forward them to me?

Mrs Trail: I thought that if you really needed that information and you were that concerned that you could have opened the folder and read the reports.

Ms O'Brien: Which you assume I had access to when I was working remotely on my laptop from Brisbane?

Mrs Trail: I - well, we all, at the time, at some point were working remotely from time and had access to the company drive. We could all log on and access anything.

Ms O'Brien: Why did you detail that email where I'm asking for the sheet to be sent to everyone else? Why do you email it in your email to Matt as the straw that broke the camel's back?

Mrs Trail: Because I felt like this - it was just another thing that was going to lead me to have further performance management brought against me that - it was just a continual pattern by people like yourself, Simon, Michael, to either exclude me or pick up on every little thing that was happening and it was just going to be another, you know, nail in the coffin, so to speak, to push me (indistinct). And to me it was just - that was it. I didn't want to deal with it any more. It was the straw that broke the camel's back. I just didn't want to go back to work the next day knowing that - that something else was going to happen, that there was going to be another written warning that didn't follow policy that was going to be for not copying you in on the emails. I didn't want to go.

.....
.....

Ms O'Brien: Okay. So just to confirm, Kerri, when you say that was the straw that broke the camel's back, it was because of that email from me asking for the finances for a third time, is why you chose to resign?

Mrs Trail: It was the ongoing pattern of what was happening. It was because of the tone of the email that you copied in Michael O'Brien, that it just - everything that had culminated over months and months, what had happened leading into that week, what had happened that morning, it was - it was just enough. It was - I couldn't take it any more.

[89] Ms O'Brien was at pains to point out to Mrs Trail in cross-examination how generous the Respondent had been while Mrs Trail endured a battle with cancer between approximately

August 2018 to August 2019. She asked Mrs Trail if she knew of all of the financial assistance and other assistance the Respondent had afforded to her. Where Mrs Trail did not know, during the hearing Ms O'Brien ensured repeatedly, *ad nauseum* Mrs Trail and the Commission knew of the Respondent's generosity¹⁵:

Ms O'Brien: So just to confirm that you would say - just quoting the document that I referenced earlier, you said you were absent from this role "during my cancer treatment from August, 2018 to approximately August, 2019", to quote your words. Are you saying that is correct, or incorrect?

Mrs Trail: That's correct, approximately, yes.

Ms O'Brien: Do you know that year, approximate year, when you were absent, how much money you were paid from O'Brien Group?

Mrs Trail: No but I'm sure you're about to share that with me.

Ms O'Brien: Correct. The figures I have of what you were paid from our payroll was a total of \$95,414, and your salary as a Venue Manager on a regular year is approximately \$114,975, so 115,000 approximately. So you received - - -?

Mrs Trail: That's inclusive of super, isn't it? So it's \$105,000 base, isn't it?

Ms O'Brien: That's correct. So you received just shy of \$10,000 of your full salary and you were absent for over - for just approximately a year. How would you explain, Kerri, that you almost reached - you were close to reaching your full salary when you were away for twelve months? How could you explain to us how you still received those funds?

Mrs Trail: Well, it was a mix of a number of things. Well, I used all of my annual leave that I had accrued over a period of years. I also used up a lot of RDOs that I had accrued over the time that didn't get wiped at the end of the financial year due to the number of RDOs that we had accrued for the Commonwealth Games, which was extensive. I also used all my sick leave, again, which I had barely touched over a four year period of time, so I had quite a lot of months of income that was owed to me. And as you well know, and where this is going is that the company also continued to pay me one or two days per week for around about three months.

Ms O'Brien: Kerri, from our files you chose not to carry over any days in lieu at the beginning of - from mid 2018 from the Commonwealth Games, and that any leave that you had dried up very quickly. From our files O'Brien Group paid you from January to April 2019, two full days a week, purely as a donation to assist you so that you did not have to worry about any finances while you were sick as an *ex gratia* as an entire gift from O'Brien Group, overseen and authorised by Michael O'Brien. And in addition to that you were welcomed back to come back to the office on any day when you felt you could simply pop in and were at many weeks and months, still very unwell. And if you attended work for one or two hours, on each occasion you were paid a full day for coming in. Is that correct?

Mrs Trail: I don't believe I was paid a full day for coming in for one or two hours. I certainly may have been paid a half day. But as you can imagine at the time, I wasn't filling in timesheets, I wasn't signing timesheets. Kerry Bailey was

looking after that for me. And I'd also like to add that I've not disputed this. I've not at any point denied this. It is factual and the company did pay me a couple of days per week for a period of about three months. And outside of that I took annual leave, sick leave, RDOs that were paid to me, or unpaid leave.

Ms O'Brien: So from our files in January 2019, or even December 2018, you had absolutely no leave left. But it shows that you were receiving almost a full week's pay when you weren't coming into the office, at all. In our files that shows that on these occasions they were complete donations from O'Brien Group and it was for that reason that your salary reached nearly your full year salary when you weren't in for twelve months of the year?

Mrs Trail: Okay, I can't dispute that because I don't know. It was a time that I was going through that was pretty darn tough, and timesheets or what I was or wasn't paid wasn't at the forefront of my mind. Kerry Bailey can attest to that. She would have been filling in timesheets for me.

Ms O'Brien: Correct?

Mrs Trail: But I don't disagree with you either. There was definitely support there from the company but you know, again I'm not sure what that has to do with this now.

Ms O'Brien: Kerri, would you say that the support that you received from O'Brien Group was extraordinarily generous?

Mrs Trail: It was generous, yes. And at the time, I praised OBG to anybody that would listen to me. Again, I'm not denying that, it's not in dispute. I just don't see how that justifies or makes it okay to then go on and breach company policies and bully people, and performance manage people to get them out of the business.

Ms O'Brien: And could I ask, Kerri, just in regards to additional donations in regards to the one that we've already touched on, is it correct also that all the staff at the Gold Coast cancelled their Christmas party so that the funds for the Christmas party could be donated to you, and then Michael O'Brien and O'Brien Group chose to double those funds to also continue to add another donation to you, is that correct?

Mrs Trail: I don't know the ins and outs but I know that there was - obviously I did receive a cash donation. I was told by Kerry Bailey that the staff had chosen not to have a Christmas party. They had said if I couldn't be at the Christmas party they didn't want one, and that they would like to see the money that had been set aside for a Christmas party donated to me to assist me with my treatment. I don't know how much that was or what contribution Michael O'Brien made to that. That gift was given to me from Kerry and then Travis Grace in an envelope. I don't know what the split was. I don't know what - who contributed what - what amount.

Ms O'Brien: So you're not aware that Michael O'Brien doubled the amount of the Christmas fund to donate that to you in addition?

Mrs Trail: I didn't know that that was doubled.

- Ms O'Brien: No one ever mentioned that to you?
- Mrs Trail: It was told to me that Michael O'Brien has also donated but I didn't know how much.
- Ms O'Brien: Could you please explain to us the additional support that was given to you, the company (indistinct) that was given to you called, "Smile for Kerri (indistinct) Day"? Could you just detail that to us, please?
- Mrs Trail: Well, unfortunately I wasn't there at the time I believed it happened. I was in hospital. I received a package afterwards of photos and a different venue, dressed in pink with signs that said, "Smile for Kerri Giles." Some places made cup cakes, I guess. I believed that some venues donated to the breast cancer foundation.
- Ms O'Brien: Would it be fair to say that the whole company at every venue across Australia stopped for a day for you to encourage you to get better?
- Mrs Trail: I don't know how long the venues stopped for or what day that occurred, but yes, I believe that all the venues that I'm aware of supported the day and dressed in pink and did a variety of, you know, bake-offs and dress-ups and things like that.
- Ms O'Brien: Did you think it was generous that by the end of your time of being away for twelve months that you were still able to have a salary of \$95,000 without being at work, as you say, at all during that period, in your documentation?
- Mrs Trail: Sorry, can you ask that again?
- Ms O'Brien: In your documentation, to repeat as earlier said, you were away for twelve months from August 2018, to 2019. Did you think it was generous of the O'Brien Group to ensure that you still had a salary of \$95,000 when you didn't attend work, in your words, during that time?
- Mrs Trail: Well, as I said, I was sick from August 2018, and at that time I did have quite a lot of annual leave, sick leave and rostered days off, so a large portion of that was money I was entitled to. But yes, the company also supported me and were generous in assisting me get through that time.

[90] I asked Mrs Trail the following questions as to why she considered she was forced to resign:¹⁶

- Commissioner: All right. Well, we need to know, Ms Trail, about your employment. So you're with this other organisation. Have you received any other income?
- Mrs Trail: I had a job that I did for (indistinct) at - in late September, which I'd have to find my - - -
- Commissioner: Well, you'll need to send through your bank details. Just the credit column is all I'm interested in. Now the respondent put in its material, why didn't you bring an anti bullying complaint. So why didn't you? If you thought the problem was with Simon Camp why didn't you bring an anti bullying complaint against him, or why didn't you go on worker's comp? Why didn't you take some sick days?

Mrs Trail: Well, at the time, until I saw something in O'Brien's response about a form 72, I didn't even know it existed. But I did raise it with Dan Smith who was the General Manager of the company. I called him on, I think it's three occasions, the first being in early May, I think it was, about it. I called him prior to my resignation and was in tears on the phone to him for 40 minutes about Simon and the way I was being treated and excluded and he told me he would take it up with Simon.

Commissioner: So you didn't know about the anti-bullying jurisdiction in the Fair Work Commission?

Mrs Trail: I didn't know that there was a form that could be filled out, no. I thought I was following the right process by taking it up with the General Manager.

Commissioner: Right, but you know about worker's comp, don't you? I mean, if you thought that Simon Camp was causing you distress then why wouldn't you have seen a doctor perhaps, got a worker's comp certificate? You didn't have any days off, did you?

Mrs Trail: No. No, I didn't - you say worker's comp now. I thought worker's comp was for somebody that had injured themselves in a workplace injury.

Commissioner: Well, isn't that what you're saying, that Simon Camp injured you in the workplace - - -?

Mrs Trail: I guess that's - - -

Commissioner: By his conduct?

Mrs Trail: So yes, I am, but I guess I didn't that with worker's comp, at all. I thought it was a workplace physical injury, if you fell over or hurt your back or something like that. I didn't know that bullying was something that would be a worker's comp one - claim.

Commissioner: I'd be surprised if it doesn't constitute at least half of the worker's comp claims that are made by people, psychological injury?

Mrs Trail: Well - - -

Commissioner: You didn't visit upon your GP?

Mrs Trail: No, I - I see my GP regularly. I certainly didn't talk to him about this specifically, no.

Commissioner: But the incidents, you say, caused enough distress for you to determine that you couldn't be at work any longer?

Mrs Trail: Yes, I just - I didn't want to go back into that workplace.

I just - it was just - for me it was clear that whatever I did was going to be, like, what's the word - scrutinised, like everything I was going to do was going to be wrong, that there was going to be ramifications no matter what decision I made or what I did, so I - - -

- Commissioner: So what would happen in that scenario then?
- Mrs Trail: Well, I felt like I would just continue to receive written warnings for anything, any little thing, and I didn't want to go down that path. I was - it was stressful.
- Commissioner: Where does that path lead you?
- Mrs Trail: Ultimately to being dismissed.
- Commissioner: And in the event that you were dismissed, then what? What does that result in?
- Mrs Trail: I don't - being unemployed, unfair dismissal, (indistinct).
- Commissioner: Right, unfair dismissal. That leads to the same path without the jurisdictional barrier?
- Mrs Trail: Yes. But, you know, like as I said in my resignation letter, I didn't make the decision lightly. There was a lot that had happened. My husband could see what was happening and it was a decision that we made together to say, I'm not going back to that, it's too much, it's - I can't. So I - I did what I thought was right at the time.
- Commissioner: So do you think that they were doing all these things because they wanted you to resign?
- Mrs Trail: Yes, I believe so. And again, I don't - I had a similar conversation, which I've listed, with Simon Camp where he told me that another staff member needed to be performance managed out of the business because the business couldn't afford to make them redundant. And it was clear that that's the process that they were going down.

[91] In re-examination, Mrs Trail said the following about other people knowing that Mr Sim had an alleged drinking issue, but not her:¹⁷

"I just, you know - the document 3, the applicant reply document 3 that I submitted, I guess was trying to be a bit of a summary of what has happened. But I guess I want to go back to the point, and I know it keeps coming up and maybe it's not as important as we all thought it was, but the situation with Aaron Sim and all the statements, you know, that people have provided date back to March, 2017 when I wasn't venue manager and there are reports of his so-called drinking or intoxication that had been told to Bevan Campbell and Simon Camp over a period of years, Anne-Marie says that she was with him for two hours and thought he was intoxicated.

It's like everybody's danced around this subject and taken no action, and then I'm being held accountable for this. And it's really frustrating when for a big chunk of that time I wasn't venue manager. And nobody discussed it with me, yet everybody else is discussing it themselves. Anne-Marie never picked up the phone and called me and had a discussion prior to the Sunday in question, nor did Simon or Michael O'Brien or Bevan, yet according to all their statements they were made aware of it by other staff members.

The company hasn't followed their policies and procedures throughout this process yet the investigation into Aaron, the disciplinary action that was taken, I don't understand why these policies and procedures are in place if they're not going to follow them. You know, there are

other people that are still going to come and testify and I hope that they're honest and tell the truth about what happened.”

Evidence of Mr Aaron Sim

[92] Mr Aaron Sim made a witness statement and appeared and gave evidence at the hearing. Mr Sim was employed by O'Brien Group Australia as Executive Chef, from 16 January 2015 until his resignation on 7 September 2020.

[93] Mr Sim stated in his written evidence that on 30 August 2020, the Gold Coast Suns had their last home game of the season at Metricon Stadium. The Suns were hosting a large corporate contingent across multiple function spaces. He said he had been working all day across multiple kitchens preparing food for all the corporate spaces and working alongside numerous chefs, kitchenhands and front of house staff.

[94] Mr Sim noted that Ms O'Brien called him when she arrived at the stadium at approximately 4.00pm. He did not recall the exact time, but it was about one hour before main gates opened at 5.00pm. He met Ms O'Brien at Gate 6 and escorted her onto the premises.

[95] Mr Sim stated that Ms O'Brien was carrying a large box of stickers which he offered to take from her. She declined, noting that he was limping. He informed her that he had an infection in his foot and was taking strong pain killers. Together they walked through all of the corporate areas to inspect them and to give Ms O'Brien an opportunity to see the food prep that had been done and discuss the menus and service times.

[96] Mr Sim stated that just after they left Coaches Field Club kitchen, Ms O'Brien asked him if he had been drinking, to which he said “No”. Ms O'Brien replied, “*I can smell it on you.*” Mr Sim replied, “*I have not been drinking.*” He said that he kept walking towards the main kitchen.

[97] When he and Ms O'Brien arrived back in the main kitchen, Ms O'Brien again asked him if he had been drinking. She stated that the company would help him if he needed any assistance, and then she asked Mr Sim about his family. Mr Sim responded that he had separated from his wife and again stated that he had not been drinking. He offered to be breathalysed or alcohol tested, to which Ms O'Brien responded, “*That's not necessary*”.

[98] Mr Sim said that following this, he and Ms O'Brien went to the Chairman's Room kitchen to commence entrée service. Present in the kitchen during entrée, main and dessert service was Joe Wild (casual chef running the kitchen), Mr Scott, Mrs Trail, Ms Tayla Heatherington (Functions & Admin Assistant) along with a number of casual kitchen hands. Mr Pete Kidson (Suncorp Chef) was running The Lounge function room but came into assist with plate up in Chairman's Room, and Jason Christiansen (Suncorp Chef) was running The Deck function but came to assist with plate up in Chairman's Room. His evidence is that but for a slight delay in mains going out on time, the plate up of all three courses went well.

[99] On 3 September 2020 at approximately 10:15am, Mrs Trail came into his office in the main kitchen and said they needed to go upstairs, somewhere private as Mr Camp was going to call. Mr Sim asked Mrs Trail what it was about; Mrs Trail apologised and said she wasn't allowed to tell him. Mrs Trail appeared to be visibly upset at this time, and when he and Mrs Trail entered the lift together, she said “*I'm sorry, I can't say anything, but I didn't know*”.

anything about this until a few minutes ago". Together they went into a corporate suite and sat down. Mrs Trail had her phone and very quickly after that Mr Camp called Mrs Trail's phone via video or zoom.

[100] During the zoom call, Mr Camp said that he was calling as Ms O'Brien had told him that Mr Sim was intoxicated at work on Sunday, 30 August 2020. Mr Camp went on to say how it was against company policy to drink or be intoxicated at work. Mr Sim replied that he had not been drinking and was not intoxicated. Mr Camp told him that other staff had also been questioned and said he was intoxicated.

[101] Mr Sim repeated that he had not been intoxicated. He informed Mr Camp that he had offered to be tested and would agree to testing at any time in the future. Mr Camp then asked Mrs Trail if she had the written warning and she had this printed and handed it over to Mr Sim. Mr Camp asked him if he was accepting the written warning. Mr Sim asked Mr Camp what choice he had, to which Mr Camp said, *"Not much as it's Anne-Maree's word against yours"*.

[102] Mr Camp went on to say that the company would offer support and help him if he needed it. Mr Sim told Mr Camp that he did not need any help. Mr Sim stated that he did not recall much more of the conversation as he was really upset and just wanted to leave the room.

[103] After leaving the room, Mrs Trail followed him and apologised again and asked him if he was ok. He replied *"No"*. Mrs Trail asked him if he wanted to talk about things further. He again replied *"No"*. Mrs Trail asked him if he wanted to take the rest of the day off. He replied *"No."*

[104] Mr Sim's evidence was that this 'disciplinary' meeting was completely against the company policy and procedure. He said that he was not given a notice of meeting, he was not offered a support person and there was no evidence presented other than being told Ms O'Brien said he was intoxicated. He said that there were numerous people that he worked closely with on that day that could have provided a statement to support him. He submitted that Mr Scott, Joe Wild, Mrs Trail, [name], Ms Victoria Taylor and Ms Heatherington all worked closely with him that day and night but were not asked to provide a written statement.

[105] Mr Sim stated that Mrs Trail advised him after the fact that both Mr Dakai and Mr Scott had been questioned by Ms O'Brien on the night of 30 August 2020, whether they thought he was intoxicated, to which both responded *"No"*. Mr Sim noted that neither Mr Dakai or Mr Scott were asked to provide witness statements. Mrs Trail told him that she had been advised by Mr Camp that he had three statements from senior members of staff. Mr Sim said that he had never been provided a copy of these statements nor had he been given the opportunity to respond to the allegations. If an investigation did take place, it was unbeknownst to him and he considered that it was obviously one sided and skewed to support Ms O'Brien's allegation.

[106] Mr Sim submitted that what occurred to him demonstrates that the Respondent showed a complete disregard to its own policies and procedures. He stated that:

- The Disciplinary Action and Warnings Policy and Procedure was not followed at all. No notice of meeting, no support person offered and no evidence presented.

- The company policy in relation to alcohol which states the company may direct the person to undergo and alcohol/or drug test was also ignored. He offered to be tested and it was refused.
- The company policy on Workplace Investigations was blatantly disregarded every step of the way. At no point was he advised of the investigation or allegations, he was not given notice or adequate (none) time to respond, he was not given the opportunity to have a support person, the investigator (Simon Camp) was totally biased as he did not take statements from all witnesses, only believed Ms O'Brien's version of events and did not want to go against the daughter of the Executive Director of the company and he was never given the chance to respond or contradict any evidence.

[107] The warning letter issued to Mr Sim is reproduced at [43]. He received it on 3 September 2020. On 7 September 2020 he resigned his employment.

[108] In examination-in-chief, Mr Sim was asked whether he was consulted with respect to a potential restructure of staff upon the Respondent losing the contract at the CBUS Stadium. He agreed that he was consulted and did not know at the time that Mrs Trail was not consulted. He answered that he was surprised and stated, *"I had assumed that if I was being asked those questions, then the manager that I directly report to would have been completely across it."*¹⁸

[109] Mr Sim was asked whether he recalled a discussion relevant to some concerns with the Head Chef. He stated that Mr Camp responded, *"Oh no. That's no good. He has to go."* He believed that Mr Camp and Mr Campbell wanted him to manage the Head Chef out of the business.¹⁹

[110] Regarding the Respondent's gifts and hospitality policy, Mr Sim stated that he was aware that a policy existed, but he did not know what was within it, nor had he heard it discussed.²⁰

[111] In cross-examination, Mr Sim stated that he had had a positive relationship with the Respondent up until early 2020. It was put to him that Mr O'Brien had given evidence that they had held multiple conversations about life's personal challenges and alcohol problems. Mr Sim stated that he could only recall one conversation with Mr O'Brien regarding alcohol.²¹

[112] In cross-examination, the following was discussed:²²

Ms O'Brien: Just a further concern, Michael's testimony to the Commission this morning said that he discussed with you that you had had problems with your consumption of alcohol. Is that correct?

Mr Sim: I do not remember a conversation saying exactly that. He - I remember having one conversation with Michael to ask about drinking, to which I said that, yes, I do enjoy a drink occasionally outside of work and that was all that was said and no further action was taken.

- Ms O'Brien: Michael's testimony this morning said that you had admitted to having a problem with alcohol and that you assured him that it was under control. Is that correct?
- Mr Sim: Completely untrue.
- Ms O'Brien: Just to remind you, Aaron, you are under oath. You are saying you've never had any problems with alcohol or discussed it with Michael O'Brien?
- Mr Sim: I'm completely aware of my legal requirements, Anne-Maree, and I stand by my comments.
- Commissioner: Mr Sim, it's Mr O'Brien's evidence that he did have these discussions with you a number of times and particularly around the time of the Commonwealth Games. He said around the time of the Commonwealth Games, you advised him that you were going across the road to the pub and drinking, I understand, during work times. So is that what you said to him?
- Mr Sim: Sorry? Excuse me, Commissioner, can you just repeat? Did Michael O'Brien say that I was going across the road to the pub during work times?
- Commissioner: No. I'm not sure whether it was during work time, but he - he said that you had told him that you are going across the road from the venue to the pub and that's what his evidence is, as though it is an issue - as though you know it's an issue?
- Mr Sim: So just to clarify, often after work was finished, a number of staff would go across the road to the golf club and have a beer. But it was definitely not during work [hours].
- Commissioner: Well, he further says that there are been late night phone calls from you to him where he considered that you were - that you had been drinking. So have you been making late night phone calls to him?
- Mr Sim: I would not say late night phone calls at all. There was definitely after-hours phone calls. Potentially 6 o'clock, 7 o'clock, raising - over the entire employment with O'Brien group raising concerns about a number of issue. I cannot recall an exact example of discussion or events. But I was - would have been at home with my family and having to put the children to bed and whatever. I often used to log on remotely for work and I know I would have called a number of people; Daniel Smit, Lee Pessel, Kerri Giles, Kerri Bailey, Anne-Maree - - -
- Commissioner: Well, you're now separated, aren't you?
- Mr Sim: I beg your pardon?
- Commissioner: You're now separated, aren't you?
- Mr Sim: Yes, I am.
- Commissioner: And you were living with some other fellow?

- Mr Sim: I - after the last (indistinct) international event that I worked, I stayed a short time at a friend's house while I applied for a rental property on the Gold Coast. I stayed - - -
- Commissioner: So were you making phone calls then? You said that you were, you know, at home with the family putting kids to bed, but what about after your separation?
- Mr Sim: Yes (indistinct)
- Commissioner: Towards - perhaps, you know, around July/August 2020. Were you making calls to Mr O'Brien after work?
- Mr Sim: I possibly could have. Yes. I can't exactly recall. Yes, it is possible.
- Commissioner: Because he says that that's around the time that he held concerns about you resuming your drinking. And that's when he alerted Ms O'Brien and Mr Camp?
- Mr Sim: Okay. I'm not sure how to respond to that, Commissioner. I'm not going to say that I didn't make phone calls to Michael O'Brien after work hours, but I would not have rung Michael if I was intoxicated.
- Commissioner: Well, he's not suggesting necessarily that you were intoxicated, but - well, he says that you were drinking, not inebriated. But that timeline makes sense, does it? Around potentially July/August, a few months before your resignation?
- Mr Sim: It is possible.
- Commissioner: Right. Well, were you after work drinking?
- Mr Sim: Occasionally I had a few alcoholic beverages after work. Yes.
- Commissioner: Okay. And is that a problem for you? Are you an alcoholic?
- Mr Sim: No I am not.
- Commissioner: Right. You've never spoken to your doctor about being an alcoholic?
- Mr Sim: No, I have not.
- Commissioner: All right. So occasionally, after work, you'd have some drinks and then you would call him?
- Mr Sim: No. I would not say that I would call him after I had been drinking.
- Commissioner: Well, that's his evidence to the Commission?
- Mr Sim: I don't know what more I can offer. I'm sorry, Commissioner. I don't know what more I can offer.

[113] After working through with Mr Sim text messages that he sent to Ms Bailey and the game time on 14 August 2020, Mr Sim believed that he left work on 14 August 2020 and

ventured across the road to the golf club at around 10:00pm. He denied having anything alcoholic while at work.²³ Mr Sim recalled getting an Uber home.

[114] I informed Mr Sim that two employees, Mr Pete Kidson and Mr Jason Christensen had provided accounts to the Respondent that they considered he had been drinking the night of 30 August 2020, while at work. With Ms O'Brien, that made three people who considered he had been drinking at work. I asked him how he travelled home on 30 August 2020. He replied that he drove home. He confirmed that at no point did Ms O'Brien enquire as to how he was travelling home.

[115] In cross-examination, the following was discussed:²⁴

Ms O'Brien: Aaron, have you ever drunk any alcohol at work whilst working with O'Brien Group?

Mr Sim: I have had a few what is alleged to knock-off drinks, which were provided by Simon Camp at the Adelaide Show and during the World Roots; I have had a beer supplied at work by Kerri Bailey after the Suns members' function, which I believe was 2019; I've had beers provided by Bevan Campbell in the Suncorp chefs' office; I've had beers provided by Bevan Campbell at a Gabba test match when Dan Fleming fell ill on day 2. They are the times.

Ms O'Brien: Thank you. Have you ever had any treatment for alcohol addiction?

Mr Sim: No.

Ms O'Brien: Under the law have you ever had any problems with alcohol consumption?

Mr Sim: Under - sorry, Anne-Maree, can you clarify under what law you're referring to?

Ms O'Brien: Under any law have you had any problems with your consumption of alcohol?

Mr Sim: No.

Commissioner: Have you been done for drink drinking, Mr Sim?

Mr Sim: No, I have not.

[116] Regarding Ms O'Brien's attendance at the stadium on 30 August 2020, Mr Sim agreed that he had spoken at length with Ms O'Brien during the week and her main focus on the night was to see the food that was being presented in the corporate areas at the stadium. The following was discussed in cross-examination relevant to her accusation that he smelt of alcohol:

Ms O'Brien: Did you think at the time that this was a personal attack, that it was a personal thing, or did you think that it was a professional?

Mr Sim: I was completely in shock. I didn't know what to think. I had in my mind that we needed to get to chairman's for service. I don't - with no disrespect, Anne-Maree, I don't know you on a personal level, so anything that we would communicate about, I took as a professional approach.

Ms O'Brien: You then stayed at work, served main course, in my recollection it was - sorry. In my recollection it occurred also after main course, but then you served dessert. How many hours later would you have gone home?

Mr Sim: After the main course service or the dessert service?

Ms O'Brien: What time would you have finished work and gone home? How much longer after our conversation would you have gone home?

Mr Sim: I don't recall, but I speculate it would have been within maybe two hours, an hour.

Ms O'Brien: So you finished work that night at what time? So main course was at - and then you had dessert afterwards, and all the kitchens to finish up and clean up?

Mr Sim: Yes. So I reckon it was probably 10 to 10, around that time, when I left.

Ms O'Brien: 9.50 pm is when you left?

Mr Sim: I'm not sure - - -

Ms O'Brien: And kick-off that night - - - ?

Mr Sim: I'm not sure, Anne-Maree. We do have - - -

Ms O'Brien: - - - I just want to ask - from my understanding, that night's kick-off, you had to get main course out by 7.10 pm, and it was running a bit late as I remember, because you didn't get it out to - - - ?

Mr Sim: Look, absolutely. I've made a note to myself that I only recalled today that main courses were about four minutes late going out. When we arrived into the kitchen you had your food-handling gloves on, standing at the end of the bench, and willing to do the micro-herb garnishing and wiping of the plates, pass them to the front of house staff. I delayed the main course service to further cook the chicken breast that was being served so that we could follow the OBGA food safety program correctly.

Ms O'Brien: Sorry, just to clarify a point from earlier, when I did speak to you about my concerns that you smelled of alcohol, from my recollection of that night you also denied then ever having a problem with alcohol. Is that correct?

Mr Sim: Yes.

Ms O'Brien: And you denied ever speaking to Michael O'Brien about it?

Mr Sim: You never mentioned that to me.

[117] In cross-examination Ms O'Brien put the following to Mr Sim:²⁵

Ms O'Brien: Do you believe, Aaron, that if O'Brien Group suspect that if any of their staff have been drinking at work, that they should turn a blind eye?

Mr Sim: No, of course not.

[118] In cross-examination, Mr Sim stated that after being issued with the written warning he was directed by Mr Camp to work from the Suncorp Stadium in Brisbane. Mr Sim lived on the Gold Coast near Metricon Stadium. He did not wish to travel as directed by Mr Camp. It played a factor in his decision to resign his employment.

[119] The following discussion took place as to why Mr Sim resigned his employment.²⁶

Ms O'Brien: So you went from having a full-time job with O'Brien Group as an executive chef, and resigned, and had no other full-time role to go to?

Mr Sim: Correct. That's how bad I wanted to get away from the company.

Ms O'Brien: Aaron, as is mentioned earlier, you and I have spoken quite a bit and did speak quite a bit, and I think you knew that you could not only call myself, my sister and my father at any time. If this was such a serious issue for you and concern, and you disputed the warning so much, why did you not call any of us directly to speak to us? Why did you choose to just resign?

Mr Sim: Because the allegations came from you, Anne-Maree.

Ms O'Brien: Did you ever apply to the Commissioner for - - - ?

Mr Sim: I would have thought that we had a working relationship where you might have rung me the next day to say, "Aaron, we need to catch up. We need to talk." But I heard nothing from no one.

Ms O'Brien: Okay. Just one final question - - -

Commissioner: So your evidence is, isn't it, that you said to Simon what you could to dispute it, and he said, "Not much, as it's Anne-Maree's word against yours"?

Mr Sim: Yes, correct. That did take place. I did forget that. I did ask Simon, "What can I do to go against it?" And, "Not much, it's Anne-Maree against you - - - "

Commissioner: Got shut down, did you? Got shut down?

Mr Sim: Yes, absolutely. So, like, Commissioner, with all due respect, what was - how was I meant to handle it?

Commissioner: I've heard from Mr O'Brien this morning that if Ms Trail had decided to refute the warning given to her, it would have stood anyway, so not much chance of your written warning having been withdrawn?

Mr Sim: Absolutely.

[120] In re-examination, Mr Sim described the following tasks on the night of 30 August 2020.²⁷

“Moving between outside of Chairman's service; moving between the lounge; checking on the carvery station; checking on the deck kitchen; into the sweets kitchen; back down to main kitchen; to food drops; making sure things were running on time to them; going out around the back and travelling to the coaches field club kitchen; doing my normal duties.”

Evidence of Mr Matthew Dakai

[121] Mr Matthew Dakai made a witness statement and appeared and gave evidence at the hearing following the making of an order for his attendance. Mr Dakai was employed by the Respondent as Retail Assistant Manager for Metricon and CBUS stadiums from 9 December 2017 until his resignation on 26 October 2020.

[122] Large parts of Mr Dakai's witness statement contained hearsay. He did, however assert that during his employment he had been highly regarded by the O'Brien family, and had even been offered ongoing work from them following his resignation, if he wished. He considered that by supporting Mrs Trail in this application, any such offer would now not be open.

[123] Mr Dakai stated that during a JobKeeper enabling direction period, he had temporarily relocated back to Newcastle. On 23 June 2020, he received a call from Ms O'Brien asking when he was coming back to Metricon Stadium. He said she seemed panicked and was wanting him to return as soon as possible, however, he informed her that he was in talks with senior managers within the company about coming to an agreement on him returning, as he wouldn't if he was not back on a full salary.

[124] He said he later found out from Ms O'Brien that she had only just been made aware of his relocation and thought he may leave the company, so she was trying to make sure he was not leaving. On 27 June 2020, Mr Dakai said he had finalised a starting date of 1 July to recommence work at Metricon Stadium and in response to his last conversation with Ms O'Brien, wanted to appease her and let her know he was coming back to work on 1 July 2020.

[125] Mr Dakai stated that on 10 July 2020, he received a call from Ms O'Brien who wanted to check in and tell him that she saw so much 'potential' in him and Mr Scott and that they were "*young and eager*" and "*the right look*" and that she wanted to replace all of the "*older, tired staff with young, fresh, well presented staff.*" Mr Dakai said she reiterated again that he and Mr Scott had great potential and a good future with the company.

[126] Mr Dakai said that sometime mid-July 2020, Ms O'Brien and Mrs O'Brien came to Metricon Stadium. During the game, he and Mr Scott were speaking with them when she referenced a tired, poorly presented outlet. Ms O'Brien said, "*You guys are here to run the stadium and bring change, we need to lift the standards and present the outlets a lot better than they are being presented.*"

[127] Mr Dakai stated that on 2 October 2020, he was working a game day at the Gabba and ultimately parked his car in a spot he was not supposed to and received a parking ticket. He messaged Mr Smith the next day to see if the company was able to pay for it. Mr Dakai said that he knew people have been refused in the past, however, knowing that he was well regarded and the fact that the ticket was \$100, he needed to try. He said Mr Smith said, "*Not normally, but I'm happy to make an exception.*"

Mr Dakai resigned his employment

[128] On 8 October 2020, he emailed Mr Smith for a salary review. Mr Dakai said that there was no response, but he later found out Mr Smith had forwarded it to Mr O'Brien to review,

and Mr Camp was also across this request. Mr Dakai said that the night of his resignation during a conversation with Mr Camp, he had said to Mr Dakai *“What a shame”* and, *“I have just gotten off the phone with Michael, and we both agreed on a salary increase”*.

[129] Mr Dakai noted that on 10 October 2020 he received a text message from Mr Camp saying, *“Good job this week and for the past few months”* and *“Thanks again for all your hard work.”*

[130] On 12 October 2020, Mr Dakai formally resigned. Mr Smith asked him the motives behind his resignation, to which he responded, *“Simon Camp”* and how *“toxic”* the workplace has gotten in such a short space of time with Mr Camp running the venue and what happened to Mrs Trail. Further, he stated that with Mrs Trail gone, and Mr Scott replacing her, how much more unsupported he would be as Mr Scott knew very little about the operations. Too much was being asked of Mr Dakai, to which Mr Smith responded, *“I am equally frustrated with what’s going on in Queensland at the moment, but it is only temporary.”*

[131] On 13 October 2020 at 6.41pm he had a missed call from Ms O’Brien. At 6.42pm he said he received a text message from her saying, *“Hi Matt, I only just heard about your resignation. If you could call me when you get a chance. Thanks, Anne-Maree”*

[132] At 7.04pm, he returned Ms O’Brien’s call. He said she greeted him, asked how he was and what had happened for him to resign. He said he told her reasons similar to what he had outlined in his resignation letter and he just didn’t want to do it anymore given he will be less supported. Mr Dakai said she asked if he knew about the salary review, stating, *“Did you know it was for \$10,000?”* She proceeded to tell him that the O’Brien family loved how much he cared about his job and she thanked him for all of his efforts.

Lunch with Ms O’Brien and Mrs O’Brien

[133] On 14 October 2020, Mr Dakai met with Ms O’Brien and Mrs O’Brien for lunch. They began discussing his resignation and he informed them that the workplace had become toxic under Mr Camp. Mr Dakai said their response was not one of shock or disbelief, but rather they expected it and have heard it all before. In fact, he said Mrs O’Brien said before he even mentioned Mr Camp that she knew the real reason behind his resignation.

[134] Mr Dakai recalled that Mrs O’Brien said words to the effect, *“We know what you’re going to say, this isn’t the first time we’ve heard it.”* Ms O’Brien then recalled how during the Commonwealth Games, she returned to Australia to help with the event. When she first saw Ms Kim Gerhardt, the former Queensland State Manager in her office, Ms Gerhardt burst into tears and hugged Ms O’Brien. Ms Gerhardt informed her that the bullying from the Suncorp team has just gotten too much. Ms O’Brien stated words to the effect, *“Kim was a strong woman, the fact that she broke down in tears really speaks volumes about Simon Camp”*.

[135] Going on, Mrs O’Brien then stated how much she likes Mr Carrol, Retail Operations Manager of the Gabba and that in all the time she’s known him, around 30 years, he hasn’t said a bad word about anyone. She then said, *“He had some really negative things to say about Simon, and that’s when you know there is a major problem”*. Mr Dakai stated that Mrs O’Brien gestured to Ms O’Brien and said words to the effect, *“You need to call your father about this.”*

[136] Mr Dakai said that both Ms O'Brien and Mrs O'Brien again reiterated how highly he was regarded and that they would not be out to lunch with him if they didn't think that. In discussing Mrs Trail's departure, it is Mr Dakai's evidence that Mrs O'Brien said words to the effect, *"If Aaron had an accident or anything happened, my husband goes to gaol."* Ms O'Brien then said words to the effect, *"Kerri had to go! But this wasn't meant to happen, you and Elliot were supposed to run the stadium."* In my efforts to assist Ms O'Brien with cross-examination on this issue, Ms O'Brien disputed that she uttered this sentence. Mr Dakai stated in cross-examination that she did.²⁸

[137] Mrs O'Brien asked him if he wanted to become Venue Manager of Metricon Stadium to which he said no and gave them the realisation that that would in fact have him working closer with Mr Camp. Ms O'Brien then asked if he wanted to work at the Gabba and said, *"Simon doesn't have much to do with the Gabba. If you want, [name, Retail Assistant Manager at the Gabba] will be gone tomorrow!"*

[138] Mr Dakai replied that he would think about it. After about an hour at lunch, the meeting ended with Ms O'Brien saying, *"Let's keep talking about this, I'm sure we can find a solution. We will check in every few days about this"*.

[139] Mr Dakai said that when he arrived home, he thought he should send Ms O'Brien a thank you text to show his appreciation. At 6.33pm, Mr Dakai received a text message from Ms O'Brien asking, *"If you could please be sure to keep our conversation today confidential. Word can spread very quickly otherwise."*

[140] Mr Dakai said that over the next two weeks until the end of his tenure, he was working primarily at the Gabba, as Mr Camp had minimal involvement and Mr Dakai was helping the set-up of the AFL Grand Final. He said he worked as he normally did, not wanting to tarnish his reputation or potential opportunities that may arise in the future.

[141] On 21 October 2020, he asked Ms O'Brien if she was at the Gabba the next day, as he wanted to catch up with her. When they met the next day, he informed her that he did not wish to take the job off [name, Retail Assistant Manager at the Gabba], nor did he want to work at a venue in Queensland as Mr Camp is or would soon be in charge of all Queensland venues.

[142] He informed Ms O'Brien that he was not opposed to relocating out of the state as he did enjoy working for the company, however she suggested he would be bored in Adelaide, but not at AAMI Park in Melbourne. She then proceeded to tell him that she was not overly happy with some of the team members down there, but that she will speak with her father and see if they could "make some room" for him at AAMI Park.

[143] On 25th October 2020, Ms O'Brien sent him a text informing him that she was glad they had spoken, and she would keep in touch to try and find new and exciting opportunities for him in the business.

