



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

COMMISSIONER ALLISON

C2023/7467

s.240 - Application to deal with a bargaining dispute

**Australian Workers' Union, The
and
Superior Energy Services (Australia) Pty Ltd
(B2023/1326)**

Melbourne

10.00 AM, MONDAY, 12 FEBRUARY 2024

Continued from 15/12/2023

PN1

THE COMMISSIONER: Good morning, parties. I'll take the appearances, please.

PN2

MS L AKSU: Good morning, Commissioner. Aksu, initial L, for the Australian Workers' Union.

PN3

THE COMMISSIONER: Thank you, Ms Aksu.

PN4

MR D TERNOVSKI: Ternovski, initial D, seeking permission to appear for the respondent, Superior Energy.

PN5

THE COMMISSIONER: Thank you, Mr Ternovski. My view is I granted permission for you to appear last time you were before me and this is a continuation of that matter, so permission is granted.

PN6

Parties, it's almost two months since you were last before me. My view in how we should run today, given there has been some lapse of time, I will give both parties the opportunity to give some brief opening submissions, prior to calling evidence, noting I have recently reviewed your material from last year, so there's no need to go through it in great detail. But if there are particular things you want to highlight or if there's anything that has changed in the interim period that has impacted your submissions or your evidence, then I think in your opening submissions you can address me on that. Both parties would obviously have the opportunity to lead their evidence.

PN7

After evidence from Mr Trew and Mr Skeen I propose that we would have a short adjournment, depending on the time, that may also be a lunch adjournment. Then, following that, both parties will have the opportunity to give closing submissions. Are the parties comfortable with that format for today? Ms Aksu?

PN8

MS AKSU: Yes, that's fine, Commissioner.

PN9

THE COMMISSIONER: Thank you. Mr Ternovski?

PN10

MR TERNOVSKI: Yes, thank you, Commissioner.

PN11

THE COMMISSIONER: Thank you. Okay, just before we go into opening submissions I'm just going to go off the record to have a talk with the parties.

OFF THE RECORD

[10.02 AM]

PN12

THE COMMISSIONER: Thank you. Ms Aksu, I'll come to you for any opening submissions and then for your evidence-in-chief. Thank you.

PN13

MS AKSU: Thank you, Commissioner. By way of opening I'll just make a few brief points. The first thing is we rely on our submissions, which we filed on 14 December. This matter relates to a notice of protected industrial action, as you may be aware, which the union issued on 8 November 2023. That notice notified of action that would commence from 16 November 2023, so some eight days later.

PN14

Then it relates to, of course, an employer decision to stand down its workforce, some 20 days after that notice of protected industrial action was first issued, which was on 28 November.

PN15

So I guess an initial point I'd like to bring to your attention is that the employer had had plenty of time to put in place appropriate plans in this case, to avoid, if I could use that word, a stand down of its workforce.

PN16

But our case is quite straightforward. We say the employer was not entitled to stand down its workforce, under the enterprise agreement provisions. We say that it is only in the specific circumstance of rig repairs, in accordance with clause 28.

PN17

With respect to clause 9(e) we say that clause is about attendance, with respect to the contract of employment. In this case we say employees were in full attendance at work. Of course that provision is broadly similar to what we understand the employer has relied on, pursuant to section 524(1) of the Fair Work Act. But we say even in the alternative, if that's what the company's relying on, we say the employer right is not enlivened unless certain preconditions have been met, in particular, if the employer could not reasonably be held responsible for certain things.

PN18

We say that has not happened here. This is a case where the employer can be held reasonably responsible for the stoppage or the events that occurred during, before and after the stoppage. So we say - what we will say today is it's unreasonable for the employer to claim that the stoppage of operations, by the client, was out of its control. We say the stoppage really took place here because of the action or the inaction of the employer.

PN19

So that's, broadly, our case, in terms of an opening statement, Commissioner.

PN20

THE COMMISSIONER: Thank you. Thank you, Ms Aksu, would you like to call Mr Trew now?

PN21

MS AKSU: Yes. Thank you, Commissioner. Mr Trew can you hear me okay?

PN22

MR TREW: Yes, I can hear you.

PN23

MS AKSU: Mr Trew, do you have, before you, your statement, it can be found in the court book, on pages 45 to 56?

PN24

MR TREW: Yes. Yes, I do.

PN25

THE COMMISSIONER: Sorry, Ms Aksu, do we have a visual for Mr Trew, on our end? Mr Trew, are you able to turn your camera on, please.

PN26

MR TREW: Commissioner, my camera is on, I can see myself on the screen, I can see all the other members in the room. I did just note to Jonas that I am on an offshore facility, so our internet may be slightly affected, but I can certainly see the other members at the moment. I'm looking at them and I'm on the screen.

PN27

THE COMMISSIONER: Mr Trew, can I get you to turn your camera on and off again? Off and on again?

PN28

MR TREW. Certainly. Off and back on. As it went off, yes, I have left and come back on.

PN29

THE COMMISSIONER: Yes. I might get you to leave and then click on the link again and rejoin, and we'll see if that fixes the problem.

PN30

MR TREW: Okay, I'll try the camera just one more time.

PN31

THE COMMISSIONER: Thank you. I might also, while we're just waiting - okay. There we go, we can see you now, Mr Trew, that's good. Just before we go, Mr Skeen, I'll get you, given you're giving evidence as well, I'll ask you to leave this hearing and when you're required to give evidence we'll alert you.

PN32

MR SKEEN: Yes, Commissioner.

PN33

THE COMMISSIONER: Thank you. Okay. Thanks, Mr Trew. I might get my associate to swear you in and then I'll hand over to Ms Aksu.

PN34

THE ASSOCIATE: Mr Trew, could you please state your full name and address, for the record?

PN35

MR TREW: Shaun Peter Trew, (address supplied).

<SHAUN PETER TREW, AFFIRMED [10.10 AM]

EXAMINATION-IN-CHIEF BY MS AKSU [10.10 AM]

PN36

MS AKSU: Thank you, Commissioner. Mr Trew, do you have in front of you your - a statement of three pages and 33 paragraphs, it's commencing from page 45 to 56 of the court book, and it is dated 14 December 2023, with four attachments: ST1, which is the current job description; ST2, which is an email from you to the crew, titled 'Protective action bans' - - -?---Yes.

PN37

Attachment ST3, which is a document titled 'Employee attendance record'?---Yes.

PN38

Attachment ST4, which is an email from you to Matthew Skeen and Matthew Marsh, titled, 'Crew movements clarification' which you sent at 10.10 am on 28 November 2023?---Yes, that's correct.

PN39

Okay. Are there any corrections you'd like to make to your statement?---Yes, it's just a wording one, on number 17. So it's currently worded, 'Before any of the bans were actually taken seems to appear to be relocating and reshuffling the workforce', that should be, 'Before the stand down actually took place', so not before the commencement of the bans but the actual stand down.

PN40

Thank you, Mr Trew. And is your statement now true and correct?---That's correct, yes. To the best of my ability it is true and correct.

PN41

Thank you. Commissioner, I tender Mr Trew's statement.

PN42

THE COMMISSIONER: Thank you. I'll mark the statement and the attachments as AWU 1.

EXHIBIT #AWU 1 WITNESS STATEMENT OF SHAUN TREW

*** SHAUN PETER TREW

XN MS AKSU

PN43

MS AKSU: Thank you, Commissioner. I also have some questions for Mr Trew, and I'm wondering if I can ask those before my colleagues goes?

PN44

THE COMMISSIONER: Yes.

PN45

MS AKSU: Yes. Thank you. Mr Trew, I just wanted to ask you a few questions. So your understanding of the bans that were notified, on 8 November, were - do you recall what the notice of the protected industrial action involved?---It did involve a number of actual bans.

PN46

Yes?---There was reference to stoppages that weren't taken at the time. So bans were put in place that were only really - there was no intent to stop work, as such.

PN47

Yes, so they were just bans but they weren't actually stoppages of work, were they?---No, that's correct. There was no stoppage of work.

PN48

Thank you. Now, I also refer to the email you sent, which is in your statement, attachment ST4, which was the email you sent, on 28 November at 10.10 am, to Mr Skeen. Have you got that in front of you? Do you know what email I'm referring to?---Yes. Yes, I do.

PN49

Thank you. And that email you sent, that was before the company stood down any of its workforce, is that correct?---That is correct. That email was directed after I'd received multiple phone calls and messages, on the morning of, and at that point crews were being moved around, installed to different establishments, brought in from offshore, some of which had been - said they could go home, whether they were a night shift or a day shift. Yes.

PN50

Okay. Thank you. Did Mr Skeen ever respond to that email that you sent, at that time, or after that time, at 10.10 am on 28 November?---No response.

PN51

Okay. During this time the parties were engaged in enterprise agreement negotiations, is that correct?---That's correct.

PN52

How would you say the communication with the workforce was, during that - this period and even up to 28 November, when the employees were stood down?

PN53

MR TERNOVSKI: Objection. Relevance.

*** SHAUN PETER TREW

XN MS AKSU

PN54

MS AKSU: Okay, I can rephrase that, Commissioner. So can you tell us - are you aware of a situation where crane operators may call in sick, on an occasion?---Yes, that's correct.

PN55

Yes. And what normally happens in that case?---In that case I guess we'd - Superior, SESA, would try and fill those positions, if possible. If not being that, we may have reverted to and used other labour hire that - out on the platforms there can be, at times, direct Esso employees that have crane training and tickets. There's other third party companies, UGL, Wood Group, so in a situation we could use those other licensed operators to keep - keep the actions proceedings. So whether it be a boat, or if it was a safety or actually just to keep the work front moving.

PN56

Okay. Thank you. And to your knowledge, following the stand down of the workforce, on 28 November, were other crane operators brought in to perform crane work?---To my knowledge, yes, other companies were brought in and works did continue.

PN57

THE COMMISSIONER: Can I just, if you can clarify that, because you've mentioned a few things there. You've mentioned Superior may have other - Superior may have other workers who can do it, there might be other workers out there and there might be labour hire. I'm just having difficulty understanding the difference and when you're saying, 'Superior may have other - may be able to fill the position', what do you mean by that? What do you mean by labour hire, and then what do you mean by the other contractors? Would they be engaged by Esso or they would be still engaged by another company? Can you just take me through that, please?---Yes. So the other contractors are engaged directly through Esso Australia, or may be direct employees of Esso, that are fully licensed and crane operative and will operate the cranes on any given day, whilst even Superior is on board with its crane drivers.

PN58

Okay. In regards to labour hire?---That's basically covering those guys, as such, as well, or it was mentioned to me that Superior Energy had contacted other workers and asked them if they'd be interested in coming and working in their off time to continue these operations.

PN59

I understand. So you were aware of that?---Yes. Yes, that was brought to my attention.

PN60

Okay. So the labour hire, when you refer to labour hire, that refers to other contractors who are currently engaged by Esso or one of the other contractors, is that right?---That's correct, yes.

*** SHAUN PETER TREW

XN MS AKSU

PN61

I see. Okay. Thank you.

PN62

MS AKSU: Thank you, Commissioner. So, Mr Trew, can I just confirm, to your knowledge, though, has SESA itself engaged contractors or labour hire, where someone may, for example, call in sick? Have they, themselves, directly employed or engaged a labour hire to fill in, for example?---I'm not personally aware whether they have or have not.

PN63

So can I just ask you, so had SESA approached the employees and said, 'Look, there's a possibility that the client is going to cease operations if you don't reconsider or modify some of your actions', would you have modified the bans, specifically the ban relating to crane operations?---Yes, I believe that's something that certainly would have been discussed, had we been given any notice of had any communication with the company, prior to the stand down. We had had several communication meetings booked and scheduled, prior to and during the commencement and the start of these bans, and each of those meetings were cancelled.

PN64

So could SESA have avoided standing down its workforce?---I believe so, with communication.

PN65

Do you believe SESA has done all in it's control and power to avoid having to stand down the workforce?

PN66

MR TERNOVSKI: Objection.

PN67

THE COMMISSIONER: Ms Aksu some of the questions are leading, if you can perhaps reword them.

*** SHAUN PETER TREW

XN MS AKSU

PN68

MS AKSU: Was there more, in your opinion, that SESA could have done, to avoid standing down its workforce, on 28 November?---I believe there was still, yes, more that could have been done. One, particularly, communication. The workforce works very closely with the Exxon company representatives out here and at no point was there any discussions, and they did and had mentioned to us that they did have further works that we could continue on with if we got to a point where we were held up or stopped, through the works itself. Maybe because we did have such a timeframe here, and through communications, it would have been quite easy just to have one of these other companies, in particular, to carry out these particular lifts that inadvertently may have stopped well operations. At no time was anything stopped, due to safety and it was basically only third party lifts. Lifts for Exxon Mobil continued as per normal. Lifts for SESA all

continued on as normal. So it was only very few lifts that were affected, where personnel could have been re-employed, but also not every member out there took the particular action. It wasn't - it was a choice whether they participated in the bans or not, so maybe there could have been people not participating that could have done the job.

PN69

Thank you. In terms of the enterprise agreement provision about stand downs, were you familiar with the clause about stand downs?---The clause itself, the only thing myself and the members were aware of that basically the only reasons we could be stood down was for rig repair, maintenance or rig survey. And to effect either of those three actual points, that there would be a seven day notice period and there would be communications between the company and the employees, before any stand downs.

PN70

Yes. And in this case, none of those conditions were met, is that - - - ?---No. No. No communication whatsoever, even on the day of when SESA was relocating its workforce. Up until that point, and when I'd sent the email, at 10 o'clock, there was no notification of any stand down in the lights, and it was not until late in the afternoon of that day that employees were all stood down, notified by email.

PN71

Thank you, Mr Trew. Sorry, one moment, please.

PN72

THE COMMISSIONER: Take your time.

PN73

MS AKSU: Mr Trew, have you had an opportunity to read Mr Skeen's statement?---I have, briefly, at the time. It's a - - -

PN74

And is there anything, in particular, that you'd like to mention, that you disagree with in that statement?---I don't have it in front of me and it was some time but, yes, there was some points of the actual notice period when SESA was informed of the stand down and when they informed the employees, I disagreed with that, in relationship to the crew moments that had happened prior to - to the actual stand down and another key point was, at the time we also had another work front which we were working and I believe, which was with Lockhart Energy, which employed fairly mixed variety of employees, which included casuals, that at the time more could have been done to move the full-time employees that had been stood down across to that work front and could have kept them going and that basically, in the stand down, one of our operations did continue offshore, which was batch 1, and I'm led to believe that there was casual employees still working on that work front whilst we have a full-time crew stood down.

*** SHAUN PETER TREW

XN MS AKSU

PN75

Okay. Thank you, Mr Trew. Can I just ask you a question, which is about a statement that Mr Skeen has stated, in his statement, where he says when SESA - effectively he suggests that, 'When SESA is on location there is no other contractor or entity to provide certain services', when SESA is on location, in the example of cranes, for example. So is that correct that when SESA is on location no other contractor or entity is engaged to provide these services?---I would strongly disagree with that statement.

PN76

Why is that?---As I said, it's - it's a task that requires training and there's multiple people on board. Where I sit, right at this moment, on this facility, yes SESA has a day and a night shift crane operator to provide 24-hour services, but our PSO, so our service operator, which is direct employee for Esso Australia, is fully licenced and can drive the crane. So he has been up moving deck chests around, doing other lifts, so we are not limited to just one on board. It's quite normal that we'll have other third party companies completing other tasks, completely unrelated to well works, it may be scaffolding, it may be construction work, and they generally do come along with their own crane drivers as well, so it's not a show stopper by any means, in most situations.

PN77

Thank you, Mr Trew. Commissioner, that was all, unless you had anything you needed clarified.

PN78

THE COMMISSIONER: Thank you. Mr Ternovski?

PN79

MR TERNOVSKI: Commissioner, there was quite extensive oral evidence here that went beyond the statement. Now, I didn't object to it because Mr Trew didn't have an opportunity, in writing, to respond to what Mr Skeen had said. However, it's difficult for me to cross-examine him on some of these things without being able to get instructions about some of the specific events that he has given evidence about, that are not the subject of any prior notice. In my submission, I would seek a short break to get instructions on those new matters that have come up in examination-in-chief, otherwise I'm not going to be able to comply with my puttage obligations.

PN80

THE COMMISSIONER: Yes. Okay. I understand. All right, I think that's - Mr Ternovski, we don't have anyone from the respondent there, do we, except from Mr Skeen.

PN81

MR TERNOVSKI: No. No.

PN82

THE COMMISSIONER: All right. I propose a 10 minute adjournment. Is that going to suffice?

*** SHAUN PETER TREW

XN MS AKSU

PN83

MR TERNOVSKI: Yes. Yes, thank you. Thank you, Commissioner.

PN84

THE COMMISSIONER: Okay. We'll adjourn for 10 minutes. I'll just note, Mr Trew, you're still required to give evidence so when we come back we won't swear you in again, I'm going to indicate that you're still bound by the declaration you made earlier but, yes, we'll stand it down for 10 minutes, thank you?---Thank you.

<THE WITNESS WITHDREW [10.30 AM]

SHORT ADJOURNMENT [10.30 AM]

RESUMED [10.41 AM]

<SHAUN PETER TREW, RECALLED [10.41 AM]

CROSS-EXAMINATION BY MR TERNOVSKI [10.41 AM]

PN85

THE COMMISSIONER: Thank you. So just to re-emphasise, Mr Trew, you're back on the record, in terms of witness evidence?---Yes.

PN86

Mr Ternovski, over to you.

PN87

MR TERNOVSKI: Thank you, Commissioner. Thank you for that opportunity to get instructions.

PN88

Mr Trew, I want to ask you some questions about what has happened in the time after you've made your statement and, in particular, what happened was that as a result of the hearing, on 15 December, the union stopped the protected industrial action, didn't it?---It was agreed that we'd stop the protected action until Christmas, that was agreed upon in the last hearing, yes. And since - since then an MOU was presented and the industrial action did stop until the last ballot was taken.

PN89

Then the industrial action was, in fact, stopped, immediately after 15 December, wasn't it?---Correct.

PN90

After the industrial action was stopped Esso lifted the suspension of Superior, didn't it?---Correct.

PN91

Then Superior ended the stand down?---That's correct.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN92

And workers were notified that very day, on 15 December, that the stand down was coming to an end and invited to come back to work. That's right, isn't it, Mr Trew?---Yes, that's correct. Yes.

PN93

And work, in fact, resumed over the next few days once crew could be airlifted back to the platform?---Once mobilisation, yes. Sorry, I haven't got the dates in front of me but, yes, I'm assuming those dates your presenting are correct. But the chain of events is exactly what happened, yes.

PN94

Now, Mr Trew you work on a 14 days on/14 days off cycle on the platforms?---Yes.

PN95

But you had a big break over December/January, didn't you?---That's correct, yes.

PN96

In fact, you've just come back to work over the last few weeks?---Yes.

PN97

Now, going back to late last year, you started a 14-day work cycle on Flounder, rig 22, on 7 November, didn't you?---I don't have the date but, yes, I did start on Flounder, on a 14-day cycle, yes.

PN98

And you finished up that 14-day cycle on 21 November?---I finished by full two-week cycle, correct.

PN99

So you were off the platforms from 21 November until this year?---Yes, correct.

PN100

Have you got your statement in front of you?---I do have my statement, yes.

PN101

Mr Trew, if I could take you to paragraph 32 and 33 of your statement, you refer there to a list of repair works that supervisors, you say, have put together, at least a week before the demobilisation?---Yes, that's correct. Yes.

PN102

Now, when you say, 'A week before SESA started to demobilise the work was' are you referring there to the stand down, on 28 November?---Yes, correct.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN103

So that - that list of repair works was put together by Esso before, well before Esso suspended Superior, wasn't it?---That - that list was communicated, directly communicated to myself, as we had full, open communication with Exxon themselves, so the workforce was open to Exxon of what the bans entailed and

what was going - going to happen, going forth. And I believe that this was complied as if we had got to a point where well works couldn't continue as such, if it was effected by any of the bans, that these works were in place, in the background, that would be implemented to keep the workforce working, rather than stand them down. That was what was relayed to myself, that it was basically, 'We've got plenty of things to keep you guys busy'.

PN104

That maintenance work that you're referring to, Mr Trew, that's maintenance work on Superior's own rigs and equipment, isn't it?---That's a mixture of both Superior rig and equipment and ExxonMobil equipment.

PN105

Mr Skeen's evidence that it's limited to Superior equipment, you disagree with that, I take it?---Yes. It was mentioned to me, by an Esso company representative, that they had plenty of works and they said, 'Even if that's painting our handrails and, you know, working on our equipment'.

PN106

Now, Mr Trew, by 27 November Superior employees had been performing that maintenance work for about a week, hadn't they?---As I was not directly on those platforms, I was led to believe that well works operations were continuing. So work directly for Esso itself, rather than doing any maintenance work on Superior equipment. So things moving forth that took us maybe directly off the current line of work but did additional work, so may have gone down and cut well heads off the next wells, in a well bay that we were to move on to. So the work front kept moving forward so it wasn't at a halt of Esso work. The workforce continued to work for Esso and continued on doing the requirements in moving forward to achieve the plug and (indistinct) program that we're currently employed to do. So it did not and had not stopped those operations.

PN107

Mr Trew, if I could bring you back to my question, which was, by 27 November Superior employees had been performing the maintenance work, that you refer to in your statement, for about a week?---No, that's not - no that's not correct. That's not what I said. No.

PN108

So you're saying no maintenance work had commenced, is that what you say?---I'm not saying that no maintenance had commenced, I'm saying that the well works operation that we were employed by ExxonMobil to complete did continue. So it continued in one form or another, that we may have been doing pre works for the next well we needed to move on to.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN109

I'll come back to that question of, if you like, the primary works, Mr Trew, but I'm just asking about the maintenance work that you referred to, in paragraph 32. And what I'm putting to you, putting aside whatever other work you say may have also

been going on, that maintenance work had been going on for about a week, by 27 November?---No.

PN110

How long do you say it's been going on for?---As I said, it may have had some of those maintenance works, but the work front of what we were employed to do continued. The works were not at a standstill. The work front and the PNA program continued, in one form or another.

PN111

Sorry, go on?---The operations, in itself, did continue.

PN112

Mr Trew, I'm going to put to you that by 27 November Superior employees had been performing maintenance work in 24 hour shifts, for about a week?---I'm not aware of that.

PN113

Now, Mr Skeen's - well, I withdraw that. Esso was not prepared to keep Superior workers on the platforms doing maintenance work unless the primary operations would continue. You're not in a position to agree or disagree with that, are you?---I'm not in a position, no. I do know works did continue moving forth throughout those operations and even after the stand down, on one of the particular operations, when the crew was in, that UGL did supply a crane driver to do a third party lift, which continued operations.

PN114

So when you say, 'were continued', you're referring to what you've just given evidence about before, that what you say SESA started doing other works, like preparing for the next stages of the projects, is that - is that what you're referring to?---Yes, that's correct. So it's direct works for Exxon and works in the program. When we're working on a well, it's normally generally one well and we may finish that one or we'll have to leave it and move on to the next one. We have a multitude of wells out here that we need to step from one to the other. So moving forth and carrying out pre-works was full time saving for ExxonMobil as we got to those, in stages.

PN115

Mr Trew, I don't mean to - I can refer you to the protected industrial action notice, feel free to refer to it if you want to, but you probably know, off the top of your head, that item 6 of that notice was what might be called a third party crane ban, that's right, isn't it?---That's correct.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN116

And the way in which that crane ban was implemented was that crane operators refused to lift third party equipment, that is, equipment that is not owned by Superior?---We did - not refuse as such, if it was a safety matter. If it was Esso owned, those lifts continued. So the likes of when the work boats turned up, the supply vessels, all lifts were carried out. If we were in a position where a well

was not safe and we were cementing it, all works continued. So only, I guess, at that point, any work that was not critical, critical work path, was stopped. And I do again mention that not every employee out here is a member of the union and took place in all the bans. There was a list circulated by the company, I can't tell you did and did not sign it, but they were asking the question every morning, 'Who was participating in the bans and what bans were they participating in on that day'.

PN117

Now, just on that topic, Mr Trew, if I suggested to you that no crane operator, or that - agreed to sign that form, one way or the other, you're not in a position to disagree with that, are you?---I was on one platform, we had four operations, eight different shifts. I have no knowledge of who did or did not sign any forms.

PN118

If I suggested to you, Mr Trew, that there were no crane operators who refused to participate in the ban and were prepared to continue the full works, you're not in a position to disagree with that either, are you?---I have no knowledge. I can't, so I don't - I guess you can't suggest it if I've got the knowledge of it.

PN119

Now, Mr Trew, you mentioned - you've just said that the crane lifts were implemented in such a way that the critical path operations could proceed. You didn't mention that in your statement, did you?---I guess those words are not in there, no.

PN120

That's because that's not right, is it?---My statement is there, the instructions that we were forwarded to the workforce was there, so I - yes.

PN121

You're referring to ST2, are you, Mr Trew, the document at ST2, when you say, 'The instructions to the workforce'?---Yes, that's correct.

PN122

Now, that document was never provided to SESA, was it?---I believe SESA had seen it, so whether they directly got it, but it was certainly circulated around each of the work platforms where SESA had staff on each of those platforms. They had supervisors and I can personally say that ExxonMobil had copies of that, because I personally handed it to the company men on those particular facilities. And, as it's stated in there, it was 'Share this around. Pin it up on the board. It's not a private document, it's so everyone is on the same page'.

PN123

Let me go back, Mr Trew, to the crane ban?---Sorry, I've lost you.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN124

No, no, I'm not saying anything. I'm formulating my question, Mr Trew. I've asked you a question about the crane ban but you didn't quite answer it, so I'm going to ask it again. Mr Trew, the way in which the crane ban was implemented

by crane operators is that putting aside - let's put safety issues aside, the crane operators would not lift third party equipment, so equipment that might be owned by a different company, not by Superior, by some other contractor, for example?---Yes.

PN125

So that was the case, regardless of whether Superior, itself, might have needed that equipment to continue its own work? It's not owned by Superior it doesn't get lifted, putting safety aside?---That's correct.

PN126

Now, on 22 November a Superior crane operator refused to pick up the milling BHA bottom collar safely on rig 22, isn't that what happened? Are you aware of that happening, Mr Trew?---I'm not aware of individual practices that happened. I believe, to my knowledge, in each of the situations the rigs and the wells were brought to a safe point and it was communicated that we won't go any further with these steps. As I say, I can't say on that particular one, but it may have been that the BHA could have been lifted but possibly if that had implemented other issues down the track and we couldn't go further, at that point maybe the client decided, 'We're at a safe point now with the well, we're not going to proceed in case something happens' - - -

PN127

But you don't know, do you? Sorry, I'll let you finish?---I was going to say, in that situation, as it's been clearly noted the whole time, anything at all that was a safety risk, all operations and everyone had agreed that works would continue. So possibly picking up a BHA may have been a decision to Esso or from Esso to actually say, 'At this point we're in a safe spot, we can secure the well, we can move on to other works'.

PN128

Mr Skeen's evidence is that on 22 November a SESA crane operator refused to pick up the BHA on rig 22. You're not in a position to disagree with that, are you, Mr Trew?---No.

PN129

Because you weren't there on rig 22 on that day, having been demobilised on the 21st?---No. So that's correct, yes.

PN130

Then, on - Mr Skeen's evidence is that on 23 November a Superior Energy, or SESA, crane operator refused to pick up a riser from the well, on HWT600. Again, you're not in a position to disagree with that, are you?---No.

PN131

His evidence is that after that the riser that couldn't be lifted couldn't be put in the next well. Again, you're not in a position to disagree with that, are you?---No, that's correct.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN132

Then his evidence is also that around the same time a SESA crane operator refused to pick up a lubricator blow out preventor from the well on batch 1. Again, you're not in a position to disagree with that, are you?---I'm not.