Mr Dakai cognisant of ill-treatment of Mrs Trail

[144] Mr Dakai said he became aware that on 3 March 2020, Mr Camp telephoned Mrs Trail and abused her for following the direction of Mr Smith. Mr Camp messaged Mr Dakai to

inform him that he was no longer coming down to Metricon Stadium to see Mrs Trail on the Tuesday, as planned. Mr Dakai noted that Mr Camp purposely withheld this information from Mrs Trail.

[145] Mr Dakai stated that Mr Camp was due down to Metricon Stadium to collect some alcohol stock. He was due to be there around midday, but instead called Mrs Trail at around 8:00am to say he would be there at 9:00am. Mr Dakai said that no one was planning to be at the venue at that time. Mrs Trail requested Mr Dakai attend with her in Mr Camp's presence as she was intimidated and felt bullied by him. This was inconvenient to Mr Dakai, however he agreed to do so to offer support to Mrs Trail. He noted that Mr Sim also attended.

[146] Mr Dakai's evidence was that from the moment he returned back to work on 1 July 2020, it became apparent to him that Mrs Trail had fallen out of favour with the company. He said that Mr Camp was becoming a lot more involved in the venue than ever.

[147] In very early July 2020, Mr Scott was relocated to Metricon as Venue Operations Manager, a title that never existed before Mr Scott was relocated to the Gold Coast. Mr Dakai said that he was looked favourably on by the O'Brien family for some reason, and he had had a meeting with Mr O'Brien some time ago stating he wanted to be a Venue Manager. Mr Dakai stated that with no experience in an operational role, having come from an admin role, he was now 2IC at the venue.

[148] Mr Dakai became suspicious of this elevation and spoke with Mr Sim. He confided in Mr Sim that he believed that Mr Scott was there to replace Mrs Trail as Venue Manager, by restructuring and making her role redundant. He hypothesised that Mr Camp was to oversee the venue in an official capacity as Mr Scott had no experience being operational and therefore, would be the 'yes man' that Simon wanted.

[149] Reflecting on Ms O'Brien's conversation with him on 10 July 2020 about himself and Mr Scott being "young" and the "right look", Mr Dakai concluded that Mr Scott was to look after the corporate side of the stadium, while he would look after retail operations, with Mr Scott overseeing the day-to-day operations.

[150] Mr Dakai stated that when Ms O'Brien and Mrs O'Brien came to look around Metricon Stadium, he again found himself hearing the same rhetoric; he and Mr Scott were there to improve the venue and make good changes. There was no mention of Mrs Trail whatsoever or a want by the O'Brien's to include her or even relay the conversation to Mrs Trail.

[151] Mr Dakai said that it was from this moment that he really began paying attention to how Mrs Trail was being excluded in conversations, emails and on some occasions, they were specifically told to not include her.

[152] Mr Dakai said that Mr Camp began calling Mr Scott, who had never worked at the venue before, and Mr Dakai directly asking them questions about the venue and the operations, answers from which he could have easily got from Mrs Trail.

[153] Mr Dakai stated that sometime in August 2020, Mr Karl Perkins, Suncorp beverage manager was down at Metricon one day and wanted to go for a walk to all the corporate areas. As Mr Dakai was the only person who knew about the beer system, he accompanied him as

did Victoria, Corporate Operations Manager and Mr Scott. Mr Dakai said to Mr Perkins, *“I’ll go get Kerri Trail,”* to which Mr Perkins said no. Mr Dakai responded that Mrs Trail knows the spaces the best and why things are the way they currently are – formally coming from Corporate Operations at Metricon stadium, however Mr Perkins said he didn’t want her to come. He said he didn’t want her ideas and that it needed to be made better with their own ideas. Mr Dakai said that the walk around was pretty much a SWOT analysis analysing what works, what does not, and how we can make it better. He considered it was something Mrs Trail should have been a part of.

[154] Mr Dakai stated that when Mr Camp was down on another occasion, he asked if Mr Dakai could go for a walk with him, to which he obliged. Mr Scott invited himself. Mr Camp announced that there was a restructure happening and added, *“You play a very big part in that.”*

[155] Mr Dakai recalled that Mr Scott was staring at him to see his reaction. Mr Dakai concluded that Mr Camp had already had a discussion with Mr Scott to discuss the restructure. Following the conversation, Mr Dakai’s suspicions grew, so he pulled Mrs Trail aside and asked her what she thought was happening. Mrs Trail informed him that she thought she was being pushed out and had spoken with Mr Smith who had told her not to worry.

[156] On 8 August 2020, Mr Camp, Mr Perkins and Ms O’Brien attended Metricon Stadium and did a walk-around with Mr Dakai. They were considering ways to improve the areas. Mr Dakai felt comfortable discussing the retail areas, but suggested he get Mrs Trail to discuss the corporate areas. He was told no, not to get Mrs Trail. Mr Dakai was unable to answer all of their questions relevant to the corporate areas.

[157] On 30 August 2020, Ms O’Brien attended the game at Metricon Stadium. She wanted the VIP event in the Chairman’s room to run flawlessly. Mr Dakai spent a considerable amount of time with Mr Sim that morning to help set up and execute last minute changes with presentation and menus.

[158] Mr Dakai’s account of the events of 30 August 2020, not given contemporaneously is given below:

“The following statement is my account of the events that took place on the 30th of August 2020 at Metricon Stadium in regards to Aaron Sim’s alleged intoxication.

The first instance I became aware of any issues is when I met Anne-Maree in the Corporate area after she had been speaking with Aaron. She went to the bathroom and Aaron and I talked for around five to ten minutes until Anne-Maree returned. Aaron then left us and we walked around Retail. As soon as we were out of earshot of Aaron, Anne-Maree asked me if I thought Aaron was drunk. I said no as he seemed normal to me. She persisted asking me if I knew of his alleged history of drinking at work to which I said no. Anne-Maree continued to tell me how “Dad [Michael O’Brien] rang Aaron after Commonwealth games and offered help” and “Aaron said he didn’t need any help and he doesn’t have a problem. I asked Anne-Maree why she thought he was drunk and she said “I can smell it. I have a strong sense of smell.” I do not believe Anne-Maree to have any formal training in Responsible Service of Alcohol and she certainly did not present any findings that were compelling and within the realms of RSA training and certainly did not have any proof.

Anne-Maree asked if I had smelt it on him and again, I replied “no” as I didn’t. I continued that I had accompanied Aaron on at least two cigarette breaks that day and engaged in multiple

conversations with him and again noticed no signs of intoxication. She then asked if I could circle back and assess him, in which I did and again found no signs of Aaron being intoxicated.

For the record I have never known Aaron Sim to be intoxicated or under the influence at work.

As an experienced hospitality professional who has held an RSA for over twelve years and am an Approved Manager registered with the Office of Liquor and Gaming Regulation it is my professional opinion that Aaron Sim was not drunk or showing signs of intoxication on the 30th of August 2020.

In addition, Elliott Scott who was in Corporate for the day, and not at all in Retail, confided with me at the end of the night that Anne-Maree had asked him the same questions and he had said no he had not noticed any signs of intoxication.”

[159] On 2 September 2020, Mrs Trail informed Mr Dakai that she had been questioned by Mr Camp and Ms O’Brien about allegations of Mr Sim drinking on the job, or smelling of alcohol. Mr Dakai informed her that Ms O’Brien had questioned him on the night, together with Mr Scott. He said that Mrs Trail became frustrated with being left out and being the last to know. Mr Dakai informed her that Ms O’Brien had given him a directive to keep it confidential.

[160] Mr Dakai considered that the bullying and harassment of Mrs Trail intensified in September 2020. He noted that Mr Camp was very rapidly becoming involved in Metricon Stadium, taking over some of Mrs Trail’s duties without informing her. It is Mr Dakai’s evidence that Mr Camp became the point of contact with the Gold Coast Suns Football Club. Mr Dakai called Mrs Trail one afternoon after a meeting with the Suns including Mr O’Brien and Mr Camp. Mrs Trail said to him, *“Well, I wouldn’t know. I was unceremoniously uninvited right before we went into the meeting”*. Mr Dakai recalls how upset Mrs Trail was on the phone and he could tell she was holding back tears.

[161] On 11 September 2020, a few hours before a very significant game was played at the stadium, Mr Dakai was sitting in the office with Mrs Trail and Mr Scott. Mr Camp walked in and asked Mr Dakai to leave the room. Mrs Trail and Mr Scott looked puzzled. Mr Dakai started to feel sick, worrying that this would not be a good result for Mrs Trail. He now knows that it was this occasion where Mr Camp issued to Mrs Trail a first written warning on account of having turned a “blind eye” to Mr Sim’s alleged drinking on the job.

[162] Mr Dakai noted that Mr Scott was a witness to the issuing of the written warning to Mrs Trail. When Mr Scott came out to assist in the retail operations, Mr Dakai discussed with him the restructure. Mr Dakai suggested that Mrs Trail was being pushed out, Mr Scott would oversee the day-to-day, reporting to Mr Camp, and Mr Dakai would look after retail. Mr Scott reflected on a discussion he had had with Ms O’Brien before he commenced at Metricon Stadium. It is Mr Dakai’s evidence that it mirrored the conversation Ms O’Brien had with him on 10 July 2020 about being young and fresh and the right look. It is Mr Dakai’s evidence that it became clear to him and to Mr Scott that they were being groomed to run Metricon Stadium.

[163] Later that afternoon, Mr Dakai and Mrs Trail exchanged the following text message:

Mr Dakai: Is that the talk we knew was coming

Mrs Trail: Nope. But it might as well have been. My time is up.

[164] On 12 September 2020, Mrs Trail informed Mr Dakai that she had received a warning for apparently knowing that Mr Sim was intoxicated at work. She informed him that Mr Scott had apologised to her after Mr Camp left the meeting, said the warning was uncalled for and offered to write a statement of support for her, if she wanted.

[165] Mr Dakai stated that on 14 September 2020, Mrs Trail informed him that she was going to be receiving another warning for obtaining tickets to the game from the Suns. It is Mr Dakai's evidence that he knows of numerous occasions where staff or ex-staff have received free tickets, free drinks, food, function entry, etc. He stated that it is very common within the company. He has received free gifts from Mr Camp; once where he allowed himself and Mr Sim to have drinks at the U2 concert at Suncorp stadium in November 2019. Mr Dakai posited that it is not a sensible thing to do; provide unlimited alcoholic drinks to a staff member who is allegedly a person who battles with alcohol issues.

[166] Mr Dakai was present when Mrs Trail received the second written warning on 16 September 2020. He stated that there was no offer of a support person. He suggested that it was ironic that Mrs Trail was being warned for breaching the Respondent's policy and procedure for gifts, yet the Respondent was breaching its own policy and procedure in the manner in which it issued to Mrs Trail the warning.

[167] Not too long after Mrs Trail went home, Mr Dakai received a text message from her stating that the email she had received from Ms O'Brien regarding being left off an email was the straw that broke the camel's back. She informed Mr Dakai that she was resigning.

[168] The morning after Mrs Trail's resignation, Mr Camp was at Metricon Stadium to meet everyone. It is Mr Dakai's evidence that he was "looking incredibly pleased with himself." He stated that unfortunately, Mrs Trail had resigned, and it wasn't his intention or that of the company's. Mr Dakai did not believe him. As everyone left the office to resume working, Mr Camp started talking to Mr Dakai that this is not what he had wanted and how he was the "good guy" in all of this. Mr O'Brien called Mr Camp and he left the room. When he returned, he announced that Mr Scott was the new Venue Manager.

[169] Ms O'Brien then called Mr Dakai and said that she knows that he has a good relationship with Mrs Trail, and words to the effect, "*We can now focus on making the venue better, and it will be better without her.*" Mr Dakai brushed her off the phone as he did not want to talk to her.

[170] Mr Dakai stated that some weeks after Mrs Trail's resignation, he and Mr Scott were on a walk-around with Mr Camp and he was 'big noting' himself about pushing Mrs Trail and Mr Sim out of Metricon Stadium.

Cross-examination

[171] In cross-examination, the following was discussed relevant to the allegation of Mr Sim now not just smelling of alcohol at work, but according to Ms O'Brien being "drunk" at work:²⁹

- Ms O'Brien: In your opinion, do you think the O'Brien family would have been correct to have concerns about Metricon as a venue after Anne-Marie O'Brien – myself – had seen concerns of Aaron being drunk at work?
- Mr Dakai: If that's what you believe you saw then absolutely.
- Ms O'Brien: Do you think it would be fair for the O'Brien Group to get Simon Camp, as a senior manager, to be more involved in the venue to understand issues such as Aaron drinking potentially at work?
- Mr Dakai: Yes, if that's what you believe you saw and that's what – that was you're guided by then absolutely. I mean it's your company. It's your livelihood. You see what you feel you need to do in the best interests of yourself and the company.
- Ms O'Brien: In section 250 onwards, you talk about how again the topic of Aaron being drunk, can I ask you in the situation if Aaron had been drunk at work as I had suspected and others had come forward later and said that they believed also. If someone on any given night one of our customers had received a meal with broken glass or poisonous detergent or possibly died from an incident as such from malpractice in the kitchen from Aaron being drunk, who would you hold responsible for this?
- Mr Dakai: I mean myself as an employee I would probably hold Aaron responsible being the one who's intoxicated. But if I was – you know – a court of law, I mean you know I know and your mother said it to me that it would go to straight to Michael. And Michael would be the one in gaol I believe was the quote.
- Ms O'Brien: Do you think we have responsibility if we suspect that Aaron was drinking at work to do something about it?
- Mr Dakai: Yes.
- Ms O'Brien: Okay. In section 256 and Appendix Y you refer to an email received from Kerri Trail which she said to you, forwarded you an email from myself Anne-Marie O'Brien, saying, 'This is the straw that broke the camel's back.' This email was in reference to an email which I, Anne-Marie O'Brien forwarded Kerri asking for the third time for the finances of Metricon Stadium to be forwarded. Kerri had continued to forward this email to other staff but for three games in a row and this is extending it to Anne-Marie which Anne-Marie normally receives. Do you think it is fair for myself to ask for these financials?
- Mr Dakai: If you wish to see the financials, absolutely – I mean you have full access as well – and if it was bothering you that much that you say you had to ask three times and you really wanted to see those financials you could have just logged on and saw them. I feel it was certainly an attempt that – and again to try and bully and belittle and harass the plaintiff and to quote, 'The straw that broke the camel's back.' is nothing that proved that that's exactly what it did.

[172] Relevant to the discussion during the lunch meeting where Mr Dakai gave evidence that Ms O'Brien offered to make sure an incumbent employee would be “gone tomorrow”, the following was discussed:³⁰

- Ms O'Brien:Just following a discussion where you referred to discussions we had about where you wanted to go in your career and discussions about [name], the Assistant Retail Manager, at The Gabba?
- Mr Dakai: Mm'hm.
- Ms O'Brien: Did I ever say to you that [name] would be sacked?
- Mr Dakai: No. And quite – no, I remember this very vividly, it was, 'He'll be gone tomorrow.'
- Ms O'Brien: You're saying that is – you're saying that is what was said to you?
- Mr Dakai: Yes.
- Ms O'Brien: Well, I can tell you that you misunderstood it, because The Gabba had had the AFL grand final and that we were creating more roles within the Queensland organisation everywhere and that is not what was said. But I can go through that later in my own statement....

Re-examination

[173] In re-examination, Mr Dakai was asked further questions about Ms O'Brien's inquiries on the night of 30 August 2020.³¹

- Mrs Trail: But I guess referring back to Aaron in and the day of Sunday 30 August, Matt – Anne-Marie asked you at some point during that when you were with her about your – what you thought about Aaron. Like, did you think he was intoxicated?
- Mr Dakai: Mm'hm. She did. She asked if I could smell it, to which I couldn't. She asked if I thought he was drinking (indistinct) – I said, 'No. Not that I'm aware of.' I had been with him earlier in the day. I believe there was like many changes that I was helping him with. I was with him when he was having a couple of cigarette breaks and then I was with him immediately, around 10 minutes before I walked off with Anne-Marie and she asked me. And, yeah – I mean as I have written in the statement I didn't notice anything.
- Mrs Trail: And did Anne-Marie ask you to provide like a formal written statement?
- Mr Dakai: No.
- Mrs Trail: Outlining that?
- Mr Dakai: She did ask that I (indistinct) but I did say that I believe in going to like in retail because retail you should be able to open and I wanted to check that some of the staff – the key staff – the supervisors were going – were arriving and everything was okay from a retail perspective and then the idea was to circle back at Anne-Marie's direction and go and observe Aaron more closely to which I ran out of time and I didn't get a chance for that.
- Mrs Trail: And so – and also when you were up in corporate and you met Anne-Marie and Aaron – Elliot was also up there?

Mr Dakai: Elliot was up there. Elliot was up there when we left. Elliot was up there when I returned later after the loop.

Mrs Trail: And that night you left work with Elliot and had a - - -?

Mr Dakai: Correct.

Mrs Trail: - - - conversation about Aaron and Anne-Marie?

Mr Dakai: Yes. So Anne-Marie had actually after the conversation confidential and on which I had full intentions of. It was actually Elliot who approached me and asked me if Anne-Marie had had a conversation with me. I don't know if Anne-Marie had asked Elliot. She maybe – I've spoken to Matt – or whatever made reference to me being in on it or whether Elliot was just asking me out of the blue. I feel the former. Yeah, Elliot asked me what I thought and I said what I told Anne-Marie. I said what I said in my statement and just what I said now. Elliot's response was the same thing that he didn't notice it.

Mrs Trail: Okay. And so at no point after that did anybody discuss with you or ask you for a full written statement or anything to during this investigation that took place regarding Aaron?

Mr Dakai: I heard nothing further on the issue.

Witnesses ordered to attend and give evidence

[174] Several witnesses were ordered to attend and give evidence on application of Mrs Trail.

Evidence of Mr Elliott Scott

[175] Mr Elliot Scott, Venue Catering Manager for Metricon Stadium, gave evidence at the hearing after being ordered to attend.

[176] Mr Scott stated that he did not recall Ms O'Brien stating that he was young, keen and the right look for the company, nor discussing it with Mr Dakai. He was then quick to add that he and Mr Dakai had multiple conversations every day, which he considered to be workplace chat. He said that he couldn't remember every single conversation they had together.

[177] Mr Scott said that in March 2020 he was sent back up to the Gabba to cover a paternity contract, but the Respondent decided after two weeks that it would prefer him at the Gold Coast, and that's when he took the role as Venue Operations Manager. When the Respondent lost the Cbus contract, he was supposed to be at that stadium as the retail operations manager. In that time, the Gabba role was filled, and understanding that his preference was to work on the Gold Coast, he was tasked with working at Metricon, assisting all departments and titled Venue Operations Manager.

[178] The following was asked relevant to any proposed restructure:³²

Mrs Trail: Okay. So I'm going to ask you another conversation then that you might have had with Matt. Did you have a conversation with him about what you thought was happening at Metricon? Obviously there were things going on where I was being excluded or removed from emails and you were being added on and this was something that was being discussed by many of the staff. Have you had a conversation with Matt about what you thought was happening with the structure?

Mr Scott: I definitely had a conversation with Matt. You know, I thought the structure was changing. Yes. I mean, in regards to emails being in a - sorry - sorry, I'm just getting another call on my phone - sorry, just one second - sorry, I'm still getting another call - yes, so I was under the impression that the structure was changing. I believed, you know, there was quite a few people leaving at the time, obviously with COVID and the loss of Cbus, I would have thought that the structure was a bit management heavy but you know, I had my personal opinions and - of what I thought what happened but it certainly hadn't come to light....

[179] Mr Scott stated that there were normally 12 games in a home season, however with the AFL being based in Brisbane in 2020, there were either 43 or 38 games held at the Metricon Stadium. He said it was a bit of a strange time with COVID, and he thought it suitable that extra support at Metricon Stadium was given.

[180] Mr Scott gave evidence that Mrs Trail was very kind when he arrived at the Gold Coast. He said that in terms of a friend and personal relationship, she was very nice; she was happy to have him there. He stated that when it came to his role, he wasn't included in everything that he would have liked to have been. On some occasions he was included, on some occasions he was not. He never knew what was going to happen the next day in regards to being included in things, and had hoped to be included in more than he was. He said he was under the impression when he went to the Gold Coast he would be helping everyone out, but he was thrown the role of staffing to do because no-one else wanted to do it.

30 August 2020

[181] Relevant to the catering on 30 August 2020, Mr Scott said that Ms O'Brien pulled him aside and asked if he could smell alcohol on Mr Sim's breath, to which he replied that he couldn't. He did not recall being asked by Ms O'Brien to go and see Mr Sim to determine if he could smell alcohol on him.

[182] I had the following discussion with Mr Scott.³³

Commissioner: the evidence of Ms O'Brien is this, and I'll read it to you. "I spoke to other O'Brien Group staff, Matt Dakai and Elliott Scott, to see if they had seen Aaron and any affects of alcohol that night. They were both in other parts of the stadium when I asked them, not near Aaron, and they said they had not seen Aaron. They kindly offered to go see him, however I said there was no need." So that's not right, is it?

Mr Scott: I was - I spoke to Anne-Marie just outside the chairman's room, which is the lounge, post (indistinct). That's when she asked.

Commissioner: So you had been in his vicinity?

- Mr Scott: Yes, I was in the kitchen where he was doing plate up. Yes. But I wasn't - - -
- Commissioner: And she asked you if you could smell alcohol on him and you said no?
- Mr Scott: Correct. I was in the same kitchen as him.
- Commissioner: So - - -?
- Mr Scott: The same vicinity.
- Commissioner: If I've just - - -?
- Mr Scott: And, no, I didn't pick up - - -
- Commissioner: If I've just read her evidence, is that incorrect, is it?
- Mr Scott: Well, I - yes, I was in the vicinity of Aaron.
- Commissioner: So you didn't say that you had not seen him?
- Mr Scott: No. No, I didn't.
- Commissioner: And you didn't offer to go and see him?
- Mr Scott: I don't believe so.
- Commissioner: And she didn't say to you, "No, there's no need"?
- Mr Scott: Not from my memory, no.

[183] Mr Scott said that the plate up on the night in question was very disorganised. He said he knew there were a few issues possibly with a bit of timing out the front, but he believed there was adequate warning given for the main. He stated that they had quite a lot of kitchen hands including himself on the plate up line. Mr Scott stated that Mr Sim took a long time to get everyone at the dish in, all the food out ready to start plate up, which caused quite a delay on getting the main courses out, and they did run late that night.

Mrs Trail's first warning

[184] Mr Scott confirmed he was present when Mrs Trail received her first warning for allegedly being aware Mr Sim was drinking at work and failing to do anything. Mr Camp informed him he was required to be a witness just outside the office door. He had no other advance notice of the meeting.

[185] Mr Scott agreed that there was no formal notice of the meeting, nor was Mrs Trail offered a support person. Mr Scott agreed that he recalled Mrs Trail disputing the wording in the letter, whereby Mr Camp asked Mrs Trail to put her concerns in writing. Mr Scott accepted that once Mr Camp left the room, he apologised to Mrs Trail and noted that he didn't know that was going to happen.

[186] When asked why he thought Mrs Trail wasn't included in the emails, Mr Scott said that:

“I have absolutely no idea why Kerri wasn't put in on them. I mean those things with the retail department were kept inside retail. I would have thought being a stadium upgrade that she should have been, because it's not just the normal retail one, but yes.”³⁴

Free Tickets

[187] Mr Scott was asked whether he had ever been given free tickets to attend an event at a stadium, to which he replied, “*Yes. I requested tickets to Metricon from Kerri Bailey, possibly the season before, to attend - I want to say Suns, but the Sydney GWS.*”³⁵ Mr Scott stated that when he received his free tickets, he did not enter it into the gift register due to receiving them internally from another venue manager, and not from suppliers or customers.

Questions asked by the Respondent

[188] In answering questions posed by the Respondent, Mr Scott confirmed that he had always lived on the Gold Coast and preferred to work on the Gold Coast, rather than travel to Brisbane. He did accept work in Brisbane but considered the drive to be tedious.

[189] Mr Scott spoke glowingly of Mr Camp and the assistance he and the Suncorp team have provided to the Metricon team.

Evidence of Mr Ben Trevers-Grace

[190] Mr Ben Trevers-Grace, Operations Manager, gave evidence at the hearing after being ordered to attend. He commenced with the Respondent in 2010. In around 2018 he became Venue Manager of Cbus Stadium, however when the contract was lost, he then performed work at Metricon Stadium.

[191] Mr Trevers-Grace agrees with Mrs Trail that they shared a good working relationship. Mrs Trail asked him why he didn't want to write a witness statement in support of his application. He replied, “*Personally I, whilst I support you in this, I just didn't think that what I would write down would actually offer you that much credibility from my point of view, and it would also - I didn't want to impact my career with O'Brien Group by writing things down that might have cast a negative light on myself and my view to the company.*”

[192] Mr Trevers-Grace agreed that Mrs Trail was regularly left off emails that he considered she should have been included. He forwarded them to her, sometimes writing, “*He keeps leaving you off*”, referring to Mr Camp.

[193] Mr Trevers-Grace had been asked to be involved in conversations with Ms O'Brien and Ms Caroline O'Brien regarding a potential upgrade or development of Metricon Stadium. He did not know that Mrs Trail was not across this, but considered that she should have been, rather than himself. He agreed that as Venue Manager, it's important to be involved in conversations, and most certainly, final conversations where decisions are being made. He stated that he wasn't surprised that Mrs Trail was left off emails and not involved in conversations; it did not surprise him on account of a pattern of behaviour he had observed and the people involved in the conversations.

[194] He was asked whether he had seen a resignation letter of another employee. He answered yes, Mr Camp had shown the resignation letter to him. Mr Trevers-Grace suggested to Mr Dakai that the employee had been bullied and had not been supported by the Respondent. Mr Trevers-Grace recalled how the employee, an executive chef had stated in his resignation letter that he had been left off conversations and email trails.

[195] The following was discussed relevant to Mr Sim:

Mrs Trail: Thanks, Ben. Just, sorry, on another topic, I just want to speak to you in regards to Aaron Sim. After he resigned, you and I had a conversation where you told me that in February 2020 when - whether you were packing, I think packing up offices or packing down the stadium before departing, that you'd had some concerns about Aaron and alcohol, and that you had called Dan Smith, do you recall that?

Mr T-Grace: Correct. That conversation with Aaron was actually in around September last year, and I had a welfare conversation with Aaron to make sure that he was actually okay. I was more concerned about Aaron's welfare with the allegations that he'd been drinking at work. I didn't actually accuse Aaron at that stage of being drunk at work. It was just an are you okay, is there anything we can do to support you, knowing that he was having issues at home and that his general welfare at work and his general attitude at work wasn't where I thought it could be or should be. So I offered him some time off if he needed to, see if we can get some support from other venues, or if he just needs, you know, to clear your headspace, or I even offered him counselling if he so desired.

Mrs Trail: And who from the company did you discuss that with?

Mr T-Grace: Only with Dan Smith.

Mrs Trail: So Dan Smith, general manager?

Mr T-Grace: Correct.

Mrs Trail: I guess, seeing you were venue manager at Cbus, and Aaron was executive chef across Cbus and Metricon, you never raised this with me at all, ever?

Mr T-Grace: No.

Mrs Trail: Did you not think that was something that I should know?

Mr T-Grace: Well, I thought as I'd raised it with Dan Smith, I thought - I mean, to your point, yes, I probably should have raised it with you. At that time Kerri Bailey was also looking after Metricon. I believe from conversations that she may have also been aware of this. But no, because I'd offered him support, I just discussed it with Dan Smith and left it with him.

Mrs Trail: But just confirming you never discussed it with me at any point ever?

Mr T-Grace: No. No, I do not believe that I've ever discussed that with you. The only other person in the company that I really discussed that with was [name], who actually was the person who raised his main concerns with me, so I kept him in the loop with my conversations with Aaron.

Mrs Trail: At the time what was [name's] position in the company?

Mr T-Grace: Head chef of Cbus.

Mrs Trail: So [name] reported to you?

Mr T-Grace: Correct.

[196] In answering questions relevant to receiving free tickets to see events, he said that he had only ever been given free tickets to see Adele at the Gabba as a patron. He has been required, on a working basis to attend other events and provide feedback to Mr O'Brien and Mr Camp. Mr Trevers-Grace is aware of a policy on gifts and hospitality benefits, but it has been more than four years since he read it, and he can't recall what it says.³⁶

[197] In cross-examination, Mr Trevers-Grace was not aware of the incident involving the chef who had resigned, having caused an anaphylactic event at the Gabba. He was not aware, as Ms O'Brien sought to inform him, that Mr O'Brien and Mrs O'Brien purchased 200 tickets for staff and family to attend the Adele concert, and therefore his ticket had been paid for.

[198] Mr Trevers-Grace stated he was surprised when, after Mrs Trail had ceased working at the Respondent she provided the code for the safe but it was incorrect by one digit. He said that she would have used the safe monthly.

Evidence of Ms Kerri Bailey

[199] Ms Kerri Bailey, former Venue Manager, Gabba Stadium and former Operations Manager, Suncorp Stadium, gave evidence at the hearing after being ordered to attend at the request of the Respondent. Ms Bailey has worked for the Respondent for approximately 20 years, most recently in Queensland. At the time of the hearing she had ceased her substantive role with the Respondent, but had just completed an eight-week contract at the Gabba.

[200] She agreed that she worked closely with Mr Sim for an extended period of time. When Ms O'Brien had attended the Gabba on 4 September 2020 and discussed with her Mrs Trail's denial of any knowledge of Mr Sim having a drinking problem, Ms Bailey was shocked and said words to the effect, "*Bullshit. Kerri Trail is well aware of it, she knows all about it. I can't believe that she doesn't*". She considered that Mrs Trail was well aware of Mr Sim's drinking. She said it had been discussed on numerous occasions and it was not something that was a secret.

[201] To Ms Bailey's knowledge, Mr Sim's drinking at work had been occurring for some time, it had been reported to numerous people, and she understood that Mr Sim was being supported by head office. She said no action was requested to be taken as "head office" was dealing with the situation.

[202] Ms Bailey said that Mr Sim's drinking problems were not hidden by anyone. I asked her what that meant? She said:³⁷

Ms Bailey: Was very well aware of it, it had been going on for quite some time. It had been - I had noticed it early on in - goodness, probably 2018. I got relocated to the Gold Coast for the Commonwealth Games, I noticed it then. I'm not

sure how long it had been going on before that. The state manager at the time, Kim Gerhardt, after I consulted her about it, said, "It's been dealt with by head office and Aaron is being provided with the support that he required." After Kim departed the company I felt then in the position - sorry, she went on maternity leave, I was covering her position. While she was away I notified it to head office again.

Commissioner: What you do? Or did you tell?

Ms Bailey: It was discussed with Dan Smith, the general manager.

Commissioner: You discussed it with Dan Smith?

Ms Bailey: Dan Smith, yes, Daniel Smith.

Commissioner: What did you say?

Ms Bailey: Kim had told me initially that Daniel Smith was dealing with the situation and just to leave it be. He was working through it with Aaron and providing support that was required, so I left it, adhering to superiors. As I said, when Kim went on maternity leave I spoke to Daniel Smith again myself to mention that Kim had told me about the situation and that I had further concerns. Again I was told just to leave it, Aaron was being provided with the support that was required. And then I got relocated into a different position working with the retail managers of both Cbus and Metricon, so it was not my position to then notify head office, it was a discussion with Ben Trevers-Grace and Kerri Trail about who was going to notify Dan Smith it was still occurring.

Commissioner: You spoke with Ms Trail and Mr - - - ?

Ms Bailey: Trevers-Grace.

Commissioner: - - - Trevers-Grace about who would alert Dan Smith that was happening again?

Ms Bailey: Yes.

Commissioner: When did you do that? When was that conversation?

Ms Bailey: I couldn't be certain of the date, but it would be sometime around possibly April, May 2018.

Commissioner: What was the decision? Who was going to discuss it with Dan Smith?

Ms Bailey: Ben Trevers-Grace discussed it with Daniel Smith.

Commissioner: What did Ms Trail say?

Ms Bailey: I'm not sure. Because of the position that I was in at that time, they were superior to me, so I just mentioned that I felt it needed to be discussed with Dan Smith, I gave them the summary of what had happened in the previous instances where I had reported it to Dan, but felt that because it was still happening, it needed to be reported again, and would leave it with them to report, whoever was going to discuss that with Dan. And yes, as I mentioned,

it was Ben Trevers-Grace who had that further discussion with Daniel, and I'm not sure of what the outcome was.

Commissioner: So the three of you got together, did you?

Ms Bailey: Yes.

Commissioner: And what was the concern? That he was drinking at work or after work?

Ms Bailey: At work.

Commissioner: Did you observe that yourself?

Ms Bailey: No, it was just in his actions that it was noticed.

Commissioner: What's that? What did you observe?

Ms Bailey: Slurred speech. Aaron is typically at work very respectful to management; and at times where we felt he was under the influence of alcohol at work he was very back-chatty, sometimes resentful of doing what was asked.

Commissioner: Had anybody else said that they had seen him drinking at work?

Ms Bailey: No.

Commissioner: Did Ms Trail said what she had observed?

Ms Bailey: Not that I can recall.

Commissioner: But the three of you had a conversation and agreed that Ben would be the one to discuss with Dan?

Ms Bailey: Yes. It was more me initiating the conversation, explaining to them what I knew about the situation from the past, dating back to when Kim first discussed with Dan; and said that I felt it needed to be addressed with head office and - between the three of us. Ben Trevers-Grace said that he was - I'm not sure whether he was going to be speaking to Daniel on a separate matter that afternoon or he was going to address it, but it was left to Ben to discuss with Daniel again.

Commissioner: Did you hear anything back?

Ms Bailey: No.

Commissioner: Did you observe any other concerning behaviour?

Ms Bailey: I don't believe from that point while I was still working with the company, no.

[203] Ms O'Brien asked Ms Bailey questions relevant to the night of 14 August 2020 where she agreed to meet Mr Sim across the road after he had finished his shift, and she was asked to explain the text messages between herself and Mrs Trail:³⁸

Ms O'Brien: Could you please explain to the Commissioner the events of that night?

Ms Bailey: Yes. I had been to a game at Metricon and the game - we decided to leave before the game had finished. I had previously let the Gold Coast team know that I was going to be at the game and if anybody wanted to catch up for a drink afterwards, that we would head across the road to the golf club. Aaron mentioned that he was going across the road. From an estimated time of when he possibly may finished work, would have been the space of about an hour before - between when we left the game and got over to the golf club. I felt the state that Aaron was in for the amount that he would have been able to consume in that short period of time, that there was a high possibility he would have been drinking at work. I don't choose to delve into Aaron's private life. I understand he has got a lot of problems with his children, and don't understand really what those challenges would be like to deal with. Whether that enhances the impact of alcohol, but I felt with the timeframe and the amount that he had - would have been able to consume in that short period of time, that he was definitely well and truly intoxicated.

Ms O'Brien: When Kerri Trail responds to you saying:

I spoke to him just before he left and I thought he was slurry.

What do you think Kerri Trail was referring to? What you think she was saying made him slurry in your opinion?

Ms Bailey: Again I can't surmise on what Kerri, you know, may or may not have meant by that comment. If that was a comment that I had made, I certainly would assume that slurring, as it slurred speech from intoxication; however, I'm not sure what sort of work timeframe he had been on, whether he was tired. From when I saw him, my observation was that he was slurring because he was drunk.

Commissioner: You offered up your text message didn't you, Ms Bailey, as evidence that Ms Trail would know this?

Ms Bailey: Sorry, Commissioner?

Commissioner: Did you offer up the text message? I mean, how would Ms O'Brien know about this text message unless you offered it up?

Ms Bailey: Yes, I did, that's correct.

Commissioner: So you've said, "Bullshit, she does know about it", and then you said, "Have a look at these text messages"?

Ms Bailey: Yes, that's correct. But at the same time I'm unsure from when I saw Aaron, I can confirm that he was intoxicated, but not knowing his work ethic - sorry, his workload from beforehand, whether he had just done a 16 hour day and was tired. From what I observed, he was intoxicated, and if he was slurry, from the other sections of the text message, I took the assumption that Kerri knew he was drinking at work again.

Commissioner: Again. You say that in the text message, "again"?

Ms Bailey: Yes.

Commissioner: Because you're referring to - you've not observed him, but you've suspected. Is that right?

Ms Bailey: Yes, that's correct.

Ms O'Brien: Kerri, when Kerri Trail responds to you additionally, when you said that, "Is he drinking at work again?" She replies by saying, "I haven't seen him like that for a while." Do you think that is in reference to alcohol consumption?

Ms Bailey: Yes.

Ms O'Brien: Kerri, when we discussed this text message conversation with Kerri Trail and asked if it was about alcohol, she denied, and said that the conversation in her opinion was about prescription medication. Do you see that be correct?

Ms Bailey: I'm not aware of any prescription medication Aaron was taking.

Ms O'Brien: From your understanding when you saw Aaron after the game, and you detailed that in a text message, did he arrived straight from work, or did he go anywhere else in between?

Ms Bailey: I'm not sure. The golf club is just across the road from Metricon, so I'm not sure that - I would hazard a guess that he hadn't been anywhere else. There's nowhere else to go.

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Ms O'Brien: On that evening, and after your text message conversation, from your understanding did Kerri Trail ask about how Aaron was getting home?

Ms Bailey: Yes, I believe she may have asked if he was driving. I couldn't be certain.

Commissioner: Sorry, what day you talking about? The 14th or the 30th?

Ms O'Brien: The 14th. The 14th, when he was super drunk in the text message.

Commissioner: Right. You wouldn't have suspected that he was driving home, would you, Ms Bailey?

Ms Bailey: I couldn't be certain. I would hope - - -

Commissioner: Friends don't let their friends hop in a car if they're super drunk in the way that you've described?

Ms Bailey: I'm not sure. I don't know whether he went outside to get in a taxi, I'm not sure whether he went outside to get in an Uber, whether someone was picking him up. He just left all of a sudden.

Commissioner: His evidence was that he got an Uber. But you didn't make any inquiries?

Ms Bailey: No.

Ms O'Brien: Okay, thanks Kerri. Just a few more questions. Just to confirm, so I had spoken to you on that evening at the Gabba that we had spoken to Kerri about her knowledge of Aaron's alcohol, and she still said that she had no knowledge to this day of any - she had heard other things from other people, but never really suspected or had any - witness of events or real understanding that it really existed. Is that how you would explain Kerri's understanding of Aaron, saying that in her view that she didn't know of any problems?

Ms Bailey: No, because we had had the conversation, as I mentioned, with Ben Trevers-Grace earlier in 2018 when the situation came about again.

[204] In cross-examination, Mrs Trail asked Ms Bailey questions as to how Ms Bailey could have satisfied herself that Mrs Trail knew about any issue Mr Sim might have with drinking at work.³⁹

Mrs Trail:At the beginning of what you've just said, you stated that it was discussed on numerous occasions with people about Aaron and his drinking. Can you just confirm who those people were that it was discussed with on numerous occasions?

Ms Bailey: On numerous occasions I had discussed it with Kim Gerhardt while she was in her state manager role, and discussing with Daniel Smith. After Kim went on maternity leave and I covered her position, the situation again was highlighted, and I discussed with Daniel Smith. When I stepped back from Kim's role and moved into the retail support role it was discussed with Ben and yourself about the situation, and that was where Ben took it upon himself to - or it was agreed that Ben was going to then report to Daniel Smith again. And at that point yourself and Ben, being superior to me, I left it to you guys to address; didn't ask of any further situations, it wasn't my place to until when you were away, and it was just on - I believe on your return is when it has been highlighted again.

Mrs Trail: Right. So you mentioned that - so Ben Trevers-Grace testified this morning, and he concurred with me that he had never discussed it with me, he and I had never discussed Aaron's drinking at any point, and I certainly don't recall having a conversation with you about it. Ben says that he did raise it with Dan Smith, but he has no recollection of having a conversation with me in regards to that?