PN133

His evidence is, further, that after that work couldn't proceed because he needed that lubricator for the next well. Again, you're not in a position to disagree with that, are you?---I - the only thing I can say on that particular one, I know the operations on batch 1 continued right through and I believe, during the stand down, no one was actually stood down off that batch 1 operation because well works continued. So maybe that particular lift did not happen, but operations continued and, at no time, through the stand down, was anyone stood down from that batch 1 facility.

PN134

Well, Mr Trew, bear with me for one second. Mr Skeen's evidence is that Esso required SESA to provide crew on batch 1 to perform residual activities that were alternative to what was otherwise scheduled for the projects. You're not in a position - you're not disagreeing with that, are you?---No. That's exactly as I said to you before, that those works were future works. So what that has done is actually save time when they've moved on to those wells and those projects. So it did move forward. No one was actually stood down. They actually had a crew change during the stand down, on that batch 1. So crews, mobilisation and personnel even finished their two-week swing and their replacement crew went back out, offshore, and continued those works throughout the whole stand down.

PN135

Could I ask you to move on to a different topic now, and ask you about what you said the alternative crane operators were available, and you've given some evidence about that in your statement and you've given some further evidence about that, orally, now. Can I just start with this issue you've raised this morning about crane operators calling in sick? Just to be clear, Mr Trew, what you were talking about - you're not talking about the stand down, you're talking about in normal, non industrial action, normal operations, sometimes a crane driver might call in sick. That's what you were talking about, weren't you?---That's correct. Everyone has sick days, personal days, we can't talk about everyone's personal wellbeing and what's happening, so I'm sure, in every industry, at times there's someone who can't attend work on a day because of personal reasons.

PN136

I think what you said, Mr Trew, is that when that happens SESA tries to replace the crane driver internally, with some other crane driver?---That's correct.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN137

Sometimes it might be a trainee crane driver?---Yes, I guess so. As mentioning that, a trainee crane driver could be ticketed in two different things. So throughout your training your signed off on deck lifts, first of all. That entails anything that you can lift on the deck. Then as they progress through their training and their time, they move on to what we call boat lifts. So that's just

basically to load and, you know, back load the supply vessel. So a trainee, as such, can be signed on to carry out all the deck lifts, as such.

PN138

So what usually happens when somebody calls in sick is that some other - some other crane operator, maybe a trainee, maybe someone else who is on the platform who is not rostered on for that shift, normally someone else fills in for that sick crane driver?---That's correct.

PN139

I think you mentioned there might have been occasions when that - they couldn't fill that position, there was no one else available. That's your evidence, isn't it?---That possibly could be the case. It may only be for a day, or it may be for a few hours in between transits of helicopters, but if there is a production service officer, if there is someone else that is licenced to drive that crane, they will take on the duties. So whether it be another company or Esso themselves.

PN140

When you say 'production services officer', are you referring to platform service officer?---Yes, so PSO.

PN141

PSO. Let's - I'll come back to the PSO's, Mr Trew, but just sticking with the issue of crane operators being sick. It's the case, isn't it, that to the extent - let's put aside the industrial action and put aside the stand down, we're talking about normal operations. During normal operations, for SESA not to be able to fill in for a sick crane operator from within its own workforce, we're only talking about maybe a few hours or maybe a shift at the most, aren't we?---In previous situations, yes.

PN142

Now - - -?---Saying that, sir, I've also been moved out to different operations where I may have gone out as a dogman and worked directly under an Esso employed crane driver. So they may have had lifts, didn't have a qualified dogman, so I've gone out and worked as a dogman for an Esso crane driver.

PN143

Now, going back to these POSs, the Esso PSO that you're referring to. If I understand you correctly, you're saying that some of them have crane tickets?---That's correct, yes.

PN144

Now, you're not in a position to know, are you, how many Esso PSOs that are - - - ?---No, I'm not.

PN145

- - - available to work on any given platform at any given time have crane tickets?---No.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN146

Of course, these PSOs, they have their own work to do, don't they?---They would have their own work schedule.

PN147

They're pretty busy people, aren't they, Mr Trew?---Again, I'm not a PSO, I'm unaware of their day-to-day activities.

PN148

So at any given moment when, say, a crane lift needs to happen, you wouldn't be able to say, would you, whether there was a PSO available at that point in time, with a crane ticket, who could do the lift, on any particular platform?---No. As I say, I'm unaware who actually is the licenced ones, how many of them and their availability at that particular time.

PN149

Now, you refer to other crane operators - sorry, I withdraw that. You refer to other contractors having their own crane operators?---Yes, that's correct.

PN150

What these crane operators ordinarily do is that they provide lifts to that contractor?---Ordinarily. But in this workplace and this environment, they will, and everyone works together. So if it happens to be a lift for someone else, or a lift for Exxon, or a lift for another company, it can be carried out. There's no us and them in this workforce that we work in.

PN151

Mr Trew, you don't have copies of the contract between Esso and other contractors, do you?---No.

PN152

You don't know what the contractual arrangements are, between Esso and those contractors - - -

PN153

MS AKSU: Objection, Commissioner. I'm just wondering, a lot of these questions are matters beyond Mr Trew's knowledge, I'm just not sure if they're relevant or appropriate.

PN154

THE COMMISSIONER: Thank you. What do you say, Mr Ternovski?

PN155

MR TERNOVSKI: Well, perhaps if Mr Trew could be - could be excused for a moment.

PN156

THE COMMISSIONER: Yes. Mr Trew, I just don't want to lose connection with you again, but are you able to like leave and it's 11.58 now, is that the best way to do it, Jonas?

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN157

THE ASSOCIATE: Put him in the lobby.

PN158

THE COMMISSIONER: Mr Trew, if you just stay there for a moment, we'll put you in another room?---Yes, no problems.

<THE WITNESS WITHDREW

[11.10 AM]

PN159

THE COMMISSIONER: Okay.

PN160

MR TERNOVSKI: Thank you, Commissioner. Commissioner, the relevance of these questions is I'm trying to establish that Mr Trew, in a nutshell, just doesn't know what he's talking about. He's making assertions about alternative arrangements that could have been made but, in reality, he just doesn't have the information to be able to say that someone else could have done this job. That's the first point. The second point, of course, I want to make sure that I comply with my *Browne v Dunn* obligation so that they can later make a submission that he's not in a position to say these things, that there's no point is taken against me.

PN161

MR JONES: Commissioner, it's Mr Jones here. Can I just make a statement there of saying that Mr Trew doesn't know what he's talking about. I worked on the oil and gas platforms for 20 years myself and what Mr Trew was trying to get through to Mr Ternovski is that every company, service company out there will have crane drivers. The PSOs, yes, the question was asked about how many have crane tickets, how many - if there is a platform, which is what they call minimum man, which is 15 personnel or less, the PSO on that platform will have a crane ticket. The boat will come in, he will do that lift.

PN162

If there's, your Honour, a platform where there is a crane driver, or a PSO without a crane ticket, Esso have got crane drivers that they fly from platform to platform to do these lifts.

PN163

THE COMMISSIONER: Mr Jones. Mr Jones, thank you. I'm going to stop you there. Obviously if Ms Aksu wants to call you as a witness, that's something we can - the AWU can put forward and we can consider. But I think, Ms Aksu, did - I think - I understand why Mr Ternovski is asking the questions. Mr Trew is obviously speaking from his experience. Mr Ternovski has a right to understand what knowledge he has, in making those statements. Did you have anything else to say?

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN164

MS AKSU: Commissioner, I think Mr Jones was trying to explain the context as well. But, of course, I agree with what he said, which is we disagree completely that Mr Trew doesn't know what he's talking about. He's obviously an operational

expert in the field. I think he's trying to assist us, including Mr Ternovski, to understand the work environment, which I think is quite relevant in that sense, so his experience. But I guess my concern was the questions seemed to be focusing on matters that may be outside, for example, whether he understands a commercial contract is not really something, you know, he can be expected to know anyway, so I don't understand why those questions were being asked.

PN165

THE COMMISSIONER: I'm going to allow the questions, but noting that obviously I'm not taking Mr Trew's evidence as expert on contracts. His evidence will be taken as from his experience as someone with a longstanding understanding of the work practices.

PN166

MS AKSU: Thank you.

PN167

THE COMMISSIONER: Thank you, Mr Ternovski. I think we can bring Mr Trew back in.

<SHAUN PETER TREW, RECALLED

[11.14 AM]

CROSS-EXAMINATION BY MR TERNOVSKI, CONTINUING [11.14 AM]

PN168

THE COMMISSIONER: Thanks, Mr Trew. Mr Ternovski. You're on mute.

PN169

MR TERNOVSKI: Thank you, Commissioner.

PN170

Mr Trew, going back to the arrangements between Esso and other contractors, you wouldn't know, would you, whether Esso can contractually require other contractors to carry out crane lifting work that Superior was otherwise supposed to do, do you?---No.

PN171

You don't know to what extent, at any point in time, other contractors might have the resources to do that work, do you?---No.

PN172

You don't know how much they would charge Esso to do that work, for Superior, do you?---No. No.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN173

If you could just bear with me for one second, Mr Trew. Now I think, in your oral evidence this morning, you disagreed with the proposition that when SESA is on location on the platform there is no other - providing crane services, there is no other contractor or entity engaged to provide these services. Just to be clear, you're not saying, are you, that when SESA is on location providing services,

including crane services, that there is some other contractor engaged to provide the same services, to lift equipment that SESA needs for its works, are you?---I'm not saying they're primarily engaged to do it, but I'm not saying they haven't done it. As I say, it's a small work group out here. At the end of the day, the entirety of is work for ExxonMobil. The entirety of this work towards getting the end result for the client who pays all our bills. So people don't get to a point out here in the workplace who, in a very small group, don't pick and choose, 'I'm not lifting that', or 'That's mine'. This is a combined work group and we work with different parties all together as one. I don't think, as you mentioned before, where how much people would charge, no one is there ticking a box that, 'I did five lifts and you did four, so you owe us money'.

PN174

You're not - - -?---Yes.

PN175

You're not aware - you're not privy to the bills that might be rendered by contractors, to Esso, are you, Mr Trew?---No.

PN176

Now, you gave some evidence about the communications between SESA and the union and the workforce, in relation to the bans?---Yes.

PN177

If you just bear with me for a moment I can just get the date. It's the case, isn't it, Mr Trew, that on 24 November, which is some three days before Esso suspended Superior, Superior requested a suspension of the protected industrial action from the - from the AWU, but the AWU did not accede to that request?---The only known request I had for them, from them, was when we were due to meet for one of our EBA meetings to progress negotiations that it was an ultimatum that if we did not drop the bans they would not meet with us. Can I please be excused for just for a sec, someone's walked into the room. Sorry about that.

PN178

Are you back, Mr Trew, are you ready?---Yes, I am back.

PN179

Can I take you back to your statement, Mr Trew, in particular paragraph 18. So you refer to a number of employees being moved to work on rig 47?---Yes, that's correct. Yes.

PN180

Now, at that time rig 47 was located in the yard in Barook(?), wasn't it?---It was in the yard, yes, correct.

PN181

So it wasn't on a platform?---No. So personnel had been moved from a platform to the yard. So people who were on the shift.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN182

Mr Skeen's evidence is that the crew that worked on rig 47 was demobilised from rig 22, due to a COVID outbreak, you don't disagree with that, do you?---I can't agree - I do know there was COVID outbreaks, but I'm not sure whether it was the whole crew, part crew, some of. It was on a crew change day, so I'm not sure if it was the ones coming to or from.

PN183

The work that was being done on rig 47, in the yard, that work was to disassemble that rig for storage, wasn't it?---That's correct.

PN184

Mr Skeen's evidence is that this work, this disassembly work, was completed within two days. You don't disagree with that, do you?---I wasn't there, so I'm not sure how long it did take or did not take.

PN185

And his evidence is, further, that after that, those two days, there was no more work to be done on rig 47. Again, you're not in a position to disagree with that, are you?---I wasn't there.

PN186

If we go back to batch 1, where you say work continued, as I recall, you've agreed to the proposition, didn't you, that the work that continued on batch 1 was different from what SESA was doing before the commencement of the crane ban? I'll be more specific on that. In particular, they were capping well caps in preparation for removing - capping well head studs, in preparation for removing well heads?---That's correct. So that - it would have been same works but on a different schedule. So if they weren't doing it today, they had to do it tomorrow, they had to do it next week, they had to do it the week after, as they moved on to each well. So those work continued to keep the whole job and the target job moving forwards.

PN187

It was rejigged to do something else which was required down the track?---It was reshuffled, yes. It was reallocated. It wasn't additional works, it was works that was on the scope, but whether it was in the same order of merit, that's all that changed.

PN188

Mr Trew, can I take you now to paragraph 27 and 28 of your statement where you say, 'Crews were working for another company, plug and abandon works, and this was made up of a casual workforce', have you got that there?---Yes. Yes.

PN189

'Our full-time workers could have been mobilised at that facility and continue to work shift, six per shift, 12 in total'. Mr Trew, what you're referring there is work for Lochard Energy, aren't you?---Correct.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN190

Now, going to Lochard Energy, Mr Skeen's evidence is that the Lochard work was - bear with me for one second, I think I've got my date wrong in my notes. Yes, the Lochard project was expected to be completed by 21 December last year. You don't disagree with that, do you?---At the time I was led to believe, from the workforce down there. They had approximately three weeks work left down there.

PN191

When you say, 'At the time', Mr Trew, what date are you referring to?---At the time that members were - - -

PN192

At the time of the stand down?---Stand down.

PN193

So the stand down was on 28 November and Mr Skeen says, 'Work was expected to be completed by 21 December', that's consistent, isn't it?---Yes, that's correct.

PN194

Mr Skeen's evidence also is that the client, Lochard that is, had requested SESA to continue with the existing crew for the small period of time remaining on the project. Again, you're not privy to those communications, were you?---No.

PN195

His evidence also is that there was no vacancies with the existing crew in place finishing the work over the next three weeks, there were no vacancies, there. Again, you're not in a position to disagree with that?---No.

PN196

Can I take you to paragraph 30 of your statement?---Yes.