.....
.....

Commissioner: Just on that, what do you say, Ms Bailey?

Ms Bailey: I've said what my recollection of the situation is, so I didn't respond because I didn't believe there was a question there.

Commissioner: Is Ben wrong?

Ms Bailey: I have given my recollection of the situation. I can very clearly recall sitting in the duty manager's office at Cbus having the conversation where Ben said that he was going to report to Daniel Smith.

Commissioner: And Ms Trail was there?

Ms Bailey: Yes.

Commissioner: So it's the Cbus office, is it?

Ms Bailey: That's correct.

Commissioner: This is in 2018?

Ms Bailey: Yes.

Commissioner: Is she wrong about that, is she, Ms Trail? You want to put to her - - -

Mrs Trail: I believe she isn't - - -

Commissioner: Ms Trail, you can put it to her that that's not true.

Mrs Trail: Correct. I'm interested to know when in 2018 that was?

Ms Bailey: I couldn't be certain of an exact date, but my recollection is that it was after a game at Cbus.

Mrs Trail: So I went - Kim Gerhardt I believe was still Queensland venue manager up until around June 2018?

Ms Bailey: I couldn't be certain. Not sure.

Mrs Trail: But just reconfirming that you never observed Aaron drinking at work?

Ms Bailey: No.

Mrs Trail: Are you aware of anybody else that observed him drinking at work?

Ms Bailey: No, I'm not.

Mrs Trail: Okay. I just want to refer to a statement. Bevan Campbell has provided a statement, and in that statement it says that - I'm just trying to find the page - that in April 2018 during the Commonwealth Games Pete Kidson, executive chef at Suncorp, reported Aaron smelling of alcohol during shifts on the Gold Coast, and then again in January 2019 at the Brisbane International Tennis. Did he report that to you?

Ms Bailey: No.

Mrs Trail: So do you have any idea who Pete Kidson would have reported that to?

Ms Bailey: No.

Mrs Trail: So during your time as the venue manager at the Brisbane International Tennis in 2019 did you have concerns that Aaron was drinking during that time at work?

Ms Bailey: No, I didn't.

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Mrs Trail: You mentioned that on 14 August that you saw Aaron, but you didn't know how many hours he might have worked, or you weren't aware that he was on medication or anything like that, but he has testified today that he was working extremely long hours. At that period of time at the Gold Coast we did four years' worth of football in three months. We did 42 games, and he was working exceptionally long hours, had an infection in his foot, and was taking medication. Could you see that as possibly being, you know, an issue and affecting his behaviour?

Ms Bailey: I can't comment on the medication and the side effects that it may have caused, not knowing what the medication is. I'm certainly not a doctor. But definitely if, you know, he had been working long hours, as I mentioned earlier, the alcohol certainly could be impacted by a lack of sleep, yes.

[205] Mrs Trail asked Ms Bailey her experience as a Venue Manager and what she might expect to receive in the form of email communication:

Mrs Trail: So as venue manager, in your experience or I guess your opinion, would you have expected to be included in meetings and conversations that would include changes to menus or signage or anything that would affect cost of goods?

Ms Bailey: Yes, most of the time. However, in my recent contract at the Gabba that certainly wasn't the case for the venue manager of that venue at the moment.

Mrs Trail: But it would be your expectation if you were venue manager that that was the sort of information that you would be required to do your job?

Ms Bailey: Yes.

Mrs Trail: Okay. I just want to give you an example of where - evidence that I've put in where Unilever have sent through a change to pricing in ice cream that was sent through, and that's sort of obviously something that affects what we do and our cost of goods, and that Simon Camp removed me from that email and added in Elliott. Does that surprise you?

Ms Bailey: If you were still venue manager, then yes, definitely.

Mrs Trail: And you worked with Simon Camp I guess for a long time in your role at Suncorp. Is that something that you have experienced with him?

Ms Bailey: What do you mean, experienced?

Mrs Trail: Well, his not including you in emails or removing you from emails, or I guess excluding you from information for you to do your job?

Ms Bailey: Not for the time that I was at Suncorp.

Mrs Trail: There's also emails that I was excluded from, again from Simon Camp, but Matthew Dakai and Elliott Scott were both included in in regards to the beer system upgrade and, you know, the reticulation system. Is that something as venue manager you would expect to be included on?

Ms Bailey: Yes, certainly.

Mrs Trail: When O'Brien Group lost the contract for Cbus and Metricon was the stadium that was left on the Gold Coast were you asked to provide your advice or opinion on structure for the Gold Coast?

Ms Bailey: Yes.

Mrs Trail: And would it surprise you that as I was venue manager at Metricon that I wasn't asked to provide any input into that?

Ms Bailey: Yes and no. Yes, I guess your opinion would have been valued; however, I think the company was looking for an outsider's view to assess the staff of both venues and who would be best suited for each position out of both venues.

Mrs Trail: Okay. Ben Trevers-Grace confirmed today, as did Aaron Sim, that they were both asked to provide their opinion on the Metricon structure, yet I still wasn't. Does that surprise you?

Ms Bailey: Yes. If they were asked, yes, it does.

[206] Mrs Trail asked Ms Bailey questions regarding tickets she had received in her years of work with the Respondent:⁴⁰

Mrs Trail: I just would like to ask if you at any time in your positions at the stadium have arranged tickets for any staff or family or friends?

Ms Bailey: Yes.

Mrs Trail: Can you elaborate that on the tickets that you arranged and what you did?

Ms Bailey: While I was at the Gabba my parents were visiting from Victoria. On a couple of occasions I had arranged tickets for them. While I was Suncorp - actually, sorry, before I got to Suncorp Simon Camp arranged tickets for us for a number of games at Suncorp. I've arranged tickets for my family for the Brisbane International. I have not been aware throughout my employment with O'Brien Group that that was not allowed.

Mrs Trail: Are you aware that there was a gifts and hospitality and benefits policy?

Ms Bailey: Yes. However, I have never considered that arranging tickets through a stakeholder would be considered a gift.

Mrs Trail: Do you recall after - I believe it was after I was forced to resign, I called you and I had told you that I had been given a written warning for arranging tickets for you to come to the games at Metricon. Do you remember what your response was to me?

Ms Bailey: Yes, absolutely, and I still stick by it. If I had have known that that was going to be the result of a written warning or that it was going to get you into trouble in any way, I would not have asked.

- Mrs Trail: So it was a shock to you - - - ?
- Ms Bailey: Absolutely.
- Mrs Trail: - - - that I got a written warning? And with that, and the tickets that you've arranged over different events for different people, and you were aware of the policy, did you ever fill in the log that's attached to the policy?
- Ms Bailey: No. As I mentioned, I wasn't aware that the ticketing situation was considered a gift.
- Commissioner: Sorry, where did you get those tickets from? When you say the tennis and the like, how did those tickets come to you?
- Ms Bailey: The tickets for the Gabba came through the Gabba venue manager at the time, Blair Conahan, through - - -
- Commissioner: Did you ask for them, or he gave them to you?
- Ms Bailey: I asked for them. It's a common practice with venue managers of venues, even to the point when I finished up at Metricon both Tim Carey and Tim Kitto mentioned if I would like to come to any event, to contact them and they would happily arrange tickets for me. I wish I had have contacted them and not Kerri.
- Commissioner: When you were employed you were asking the venue for tickets, were you?
- Ms Bailey: Yes.
- Commissioner: And you know that Mr O'Brien has very strong views about that, that that's not okay because it can lead to corruption?
- Ms Bailey: I've never been aware of that.
- Commissioner: He thinks that if you brush my hand, I have to brush yours. You might offer free drinks or food for that?
- Ms Bailey: I've not been aware of that.
- Commissioner: On how many occasions do you think that you asked for free tickets?
- Ms Bailey: Once for the Brisbane International; possibly twice for the Gabba, however once was with Mr O'Brien's knowledge because he arranged them for me, and my family were hosted in a corporate suite.
- Commissioner: So on one occasion you asked for tickets for the Gabba?
- Ms Bailey: Yes.
- Commissioner: And one occasion you asked for tickets to Brisbane International?
- Ms Bailey: Yes, that's correct.
- Commissioner: Right. So do you realise you were in breach of the policy?

Ms Bailey: - - - no. No, I feel that the policy is not clearly written, and that the understanding of tickets considered as gifts would not be well known throughout the business.

Commissioner: The policy says that you must not solicit any gift, hospitality or benefit from any supplier, business partner, venue, higher up, promoter, et cetera. What's unclear about that?

Ms Bailey: Well, I guess nothing. So I'm in breach of the policy as well.

.....

.....

Mr Dakai: Kerri, if you have to give an estimation on how many times you thought Simon had solicited tickets to Suncorp Stadium or other venues without Michael's knowledge, do you feel confident giving a number?

Ms Bailey: No, I don't. I can't be sure whether Simon has approval from Michael for those tickets. I've certainly been a beneficiary to several events at Suncorp Stadium through Simon. I wouldn't be certain on a number.

Mrs Trail: Kerri, my last point of this as well is because you've used terminology that I've used, which was "it was common practice among the venues to solicit tickets". I haven't listed it in my statement because I didn't want to have to call people or speak to people, but it is widely known that many people solicit tickets across the venues. Would you agree with that?

Ms Bailey: Yes.

Commissioner: Who are the many people? What sort of level employee are they?

Mrs Trail: From my experience they would be full-time staff - - -

Commissioner: - - - question for Ms Bailey?

Ms Bailey: Sorry. Yes, I would say that it's full-time staff across many venues. I would say it's common practice.

Mrs Trail: Sorry, that was opening for me. When Simon Camp was issuing me with the first written warning and the discussion came up where I had arranged the tickets for you, he had said to me that it was against company policy to do that. Are you aware that Simon Camp has done that himself?

Ms Bailey: As I mentioned, I've been a beneficiary of tickets through Simon Camp. However, whether that was with the understanding of Michael's knowledge, I can't be sure.

Commissioner: What events do you recall?

Ms Bailey: I've been to concerts, I've been to Wallabies games, I've been to Broncos games. I think that's - - -

Commissioner: Which concerts, do you recall?

Ms Bailey: I've been to Phil Collins. My family were hosted in a corporate suite for the Paul McCartney concert while I was working at Suncorp Stadium. My husband is a Parramatta Eels supporter, we've been to I would say probably three Broncos v Parramatta games. My business also follows the Wallabies. We've been to, I would suggest, three Wallabies games.

[207] Ms Bailey was recalled to give evidence on the fourth date of hearing on account of the supplementary witness statement supplied by Mr O'Brien. I agreed to have Ms Bailey recalled as Mrs Trail had further questions of her. Mrs Trail took Ms Bailey to Mr O'Brien's second statement where he said that Mrs Trail had rung him requesting 10 tickets in a corporate box to see Taylor Swift.⁴¹

Mrs Trail: Can you confirm if that sequence of events is true?

Ms Bailey: I'm certainly not aware of this, if you did call Michael, but that request for tickets actually came through myself. Maria had spoken to me and I do believe it was at a time where you really weren't all that well and Maria spoke to me and mentioned how much you really loved Taylor Swift and would there be any tickets available at the Gabba. I said I'll have a chat to Michael and see if there's anything that can be arranged. So, at that point, I believe I emailed Michael with those exact details that you really weren't well at the moment, that yourself and your daughter Riley, really liked Taylor Swift and following that, Michael came back to me and had arranged four tickets. I'm not certain of the guests, but I thought it was yourself, Riley, Libby and Maria.

Mrs Trail: And then how did it come about that there was - it went from four seated tickets in the seating bowl, to a corporate suite?

Ms Bailey: I can't be certain, because the only - the tickets I received were for a corporate suite. I don't recall the conversation about a request for 10 tickets and certainly I would at no point ever suggest, or request from Michael that what you've given me is not good enough; can I have something better, never.

Mrs Trail: Do you know how many tickets you were actually issued with? Michael states that he issued me 10 tickets?

Ms Bailey: No, I believe it was four.

Mrs Trail: Well, I can confirm that there was five of us in the group. There was myself, my daughter, Maria, Libby Poulson as you said, who both worked at O'Brien Group and a very close friend of mine, Dominic Burgess. Certainly, Natalie Davey did not attend. There was four or five other people in the suite. I don't know who they were, but I was told that they were guests of Michael O'Brien and they also shared in the food and beverage that was provided in the suite that night.

I'm also just interested to explore, in your experience, having been at the Gabba and Suncorp and whether or not, I don't know, if Michael pays for the suites, or they're a part of his contract, or it's a contra arrangement. But certainly, would it be the norm that O'Brien Group would invoice Mr Michael O'Brien himself for \$150 a head for 10 guests?

Ms Bailey: I'm not sure, Kerri. I've - I don't recall invoices being raised to Michael for food and beverage.

Mrs Trail: Yes, that's what I thought too. That's the detail that I have from Michael O'Brien's supplementary witness statement, which I wanted to refute, because it is completely untruthful, incorrect and it's quite clear that his recollection is not clear, because I never spoke to him about it at all. Obviously, some documentation that I provided this morning, which is some text message exchanges between Maria and my husband, outline that it is a surprise and I didn't know anything about it. That would be your understanding of how the events transpired?

Ms Bailey: Yes.

[208] Mrs Trail took Ms Bailey through Mr Camp's supplementary statement. She asked her questions relevant to staff drinking while at work:⁴²

Mrs Trail: Just moving on from that, there's a lot of, I guess discussion around the drinking culture at Metricon. Simon states that Elliott's got - is uncomfortable with the fact that Matt and I drank alcohol in the office when finalising work reports. He also states that he received an email from Elliott that concerns Matt was drinking a beer whilst at work, during work hours and at the premises. In your years of experience as a senior manager with the company, did you at the Gabba, at Suncorp, ever see or experience staff drinking at work after a game day?

Ms Bailey: Yes.

Mrs Trail: At which venues?

Ms Bailey: At all venues. I've not worked at a venue in Queensland or Victoria where having a drink after an event is not normal.

Mrs Trail: And that would happen in the office, as a group, in the seating box, in the seating bowl. Where did that take place?

Ms Bailey: At Suncorp, drinks were always in the office. At the Gabba, traditionally, even as recent as after the grand final, it was in the seating bowl. It's more often than not done as a group, the management team.

Mrs Trail: For example, at Suncorp, can you advise who would participate in those drinks?

Ms Bailey: Generally the Chef kept to themselves; they had a carton of beer that was in their office in the kitchen after each event. So, they were always excluded because they finished earlier. In the office, it would be the retail team, Carl Perkins, Craig Walters, Will Wagaman, Simon Camp, myself, Sam Ryan, staffing team. It was an entirety of staff.

Mrs Trail: What about at the Gabba?

Ms Bailey: At the Gabba the same thing. Kevin Baker, Patty Carol, Sandeep, staffing, Beth, Johnno.

- Mrs Trail: So, it would be fair to say it's common practice and it happens at all venues?
- Ms Bailey: Whether I can include all venues, I'm not sure, but certainly all the venues that I've worked at, yes.
- Mrs Trail: So, Anne-Maree and Simon Camp have both made it out to seem that it doesn't happen, that nobody drinks at work, that there are no knock-off drinks, that what happened at Metricon was the culture at Metricon and it didn't happen anywhere else. What would you say about that?
- Ms Bailey: Not true.

[209] Mrs Trail asked Ms Bailey questions about the use of foul language, and how Mr Camp had stated in his supplementary statement that it was inappropriate and unprofessional, especially from some of the Metricon Stadium staff. Ms Bailey scoffed and stated that Mr Camp would be the “king of inappropriate language.”⁴³ The following was discussed:

- Mrs Trail: Have you heard him use inappropriate language to other staff members?
- Ms Bailey: Not as a direct result of - well, yes.
- Mrs Trail: Are you able to elaborate on that?
- Ms Bailey: Simon, at times, while I was working at Suncorp, I felt he stepped over the line with some of the comments that he made, certainly in the company of other female staff members. As you know, I'm pretty thick-skinned and not much bothers me, but some of the language that he used in the past, I have mentioned that that's probably enough and you know, those words shouldn't be said.
- Commissioner: Which words, Ms Bailey?
- Ms Bailey: Sorry, Commissioner?
- Commissioner: Which words?
- Ms Bailey: A "C" word.
- Commissioner: Right. So, you've heard him say that in front of female employees, have you?
- Ms Bailey: Yes.
- Commissioner: And you chastised him?
- Ms Bailey: Yes.
- Commissioner: What was his response?
- Ms Bailey: The response that Simon normally gives, which is just a laugh.
- Commissioner: Do you recall when this occurred?
- Ms Bailey: No, sorry, not in a direct basis. It wasn't a one-off occurrence.

Commissioner: Right. I'm just trying to find the email that Ms Trail sent. So, in December 2019, New Year's Eve, Ms Trail emails a few people, says Michael O'Brien will be on site tomorrow, FYI. Natalie Davey wrote, "Oh fucking great". Ms Trail - just to Ms Trail, not to the others on the email. Ms Trail responded, "will just add to the fucking excitement of the day".

So, do you think that's appropriate?

Ms Bailey: It's not. However, having any member of the O'Brien family on site is always a stressful occasion. It's, yes. As I've mentioned, I very much enjoy working with the O'Brien family and most recently with Caroline, Anne-Maree, Elizabeth for the Grand Final contract, but I do know that when any of the O'Brien's are on site at any venue, it can be a stressful or added stress to the management team.

Commissioner: Right, well, they're the owners of the business, they have expectations, no different to - - -?

Ms Bailey: Absolutely.

Commissioner: If it was not a privately owned business and a usual corporation, not family run, same deal right? Big boss is on site, stressing?

Ms Bailey: Absolutely. Yes, definitely.

Evidence of Mr Tim Carey

[210] Mr Tim Carey, General Manager at Metricon Stadium for the Gold Coast Football Club (the Suns) gave evidence at the hearing after being ordered to attend. Mr Carey explained that the stadium is owned by Stadiums of Queensland, a statutory authority of government. His role is to deal with all of the service providers, catering included. He has worked at the stadium for nine years.

[211] Mrs Trail took Mr Carey through the meeting where Mrs Trail was excluded at the last moment. Mr Carey agreed that he had been expecting her to attend and thought it appropriate to attend. Mr Carey agreed that in his experience, it would be very unusual to not have the Venue Manager in the meeting, but it was a matter for Mr O'Brien.

[212] Mr Carey agreed that during the COVID-19 lockdown period, he had initially been dealing with Mrs Trail on a particular issue regarding use of the kitchens, and he was then directed to deal with Mr Camp on the issue. His evidence is that he was confused as to why he should be speaking with Mr Camp.

[213] Mr Carey agreed that where he noticed Mrs Trail had not been included in on some emails, he would forward them to her with wording to the effect, "Just keeping you in the loop." He was keen to ensure she was aware of arrangements so there was no confusion.

[214] Regarding the provision of tickets to events for former Respondent staff members, Mr Carey said the following, confirming he was happy to offer tickets:⁴⁴

"Absolutely. That's a standing offer of the, you know, anybody who leaves us on good terms is, you know, by way of acknowledgement or recognition, I'm more than happy at any time to

look after anyone if I can, if they would like to visit our stadium and they, you know, they've shown a level of dedication or commitment to us, it's incredibly normal for me to make that offer to people who we know, be they caterers, cleaners, security, whoever.”

[215] Mr Carey stated that if there are typically 12 games per year, the football club gifts tickets to the Respondent’s employees or associations around three to four times per year. He confirmed that it is at no cost to the football club. Mr Carey rejected the potential suggestion that tickets are issued so that requests for free food can be made.

[216] In answering questions from the Respondent, Mr Carey agreed that the contract negotiations were tough, and kept to only a select few from his side, which he expects was the same for the Respondent.

[217] In re-examination, Mr Carey had the following to say about the circumstances of Mr Camp becoming more involved in Metricon Stadium, and Mrs Trail being left out of communication:⁴⁵

“Yes, I certainly - I picked up a level of probably we'll call it confusion, perhaps frustration, Kerri, and what I would say is that, you know, I had a similar level of confusion at that time. It was difficult to know necessarily who I should be talking to on certain matters at different times for me. So how that manifests itself culturally for you and your team, I don't know but certainly again, with an overlay of COVID and people being stood down and people on reduced hours and what have you, there was, in my team, we were creating certainty on certain things so I imagine in your team, if you call it creating certainty and for me when it came to catering operations, I probably had a couple of different conversations on the go with different people at O'Brien so I found that a little bit challenging. Presumably other people in that situation also found that challenging.”

[218] I put to Mr Carey the following scenario which mirrored Ms O’Brien’s alleged concern on the night of 30 August 2020.⁴⁶

Commissioner: What's your view on this scenario. Somebody comes in and sees Mr Sim and suspects that he's drunk while serving at an event in August 2020, observes him for two hours, lets him get on with the work but suspects that he's drunk. What's your on that?

Mr Carey: I would have a concern if - from a workplace health and safety point of view. I guess what I would play out is how I'd hope that I would respond in that situation and how I hope I would respond is I will - if I suspected someone was affected by whatever substance while they were here and in a working capacity, my normal approach would be to pull them aside, address that issue and perhaps check in on their wellbeing so that they need not hurt themselves or others. It would be - I would be disappointed if we let someone work for two hours if they were suspected of being drunk.

Commissioner: Right. Well, it wasn't any of your people it was Ms O'Brien, she observed what she says is Mr Sim being - smelling of alcohol, leaving work for two hours and asked him and he denied it, but she still suspected him, didn't inquire about how he might safely get home from work and then he was issued a written warning on the basis of that statement that he was, in her view, under the influence?

Mr Carey: Look, again, I can't really speak for what Ms O'Brien observed or what it is the behaviour was that Mr Sim's was exhibiting on that occasion. All I would say is that from my point of view that process was likely - doesn't necessarily - it was best practice from a workplace health and safety point of view. (Indistinct).

Commissioner: Working in a kitchen which was hot?

Mr Carey: And look, to my earlier comment, I would be hopeful that my first inquiry was about their wellbeing and to your point how would we get someone home who might be affected by alcohol.

Commissioner: Do you have any capacity to, if any of your staff are - you suspected being under the influence of breath testing them or putting them in a safe room or anything like that?

Mr Carey: We - if we're talking about an event day I have paramedics here for the purpose of responding to medical incidents that arise in the crowd. I suspect I would be looking for an assessment from a medical person about the person's wellbeing and certainly I have the capacity to be able to put someone in a cab or have a colleague drive them home if we think we need to.

[219] Ms O'Brien put the following to Mr Carey about the level of alleged intoxication she considered Mr Sim to be impaired by on 30 August 2020:⁴⁷

Ms O'Brien: Mr Carey, would you in your experience of working with the O'Brien Group and myself, would you believe that if I had in any way thought that Aaron was drunk that I would have continued to let him work at the venue?

Mr Carey: Anne-Maree, if Aaron was drunk to the point where you thought that he was going to endanger himself or others, I have no doubt you would have jumped in and put a stop to whatever was going on immediately. I don't doubt that for a second. I suppose perhaps the question for whomever it is, is required to make a determination is how the level of intoxication that, it's been proposed that Aaron had is probably what's up for grabs, but I agree with you, Anne-Maree, if there's something obviously dangerous you certainly wouldn't have allowed that to happen.

Ms O'Brien: Thank you.

Commissioner: Before you go there, Mr Carey, I want to just make it clear what her evidence is. At paragraph 10 of Ms O'Brien's statement she says:

The entire I continued to smell the overwhelmingly strong odour of as coming from Aaron, it was undeniable. I waited to see if the smell would subside but it didn't. I have a strong sense of smell -

- I'm paraphrasing there:

Called Mr O'Brien. Learnt that he had had admitted a drinking problem to Mr O'Brien. I waited to see after main course. Aaron struggled enormous during this service. He couldn't coordinate the staff. I could smell alcohol. It was clear that he had been drinking.

That's Ms O'Brien's statement - evidence to the Commission so in that scenario, Mr Carey, what do you think is the right thing to do in your stadium?

Mr Carey: Look, that's disappointing in my stadium as you suggest, yeah, we'd be hopeful that there'd be a intervention with Aaron perhaps a little bit earlier than what happened. If it's apparent that - to point what you've just read out to me, if it was that obvious that he'd been affected, I'd be hopeful that we'd find a way to intervene a little earlier.

Evidence of Mr Daniel Smith

[220] Towards the end of the second day of hearing, the parties expressed that they would like to hear evidence from Mr Smith. I decided on 25 January 2021 to issue an Order to Attend for Mr Smith. Mr Smith gave oral evidence in this proceeding. He is the General Manger of the Respondent. He has worked for the Respondent from 1995-2007 and again from 2011.

[221] Mr Smith said that when he came back in 2011, there wasn't a formal human resource function in the way it exists now. Ms Jacinta Clancy is the HR Manager and reports to him. There are around 125 full-time staff and several thousand casual staff.

[222] Mr Smith said that he recalled Mrs Trail telephoning him in or around April 2020 where Mrs Trail was upset, detailing how Mr Camp had called her and was rude, direct and abrupt. He confirmed that he spoke with Mr Camp about the issue. Mr Camp informed him that he didn't think he had been overly aggressive or assertive. Mr Smith asked Mr Camp to be mindful of everybody's stress levels.

[223] Mr Smith stated that neither he nor Ms Clancy were aware of any investigation regarding Mr Sim's alleged alcohol issue. Neither of them were made aware that Mr Sim or Mrs Trail were to be issued with a written warning. He said that if Mr Camp had asked for assistance with understanding Respondent policies, he would have provided that assistance to him. He does not know why Mr Camp did not ask for assistance.

[224] Mrs Trail put to Mr Smith that the manner in which she was issued a warning did not follow the Respondent's procedure. He said he understood she was aggrieved by receiving it, but said he had a level of satisfaction that overall it was an appropriate procedure. The following was discussed:⁴⁸

Commissioner: Well, let's go to the policy there, Mr Smith. Have you got the policy there?

So it requires allegations to be put to employees, doesn't it?

Mr Smith: Yes.

Commissioner: At 4.1.2?

Mr Smith: Yes.

Commissioner: So what do you know of allegations relevant to Mr Sim and also to Ms Trail? What's before the Commission is clearly that they were both issued with written warnings without it being put to them in a formal setting that this

is the company's concerns, this is why we say that and this is what we want to hear from you. We're going to consider it. None of that occurred. Are you aware of that?

Mr Smith: No, I'm not, Commissioner - I wasn't part of the process. I wasn't part of the procedures that took place with either Mr Sim or Ms Trail. that wasn't something that was done under my knowledge or direction - - -

Commissioner: So why did you just give evidence, just now, that you were comfortable with the process that was followed?

Mr Smith: I was comfortable in terms of what Simon had described to me, in terms of, you know, I suppose the reasons for the warnings. As I said, I wasn't aware chapter and verse of how that was managed. Simon is well aware of this procedure.

Commissioner: I'm not sure he is, actually. What makes you say that?

Mr Smith: Well, as in it's a published document on our share drive on our policy drive. It's something that is available and is available for all staff, as it was for Kerri.

Commissioner: Well, he said he's never had to issue warnings before. This was his first time and it looks to me as though he's failed miserably. He's failed miserably following this process with both Mr Sim and Ms Trail. So you don't know, do you, as to what his knowledge is or how he went about it, do you?

Mr Smith: No, I don't know specifically how he went about it. That's what I've said in the evidence, that I wasn't - chapter and verse - wasn't aware of exactly the way it was done. I broadly didn't have a problem with the reasoning for the delivery of it, the reason for the warnings. I - you know - I was satisfied with that.

Commissioner: With what you had been told by Mr Camp - is that right?

Mr Smith: Yes, I was satisfied with the reasons for the issuing of the warnings. There was no cause for concern there. I didn't educate myself at the time and ask him to confirm that he delivered them exactly as per the procedure. But I was satisfied that the reasons for the warnings were appropriate.

Commissioner: So what were the reasons for the warning for Ms Trail?

Mr Smith: There was a failure - as far as it was presented to me, there was a failure by Ms Trail to, you know, identify, and manage what was deemed to be the inappropriate, I suppose, behaviour by Aaron as far as the allegations of intoxication at work, whether it was drinking in the venue or, you know, related to the venue, against company policy. The company has a very strong policy about use of alcohol and drugs and intoxication in the workplace and that Kerri had been aware of that behaviour and had done nothing to act on that behaviour. That was putting at risk both Aaron as the employee and a number of other staff and customers, to an extent. So that was - is what was presented to me. Again, as a manager, Kerri had been aware of that behaviour of Mr Sim and had not acted to correct it or report it to management.

Commissioner: Who told you that?

Mr Smith: That's what was presented to me by Simon as a summary of why the warning was issued.

Commissioner: Right, so what we know as a fact is that Simon knew of Aaron's drinking at work because it had been reported to him about five or six times by various people and he's reported it to Michael O'Brien, who was apparently dealing with it. Apparently, you're dealing with it as well. That's what other witnesses have told us, that you're dealing with it too but we don't have any solid facts before the Commission - any solid facts - that Ms Trail knew about it. So what has gone on here, with Simon, Michael, you - you all know, apparently, but no one has gone to Ms Trail and said, "You're with Aaron at the venue a lot. Can you let us know, can you keep an eye on this?" No one has done that?

Mr Smith: Look, I can't recall whether anyone did or not. I would take it on face value that we didn't. Certainly, the approach with Aaron and my approach and I know Michael's approach was one of trying to support Aaron. These were the way that had been presented to me simply - or not simply - but they were allegations. They were suggestions from people who had concerns about Aaron's behaviour. They were concerned about him as a colleague and a friend. So they had raised with me, that concern. Others and I had conversations directly with Aaron about whether there was a problem, which he always denied, completely and utterly denied. Initially I was actually satisfied to take that denial at face value. I knew Aaron fairly well, always had a good working relationship with Aaron. He was relatively upset with that allegation. So at that point in time I knew he was under a lot of stress in his life. He had issues with his children. His relationship was breaking down. It was a very busy period for him in the business. Aaron and I would have regular conversations. Again, in the context that I'm remote, I'm not on the ground, so I'm not seeing Aaron directly. I never took anything from my conversations that caused me to have concern that these allegations were true or anything that led me to be overly worried about - once he gave me his assurance and denial I was happy to take that on face value. Over time, obviously, you know, other people had raised that concern. Again, I had no evidence to say that it was actually correct. So there was a long period where it wasn't raised. There was a long period where nobody came forward and said they thought there was an issue and I think in fairness, in terms of whether or not Ms Trail was notified there is a long period there where Kerri - we're talking about significant change in management structure there.

When Kim Gerhardt left the business, Kerri has taken on a role there as a venue manager in a busy period with the Commonwealth Games. It was not something that was necessarily had occurred to me that Kerri needed to be notified about Aaron's behaviour. As I say, I at that stage didn't have ongoing concerns about it. I know others that were still working with him. The ones that had probably raised it previously would raise it again if they thought it was a concern again.

Commissioner: Yes, well, there is evidence that it was regularly raised over a reasonable period of time with Simon Camp and then he would report that to Mr O'Brien?

Mr Smith: Well, I'm not aware of anything - conversations between Simon and Mr O'Brien are not known to me.

Commissioner: Not known to Ms Trail either - so you know, Simon knows, Michael O'Brien knows but none of this is shared with Ms Trail?

Mr Smith: Well, as I say I can't describe why. From my point of view, as I said, it was a long period from when I was first made aware that there were concerns about Aaron. You know, quite a considerable time from when that was raised till when Kerri would have taken over this role. You know, again, on my behalf, you know - probably there is an assumption there that certain people that are working in that environment knew of the allegations because, you know, it seemed that a number of people did, you know? I probably failed in not following up to make sure she was fully aware of it. But at that point in time, when she assumed the role of venue manager, I saw no reason for concern with Aaron's behaviour. Again, I reiterate the point, I'm not on the ground. I'm not seeing him day to day. I don't see him at work. I have remote conversations with him, either by phone call or video link so I'm not watching his behaviour. I'm not watching his movements around the venue. I don't see him coming and going. I'm not there to physically smell alcohol on his breath.

[225] Relevant to Mr Sim being allowed to continue to work across various kitchens while Ms O'Brien made an assumption that he was under the influence of alcohol, the following was discussed:⁴⁹

Commissioner: What would you do if you did come across a chef during service smelling of alcohol and you were pretty satisfied that they were?

Mr Smith: Look, I would be asking them to immediately stand down, you know, for that period in time. As I say, very seriously, the alcohol issue in a workplace, let alone a dangerous place like the kitchen, is not something I would be prepared to put up with. In that staff member's interest they would be asked to stand down for that period. Now, what would do after that in terms of dealing with them, I'm satisfied that with Aaron very initially it was a welfare concern we had. It was counselling, try and get him assistance, offering him help, telling him if he had a problem he could talk to us, telling him that the company would stand by him. Again, understanding the context of what was going on in Aaron's life, it certainly was counselling over discipline in terms of if there was a concern but given that he had been previously - had several people and myself and Michael and Simon included reach out to him, offer him help, try, and tell him to get help if he was continuing to drink and put himself in a situation where he was either intoxicated or drinking in the workplace. I think he had reasonable. I think he had been given lots of opportunities to actually admit that yes, he needed help. So had I found him drinking in the workplace, or suspected it, I would have taken action to remove him from that situation.

Commissioner: Yes, so if Ms Trail had come across that you would expect that she would have stood him aside, let someone else finish the service that night, make sure that he was - he got home safely, you would expect? You'd ask him whether he was driving?

Mr Smith: I would hope, yes.

Commissioner: Because you wouldn't want him hopping in a car if you had any concerns. But you wouldn't know, would you, if he was 0.05 or not? You

wouldn't want him driving himself home? That is what you'd expect of her, if that were under her nose?

Mr Smith: I would expect that of any one of our senior staff to act if they had suspicions and I can't speak for why Kerri may or may not have had - may not have acted or may or may not have had her own suspicions. I'm aware that several other staff that worked with him at that time had very strong suspicions.

Commissioner: Ms O'Brien's evidence to the Commission is that on the night in [August] 2020 she came across Aaron, he greeted her, walked around. She immediately thought he smelt of alcohol. She let him continue working for the next two hours, in the kitchen, serving up. The service either was or wasn't good. Her evidence is different on that issue. Service was 20 minutes late but she let him work in the kitchen while she felt that he smelled of alcohol - never asked him, made inquiries as to how he was getting home that night. What do you think about that?

Mr Smith: Look, there could be any number of reasons, Commissioner, why somebody would smell of alcohol. We work in an industry that is surrounded by alcohol. Alcohol is in the outlets we work in, in kitchens that use wine for cooking. There are all sorts of reasons why a staff member - we have staff behind bars who go home of a night smelling like a brewery that wouldn't have a drop of alcohol on their breath. So I can't speak to what Anne-Maree experienced on that night. She hasn't discussed that with me. I don't know what she experienced, what her assessment of Aaron's condition was and why she did or didn't take further steps with Aaron on that night.

Commissioner: She asked Elliott. She pulled Elliott aside and said, "Do you smell alcohol", and he said no and also Matt Dakai. He said no, he couldn't. He'd seen him earlier, hadn't smelled it. Didn't ask Ms Trail her view but gives evidence that she absolutely believes that he had been drinking that night and therefore he was issued a written warning. There was no process followed. He just gets a written warning a few days later?

Mr Smith: Look, again, I'm not privy to that process, Commissioner. I wasn't part of the issuing of that written warning. What I am aware and what I found out afterwards by speaking to Mr Camp was that several other senior managers were happy to confirm that they also had concerns about that and believed that he had been drinking.

Commissioner: Yes, two other people were later contacted and asked and they said yes. But you've got Elliott, you've got Matt - never made any inquiries of Ms Trail. Ms O'Brien let him work in the kitchen, let him work for another two hours and then never made inquiries about how he might safely get home. You think there is a concern there?

Mr Smith: No. What I think is in terms of Mr Dakai and Mr Scott's evidence is that they don't work directly side by side with Aaron so if we have people that have got a differing assessment of Aaron's state, that those staff that work with him in the kitchen - I mean, they work side by side. They are in close physical proximity. Mr Dakai, Mr Scott, Ms Trail might pass Aaron five metres apart from each other. They might acknowledge each other across a room. They're not working in direct contact. They communicate via two-way radio or telephone. You know, there is a lot going on during service for somebody to sort of stand - you don't stand next to a chef when he's cooking if you're a

manager. You stay right of his way so I'm not surprised that there is differing evidence in that respect. Again, I cannot comment on what Ms O'Brien or anybody else did on that night. I was not there.

Commissioner: You would expect these sort of allegations would be put to Mr Sim and that he would be given an opportunity to respond to the allegations, wouldn't you?

Mr Smith: Look, I would certainly hope in any disciplinary proceeding that the company undertakes that the staff - you know, the allegation is presented to them and I didn't see any reason post that process that that hadn't actually been the case. He had certainly been - my understanding, and I could be wrong, was that he even acknowledged that there had been some alcohol.

Commissioner: No?

Mr Smith: I could be wrong.

Commissioner: Where did you hear that?

Mr Smith: Well, that's - that's inquiries I've made. I thought that was the case. As I say, I could be wrong.

Commissioner: I think you are?

Mr Smith: As I say, I'm not there for these processes. I'm not dealing with it; I didn't undertake the disciplinary process. I didn't have a conversation with Mr Sim about that process.

[226] Mrs Trail asked Mr Smith to reflect on the video meeting she had with him on 14 September 2020. He noted that she was very upset. He confirmed that Mrs Trail stated that Mr Camp was bullying her. Mr Smith formed an immediate view that she was not being bullied by being left off emails.

[227] Following a further telephone call on 16 September 2020 where Mr Smith exclaimed, "*Please don't tell me he said that*", referring to Mr Camp's incorrect assertion that Ms O'Brien is a Harvard trained barrister, Mr Smith encouraged Mrs Trail to go home. He noted that she had not been sleeping well.

Evidence of Mr Michael O'Brien

[228] Mr Michael O'Brien, Director of O'Brien Group Australia, made a witness statement and appeared and gave evidence at the hearing. In his written statement he stated that over the past few years, he held discussions with Mr Sim regarding his alcohol problem. Mr O'Brien said that Mr Sim freely admitted to him that it was of a concern but assured him that he was overcoming it and on top of it. With these assurances from Mr Sim, Mr O'Brien said his approach was to encourage him to work forward in a positive manner. He said that he was aware he was dealing with a challenging situation with regards to his children's health and it was a stressful time for him.

[229] As a Director of the Respondent, Mr O'Brien instructs all of the Venue Managers to provide monthly updates to the head office team through their monthly management report. He said he required an update of all items of concern and compliance; basically issues that

had to be dealt with and to ensure that the Respondent was fully compliant with all legal and statutory obligations.

[230] It is Mr O'Brien's evidence that in the two months preceding Mr Sim's resignation – July and August 2020 – he was “sensing the problem in relation to alcohol was once again becoming part of his life.” Having become “aware”, he instructed Ms O'Brien and the Brisbane Leadership team that this needed to be addressed. It appears that the Brisbane Leadership Team does not include Mrs Trail.

[231] Mr O'Brien stated that it is well-documented how financially supportive and generous the Respondent was to Mrs Trail when she was unwell. He that the level of support provided to her was instigated by him to ensure that she didn't have to worry about finances during this stressful time. Further, the Respondent provided tremendous emotional support, encouraging her to come back to work just to pop in and say hi at any stage, while on full pay, and organising the “Smiles for Kerri” company-wide day.

[232] Mr O'Brien had the following to say:

“Kerri was performance managed on 2 issues that the company had a responsibility to address. It would have been irresponsible and a dereliction of our corporate duties and our companies contractual obligations to Stadiums Queensland and the 300,000 patrons that attend Metricon Stadium on an annual basis if we had simply not addressed these serious issues.