PN197

Where you refer to work at Berrys Beach Marine Terminal, that's (indistinct) dog house, isn't it?---That was the particular work, I believe that was carried out down there. There was a work scope, unrelated to the current well works we were doing, but there was - there was year to end other small work scopes that come up that Esso was finding work to get the guys back to work at.

PN198

Now, Mr Skeen's evidence is that Superior sent two employees there, you don't take issue with that, do you?---No.

PN199

And his evidence is, further, that other than those two employees there were no further vacancies there. Again, you don't disagree with that, do you?---No.

PN200

His evidence is, further, that there was only two days work there. Again, you don't disagree with that, do you?---No.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN201

Can I take you to paragraph 31, where you say, 'The small additional jobs are also starting to be offered by SESA'. Just to be clear, what you're referring to there is pump job on Barracuda, is one of those small jobs?---Yes.

PN202

The work on Berrys Beach that - - -?---Yes, we just discussed.

PN203

- - - we just discussed, and batch 1?---Yes, correct.

PN204

That's what you're talking about in paragraph 31?---Correct.

PN205

Now, Mr Skeen's evidence that the pump job at Barracuda involved four employees, over a period of 11 days, you don't disagree with that, do you?---I don't disagree, but I'm not privy to understand exactly how many were there, but I believe that would be fairly true and correct.

PN206

If you just bear with me one moment, Mr Trew, I just want to make sure I haven't forgotten anything. No further questions, Commissioner.

PN207

THE COMMISSIONER: Thank you. I have a few questions I want to ask, I'll then give, Mr Ternovski, if you need to address anything after I've asked questions, then back to you, Ms Aksu.

PN208

Thanks, Mr Trew, when you're referring to the email at ST2, you spoke before about how you said supervisors, you thought, were aware and Exxon employees were aware of this email. Can you give me some more details of why you say that?---It was clearly communicated and I believe it's even referenced on the email, to share that email with all parties, to hang it in all boot rooms, to discuss it and continue full, open communication with the Exxon representatives on board and it was displayed particularly, and given to our site supervisors and the direct staff of Superior Energy.

PN209

Okay. So do you say it was actually displayed?---Yes, I'm led to believe, to the best of my knowledge, that it was. I can vouch, 100 per cent, on the facility that I was working. The company representatives had it in hand. They actually asked permission to pull it on to their superintendents and also to the people who deal directly with SESA, at a contract level. They asked if it was okay to pass that email and I said, 'There's nothing to hide on that email, feel free'.

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN210

Okay. Thank you. In relation to you talked about the maintenance list, and you indicated you say that it was not just SESA work it was Esso work as well, so how

did you know that?---From direct and open communications with the company man. We had - - -

PN211

Just for my - when you say 'company man', what do you mean?---He's the direct liaison officer for ExxonMobil back to Exxon town. So he's an Esso employee, or contractor, as such, who is basically the foreman, the boss, the overall supervisor of the well works on board, in each of the facilities. So they're a company representative and it was through direct communication, myself with the Esso representative company man, who said to me that we had works and that, and the like.

PN212

So what did he say?---He basically told me, 'We have enough work to keep you guys busy'.

PN213

When did he say that?---I can't recall the exact date, but it was after the implementation of the bans, prior to the stand down. So in that timeframe there somewhere, whilst I was still on board on the rig.

PN214

Thank you. What are Esso's options, if they don't want to use Superior?---Currently, at the moment, short-term, I don't believe there'd be anything, at the moment, in country, to carry out the works, as an immediate. It would have to be a long-term contractual agreement, or something, to employ another workforce at the moment. Like it would - it would have to be, I believe, not seeing the agreement, so it would be a very large thing. It's not like a normal job that we carry out, out there, it's a specialist job. There's only a certain amount and equipment in the country. Yes, I wouldn't think that it's someone that you can stop Superior today and start someone tomorrow. We did have a change of company with one of the other, I guess, third party people, who we worked directly with, on a daily basis, who carry out the wire line, so they're a direct part of our operation, and to change those companies from Halliburton, across to Baker Hughes, probably took around 18 months and extension to the contract, just to get equipment, and they are a company that has very small amounts of equipment and personnel, into the country to be able to perform it and it was basically a shirt change from the employees, but it still took 18 months for the actual company to swap over.

PN215

Okay. I think that's - they're the questions I had. Mr Ternovski, was there anything coming out of that that you wanted to have any follow up questions?

PN216

MR TERNOVSKI: No. No, Commissioner, thank you.

PN217

THE COMMISSIONER: Thank you. Ms Aksu?

*** SHAUN PETER TREW

XXN MR TERNOVSKI

PN218

MS AKSU: Commissioner, if I may just ask one question.

RE-EXAMINATION BY MS AKSU

[11.34 AM]

PN219

MS AKSU: Mr Trew, do you recall the email that was referred to, or the correspondence, from Superior Energy's representatives, which was on 24 November, where there was a request made to the AWU to temporarily suspend all protected industrial action. Do you recall that correspondence?---I do recall correspondence to that. To the best of my ability, at this moment, that correspondence directly related to continuing negotiations, and that was an ultimatum.

PN220

Yes. Thank you. So that request, or whatever, ultimatum, did it refer to any specific protected industrial action that the company was seeking for the union to suspend? Was a particular ban mentioned or was it just all protected industrial action that's on foot?---As I don't have it in hand, to the best of my knowledge, without looking up, I believe it was to drop all industrial bans. So each ban that had been implemented to be all dropped.

PN221

But there was no mention, specifically, of this crane ban that's been referred to, is that right?---Never to my - never to my knowledge, it was always a drop of all bans.

PN222

THE COMMISSIONER: Ms Aksu, if you have an email, we can - I know it's difficult over Teams, but we can share the screen, if you would like Mr Trew - if you want to submit it to evidence.

PN223

MS AKSU: I would like to, Commissioner, submit it to evidence, but I'm not quite sure how to do that. I could forward the email, or I could share it. What's easier?

PN224

THE COMMISSIONER: I think if you emailed it to Chambers and to Mr Ternovski, in the first instance.

PN225

MS AKSU: Yes.

PN226

THE COMMISSIONER: Then we can share it on screen.

PN227

MS AKSU: Okay. Thank you. I'll be one moment.

*** SHAUN PETER TREW

RXN MS AKSU

PN228

THE COMMISSIONER: Subject to any objections Mr Ternovski may have.

PN229

MS AKSU: I may just need the email address of Mr Ternovski to do that. I've just forwarded - - -

PN230

THE COMMISSIONER: (Indistinct) email, Mr Ternovski.

PN231

MR TERNOVSKI: I'm sorry, Commissioner, I didn't catch that.

PN232

THE COMMISSIONER: Best email, if we're sending something through to you.

PN233

MR TERNOVSKI: Yes. It's the letter d@ternovski.com.

PN234

THE COMMISSIONER: d@ternovski.com?

PN235

MR TERNOVSKI: Yes. Thank you.

PN236

THE COMMISSIONER: Just forward that email. I think that's just in transit at the moment. Mr Ternovski, has that come through for you?

PN237

MR TERNOVSKI: Not yet, no. I'll - - -

PN238

THE ASSOCIATE: I think it should be T-e-r-n-o-v-s-k-i, not M. I think Ms Aksu might have sent it to the wrong address.

PN239

MS AKSU: Okay. Sorry, I'll try again. Sorry, can I just get that email again, please? d@tem - - -

PN240

THE COMMISSIONER: T-e-r-n-o-v-s - - -

PN241

MR TERNOVSKI: I can put it in the chat, if that helps.

PN242

MS AKSU: I've just forwarded it. That's the first one, there's actually two emails. Has that come through now?

*** SHAUN PETER TREW

RXN MS AKSU

PN243

MR TERNOVSKI: Something has come. I've got an email from you, Ms Aksu, forwarding the notice of listing and the orders, on 5 October.

PN244

MS AKSU: Okay. I'm sorry, Commissioner, would it be easier if I do put it on the screen and then I'll just supply it separately, would that just save time?

PN245

THE COMMISSIONER: Well, I'll ask - we might put Mr Trew in - Mr Trew, we're just going to put you into the waiting room again?---Okay. That's fine. Thank you.

<THE WITNESS WITHDREW

[11.40 AM]

PN246

THE COMMISSIONER: We won't be a moment.

PN247

MS AKSU: Sorry. Thank you.

PN248

THE COMMISSIONER: Thank you.

PN249

MS AKSU: Sorry. Okay. I can try and send these again, apologies.

PN250

THE COMMISSIONER: Mr Trew's in the waiting room now, if you want to share it on screen.

PN251

MS AKSU: Maybe that's easier, if I do share it on the screen. I'm not sure if you can see this email. So this is the first email, Commissioner, and I'll try and send that again. Can I just forward this again, does that help? So there are two emails, one is at 7.52 am, on 24 November, that's this first one, that's correct, and I'll resend that, apologies. Then there is a second email, which is the one that I was trying to send, which is at 2.52 pm on the same date, Commissioner. I hope that I have not confused anyone. So apologies for that.

PN252

So, basically, Commissioner, these are the two emails that I would like to, if we can, include.

PN253

THE COMMISSIONER: Okay. Mr Ternovski, do you need a few minutes, or are you - do you have any objections?

PN254

MR TERNOVSKI: No. No objections.

*** SHAUN PETER TREW

RXN MS AKSU

PN255

THE COMMISSIONER: Okay. Thank you. Well, I think what we'll do - sorry, we're just trying to do a workaround, being on Teams, but if you continue to share your screen and show - will Mr Trew - Mr Trew has seen these emails?---He's been copied into these, Commissioner, so he'd be aware of them.

PN256

Okay. I think if you just show those and ask him to identify them and we can - then they can be tendered.

PN257

MS AKSU: Thank you.

PN258

THE COMMISSIONER: We might bring Mr Trew back.

<SHAUN PETER TREW, RECALLED [11.43 AM]

FURTHER CROSS-EXAMINATION BY MS AKSU [11.43 AM]

PN259

THE COMMISSIONER: Thanks, Mr Trew?---Thank you.

PN260

There we go.

PN261

MS AKSU: Thank you.

PN262

THE COMMISSIONER: So, Mr Trew, before - now I might get you to try your camera again. There we go. Before you went into the waiting room we were discussing two documents. We now - are you able to see, we should have those up on screen now. I'll hand over to Ms Aksu.

PN263

MS AKSU: Thank you, Commissioner. Mr Trew, can you see the email that I've put up on the screen? This was the 24 November email, do you - can you see the email?

PN264

THE COMMISSIONER: Sorry, you're on mute. Sorry, Mr Trew.

PN265

MS AKSU: You're on mute?---Yes, I am struggling to read that, (indistinct) though.

PN266

MR TERNOVSKI: I'm sorry, I couldn't hear that, Commissioner.

*** SHAUN PETER TREW

FXXN MS AKSU

PN267

THE WITNESS: I do have the email in front of me. As I said, I'm just struggling to read it, with the font size on the device I'm on.

PN268

MS AKSU: So this email basically was from the representative of SESA, requesting that the union temporarily suspend all protected industrial action, and you were copied in on that email, Mr Trew, do you remember that email?---Yes.

PN269

Can you confirm that that doesn't actually mention any particular ban, it just talks about all protected industrial action?---That's correct, as per my statement. It was my recollection that all bans be dropped.

PN270

Thank you. That was sent around 7.52 am, on 24 November and then, I believe, there was a further email that was sent, that was sent at about, in the afternoon - sorry. This was the other email that was sent, at 2.52 pm, on 24 November. Do you see or read that email?---Yes, I do recall that one. It seems to confirm that - -
-

PN271

Yes, you were copied into that email as well?---That's correct.

PN272

THE COMMISSIONER: Mr Trew, you're very faint. I don't know if the microphone - - -?---Sorry.

PN273

That's better, thank you?---Yes.

PN274

MS AKSU: So do you recall seeing this email as well, Mr Trew, where you were copied in and there's, again, a request here that there be a temporary suspension of all current PIA?---Yes, I do recall that. Yes.

PN275

So can you confirm that there was nothing mentioned, in particular, about the so-called crane ban, number 6?---At no time was an individual ban ever mentioned. It was always the entirety of the bans that were in place.

PN276

Thank you. Commissioner, I think that's everything, unless you had any questions.

PN277

THE COMMISSIONER: So you were seeking to tender those two documents?

PN278

MS AKSU: Yes. Thank you.

*** SHAUN PETER TREW

FXNX MS AKSU

PN279

THE COMMISSIONER: Yes. Thank you. I'll mark the emails dated - the first one is what time, there we go, 12/02/2024 at 12.31 pm, as AWU2, and the second one, I'll just get you to bring up, Ms Aksu. Dated 12/02/2024 at -

PN280

MR TERNOVSKI: I believe they're both dated the 24th - - -

PN281

MS AKSU: That's today's date, Commissioner. Yes, and I've just tried to forward - - -

PN282

THE COMMISSIONER: Sorry, where are we. 24 November 2023, at 2.52 pm AWU3. Sorry, I'm just going to get you to jump back to the first email so I can record that properly.

PN283

MS AKSU: I'll just open the first email. So this was the first email.

PN284

THE COMMISSIONER: There we go. Friday, 24 November 2023 at 7.52 am will be marked AWU 2.

EXHIBIT #AWU 2 EMAIL DATED 24/11/2023 AT 7.52 AM

EXHIBIT #AWU 3 EMAILE DATED 24/11/2023 AT 2.52 PM

PN285

Thank you.

PN286

MS AKSU: Thank you, Commissioner, I think that's everything from - - -

PN287

THE COMMISSIONER: No further questions from you?

PN288

MS AKSU: No further questions.

PN289

THE COMMISSIONER: Thank you. I'll get you to stop sharing your screen and thank you, Mr Trew, you're now able to step down from witness evidence and go about your day. Thank you for your time?---Thank you.

<THE WITNESS WITHDREW

[11.49 AM]

PN290

THE COMMISSIONER: Is Mr Trew saying as part of the hearing, Ms Aksu?