I did not understand why Kerri basically worked against the company as we sought to address Aaron's issue. I'm disappointed to understand now that despite Kerri's responsibility of Venue Manager at Metricon Stadium, she put her friendship ahead of duty and failed to share any knowledge or concerns of Aaron's reoccurring alcohol problems. Our Gold Coast office is a very small team, of 8 full time staff and knowledge of this issue was widespread. In my opinion it was completely negligent and a total failure of her leadership that she chose to cover-up these issues and in fact acted in a most deceptive manner to myself and the company.”

Oral evidence given at the hearing

[233] Mr O'Brien stated that the Respondent has existed for close to 30 years. It's made up of a series of primarily government contracts with stadium authorities and Victoria and New South Wales, New Zealand government bodies who control public venues. A part of the business owns and operates freehold properties in hospitality. It's a diverse business that deals with numerous business partners and numerous landlords.

[234] Mr O'Brien contends that the Respondent has a first-class reputation, including contracts at stadiums including the Gabba for 25 years. He explained that part of his role is to nurture relationships with various boards and to maintain the principles the business is built upon. Mr O'Brien considers that he takes the ultimate accountability to all of the business partners, sponsors and clubs with which the Respondent does business with.

[235] Mr O'Brien said the following:⁵⁰

“Equally and secondly is my own role right now, in the last two years, has been to focus on compliance and our statutory obligations to the whole broad range of obligations that we have

with accountability, through liquor licencing, payroll, health, risk management. I'm very aware of the obligations that I have, as the director of the company, from a legal view point."

[236] Regarding staff obtaining tickets to events, and why the Respondent has a policy prohibiting solicitation, Mr O'Brien said the following:⁵¹

"Well, I suppose it's terminology that's a bit old school and I suppose I have got a conservative approach, but I very much believe, for the company, that there is no such thing as a free lunch and I think that when we are negotiating it's sort of like we go to our landlord, and in the majority of cases our landlords are in a position where they have to pay for tickets. If we seek or source gifts from them, in a simplistic manner, the next thing that I get back on my desk is, "We looked after you", or "We did this", which has happened and why I've made it such a firm policy, is that we have done something for you, as caterers, so therefore we want this, or whatever.

I also know that in many instances, our landlord is regarded as literally being a test. They're trying to put events on, e.g. Queen or AFL matches, and they're being tested by us. So I've got a clear policy that no tickets, no gifts are to be received from even our chief financial officer and our state manager sign a - I want to know exactly what the (indistinct) is, why they want it and I'll make the call.

Look, just for this test that's just been held at the Gabba, I've had probably eight requests from different people, not staff, but people who are outside the company, for tickets. I paid for the eight tickets myself. I just don't like it and I think it's - that's why the guys clearly understand that they can pick the phone up to me, run it past me and the majority of the time my response is no, because we're also in an industry where it can extend to suppliers too.

Unfortunately we're an industry in which, from the butcher to the fruiterer to the liquor supplier who gives our staff a gift or half a dozen bottles of wine, it ultimately comes back to a cost against the company.

So I'm very strong on this and I think that discipline that we have got has been a very important factor in our company, (1) maintaining good quality relationship with landlords and, ultimately, helping us to - it's one of the reasons that our track record, compared to other caterers, of retaining and continuing with contracts with the particular landlords has been based on the fact that I think that they would regard O'Brien Group are not pests who come along continually seeking favours, through ticketing.

I mean people need to realise that ticketing, in many cases, is \$120, \$130 pop concerts, whatever, so it is real money and that is why I have been firmly with that policy."

[237] Mr O'Brien had the following to say regarding Mr Sim's alleged drinking issue:⁵²

Mr O'Brien:When I was made aware that Aaron had the issue, I did have several chats with him about it and said to him, "Mate, you've got to do something about it, it is an issue and I'm becoming aware of it". He assured me that he was getting on top of it and he acknowledged it but that he was dealing with it.

So I think alcoholism is one topic, but there's a lot of topics when people run into a bit of trouble or challenge in their workplace. I think the first thing is to say to them, "This is the issue", and alcohol is no different. Aaron did say he was taking steps, that he was (indistinct). I mean I have - the norms do suggest that they go and go to Alcoholics Anonymous or go to a group where it's - a lot of our staff have gone, come back and been fine. Aaron did say that

he was - I was aware that obviously he had his own particular challenges with his children being not well. So I think - look, I fundamentally, sympathy and understanding of it.

So based what I'd sort of known, from Aaron himself, his assurances, that he was - so where I think this led to is that I was - I was sensing sort of that this problem around the time that, you know, the reference to when it was found at the location, regarding Aaron, but prior to that I was getting feedback again that it was becoming a bit of an issue. To what extent I wasn't sure, but I had told Anne-Maree, I was in Melbourne, it needed to be looked at and to see and to try and find out - so one - - -

Commissioner: Mr O'Brien, where you say, in your statement, "I was sensing that over the two months preceding Aaron's resignation, the problem in relation to alcohol was once again becoming part of his life", what do you mean by that and who was telling you this?

Mr O'Brien: Look, I think it's just anecdotally through casual staff saying things like, "Aaron was in great form in the kitchen the other day", or "Aaron was -", on the other end of the spectrum, "was struggling", or something like that. Look, on face value, I can't completely jump at those comments when people say them.

Commissioner: What casual staff are saying this to you, Mr O'Brien? Are they getting on the phone and ringing you from the Gold Coast - - -?

Mr O'Brien: No, if - no. If I was - I'd speak to our staff at Suncorp, who went there, and they'd make a comment about it. So I was hearing it from Queensland staff. I was in Melbourne, but I was talking and just it was coming through. I mean, look, it was sixth sense that I could sense.

Look, the other thing is, Aaron would randomly make calls to me to have a chat at different times, sometimes bizarre times from, you know, particularly late at night, or what I regard late at night, 9 or 10, just to say hello. I always sensed, in those things, that there was an alcohol call but, I mean, if there'd been a bit of alcohol, it was a call that he made under having had a few drinks. Now, whether he was completely - I'm not saying he was completely intoxicated or knocked out, but I mean I think I could read that they were phone calls made, under the influence of liquor or inspired by liquor to ring his boss late at night, just to have a chat about nothing, you know. So I was sensing that - - -

Commissioner: So you didn't think to ring Ms Trail and ask her to keep an eye on him?

Mr O'Brien: No. Well, I did actually - not in the immediate sense, but I certainly said to Anne-Maree, "We need to go and just understand exactly what the position is". But I did - I mean the other thing is, I've also got to be careful not to absolutely ring him up and tell him, just on a phone call, that he's been - that I think he's intoxicated or he's got an alcohol problem again, but I certainly said it to Anne-Marie, who was in Brisbane, "I've got a sixth sense about this, this is not quite right, you need to go and just see exactly what's going on". Now, there was nothing coming through, in a formal sense, in any management reports about it, so I mean the management reports do provide an opportunity to make commentary about all challenges and complaints or problems that might be there, that had never come through. The other thing is, I could well

have been - misread it, but that was my thoughts. I sensed, I sensed, I had a sixth sense and I think that there was - the issue was there again, you know. To what level, I don't know, but it required and it was my instructions to go - with Anne-Maree being present to go and just understand what was going on.

[238] I had the following discussion with Mr O'Brien:⁵³

- Commissioner: Do you understand, Mr O'Brien, that Mr Sim denies any such issue?
- Mr O'Brien: That she does?
- Commissioner: No, Mr Sim, he denies any such issue, in his evidence to the Commission?
- Mr O'Brien: I've got to say, I would find that - I don't know how to use - I find that to be completely untruthful.
- Commissioner: That's based on what other people have told you and also, you say, these phone calls that he's had with you?
- Mr O'Brien: No, no, I - no, I've had my own - no, no, I've discussions over a period of time about this problem. The only thing that is questionable - no, I've had discussions - discussions - many discussions with him, about this issue as a problem. So that's a - - -
- Commissioner: No, I'm not saying that he denies the phone calls with you, but he denies being under the influence at work?
- Mr O'Brien: Okay. Look, I wasn't there, on that particular evening, but - yes, well, I can't really comment about that, although I suppose bits and pieces that have come out since would point to another direction. I think there's a few people who have made the comment that there was an issue, a few of our staff that was around, but - - -
- Commissioner: Similarly, though, you've got Mr Dakai and Mr Elliott Scott, who were approached by Ms O'Brien that night, asked whether they thought he was under the influence and they said no, their belief was that he was not?
- Mr O'Brien: My evidence is quite clear. Aaron and I had multiple discussions, there's been a problem. Now, the thing that you're raising is you're saying, "in that period of two months", or "that particular evening", there's a different viewpoint on. But I think, unquestionably, there was, for a sustained period of time, a documented - a known issue that Aaron had and was dealing with it. I think what it comes down to is that I think he, anecdotally, my own discussions, led me to believe in the couple of months that he had slipped back. On this particular night I wasn't there so I can't comment. But - - -
- Commissioner: Do you understand, Mr O'Brien, that he was warned? He was issued a written warning, straight off the bat, without having been afforded an opportunity to have an investigation on this issue? It was Ms O'Brien's declaration that she considered that he was under the influence that then warranted him being issued with a warning, without him being able to say, "I deny that. I reject that. I shouldn't be issued with a written warning", it was just issued?

- Mr O'Brien: Commissioner, I actually had told him, without in writing, that if it was to happen again there would be a written warning, so I don't think it was completely without notice. He was clearly of the understanding that there would be. Now, the question is, I - you've got the comments from those two, but I think there are others who would say he was under the influence.
- Commissioner: How does that fare well with somebody is told, "Ms O'Brien says that you were drunk, so therefore you were drunk and therefore you're getting a warning. If he says, "I wasn't, and if you go and speak to other people they will suggest that I wasn't and that perhaps it was the medication". But the warning is issued, there's no - - -?
- Mr O'Brien: The warning was issued on the back of the fact that he'd been told and we'd been extraordinarily patient, probably very patient. The thing is, he - he acknowledged to me that it was an issue and the fact is that, "If it happened again, Aaron, they'd be a written warning". Now, I suppose, in our mind, it did happen again and that's where the written warning comes. So he did have notice that that would be the consequences of another (indistinct). So in our - -
- Commissioner: Am I getting through to you, Mr O'Brien, that he denied that he was drunk on that occasion, and therefore he would have liked - appreciated the opportunity, under your policy, perhaps, to have then disputed it. Ultimately, at the end of the day, the company does get to make a decision as to whether a written warning is issued, but there needs to be an investigation or at least an allegation put to him. Instead he's just issued the warning because Ms O'Brien says he was drunk?
- Mr O'Brien: When he was - well, wouldn't he believe that he could have had the opportunity just to contact me, or someone, and say that he didn't think it was reasonable or say to Anne-Maree, when it was given, it was unreasonable? When he's got the opportunity - again, he's got my number, he can ring me when he wants to. Do you think, if he felt so strongly about it, that he would have picked the phone up and said, "I think this is unfair", given that he knows - given, again - again - I've got to say that Aaron - I have, and he will, I think you should examine him on this, but on numerous occasions we've paid him out leave, we've given him benefits, we've done a lot things. I think, again, if you go through it, and I haven't researched the file, but I have been, and the company's been very compassionate and understanding to him. He has got complete access to me and he would have seemed that he just accepted it, on that particular thing, that that was the fact anyway. I think - I've got to say, I think he would have known that he's probably been lucky that we haven't raised it before, or he hasn't got a warning before on it.
- Commissioner: Well, he's given evidence to this Commission that he wasn't intoxicated that night?
- Mr O'Brien: Yes, okay.
- Commissioner: The company runs the risk of the Commission finding that the horse has bolted, that once you issue a written warning and then you ask someone about and go, well have them deny it, after they've been issued the written warning, the warning's been issued. He needs to go to the most senior person in the business - he needs to say, "Well, I think this has been given inappropriately", and you say, "Well, Ms O'Brien saw you"?

Mr O'Brien: If the warning - okay, if the warning - there is the opportunity to respond to a warning anyway, isn't there?

Commissioner: Well, Ms Trail didn't have much luck with hers?

Mr O'Brien: There is an opportunity.

Commissioner: But tell me, what do you think about Ms O'Brien's conduct in observing Mr Sim under the influence and allowing him to work for a period of two hours, including serving up food? What do you think about that?

Mr O'Brien: Look, it's a hard call. I mean the point is, there is also - it's my (indistinct) in working with these people, a lot of these people are what I would call functioning alcoholics. I think the thought that night was to let him finish the shift and supervise him and with the other guys to watch and make sure that he wasn't working in a space completely on his own, he was supervised and whatever. But - so it's a hard call. You've got a major event, but you're surrounded by probably six or seven other chefs, so it's not as though he's just a one man band, he just had to get through that process. But it's - - -

Commissioner: So he offered to take a breathalyser test and Ms O'Brien said, "No, that's not necessary". So might the appropriate thing to have occurred is that he be put in a room, with a glass of water, and told, "Don't worry about it, the other guys will handle it", rather than me writing a decision, telling the world that he served up food to all of the people in the Chairman's Lounge while Ms O'Brien observed him under the influence?

Mr O'Brien: Yes, but he was part of a team. In the end, when that was observed, the decision was, "Look, keep him in the kitchen but he doesn't become the principal conductor of the orchestra". He is part of the team but he's not going to become the total in control. As I said, you've got six or seven other chefs in the room at the same time, the menus. I think the danger you run is to march a chef out, at that particular point in time, is absolute chaos in the kitchen. So, look, it was a difficult situation but I think it was handled correctly and I think if it was done again that would be the, in those circumstances, providing his supervisor - providing there's others there, that I think, rather than to throw him out of the kitchen and throw him in a room would not be the way to do it.

[239] Knowing that Mr O'Brien was comfortable to allow an employee reportedly under the influence of alcohol continue to serve food in the Chairman's lounge, and if the circumstances arose again, he would have the same decision made, I considered that it became necessary at this point to make inquiries as to what efforts, if any, Ms O'Brien took to ensure Mr Sim made it home safely that night. The following was discussed:⁵⁴

Commissioner: Ms O'Brien, this is a question for you, and I appreciate you haven't taken an affirmation, but you'll do so later, do you know how Mr Sim got to work each day and night?

Ms O'Brien: No, I don't know.
My understanding is he drove and may - and that is that, I guess. But I had been told, by Aaron himself on that night, that his ex-wife no longer wanted him to have their children in the car with him and I also understand that Aaron did have quite a serious car accident not long after the fact that we had - had

spoken, in the days or weeks after. So my understanding, and presumption, when Aaron told me that his ex-wife did not want him to have his children in the car with him, you know, when I was putting dots together after the fact of smelling alcohol profusely on Aaron that night, was that there was a reason why his ex-wife didn't want children to be in the car with him and my guess, and I haven't said this to Aaron or to others, that it was about his alcohol problem.

Commissioner: So what care did you have for how he might make his way home that night, safely?

Ms O'Brien: Commissioner, my statement says that Aaron reeked of alcohol on that night. I did not say that - - -

Commissioner: No, I've asked you a question, Ms O'Brien?

Ms O'Brien: Yes?

Commissioner: I've asked you a question just now, and I want your father to hear this. What regard did you have for Mr Sim getting home safely that night if you thought that he reeked of alcohol?

Ms O'Brien: At the time, Commissioner, because he was standing and able to serve a meal in front of me, for 200 guests, I didn't have concern of him driving on the road that night. My bigger concern was, as shown in the text messages between Kerri Trail and Kerri Bailey that he was going to continue to go out after work and drink.

Commissioner: No, no, you didn't know that on the night, did you? So my question to you is, what regard did you have for him getting home safely that night, not knowing whether he caught the bus, or you didn't make any inquiries of him, did you?

Ms O'Brien: No, that's correct, Commissioner, I didn't, because I didn't have concern that he - that he would be having a car accident. I didn't see that his condition would result in that. I could smell alcohol on him, but I didn't, in my - in what I witnessed in his behaviour, worry that he would have a bad car accident that night. And if I did have concern about it - - -

Commissioner: He had just told him - sorry, he had just told you that his wife doesn't want his children in the car. So, Mr O'Brien, what do you think of this?

Mr O'Brien: Yes.

Commissioner: What do you think about your daughter declaring that she observed him to be reeking of alcohol yet she didn't make any inquiries how your employee might get home safely, in such a condition?

Mr O'Brien: Well, I think the first issue is, with Aaron, the effect of alcohol on his breath, of any description, was against the fundamental agreement that I'd had with him, that there was to be no more drinking, or drinking at work. Now, the question you're saying is whether he was 0.05, all right? And I don't know.

Commissioner: No, if I observed a colleague, any colleague who appeared to me to be under the influence and I suspected they might go on the road and drive then I know

that I would take definite action about - I would make inquiries about, "How are you getting home?". If I suspected that they were - - -?

Mr O'Brien: Okay. When you say "under the influence", are you talking about the fact that under the influence of liquor is even below 0.05, under the influence of liquor, by definition. So under the influence of liquor, and you can see it in a social setting and you can be with people in a social setting, do you feel that if they're under the influence, you're not sure whether they're 0.05 or what they are, but you know they've been drinking and they reek of alcohol, I'm not sure whether - look, in an ideal, perfect world, what you would say is you would stand along side of them and say to anyone who was reeking of alcohol, "Don't drive"? I mean I'm not sure whether - - -

Commissioner: If they were my employee, in my workplace, yes. Even if I'm not their supervisor, if I was just in my workplace. I have a duty of care?

Mr O'Brien: Yes.

Commissioner: So it appears that there was no regard for that, that night. There was no inquiries made as to how he might safely get home, or his mode of transport?

Mr O'Brien: I suppose he was denying it anyway, wasn't he?

Commissioner: Yes, he was, but he's been issued a warning?

Mr O'Brien: So if he's denying it - - -

Ms O'Brien: (Indistinct) that night - - -

Mr O'Brien: Go on.

Ms O'Brien: On that night, when I spoke to Aaron directly, which I think was the responsible thing to do, besides Kerri Trail saying that I shouldn't have spoken to him, or anyone other than her, the fact that I did speak to Aaron, he denied that he had ever spoken to Michael about his alcohol problem, he denied that he ever had an alcohol problem and he denied that he'd been drinking that night.

Commissioner: Well, I'm just curious about your conduct there, Ms O'Brien. I just wanted that to be explored, while we're on the phone here with your father. Because this will be something that I flesh out in the decision?

Ms O'Brien: If he's denied it what do you do? If he has denied it. If he's denied it, looks you in the eye and denies it? Tell me what your next thing would be? To physically force him to go and take a breathalyser?

Commissioner: Why not? If you're going to then declare that he is under the influence and you issue him with a written warning, without even putting it to him in a disciplinary process, well, Ms O'Brien has concluded, to her satisfaction, that he was under the influence?

Mr O'Brien: Yes, under the influence but not necessarily over 0.05.

Commissioner: Look, it doesn't matter, does it?

- Mr O'Brien: That's correct. Well, it does, Commissioner, because she - - -
- Commissioner: Well, I will be putting in my decision, Mr O'Brien, that she made no inquiries whatsoever and I question whether she met her duty of care.
- Ms O'Brien: Commissioner, in my opinion I could absolutely not say whether he was over 0.05. My submission and statement says that - - -
- Commissioner: None of us could, could we?
- Ms O'Brien: - - - he smelt of alcohol, not that he was incapable of driving.
- Commissioner: I think you've used the term "reeked of alcohol" here today. None of us could determine what his blood alcohol - we wouldn't know how long, his body mass, et cetera. None of us could know whether he was under 0.05 or, in fact, whether - what sort of licence he has. Does he have a licence where he can't drink any alcohol at all? None of us would know that, but no inquiries were made.
- Mr O'Brien: Just in a practical sense, Commissioner, I mean to do a breathalyser on the spot, well, it raises the question, I mean what do you do to facilitate that - those breathalysers at venues?
- Commissioner: He offered. Ms O'Brien said, "That's not necessary"?
- Mr O'Brien: Yes. But I mean where would you go and get the breathalyser?
- Commissioner: I'm not sure, this is your bread and butter, isn't it?
- Mr O'Brien: No, well we don't have a breathalyser - - -
- Commissioner: Haven't you said, Ms O'Brien, there's measures, in your statement, isn't there, as to how that could be conducted?
- Ms O'Brien: No, Commissioner. At the time - I don't carry a breathalyser in my pocket, and it was an event that I was expecting to witness and I certainly would not know where to source one at that time, at a football game.
- Commissioner: Not employers would not have a breathalyser capacity at their workplace, but if they suspect that somebody is under the influence of alcohol I would expect that they would isolate that person, put them in a safe place, remove all capability for that person to drive home, offer them a way to get home - - -
- Mr O'Brien: (Indistinct).
- Commissioner: Taxi, have somebody else drive them home. And if the person says, "I'm not drunk", "That's okay, we're just making sure because we think you are and we don't want you to get into your vehicle"?
- Mr O'Brien: Despite their denials. Despite their resistance that they are okay.
- Commissioner: Yes?
- Mr O'Brien: Okay.

Cross-examination

[240] Mrs Trail questioned Mr O'Brien as to why he didn't alert her to the concerns he had around Mr Sim's alleged drinking:⁵⁵

Mrs Trail: And so at that time, whilst Kim was Queensland state manager, was there not a thought that maybe that should be brought to my attention and to let me know, as the venue manager at the Gold Coast?

Mr O'Brien: Look, again, I think if people are trying to make themselves better and someone new comes in, and I believe they're making themselves better, and I think Kim believed he was making himself better, look, in some ways I didn't think that it was necessary to say to you about what I thought was hopefully an historical challenge or a problem that was there, or misdemeanour. I actually believed that he was sort of coming good. He assured me he was committed to doing it. As I said, I've had a lot of positive stories where staff had got through it and come out at the other side. So for me to go and say to you, the moment you've come down, "Hey, listen, Aaron's got this problem", my comment would have been that I didn't think it - my comment would be that he was over the problem, I hoped. So, no, I didn't say it to you.

[241] Focussing again on how Mr O'Brien concluded that Mrs Trail supposedly knew that Mr Sim was drinking at work, the following was discussed:⁵⁶

Mr Dakai: So, Michael, just to confirm with that, when Kim went on maternity leave, shortly after the Commonwealth Games, and there was no one in that supervisory role to Aaron, who was aware of the problem or keeping a monitor on the potential issues, you still didn't think to inform Kerri?

Mr O'Brien: No. I think when people have got problems, I mean even from my viewpoint, sometimes if I feel as though they're getting on top of whatever the problem is, and it can be all sorts of problems, I don't think it's necessary for me to come into the office and share with everyone something that's a personal problem or something that's not been good. But if I believe that they're on top of it, my answer to that, Matt, would be not to come in and say to the person, "Hey, Aaron is like that", so I think that goes on a lot of levels when people have different workplace or personal issues. If you feel as though that they are getting on top of it I don't think it's worth just necessarily regurgitating it and bringing it up and telling everyone who then gets some unreasonable sort of thing. I think if the guy has - if it's behind him and he's on top of it, let's sort of move on in a positive way. Look, I did believe he was going all right with this. I've got to say that. And he probably was. There probably was a period of time when - go on.

Mrs Trail: Sorry. You've stated that in the two months preceding Aaron's resignation that you thought alcohol was once again becoming part of his life, and you've already explained to the Commissioner that you had a sixth sense and you had late nights - - - ?

Mr O'Brien: Well, even - yes, so a few phone calls with Aaron that he'd make.

Mrs Trail: So basically you're saying that two months prior to Aaron's resignation, which was in September, you became aware and you discussed that. Your

instructions to Anne-Maree and the Brisbane leadership team was that this needed to be addressed. So who is the Brisbane leadership team?

Mr O'Brien: Well, I think, firstly, I didn't know - I said I thought it might be becoming an issue, whether it was a serious issue I didn't know. The Brisbane leadership team, I basically said, "Look, next time that either Anne-Maree - you need to have a close look at it next time you're down there and just understand and see whether what I think is - from his phone calls and that, that he - that there is an issue". So, look, I think, at the highest level, the leadership is probably myself and Anne-Maree and Simon Camp. I don't think I'd - look, I wasn't down shouting from the treetops in that two months that he had, I just sensed that it's coming back into his life a bit. The level of the problem I wasn't sure, but I certainly thought maybe I would be at Metricon during that period, but with the lockdown I was in Melbourne. So that's why I did say to Anne-Maree to pay particular attention to whether it is an issue with him.

Mrs Trail: I guess what I'm really struggling with here, Michael, is that, you know, you've put things in your statement that say that I failed to share knowledge or concerns of Aaron's recurring alcohol problem, which I wasn't aware of, yet you, in the two months preceding, have raised it with Anne-Maree and the Brisbane leadership team, at the next time they come down. Wouldn't it have been - would it be fair to say that you could have picked up the phone and called me to let me know that you had concerns and that maybe I should be keeping an eye on Aaron?

Mr O'Brien: Well, in fairness to that, look, I had a sixth sense, I thought it, I felt it, but I didn't think it right for me to get on the phone and definitively say to you, "You know what, I've got a bit of a feeling that there is an issue here and we should have a look at it". I didn't see it at that particular point in time, just on where I was in Melbourne, that it might have just been a one-off. He was home doing it, you know, late night, or doing something. I just thought it was a bit of feedback coming back. But we're in an industry where people say different things about different people. Look, I didn't have any absolute certainty. I didn't think, again, it was fair to probably ring and say, "Hey, Kerri, you know, Aaron has got it". I felt that it was something that if I came up I would address, because it's something that I had sort of, on a head to head basis, done with him before and representing myself with Anne-Maree there, I thought it was timely for her to just to go and check in with him and see how he was.

Mr Dakai: Sorry, you just said you didn't feel the need to inform Kerri because you were acting (indistinct) or whatever you said, yet you still called the Brisbane leadership team and informed them? Why did - - -?

Mr O'Brien: I think, Matt - Matt, I think the leadership team is, fundamentally, myself, Anne-Maree and Simon. I mean that is the Brisbane, the Queensland, the state team, and that is the - they're the significant people that - and I think, again, look, given the - given that I wasn't 100 per cent sure, in those two months, what the outcome of these are. No, I don't think it's something that I should have rang and talked to you, talked to Kerri about the whole thing. I mean it was a hunch really, right? It wasn't an absolute, definitive position I had on it, other than I could sense that he'd slipped back into a few things. I think I was aware that he was probably dealing with the tougher financial - tougher personal situation. Look, he shared that with me too about that. So I

think at that stage I was happy just to go through that process of Anne-Maree representing myself to have a close look at it. I think, again - go on.

Mrs Trail: Sorry, but you also discussed it with Simon Camp?

Mr O'Brien: Simon Camp?

Mrs Trail: Yes?

Mr O'Brien: Well, we had, in an overall sense, we'd dealt with similar issues at Suncorp and we'd actually gone and encouraged and taken people to AA and we've had some great success stories. Guys had significant problems, and one thing I would say to Simon, on a regular basis, is that, "We need to either drag him along, or do something, but someone's got to get him to AA". So there was a bit of a discussion on that with Simon. But, yes, just how you deal with how you can sort of address it, yes.

Mrs Trail: I guess I'm just really struggling to understand how yourself, Anne-Maree and Simon have all discussed some concern regarding Aaron and nobody picked up the phone to call me and discuss it with me when throughout everybody's statements they're talking about how it was a small Gold Coast team and we worked closely together. It's like the information was being withheld from me?

Mr O'Brien: Well, I sort of find it, I've got to say, unbelievable that you had no awareness of it. I find that unbelievable. I really do. I just find it totally unbelievable the fact that it is such a small team, it staggers me that I'm in Melbourne but it was clearly understood with Aaron, and if you knew him at all well, and Matt did, you would have understood, 100 per cent, that it was an issue and it has been an issue. I find it unbelievable that you can say to me that you had no awareness. I just can't - I just find it staggering. Staggering.

Mr Dakai: Sorry, Michael, you say it's unbelievable that Kerri had no awareness of it, yet when I asked you why you didn't inform Kerri about it and that you were sensing it was becoming an issue it was because you didn't want to spread rumours, essentially, because you had no proof that Aaron had a problem, yet you can say (indistinct) Kerri knew. So you'd just be telling her something that you already knew, essentially?

Mr O'Brien: No. I'm saying to you that in that particular period that Kerri was there, I was of the understanding that he was on top of it, or it was getting -it was okay. So I don't think it's with me, as the director of the company, running around saying to people, "Give him a chance". If he is recovering I don't want to put it up in headlights again, but what I'm saying is that in my absence, or being there, it was clear that there was still an issue, an ongoing issue, right. And you worked close to it, and Kerri was very close to it, and I just find that that small team and the fact that it was known, and it seemed it was known it was happening, and that both of you can deny that there was any knowledge of it whatsoever.

Commissioner: Mr O'Brien, it's the Commissioner here? Do you think that the phone calls that he was making to you was during his work hours?

Mr O'Brien: No, they were sort of either ringing from somewhere or - no, they weren't - they were out of work hours, yes.

- Commissioner: Right. So perhaps he finishes work, then has a drink, then decides to call you. Is that how you think it played out?
- Mr O'Brien: Correct. Yes, yes.
- Commissioner: So how would Ms Trail know that he was drinking on the job, if when he's calling you to discuss certain things, and you suspect that he's had a few drinks, then it's out of hours?
- Mr O'Brien: Because historically he had drunk on the job. Now - - -
- Commissioner: How do you know that? That's through Kim, is it?
- Mr O'Brien: Because he told me - no, no. He told me. During the Commonwealth Games he was going across to the Emerald Lakes Tavern, in between shifts, and drinking. No, look, I know that - I think he's ringing because he knows he's (indistinct). But I mean all I gained from that is he is back drinking, all right, where he'd told me he was off drinking.
- Commissioner: But it's after hours, perhaps?
- Mr O'Brien: Yes.
- Commissioner: You wouldn't have - - -?
- Mr O'Brien: Yes, I know, but - - -
- Commissioner: - - - suspected or have any evidence that he was drinking at work?
- Mr O'Brien: No. No, but I'm saying the issue with it is that, without sort of getting a doctorate in studying alcoholism, I mean what it indicated to me is he is back drinking. That's what it just told me. Like he's told me he was off the drink, he controlled it and he wasn't drinking. But, clearly, these phone calls just indicated to me that he is back drinking so therefore, you know, an undertaking that he'd sort of said to me that he was not going to drink and it was finished, that sort of scenario was now off the table, he was back into a drinking situation. That's where - so, look, as I said, just standing the way and seeing that there are (indistinct) alcohol. I mean once, you know, that general comment, but wondering is just not enough.
- Commissioner: Well, it doesn't make any sense to me, Mr O'Brien, that once you were cognisant that perhaps he was back drinking that you didn't use your eyes and ears, in Ms Trail, on site to alert her to your concerns. It took your roaming daughter, who visits many sites, to then turn up one night and declare that he was under the influence. Why wouldn't you, if you had concerns that he was drinking at work, contact Ms Trail and say, "I've known about this for some time, I now need to have your eyes and ears on this, please. You are now my - you now have that responsibility". So did you meet your responsibility?
- Mr O'Brien: Look, I think that firstly, my first thoughts were that I didn't want to go broadcasting on just thinking that if Aaron was back drinking, but to give him a chance, I think, sort of to go back and broadcast to Kerri and the team that, you know, there was a serious issue, which I wasn't 100 per cent sure with, other than to know that he was back drinking. I think sometimes when an

issue like that and, like I said, it was a gut feeling that I had, I didn't think that to tell Kerri. I mean, no I didn't. Look, I (indistinct) that she would know more than I knew about the whole thing, you know.

[242] Mrs Trail put to Mr O'Brien that witnesses had now declared that senior managers, including Mr Smith and Mr Camp were aware of concerns regarding Mr Sim's drinking, without Mrs Trail's knowledge. The following was discussed:⁵⁷

Mrs Trail: So, Michael, other statements that have been provided by Simon Camp and Bevan, for example Bevan states that, in his statement, that Dan Fleming, the executive chef at the Gabba, reported to Bevan that a kitchen hand at Metricon had concerns about Aaron's drinking during the 2019 Brisbane International, so that's the tennis?

Mr O'Brien: Yes.

Mrs Trail: And I'm not the venue manager of the tennis, that's Kerri Bailey has always been the manager of the tennis. So what was done about that? It says in here that he reported this to senior managers?

Mr O'Brien: Yes.

Mrs Trail: So what happened during the 2019 international tennis, when that was reported to Bevan Campbell?

Mr O'Brien: Look, you'd have to ask Bevan exactly yourself. I don't know whether it was drinking post event, after he'd been there, or what it was. I'm not sure. I'd have to - look, without following that one up, Kerri, I'd have to check.

Mrs Trail: It's also reported, in Bevan's statement, and it was actually confirmed to me by Ben Trevers-Grace that when Cbus has been packed down and the offices were being packed down, Ben had concerns regarding Aaron and that he raised those concerns with, I believe it was Dan Smith and possibly Simon Camp, in February 2020, were you aware of that?

Mr O'Brien: Look, I - that's specifically - look, I think I - those, what you're talking about, that Cbus back down and that, I think it was probably just a bit of a watching brief. Look, it was an issue, but, as I said, I think I get different feedback. I think it was probably just the Cbus, I recall, was - maybe not in breach, but drinking's back on the table a bit. In a lot of ways, despite what I'm saying, he's still entitled to drink outside of hours and he's still entitled to drink if he chooses to be. But I think, in terms of his recovery, for someone else it's not an issue, but in Aaron's case, it is an issue when you get back on the drink. I think that - I think there's just a little bit of people don't want to run round and declare that Aaron's got this problem back again. Yes, he is drinking, which is a concern, yes, to what it sort of translated to. I suppose you can - - -

[243] Mr O'Brien repeatedly suggested that he was of the view that Mrs Trail knew Mr Sim to have a drinking problem at work. The following was discussed:⁵⁸

Commissioner: Mr O'Brien, I'm looking at the warning letter that was issued to Ms Trail, and it says, "It's been brought to my attention that you're clearly aware of the issues around Aaron and his conduct, while working as the executive chef at Metricon stadium. The consequence of turning a blind eye to an act of gross

misconduct is far-reaching and could ultimately result in a criminal prosecution for the company, as well as putting the catering contract at Metricon stadium at risk". Now, are you the person with the most awareness of Mr Sim's conduct?

Mr O'Brien: The most awareness? Well, not in a specific sense. I never stood alongside him in that period of time to see, in a physical sense, whether he was reeking of alcohol. I didn't have that benefit. And I think the other thing is that in my discussions, and he assured me that he was going well and, in fairness, for me making the judgment, I think it's right that I ask those people directly what their own interpretation of it. So he'd given me assurances. I was not as convinced as obviously he was trying to make me, but - - -

Commissioner: So the warning was issued on the basis of the text message from Ms Trail to Ms Bailey, that's the basis of the warning letter given to Ms Trail?

Mr O'Brien: Yes, but I think there was other - combined with on that particular night that Anne-Maree saw it.

Commissioner: Well, what is it? Ms Trail denies knowing of any issues. So you've authorised this warning letter being given without it being put to her. So on what basis do you say that she knew?

Mr O'Brien: I just - I come back to - - -

Commissioner: Because you didn't want to tell her - you didn't want to gossip with her and alert her. You could have had a conversation, but you chose not to. So do you think that she didn't know, up until that time? Otherwise why wouldn't you have just said, "You know and I know that Aaron has a problem, let's just keep an eye on it, okay?"?

Mr O'Brien: I was - - -

Commissioner: So you didn't know?

Mr O'Brien: I would have assumed that in an office of eight people, so it's a tight little group of people, that she did know, yes. So, look, (indistinct) I would maintain that that assumption was correct, that she did know and she would have been aware.

Commissioner: Well, that's just in contrast to the evidence that you've given just a short while ago, about not wanting to have a discussion with her and to kind of keeping Aaron's information a bit privy and - but you say, on the one hand, she ought to know, or you assume she knew, but then you wouldn't have a discussion with her because you're keeping it to the higher level of Anne-Maree and Simon?

Mr O'Brien: Well, I didn't put - - -

Commissioner: What am I to do with that?

Mr O'Brien: - - - put oxygen to it, to fuel the whole discussion. With Michael O'Brien saying it takes - I didn't think it warranted it at that stage, when I didn't - I had my suspicions, but I didn't want to fuel the whole sort of gossip situation of, "Michael O'Brien's of the opinion that this is the case".

Commissioner: Well, on 11 September she's issued a written warning declaring that she has been turning a blind eye, without any investigation done or allegation put to her. It was a decision made that she has been turning a blind eye. Yet, I'm hearing your evidence that you didn't want to discuss it with her because you didn't want to add fuel to the fire or fan it, and you wanted to keep it a little bit on the quiet. So none of that makes sense, Mr O'Brien?

Mr O'Brien: Well, I'm saying that she knew because she was in that world, and I believe she did know.

Commissioner: Why wouldn't you discuss it with her then? Why wouldn't she be your eyes and ears?

Mr O'Brien: Because I didn't want to fuel the whole thing, in fairness to Aaron, to get a public debate in the office about Aaron's personal situation, which he was going through, which he'd talk about, or I didn't want to fuel the whole discussion.

Commissioner: So when Aaron was issued with a written warning again, without an investigation for him, were you aware that he denied the allegation, on the night? Were you aware that Ms O'Brien offered - declined a breathalyser? Were you aware, or did you just accept her word that she considered him to be under the influence?

Mr O'Brien: Well, I took Anne-Maree's word that he was under the influence. It was quite apparent.

Commissioner: So did you know that he denied it on the night?

Mr O'Brien: Yes. Well, look, that's one of those judgment calls that you - that - he's denied it and we believe, running the venue, that he is under the influence and that's a decision that we make. I mean I think, as you know, dealing with denial is a great feature of an alcoholic personality. It's the immediate thing. Now, you know, that judgment, made by Anne-Maree, was that the denial was not correct, it was not truthful and that he was under the influence and that was why.

[244] In further questioning, the following was discussed:⁵⁹

Commissioner: So you're not willing to concede that she may not have known?

Mr O'Brien: Look, I'm not. I find it - I've got to say I find it impossible to believe that she didn't know. Yes, I do. I really do. I find it absolutely impossible. I can't accept at all that she did not know. I think, as I said, it was (indistinct) - - -

Commissioner: Well what about 30 August? You've got half the people saying he was, half the people saying he wasn't?

Mr O'Brien: Yes.

Commissioner: But she's given a written warning because he was, based on what your daughter says, and that she should have known and she should have done

something about it. Yet Ms O'Brien didn't do anything about it on the night, other than make sure that he plated up, but Ms Trail gets a written warning?

Mr O'Brien: I think he was - effectively realised that night that he was (indistinct) out of the - I think the action was, as I said, it would have been not appropriate to have a stand-up and physically evict him from the kitchen against his best wishes when he's denying it. I think the best decision which Anne-Marie did was to keep him in the room, but don't give him the absolute control of the room, and it went to the other guys and it was monitored and watched, with Anne-Marie included. I don't think he was working in the kitchen one out, where we said okay, keep doing it, we'll come back and see you in two hours. He was monitored; he was watched, and then he was made aware.

Commissioner: All right. Ask away, thanks, Ms Trail.

Mrs Trail: Sorry, Commissioner, I was just going to interject there and - what I want to say is that Aaron was the executive chef. The chairman function room's just one room that was being run that night that significance had been placed on. He did not remain in that room. He was running five other function rooms - he was overseeing five other function rooms and 15 suites. He was in chairman's to oversee the plate up of main course?

Mr O'Brien: Yes.

Mrs Trail: And throughout the rest of the time he traversed the entire stadium overseeing the delivery of food to all the other corporate spaces?

Mr O'Brien: Yes.

Mrs Trail: So to say that he remained in that room is not correct?

Mr O'Brien: Well, but just to explain to the Commissioner our structure. In each of those separate kitchens and separate spaces there was a senior chef within the company, known to the company who was running the suites and boxes and running the barbeque upstairs. So there was a senior person running those rooms who ultimately Aaron's influence on after that was minimal. They were running it. It was self-contained kitchens, fully accountable and the structure - the main thing that he was taking - the hands-on involvement was with the Chairmans, but after than the rest of the business was on a self-contained basis run by skilled professional highly-qualified chefs.