*** SHAUN PETER TREW

FXXN MS AKSU

PN291

MS AKSU: I'm not certain of that, Commissioner. I think if he's available he may just listen in, otherwise - if he's called to work he'll probably return to work.

PN292

THE COMMISSIONER: Okay. Thank you.

PN293

MR TREW: At this moment I'm able to say but, as I say, if things change, I may have to leave.

PN294

THE COMMISSIONER: Thank you. Okay. Thanks, Mr Trew.

PN295

Mr Ternovski, look - so it's 12.39 now, I'm happy to proceed with opening statement and witness evidence, or, alternatively, we could take a short lunch break now and come back. Do you have a particular view?

PN296

MR TERNOVSKI: I would like to have a short break of some - I'd like to have an opportunity to find out what the position is, with the contract. However, I can probably do that over lunch. But perhaps the convenient course might be if I open and then we take the break for lunch and then I can find out what the position is about the contract, because that will form a part of Mr Skeen's evidence.

PN297

THE COMMISSIONER: Yes. Thank you. I think that that makes sense. Thank you.

PN298

MR TERNOVSKI: Thank you, Commissioner. Of course we rely on our written submission, which covers what we say the facts are and the legal issues, in some detail. But perhaps I just want to outline, orally, our case in a nutshell.

PN299

SESA provides services to the client, Esso, on the offshore platform. A critical component of those services is crane lifting and that's because crane lifting is required to move equipment on and off the platforms, to move equipment around the platforms and to use equipment in and out of the well.

PN300

The union's moves for protected industrial action include, at item 6, the crane ban. Our case is simply that the way in which the crane ban was implemented, being that the crane operators refuse to lift third party equipment, that is, the equipment owned by third parties, meant that at some point, after - the crane ban commenced on 16 November and by 22 and 23 November the usual work had ground to a halt because on each of the platform a critical item needed to continue the standard works couldn't be lifted.

PN301

Workers then did maintenance work for about a week, and you've seen there's a dispute on the evidence about whether that was limited to Superior work, to Superior equipment or whether, as Mr Trew says, it covered work on Esso's equipment as well. But, ultimately, we say it doesn't really matter. After about a week it got to a point where Esso was not prepared to continue to have SESA crews on the platform performing that sort of work.

PN302

On 27 November Esso gave notice that it is suspending SESA's services and asks SESA personnel to be taken off the site, with some exceptions, in particular personnel was allowed to stay on batch 1 and work some work, different work, not the same work, but some work continued there.

PN303

The upshot of that, the legal upshot of that, I will be submitting, is that the requirements for a stand down are satisfied, under section 524(1) of the Fair Work Act or, alternatively, under clause 9(e) of the enterprise agreement, it doesn't really matter which one. Because there was stoppage of work employees could not be usefully employed and that stoppage was not due to a cause for which SESA can be held reasonably responsible.

PN304

Now, one point I wish to flag, at the outset, and I'm going to develop that further in closing submissions, is that there is a bit of evidence, in the written submissions, and there has been evidence orally in cross-examination, on the question of what else Esso could have done.

PN305

But the point I will be making, in closing, that I wish to flag now, is that, ultimately, we don't have to justify Esso's decision. Esso's decision is what it is. It's Esso's decision that caused a stoppage of work. Whether Esso was right or wrong is, ultimately, neither here nor there. The question for you, Commissioner, is, was there a stoppage of work or could employees have been usefully employed and was there something else that - can SESA be held reasonably responsible or Esso's decision. Those are the questions.

PN306

The last point I wish to raise is one of remedy. Of course the application, as original framed, and I can take you to that, that's on page 6 of the court book, if you look, under 3.1, did not seek any monetary remedy. Rather, they effectively sought withdrawal of the stand down, consultation or, in the alternative, retrenchment. Now, all of those remedies have, of course, fallen by the wayside after what happened on 15 November, with the industrial action being lifted and work resuming. I understand what we're here today is a monetary - is the union seeking a monetary remedy.

PN307

Now, I'm not trying to make some kind of late objection to the union expanding its application. It is what it is and that was flagged at the last hearing. But the point I simply wish to flag is, of course, this Commission is not a Chapter 3 court and there are limits to what it can do, in respect of a monetary remedy in

exercising its jurisdiction in this proceeding. One thing it cannot do is order anything in the nature of compensation. I'll address you further on that, in my closing submissions.

PN308

That's all I wish to say, by way of opening.

PN309

THE COMMISSIONER: Thank you. I note the time now is 12.46. I intend to adjourn till 1.46, sorry, 1.45, to give the parties an opportunity to have lunch and Mr Ternovski to receive an update on the issue regarding schedule C. Any matters before I adjourn? No. Thank you. I'll now adjourn.

LUNCHEON ADJOURNMENT

[11.58 AM]

RESUMED

[1.45 PM]

PN310

THE COMMISSIONER: Thank you, parties. Over the break I've received an email from the respondent with schedule C, I think, minus the attachments. Mr Ternovski, was the plan that you would tender that as part of Mr Skeen's evidence?

PN311

MR TERNOVSKI: Yes. And if it's convenient, I was purporting to show him the first page on the screen and then otherwise tender the document that's been emailed subject, of course, to any objection.

PN312

THE COMMISSIONER: Yes. Thank you. We can do that. Okay, I'll hand over to you Mr Ternovski.

PN313

MR TERNOVSKI: I call Mr Skeen.

PN314

THE COMMISSIONER: Thank you, Mr Skeen. Mr Skeen, we're now going to swear you in, so if you can just listen to my associate.

PN315

THE ASSOCIATE: Thank you, Commissioner. Mr Skeen, could you please state your full name and address, for the record?

PN316

MR SKEEN: Matthew Skeen (address supplied).

<MATTHEW SKEEN, AFFIRMED

[1.47 PM]

EXAMINATION-IN-CHIEF BY MR TERNOVSKI

[1.47 PM]

*** MATTHEW SKEEN

XN MR TERNOVSKI

PN317

MR TERNOVSKI: Mr Skeen, would you just repeat your full name and address, for the record?---Matthew Skeen (address supplied).

PN318

Mr Skeen, you've made a witness statement in this matter?---Yes, I have.

PN319

Have you got a copy of the court book there?---I have.

PN320

If you turn to page 71?---I'm at page 71.

PN321

Is that the witness statement, Mr Skeen?---Yes, it is.

PN322

And it's got 43 paragraphs and five attachments?---That's correct.

PN323

Have you had a chance to read it recently?---Yes, I have.

PN324

Are the contents true and correct?---Yes, they are.

PN325

I tender that statement.

PN326

THE COMMISSIONER: Thank you. I'll mark that statement, with the attachments, SESA 1.

EXHIBIT #SESA 1 WITNESS STATEMENT OF MATTHEW SKEEN

PN327

MR TERNOVSKI: Mr Skeen, I'm just going to show you a document on the screen, if you bear with me. If we go back one step. Mr Skeen, in your witness statement you attach extracts from the contract between SESA and Esso?---Yes, I did.

PN328

I'm just going to show you a document on the screen. Can you see that, Mr Skeen?---Yes, I can.

PN329

Is that schedule C to that contract?---Yes, it is.

PN330

I tender that document. This is the document that's been emailed to the Commission, Commissioner.

*** MATTHEW SKEEN

XN MR TERNOVSKI

PN331

THE COMMISSIONER: Yes, thank you. I'll mark that document SESA 2.

EXHIBIT #SESA 2 SCHEDULE C TO CONTRACT

PN332

MR TERNOVSKI: Commissioner, I propose to ask Mr Skeen a few additional questions, by way of update and also arising out of what's transpired this morning.

PN333

THE COMMISSIONER: Thank you.

PN334

MR TERNOVSKI: Mr Skeen, following the hearing of the Commission, on 15 December, what happened with the industrial action?---Can I just refer to my notes, please?

PN335

I think I can ask the question in a simpler way, Mr Skeen?---Yes. Sorry.

PN336

Did the industrial action continue, following the hearing on 15 December?---The industrial action concluded the day after.

PN337

And what communications, if any, have you had with Esso, in relation to the conclusion of the industrial action?---I've been in contact with the representative at Esso, letting him know that there'd been agreement between the AWU and ourselves to finish the protected action and arrangements were made, shortly after, to commence getting people back to work as soon as Saturday the 16th.

PN338

What was the response, if any, did you receive from that representative of Esso, when you told them that the industrial action was going to come to an end?---They were accepting that work could continue as normal.

PN339

During the receipt of that confirmation, what happened to the stand down?---The stand down was finished.

PN340

Was that communicated to the workers in any way?---Yes, it was. There was an email that went out the afternoon of the 15th, notifying all employees that that had happened.

PN341

And did work, in fact, resume?---Yes, it did. As of the 16h we began mobilising personnel back offshore, to location, and continue on until crew change on the Tuesday. Personnel were contacted individually, those that had applied for leave, and to confirm their - they were okay to go back to work straightaway.

*** MATTHEW SKEEN

XN MR TERNOVSKI

PN342

Mr Skeen, can I now take you back to the time before the industrial action, so a time of normal operations on the platforms.

PN343

THE COMMISSIONER: Mr Ternovski, can I ask, I know you may have some questions regarding schedule C, but while you're sharing the screen it's having some impact on my visibility on - - -

PN344

MR TERNOVSKI: No, no. Thank you, Commissioner.

PN345

THE COMMISSIONER: Maybe you can stop sharing until we - until we come back to it.

PN346

MR TERNOVSKI: Yes. I have no questions on schedule C, I just forgot to turn it off. Thank you for reminding me.

PN347

THE COMMISSIONER: Okay. There we go. Thank you.

PN348

MR TERNOVSKI: Mr Skeen, can I take you to the time of normal operations before the industrial action, in late last year? I'm just asking generally about how things run normally on the platform?---Sure. Sorry.

PN349

Perhaps if you let me ask my question. Mr Skeen, what happens if a crane operator who is rostered on a shift, calls in sick and is unable to work, due to being sick?---We make arrangements to fill that position within our - either our permanent crane drivers or casual pool.

PN350

Does it ever happen that you cannot bring in somebody else, from your workforce, to fill that gap?---None that comes to mind straightaway. There may be small absences or gaps, but they're very minimalised.

PN351

When you say 'small absences or gaps that are very minimised', how long are you talking about?---Maybe half a shift to one shift.

PN352

Can I take you back to the court book, Mr Skeen and, in particular, page 56 of the court book?---Yes.

PN353

You see that's an email - that's an email from Mr Trew to you, on - dated 28 November at 10.10 am?---Yes.

*** MATTHEW SKEEN

XN MR TERNOVSKI

PN354

Mr Skeen, have you ever responded to that email?---No, I haven't.

PN355

Why not?---The day of the 28th we had quite a bit going on in the office and following that there was no real point.

PN356

Sorry, following what, Mr Skeen?---Following the notification that we've sent out on the 28th. That answered the questions that that email was asking.

PN357

Are you referring to the stand down notification, Mr Skeen?---Yes, I am.

PN358

Mr Skeen, as far as you're aware, to what extent are Esso platform services officers, or PSOs, able to perform crane lifts that SESA is contracted to perform?---That would vary between individuals, as some of the platform service officers, I understand, have partial certification, being either deck lifts or full boat lifts, and some of them are in training, and some of them do not have a crane ticket at all.

PN359

Is it part of their usual duties, as far as you know, to perform the crane lifts that SESA is contracted to perform?---Not on our equipment or campaigned on the platforms.

PN360

To what extent as far as you know are other contractors present on the platforms, as in contractors other than Superior able to perform crane lifts that SESA was contracted to perform?---I am unsure of that due to we do not manage other people's personnel but different contractors do have crane drivers, I am unaware of who they are.

PN361

Now, before the stand down notice was issued on 28 November, did SESA ever warn the AWU or the workforce that there would be a stand down unless the crane ban was lifted?---No, there was no warning, but we did request the AWU lifted – lift the protected action.

PN362

Why was not there a specific warning?---We had not planned to stand down anyone due to the industrial action.

PN363

So why did you?---It was a result of our client releasing us.

*** MATTHEW SKEEN

XN MR TERNOVSKI

PN364

Can I take you to paragraph 43 of your statement which is on page 77 of the court book where you there refer to rig repair works being performed on SESA's

equipment on the platform? So perhaps I will let you read the paragraph?---In response to paragraphs 32 and 33 of the - - -

PN365

Yes, that's it there?--- - - - true statement?

PN366

That's the one?---

PN367

Once the core operations on the project could not proceed, see paragraph 20 above, some employees perform rig repair works on SESA's - SESA's equipment on the platforms. This list had been created for that purpose, however, Esso subsequently decided to suspend the projects and required personnel to be moved off the platforms. See paragraph 24 above.

PN368

(Indistinct) now, I just want to ask you a few questions about that (indistinct) paragraph. Firstly, you refer there to rig repair work being done on SESA's equipment. Are you aware of any repair or maintenance work being done on Esso's equipment?---Not that I am aware of.

PN369

When did employees start performing this rig repair work that you refer to in paragraph 43?---Rig 22 was the 22 November and HWT was the 23 November.

PN370

And when did they stop performing that maintenance work?---On 28 November when we moved them from offshore to onshore.

PN371

And I am not asking you to quantify it in any particular unit but can you give an indication of how much maintenance work was done during the period?---There was some maintenance and servicing done. The normal – the normal amount that usually gets done, there was some painting done and – on chipping.

PN372

What were the shift arrangements for the – when that maintenance work was performed? How many hours a day was it done?---Twenty-four hours a day.

PN373

Could the employees have continued performing that maintenance work after the 28 November?---There's always something to do on the rig packages. It was – it was a (indistinct) we'd – we'd completed our servicing and were ready to continue work.

PN374

So why did not that maintenance work continue after the 20th?---We'd been – SESA had been requested to move personnel off the platform.

*** MATTHEW SKEEN

XN MR TERNOVSKI

PN375

Now, you mentioned - - -

PN376

THE COMMISSIONER: Sorry, just so for my clarity. So with SESA's equipment, it has to be done off shore. It's not that it could be done on shore. Is that correct?---No, well, all the rigs are put together off shore and we cannot move them back in.

PN377

So the equipment is off – the equipment in terms of – that was potentially need maintenance, that was on the platform?---Yes, that's correct, Commissioner.

PN378

Yes, yes. Okay. Thank you.

PN379

MR TERNOVSKI: Now, you mentioning that maintenance work being done on HWT 600 and rig 22. What work was then continued on batch 1 after the 22, 23 of November?---There's a change of scope in the work that could not continue with the wire line well operations so there was an alternative work scope provided to cut studs and remove well heads.

PN380

And how long did that work continue?---It was estimated to continue for another week to 10 days.

PN381

And did it?---Yes, it did.

PN382

Following the – did that work finish before or after the end of the stand down ?---It continued on in some fashion with – we additionally moved some people across to West Kingfish to do some work out of there and the tree removal continued on.

PN383

You say it continued on. Are you referring to batch 1?---Yes.

PN384

All right. And when you say it continued on is it – did it continue on beyond the end of the stand down ? Are you – or are you saying it's wrapped up before the end of the stand down ?---?---No, it continued on.

PN385

You said that normal work, this was alternative work being done on batch 1? Why was normal work not continued?---IK Hughes had their pressure control equipment rigged up and their lubricator for the wire line phase of the operation. And it was refused to lay down that equipment.

*** MATTHEW SKEEN

XN MR TERNOVSKI

PN386

And what was the – what were the practical consequences of that?---It was still rigged up on a well – on Kingfish 8.

PN387

And what does that – how does that impact the continuation of the work?---Without removing the lubricator and the pressure control equipment, they could not move across to another well.

PN388

I have got no further question, Mr Skeen but stay on the line and Ms Aksu might have some questions for you.

PN389

THE COMMISSIONER: Thank you. Ms Aksu, did you need to – I know you and Mr Jones and Mr Trew are not there with you. Did you need to seek instructions on any of the things arising out of those questions before you question Mr Skeen?

PN390

MS AKSU: Commissioner, it may be helpful just to have a five minute separate room if that's possible?

PN391

THE COMMISSIONER: Yes, thank you. We will give you – we will have a five minute adjournment where we can put you in a separate room, Mr Associate. Thank you.

PN392

THE ASSOCIATE: I will just place you and your clients in a separate room. You should be moved shortly.

<THE WITNESS WITHDREW [2.05 PM]

SHORT ADJOURNMENT [2.05 PM]

RESUMED [2.06 PM]

PN393

THE COMMISSIONER: The parties, and thank you, Mr Skeen. I will now hand over to Ms Aksu for any questions.

PN394

MS AKSU: Thank you, Commissioner.

<MATTHEW SKEEN, RECALLED [2.06 PM]

CROSS-EXAMINATION BY MR SKEEN [2.06 PM]

*** MATTHEW SKEEN

XXN MR SKEEN

PN395

MS AKSU: Mr Skeen, I refer you to Clause – page 42 of the court book. I will just make sure you can see that, so this is on the bottom of page 42 of the court book. You will see there that there's an email that is dated 27 November at 10.29 am in which that was an email sent to you from Esso's wells operation superintendent. Have you got that in front of you?---Yes, I have.

PN396

And I do not know if you need a few moments just to read that or are you familiar with what that said?---Yes.

PN397

Okay. So in that email to summarise, we understand that it's referring to the collaborative nature in which the parties – the company and SESA or Esso and SESA appear to have worked through the industrial action that commenced on the 16 November and then it refers to approaching day 12 of the industrial action. And then I think further in that email, it says that you know,

PN398

As day 12 is approached, no longer able to conduct meaningful work, et cetera

PN399

And then it says,

PN400

From the 28th November onwards, limited individuals will be needed.

PN401

So I have just summarised that. So you were in discussion almost daily with Esso about the industrial action. Is that correct?---Yes, that's correct.

PN402

And at that stage, that was at least 12 days of collaborating. Is that correct?---The collaboration was to continue to keep people at work for those - - -

PN403

But at that stage, it was 12 days where you have been engaging with Esso about the industrial action that was taking place?---It was not about the industrial action. It was – it was to continue on with – with the work that was going on out there.

PN404

Okay. So during that 12 days, there was enterprise agreement negotiations underway with the union? Yes? Is that right?---Yes.

PN405

There was - - -?---Yes, that's correct.

*** MATTHEW SKEEN

XXN MR SKEEN

PN406

Yes? So prior to that email at 10.29 am, did the client – did Esso at any time say anything to suggest they may have to shut down some of their operation?---Not that I can recall.

PN407

And do you think there was a risk that that could occur?---I would assume so, considering we were not doing what our client was paying us to do.

PN408

Did the client state which particular ban was impacting operations?---Not specifically.

PN409

So did you ask them that question?---No.

PN410

No. Did you – and you did not – did you raise the possibility of a stand down because of any of the industrial action at any time with the union?---We requested that the protected action be lifted.

PN411

But did you request – did you raise the possibility that if there was no – if there was no change to the industrial action that was on foot at the time, that there was a possibility that work or operations may have to cease?---No.

PN412

No? And sorry, Commissioner? Oh, okay. Sorry, I will continue. If I just refer you back to page 42 of the court book, so if you go above that there's – this is AWU4, attachment AWU4, so the top of that email that we just spoke about?---Yes.

PN413

That's the email that you sent, it appears to be a reply to the Esso Group representative you were talking with and that's – that was sent at 3.46 pm on November 27. Have you got that email in front of you?---I have.

PN414

Okay. Now, you have sent that email at 3.46 pm after the company, so already made its decision to reduce the workforce numbers. Is that correct?---We'd had a plan.

PN415

And that's – and that plan set out the number of staff, the company had decided it would keep on?---Yes.

PN416

And presumably then or consequently, that would have included staff numbers, you would have stood down?---The plan was for the staff positions to monitor the well and continue to look after the equipment.

*** MATTHEW SKEEN

XXN MR SKEEN

PN417

And between the – before you sent that email at 3.46 pm on 27th or even before standing your employees down on the 28th the next day, you did not consult with staff or the union about any of the – of the possibility of a stand down?---Well, putting plans together or continuing discussions with our client and it was not until the 28th that the decision had been made to bring those people in.

PN418

So and that consultation did not involve any of your staff or the union at all?---No, it did not.

PN419

Just refer you now to page 56 of the court book. You can turn to page 56 and yes, now that's the attachment to Mr Trew's statement, ST4, and I think there may have been some reference to this previously as well. And you received this email before the workforce was stood down, is that correct?---Yes.

PN420

Yes, and you did not respond to that email?---No, I did not.

PN421

I will just now go to page 71 of the court book. Actually, I will just withdraw that. If I could just get you to turn to page 110 of the court book – okay. So, just to confirm. This appendix B that you have attached to your statement which is entitled MS5, this provides that at least there need to be minimum staff or personnel on the site at any one time. Is that correct?---It's not minimum requirements, a personnel requirements.

PN422

But could there be more or less than this amount that's here? But the total there, it says, 14 personnel?---It is a crew compliment for 24 hour operations.

PN423

Yes?---There could be more.

PN424

Okay. According to this, yes, there's at least 14 personnel and at least two of those need to be crane operators. Is that correct?---Yes.

PN425

I will now just refer you going back to your witness statement, the court book on page 73?---Yes.

PN426

Okay, so at paragraph 18, you say cranes are part of a platform infrastructure. One of SESA's four responsibilities is to provide personnel to operate cranes on the platforms. So you say crane operations is one of the company's core responsibilities. But there are other responsibilities the company has, does not it?---Yes, that's correct.

*** MATTHEW SKEEN

XXN MR SKEEN

PN427

Yes. So it's not just crane operations or exclusively crane operations?---No, it's not.

PN428

To your knowledge, is there anything – I withdraw that. I will come back to that. But in paragraph 19 of your statement, you say that SESA supervisors began to tell you that crane operators were refusing to lift equipment and that was interrupting core operations and hampering progress. Have you got that in front of you?---That is correct.

PN429

But this was an interruption, is that correct? Otherwise work was continuing, was not it?---We could not continue on with EL program that clients expected.

PN430

But well works were continuing were not they?---On rig 22, we could not lift the bottom hole or assembly up to run in the hole on the HWT, we could not remove the riser to skid out of the way and remove that from the well. And on batch 1, we could not remove the IK Hughes pressure control equipment and lubricator.

PN431

And are you saying that this was because of the ban on crane operations?---Yes.

PN432

And so until I think you say in your statement, at paragraph 20, at least up until 22 of November, operations were proceeding as normal. Is that correct?---Yes.

PN433

So if the crane ban was not in place, it would not have come to the point of operations ceasing? Is that correct?---I cannot answer that question.

PN434

So if the crane ban was not in place, could work just have continued?---I would only be assuming so.

PN435

I will refer you to paragraph 21 of your statement, where you say that on 24 November 2023, SESA requested a temporary suspension of all protected industrial action from the AWU. Now, I – that – do you recall that request that the company made to the union?---Yes, I do.

PN436

And do you recall whether that communication made any specific request in terms of any specific protected industrial action that was happening at the time?---I cannot recall specifically what was on the email.

PN437

So do you recall whether the company specifically requested that the ban in relation to crane operations be lifted?---I cannot specifically remember.

*** MATTHEW SKEEN

XXN MR SKEEN

PN438

Do you remember if – I think you have – might have answered this. But I will just – I will withdraw that. So in – do you recall whether before the employees were stood down or before your email of 22 of – sorry – before the 24 November correspondence, was there ever a mention that some core operations of the company might be affected and might have to cease?---We'd adjusted the EL work on the platform up until that stage and from that stage, where we could not continue on with the program, we found the alternate duties and continued on with those.

PN439

But that was before your email exchange with Esso on 27 November?---Yes, that's correct.

PN440

I refer you now to page 74 of the court book and paragraph 26 of your statement where you say that it was – it was costing about \$84,000 in lost revenue. Each day that the stand down was taking place. Have you seen that paragraph 26?---Yes, I can.

PN441

So presumably, then SESA would try to avoid standing down employees?---That's correct.

PN442

And so it's not in SESA's interest to stand down employees?---No, it's not.

PN443

So could you have simply requested the unions – the union or the employees to withdraw the crane ban?---We did request the removal of the protected action.

PN444

But did you – but if you had – could you have requested that they withdraw the crane ban?---I am not sure.

PN445

Well, do you think if you had raised this concern about the crane ban with the union or employees, and told them that there was a risk that they might be stood down because of the client's decision, that they may have modified some of their actions?---I will go back to the 24th where we – sorry – back to where we did request that protected action which crane driving was one of those six items to be removed.

PN446

What I put to you, Mr Skeen, is that that list of – the protected industrial action as a whole was not specifically requested or asked to be modified in that correspondence. I will just move on, I think, from that, to page 75 of the court book, Mr Skeen, and paragraph 27 of your statement where you say, 'I did not encourage Esso to make the decision to suspend the projects'?---Yes.

*** MATTHEW SKEEN

XXN MR SKEEN

PN447

Yes. So you – you say you did not encourage them but did you try and discourage them?---Of course we did. We – as you just pointed out, the company was losing close to \$84,000 a day, once this had happened. So it was in our best interest to discourage for the personnel and for the company.

PN448

But did not you just say that you just said that on the 24 November, is when you – there was a correspondence – communication sent that all industrial action cease. But that was on the 24 November, was not it?---Yes, it was.

PN449

Okay. And you – at – but the email exchange that you had with Esso took place on 27 November?---Correct.

PN450

Yes. And so at that – during that or before or – sorry – I withdraw that. As part of that exchange with Esso and before the company on the 28th decided to stand down its workforce, did it tell Esso, we will just have the chat for example, did you say we can have a chat with the union or the employees and did you do anything like that? Because I think you - - -?---As we have already discussed, I was talking daily with the client in regards to the situation that was unfolding, I am sure, and we agreed to continue the work, doing valuating work and up until that point, we will continually do work.

PN451

And that was a discussion you were having with Esso but not with your employees or with the union, is that correct?---That's correct.

PN452

I will refer you now to paragraph 28 of your statement which is on page 75 of the court book where you, in summary, you're – it's your understanding about what Esso's rights are to suspend projects. You may need a moment to read that – that paragraph?---I am good to move on.

PN453

Yes, and so is that your – that was your understanding, was it, that gave Esso the right to sustain the project?---Yes.

PN454

And in paragraph 28, you refer to your attachment, MS5, so I will refer – I will just draw your attention to that attachment on page 108 of the court book?---Yes.

PN455

You were MS5 which is schedule A definitions?---Yes.

PN456

And then I think on page 109 there are some clauses that have been included or extracted from the contract, the services contract?---Yes.

*** MATTHEW SKEEN

XXN MR SKEEN

PN457

Yes, and then 110 appears to be the personnel required for the work. Is that correct?---That's correct.

PN458

So have you read those clauses of the contract, Mr Skeen?---Yes.

PN459

Yes, so at 7.1 of that – it says, 'Contract Equipment'. And my – is your understanding that what that clause says is that what SESA has to provide which is equipment and personnel and if it does not - - -?---Yes.

PN460

- - - then that Esso has an option to suspend operations?---Yes, that's correct.

PN461

So it's not an unfettered right or a right at large just to suspend projects, is it?---I am unsure how the client runs their business.

PN462

So can the client just decide without any reason that it will just suspend work?---I believe so.

PN463

So well, I put it to you that Esso, your client would need a reason and according to clause 7.1, it has to be if the – if SESA were not able to provide equipment and personnel?---Yes. In that 7.1 it also says, 'In order to perform the services.

PN464

Yes. So – but would you agree - - -?---We were not – which we were not doing.

PN465

Yes, so my question – well, okay, sorry, I will rephrase.

PN466

MR TERNOVSKI: Commissioner, I am just – I think I need to object to this line of questioning simply on the basis that ultimately this is a legal question for you to decide - - -

PN467

MS AKSU: Yes.

PN468

MR TERNOVSKI: - - - as to what the contract entails and does not entail. And I am not sure what the relevance is if the witness is you know, looking - - -

PN469

MS AKSU: I can rephrase the question, Commissioner.