[245] Mr O'Brien confirmed that on receipt of the first written warning, if Mrs Trail had tried to dispute it with him, Mr O'Brien would have affirmed the written warning. He said, *"Look, I was - I was across it. I understood the background. So I don't - I would have supported that decision the way it was in that case. I mean, I think if there's a marginal, debatable case I'll discuss it, but I saw it pretty crystal clear."*⁶⁰

[246] In cross-examination, Mr O'Brien said that he didn't believe the Respondent followed the Disciplinary Action and Warnings: Policy and Procedure with respect to Mr Sim, and he considered the Respondent was "sloppy" when it issued to Mrs Trail her written warnings.⁶¹ He said it was something the Respondent needs to go away and get better at. Mrs Trail asked him if thought procedural fairness was followed. He answered as follows:⁶²

“Look, I think with yourself, Kerri, they were constructive warnings, performance warnings that were basically addressing issues of huge significance to myself and to the company and I will repeat again, there was never, ever, ever, ever any intention of replacing you or what you did. I mean, your resignation was - I don't understand it and I still don't understand it and, I don't know, maybe in the end you fundamentally realised that it was a poor decision to resign like that. Maybe that's what hits you. Because it was just a poor decision and it was a complete lack of trust in decent people you'd worked with, and I displayed nothing whatsoever to you that would indicate that the behaviour of the company would be that we were wanting to move you out. I just - it was just completely - but surely and this is what I said to the Commissioner before, why I'm here and why I'm determined to sort of pursue this and follow it through, I just can't stand by and allow people that when we try to performance manage in the future, who throw in their resignation and then want to head down to Fair Work. And that's what you've done and that's why I want to fight it, and I will fight it and I'm understanding very much what the Commissioner says, that there will be elements which will come out of it that we've - you know, we've got to get better at some of the sloppiness and not a hundred per cent thing and there is an issue that the Commissioner has raised which is very, very true and was a resounding comment but, you know, managing staff into the future or customers with an alcohol thing is maybe we put breathalysers in kitchens. Maybe we become, sort of, more sort of thing, but - but it's something that probably resonated with me this morning, with the comments. But as for - as for, sort of, resigning yourself and that to me was just nonsensical.”

[247] Mrs Trail informed Mr O'Brien that in evidence, Mr Scott had stated that he had been given free tickets to an event by Ms Bailey, along with a \$100 food and beverage voucher. Mr O'Brien stated that he was not aware of that, it is not the correct thing to do, and he will speak with Mr Scott about that. In answering questions from me, Mr O'Brien said it was incorrect for Mr Scott to have suggested that Mr O'Brien receives four tickets per event, and certainly not at the Gabba. Any tickets that Mr O'Brien provides to staff are tickets that he has paid for or if he asks for them.

[248] Mr Dakai asked Mr O'Brien if, in accordance with the policy, a log is completed. He answered no, it was not. Mr Dakai pointed out to Mr O'Brien the policy was not being followed by the Respondent. Mr O'Brien suggested perhaps the fine print of the policy was not being followed.⁶³

[249] In re-examination, Mr O'Brien was asked about the log to which he said:⁶⁴

“No. No, I don't even - no, I don't. I don't. I mean, for me, it might be old-fashioned management, give me a call and I'll either okay or not. So that is the pattern that I work on and I'm not sort of logging on to the computer and checking things and doing it. I mean, I think the main thing is - the main message, Matt and Kerri, is I want to be told and I want to give the authority because ultimately I - we -the company will be paying for them.”

[250] As to why the policy exists if there is no apparent log, Mr O'Brien stated:

“...It exists, Matt, so that I can be the one who gives the yes or not. That's why it exists. That's the policy. The policy is I want to be in the position to give the yes or no whether we do it. That is the fundamental nucleus of the policy. Now, how I choose to record it or how I choose it is secondary. That main thing of the policy is there. I want to be told. I want to clear it, yes or no, because ultimately I'm going to be paying for it. That is why that is the policy. Now, how I choose to put it in my own computer or write it in my own notebook or record it or not record it, the main this is the permission, the request does down the line come ultimately to my desk. That's the policy. Because it's my money, mate. I'm paying for it, I'd

like to be told. Now, whether you say, "It's not right, because you don't write it down", well, that's my problem. I am paying for it. I want to be told. That's why the policy is there. I think you are seriously losing what the purpose of the policy is."

[251] At the conclusion of Mr O'Brien's evidence, I afforded him the opportunity to say anything else he wished to say:⁶⁵

"No. Look, I - you've given me a good opportunity to speak. So thank you. No, look, I think in summary I'd go back to probably what I've said twice or three times. I really believe it's an unreasonable ambit - claim. I think it's a money-grabbing claim. It's got no genuine foundation. I think that there are things to come out of it that we can do better, but to say that it was a forced resignation or it was an unfair performance management correspondence, I think is just totally unfair. And I suppose ultimately in the background against it, in my viewpoint, disappointing. And look, I - you know, I think Kerri's fighting for a cause and I'm fighting for a cause and having sort of had the discussion this morning, I'm even more determined that we take it to your judgment, Commissioner."

[252] On 31 January 2021, Mr O'Brien made a further witness statement. He provided a gift register held by him for the 2020/2021 financial year. He stated that all requests are sent directly to his desk either verbally or in writing.

[253] Mr O'Brien stated that he should have earlier stated in his oral evidence that in November 2018 he gave Mrs Trail tickets to the Taylor Swift concert. He stated that Mrs Trail rang him early November 2018 and said Taylor Swift is her favourite singer, and that of her daughter. Although she was feeling unwell due to her cancer journey, she would be delighted if Mr O'Brien could help her out with tickets. Mr O'Brien told her he would purchase four bowl tickets for her.

[254] Mrs Trail said with her medical condition she could not sit in normal seating and wondered if he could organise a VIP corporate suite. She would also like to bring other guests, totalling 10 tickets. Mr O'Brien's evidence is that within 48 hours he purchased a suite for Mrs Trail at a cost of \$4,000. In addition, he provided a full complimentary food, beverage and steward package for a further cost of \$1,500. He recalled how Mrs Trail and her family and friends had a wonderful evening and couldn't thank the Respondent, the O'Brien family and the team enough. Key staff visited Mrs Trail during the evening to ensure she and her guests were enjoying the concert.

[255] On day three of the hearing, after reading Mr O'Brien's supplementary statement, Mrs Trail had the following to say:⁶⁶

Mrs Trail: I never called Mr O'Brien. I never requested tickets. I never spoke to him about it. It was actually a surprise gift that Marie Moshavic and Kerri Bailey contacted me about just days before it happened and asked me to attend. Natalie Davey who's listed never attended. (indistinct) it was a surprise that was offered to me by Kerri Bailey and Marie Moshavic.

Commissioner: Right. Is it factually correct that you were in the corporate box on the night of the concert?

Mrs Trail: Yes, when Marie Moshavic called me to tell me she had tickets, she told me that it was in a corporate suite.

Commissioner: All right. All right. Well, I don't think there's an issue more than that. At the end of the day you're in a corporate suite, whether you asked for it or not and it's Mr O'Brien's evidence that he purchased them on behalf of the company.

Mrs Trail: Yes. (Indistinct).

Commissioner: You don't disagree with that.

Mrs Trail: I don't know how the tickets came about, I was just called at the time and was told there was tickets and I was attending.

Commissioner: All right. So you disagree that you said to him that it's your daughter's favourite singer.

Mrs Trail: Absolutely. I never spoke to Michael about it at any point in time.

Commissioner: All right. Well, it's up to you, Ms O'Brien, if you would like your father recalled to give evidence, his evidence is that his - this is what he thinks it - he recalls it over the weekend as being.

Ms O'Brien: Yes. And I spoke to him over the weekend when (indistinct) together and his recollection was very clear to me on how it all happened and that Kerri - I understand, her daughter attended as well and because on the strict report that it was Kerri's favourite singer and it would mean a lot to her in her recovery, in her health at the time and that she couldn't sit in the public seating bowl, that a corporate suite and corporate food then was provided for that night so that she could enjoy (indistinct) - - -

Commissioner: So you understand it's her evidence that she didn't put that, perhaps Marie might have put that on her behalf.

Ms O'Brien: Yes. Well, all I can say is that my father's crystal clear said that in his statement and so that's, you know, obviously I wasn't in either conversation but his crystal clear recollection is exactly as he's written in his witness statement.

Commissioner: Well, parties, if you think it's material I'll have Mr O'Brien back at some point and this can be put to him if you think it's material.

Mrs Trail: Well, I just - from my perspective it - what she's saying didn't happen and it's untrue. Maybe somebody did call him but it wasn't me and I never requested tickets, I didn't know anything about tickets being offered in a seating bowl or suite, there were other people in the suite at that time as well that I believe were friends of Michael O'Brien. It wasn't just myself in that suite, it was a shared space. So what he's saying is untrue.

[256] On the fourth hearing day, Mr O'Brien was recalled to give evidence. Much was discussed regarding the Taylor Swift concert and whether, Mr O'Brien's assertions that Mrs Trail requested the tickets was correct.⁶⁷

Mrs Trail: - - - (indistinct). I have text messages from Maria Moshavic to my husband outlining that it was going to be a secret and a surprise, and not to let me know about any of it because it was going to be a special treat. So - - -?

Mr O'Brien: Sorry, can I - okay, Kerri, firstly, you called me on a regular basis, right? You called me on a regular basis and telling me how you were progressing, right, and I think you mentioned you didn't talk there (indistinct). Well, to be quite honest, you did, in significant detail with me about what was exactly happening, all right. So you did call me, and you did specifically tell me when on one of those calls - how are you going, what can I do - you said you love Taylor Swift, you'd love to go to the concert, right; you'd love to go, and you understand that it's not easy for me and whatever, but if I could do something you'd appreciate it. Now what happened after that is, just reading your things, I think obviously that the facilitation of the tickets, I didn't actually pass them to you, but the clear thing is that you, on the same call to me, and you did - firstly, you say you didn't phone me. You did phone me all the time. Okay? You know that, and you know to say otherwise is not truthful. You asked - you told me what Taylor Swift meant to you regarding the - you'd like to see her, your daughter, and to say otherwise - how that facilitated from there at the beginning of November to you getting tickets is a process that maybe Kerri got involved in, but the bottom line, the initial liquid - the initial to me was clearly: I love Taylor Swift; my daughter loved Taylor Swift; I'm not well - I think you were at the thing; I would love to go. It's clear as anything, right. So I've got to say that is just - I don't like using the word, but it's a complete lie.

Mrs Trail: Well I agree with you that it is a complete lie when your (indistinct) is that I never had that conversation with you. During that time I was extremely ill. I was undergoing some therapy. I had been hospitalised. Certainly going to the Taylor Swift concert was not on my list of things to do, and it was arranged as a surprise between Maria Moshavic and Kerri Bailey. You also state that there was 10 tickets. There was other people in that suite. I don't know who they were. I was told that they were guests of yours. We didn't know them. They sat in the suite at one end of the table, and myself and the people I was with sat at the other end of the table. So I can tell you who was there in attendance: it was myself, my daughter, Maria Moshavic, Libby Holmsen and Dominique Burgess. That's who attended. So who the other people in - -
-?

Mr O'Brien: (Indistinct) You were given the suite, because with the suite, regardless of the numbers, what we buy, having not been able to buy tickets in the stadium, a suite is a suite of 12 people. The suite was purchased for yourself - for yourself. I didn't purchase any other suite from anyone else. It was purchased for yourself so you could get an exclusive space. During the course of the night I've got no doubts that - in fact I know I went in, and I know Caroline went in and I think others, probably Kevin Baker, went into the suite. I think Kevin did go in. And just going through it this week, you had exclusive use of the suite. Now whether you're saying that - and as far as - and the 12 tickets were given to you; you had the suite; if people dropped - if I dropped in and others dropped in - but you had the suite on an exclusive basis, and that's what I bought. That's what I paid for, and you got it, and that's why you wanted an exclusive space and you were given it. So as far as I'm concerned, there were 12 tickets given to you, and the exact numbers that you may have got in there I don't know on the night, but you were given 12 tickets.

Commissioner: Mr O'Brien, it's the Commissioner here. Let's be clear, it's Ms Trail's evidence that she didn't know who these other people are. So do you know who they are?

- Mr O'Brien: I can't - I'd like her to tell me what she's exactly talking about.
- Commissioner: Well I'm asking you a question, Mr O'Brien?
- Mr O'Brien: What do you mean - - -
- Commissioner: Listen up. I'm asking you a question - - -?
- Mr O'Brien: Well, no, my - I don't believe (indistinct) - - -
- Commissioner: She says that there's five or six of her party?
- Mr O'Brien: Right.
- Commissioner: And then there are other people - they're not her party; they're people that perhaps you have invited into the suite. So do you know who they are?
- Mr O'Brien: No, I don't. I'd like Kerri to tell me who they are. I mean, are you talking of Kevin Baker, or you're talking of Caroline O'Brien; are you talking someone who dropped in on the night, those other people? There were 12 tickets given to you. Tell me who those other people were. Tell me - you can't tell me you sat in a suite all night for three hours of the concert and have no idea who they are.
- Commissioner: Well let's - - -?
- Mr O'Brien: Tell me who they are.
- Commissioner: Just tell Mr O'Brien your evidence there, Ms Trail, that you gave earlier.
- Mrs Trail: The evidence is, and I have photographic evidence of that night, that myself, my daughter, Maria Moshavic, Libby Holmsen and my friend, Dominique Burgess attended. Maria Moshavic had the tickets. She told me she had five tickets, and that's the five (indistinct). They were the five people that I knew in the suite. We arrived first. We took our seats. A little bit later other guests came into the suite and I was told that they were guests of Michael O'Brien. I did not know who they were. I did not speak to them. Yes, (indistinct) - - -?
- Mr O'Brien: Can I say one thing?
- Mrs Trail: Yes, Caroline O'Brien came in, (indistinct). I'm not referring to those people?
- Mr O'Brien: Okay.
- Mrs Trail: I'm referring to guests that were in the suite?
- Mr O'Brien: Can I just say one thing with a suite? You may have a photo of five people, but that doesn't in any way say it's just an explanation that there's no other guest of Kerri that I've given to you in the suite at all. I mean, I think you realise that you can take a photo of five people in the suite of your own guests, but it's not reflective of all the guests who were in the suite anyway.
- Mrs Trail: (Indistinct) in attendance that were in there, because they didn't know that - - - ?

- Mr O'Brien: Say it again?
- Mrs Trail: Any of the attendees that I were with can answer that question the same?
- Mr O'Brien: Yes.
- Mrs Trail: They did not know the other people that entered the suite?
- Mr O'Brien: Well, I find that - I just - unbelievable, and I think the other thing is, you were given the (indistinct). I don't accept that that actually happened, you know.
- Commissioner: Well, how was she given the suite, Mr - - -?
- Mr O'Brien: It was a gift - - -
- Commissioner: Mr O'Brien, I'm asking questions now. Just wait until I'm finished?
- Mr O'Brien: Yes, okay.
- Commissioner: If she has five tickets, how did the other people get into the ground, and get into the corporate suite?
- Mr O'Brien: Well, that's the point of - if Kerri's been given the 12 tickets, that's the reality - - -
- Mrs Trail: Which I wasn't - - -?
- Mr O'Brien: The reality of it - - -
- Yes. That's what goes through my mind. I don't know how they do go into the suite, you know. I don't know. I don't know if - - -
- Commissioner: Well - - -?
- Mr O'Brien: So I find it - - -
- Commissioner: It's been put that they're your guests and not hers. She says that she didn't ask for 10 tickets. Your evidence is in your statement that she did ask for 10 tickets?
- Mr O'Brien: Yes.
- Commissioner: You're now saying today it's 12 - - -?
- Mr O'Brien: No, but she asked for 10 - - -
- Commissioner: How do these other people get in the stadium?
- Mr O'Brien: Well, just to correct this - well I'm disputing the other people into the suite. I'm saying people might have dropped in, but they weren't permanent people. They may have people during the course of the night. I mean, I know there's Kevin Baker, Caroline and myself, and I presume other staff dropped in to see Kerri, right. But the reality is the 10 tickets that were given, I can't actually buy a suite for 10 tickets, so there is 12 seats in a suite. You buy it as

one block. So even though Kerri may have been given 10 tickets, the cost to the company was 12 tickets. So you buy 12 - - -

Commissioner: Well, her evidence is that she wasn't given 10 tickets. She had five?

Mr O'Brien: Well, that's what I (indistinct) - - -

Commissioner: And she says that there's these other people who she doesn't know. I have her evidence there, and I don't have any evidence from you saying well, I can help you out with that, because these are the other friends of hers. She's telling me I had a party of five?

Mr O'Brien: Which I dispute, and I also can't believe that if there were other people in the suite, in a room for three hours, that she has no idea who these other people were. I find that completely unbelievable. Because I've been in corporate suites all my life. When you're in a little space of 10 people or 12 people in a suite, it is absolutely a reality of life that by the end of the night you know who people are. So I dispute that fact. Look, it was 10 that I said in the document, but upon reflection we paid for 12, because we paid for a whole suite. I didn't - I don't know how the tickets actually got to Kerri in the end. I mean I didn't physically give them to her, but she was given the suite for the night. I'm actually looking even at the invoice and the recording of the details of the night. It was Kerri Trail, and I've had the discussions during the week and that was - she was in the suite, and she's in the suite on (indistinct). So I refute that evidence completely.

Commissioner: Well I need something more, Mr O'Brien?

Mr O'Brien: Well, I'm saying to you I don't believe in any way, shape or form that there were other people in the suite. I don't accept it. Now (indistinct) - - -

Commissioner: Well you can't help me out?

Mr O'Brien: (indistinct) show me photos - - -

Commissioner: No, well you can't help me out with the 10 or 12 people that she took along, and she's giving evidence to the Commission that it's these five people only. So there's a gap there, and I've got her evidence with five people, and you're telling me that I should make up these other seven people?

Mr O'Brien: No. I think what you should do is, she was given the tickets. When she was given, I didn't ask her who - for the guest list whatsoever; I had no interest. I just said they're yours (indistinct) - - -

Commissioner: Well you can't recall giving her the tickets. You don't know who you gave the tickets to?

Mr O'Brien: Well, look - - -

Commissioner: You just said that. I don't know if you gave five or 12. So who did you give the tickets to?

Mr O'Brien: I didn't physically give her the tickets myself. I didn't go and pass them over to her, right, but she was given the tickets obviously through the company

with my approval, and the box was exclusive use. So I have got no sort of understanding of what Kerri is saying. I know it was her exclusive use. It was given to her as exclusive use, and I didn't ask her for a guest list, right. I didn't. I just said invite who you want to invite.

Commissioner: Perhaps somebody from her party was given five tickets, Mr O'Brien?

Mr O'Brien: Were given five tickets?

Commissioner: Yes?

Mr O'Brien: I can confirm(?) that she was given 10 tickets, and she may have only - I don't know how many she used or what she did, but they were tickets given to her for exclusive use of the suite.

Commissioner: Well, I'm going to struggle- - -?

Mr O'Brien: What she did with (indistinct) - - -

Commissioner: - - - with accepting that evidence, Mr O'Brien?

Mr O'Brien: I beg your pardon?

Commissioner: I'm going to struggle accepting that evidence?

Mr O'Brien: That what? Well, how can you - well what Kerri is saying - has she got any idea of who these people that she is referring to?

Commissioner: Well you don't get to ask questions, because you're a witness?

Mr O'Brien: Okay. Anyhow, look, I stand by my position. She was given exclusive use of the suite. She took the suite. The guest list was her guest list, and that was the position, and I don't accept that there were any other tickets given, except for people who may have been for staff who dropped in. The bottom line is, Commissioner, there was the financial benefit given to her out of the goodness of the company. That's the reality.

Commissioner: It's just that - well, you're the one who cited this evidence, Mr O'Brien, by making these bold assertions that she asked for them, she requested them, she got them. Let me finish. You don't recall who you gave the tickets to?

Mr O'Brien: Well, look, I authorised them, but it's a large company. It was (indistinct) sell out events, and I don't recall other than I authorised, having had my discussion and the request for Kerri to authorise that she be given the corporate suite on an exclusive basis for the night. I don't know, for instance, whether she was given them three days in advance or whether she picked them up the night of going to the stadium. I didn't ask her who she was bringing. All I said to her is that - she said there was 10 people going and I got a suite.

Commissioner: It's Ms Bailey's evidence that she emailed you requesting those tickets and said that Ms Trail wasn't well - - -?

Mr O'Brien: --- (Indistinct)

Commissioner: - - - and she organised four tickets. Pardon?

Mr O'Brien: Yes, I agree firstly that she wasn't well, but myself, having authorised the tickets with Kerri Trail, I would assume that she went and facilitated the collection or the details of the tickets from Kerri Bailey. I mean, the facts are - - -

Commissioner: Do you accept Ms Bailey's evidence that she emailed you requesting the tickets?

Mr O'Brien: Well, she may have been (indistinct) once I'd given the approval to Kerri to collect them to facilitate the process, but the initial discussion regarding the tickets was with Kerri herself requesting for me a favour. Now, ultimately Kerri Bailey, once I'd given the green light, or someone, would have said where are the tickets, how do we get in, or what it is or how do I get them to Kerri. I accept that. But the first initial step which I'm saying, Commissioner, quite clearly is the first request and the first discussion on Taylor Swift was with Kerri directly to myself.

Commissioner: Ms Bailey has given evidence to the Commission that the request for tickets came from her, that Ms Trail wasn't well, Maria said how much Ms Trail loves Taylor Swift - these are my notes?

Mr O'Brien: Yes.

Commissioner: "I emailed Michael with those details that you and Riley - and that you weren't well; I organised four tickets - I don't know how four became 10; I obtained for you four tickets in the corporate suite. And Ms Bailey with Ms Trail that it was a surprise for her"?

Mr O'Brien: Well, I think it's the first request, Commissioner, that I'm saying quite clearly the discussion, the first discussion, was with Kerri Trail and myself, and that I'm 100 per cent certain; absolutely 100 per cent certain. The process after that, I think that what I said to Kerri was leave it for 48 hours. The process after that may have been the actual telling to Kerri that we got the tickets. It may not have been through me; it might have been through one of the others, but the bottom line is the first initial request came from Kerri. I knew she wasn't well. She rang and told me she wasn't well. She went through it in detail, and she said that (indistinct). But the actual facilitation of putting this train into motion, of getting the tickets to her, was once I approved it, it was the process that I said, but I didn't actually physically give the tickets to Kerri.

[257] After hearing Ms Bailey's oral evidence as to the "knock off" drinks occurring at various stadiums, the following was discussed with Mr O'Brien:

Mrs Trail: There's been a lot of discussion or information coming from Simon Camp about drinking at work. Kerri Bailey has just testified that is a common practice at all the venues she's certainly been at. She says Suncorp, Gabba, Adelaide, AAMI Park to have knock-off drinks after an event, post-event while still at work. Are you aware of that?

Mr O'Brien: No. Can we just go through it again, if you could, please? She's saying that - where - what location, sorry? Well if I go through Suncorp - could you please say it again, Kerri?

Mrs Trail: My question is are you aware that knock-off drinks take place at a lot of the venues, including Suncorp, Gabba, AAMI Park and Adelaide, that drinks are consumed as knock-off drinks by a lot of the staff at those venues?

Mr O'Brien: Well, if I go through them, Suncorp - we've been there [for] years and I suppose many events I've been there then - I have never seen it and I'm not aware of it at all, and I don't believe that. I don't accept it. I don't accept it at all. I mean Melbourne where I'm based, Melbourne & Olympic Parks Trust, I've never seen it. The Gabba - no, I don't see that at all. I mean, there are occasions where, you know, I would authorise it on a special one-off request, if it was a major event or something, but fundamentally, if it's happened, which I don't agree with - I can't accept it. I've said every game I've been to at Suncorp and I've wandered around there at the end of the night, I haven't seen it at all. I just don't think it's just because I have been there or anything. But I don't accept that. I think our company, and it probably starts from myself, we are not a - we are virtually - we've got a very conservative obviously in hospitality approach to the whole policy of drinking, starting from myself. We don't support it. We don't encourage it. We are different to other organisations, and it doesn't happen at these stadiums. I don't see it at all. I mean, I've seen - yes, so I don't agree.

Mrs Trail: Okay. Yes, Kerri Bailey has just testified that it happens at all the venues that she's been at, that cartons of beer have been taken to (indistinct) chef, that Simon Camp participates, that Paddy, Carol, Kevin Baker - basically everybody participates in knock-off drinks after an event?

Mr O'Brien: I refute that completely. I refute it completely. I really do. I mean I'm on the ground - I mean I refute that completely, and I think it's - well for her to say that, it's twisted, bitter evidence really, to be quite honest. That is really twisted, bitter evidence - no, really, it is - - -

.....

Mrs Trail: The reason that this has been raised at all is because Simon Camp has said that there is a culture of drinking at work at Metricon, and has submitted what he calls evidence of knock-off drinks happening. But Kerri Bailey has just testified that it's common practice, and has quoted numerous events and numerous people that take part in that, and I also submitted an email this morning with documentation that shows staff, including Simon Camp, drinking at work?---Can I get a copy of that or not?

[258] I had to remind Mr O'Brien that Ms Bailey had been ordered to attend and give evidence at the request of the Respondent.⁶⁸

[259] Curiously, Mr O'Brien quibbled with me as to a photo that Mr Scott had put on Facebook, produced by Mrs Trail, saying "That's a wrap" with a beer bottle nearby does not mean that Mr Scott was enjoying a beer after a very busy schedule. He concluded that it simply meant it might be an empty beer bottle and if he didn't authorise Mr Scott to have an alcoholic drink he would not have had one.⁶⁹

[260] Reverting to the issue of tickets being requested without Mr O'Brien's knowledge, and drinking at the end of shift, the following was discussed, which led into the Respondent's awareness of an offensive email Mrs Trail had sent in respect of Mr O'Brien:⁷⁰

- Mrs Trail: Michael, in that document that Anne-Marie has just forwarded to you, the last point on there is a text message exchange between Caroline Gresniak and Aaron Sim dated Friday, 23 October 2020 to which Caroline has organised for Aaron Sim and two of his friends to enter through the back kitchen door to gain access to the Adelaide 4-wheel Drive and Adventure Show. Were you aware of that?
- Mr O'Brien: Well, I think that - no, and I think it's disappointing, but, you know, as I said from the outset, I'm not saying that policies are not - we've got rules and guidelines, but no, I didn't. Yes, that is disappointing, and that's not right, yes, I agree.
- Mrs Trail: Michael, I just want to put it to you - and, you know, I'm really trying not to be disrespectful at all, but there's a lot of things that go on that you're not aware of?
- Mr O'Brien: Yes.
- Mrs Trail: But there is drinking on event day at the end of an event by numerous staff at numerous venues, and that's not just Suncorp. It includes Kevin Baker, Patty Carol, Sandeep, all of those staff members. They all do it?
- Mr O'Brien: Well, I don't accept that, and, I mean, clearly my first thing this afternoon is to go and ask those people directly, to their face, what you are accusing them of, Kerri, because I don't accept it. And, I mean, the Gabba, I am very close to that team. (indistinct) the test, the most recent event, the Big Bash, and I didn't see anything of that at all. So, you know - so we have an expectation that our venue managers, you know, will implement these policies. I can't be everywhere, and, Kerri, you were a venue manager. And can I just say one thing there which just twigged. You said that you don't want to be disrespectful to me. I mean, I've got to say, my disappointment - you're saying you don't want to be disrespectful, which is very kind of you to say, but the first visit I make to Metricon to see you after your time and to go to an event there, we get this - I think your words "Will just add virtually to the fucking excitement of the day. Michael's coming", in your exchange with Natalie Davey. "Oh, fucking great." I mean, talk about disrespectful. For everything that happened before, when I come to the venue you - "Will just add to the fucking excitement of the day." "Oh, fucking great. Thanks." So I'm just curious why you said you don't want to be disrespectful. I think that's - I've got to tell you, that is - when I saw that I was speechless to think that's what you respond to what - everything had taken place before.
- Mrs Trail: Well, I've actually - it's one email to Kerri Bailey?
- Mr O'Brien: Pardon?
- Mrs Trail: I've explained that email to Kerri Bailey and she agrees with me as to the context of it. I'm sure Anne-Marie will pass that information on to you. So also adding to that - - -?
- Mr O'Brien: How can you explain - why did you explain to Kerri Bailey? It's between Natalie Davey and you. between Natalie Davey and you.

Commissioner: Well, look, Mr O'Brien, what was put this morning was that that particular day, Ms Bailey accepts, was a stressful day, most likely, for Ms Trail. Ms Trail has put that the crowd attendance looked like it went from about 12 to 13,000 up to about 25,000 or so. So it's been put that the ladies were under a bit of stress, and then they hear that you, the big boss, is coming down, and that's why that email was sent. It wasn't for any other reason but for that. And I put to them that it wouldn't matter if it was a family business, at the end of the day, if it was a commercial position that wasn't family run, then you'd still have big bosses coming down, and they're entitled to walk around and run the show. But that was the context, I guess, around 31 December, that they were under some stress?

Mr O'Brien: Well, I think you - - -

Commissioner: I think that's what she's trying to say to you?

Mr O'Brien: I think you would have - I still find it extremely offensive, Commissioner.

Commissioner: Well, I agree, it is?

Mr O'Brien: You know, it's extremely offensive.

Commissioner: Yes, I agree with you, it is?

Mr O'Brien: It is extremely offensive, you know. So after everything that I'd personally got involved, to have such a derogatory comment in the leader of the team, the venue manager, to engender that with one of the head chefs and have that going on - anyway.

Commissioner: Yes, well, if I am with Ms Trail, then it is something that comes up - it will come up in part of my consideration for post-employment discovery of potential misconduct?

Mr O'Brien: Yes.

Commissioner: And I hear what Ms Trail says about why it was written, because they were under some stress, but it's still, in my view, very disrespectful?

Mr O'Brien: Yes.

Evidence of Mr Bevan Campbell

[261] Mr Bevan Campbell made a witness statement and appeared and gave evidence at the hearing. Mr Campbell is the Group Executive Chef for the Respondent. His main role is Executive Chef at Suncorp Stadium.

[262] Mr Campbell said that in March 2017, Mr Jason Christensen - Executive Sous Chef, came to him with concerns while working on the Gold Coast that Mr Sim was intoxicated at work and smelt of alcohol and it was common knowledge within the management team at the venue.

[263] It was Mr Campbell's evidence was that in June 2017, Ms Christine Patavia - Suncorp Stadiums Executive Pastry Chef, reported Mr Sim reeking of alcohol while on duty at Metricon Stadium and said his moods were erratic and he seemed confused at times.

[264] Mr Campbell stated that in April 2018, during the Commonwealth Games, Mr Pete Kidson - Executive Sous chef at Suncorp Stadium, reported Mr Sim smelling of alcohol during shifts on the Gold Coast and then again in January 2019 at the Brisbane International ATP tennis tournament.

[265] Mr Campbell stated that Dan Flemming, Executive Chef at Gabba Stadium, reported to him that Andre Lopes a kitchen hand at Metricon Stadium had concerns about Mr Sim drinking during the 2019 Brisbane International and as far back as the 2018 Commonwealth Games. Mr Sim was allegedly regularly intoxicated while at work and he had removed alcohol from the kitchen to stop Mr Sim from drinking. He had reported this to senior managers, but nothing had been actioned and he was concerned for Mr Sim's well-being

[266] Mr Campbell stated that in February 2020, he was requested to go through stocktake procedures with the Metricon Chefs Mr Sim and [name] due to poor financial results. While there in the office in close proximity to Mr Sim, he could smell a strong odour of alcohol

[267] Mr Campbell said that [name], Sous Chef of Metricon Stadium, discussed with him Mr Sim's drinking over the past 3 years and how it had greatly contributed to his erratic behaviour at work. Mr Campbell said that he had reported this to the manager but felt it was falling on deaf ears and he simply did not know how to manage the situation as then retail manager Paul was enabling Mr Sim's drinking problem by supplying him with alcohol and senior managers were ignoring and covering.

[268] Mr Campbell said that it was a relief that Ms O'Brien finally brought the matter to a head challenging Mr Sim about his drinking and intoxication while at work. He said that this had greatly contributed to a break down in the morale and mismanagement of the kitchen at Metricon. He considered that this matter had been covered up and ignored for long by the management team at Metricon, leaving the company vulnerable in Work Health and Safety and Food Safety Compliance.

[269] In examination-in-chief, Mr Campbell stated that he did believe that Mr Sim had a drinking problem. He reported his concerns to Mr Camp, who informed him that it was being dealt with. He then didn't see any cause for concern for a number of years, until he went to Metricon to do the stocktake in 2020. Mr Campbell said he didn't think that Mr Sim was actually intoxicated, but he could smell alcohol and he reported that to Mr Camp.

[270] Mr Campbell said he thought the Respondent was offering Mr Sim help. I inquired why he thought that; Mr Campbell said he had seen Mr Sim's warning letter. I took Mr Campbell to the part of the warning letter where it reads, "*I'm personally committed to ensuring that you take appropriate remedial action to address this issue.*" His evidence is he thought that meant the Respondent was helping him by not sacking him, and giving him a chance to fix the problem.

[271] In cross-examination, Mr Campbell confirmed that in March 2017 he took concerns that Mr Sim smelled of alcohol to Mr Camp. Mr Campbell considered it to be a delicate situation so he didn't raise it with Mr Ben Jones-Wilson, the Venue Manager at the time.

[272] Mr Campbell confirmed that when Ms Petavia raised her concerns with him in June 2017, he again raised this with Mr Camp. Mr Camp informed him he would speak with “head office” about it.

[273] Mr Campbell confirmed that when a further issue was raised by Mr Kidson in April 2018, he took those concerns to Mr Camp. When Mr Dakai confirmed with Mr Campbell that this was now the third occasion he had raised concerns with Mr Camp, Mr Campbell explained that he was told that “they” were talking to Mr Sim. He understood that Mr Sim had a number of personal issues so he was being supported.

[274] In January 2019, Mr Campbell again reported his concerns to Mr Camp following Mr Kidson reporting concerning behaviour of Mr Sim. Mr Campbell agreed that he had reported the issue to Mr Camp on four occasions. According to Mr Campbell, Mr Sim had admitted to a drinking problem to Mr Camp and was looking at rectifying it.

[275] Mrs Trail asked Mr Campbell why, when he became Group Executive Chef, he did not take on a responsibility to speak with Mr Sim and inquire into his welfare? No specific answer was given, other than a mixture of dates when he commenced in that role. Mr Campbell was in the role when he visited upon Mr Sim in February 2020 and considered that he smelt of alcohol. He was satisfied that he was not drinking at work as it was around 9am.

[276] Mr Campbell said he thought that when he informed Mr Camp of the issue in February 2020, Mr Camp had spoken to Ms O’Brien. Mr Campbell was asked what he understood Mrs Trail’s knowledge of Mr Sim’s alleged drinking problem to be. He stated, *“Personally I don't know what her knowledge is. All I know is that - Commissioner, if I'm just talking about myself and not second-hand knowledge, then I do not know any of Kerri Trail's knowledge of Aaron, but being in a senior role she is there - I assume she was spoken to, I assume she knew about it.”* Mr Campbell confirmed in evidence that he had no basis for assuming that Mrs Trail knew of the issue.

[277] Mr Campbell conceded that if the matter had been an issue since March 2017, and senior executives of the business knew of the issue, the senior executives should have raised this with her. He suggested that because the management team at Metricon changed regularly, it was up to the senior executives if they wanted to raise these issues with her. It was his understanding, through his discussions with [name], that Ms Bailey knew of the concerns.

Evidence of Ms Anne-Maree O’Brien

[278] Ms Anne-Maree O’Brien, Operations Direction for the O’Brien Group Australia, made a witness statement and appeared and gave evidence at the hearing. Ms O’Brien said that she could confirm that she had not witnessed any bullying towards Mrs Trail during her entire employment with O’Brien Group. She said that she believed her family and the Respondent’s treatment of Mrs Trail was exceptional and went far and beyond what any other company would do to support her, particularly during her cancer treatment.

[279] Ms O’Brien said that on 30 August 2020, she attended Metricon stadium after travelling from Brisbane where she was based at the time. She was there to oversee the operations on the day. She had been speaking to Mr Sim in the days leading up to the event, specifically talking through what they would be serving for the VIP Chairman’s function.

[280] Ms O'Brien said that when she arrived on the night, Mr Sim met her at the gate, as she brought with her from Brisbane stickers for the food packaging that he would need immediately. She said that it was clear to her from the moment that they met that he smelt of alcohol and it was overwhelmingly strong.

[281] Mr Sim mentioned at the time that he was limping due to a foot infection and that he was on medication for this. She said she then spent at least the next two hours by Mr Sim's side as they walked through all of the corporate kitchens and spaces. Her evidence is that the entire time she continued to smell the overwhelmingly strong odour of alcohol coming from Mr Sim. She said it was "undeniable." She waited to see if the smell would subside, but it didn't.

[282] Ms O'Brien said that as an asthmatic, she has always had a strong sense of any smell. She said that she knew, as uncomfortable as the situation was, that her sense of smell was right and to back herself. She privately called her father, Mr O'Brien, to inform him of the situation. He told her that she must address it immediately and must speak to Mr Sim in person that night and offer him help. She said that Mr O'Brien mentioned that he had openly talked to Mr Sim about his drinking problem over 18 months ago and was assured by Mr Sim he was on top of it. She stated that her father was concerned to hear it was still a problem.

[283] Ms O'Brien stated that she and Mr Sim had always had a good working relationship over a number of years and never had a disagreement. She said that obviously, it was uncomfortable to have to have this conversation with him, but she knew it had to be addressed. Her evidence is that she knew to wait until after the main course service in the VIP Chairman's room was served, as earlier would unsettle Mr Sim as he struggled enormously during this service. She said that the meal came out very late and he couldn't coordinate the staff. She said that she had previously observed hundreds of plate ups and was genuinely concerned if Mr Sim was going to pull it together in time. She said she had considered at the time asking other chefs from other kitchens to come and help him.

[284] Ms O'Brien said that afterwards, she quietly spoke to Mr Sim and said that she could smell alcohol on him and that it was clear that he had been drinking. She said that Mr Sim denied ever having a problem and denied that he had been drinking that day.

[285] It was Ms O'Brien's evidence that she spoke to other staff, Mr Dakai and Mr Scott, to see if they had seen Mr Sim and any effects of alcohol that night. She said that they were both in other parts of the stadium when she asked them. They reported that they had not seen him. Her evidence is that they kindly offered to go to see him, however, she said there was no need.

[286] Ms O'Brien said that in the days afterwards, she started asking staff questions around the company about Mr Sim and if they were aware of any drinking problem he may have. She stated that in the days following, she and Mr Camp called Mrs Trail to find out what she knew, so if there was a problem they could address it.

[287] Ms O'Brien stated that in this call, Mrs Trail clearly denied knowing anything about Mr Sim's drinking and said she had only ever "wondered". She said that a few days later, she sighted a text message that Mrs Trail had sent to Ms Bailey, proving that Mrs Trail was well aware of Mr Sim's drinking problem. Ms O'Brien said it was extremely disappointing to see that they had been lied to by Mrs Trail.

[288] Ms O'Brien stated that she appreciated that Mrs Trail was a very close personal friend with Mr Sim and that she was protecting a friend, however the "liable position she put the company in by protecting Mr Sim was extremely unprofessional and negligent".

[289] Shortly after this call, Ms O'Brien said that a letter of warning was delivered to Mrs Trail for her deceptive behaviour. Mrs Trail disputed this, however they stood by their warning.