*** MATTHEW SKEEN

XXN MR SKEEN

PN470

THE COMMISSIONER: Analysing the contract clauses. Yes. What do you say, Ms Aksu?

PN471

MS AKSU: Commissioner, I can rephrase it, but I mean, I think it's quite relevant because it goes to the question of when or SESA's understanding of the obligations that it had with its – with Esso and that Esso actually – there were certain preconditions before SESA could have come to the conclusion that it had to stand down employees. So I think it's relevant to that. But I can rephrase the question.

PN472

THE COMMISSIONER: I am happy as I have previously today allowed the question under noting the witness's experience and the fact that they are not – that Mr Skeen is not an expert in determining contractual clauses.

PN473

MS AKSU: Thank you, Commissioner. So I will rephrase this if I may. Mr Skeen, so what I am putting to you is that if your – if SESA has about \$84,000 per day, that is – it could lose presumably that it wo not – there would need to be certain conditions that it would not have to have done for a client to withdraw or stop its operations?---Yes.

PN474

So, and as you said, SESA would have tried to take steps to avoid giving Esso that reason, presumably?---Yes. That's correct.

PN475

Okay. And if I refer you to the definition of personnel in appendix A there, on page 108 of the court book, you will see that personnel is defined to mean personnel who are supplied by the contractor where the employees contractor/subcontractor or otherwise – I will just get you to read that. I understand that it's not a legal interpretation question that I am going to be asking. But - - -?---Yes, I have read that.

PN476

Well, so is it correct that SESA could take steps to meet its commitments to its client by engaging other contractors? For example, all casual – I think casual workforce or some alternative workers?---The only other subcontractor that Superior utilises is electricians.

PN477

So are you saying that if one of your crane operators for example was not able to attend work that you would not be – you would not be able to source that through casual (indistinct)?---We have casual crane drivers, but at the time, they were all participating in the protected action.

*** MATTHEW SKEEN

XXN MR SKEEN

PN478

Well, was there anything stopping SESA from engaging other alternative crane operators?---No, but our normal operation is not to have third party crane drivers handling our equipment.

PN479

Mr Skeen, so following the 28 November, were other crane operators engaged by SESA?---Not by SESA, no.

PN480

Now, I will just now refer to some of the matters that were raised just this afternoon by Mr Ternovski. Just in relation to the 15 December, I believe that the hearing that happened at the Commission, Mr Skeen, was not the decision for the employees to return to the workplace following discussions about Esso having work available if the action were to cease and workers could return?---From memory, I will recollect something along those lines.

PN481

But would you agree that it was not the employees who initiated returning to work on the 15 December, it was in fact SESA that proposed that?---Yes. It was our client.

PN482

I think that's all at the moment, Commissioner, in terms of my questions.

PN483

THE COMMISSIONER: Thank you. Mr Skeen, there are just a few things I – I want to ask. So that – the email you received from Esso on the 27th where they say we anticipate these activity fronts will be placed on a non-productive time. Sorry, it's at 106 – just of the court book?---Yes, Commissioner.

PN484

So was this a shock? Was this a surprise for you when you received this email?---I would not say it was a surprise Commissioner, as we were not – we were not moving forward with the work that our client was expecting us to.

PN485

What – when you read that, what did you think?---I guess I was a little surprised to some extent. We have got a client that is very supportive of our operations and that allowed odd number of days perhaps to reach out requesting that the protected action be removed and they'd found productive work to keep going on with, but - -
-

PN486

So when you say they allowed a couple of days for the – so had they requested that you asked the protected action stop?---No, I talked to my contact at Esso and said that Superior were going to request that the union remove the protected action.

*** MATTHEW SKEEN

XXN MR SKEEN

PN487

And so what did you do after receiving that email?---We were trying to – we had further discussions with Esso, trying to – sorry?

PN488

Sorry, you keep going?---Yes, trying to come to some sort of an agreement to continue operations but we'd reached the point where we could not progress with the work scope and yes, we had to make plans and make arrangements to get everyone back on (indistinct).

PN489

In the discussions you had with Esso, what were they saying they needed?---To continue operations without disruption.

PN490

And what steps did you think, when you said you wanted to discourage them, what steps did you take to discourage them?---We'd come up with a list as – that's been referenced in the documents of maintenance and painting and other bits and pieces.

PN491

And after that email on the 27th, what steps – what steps did you take to discourage them?---They'd kind of made their minds up.

PN492

So what did they say?---Until we can continue on in the normal process of working though the programs, they were leasing us from the platform.

PN493

Was there any consideration of finding alternative workers with the reference to crane drivers. Was there any consideration?---I know Esso reached out to some crane providers and it took them quite some time to get a third party crane driver to batch 1 to remove the well control equipment to make the well safe. There had been quite a few people refused to come and work on the site that SESA was attending.

PN494

And did Superior make any enquiries?---We did not.

PN495

In the union's evidence, they have put that if Superior had spoken to them and indicated there was a stand down they would have adjusted their bands. What do you say to that? What do you think?---I do not agree.

PN496

Yes. And why?---When we requested for the protected industrial action to be removed, we got one more email back saying that they'd have to contact their members and then did not get a response after that.

*** MATTHEW SKEEN

XXN MR SKEEN

PN497

Okay. Thank you. Ms Aksu, if there's anything arising out of what I have said, you have an opportunity before I will hand to Mr Ternovski to finish with any questions.

PN498

MS AKSU: Thank you, no, Commissioner.

PN499

THE COMMISSIONER: Thank you. Mr Ternovski.

RE-EXAMINATION BY MS LADEMANN

[2.49 PM]

PN500

MR TERNOVSKI: Thank you, Commissioner. Mr Skeen, you were asked some questions about the work being performed by SESA on the platforms. And in particular, the crane components of that work and the rest of the work. And as part of that line of questioning, you said that on rig 22 the BHA, the bottom hole assembly could not be lifted. Mr Skeen, what impact did that have on the project work that SESA was supposed to be doing on rig 22?---It was our next step in the operation was to run that into the well.

PN501

Could the operation progress?---No, it could not.

PN502

Why not?---Because we could not get that BHA into the well and continue on with the program.

PN503

You said on HWT you could not remove the riser. What impact did that have on the rest of the program works on HWT?---The program came to a standstill there as we could not remove that piece of equipment. It inhibited us from skidding and moving to that next phase of the operation.

PN504

I am not going to ask you about batch 1, because I think you have already – I have already asked you that in evidence-in-chief. Can I just move on to another topic, Mr Skeen. So when the project operations stopped on rig 22 and HWT and the employees started doing maintenance work, as far as you know, were employees aware that the core work of the project workers stopped?---Sorry, could you please repeat the question?

PN505

So let's break this down,. If I understand the chronology, on rig 22 you're unable to lift the BHA?---Yes.

PN506

And then the project work stops?---That's right.

*** MATTHEW SKEEN

RXN MS LADEMANN

PN507

And then I think you said around that time the employees move on and start doing maintenance work?---Yes.

PN508

Now, as far as you know, your employees aware that the core work on the project had stopped?---Yes. Very aware.

PN509

How so?---The – a copy of the program that we follow is provided to our supervisors and I believe there's a copy that's available on the rig floor and there used to be a copy in the tool house available for people to refer to.

PN510

Similarly, on HWT, when – if I understand the chronology, the riser could not be removed and again employees were moved on to doing maintenance work. Based on what you know, were employees aware that the core work had stopped?---Yes, it would have been under the same circumstances.

PN511

And similarly on batch 1, I think you said the alternative work was engaged in. Were employees aware of that?---Yes. They moved to a different phase or a different work scope to what they were moving normally – originally.

PN512

At the time when the core work stopped, were there any union delegates on any of the platforms or the work – the core work had stopped?---Yes, there would have been.

PN513

Can you elaborate on that? Who and where?---Wayne Hubbard would have been on shift at the time.

PN514

On which platform?---He was on Flounder on rig 22.

PN515

You were asked by my learned friend whether SESA had engaged other crane operators to replace your own crane drivers that were engaging in industrial action. And you said no. And then you were asked by the Commissioner if you made any enquiries about engaging alternative crane drivers and you said no. Why did not SESA try to engage alternative crane driver contractors?---The crane drivers are very, I would say, a limited pool of people. In the past, we have attempted to fill a gap here and there with another service provider without – with very little success. There's companies that we have lost crane drivers to over the past 12 months or so, so there is a shortage of crane drivers. So I would assume that no one would want to come over and get involved in the Superior industrial action.

*** MATTHEW SKEEN

RXN MS LADEMANN

PN516

You were asked, Mr Skeen, if you have raised - before the stand down , you have raised the possibility of there being a stand down with the union and you said no. Why not?---There just had not been any discussion about it.

PN517

Sorry, any discussion between who and whom?---Oh, look, well, there'd been – we had not thought that there was the potential for a stand down .

PN518

Until when?---Until I received the email from our client.

PN519

I have got no further questions, Commissioner.

PN520

THE COMMISSIONER: Thank you. Okay. Thanks. Thanks, Mr Skeen. You can now stand down from the witness box. You're welcome to stay and watch the remainder of the hearing if you wish or otherwise you can go?---Thank you, Commissioner.

<THE WITNESS WITHDREW

[2.52 PM]

PN521

THE COMMISSIONER: Okay. It's 3.05. Would the parties like a short adjournment, now that we have heard all the evidence-in-chief, before closing submissions? Ms Aksu?

PN522

MS AKSU: I think we're fine to proceed if others are, Commissioner, if you're happy to? To make sure that we can leave at a – potentially close the matter in a good time?

PN523

THE COMMISSIONER: Thank you. Mr Ternovski?

PN524

MR TERNOVSKI: Same here. Keen to make sure we finish today.

PN525

THE COMMISSIONER: Okay. No problem. Happy with that. Okay, Ms Aksu, over to you.

PN526

MS AKSU: Commissioner, I think from the evidence today, there's been quite a number of details that have been provided that obviously need to be considered in some detail.

*** MATTHEW SKEEN

RXN MS LADEMANN

PN527

I think in terms of the dispute that we brought initially, this was about whether the company had a right to do what it did in terms of a stand down under the

enterprise agreement. We hope that the material has shown that the employees were clearly of the understanding that under their employment contract with their – with SESA, that it was only pursuant to clause 28 of the agreement that they could be stood down. And that involved a number of steps and in their minds, none of that happened and therefore, you know, the company was not entitled to stand them down under the enterprise agreement.

PN528

THE COMMISSIONER: Ms Aksu, can I just understand, I know you touched on it in your initial submissions, but what do you say in relation to, is it nine's - - -

PN529

MS AKSU: Yes. 9(e)?

PN530

THE COMMISSIONER: 9(e)(6) that does refer – it does say – it does refer to the company's right to stand down. What – how do you say – what do you say in relation to that? How does that interact with your argument?

PN531

MS AKSU: Commissioner, I will – I will address the – it's quote – the words are on one view similar to the requirements of section 524(1) of the Act.

PN532

THE COMMISSIONER: Yes.

PN533

MS AKSU: And I will address those in a moment. Those elements. But what we say is, that clause is about attendance at work, so we say it's only enlivened if those certain preconditions are met and our argument is well, they have not been met. And you know, that is our alternative argument. I mean, in the alternative, what we're saying is even if the company is asserting that you know, that the stand down was pursuant to section 524(1) of the Fair Work Act, we say that that – it has not conformed with the requirements in that provision. And I am happy to go through some of that. But it will be similar to what 9 – that clause 9 also provides.

PN534

THE COMMISSIONER: Yes, yes.

PN535

MS AKSU: So I will just go through those briefly, Commissioner, but the first thing is employees were in this case stood down during a time in which they could have been usefully employed.

PN536

We say that there was no stoppage of work until the employer made that decision and that was just before the stand down notice was issued. And our argument is really all the company needed to do was put on replacement crane operators. So that's where they fall down on that limb, if you like. Yes, there was, you know, industrial action needed to be present. The stoppage of work had to be

present. Well, we say well, the company has confirmed that it really relied on the decision of its client to stop all work. And it was the decision of the client that may have been the result but that was because of some significant failures by SESA and the employer could have prevented the client ultimately making that decision, but did not do so.

PN537

And so we say that, you know, in addition to that, there's the limb in relation to the employer in this case, we say the employer can be held reasonably responsible for that stoppage. It's unreasonable for SESA to claim the stoppage of operations by the client towards the end of, you know, the 27 and 28 November was just out its control. But we say that the stoppage took place, if that's the stoppage that we're talking about which is the decision by the clients to be ceasing operations, well, that took place because of the inaction or actions of the employer. So we do not think that's a good enough excuse to then take this decision to stand down an entire workforce.

PN538

And I think hopefully, the evidence has also brought out that the commercial contract that SESA appears to have relied on here, there is no unfettered right just for Esso to just suspend all services. You know, there's conditions on that and that - it's interesting though, the sequence of events and how that actually came to be. You know, there were certain steps that clearly SESA could have taken which could have stopped that even happening and Esso making that decision to suspend services.

PN539

So even if it took no action, SESA did not do anything to stop or prevent this from happening. It was quite clear that they were not even – SESA was not even communicating with the union or the workforce. And of course that's why there has been all these exacerbation, I would say, of events and why things possibly got to the point that it did. I'd just like to also make the point that the protected industrial action was issued on 8 November for action to commence I think, I may have mentioned this at the outset which was almost eight days later and it appears from Mr Skeen's material that only after the 22 November, it appears that there are issues arising with operations. So the company had plenty of time to put in place measures or some sort of contingency plan in relation to these bans. In fact, you know, it should have in our argument, in our submission, as soon as the orders, from the Commission, you know, weeks prior even to being notified of action, should have been – we would have thought any reasonable minded employer should have taken some steps or started to make plans or contingency measures put in place but Mr Skeen's responses say there were plans but they were plans with the client, there were nothing in terms of the actual practical operations and how they'd meet the services. In no discussions with the union, but even not with the union, directly with the employees, so none of that's actually happened.