[290] Ms O'Brien said that Mr Sim was also given a letter of warning for drinking at work and he did not dispute this and resigned shortly thereafter.

[291] Ms O'Brien stated that Mrs Trail also admitted during the first warning being delivered, that she had solicited free tickets from the Respondent's landlords for a friend. Ms O'Brien said that everyone in O'Brien Group knows this is not permitted, and it is in policies that are distributed to all staff, but also discussed openly and often.

[292] Ms O'Brien stated that Mrs Trail was then given her second warning for this, and she did not dispute this. She said that Mrs Trail then voluntarily resigned.

[293] Ms O'Brien said that she disputes Mrs Trail's claims of bullying and exclusion, and she personally has always gone to great lengths to include her on emails and meetings. Ms O'Brien said that she was however frustrated that Mrs Trail deliberately left her off some critical emails on post-event reports, a number of times. She said that she politely asked Mrs Trail to not forget, however she made a repeated stance cutting her off the group email on a number of occasions.

[294] Mrs O'Brien's evidence was that she believed as a company, the Respondent has always been incredibly supportive of Mrs Trail. She said that having seen the incredible support the company provided Mrs Trail both financially and emotionally during her cancer treatment, Ms O'Brien personally found it very ungrateful of Mrs Trail to come back and ask the company for more money (in pursuing this application), particularly when she was always treated so well and when the company has done nothing wrong but performance managed her.

[295] Ms O'Brien said that the company went to great lengths to ensure that Mrs Trail never had to worry about money during her illness and donated tens of thousands of dollars to her when she was in hospital. She stated that this was something no other company would do.

Oral evidence given during the hearing

[296] Ms O'Brien detailed her extensive history working for the Respondent, commencing when she was at school. She has run many of the venues. She stated that she and the Respondent have responsibility to staff, landlords and patrons. She returned last year after having studied overseas and based herself in Brisbane. She stated that she was concerned from as early as the Commonwealth Games in 2018 with the culture out of Metricon Stadium. Mrs Trail was not the manager at the time.

[297] Ms O'Brien was shocked when on 1 January 2020, one of the sous chefs said harsh words to Mr O'Brien, asking him if he was going to assist.

[298] Ms O'Brien stated that leading up to the visit to Metricon Stadium on 30 August 2020 she had been forewarned by her father that Mr Sim had a drinking problem. This was the first time Ms O'Brien gave evidence as to what it was her father said to her:⁷¹

Ms O'Brien:my father had said before I went to the game on the 30th that - he had said to me previously, he said, "Look, I've got to tell you, you haven't seen Aaron in a while in person. I had spoken to him about 18 months ago about the drinking problem. I've asked him - he told me explicitly that it was fixed." I had in the background - but dad had said that he believed that Aaron had said that he fixed it but still to keep my eyes open. I had - to be honest, I felt sorry for Aaron because he had two very, very sick children, very disabled; born with serious problems. Then to hear that they had - he and his wife - separated and that he had moved in with what I understand was someone who was quite unsavoury and who had bad habits, to put it politely, whether it was drinking or other substances. That was a concern and I was worried for Aaron, to be honest. So then when I went down to the game at Metricon stadium Aaron met me at the gate because I had got some stickers produced for him from Bruce and I brought them down. He needed them for the packaging immediately. So I handed that to him straight away. I could instantly smell alcohol on him and to say at the beginning I am an asthmatic that can smell the perfume from someone 20 metres after they've walked past me, I can still smell it so my sense of smell is heightened compared to, I guess, any other person. I'm allergic to most smells so I can smell it quite easily and I don't doubt it. I know my sense of smell because of it. I know there is something with my senses, it's something that I smell very clearly. So on that night when I smelled alcohol on Aaron of course we walked around exclusively, the two of us, to do every single kitchen together.

I was there really to see him and see the food and he asked me to come down that night and so I did specifically because he said that was an important function and I said I would spend the time with him and I wanted to show interest in what he was doing and what he was producing. But I was concerned. The smell of alcohol didn't, as I said in my statement, go away. Someone else might have stood in the lift next to us and not smelt it but for me, I knew that I could and I kept looking out for it in his breath as we were walking around. I kept trying to say, "Am I wrong?" I did question myself, "Am I wrong", and, "Did I have the wrong assessment?" But I knew after a while that I didn't and I had hoped the smell would subside but it didn't. So after a while I called my father privately and I said, "Look, I have concerns that Aaron has been drinking", and he was very firm with me and said, "You must speak to Aaron tonight about this." To be clear, I did not have concerns, as I said earlier today. If I had concerns that Aaron was going to do any harm in the kitchen when he was serving the food, to any one of our guests, there is no way in any capacity I would have allowed it to happen.

I can tell you if there is anyone that worried about any situation more than anyone it would be me and O'Brien. We are pedantic about any circumstances and I have no fear in telling someone if there was a problem. With Aaron, undoubtedly he smelt of alcohol but I did not have concerns that he was going to cause any harm to anyone else or to himself. I continued to stay with him, as I had always planned to do for that night and observed. Without a doubt, he served the main course 20 minutes late and that was a concern for me and I was more so concerned that the front of house game was about to kick off and the mains hadn't been served. That was my

concern on that night, not that Aaron was at that time unable to serve in his duty of care as the chef to the customers, the wrong meals. So my father said to me that I must speak to Aaron and address him. "Wait till after main course", he advised me, and to speak to Aaron, offer some help, offer him support but to say - to speak to him and address it immediately and I do believe that was the right advice because I later learned there was a culture of - as you can say with Kerri Trail - taking it and brushing it under the carpet. It's very disappointing to see that happen. I think as a leader in our company these uncomfortable conversations have to happen although Aaron and I get along very well and always have. It was an uncomfortable conversation that had to be had.

[299] In concluding her examination-in-chief, Ms O'Brien had the following to say, now declaring that Mr Sim was a "drunk chef":⁷²

Ms O'Brien: As a company I don't believe what more we could have done to not only support Kerri Trail but also all of the staff there. In my belief there was a culture of cover up. There was a drunk chef there. It is clear in Kerri Trail's text message she knew all about it and it is clear that she lied to me and to Simon Camp about it and she didn't want us to know a lot: a lot in regard to free tickets, a lot in regard to falsifying time sheets and improper practices. I believe as a company - I wholeheartedly believe - that we acted in the correct way and it was Kerri Trail's choice to resign because she clearly didn't enjoy being questioned on things that were very reasonable of any venue manager to be questioned about. No further comments from me, Commissioner.

Cross-examination

[300] In cross-examination, Ms O'Brien stated that she attended on Metricon Stadium on only four occasions throughout 2020. Mrs Trail put to her that she wouldn't have witnessed any bullying of her if she was there so occasionally and didn't make an effort to speak with Mrs Trail. Ms O'Brien said that when she attended, she was focussed on watching retail outlets and the corporate kitchen.

[301] Mrs Trail asked why she wasn't informed of the concerns Mr O'Brien had:⁷³

Mrs Trail: In Michael O'Brien's statement he states that in the two months preceding Aaron's resignation the problems with alcohol were once again becoming part of his life. Having become aware of this, his instruction to you and the Brisbane leadership team was that this needed to be addressed. Why didn't you address it with me? Why didn't you speak to me as the venue manager that there was concern if your father had instructed you the two months preceding?

Ms O'Brien: Yes, well, I think that firstly it's as my father mentioned, it's clearly a very personal matter with Aaron and one that you don't want to start saying to everyone that there is a problem until you know. I mean, I think it's defamatory to start to say that at anyone without proof. But as a legitimate concern, my father said, "Please keep your eyes open", and, Kerri, we did question you. Simon Camp and I did question you and you lied when we did so if I had, looking back, questioned you - - -

Commissioner: Let's just be clear here as to the question. In the two months prior to his resignation so let's talk about July and August, is your father's evidence. So

the question is why you didn't then alert Ms Trail then to your father's concern?

Ms O'Brien: My father's concern would have been - that he expressed with me - would have been towards the actual visit that I had with Aaron. He had told me months earlier that Aaron was having problems, that his marriage had broken up and I thought that was - I was concerned for Aaron. Dad and I are about people's families. We could tell you everyone's family story, where we know in the company because we are concerned about all their wellbeing. Then towards - - -

Commissioner: So much so that Mr Sim said he doesn't have two children. That is not the number of children that he has. He was quite upset with you about that and you repeated that evidence today, that he has two children?

Ms O'Brien: Right, I agree. I clearly made an error.....

[302] Ms O'Brien's evidence relevant to when she spoke with Mr Scott on 30 August 2020 did not marry with Mr Scott's evidence. I inquired of Ms O'Brien whether her evidence was correct. She assured me it was. The following was then discussed:⁷⁴

Commissioner: I thought we had agreed that you had seen them and they said no, he's not - in their view he's not - he doesn't smell of alcohol?

Ms O'Brien: So when Matt had said he'd seen him earlier in the day, as he's also testified in this hearing, he'd seen - he's seen Aaron earlier, before the game, well before the gates had opened to the game. So he's talking about - he has referenced five hours earlier, perhaps seeing Aaron. To understand the layout of the stadium on the night - Matt and Aaron are in complete other parts of the stadium entirely on game nights. They're not near each other. When I smelt alcohol on Aaron it was fresh. It was like he had had a swig just before he met me at the gate. So when they - at the time they both offered - they didn't know there was a problem. But they had said they hadn't seen him and they could see that they were visibly in other parts of the stadium as him at that time and so I wasn't going to ask them to stop doing their jobs when the stadium was full of crowds and everyone was talking through the gate to go and smell Aaron. I wasn't going to ask them to stop doing their jobs because they also had responsibilities to uphold in other parts of the stadium.

Commissioner: My notes record here that Elliott Scott's evidence is this: "I did check in and assist with plate up from entrée and main. Anne-Maree pulled me aside at the lounge and I replied that I couldn't smell it from him." Then I've written for myself, "Ms O'Brien's evidence at paragraph 17 looks to be incorrect"?

Ms O'Brien: Look, from my recollection, Commissioner, I didn't recall seeing Elliott in the kitchen that night and to be fair, there were 20 people in the kitchen. It was a busy kitchen, a busy plate up, and there was a lot happening. My eyes were fixed on Aaron Sim and to making sure that he was getting the plates out. I was extremely concerned at the time. I was watching my watch, I was watching the room to make sure that I could see everyone sitting down waiting to get fed, batch one of people. I was fixed on making sure what (indistinct) together and that was my focus. I don't doubt or disagree with Elliott's statement that he was in the room but to be honest, I didn't recall it. My focus was purely Aaron Sim on that night.

Commissioner: So the Commission should accept Mr Scott's evidence that you pulled him aside and asked him whether he could smell - - -?

Ms O'Brien: My recollection was I spoke to Elliott prior to the main course. That was my recollection because my father's instructions were to wait. Again, Aaron's recollection is different as well because he said I spoke to him before main course, which I didn't. I wouldn't do that and make him rattled before main course, which was the critical part of the night. My father's instructions and as I recall I did I waited till after main course and I spoke directly to Aaron after he had delivered the main course to the room because that was then the biggest job for the night done and if he was going to be startled by the conversation I was about to have with him it wasn't the right time to do it, before the main course.

....
....

Mrs Trail: The conversation didn't happen in front of Aaron. It could have been like you had with Elliott, outside in the lounge after plate up finished?

Ms O'Brien: Yes, and on neither occasion with Matt nor with Elliott did I specifically say to them, "Can you walk outside the room, I want to have a private conversation with you?" That was not the circumstance or the situation. I simply bumped into them when they were in an empty open space with no one around and took the opportunity to ask them what their thoughts were. At no stage did I see someone like yourself in the kitchen and say, "Can you come outside, I need to have a talk to you?" I didn't want to disturb the operations of the night. I didn't want to take anyone from their role or to take them out of the room to have a conversation. It was because I saw Matt (indistinct) in a clear space by himself with no one else around and the exact same situation with Elliott that I took the opportunity. It was simply because I bumped into them that I asked them for their thoughts.

Commissioner: Ms O'Brien, you've heard my notes that I've written and I have the transcript if need it: "Anne-Maree pulled me aside at the lounge and I replied that I couldn't smell it from him." So his evidence is that you did pull him aside?

Ms O'Brien: But at that time, Commissioner, to give the layout of the room, that room is a space that fits 800 people at least, standing in the lounge. It's an enormous space. At that time it was vacated because all the guests that are in that room were out watching the game or weren't in the room. It was a completely open space, no one there - no one there in a room that fits 800 people. So it was an ideal situation when I saw Elliott to say, "Can I have a word with you?"

Commissioner: Ms Trail's question to you is why you couldn't have pulled her aside?

Ms O'Brien: Because I didn't see Kerri - as I said, I rarely saw Kerri in the stadium. I didn't bump into her. Sometimes I would see her in the main function room but it was purely because I bumped into both Matt and Elliott Scott and I didn't think it appropriate to stop the operations. We did call Kerri two days later and have a thorough conversation.

Commissioner: I know you did but that's not her question?

Ms O'Brien: Yes, okay - I think I've answered it to the best of my ability, why I didn't pull anyone aside out of the room and I simply bumped into whoever I bumped into was who I spoke to. And I think both staff - I don't see why I shouldn't trust the opinion of either of the staff. They're all managers at the venue there. So I don't see why it was inappropriate just to ask either of them either.

Commissioner: No, but do you accept Mr Scott's answer? You didn't accept his answer. You prefer your opinion over his answer. Anyway, next question, Ms Trail.

[303] Upon learning in cross-examination that Ms O'Brien had recorded the telephone conversation with Mrs Trail on 2 September 2020, I asked her why she did so without informing Mrs Trail she was recording the conversation. She said she did so because she had considered that Mr Sim had lied to her on 30 August 2020. I asked her if, when secretly recording Mrs Trail she had satisfied herself that she was permitted to do so without committing a crime? Ms O'Brien confirmed that she is not aware of the laws in Queensland regarding recording conversations without the other party's knowledge. I assured her that it wasn't a crime, however it is an offence in some other states. She confirmed that she did not satisfy herself on this issue.

[304] I was in utter disbelief when Ms O'Brien stated in cross-examination that following these proceedings, the Respondent would now pull back on its policies and procedures to reflect what she thinks the law is, and not include procedural fairness within the policies and procedures. The following was discussed:⁷⁵

Mrs Trail: The policy and procedure for issuing warnings clearly says that you need to arrange a formal meeting with the team member, advise the team member they had the option to have a support person, outline the reasons for the warning, including presentation of any evidence. Can you advise - you said that yourself, Michael, and Simon had all approved and confirmed the content of the letter of warning. What about the formal notice of meeting? Why wasn't that issued?

Ms O'Brien: That is a question you can ask directly to Simon when you speak to him this afternoon. Obviously, I wasn't privy to that meeting but I understand what our policies say and I understand that as my father said we could update them - we should update them more to reflect the law, which does not require many of these processes that we impose on ourselves.

Commissioner: Really? Is that what you're going to do, Ms O'Brien?

Ms O'Brien: Yes, Commissioner, absolutely - I think it's absolutely been something - to be honest, I myself have been looking further through all company policies as, you know, throughout this process and I realise that in many ways, in many parts of our policy we're putting obligations on ourselves that aren't necessary, that aren't as per the law and aren't required.

Commissioner: What do you think about (b) and (c) of section 387 when you're putting performance issues to people? I mean, the ability of notifying people of accusations? Because that's what they are, they're accusations. Employers don't have the eye of God where they are completely right all the time, even if they think they are. Putting allegations, accusations to people, allowing them the opportunity to respond; that is exactly what that process says it's intended to do and that is what good companies should be doing, not backtracking, and

just issuing warnings because you won't survive if you think you're going to backtrack on this policy. You don't have the eye of God?

Ms O'Brien: Yes. I understand. I appreciate that. But I also do appreciate that Aaron - I appreciate what Simon had said to Aaron, particularly in that circumstance when he was given the warning for alcohol consumption at work. But Aaron didn't, Commissioner, formally submit a refusal to accept that. He resigned. Following that, an incredible amount of information has come forward which makes it profoundly clear that Aaron did have a drinking problem. I believe that without a doubt he knew he had nowhere to go. I believe that strongly and I understand there is evidence and procedures and all that but I believe that we - someone for the first time I called Aaron and said there is a problem and that hadn't happened before and he was well protected by the team there and he needed to be eyeballed and when he did, he ran a mile. That is what - and I appreciate what you're saying is highly about procedures and - but Aaron at the same time did not come back and submit a formal refusal to accept - - -

Commissioner: But Ms Trail did and where did that get her?

Ms O'Brien: I believe we took it on board - absolutely. We certainly didn't take it lightly and anyway, just because it's submitted, Commissioner, doesn't mean that it should automatically be accepted and because it wasn't accepted it was ignored. It certainly wasn't ignored.

Commissioner: No, because Mr O'Brien even supports you. He says that he trusts you implicitly. If you say Aaron was drunk he was drunk?

Ms O'Brien: Well, that he was drinking - that he smelt of alcohol.

Commissioner: Yes, it's a written warning with an investigation - without an opportunity to respond?

Ms O'Brien: But Michael had also had a personal conversation with Aaron, 18 months earlier, where Aaron had said - and he had an agreement with Aaron. Aaron had openly said he had a drinking problem. (Indistinct) why would Michael -
- -

Commissioner: We're here today because of Ms Trail, where nobody fills her in. It's just so interesting that nobody pulls her aside and says, "You're the eyes and the ears. You're the eyes and the ears"?

Ms O'Brien: ---(Indistinct reply)

Commissioner: No, no - nobody prior to this August incident pulls her aside and says, "You're the eyes and the ears." I just heard your evidence before that she's the eyes and the ears but she wasn't the eyes and the ears, was she? She wasn't allowed to know. She was kept in the dark because - - -?

Ms O'Brien: I disagree with that assessment. I do disagree with that assessment because - -
-

Commissioner: When did you tell her to keep an eye on him and when did Mr O'Brien tell her to keep an eye on him and when did Mr Camp tell her to keep an eye on him?

Ms O'Brien: We didn't forewarn anyone at that venue of a problem because as I said, without evidence, Commissioner, it isn't correct to go around saying there is an alcohol problem. We'd be sitting here otherwise saying that we said inflammatory things about someone that wasn't true and then you'd say, "Where's the evidence?"

Commissioner: You trust your father, don't you? Your father believed he's an alcoholic because of all these phone calls?

Ms O'Brien: Because he told me - because Aaron said the problem was under control and had an agreement with my father that he would not drink again at work at all.

Commissioner: Well, your evidence before this Commission is that Ms Trail is the eyes and the ears but she wasn't trusted enough to be the eyes and the ears, a little heads up of, "Please let us know. We'd be horrified if we learned that Aaron was drinking at work"?

Ms O'Brien: Yes. We also had an understanding that it was a very close team there, that they were personal friends, and I did not go down there that night at all - my focus was on the quality of the food that Aaron was presenting. I did not go there thinking I would see a problem. My father believed that he had (indistinct) but I certainly didn't go down there at all thinking that I was going to find a problem. I went down there to check that the entrees, the main course, looked as they should for the Gold Coast Suns chairman function and I went there to meet Aaron, to look at those meals which we had talked about all week and email back all week in detail and I wanted to see - to ensure the quality came out. It was a one-off function that didn't happen throughout the year when the Gold Coast Suns hosted a chairman's function and in a tender year it's critical to get it right. That is what I went - I did not intend in any way to see any alcohol problem that night, not at all, and my father certainly didn't expect me to see it. No one thought that was - I was certainly not looking for that at all.

.....
.....

Commissioner: Do you accept that the company's procedure was not followed?

Ms O'Brien: Yes, I accept that, and I accept, as my father said, who I think is who we get all our advice and where the company and the policies would go moving forward is that they could - it's not required in the law, what we have in our policies and we are more than happy - and I believe that we actually should update them to reflect what is actually obligated under the law and certainly we think - - -

Commissioner: You haven't listened to anything I've said then.....

[305] In cross-examination, Ms O'Brien again accused Mrs Trail of "covering up for a drunk chef."⁷⁶ At another time during her cross-examination, when I had raised with her my concerns regarding the duty of care she owed to an employee whom she had considered was drinking, she stated that she did not think he was intoxicated on 30 August 2020, and said the following:⁷⁷

“... Commissioner, I think there is just one point of clarification that I would like to make. As per my statement I did say on the evening that my biggest concern was that Aaron smelt of alcohol and that I did feel that as a result of that the mains would come out 20 minutes late. I do not believe that he was intoxicated or over 0.5 and I think that in my decades of experience I trust that he was not in a state of concern for me particularly driving home at that night but our company policy certainly is that no one is allowed to drink at work whilst working for O'Brien Group and I did address that with Aaron on the evening and ask if there was a problem which he denied.”

[306] I asked Ms O'Brien why Mr Campbell should not receive a written warning in the manner in which Mrs Trail did for apparently knowing about Mr Sim's alleged drinking issue. She was adamant that it did not warrant Mr Campbell receiving a written warning because there was no proof of Mr Sim's drinking at work, only suspicion.

[307] It became clear in Ms O'Brien's cross-examination that Mr Camp had not informed her of Mr Campbell's concerns leading up to 30 August 2020, where he satisfied himself that Mr Sim smelled of alcohol during the stocktake. The scenario, therefore, is that Mr Campbell believed Mr Sim smelled of alcohol, he reported it to Mr Camp, and Mr Camp did not report that issue to Ms O'Brien until after 30 August 2020.

[308] It is important to traverse the shifting evidence of Ms O'Brien relevant to Mr Sim's performance on 30 August 2020. The following was discussed:⁷⁸

Mr Dakai: So just referring to your paragraph 15 of your statement: "Aaron struggled enormously during the service. It came out very late and he couldn't (indistinct) the start. I had stood (indistinct) and was genuinely concerned if Aaron was going to pull it together in time. I had considered at the time asking chefs from other kitchens to come and help him." That sounds like you are concerned?

Ms O'Brien: I wasn't - there is a difference between being 0.05 and a difference between pulling a meal together to the standard that I like it to be delivered. That is a high-profile room, the Gold Coast Suns being our landlords and the chairman's function and I am very pedantic about making sure that the food gets out on time and at AAMI Park this weekend I stood in the kitchen like I do at every game and I look at my watch the whole time and if it's not moving as fast as it should be - and I'm watching when kick-off should happen - I get concerned and I had had, weeks earlier when I was at Metricon, a similar concern and Kerri would remember I said, "I want the food out now. There is a room full of people and the food is not out there." Kerri said, "No, we're not putting it out." I was even more concerned on this night that it was kick-off was coming at - what I believe was 10 past - so it was 10 past 8, I think, but it was supposed to be 20 minutes - the main course was supposed to come out 20 minutes earlier than what it did. There was no reason for it to not come out. There was no meat that was still cooking. There was - all the food was ready but Aaron didn't - he seemed flustered. He seemed like - and I was standing there, watching him. I stood in every single kitchen at every stadium I go to always stand in the kitchen and watch the main course plate up because timing is critical. Again, Aaron says in his statement when he spoke the other day it was only six minutes late. My recollection is certainly not that. It was at least 20 minutes late and only a short window of time to get it out before kick-off. The food, when it came out, looked fantastic. The plate up was - I've got pictures of the food because I even looked at it (indistinct)

other chefs to make the food look like these certain dishes. I wanted to replicate at other venues. The food looked great, the product that he put together on the night. But the coordination of the kitchen - his coordination of the kitchen was certainly delayed and to me there was no other reason for that delay, other than he just couldn't coordinate the kitchen. I was and I would normally and I would not hesitate on any occasion if I needed to always move staff around from one room to another if it's particularly busy, like on the night my father came and said to Natalie that he wanted the chefs to come and help in retail. It is a normal thing that if I need a chef I sort of - I would have certainly pulled them from another kitchen to assist the production of the food.

Mr Dakai: So what you're saying is Aaron couldn't coordinate the kitchen, you smelt alcohol, you had strong suspicions of him drinking and what, you still didn't think he was drunk or you didn't think to stop him working?

Ms O'Brien: No, I didn't think it was that because the food came out very well when it did come out. But, look, maybe he could put it down to being - saying he was nervous that I was there but I'm there all the time in the kitchens and we're always, you know, working together on those things but for me, putting together the fact that he did smell of alcohol in the two hours I walked around the entire stadium with him was an enormous concern and - - -

[309] Earlier, while Ms O'Brien was asking her father questions in examination-in-chief, I considered it necessary to ask questions of Ms O'Brien regarding what I considered to be inconsistent evidence which had just come to the Commission's attention after the transcript of the secretly recorded conversation became available.⁷⁹

Commissioner: While we're on Aaron - I'll hear from you as well, Ms O'Brien, on this - so this is effectively evidence. It's useful to have your dad here while this evidence is given. The evidence that you've given to the Commission, both in writing and orally, Ms O'Brien, is that it wasn't great, Aaron's service that night. It was 20 minutes late, it was disrupted, it was unpleasant, and then, Ms O'Brien, the transcripts that you provided to the Commission of the taped telephone call that Ms Trail was not aware of, at page 2 you say, "Look, you know, his performance was fine on the weekend and we know there was no problems, but it was just something that I thought I should say to him", and then later you say, "Yes, look, no, his performance - I mean on the weekend his food is fantastic, and I just think that he's pulled it together." So what do you say, Ms O'Brien, about that phone call that you had in a reasonably short period of time after the incident, and then the evidence that you've repeatedly given to this Commission that it was not great?

Ms O'Brien: Commissioner, I stand by what I said in both the transcripts that we sent to you during the week and what I had submitted earlier. The food on that night I did think was fantastic. I took photos of it, and I sent it to other chefs in other venues afterwards saying that I thought the food itself did look great that night, and I ate some of it myself later to try it and I did think it was - it was a great meal. He'd presented it very well. But I was, as I said, concerned on the night that it was 20 minutes late, the plate up, and that isn't acceptable, particularly when there is a tight timeline, and Aaron had assured me during the night it would be out early, it would be out early, and there was no reason for it being delayed, as it was, and that was a concern to me, and it would be at any other venue when it happened, and adding to that, the smell of alcohol

that I have stated on many occasions I could smell from him from the minute that I saw him that night - - -

Commissioner: I heard that. Thank you. My question is: why did you tell Ms Trail in the phone call in the days following, look, you know, his performance was fine on the weekend, and you know, there was no problems.

Ms O'Brien: Yes.

Commissioner: And then later you say I just think he's pulled it together. What am I to do with this conflicting evidence, Ms O'Brien?

Mr O'Brien: Commissioner, can I - - -

Commissioner: No, Mr O'Brien. You're just here simply listening to this evidence at the moment, thank you?

Mr O'Brien: Okay.

Commissioner: I'm interposing Ms O'Brien?

Mr O'Brien: Okay.

Commissioner: Because I think it's useful that you hear this issue of conflicting evidence that Ms O'Brien is giving to the Commission. Yes, Ms O'Brien?

Ms O'Brien: Commissioner, I do not believe it's conflicting information that I have submitted. I think it's all been very truthful and honest. I think - - -

Commissioner: All right. Thank you. That's all I need to hear, Ms O'Brien?

Mr O'Brien: Can I make a comment?

Commissioner: Sure?

Mr O'Brien: Look, I think you'll recall my evidence was that my understanding of what did happen when it was acknowledged that Aaron had the smell of alcohol, that we actually took him out from being the absolute prime conductor of what was happening in the kitchen and sort of put him to the side and called on the other guys for a big effort.

Commissioner: I don't know if that's true, is it?

Mr O'Brien: I think you will recall - - -

Commissioner: I don't if that's true, Ms O'Brien?

Ms O'Brien: Well, I think that when we acknowledged it, we - - -

Commissioner: That's not right, is it, Ms O'Brien?

Ms O'Brien: Was cautiously watched him under supervision and didn't allow him to become totally the el supremo for the whole event to make sure that - - -

Commissioner: Well that's not true, is it, Ms O'Brien? Ms O'Brien, that's not true, is it? He was still running the show, wasn't he?

Ms O'Brien: No. No - yes, Commissioner, he was under my supervision. We didn't swap him out of the kitchen that night at all, but I did say 100 per cent myself, watching him the entire service of all the meals that night, in that kitchen, (indistinct) - - -

Commissioner: So Mr O'Brien, you're not correct?

Mr O'Brien: Who, I'm not correct? I believe I am. I said to you in my evidence that we didn't remove him from the kitchen because we thought it'd be potentially conflicting or create a scene, but that it was - if we watched him very closely, we supported him and he was basically under a higher level of management to make sure that it went through correctly, right.

Commissioner: Okay, but not with other chefs, just Ms O'Brien watching him?

Mr O'Brien: No, with other chefs - no, the other chefs that - you know, calling on them for a bigger effort, that you know, they were required. I mean the bottom line is there was a problem there and he wasn't left to his own resources. The outcome was good. So he was watched.

Commissioner: Well a couple of days later Ms O'Brien puts that it was fine, and then I hear in evidence a bit of a beat up I think. That's how it appears to me, Ms O'Brien. You've made far too much of it to the Commission, but when I get the transcript that you hadn't been voluntarily provided, you tell Ms Trail when you're asking her what she saw on the night, yes, it was fine - he was fine.

Ms O'Brien: Commissioner, I think - - -

Commissioner: I was just worried about long term.

Ms O'Brien: - - - (indistinct) that - Commissioner, if I could state, I think when listening to the actual recording you can see from the very beginning of it, and hear, that Kerri Trail was very nervous talking about this issue from the beginning of the conversation, and I can tell you that I certainly tried to be the one to relax her. I could see that Simon was asking hard-hitting questions and that Kerri - I think you could tell by - - -

Commissioner: Was he, Ms O'Brien?

Ms O'Brien: - - - (indistinct).

Commissioner: Was Mr Camp asking hard-hitting questions? Because if he had been, he would have said do you know what I've seen and been told. He zips his lips completely. He didn't reveal anything about what he had been - - -

Ms O'Brien: (Indistinct)

Commissioner: Well, you tell me where he said I've had chef after chef after chef - - -

Ms O'Brien: (Indistinct) - - -

- Commissioner: I'm speaking. He didn't say I've had chef after chef after chef tell me that there's problems there. He didn't reveal anything to Ms Trail about what he had heard or what he had seen, did he?
- Ms O'Brien: Commissioner, Simon did ask Kerri in the phone recording clearly, had you had a conversation with Aaron about alcohol, and Kerri said no, I have not.
- Commissioner: Are you listening to me, Ms O'Brien? I'm saying that Mr Camp did not reveal anything as to what he had been told by the chefs. He played dumb.
- Ms O'Brien: But Commissioner, the question you said was was he asking hard-hitting questions, and I believe that he was.
- Commissioner: And I believe - - -
- Ms O'Brien: (Indistinct) - - -
- Commissioner: I'll tell you what I think. I think Ms Trail was telling you everything that she knew.

[310] In cross-examination Ms O'Brien could not explain why the former Head Chef who had participated in vulgar commentary regarding Mr O'Brien's visit was made redundant, yet Metricon still had a Head Chef. Mr Dakai suggested that it curious that she had been made redundant, yet the role was still required to be performed.

[311] Regarding how well-known Ms O'Brien thinks the gifts policy and procedure is, she could not explain why Ms Bailey, a long-standing employee across many Queensland stadiums was not aware of the policy. She stated that she was disappointed Ms Bailey did not know of the policy.

[312] In answering a question from me as to how long she thinks Mrs Trail's employment would have lasted had she not resigned, she considered that it would have lasted for a reasonable period of time. She said that Mrs Trail would have continued in her role.

Evidence of Mr Simon Camp

[313] Mr Simon Camp, Venue Catering Manager, Suncorp Stadium, made a witness statement and appeared and gave evidence at the hearing.

[314] Mr Camp said that in early September 2020, Ms O'Brien informed her that on a recent visit to Metricon Stadium, on a game night, she had a strong belief that Mr Sim had been under the influence of alcohol whilst at work and was concerned. Mr Camp stated that he had heard rumours in the past about Mr Sim's problems with alcohol at work. He said he knew that Mr Sim had a lot of personal challenges with the breakup of his marriage and children who were unwell. Mr Camp said that he now understands that this "would have increased his drinking problem."

[315] The following is Mr Camp's evidence as to how a warning letter was issued to Mr Sim:

"After Michael and Anne-Maree O'Brien raised their serious concerns about Aaron Sim's, Executive Chef at Metricon, alcohol consumption at work, they asked me to draft a Letter of

Warning to Aaron. I sent this draft to Anne-Maree and Michael and they both approved it and asked for me to deliver it to Aaron on their behalf.

I delivered this to Aaron (3rd September 2020). Aaron did not dispute this Letter of Warning.

Aaron was then put on a disciplinary process, whereby he was asked to work from Suncorp stadium under the supervision of our Executive Chef there. Aarons pay and title remained the same.

Aaron then resigned from his position on the date 7th September 2020.”

[316] Mr Camp’s evidence was that he then went and asked Mr Campbell if he knew or had observed anything of concern in his recent interactions with Mr Sim. Mr Campbell informed him that he believed that only a few days earlier when he sat with Mr Sim during the week to go over some work that he strongly smelt of alcohol and he was concerned.

[317] Mr Camp said he and Ms O’Brien then called Mrs Trail to ask what she knew about the situation. His evidence is that because he was based in Brisbane, and Mrs Trail was at the Metricon Stadium with Mr Sim, Mrs Trail would be close to any situation.

[318] Mr Camp stated that when he and Ms O’Brien phoned Mrs Trail to ask about Mr Sim’s consumption of alcohol, Mrs Trail appeared surprised by the question and completely denied knowing anything about Mr Sim having a drinking problem. Mr Camp said that in Ms Trail’s view, there was no problem and said sometimes she had “wondered” but never witnessed anything, never questioned Mr Sim and never mentioned it to her superiors.

[319] Mr Camp said that he and Ms O’Brien then continued to ask other staff throughout the company if they were aware of any problems with Mr Sim’s consumption of alcohol at work and people informed them that it was widely known that he has, for a long time, had a problem with alcohol and being drunk at work.

[320] Mr Camp recounted Ms O’Brien’s evidence that she was shown text messages from Ms Bailey, agreeing that Mr Sim had an issue with alcohol. Mr Camp gave the following evidence:

“Anne-Maree and I were naturally disappointed with Kerri as the most senior manager on the Gold Coast, effectively hiding this serious issue. Michael and Anne-Maree O’Brien were very concerned about this situation and the liable position it put the company in if it was not addressed immediately.

Michael and Anne-Maree informed me that they would like to give Kerri Trail a letter of warning, in her failure to uphold her duties as a Venue Manager. We all drafted the letter and under their instructions I delivered the letter to Kerri Trail on 11 September 2020.

When I presented Kerri with the Letter of Warning I asked her if she was comfortable with Elliott Scott being present as a witness to which Kerri replied that she was, I then presented the first warning letter to Kerri explaining that she was entitled to contest the warning letter as she felt it was not justified as she didn’t think Aaron had done anything wrong.

Kerri Trail submitted a letter saying that she disagreed with the letter of warning and that said that she did not deny that Aaron had a drinking problem.

As Anne-Maree O'Brien had transcribed the call with Kerri Trail, we then went over the wording of the conversation and it was once again clear that Kerri had denied knowing anything.

In consultation with both Michael and Anne-Maree O'Brien, we informed Kerri that we stood by the Letter of Warning issued to her."

[321] Mr Camp's evidence relevant to the issuing of the second written warning to Mrs Trail is as follows:

"While I was informing Kerri of her first warning letter I mentioned to her that Anne-Maree was in possession of a text message from her to Kerri Bailey which mentioned that Aaron was not in a good way at work. I asked Kerri Trail if she was still in contact with Kerri Bailey to which she replied that she was as she had got her tickets for the Geelong game that evening at Metricon for free from our Landlords, the Gold Coast Suns.

I asked her if she had completed the gift register to which she said that she hadn't and wasn't aware of the company policy on tickets. I informed her that as a Venue manager she should be aware of the policy and asked if she received tickets in the past. She said that she hadn't.

I asked her if any other staff had received tickets and she said that she thought Aaron may have had some previously. No gift register was completed for these. I informed Kerri that this breach of company policy will probably result in a second written warning.

It has always been told formally to all staff throughout the company that they are not allowed to go to our landlords (ie: Gold Coast Suns) for free tickets, on any occasion whether it be football games, concerts or other. This is seen as putting an unfair and unprofessional burden on our working relationship with our Landlords.

Getting free tickets from our landlords is particularly sensitive when we are constantly doing pricing negotiations with them.

Kerri Trail was fully aware of this policy.

I then informed Michael and Anne-Maree O'Brien about the fact that Kerri had given out free tickets she had solicited the Gold Coast Suns for free. They were both very disappointed to hear this, particularly as all staff in the company have always known that this is not allowed.

Michael was particularly disappointed as he informed me that when he needed to get tickets himself at Metricon stadium months earlier, for colleagues, that he ordered and paid for them himself on his credit card rather than going through the Gold Coast Suns. Further, the fact that we were in a Tender year at the Gold Coast, this was seen as a particularly sensitive issue.

Again, under the request of both Michael and Anne-Maree O'Brien, I delivered Kerri's second letter of warning. Kerri did not dispute this.

At the time of delivering the Second Warning to Kerri, I asked Kerri if she had ever asked for and received free tickets from the Gold Coast Suns in the past. Kerri said 'no'.

I was then disappointed to later discover, when Kerri left the company, that she had in fact given out free tickets a few months earlier to Maria Moshovis, a former O'Brien Group staff member and good friend of Kerri's.

Kerri had deleted evidence of this conversation with Maria in her O'Brien Group company Inbox and Trash mail, however the conversation trail was still in her sent items."

Oral evidence given at the hearing

[322] Mr Camp agreed that he is considered the most senior manager for the Respondent in Queensland. He stated that he has a very close relationship with Mr O'Brien, noting, "*He does use me to help in what wherever is required.*" He said that on certain matters, Mrs Trail reported to him.

[323] He was asked to have greater involvement with the Metricon Stadium on New Years Day 2020 as Mr O'Brien had a number of concerns. His impression was that the staff at Metricon Stadium did not want him there. He considered that there was animosity towards him. He described the animosity as coming from Mrs Trail and Mr Dakai. He didn't like their body language and he considered that they felt threatened by him being there, overseeing them.

[324] He also considered that there was a drinking culture among staff. He said they were quite happy to have a drink as soon as they finished work even though they were still working in the office. He said that they were standing around drinking alcohol which raised a few red flags for him. He didn't like that there was hostility towards Mr O'Brien. He referred to the email Mrs Trail had sent on 31 December 1999, objecting with foul language to Mr O'Brien being present that day. Of course, Mr Camp did not know about this email at that time; he did not discover it until Mrs Trail was no longer with the business.

[325] Mr Camp concluded that the staff did not want Mr Scott at the Metricon site. He considered that Mrs Trail, Mr Dakai, Mr Sim and another staff member were part of a clique, or as he described it, a "little hive".

[326] I informed the parties that Mr Camp's evidence-in-chief was entirely unsatisfactory and should have been included in his first witness statement. Mr Camp had other things to attend to, so I permitted him to prepare a supplementary witness statement and attend and give further evidence on the fourth day of hearing.

[327] In Mr Camp's second witness statement he made further allegations against Mrs Trail, including her allowing employees to drink at work, alleged falsification of timesheets and inappropriate and unprofessional language. I have had no regard to the allegation of falsification of timesheets and I do not see any merit whatsoever in the allegation put and misconduct was not pressed.⁸⁰ Later, Ms O'Brien did seek to press the late accusation, however I consider Mr Camp's evidence on this issue to be entirely unconvincing.

[328] Having recalled Mr Camp on the last day of the hearing, the following evidence was given. Regarding him contacting Mrs Trail when the March 2020 lockdown occurred, Mr Camp said he considered it was reasonable to require of her to go in and do a stocktake and find a solution to move the perishable stock on. He did not consider that he was bullying her.

[329] The following was asked of Mr Camp relevant to any knowledge Mrs Trail might have had regarding Mr Sim's alleged drinking at work:

Ms O'Brien: In Kerri Trail's position at the time as venue manager at Metricon Stadium, do you believe that it was right for us to go to her to ask? Is there anyone else that we should have first asked at the venue who would have been senior to Aaron to know what was happening at that time?

Mr Camp: Kerri was the venue manager. She was the leader of that team.

Ms O'Brien: And being the leader of the team at that venue, would you say that it was her responsibility to have an intimate knowledge of what's going on at the venue, particularly if staff were drinking whilst at work?

Mr Camp: Absolutely, yes. You're the leader. You're running the venue. You need to know exactly what's going on in your venue.

Ms O'Brien: Okay, thank you. We then gave Kerri a first warning given the evidence that came to hand to us - following the phone conversation the text message had come to light. Kerri then disputed this warning and submitted it in writing to yourself. How was this then treated within O'Brien Group? Was it read, was it considered? How was it approached at that time?

Mr Camp: Yes, it was. I mean, I did when I gave her the written warning say, "Look, you're perfectly entitled to take this or give us", you know, "your side of things if you don't agree to it", which she did. That was then passed on to Michael and Michael came back and said that he wanted to stand by the first letter.

Cross-examination

[330] Mr Camp agreed that Mrs Trail reported into Mr Smith, but he was the manager on the ground in Queensland. He could not recall saying to Mrs Trail when he issued to her the first warning that he didn't know why he was doing that, and not Mr Smith.

[331] Mr Camp conceded that he was abrupt when he spoke with Mrs Trail in March 2020 regarding the actions she should take to sell perishable stock. He considered that they were all under pressure. Mrs Trail put to him that she had been following Mr Smith's strict directive not to attend work. Mr Camp stated:

Mr Camp: But the point was - the point I was making to you at the time was you need to have a plan so you can go back to Dan and say, "Dan, I need to be at work because of X, Y, Z." That's what I was saying to you. It's all well and good saying Dan's in Melbourne. He doesn't know your stockholding, he doesn't know the dates on your cake, he doesn't know the dates on your confectionary. He didn't know that, so you need to go to Dan and say, "Dan, if I don't go to work" - this is what I said to you, you need to tell him, like I did and like Kevin did, that, "We need to be at work to get this stock. We need to consolidate it and then we need to try and generate some money out of it", and you turned round to me and said, "No, I've been told not to be at work so I'm not going to work", and I just felt that was not the right approach. The right approach was to put a plan together to get into work.

Mrs Trail: I just would have thought maybe the most senior manager in Queensland may have discussed that with the general manager and a plan would have been put in place for staff to attend work and make that happen. Anyway - - -?

Mr Camp: I just feel that I - look, Kerri, I don't think I was rude. I was very abrupt because I felt that you needed to understand the seriousness of the situation we were in. And, yes, Dan did give us a directive not to be at work, but the minute I said to Dan, "Look, Dan, I've got half a million dollars' worth of stock here. We need to do something about it", he was fine, and Kevin did the same. So I was just saying to you to get a plan together. I was not being rude to you, I was just being forceful in the fact that you needed to put a plan together to secure this stock.

[332] Mrs Trail took Mr Camp to his first witness statement where he declared, "*I have heard rumours in the past about Aaron's problems with alcohol.*" She asked him what he knew and what he had done about it. His evidence is as follows:

Mr Camp: Well, when he came to Suncorp I spoke to him. I spoke to him on a couple of occasions when he was here, because, you know, me and Aaron go back to - it's probably about 2008, 2009. It was when he was at Adelaide Oval, and I just said, "How are you going?" You know, "Is everything all right? How's your family life?" He always told me everything was fine. He never told me anything different. He always - every time I had a conversation with him he'd just turn around to me and say, "No, I'm fine, mate. I'm fine."

Mrs Trail: Bevan Campbell states that he came to you on at least four or five occasions to raise with you his concerns that other people had raised with him regarding Aaron in March 2017, June 2017, April 2018, January 2019 and February 2020. So was it rumours or did Bevan come and speak to you about the concerns that had been raised?

Mr Camp: No, he - I'm not sure of the exact dates, but I do recall Bevan talking to me about it as well. It was definitely a concern on Bevan's part and he definitely spoke to me about it.

Mrs Trail: So in point 3 of your statement you said "I then went and asked Bevan Campbell if he knew or had observed anything of concern in his recent interactions", but you already knew that Bevan had concerns. The two of you had spoken about it?

Mr Camp: Well, I was just really seeing how he felt Aaron was going, because I then passed it all on to Michael, because, you know, I felt there was a lot of noise in the background about what Aaron was up to and I felt at the time that Michael needed to be aware of it. So I just passed everything on to Michael.

.....
Mr Dakai: So from March 2017 Bevan has alerted you five times over the course of three years of rumours and speculation that Aaron was intoxicated at work and you only thought to bring it to Michael's attention in 2020?

Mr Camp: No. No, I told Michael prior to that.

Mr Dakai: Sorry?

Mr Camp: I'd had conversations with Michael prior to that about Aaron going back probably to the Comm Games, I think.

- Mr Dakai: So in the two instances - so March 2017 and June 2017 when Bevan Campbell testified he told you that he had suspicions through other people that Aaron had a drinking problem you did not go to Michael?
- Mr Camp: Yes, I did. No, I did go to Michael.
- Mr Dakai: So that's prior to the Commonwealth Games. So you did in fact go to Michael on all five of those occasions?
- Mr Camp: Is that before the Comm Games?
- Mr Dakai: Yes?
- Mr Camp: Yes, basically I pass everything - all that information I get like that I normally, as a rule, pass it straight on to Michael.
- Mr Dakai: And what was Michael's directive?
- Mr Camp: That he was going to deal with it.
- Mr Dakai: So five occasions later, three years later, the issue's still occurring. Did you perhaps ask Michael how he was going to deal with it because it still seemingly hadn't been addressed?
- Mr Camp: Well, look, I hadn't seen it first-hand, so as far as I was concerned I'd pass it on to Michael. Now, it's not up to me to chase that up with Michael about what he's doing when Aaron doesn't work for me, doesn't come under my direct control. I'm not his venue manager. I just hear things. When he came to Suncorp I never saw him in that state so why would I follow that up with Michael?
- Mr Dakai: But you were actively looking for Aaron to be in that state when he was at Suncorp. Is that essentially what you're saying? You would assess him?
- Mr Camp: Sorry, can you repeat that?
- Mr Dakai: Would you assess Aaron Sim when he came to work at Suncorp to see if he was showing signs of intoxication?
- Mr Camp: Did I assess him?
- Mr Dakai: Yes, knowing that this was an issue?
- Mr Camp: No. No, absolutely not. I didn't have time for that. I've got 1000 staff here on a big game. Do you think I go in and assess every single staff member to see if they're intoxicated?
- Mrs Trail: Bevan's testified that he told you on at least five occasions and now you're saying that you told Michael on at least those same five occasions?
- Mr Camp: As far as I recall, I passed on information when it was presented to me to Michael. I don't know - I can't recall the dates. I didn't write anything down. I've got no documentation around that.

- Mrs Trail: So Bevan testified that he came to you because you were his venue manager. At any point in time did you feel that you should contact the venue manager at Metricon and let them know of the concerns that were being raised?
- Mr Camp: I thought you'd know about it, to be quite honest.
- Mrs Trail: Well, I wasn't the venue manager for all of that period of time. Ben Jones-Wilson was there, Kerri Bailey was there, I was there. Has anybody at any point contacted them?
- Mr Camp: I don't know.
- Mrs Trail: Point 4, you've said that when you went and asked Bevan Campbell if he had observed anything of concern in his reaction, Bevan informed you that only a few days earlier when he sat with Aaron during the week to go over some work, that he strongly smelt of alcohol and he was concerned. What did you do with that information?
- Mr Camp: Again, I think I passed it on to Michael.
- Mrs Trail: So that day in question is the day that you and Bevan both travelled down to Metricon to check on stock, to check our stocktake, so you both travelled down together. You spent time with Aaron in the kitchen?
- Mr Camp: No, I didn't. No, I didn't.
- Mrs Trail: Well, you had conversations with Aaron, because that's the same day you came and spoke to me about [name] and the concerns that had been raised with him and the meeting that I'd had with Aaron regarding [name]?
- Mr Camp: I literally saw Aaron for about under a minute when I went to get Bevan when we left. He was sitting with Aaron in the office and I said, "Right, it's time to go." That was my only interaction with Aaron that day.
- Mrs Trail: But you came into the office and you told me what was going on with [name], that you'd just spoken to Aaron and Aaron had brought you up to speed on a meeting that we'd had regarding some complaints that had been made against [name]?
- Mr Camp: No, that was with you. That wasn't with Aaron.
- Mrs Trail: You came to me because Aaron had brought it to your attention. You asked me what was going on with [name] because you had just had a conversation with Aaron about it?
- Mr Camp: I don't recall that.
- Mrs Trail: So you recall coming into the office, though, and speaking to me about [name]?
- Mr Camp: Yes.

[333] I considered it necessary to inquire of Mr Camp what he knew of conducting an appropriate and fair disciplinary meeting, and how a prudent employer might investigate a matter and decide to issue a written warning. Mr Camp gave the following evidence:

- Commissioner: Mr Camp, what is the process of performance managing somebody?
- Mr Camp: Well, it all depends what the disciplinary procedure was. I mean, I wasn't sure what exactly the complaint was, but normally if somebody said they've got a complaint about someone the first thing we do is sit them down and then we work through what the issue is and find out - - -
- Commissioner: Okay, so the situation with Mr Sim where Ms O'Brien says that she smelt alcohol on him while he was at work, talk me through that disciplinary process with Mr Sim?
- Mr Camp: Well, that was then a discussion with Anne-Marie and myself and Michael around "What are we going to do with Aaron?" because he was clearly drinking at work.
- Commissioner: Well, you just said now that you would sit someone down and put it to them. So you didn't put anything to Mr Sim, did you?
- Mr Camp: Well, it depends on what level - of what - I mean, I didn't know what the complaint was about those - what those two girls' complaint was against [name].
- Commissioner: No, no, I'm talking to you about Mr Sim. Let's talk about that and then we can talk about the disciplinary action taken against Ms Trail. So are you familiar with the company's disciplinary process?
- Mr Camp: Yes.
- Commissioner: Tell me in your words what you're required to do?
- Mr Camp: Well, it was decided - - -
- Commissioner: No, no - - -?
- Mr Camp: - - - by Michael - - -
- Commissioner: No, I've asked you about the process. What does the company's process require you to do?
- Mr Camp: Well, we need to investigate, that's the first thing. So we investigate the complaints and then the information gets presented to whoever's in charge, depending on what the severity is, and then a decision is made on what the next step will be.
- Commissioner: So have you ever looked at the written process and procedure?
- Mr Camp: Yes, I have.
- Commissioner: Let's walk through it now. Parties, what page is it on? Parties, can you help me out with the court book with what page it's on.

Mrs Trail: Sorry, Commissioner, but with myself and Matt, we've lost Internet connection. My Wi-Fi is not working so I can't access my emails.

Commissioner: Well, I'll take some time to find it. I see that the workplace agreement is at page 41, but that's not what we're after. So let's hear again - - -

Mr Dakai: It's 14 - - -

Commissioner: - - - from you, Mr Camp. So in Aaron Sim - his situation, you, Ms O'Brien and Mr O'Brien talk about it and then you issue him with a written warning. Is that what you do?

Mr Camp: Yes. Yes, so we - - -

Commissioner: Right. So you didn't think to put the allegation - actually, it's at page 14, parties. So you didn't put it to him that he was drinking on the night and then give him an opportunity to respond. You didn't do any of that?

Mr Camp: Well, I wasn't there on the night.

Commissioner: No, but you issue him with the written warning, don't you?

Mr Camp: Well, I did, but it was written by Michael O'Brien.

Commissioner: Yes, so there was no allegation put to him before he was given the written warning to allow him to respond, to say, "No, that's not right. I disagree"?

Mr Camp: I'm not sure if Anne-Marie spoke to him on the night, but I certainly never spoke to him before he was issued the written warning.

Commissioner: No. So 4.2 of the policy, page 15 of the written process here, says:

Arrange a formal meeting with the team member. Advise the team member that they have the option to have a support person. Outline the reasons for the warning. Outline the expected conduct.

There's a process before, isn't there?

Mrs Trail: Yes, there's the investigation process, which - I'm still trying to get back onto the Internet.

Commissioner: Here we go:

The formal counselling session will take place as soon as possible after the behaviour and/or performance issue is identified, with the employee being advised in writing of when and where the interview will take place, the matters that will be discussed, specific details of the alleged unacceptable performance or misconduct.

So you understand that it's alleged that he was drinking, or he smelt of alcohol:

Their opportunity to respond and the opportunity to bring a support person. At the meeting the coordinator and employee will review and discuss

the allegations and their responses to these allegations as well as any additional incidents, information and prior relevant corrective action plans. At the conclusion of the formal counselling session a written record of the meeting will be provided to the employee confirming the issue of concern, the agreed actions and timelines, any assistance, support, date -

et cetera.

So none of that happened, did it? Just, bang. Anne-Marie says he's at work smelling of alcohol and the three of you decide that that's what happened and Aaron gets a written warning. That's right, isn't it?

Mr Camp: Yes, I think so.

Commissioner: Is that how things work in this business, is it, despite the written policies that exist?

Mr Camp: Well, we haven't handed out any - I mean, at Suncorp I haven't issued any.

Commissioner: You haven't had to issue written warnings to people before?

Mr Camp: Not at Suncorp Stadium, no.

Commissioner: Right. So because somebody senior in the business says something, then it's true, it happened, and it doesn't matter what the person says in defence?

Mr Camp: Well, I think with Aaron it was more about us trying to help him. We wanted to help him and raise the issue with him, and in that meeting we did offer him as much help as he needed, which he declined, so that's when we - - -

Commissioner: That's what your policy says you'll do. Your policy says that that's what you'll do, that you'll put allegations to someone, you'll hear their response, there will be agreed actions, timelines, but there weren't - I mean, Ms Trail, she was instructed to issue him with a written warning against how she felt. That's what she was tasked to do. That was her job that day. So no allegations were put to him, findings were put to him, weren't they, that Anne-Marie said that he was under the influence and that was what had been decided by the company. Do you understand how that doesn't sit very well?

Mr Camp: Yes, I do.

Commissioner: How does that feel? What if somebody said, "James is stealing money" and you get that person's account and then you just go to James and you go, "You've stolen money. You're either getting terminated or sacked", without putting the allegation to him?

Mr Camp: Well, he wasn't getting terminated.

Commissioner: No. No, he was getting a warning?

Mr Camp: That wasn't the point of the process.

Commissioner: No?

Mr Camp: It was a warning and an offer of help.

Commissioner: Well, where's the help? The help's in the meeting, is it?

Mr Camp: Yes. Well, we were going to escalate it, but he said he didn't want any help. I mean, we were - we'd spoken about even rehab or something like that for him, but - you know, and then after that it was decided that maybe he could come and work at Suncorp, work a bit closer with the team up here, but he didn't want to do that either.

Commissioner: No, because he doesn't live there in Brisbane, does he? He lives closer to Metricon, doesn't he?

Mr Camp: Yes, but he works up here quite a lot anyway. I mean, it's quite a regular occurrence that he's working out of the Gabba or the tennis or Suncorp.

Commissioner: But he was directed to work out of Suncorp, wasn't he?

Mr Camp: Well, it was offered, yes, which he declined.

Commissioner: Well, he ended up resigning. I mean, he's issued - see, there's - he's told that there's an alcohol issue.

It was evident that you weren't fully focused and not delivering a first class outcome for our landlord and customers, as a consequence of alcohol.

That's because of Ms O'Brien's account. That was taken as gospel, wasn't it?

Mr Camp: Well, there were a couple of other witnesses on the day who verified that.

Commissioner: Even on Ms O'Brien's evidence, there's two who said no and two who said yes. You got Elliott, who appears to be the golden boy, who said, "No, didn't observe it". He's pulled aside. Ms O'Brien pulls Elliott aside and asks him and he said, "No". Never speaks to Ms Trail who, on your evidence, you've said earlier, absolutely she should have an intimate knowledge of what's going on in her venue. Why? Why didn't anybody speak to Ms Trail, prior to this August 2000 even and say, "You're our eyes and ears", because that's, apparently, what Ms O'Brien's evidence is. "You're our eyes and ears, you need to let us know if you think Aaron's drinking." Why didn't you have that discussion with her and why don't you think anybody else had that discussion with her?

Mr Camp: I think - I don't know if I saw confidence in her. I mean I knew she was really close to Aaron, they socialised a lot out of work. They're very, very close out of work. I mean even when they both resigned they came to a game at Metricon together. I wasn't sure exactly how - whether she'd be putting the company's interests first.

Commissioner: So while she was employed you didn't think that she would put the company's interests first. I mean, isn't it important that Aaron doesn't drink at work and she could ensure, as the venue manager, that that wouldn't occur? But she was kept in the dark, wasn't she?

Mr Camp: Kerri's position was that he doesn't drink.

- Commissioner: Well, that's not exactly what she told you, because I now have the transcript of this secret recording, but you didn't speak to her at all, even though you had been told, by others, two and a half years earlier, or more, that this had been going on. Why didn't you think to speak to her and say, "I need you to let me know if this is going on"?
- Mr Camp: I mean, I'd spoken to Ben T-G at Cbus about it, but I hadn't spoken to Kerri about it, because - I mean two points, I'd never been to Metricon. The first time I went to Metricon was 2020, I didn't go there for the Commonwealth Games.
- Commissioner: You've got all these other chefs telling you, on numerous occasions, that this is happening and then you never think to tell her, "Can you keep an eye on this. I'm getting reports. You work closely with Aaron, can you make sure he's not drinking at work". So why didn't you do that? You just escalated it to Michael and it became Michael's problem, is that right?
- Mr Camp: Yes, that's correct.
- Commissioner: So you washed your hands of it, did you?
- Mr Camp: I wouldn't say I washed my hands of it, but I'm not sure - - -
- Commissioner: Well, what if it was one of your chefs, at Suncorp, that, you know, people were reporting to you, you would keep an eye on it, wouldn't you? You'd make some surprise visits?
- Mr Camp: Well, I would. I wouldn't want - you know, I don't think I need an outside person to manage my staff at Suncorp.
- Commissioner: You'd want to know, wouldn't you, if people suspected one of your Suncorp chefs drinking on the job?
- Mr Camp: Well, I'd like to think I'd know anyway.
- Commissioner: Well, if you didn't, if you didn't, and someone else told you, you'd want to know, wouldn't you?
- Mr Camp: Well, I (indistinct) but I spend a lot of time in the kitchen with my chefs. I spend a lot of time, one on one, with all my staff. So I'd like to think I'd pick that up pretty quickly.
- Commissioner: All right. But do you think Ms Trail would like to know if half a dozen other chefs and you believe that he's drinking on the job?
- Mr Camp: Well, like I said, I just passed it on to Michael.
- Commissioner: So I'm still not clear why you didn't have a single discussion with Ms Trail about this issue?
- Mr Camp: Because I felt this needed to go to Michael, rather than Kerri.
- Commissioner: You left it with Michael to sort out?

- Mr Camp: Well, Kerri's the venue manager, if we're hearing things in Brisbane about what's going on in the venue, and Kerri's the venue manager and she's not hearing anything, or seeing anything, then it had to go to Michael.
- Commissioner: Right. But some of these people reporting it, it wasn't happening at Metricon, it was happening at the tennis, it was happening at different places, how could she know?
- Mr Camp: Surely someone would tell her.
- Commissioner: Right, but not you?
- Mr Camp: Well, like I said, I didn't go to Metricon until the 20th - until the start of 2020.
- Commissioner: Now, but over three or more years you didn't have a single conversation with her to say, "I'm hearing this, can you please keep an eye on it"?
- Mr Camp: No, I didn't.
- Commissioner: Right?
- Mr Camp: But I wasn't - I didn't get involved in Metricon until 2020.
- Commissioner: Well, it's not okay, is it, to have - - -?
- Mr Camp: I had no involvement with Metricon.
- Commissioner: It's not okay, under any circumstances, is it, to have a chef drinking at work, in a hot kitchen, is it?
- Mr Camp: No, it's not.
- Commissioner: So you're now a manager of a bigger area than you were, would you repeat that failure to report now, if you heard the same thing now?
- Mr Camp: I'd still pass it on to Michael.
- Commissioner: And you wouldn't pass it on to the venue manager?
- Mr Camp: It depends how close they were to that person.
- Commissioner: Right. So you'd just let somebody come to work and be drunk and put themselves and others at risk, until such time as Michael dealt with it?
- Mr Camp: Well, my understanding was Michael was dealing with it.
- Commissioner: Over three years?
- Mr Camp: Yes.
- Commissioner: Right. That doesn't sound very safe, does it?
- Mr Camp: Well, I'm not privy to the conversations Michael had with Aaron - - -

Commissioner: No, I'm just talking about, you know, a potentially drunk chef in a hot kitchen serving food to the community, where we have such a concern that that could cause poisoning to patrons and potentially Mr O'Brien going to gaol. That's what I've learned. That doesn't sound very safe, is it, if it had been going on, potentially, for three years?

Mr Camp: I mean I don't know if he actually was drunk, but - - -

Commissioner: None of us know, none of us could decide that?

Mr Camp: No.

Commissioner: But that's the effect of it. You've had people whispering in your year, telling you stuff for three years, you've set it upstairs and you never thought to tell the relevant venue manager, whether it was Ms Trail or her predecessors. And I'm suggesting to you that that doesn't sound like a very safe thing to do? Do you agree?

Mr Camp: Well, I did - I passed it on to Michael and that's what I did.

Commissioner: So I've heard. So when Ms O'Brien declares that she has smelled alcohol, Mr Sim is issued with a written warning, regardless of his protestations, is that right?

Mr Camp: That's correct.

Commissioner: Then Ms Trail, she gets a written warning because she supposedly turned a blind eye and known about this. She doesn't get any of that due process of, "We want to put it to you that you've turned a blind eye. We want to put it to you that this text message means this". She doesn't get any of that, does she?

Mr Camp: No.

Commissioner: No. So the process wasn't followed for her either, was it?

Mr Camp: Not like the policy says, no.

[334] Mrs Trail asked Mr Camp in cross-examination why he incorrectly stated to her that Ms O'Brien was a Harvard graduated barrister. This following conversation took place:

Mrs Trail: After the meeting, you called me and you asked me how Aaron was, and I said to you that he seemed quite upset and angry, and you told me that Michael O'Brien would not take too kindly to his daughter being called a liar and you said that Anne-Maree was a Harvard graduated barrister and would know if someone was intoxicated. Why did you say that?

Mr Camp: Because you were telling me that he was not intoxicated and I said, well - I was just trying to point out that Anne-Maree is a highly intelligent person, that if she can smell alcohol on him, then she can smell alcohol on him, she wasn't lying. And I was trying to make the point that she's an educated person and she doesn't drink or smoke, so her senses would be heightened and if can - if she says there's alcohol, there's alcohol. I mean my understanding was that Anne-Maree asked him, on the night, and he denied it.

- Mrs Trail: Yes, and she also asked Elliott and she also asked Matt, and they both also agreed that they did not believe that he was showing any signs of intoxication and that they couldn't smell any alcohol on him?
- Mr Camp: No, but how close were they to him? I mean Anne-Maree said, it was my understanding that she was right next to him. She doesn't smoke or drink herself, so she can smell it a lot - her sense is a lot more heightened.
- Mrs Trail: All right. Elliott was beside Aaron on the plate up line in the kitchen, for probably a good hour and a half, at least. I put to you that the, I guess the word that you used to me, before the written - Aaron's written warning and after Aaron's written warning were said to intimidate me so that I would get on board and get on side with what as happening with Aaron. And I wouldn't, and I wouldn't agree to it, and you used that as an intimidation tactic?
- Mr Camp: No, because - I mean being intoxicated at work is actually instant dismissal, it's serious misconduct. So, you know, I agreed we could have followed the policy closer, but my understanding, from Anne-Maree, that time was of the essence and, you know, he - he could have been instantly dismissed for serious misconduct.
- Commissioner: Well, Mr Camp, he wasn't intoxicated, was he, because Ms O'Brien let him work for two hours in a hot kitchen?
- Mr Camp: No. No, my understanding was that he wasn't. I mean I got - - -
- Commissioner: No. No. She didn't put him aside in a room, like you'd expect you would do with somebody who you thought might be under the influence of alcohol. She let him continue working and serving to the Chairman's Lounge patrons. So, you know, what would you do with somebody who you thought was intoxicated?
- Mr Camp: It depends if he was intoxicated or just smelled of alcohol, there's a (indistinct) - - -
- Commissioner: Okay. I understand. Yes, so he wasn't intoxicated. He wasn't intoxicated, was he, according to Ms O'Brien?
- Mr Camp: Well, I wasn't - I wasn't there.
- Commissioner: He wasn't inebriated?
- Mr Camp: My understanding was that he wasn't inebriated, he just smelt of alcohol.

[335] Mr Camp agreed in cross-examination that he hadn't followed the Disciplinary Action and Warnings: Policy and Procedure. He was asked if he had received a written warning for not following the policy. He answered no, because he had been instructed to issue the second written warning.

[336] Regarding the Unilever, ice-cream email Mr Camp removed Mrs Trail from, Mr Camp said that he had also removed Kevin Baker from the email. Mrs Trail correctly informed Mr Camp that Mr Baker was never on the original email. He responded that he considered it to be a retail manager issue and not a venue manager issue.

[337] He was then asked why he didn't remove Mr Smith from the email as he also works in retail. Mr Camp responded that because he works from head office, he needed to know. Mr Camp stated that there was no malice intended in having removed Mrs Trail from the email.

[338] Regarding other emails Mrs Trail was excluded from, Mr Camp stated that he didn't need to involve her in those, and he would have involved her at the 'pointy end', or Mr Trevers-Grace would have involved her at the right time.

[339] Mr Camp denied that there is a drinking culture at Suncorp and stated that after an event or game, everybody leaves.

[340] Regarding allegations of Mr Camp's use of profanities in the workplace, the following was discussed:

Commissioner: Yes. Let's hear about that. So, Mr Camp, I heard evidence today that you've used the C word and Ms Bailey has had to reprimand you for that and you've sort of laughed, like you just laughed just now?

Mr Camp: Ms Bailey's (indistinct).

Commissioner: Yes?

Mr Camp: Okay. Can I put this into some sort of context about Ms Bailey? She does not like me. She would do anything to have me removed from this company. She came to Suncorp, when we opened Suncorp, and her sole agenda was to settle some scores when she worked for me previously, for Spotless, and she wanted my job. In the end - - -

Commissioner: I'm just interested, she says, "Heard him say "cunt" in front of other female staff. I chastised him and he laughed", is that true?

Mr Camp: No, that's not true. Absolutely not true. I mean that - I've got emails from - I know you didn't want to hear about these, there's lots of emails from Matt Dakai to Aaron Sim, using that word, which I found - it seems to be a normal word down on the Gold Coast, but it's certainly not used at Sun Corp.

Mr Dakai: What was Aaron's response, Simon, then?

Mr Camp: Well, you said, on 1 February 2020, "You suck cunt, what you doing?", after Aaron said, "I'm not anymore answering your fucking phone". That's what I mean. You sent him another email, on 3 March 2020, saying, "Hi, cunt". There's quite a lot.

Mr Dakai: Do either of us - - -?

Mr Camp: Sorry?

Mr Dakai: Do either of us seem offended?

Mr Camp: I didn't get Aaron's response when you called him, "Hi cunt", but it's not really the sort of words you use on company emails with company headings.

Commissioner: No, it's not. It's not to be said or written, parties. How disgraceful?

- Mr Camp: Yes. And that's - that just seemed to be the tone of the conversations down there. The fact that they were happy to write it and they don't see what's wrong with that word, (indistinct) using it - - -
- Commissioner: Well, I still have this allegation that you deny, and I'll have to decide whose evidence I prefer, relevant to the suggestions that you've said it, verbally?
- Mr Camp: Yes. We're a lot more professional here, we don't use that language at Suncorp Stadium.

Submissions

[341] Following the hearing, the parties were invited to provide written submissions. Mrs Trail filed her written submissions on 17 February 2021. She outlined the reasons for her resignation.

[342] On 3 March 2021, the Respondent filed its written submissions. These were clearly prepared with external assistance as they addressed all of the relevant criteria for the Commission's consideration, which had not been done earlier in the Respondent's outline of submissions. The submissions referred to relevant case law. I have given due consideration to the Respondent's detailed submissions.

[343] On 9 March 2021, Mrs Trail filed reply written submissions. Mrs Trail gave careful consideration to the matters before the Commission and rebutted many of the Respondent's contentions. I have given due consideration to Mrs Trail's detailed response.

[344] Given the length of this decision, I have decided against reproducing or summarising the written submissions here. All submissions have been taken into account.

Consideration

Has Mrs Trail been dismissed?

[345] Although applied under the previous Act,⁸¹ the following approach of the Full Bench of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd*⁸² in my view remains generally apposite to the consideration of s.386(1) of the Act:

“[21] In this Commission the concepts have been addressed on numerous occasions and by a number of Full Benches. In *Pawel v Advanced Precast Pty Ltd* (Pawel) a Full Bench said:

“[13] It is plain that the Full Court in *Mohazab* considered that an important feature in the question of whether termination is at the initiative of the employer is whether the act of an employer results directly or consequentially in the termination of the employment and that the employment relationship is not voluntarily left by the employee. However, it is to be noted that the Full Court described it as an important feature. It plainly cannot be the only feature. An example will serve to illustrate this point. Suppose an employee wants a pay rise and makes such a request of his or her employer. If the employer declines and the employee, feeling dissatisfied resigns, can the resignation be

said to be a termination at the initiative of the employer? We do not think it can and yet it can be said that the act of the employer i.e. refusing the pay rise, has at least consequentially resulted in the termination of the employment. This situation may be contrasted with the position where an employee is told to resign or he or she will be terminated. We think that all of the circumstances and not only the act of the employer must be examined. These in our view, will include the circumstances giving rise to the termination, the seriousness of the issues involved and the respective conduct of the employer and the employee. In the instant case the uncontested factual findings are that the applicant had for almost the whole of his employment performed welding duties; that there was no objective threat to his health and safety involved in the requirement that he undertake welding duties so long as it was not on a continuous basis and that the welding he was required to do was not continuous.”

[22] In the Full Bench decision of *ABB Engineering Construction Pty Ltd v Doumit* (ABB Engineering) it was said:

“Often it will only be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer. But narrow though it be, it is important that that line be closely drawn and rigorously observed. Otherwise, the remedy against unfair termination of employment at the initiative of the employer may be too readily invoked in circumstances where it is the discretion of a resigning employee, rather than that of the employer, that gives rise to the termination. The remedies provided in the Act are directed to the provision of remedies against unlawful termination of employment. Where it is the immediate action of the employee that causes the employment relationship to cease, it is necessary to ensure that the employer’s conduct, said to have been the principal contributing factor in the resultant termination of employment, is weighed objectively. The employer’s conduct may be shown to be a sufficiently operative factor in the resignation for it to be tantamount to a reason for dismissal. In such circumstances, a resignation may fairly readily be conceived to be a termination at the initiative of the employer. The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary.”

[23] In our view the full statement of reasons in *Mohazab* which we have set out together with the further explanation by Moore J in *Rheinberger* and the decisions of Full Benches of this Commission in *Pawel* and *ABB Engineering* require that there to be some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end. It is not simply a question of whether “the act of the employer [resulted] directly or consequentially in the termination of the employment.” Decisions which adopt the shorter formulation of the reasons for decision should be treated with some caution as they may not give full weight to the decision in *Mohazab*. In determining whether a termination was at the initiative of the employer an objective

analysis of the employer’s conduct is required to determine whether it was of such a nature that resignation was the probable result or that the appellant had no effective or real choice but to resign.” (footnotes omitted)

[346] A more recent Full Bench reinforced the relevance of the above approach in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Tavassoli*,⁸³ in the following terms:

“[33] Notwithstanding that it was clearly established, prior to the enactment of the FW Act, that a “forced” resignation could constitute a termination of employment at the initiative of the employer, the legislature in s.386(1) chose to define dismissal in a way that retained the “termination at the initiative of the employer” formulation but separately provided for forced resignation. This was discussed in the Explanatory Memorandum for the *Fair Work Bill* as follows:

“1528. This clause sets out the circumstances in which a person is taken to be dismissed. A person is dismissed if the person's employment with his or her employer was terminated on the employer's initiative. This is intended to capture case law relating to the meaning of 'termination at the initiative of the employer' (see, e.g., *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200).

1529. Paragraph 386(1)(b) provides that a person has been dismissed if they resigned from their employment but were forced to do so because of conduct, or a course of conduct, engaged in by their employer. Conduct includes both an act and a failure to act (see the definition in clause 12).

1530. Paragraph 386(1)(b) is intended to reflect the common law concept of constructive dismissal, and allow for a finding that an employee was dismissed in the following situations:

- where the employee is effectively instructed to resign by the employer in the face of a threatened or impending dismissal; or
- where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign.”

[34] It is apparent, as was observed in the decision of the Federal Circuit Court (Whelan J) in *Wilkie v National Storage Operations Pty Ltd*, that “The wording of s.386(1)(b) of the Act appears to reflect in statutory form the test developed by the Full Court of the then Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd (No. 1)* and summarised by the Full Bench of the Australian Industrial Relations Commission in *O’Meara v Stanley Works Pty Ltd*” (footnotes omitted). The body of pre-FW Act decisions concerning “forced” resignations, including the decisions to which we have earlier referred, has been applied to s.386(1)(b): *Bruce v Fingal Glen Pty Ltd (in liq)*; *Ryan v ISS Integrated Facility Services Pty Ltd*; *Parsons v Pope Nitschke Pty Ltd ATF Pope Nitschke Unit Trust*.”

(footnotes omitted)

[347] Accordingly, the general principles to be applied in this case are well settled. Stated succinctly, they include:

- the question as to whether the resignation was forced within the meaning of the Act is a jurisdictional fact that must be established by the applicant;
- a termination at the initiative of the employer involves the conduct (or course of conduct) engaged in by the employer as the principal constituting factor leading to the termination. There must be a sufficient causal connection between the conduct and the resignation such that it “forced” the resignation;
- the employer must have engaged in some conduct that intended to bring the employment relationship to an end or had that probable result;
- conduct includes an omission;
- considerable caution should be exercised in treating a resignation as other than voluntary where the conduct of the employer is ambiguous and it is necessary to determine whether the employer’s conduct was of such a nature that resignation was the probable result such that the employee had no effective or real choice but to resign; and
- in determining the question of whether the termination was at the initiative of the employer, an objective analysis of the employer’s conduct is required.

Was Mrs Trail forced to resign?

[348] In light of the terms of the Act and the authorities, it is necessary to consider whether Mrs Trail was forced to resign. In making that assessment, it is appropriate to make an objective analysis of the Respondent’s conduct to determine whether it was of such a nature that resignation was the probable result or that the employee had no effective or real choice but to resign. The line distinguishing conduct that leaves an employee no real choice but to resign, from an employee resigning at their own initiative is a narrow one. The line, however, must be “closely drawn and rigorously observed”.

[349] The onus is on Mrs Trail to establish that she did not resign voluntarily, proving that the Respondent forced her resignation.⁸⁴ For Mrs Trail to succeed I must find that the Respondent took action with the intent or probable result to bring the employment relationship between Mrs Trail and the Respondent to an end.⁸⁵

Respondent’s failure to afford procedural fairness

[350] I have never been so astounded to learn from a large organisation, the size of the Respondent, that it considers that it can issue written warnings to employees without a proper investigation and without affording to an employee procedural fairness.

[351] Mr Sim was issued a written warning on account of Ms O’Brien’s declaration that she considered he had been drinking at work. Ms O’Brien flip-flopped like a fish out of water

when she recounted her version of the events of 30 August 2020. At various times she referred to Mr Sim as a “drunk chef”, a person with an alcohol problem, and only when I raised with her the clear dereliction of her duty of care to Mr Sim to allow him to continue working while in that alleged condition, or not make inquiries as to how he would get home did she give evidence that she didn’t think he was intoxicated.

[352] Ms O’Brien’s evidence was entirely unsatisfactory. Where Ms O’Brien at various times painted her and the Respondent as being a caring, sensitive and sympathetic employer, there was a shocking demonstration of callousness in the way it dealt with Mr Sim. The Commission learned during the hearing that Mr Camp and Mr O’Brien held suspicions for many years, at least as early as 2017 that Mr Sim had a drinking problem. Numerous instances of *suspicions* of Mr Sim smelling of alcohol at work were reported to Mr Camp.

[353] It seems, then, that Mr Camp alerted Mr O’Brien to these repeated concerns. As a result, Mr O’Brien and Mr Smith had conversations with Mr Sim, at times. On the evidence before the Commission, Mr Camp only informed Ms O’Brien of the most recent concern occurring a short time prior to 30 August 2020, being the stocktake at Metricon Stadium attended by Mr Campbell in February 2020. Mr Camp did not inform Ms O’Brien, it seems, that it had been reported to him from various different chefs since 2017.

[354] Not one iota of these allegations was put to Mr Sim when he was issued with a written warning. The Respondent has taken it as a fact that all of these reported instances occurred. This included that he was reportedly under the influence when working during the tennis tournament some years ago. Curiously, Ms Bailey gave evidence that she did not know that Mr Sim was reportedly drinking while working at the tennis. Yet Mr Kidson reported it to Mr Camp, who failed to report the concern to Ms Bailey. Mr Camp gave evidence Mrs Trail should know if her colleague was drinking at work, but it seems Ms Bailey was left in the dark by Mr Camp relevant to the period of time where Mr Sim was working at the tennis tournament under Ms Bailey. The highest Ms Bailey’s purported knowledge of Mr Sim’s drinking at work was back during the Commonwealth Games period.

[355] During the months where Mr O’Brien had his “sixth sense” relevant to Mr Sim’s alleged drinking at work, or drinking after work, Mr Sim had no idea that Mr O’Brien, Ms O’Brien and Mr Camp as the senior leaders were now going to be keeping a close eye on him. Mrs Trail certainly didn’t know the plan of the senior leaders. Nobody bothered to tell her. The evidence before the Commission is that it was deliberately withheld from Mrs Trail on account of her relationship with Mr Sim and not wanting to put a hunch or rumour to Mrs Trail and to protect Mr Sim’s privacy.

[356] The most incredulous evidence put before the Commission by Mr O’Brien and Mr Camp is that Mrs Trail ought to have known; yet they were not prepared to discuss their suspicions with her, which the Commission now understands were based on years’ worth of reports of suspected conduct. On one hand, Mr O’Brien’s evidence to the Commission is that he didn’t think to tell Mrs Trail as he didn’t think it was appropriate and he wanted to protect Mr Sim. He stated that he didn’t think it right to telephone Mrs Trail, and he kept his concerns to Ms O’Brien and Mr Sim. He said he didn’t want to broadcast it. On the other hand, his evidence to the Commission is that he considers it “unbelievable” and “staggering” that she did not know. The evidence given contradicts itself. What is certain is that neither Mr O’Brien, Ms O’Brien or Mr Camp decided it suitable to discuss their knowledge with Mrs Trail when they ought to have.

[357] It was Ms O'Brien's self-proclaimed hyper-sensitive nose that led her to conclude that on 30 August 2020, Mr Sim either smelt of alcohol, had taken a swig of alcohol because she considered his aroma to be "fresh", or when her evidence suited her, he was a drunk chef.

[358] None of the usual or expected events occurred when a prudent employer investigates an employee over an alleged serious issue. Mr Sim certainly was not stood aside on the night. Ms O'Brien's evidence was that she considered he wasn't affected enough to cause her to stand him aside. Yet Mr O'Brien sought to suggest that he had been told that Mr Sim was somewhat side-lined, with other chefs providing greater assistance. In oral evidence it was demonstrated that Mr O'Brien's understanding on this issue was simply not correct. In fact, Mr Sim was across numerous kitchens across the relevant evening, with Ms O'Brien in attendance at all times.

[359] Mr Sim was not informed that an investigation was underway. He was, astonishingly, issued with a written warning. The Respondent finds some satisfaction in its actions suggesting that Mr Sim did not dispute the written warning. If he had, it stated, it would have been reviewed. I heard enough evidence of the Respondent, including Mr O'Brien that he trusted his daughter implicitly, and if his daughter said Mr Sim smelt of alcohol that night, he certainly smelt like alcohol.

[360] Any suggestion that Mr Sim could have had the written warning issued to him reviewed is a complete nonsense. This business does what it wants to do, without regard for procedural fairness obligations it owes to its employees. Mr Camp made it clear to Mrs Trail that Mr Sim ought not to challenge the warning issued to him as Mr O'Brien would not take too kindly to his daughter being called a liar. Mr Camp said such a thing to Mr Sim when he wanted to challenge the warning.⁸⁶ He then went on to declare to Mrs Trail the incredible untruth about Ms O'Brien's qualifications – Mr Camp's error, not Ms O'Brien's.

[361] Mrs Trail was unfortunately involved in the issuing of the written warning to Mr Sim. She felt extremely uncomfortable with the process and the facts. She knew that it was not appropriate to simply declare that Mr Sim had been drinking at work. She knew that an investigation should occur, including putting the allegation to him and allowing him an opportunity to respond before any finding is made. Instead, findings were made and a disciplinary process implemented before a full investigation could occur and accusations put.

[362] Mr Sim wasn't only just warned about a matter he denied, he was sanctioned. He was told that he would then need to travel north to work out of Suncorp Stadium so his work could be supervised. If the Respondent had any concerns about its employee drinking on the job, it did a fine job of then requiring that employee to drive at least 40 minutes home after long shifts. If the Respondent had any concerns that Mr Sim was an alcoholic, and prone to drinking either at work or after work, it made no attempts to satisfy itself that Mr Sim wouldn't finish a shift at Suncorp and sit in his car, drinking alcohol before he then travelled on the freeway. Understandably, Mr Sim resigned, appalled and disappointed at the warning having been issued to him and the sanctions imposed upon him.

[363] Mrs Trail felt terribly sorry for Mr Sim. She was next to fall victim of the Respondent's failure to follow its own policy and procedure and in fact, simple decency to put an allegation to an employee before a finding is made.

[364] During the telephone call with Mrs Trail on 2 September 2020, Mr Camp kept very quiet as to what he had learned since 2017. He didn't share this with Mrs Trail. He didn't think to say to her that if it had been such common knowledge among visiting chefs that Mr Sim had a drinking problem, why wouldn't she know of this. Mrs Trail's account was accepted. She acknowledged that she knew it was an issue during the Commonwealth Games, but she wasn't, at the time, Venue Manager. Other people were looking after the issue.

[365] She even acknowledged that in recent times when she had concerns, Mr Sim had reported that he was taking medication. It sounded a plausible explanation as to why Mr Sim might not be in full control, being on pain killers. Mrs Trail's account was, it seems, accepted. Yet in written closing submissions it was put that Mrs Trail was clearly aware that Mr Sim had been at work and under the influence of alcohol and failed to truthfully report this during the investigation. The Respondent's submissions are not accepted. Mrs Trail's evidence is accepted.

[366] What Mrs Trail wasn't told was that implicitly, there had been examples reported to Mr Camp for many years, which were then forwarded to Mr O'Brien to attend to. No explanation was provided to Mrs Trail during this phone call to say that she had been kept out of the loop on this information on account of Mr Sim's right to privacy.

[367] Ms O'Brien's next steps of discussing the matter with Ms Bailey then set a course for Mrs Trail. Ms O'Brien was convinced, having read the text messages exchanged between Ms Bailey and Mrs Trail that Mrs Trail knew that Mr Sim had a drinking problem and had been drinking at work. Nothing at all would sway Ms O'Brien from her view as to what the text messages describe. She gave no weight at all to the fact that Ms Bailey had, when she referred to Mrs Trail knowing that Mr Sim drinks at work, referred to the period of the Commonwealth Games and not any more recent period of time. On Ms Bailey's evidence, she only had suspicions, but had not observed Mr Sim drinking at work and the relevant period was many years prior. Ms Bailey's evidence given during the hearing is that she had no concerns while overseeing Mr Sim's work during the tennis tournament period.

[368] Further, it came to light in cross-examination of Ms Bailey that she thought during the Commonwealth game period she had informed Mrs Trail and Mr Trevers-Grace of matters involving Mr Sim's drinking, and she understood Mr Trevers-Grace had raised the issue with Mr Smith. She is correct about that issue; Mr Trevers-Grace did. However, Mr Trevers-Grace gave evidence, which I prefer over Ms Bailey's, that at no time did he discuss the matter with Mrs Trail. Mrs Trail's evidence on this issue is also accepted. Accordingly, where Ms Bailey considered that Mrs Trail did know about this specific issue, I find that she did not, and it was left with Mr Trevers-Grace to bring to Mr Smith's attention. This, of course, affected Ms Bailey's adverse statement to Ms O'Brien relevant to Mrs Trail's purported knowledge that it was "bullshit" that Mrs Trail did not know of Mr Sim's alleged drinking at work issue.

[369] Ms O'Brien gave no weight to the fact that Mr Sim attended the golf club out of hours, and if on prescribed medication, might be more readily affected by alcohol in a short period, albeit drinking outside of work.

[370] Ms O'Brien assumed that because Mrs Trail said that she had seen him slurry at work she must have observed him under the influence at work. As is clear from Ms Bailey's oral

evidence, she did not know that Mr Sim was taking prescription medication at this time which may have affected his tolerance to the drinks he consumed at the golf club.

[371] Throughout the course of the hearing, Ms O'Brien repeatedly stated that Mrs Trail had lied over her assertion that she had not known of Mr Sim's alleged drinking issue and the ticket issue.⁸⁷ Her demeanour was savage, calculated and unforgiving. She felt slighted and deceived. She never once, however, informed Mrs Trail that she was secretly recording the conversation of 2 September 2020, nor during that meeting did she disclose that all senior managers already knew about specific alleged incidents prior to 30 August 2020, including the matter involving Mr Campbell.

[372] Ms O'Brien discussed the matter with Mr O'Brien and together they determined that Mrs Trail must receive a written warning. As simple as that, Mrs Trail must receive a written warning. It would be issued to her, and it was.

[373] Mrs Trail earnestly asked for the warning to be reviewed, raising very valid points that she had since learned that Mr Camp and Mr Smith had apparently been working with Mr Sim relevant to his alleged drinking issue. She inquired why it is that she had not been included in this corporate knowledge, because if she had, she might not have accepted Mr Sim's response on one occasion that he was on medication and that is why he appeared groggy. Mrs Trail was never given an answer to this question. No effort was made to inform her why the senior leaders' knowledge, known to Mr O'Brien, Ms O'Brien, Mr Smith and Mr Camp wasn't shared with her.

[374] Instead, within two hours of her disputing the written warning, she was informed that the warning was supported, and apparently three unnamed people supported the conclusion that Mr Sim had been drinking at work on 30 August 2020. As is clear from Ms O'Brien's evidence to the Commission, she was incorrect with her references to Mr Dakai and Mr Scott not having seen Mr Sim and being in a position to declare if he smelled of alcohol. Mr Dakai and Mr Scott's evidence is accepted; they had worked with Mr Sim for a substantial period on 30 August 2020, and Ms O'Brien's earlier evidence that they had not is incorrect. It is a material fact that failed to form part of any investigation of the Respondent.

[375] The conduct of the Respondent is astonishing, but neither Ms O'Brien nor Mr Camp can make any concessions that this course of conduct is not appropriate. It seems to me that they don't know how to make appropriate concessions. Mr O'Brien made a gentle attempt to acknowledge the way the Respondent conducted itself is not appropriate, but curiously, is prepared to let the decision of the Commission serve as an educational lesson. Ms O'Brien then doubled-down, declaring the Respondent will weaken the procedural fairness within its policies, clearly to the detriment of employees.

[376] Mrs Trail was, on her accounts, which I accept, unable to sleep. She had worked for the business for a long time. She had been feeling excluded by Mr Camp for some time, which I'll address later. She was issued with a written warning which she did not consider was validly issued and shot down a short time later when she disputed it. She was not given answers to her very valid questions within the letter requesting a review. As we have learned, any review was pointless. Mr O'Brien, the decision maker, gave evidence that if Mrs Trail had attempted to dispute the first written warning directly with him the warning would have stood.

Second written warning

[377] On account of Mrs Trail's admission that she had provided tickets to Ms Bailey – such admission made on the run while she was being informed that she'd be issued with a first written warning - the Respondent then went ahead and issued to Mrs Trail a second written warning.

[378] No investigation was conducted relevant to Mrs Trail's knowledge of the Respondent's Gifts, Hospitality and Benefits Policy and Procedure. No investigation was conducted into the corporate knowledge of relevant employees and their adherence to the above policy. The Commission learned in evidence that many employees either had no knowledge of the policy or could not recall what it said. Mr Trevers-Grace had not read it for around four years, and Ms Bailey clearly has been in breach of it time and time again. Mr Scott has received free tickets.

[379] Ms O'Brien said she was disappointed that Ms Bailey was in breach of the policy, but knowing that Ms Bailey had received tickets from Mrs Trail, still saw fit, it seems, to re-employ Ms Bailey prior to the hearing of this application on an eight week contract to assist with a particular need. At the time of the hearing, Ms Bailey still did not have any knowledge of the policy.

Discussions with Mr Smith

[380] In the days between Mrs Trail learning that her first warning letter would not be withdrawn, and being issued with a second written warning, Mrs Trail was consulting with Mr Smith. She was shaking, crying and according to Mr Smith, very upset. He told her, "*This is the O'Brien way*" and asked her not to take it personally. This was said after Mrs Trail had received her first written warning.

[381] I accept Mrs Trail's evidence that Mr Smith said that being "the O'Brien way" is not a justification for the company's behaviour, but this is just "how they work."

[382] Where it could be expected that Mr Smith, the manager responsible for HR might have been responsible for ensuring that Mrs Trail received a "fair go", he was the last to learn that Mrs Trail was issued with a second written warning on 16 September 2020. Clearly, neither Mr Camp, Mr O'Brien or Ms O'Brien consulted him to obtain his views as to whether a warning should be issued, or even better, an investigation commenced.

[383] Mrs Trail spoke with Mr Smith after receiving the second warning and told him that she was being bullied and she couldn't take it anymore. She told him she considered she was being unfairly performance managed out of the business. Mr Smith informed her he would follow it up with Mr Camp.

[384] Mr Camp contacted Mrs Trail the same day and apologised for leaving her off emails and he didn't deliberately intend to, except for the Unilever email. He said he didn't consider she needed to be on that email and she was the only person removed, which was not true. I do not suggest that Mr Camp deliberately lied to Mrs Trail in this telephone call, however he was mistaken. I consider that Mr Camp's telephone call to Mrs Trail was not sincere.

[385] Mrs Trail then received the email from Ms O'Brien, copying in Mr O'Brien, reminding her that she must not leave Ms O'Brien off financial emails and this has been repeatedly done. Mrs Trail's evidence is that it was the straw that broke the camel's back, and she considered she was being readied to be dismissed. Accordingly, she resigned. Her resignation letter speaks for itself.

[386] Regarding Mr Smith's evidence, when the Commission suggested to Mr Smith that if a manager smelt alcohol on Mr Sim in the performance of his duties, he said that he would have taken action to remove him from that situation. I consider Mr Smith's evidence in answering this question to have been mistakenly given as to what he considered Mrs Trail ought to have done and did not do. Not surprisingly, when the Commission informed him that this was, in fact, Ms O'Brien who had not stood Mr Sim aside given her suspicions of smelling of alcohol, Mr Smith then said perhaps a chef might smell of alcohol because he used alcohol for cooking. Indeed!

[387] I consider that Mr Smith was unable to understand the biased evidence he had given to the Commission. He was prepared to condemn Mrs Trail for presumably not meeting her duty of care to stand aside a chef who smelled of alcohol, but when he learned it was Ms O'Brien who had failed to stand aside a chef who she considered smelt of alcohol, he provided an explanation that a chef might smell of alcohol because they may use alcohol in the meals they serve.

[388] The hypocrisy of then issuing to Mr Sim a written warning, and Mrs Trail a written warning for these matters is not lost on the Commission.

Exclusion from emails and walk-arounds

[389] I accept Mrs Trail's evidence that she was being undeservedly removed from relevant emails that she should, at large, have been included in on. I am satisfied that Mr Camp did deliberately seek to ostracise Mrs Trail from important emails. He preferred to deal with other employees including Mr Scott, Mr Dakai and Mr Trevers-Grace. Disappointingly, Mr Carey noticed the ostracization. Impartially, he considered it confusing and unnecessary. He included Mrs Trail in on relevant emails where he considered it important she know about certain matters.

[390] Mr Trevers-Grace was also of the view that she was being left out of relevant emails. His evidence to the Commission is that he had noticed a pattern of behaviour and it didn't surprise him given the individuals who were leaving Mrs Trail off the emails.

[391] In cross-examination, Ms Bailey agreed that the type of emails Mrs Trail was being excluded from are ones that she expects a Venue Manager would be included on.

[392] The relevant time Mrs Trail complains of having been left out of emails is important – July, August and September 2020. It was a not a longer period, but it was largely on the return of events to the stadium and at an extraordinarily busy period of time for the employees and the Respondent on account of the many games of football being held at Metricon Stadium.

[393] I also accept Mrs Trail's evidence that she was generally ignored by Ms O'Brien during relevant walk-arounds Metricon Stadium. I accept Ms O'Brien's evidence that she

need not walk-around with Mrs Trail on all or even many occasions she attends the stadium; the O'Brien family may walk around at-will. However, I do accept that Ms O'Brien made very little attempt to speak with Mrs Trail throughout the latter part of 2020, other than to exchange simple greetings and conduct bare-bones business talk.

[394] It is evident that Ms O'Brien was not interested in continuing the relationship with Mrs Trail, the Venue Manager. I am satisfied that Ms O'Brien had her eye on the future – Mr Scott and Mr Dakai – she had told them as much. I accept Mr Dakai's evidence that he and Mr Scott were informed that they were the future of the stadium because of their age and "look". I accept Mr Dakai's evidence that this very sentiment was repeated to him when he lunched with Ms O'Brien and Mrs O'Brien following Mrs Trail's departure.

[395] I would find it hard to believe that Ms O'Brien would scarcely speak with other Venue Managers in the way she scarcely spoke with Mrs Trail throughout the latter part of 2020. I accept Mr Dakai's evidence that one day after Mrs Trail resigned, in a telephone call with Ms O'Brien, she said, "*We can now focus on making the venue better, and it will be better without her*", referring to Mrs Trail.

[396] Interestingly, Ms O'Brien even offered to retain Mr Dakai following his resignation by finding him a role at the Gabba stadium, naming an incumbent, saying "*if you want, [name] will be gone tomorrow!*". I accept Mr Dakai's evidence over Ms O'Brien's on this issue, particularly so as she saw fit to text Mr Dakai later that day to ensure the conversation was kept confidential on account of her not wanting word to spread. If she was simply prepared to find Mr Dakai a role without removing an incumbent there would appear to me to be no reason for Ms O'Brien to send the particular text message she sent to Mr Dakai.

Evidence given relevant to Taylor Swift concert

[397] It is not a factor of consideration relevant to whether there was a dismissal. However, the Respondent, and in particular, Mr O'Brien sought to make an extraordinarily big deal over Mrs Trail's attendance at the Taylor Swift concert at the Gabba while she was recovering from cancer.

[398] I accept and prefer Mrs Trail's evidence and Ms Bailey's evidence over Mr O'Brien's. For whatever reason, Mr O'Brien considers Mrs Trail asked for a corporate box and indeed had 12 people in attendance during the concert, I do not accept Mr O'Brien's evidence.

[399] Ms Bailey's evidence is clear; the request for tickets was made by her. She emailed Mr O'Brien and requested four tickets. She explained that Mrs Trail is a huge fan and it would mean a great deal to her and her daughter if she could attend. It was, in fact a surprise for Mrs Trail. I accept Mrs Trail's evidence that her party was of five people only (four became five). It may be usual for Mr O'Brien, in his position, to mix well with all people within a corporate box. Mrs Trail was, at the time, recovering from cancer and in attendance with her daughter and three others. I do not consider it beyond comprehension that she might not have mixed with the other people in the corporate box; people she cannot identify. Mr O'Brien was not able to say who the other people were, simply asserting they must have been guests of Mrs Trail. I accept that they were not.

Conclusion on dismissal

[400] Mrs Trail had been held in high regard by the Respondent until she was not; the relationship began to deteriorate at the Respondent's initiative throughout 2020. Mr Camp's increased involvement at Metricon Stadium commenced the creep of the beginning of the end.

[401] Ms O'Brien also began to turn off; she began to imagine a future with Mr Scott and Mr Dakai running the venue, without Mrs Trail.

[402] Mr Smith reflected on the conduct of the family, described as "the O'Brien way". It was evident throughout the hearing that with no independence, the O'Brien family makes decisions as it sees fit, without regard to its own written policies, procedural fairness or a fair go. This is evident in the way Mr Sim and Mrs Trail were treated. Declarations are made relevant to employees' conduct; investigations are not properly conducted.

[403] Mr Camp, with no experience in following the Respondent's disciplinary policy and procedure and with no understanding of how to properly conduct an investigation was the manager tasked with executing the written warnings. Mr Smith and the HR team were not consulted. I am not certain they would have any impact if they were consulted; Mr Smith's HR knowledge is, in my view, unsatisfactory, and sadly, impotent against the family's determination to do things their way.

[404] Mrs Trail was, in a relatively short period of time, faced with a situation where she had, I accept, been ostracised and unfairly issued with two written warnings. I accept her evidence that she was not aware of the anti-bullying provisions within the Act. Certainly, in her pleadings with Mr Smith, alleging she had been bullied, he did not inform her of the avenues available to her, including bringing an anti-bullying application before the Commission. He did not encourage her to take a substantial break from work; he encouraged her to look after her immediate mental health, however he did not inform her that if she considered she was suffering a workplace injury she could make a workers' compensation claim.

[405] Understanding how distraught Mrs Trail was given the receipt of two written warnings in such quick succession, the unsatisfactory handling by Mr Smith of the issue before him, the further phone call from Mr Camp on 16 September 2020 and to a lesser extent, Ms O'Brien's email which Mrs Trail considered to be chastising, I accept that Mrs Trail considered that if she did not resign, giving the required notice, she would likely be dismissed. I accept her concerns were real and termination of her employment would likely be realised given the manner in which she had been treated in the prior months, weeks and days.

[406] I am satisfied that the conduct engaged in by the Respondent was the principal constituting factor leading to the termination. I am satisfied there was sufficient causal connection between the Respondent's conduct to Mrs Trail and the resignation such that it forced the resignation.

[407] On the evidence before me, I am satisfied that the Respondent engaged in the conduct that it did with an intention to bring the employment relationship to an end, or that it would have that probable result.

[408] I do not consider the conduct of the Respondent to be ambiguous. I accept that Mrs Trail had no effective or real choice but to resign her employment.

[409] In coming to my conclusion, I have objectively analysed the Respondent's conduct.

[410] I am satisfied, having regard to all of the evidence and submissions before me that Mrs Trail resigned having been forced to do so because of a course of conduct engaged in by the Respondent.

[411] Having determined that Mrs Trail was dismissed pursuant to s.386(1)(b) of the Act, I must now determine if Mrs Trail has been unfairly dismissed having regard to the criteria in s.387 of the Act.

Was the dismissal unfair?

[412] A dismissal may be unfair, when examining if it is 'harsh, unjust or unreasonable' by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:⁸⁸

"It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

[413] I am duty-bound to consider each of the criteria set out in s.387 of the Act in determining this matter.⁸⁹ I will address each of the criteria set out in s.387 of the Act separately.

s.387(a) - Whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees)

[414] When considering whether there is a valid reason for termination, the decision of North J in *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373 provides guidance as to what the Commission must consider:

"In its context in s.170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, common-sense way to ensure that the employer and employee are treated fairly."

[415] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.⁹⁰

[416] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.⁹¹ "The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."⁹²

[417] The Respondent must have a valid reason for the dismissal of Mrs Trail, although it need not be the reason given to the Applicant at the time of the dismissal.⁹³ Following Mrs Trail's resignation, the Respondent discovered a number of emails where it has concluded, and it is not disputed by Mrs Trail, that she solicited various tickets for people known to her, including former employees, or she facilitated the giving by Mr Carey of tickets to former employees.

[418] These matters were not known to the Respondent in early September 2020. By virtue of the authority in *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 these matters must be considered and assessed against the criteria in s.387 of the Act.

[419] I am not satisfied that Mrs Trail had ever observed Mr Sim under the influence of alcohol at work. She had heard of concerns around the time of the Commonwealth Games, however she was not tasked to deal with those concerns. The conduct of any inquiry was not with Mrs Trail and I accept the evidence of Mr Trevers-Grace that he alone held discussions with Mr Smith. I do not accept Ms Bailey's evidence that Mrs Trail was privy to the discussions held, as I consider her evidence to be weak on account of Mrs Trail's supposed presence in the office within the stadium. I prefer the evidence of Mrs Trail and Mr Trevers-Grace over Ms Bailey.

[420] Relevant to the period of time when Mrs Trail observed Mr Sim groggy at work, I accept that she considered his explanation of being on pain killers to be a reasonable explanation. She afforded him a period of four days to recuperate. I consider that Mrs Trail was truthful when she replied to Ms Bailey's text message in mid-August 2020. Further, I consider she was truthful when she was asked relevant questions by Ms O'Brien and Mr Camp on 2 September 2020.

[421] If anybody was concealing information during the telephone call of 2 September 2020, it was Ms O'Brien and Mr Camp. I consider they ought to have informed Mrs Trail of the many instances various people held suspicions relevant to Mr Sim's alleged drinking at work.

[422] I accept Mrs Trail's evidence that she did not observe Mr Sim smelling of alcohol during the plate service on 30 August 2020. This evidence is corroborated by Mr Dakai and Mr Scott.

[423] Regarding Mrs Trail's deletion of emails upon her resignation, I accept that she did not purposefully delete any emails referencing having secured tickets for other people in breach of the ticketing policy. I accept Mrs Trail's evidence that she did not purposefully and discriminately delete only the ticketing emails. If so, she would have removed the emails from the sent items folder, deleted them and then further emptied the "deleted items" emails.

[424] I do not accept the Respondent's contentions that Mrs Trail deliberately concealed the amount of times she had procured tickets for others. When first asked about this, it was during the time when she was receiving her first written warning. Her acknowledgement of securing tickets for Ms Bailey came about because of the questioning by Mr Camp. I consider that Mrs Trail gave the best answer she could give during an unexpected line of questioning and a very difficult time for her, receiving a written warning. I accept Mrs Trail's evidence that once she had the opportunity to think further about the issue, she recalled further instances of securing tickets for others.

[425] Mrs Trail was not aware of the details of the policy and it certainly has not put before senior employees in the business for some time. Many employees who gave evidence before the Commission affirmed that they had no knowledge of the detail within the policy, and it appears to have been largely ignored. The Respondent made no attempts, it seems, to periodically educate team members on the policy. As I have said above, Ms Bailey was re-engaged following Mrs Trail's departure, even with the Respondent's knowledge that Ms Bailey had been the recipient of solicited tickets. Ms Bailey gave honest evidence that at the time of the hearing she did not know the relevant details of the policy.

[426] If Mrs Trail had been properly consulted relevant to the policy breach, given appropriate time to reveal other policy breaches, and the Respondent satisfied itself that its policy was not widely promulgated, I am of the view that Mrs Trail would have deserved a written warning at the highest. This would have been a first written warning, as I do not consider she deserved a written warning relevant to Mr Sim.

[427] Having regard to the above, I do not consider that there was a valid reason for the dismissal.

Notification of the valid reason - s.387(b)

[428] Mrs Trail resigned her employment, therefore this criteria is a neutral consideration. The warning letters issued to Mrs Trail are noted.

Opportunity to respond - s.387(c)

[429] If the matters arising out of Mrs Trail's repeated breach of the policy, unbeknownst to her carries relevant weight in the s.387(a) consideration, the decision of *ASP Group (Placements) Pty Ltd v O'Loughlin*⁹⁴ is the authority that if the employer has not provided the employee with an opportunity to respond, and became aware of relevant events subsequent to the dismissal, the employer will have to wear that in the consideration of s.387(c).

[430] As is clear in my earlier consideration as to whether there was a dismissal, Mrs Trail was not provided with a proper opportunity to respond to matters put before her. She was warned and then offered a cursory opportunity to respond, which carried no weight because any review of an issued written warning is not a genuine review.

[431] I conclude that Mrs Trail was not given an opportunity to respond.

Unreasonable refusal by the employer to allow a support person - s.387(d)

[432] Mrs Trail did not request particular support persons in the meetings she had with Mr Camp and therefore she was not refused a support person. Regrettably, Mr Camp organised for direct reports of Mrs Trail to observe her being issued with the two written warnings.

[433] This criterion is a neutral consideration.

Warnings regarding unsatisfactory performance - s.387(e)

[434] It is clear that the two warnings issued to Mrs Trail are entirely unsatisfactory and should not have been issued in the substance and the manner in which they were issued.

[435] I accept that following a thorough investigation into the ticketing issue, it may have been appropriate to issue to Mrs Trail a first written warning relevant to soliciting tickets, however in doing so, the Respondent would have needed to consider how widespread the issue was among its management team. I do not consider that Mrs Trail's acts in soliciting tickets in breach of the policy constituted misconduct as she, like others, was not familiar with the policy.

Impact of the size of the Respondent on procedures followed - s.387(f); and

Absence of dedicated human resources management specialist/expertise on procedures followed - s.387(g)

[436] The Respondent is a large organisation, employing thousands of employees. On the evidence before the Commission its human resources function is unsophisticated and largely impotent when regard is had for the O'Brien family's overreach on such issues.

Other relevant matters - s.387(h)

[437] Section 387(h) provides the Commission with a broad scope to consider any other matters it considers relevant. I consider the following matters to be relevant to the determination of whether the dismissal of Mrs Trail was harsh, unjust or unreasonable.

[438] I have had regard to the Respondent's failure to follow the Disciplinary Action and Warnings: Policy and Procedure. It is a well-written document and appropriately explains how the Respondent will conduct relevant investigations when considering whether to discipline an employee. It should have been followed by the Respondent, however it is clear that neither Mr O'Brien, Ms O'Brien, Mr Smith or Mr Camp have had any regard to it since its inception.

[439] Ms O'Brien's statements to the Commission that it is not required to be followed and that the Respondent is simply required to follow "the law" is very concerning. Even more concerning is Ms O'Brien's declaration that the Respondent will now water the policy and procedure down.

[440] I have had regard to my findings relevant to Mr Camp and Ms O'Brien's conduct towards Mrs Trail in the months leading up to her resignation where they largely ostracized her or excluded her unnecessarily from relevant emails.

[441] I have had regard to Mrs Trail's otherwise exemplary employment record for a period of approximately five years.

[442] I have had regard to the considerable generosity of the Respondent and the O'Brien family in ensuring that Mrs Trail was financially looked-after during her approximate one-year battle with cancer, when she required a substantial period of time off work. I note this period was between 2018 and 2019.

Conclusion

[443] I have determined that there was no valid reason for the dismissal.

[444] I have determined that Mrs Trail was not given an opportunity to respond.

[445] I have determined that the warning letters issued to Mrs Trail were unsatisfactory.

[446] Having made the findings above, and in consideration of all of the material before the Commission at s.387, I find that the dismissal was harsh, unjust and unreasonable.

Remedy

[447] Section 390 of the Act reads as follows:

“390 When the FWC may order remedy for unfair dismissal

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.”

[448] Mrs Trail is a person protected from unfair dismissal for the Act's purposes, and is a person who has been unfairly dismissed. Accordingly, I am empowered to exercise discretion as to whether she can be reinstated.

[449] Mrs Trail does not seek reinstatement, and I am satisfied in all of the circumstances that reinstatement is inappropriate.

[450] I now turn to consideration of compensation.

Compensation

[451] Section 392 of the Act provides:

“392 Remedy—compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the person’s employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

- (a) the effect of the order on the viability of the employer’s enterprise; and
- (b) the length of the person’s service with the employer; and
- (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer’s decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

- (a) the amount worked out under subsection (6); and
- (b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

- (a) the total amount of remuneration:
 - (i) received by the person; or
 - (ii) to which the person was entitled;
(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
- (b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.'

Authorities

[452] The approach to the calculation of compensation is set out in a decision of a Full Bench of the Australian Industrial Relations Commission in *Sprigg v Paul's Licensed Festival Supermarket*.⁹⁵ That approach, with some refinement, has subsequently been endorsed and adopted by Full Benches of the Commission in *Bowden v Ottrey Homes Cobram and District Retirement Villages inc T/A Ottrey*⁹⁶; *Jetstar Airways Pty Ltd v Neeteson-Lemkes*⁹⁷ and *McCulloch v Calvary Health Care*⁹⁸ (*McCulloch*).

[453] I have had regard to the above authorities, and I have considered the submission of each party. It is not necessary to summarise the submissions.

The effect of the order on the viability of the Respondent

[454] An award of compensation in this matter would not affect the viability of the Respondent.

The length of Mrs Trail's service

[455] Mrs Trail had been employed for a period of approximately five years. This is not a short period of time, nor is it a long period of time.

The remuneration that Mrs Trail would have received, or would have been likely to receive, if she had not been dismissed

[456] I am of the view that Mrs Trail would have been dismissed within a period of 14 weeks by the Respondent on account of its aggressive march towards finding fault with Mrs Trail. Mr Camp had been implanted, and Mr Dakai and Mr Scott were being favoured over Mrs Trail because of their youth and “look”. I am satisfied that the Respondent would have found some fault in Mrs Trail’s conduct or capacity within a period of 14 weeks such to dismiss her.

[457] Mrs Trail’s remuneration was \$105,000 plus superannuation. The weekly amount is \$2,019.23. I consider she would have earned $14 \times \$2,019.23 = \$28,269.22$.

The efforts of Mrs Trail (if any) to mitigate the loss suffered because of the dismissal

[458] Mrs Trail gave evidence that she had been actively applying for full time positions since 17 September 2020. She was offered a fulltime position with a salary of \$66,000. She completed only four shifts on account of the hours being 5:30pm to 3:30am, five days per week. She stated that the hours of work were not physically or mentally suitable for her.

[459] Mrs Trail accepted a casual food and beverage role commencing 10 October 2020. At the time of giving evidence, she was working between 28 to 32 hours per week.

[460] I am satisfied that Mrs Trail made all efforts to mitigate the loss suffered because of the dismissal.

The amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation

[461] Mrs Trail was paid four weeks’ notice and not required to work out her notice period. This is an amount of $4 \times \$2,019.23 = \$8,076.92$.

[462] It will be necessary to determine Mrs Trail’s gross earnings from other employment between 17 September 2020 and 23 December 2020 so as to make an appropriate deduction from the amount at [456].

The amount of any income reasonably likely to be so earned by Mrs Trail during the period between the making of the order for compensation and the actual compensation

[463] This consideration is not relevant.

Other relevant matters

[464] I do not consider there are any other relevant matters for consideration.

Misconduct reduces amount

[465] Section 392(3) requires that if the Commission is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person then the Commission must reduce the amount it would otherwise order by an appropriate amount on account of the misconduct.

[466] The section requires that consideration be given by the Commission to whether misconduct contributed to the decision to dismiss an employee even where it has been found there was no valid reason for the termination.⁹⁹ The absence of a valid reason may be relevant to the appropriate amount by which compensation should be reduced.¹⁰⁰

[467] I have found earlier that there was not a valid reason for the dismissal, and I do not accept that Mrs Trail engaged in misconduct. Where she did breach the gift policy, I do not consider that it constituted misconduct. Where Mrs Trail used foul language in an email in December 2019 at [209], relevant to Mr O'Brien's visit to the stadium on this occasion, I consider it was extremely inappropriate. It was not, however conduct that contributed to the Respondent's decision to dismiss Mrs Trail. Accordingly, there is no deduction required. I have, however, used my discretion to make an appropriate deduction on account of the inappropriateness of the email, discovered following Mrs Trail's departure from the Respondent.

Shock, distress etc. disregarded

[468] I confirm that any amount ordered does not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt caused to Mrs Trail by the manner of the dismissal.

Compensation Cap

[469] The high-income threshold immediately prior to the dismissal was \$153, 600, and the amount for 26 weeks was \$76, 800. The amount of compensation the Commission will order does not exceed the compensation cap.

Payment by instalments

[470] This is not an appropriate consideration given the size of the Respondent.

Order of compensation

[471] I have determined that the Respondent is to pay to Mrs Trail an amount of \$28,269.22 less \$8,076.92 for the notice period paid to her and less any earnings from her in other employment between 17 September 2020 and 23 December 2020. I have made a further deduction of 10% on account of the inappropriateness of the email at [209], disparaging Mr O'Brien. The calculation will look like this:

Compensation of 14 weeks: 14 x \$2,019.23	\$28,269.22
Less remuneration earned between 17 September 2020 and 23 December 2020	To be confirmed

Total:		To be confirmed
Less 10%		To be confirmed
Total:		To be confirmed
Less 4 weeks' notice:	4 x \$2,019.23	-\$8,076.92
Total:		To be confirmed

[472] In addition, the Respondent is to pay superannuation on the amount, once determined, at the rate of 9.5% (as it was prior to 1 July 2021) into Mrs Trail's superannuation fund.

[473] Mrs Trail is directed to provide evidence of her gross earnings between 17 September 2020 and 23 December 2020 to my chambers by Monday, 19 July 2021.



COMMISSIONER

Appearances:

Trail K, Applicant.

O'Brien A, Respondent.

Hearing details:

19 January 2021, by Telephone.

20 January 2021, by Telephone.

1 February 2021, by Telephone.

9 February 2021, by Telephone.

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<PR731633>

¹ Transcript at PN355.

² Ibid at PN355.

³ Ibid at PN374.

⁴ Ibid at PN376.

⁵ Ibid at PN389.

⁶ Ibid at PN390.

⁷ Ibid at PN392.

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- ⁸ Ibid at PN385.
- ⁹ Ibid at PN408.
- ¹⁰ Ibid at PN420-PN443.
- ¹¹ Ibid at PN471.
- ¹² Ibid at PN478-PN485.
- ¹³ Ibid at PN486-PN543.
- ¹⁴ Ibid at PN563-PN565.
- ¹⁵ Ibid at PN580-Pn594.
- ¹⁶ Ibid at PN600-PN614.
- ¹⁷ Ibid at PN655-PN657.
- ¹⁸ Ibid at PN1375.
- ¹⁹ Ibid at PN1382.
- ²⁰ Ibid at PN1386.
- ²¹ Ibid at PN1396.
- ²² Ibid at PN1397-PN1414.
- ²³ Ibid at PN1451.
- ²⁴ Ibid at PN1473-PN1477.
- ²⁵ Ibid at PN1502.
- ²⁶ Ibid at PN1523-PN1529.
- ²⁷ Ibid at PN1546.
- ²⁸ Ibid at PN257-PN258.
- ²⁹ Ibid at PN170-PN173.
- ³⁰ Ibid at PN178-PN181.
- ³¹ Ibid at PN275-PN281.
- ³² Ibid at PN708.
- ³³ Ibid at PN733-PN741.
- ³⁴ Ibid at PN760.
- ³⁵ Ibid at PN764.
- ³⁶ Ibid at PN1152.
- ³⁷ Ibid at PN1593-PN1610.
- ³⁸ Ibid at PN1620-PN1640.
- ³⁹ Ibid at PN1649-PN1670.
- ⁴⁰ Ibid at PN1672-PN1680.
- ⁴¹ Ibid at PN2567-PN2572.
- ⁴² Ibid at PN2582-PN2588.
- ⁴³ Ibid at PN2610.
- ⁴⁴ Ibid at PN1836.
- ⁴⁵ Ibid at PN1881.
- ⁴⁶ Ibid at PN1900-PN1903.
- ⁴⁷ Ibid at PN1917-PN1923.
- ⁴⁸ Ibid at PN3314-PN3327.
- ⁴⁹ Ibid at PN3328-PN3337.
- ⁵⁰ Ibid at PN859.
- ⁵¹ Ibid at PN868-PN873.
- ⁵² Ibid at PN881-PN887.
- ⁵³ Ibid at PN890-PN902.
- ⁵⁴ Ibid at PN903-PN941.

- ⁵⁵ Ibid at PN966.
- ⁵⁶ Ibid at PN967-PN984.
- ⁵⁷ Ibid at PN989-PN992.
- ⁵⁸ Ibid at PN997-PN1007.
- ⁵⁹ Ibid at PN1236-PN1242.
- ⁶⁰ Ibid at PN1249.
- ⁶¹ Ibid at PN838.
- ⁶² Ibid at PN1282.
- ⁶³ Ibid at PN836.
- ⁶⁴ Ibid at PN836.
- ⁶⁵ Ibid at PN1344.
- ⁶⁶ Ibid at PN1775-PN1789.
- ⁶⁷ Ibid at PN2699-PN2741.
- ⁶⁸ Ibid at PN2780.
- ⁶⁹ Ibid at PN2775.
- ⁷⁰ Ibid at PN2857-PN2867.
- ⁷¹ Ibid at PN1756.
- ⁷² Ibid at PN2068.
- ⁷³ Ibid at PN1756-PN1758.
- ⁷⁴ Ibid at PN2091-PN2101.
- ⁷⁵ Ibid at PN2169-PN2187.
- ⁷⁶ Ibid at PN2194.
- ⁷⁷ Ibid at PN1755.
- ⁷⁸ Ibid at PN2244-2245.
- ⁷⁹ Ibid at PN2783-PN2817.
- ⁸⁰ Ibid at PN2533.
- ⁸¹ *Workplace Relations Act 1996* (Cth).
- ⁸² [2006] AIRC 496 ([PR973462](#)).
- ⁸³ [\[2017\] FWCFB 3491](#).
- ⁸⁴ *Australian Hearing v Peary* [2009] AIRCFB 680 (Giudice J, Kaufman SDP, Larkin C, 28 July 2009) at para. 30, [(2009) 185 IR 359].
- ⁸⁵ *O'Meara v Stanley Works Pty Ltd* PR973462 (AIRCFCB, Giudice J, Watson VP, Cribb C, 11 August 2006) at para. 23, [(2006) 58 AILR 100].
- ⁸⁶ PN1496.
- ⁸⁷ PN2063, PN2068, PN2080, PN2194, PN2299.
- ⁸⁸ (1995) 185 CLR 410, [465].
- ⁸⁹ *Sayer v Melsteel* [2011] FWAFB 7498 at [20].
- ⁹⁰ *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.
- ⁹¹ *Edwards v Justice Giudice* [1999] FCA 1836, [7].
- ⁹² *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].
- ⁹³ *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-378.
- ⁹⁴ *ASP Group (Placements) Pty Ltd v O'Loughlin* [2011] FWAFB 5230
- ⁹⁵ (1998) 88 IR 21.
- ⁹⁶ [2013] FWCFB 431.
- ⁹⁷ [2014] FWCFB 8683.
- ⁹⁸ [2015] FWCFB 2267.
- ⁹⁹ *Read v Gordon Square Child Care Centre Inc.* [\[2013\] FWCFB 762](#) [83].

¹⁰⁰ Ibid.