PN540

You know, the company could have mitigated the impact had they done so, but they have done nothing to prevent or even, you know, stop a stand down decision of the client, so what we're saying is it's absurd that an employer can just rely on

the decision of its client to cease operations and just stand down as workforce the way it has and really have no accountability. You know, this really, it's about the injustice and the unfairness to the 95 or so employees who were stood down with no pay and had to resort to using their annual leave, because at that time, you know, just it did not look like there was an end in sight to when this stand down was likely to come to an end. And we say it's because of the employers own acts or omissions and negligence that ultimately the stand down had to take place.

PN541

There was some mention of our application that was made in terms of the remedy that we had sought and just to be clear, the application was made on 1 December which was only a few days after the stand down decision of the 28 November, so obviously there has been quite a number of developments since our application was made and we had not at that time anticipated that this matter would be dragging on for this long. We thought the workforce would be back, you know, a lot sooner. And so, obviously what we are seeking is a determination that SESA was not entitled to stand down its employees. You know, our employees were returned to the workforce on or around 15 December, and there was that period of time that we are looking at, obviously, reimbursing, if we were to succeed with this matter and recrediting of leave that has been now, you know, since our application, the result. So obviously that should not affect the application or how we have worded our request for remedy.

PN542

Commissioner, unless you have any other specific questions. I think they're the points that we would like to make in closing.

PN543

THE COMMISSIONER: Okay. Thanks, Ms Aksu. Mr Ternovski.

PN544

MR TERNOVSKI: Thank you, Commissioner. There are seven issues I would like to address in my closing. And they are at least the first six of them are covered in our written submissions but I would like to further develop those submissions and also deal with the evidence as it has panned out today.

PN545

The first issue is whether there was an applicable – I will tell you what those issues are and then I will deal with them, sequentially. The first is whether – what the source of power there was to stand down employees. The second issue is the general principles that apply, assuming we are correct that there was a stand down power. Thirdly, is whether there was a stoppage of work and whether employees could be usefully employed. They are two issues but they are closely connected. Fourthly, whether Superior can reasonably be held responsible for the stoppage. Five. The issue raised by the union about the stand down not having a definite end date. Six, the alleged breach of the consultation requirement in clause 38 of the agreement, and lastly the issue of remedy or what is left of the application.

PN546

If I could take you to dealing with the first issue, the source of the power. Commissioner, as you would have seen in our submission, we rely on primarily sections – in the first, it was section 524(1)(c) of the Act, or in the alternative, clause 9(e)(6) of the agreement. And it ultimately does not matter which one of them is available because they are, we would say, in relevantly identical terms.

PN547

Now, as for section 524(1)(c), that is dealt with in some length in our written submissions at paragraph 11 and 28, but the short point is that if one looks to the text of section 524(2), subsection (2) deals with (indistinct) provides when section 524(1) is rendered inapplicable by a provision of an enterprise agreement of a stand down provision in an employment contract or an enterprise agreement.

PN548

Now, employment contract can be put to one side because I do not think there is any suggestion that there is any stand down power in the employment contract, so it is really down to the enterprise agreement. And what is in my submission clear from what is the text of section 524(2), and the explanatory memorandum we extracted in our submissions, is that the exclusion of section 524(2) is only engaged where an enterprise agreement provides for stand down on the basis of one of the circumstances in 524(1).

PN549

So it's not the case that just because an enterprise agreement can provides for a stand down for some reason X, therefore that's the only reason on which one can stand down. It's only rather if an enterprise agreement provides for a stand down here on the basis of:

PN550

(c) a stoppage of work for any cause for which the employer cannot be reasonably held responsible.

PN551

Only then is 524(1)(c) excluded and one goes to the enterprise agreement to comply with whatever requirements that enterprise agreement might have in relation to a stand down for that reason.

PN552

This is, in my submission, made clear by the text, it's made clear by the explanatory memorandum, there are no contrary – there are no contrary authority. There's no authority for the proposition that the union seems to advance. That merely because here the agreement in clause 27 and 28 provides for stand down on the basis of respecting the 27 storm abandonment and 28 is – stands for rig down. Therefore the general provisions of 524(1) do not apply. There's no authority for that. It's contrary to the text and it's contrary to the explanation of that text provided in the explanatory memorandum.

PN553

The next issue on the source of power is 9(e)(6). Now, the reason why we rely primarily on – as a primary open on 524(1)(c) is because if you look at the way in

which 9(e)(6) is expressed and that's on page 84 of the court book, it refers – it says:

PN554

The provisions of this clause will not effect the right of the employer to deduct payment - et cetera, et cetera - cannot be usefully employed because of any strike or break down of machinery and stoppage of work.

PN555

So the way in which the clause is expressed is it seems to pre-suppose that there is some pre-existing right to effectively – well, deduct pay for any day – well, that's a stand down, in essence. So clause 9(e)(6) in its own wording pre-supposes that there is some other pre-existing right to stand down on the basis of the stoppage of work and it seems to be expressed as an abundance of caution provision to make clear that pre-existing right is not excluded. Well, what is that pre-existing right, I ask rhetorically? Well, obviously it's 524(1)(c) because of the striking similarity between what this clause says on 524(1)(c).

PN556

But if I am wrong about that, and this is not merely an abundance of caution provision, but a provision that confer the substantive right to stand down, well, then we can rely on that in the alternative and it's basically – and I think my learned friend accepted basically the same. And it provides for the right to deduct or provides for deduction of payment for any day the employee cannot be usefully employed, that is in essence what a stand down is.

PN557

So that's the source of power. I have – well, in terms of the principles, our submissions address them by reference to 524(1)(c) because that's what the authorities deal with. But of course, if the operative source of power is clause 96 of the enterprise agreement then the same (indistinct) would apply because it just re-expresses the power in 524(1)(c).

PN558

I am not going to the principles I set out in paragraphs 29 to 32 of our submissions and I do not want to – I am not going to rehearse them in any detail. But I just want to make a few brief points. Really, the process that the questions, rather, that Commissioner you have to ask yourself is it really follows a series of steps. And the first step is to ask whether an employee can be usefully employed during the period of the stand down. That's the first issue. And the authorities to which we referred make it clear that usefully employed does not mean that just there is some work that the employee can in a theoretical world be doing. Usefully employed means doing work that would actually be of and add benefit to the employer's business. And what's more, if I can refer to you – I am not going to take you to but I am just going to give you the citation - paragraph 26 of Van Der Linden v LDA Group [2020] of WC3531, that's in the joint bundle or in our bundle of authorities, tab 15. Paragraph 26. It points to the relevant principle as being:

PN559

If it be shown that an employer has acted upon proper principles and in good faith, the evidence will not be gone through with a tooth comb in order to apply

to his actions of a standard of perfection which in cases such as this, will always be impossible to achieve.

PN560

So in my submission, the question of whether the employees can be usefully employed is a relatively broad brush analysis. You do not go through the evidence with a fine tooth comb and say, 'Oh well, maybe this particular employee could have done half an hour in here or maybe someone could have done two hours there'. It's a much more broad brush analysis than that.

PN561

And the question as the case I have just quoted to you makes clear, it is not whether in some perfect world it may have been impossible to find its subworth here and there but whether in substance employees cannot be usefully employed. So that's the first question.

PN562

The next question is if employees cannot be usefully employed is it because of the stoppage of work. And here the authorities to which we referred made clear the stoppage of work just means cessation of some particular business activity in which work is being performed. It does not have to be cessation of all business activity. And what's more, those authorities make clear also is that the cessation of work need not – or stoppage of work need not occur in the employer's own business. And in fact, a stoppage scenario, a legitimate stoppage scenario recognised in the authorities that we cite in our submissions, is where an employer's client directs the client to suspend the provision of services, which is of course exactly what's happened here.

PN563

The third question is, if there is a stoppage of work, is a stoppage for a cause for which the employer cannot reasonably be held responsible. And here again, the cited authorities to the effect of the question of reasonableness is to be assessed by reference to what a reasonable person ought do. And again, I would submit that this is not something to which one applies a standard of perfection, sitting here with the benefit of hindsight and trying to investigate, well, what could have been done. You have got to look at it at the time, by reference to what a reasonable person would do. And now, I move on to issue 3 which is could the employees be usefully employed here on the facts and was there a stoppage of work and of course these are classic annexure point.

PN564

Now, as you would have seen from the evidence, our case is that the immediate cause of the stoppage of work was a decision by Esso to suspend the services being provided by Superior. Suspend by and large with some limited exceptions of some work continued and of course those employees were not stood down.

PN565

Now, there was a lot of evidence here about how that decision of Esso's came about. Why it was that Esso decided to suspend the services. And what that evidence shows in my submission is that Esso's decision was unsurprising because the union's ban included a ban on crane services, crane – well, a partial ban but a

ban on lifting third party equipment – well, that's the way it was implemented. Crane services are essential to the workings being performed on the platform, just not the whole work but in order to do the work on the wells, they need the cranes.

PN566

And I should say that there is no dispute that the way in which the ban was implemented was that crane operators were refusing to lift third party equipment because Mr Trew conceded that in cross-examination.

PN567

So eventually, they get to a point where on each of the platforms, the work grounds to a halt because a critical item they needed to progress the core works cannot – cannot be lifted. And Mr Skeen says that at paragraph 20 of his statement and he elaborated on that in some detail further in his oral evidence. And now, Mr Trew made some general assertions to the effect that a critical pathway was not effected and that work had continued. So when I put to him the specific propositions in relation to each platform, that there was a particular item on a particular day could not be lifted and that meant that works could not progress on that platform, it did not – he could not disagree. He did not know. He was not even there on the 22nd and 23rd of November when they effectively, the work ground to a halt on these platforms. He was not there. He was off home. And of course, he is a, without any disrespect, he is a floorman and the tong operator. He's not managing the project so he has got no first hand knowledge of what's critical to continuing the project. So really, there is no basis in my submission to reject Mr Skeen's evidence that because of the - in each case on each platform, because of the critical item, work could not continue. Now, that was the case on each of the – the scheduled work could not continue. That was the case on each of the three platforms. But there is a difference between batch 1 on the one hand and HWT 600 and rig 22 on the other hand. Because on batch 1, they were able to rejig the works and continue doing some other – not just maintenance, not just painting the rig, but continue to do some other work albeit not the work that they were supposed to be doing, but they were able to continue doing some other work and the work continued and the employees were not stood down. But on the other two platforms they could not do that. And so the employees then shift into doing maintenance work in 24 hour shifts. And there was some dispute about whether that is limited to SESA's own equipment or whether they were also doing work on Esso's equipment. Ultimately, it does not really matter. The point is instead of doing the project, they were sitting there doing maintenance in 24 hour shifts for almost a week.

PN568

And yes, theoretically, Mr Skeen candidly conceded that they probably could have found them some other work to keep going after the 28th November, but there's no opportunity for that to happen because Esso suspended SESA's services on the 27th and kicked them off the platforms. And as you – as your questioning, Commissioner, revealed the thing that they were doing maintenance on, the rigs, they were fixed to the platform so that once the work – once SESA services are suspended, and SESA is kicked off the platform, well he cannot continue that maintenance work.

PN569

There was some work done on rig 47, you would have heard in the yard. But that was a small amount of work involving, I think a – from memory – a couple of employees and that was wrapped up in a couple of days. So this – all of this evidence explains why Esso made the decision that he did, but as I read to you in opening and I want to emphasize here, at least for the purposes of determining whether there was in fact a stoppage of work, this 'Why' question does not matter. It does not matter why Esso decided to suspend Superior's services. Now, because we say that Esso's decision was understandable and it was reasonable and it was probably unavoidable, but even if you form a different view and even if you decide that Esso could have done something else, maybe it could have used the PSO's, rejigged it, engaged some other crane operator to do the crane lifts at some uncertain cost and practicability because Mr Trew did not know about any of these things, right. Even if you find that Esso could have made some other decision, it does not matter. The point is, from my client's point of view, Esso did make the decision to suspend its services and once a service is suspended and Superior employees are kicked off the platforms with the exception of the small number of workers performing bits and bobs, that's the stoppage. And so all of that evidence about the alternatives open to SESA, alternatives open to Esso, in my submission that does not really go to the stoppage of work at all. The extent that that evidence is relevant at all, it is only relevant to the question of whether SESA can reasonably be held responsible for the stoppage. That's the next issue. But as far as stoppage is concerned, there was a stoppage because SESA made – because Esso made the decision that it did.

PN570

Now, in terms of the – going to the question of whether employees could be usefully employed, Mr Skeen's given some evidence about that. There was work done on the Lochard Energy Project, that they had only had three weeks left to run it, and Mr Trew conceded. And Lochard wanted to keep the existing crew there and there were no maintenances. In the yard, there was some small amount of work being done on rig 47. It was only a few days, it was finished, there were no vacancies.

PN571

Ryalung, Doghouse v Berries Beach, Mr Skeen dealt with that at paragraph 33(d). Again, to the extent employees could be usefully deployed there, they were. Beyond that, there were no vacancies. There was some amount of work for Esso including work that is continued, albeit different work from batch 1 and a few other bits and bobs that Mr Skeen deals with in paragraph 33. Again, his evidence, which is really unchallenged in that regard is – and I do not think he was cross-examined about paragraph 33 - is to the extent there was small amounts of work here and there that work was allocated and those employees were not stood down. So that deals with the stoppage and with – whether employees could be usefully employed.

PN572

If I can now move to the next issue, and whether Superior can reasonably be held responsible for the stoppage. Now, Mr Skeen's unchallenged evidence is that he did not do anything to encourage Esso's decision to stem the work and indeed he

said he tried to discourage it and what he has tried to do is to come up with this alternative maintenance works which worked for a while but after – but only up to a point.

PN573

And his unchallenged evidence which is that it cost a substantial amount of money for SESA, \$84,000 a day, the stoppage of works, so that just – one would be slow in my submission to second guess the business decisions that SESA made and to say well, SESA could have done – shot itself in the foot and they could have done something else to save itself the money that it ended up wasting.

PN574

And then management is making decisions in the interests of the business, and they ended up in situations where they're losing money, it's a starting proposition, it's a reasonable inference absent some specific evidence to the contrary, that if there was something that could have – could have practically been done, it would have been done to – to save that money.

PN575

So what is – so what could Superior have then done. Well, the first question is, could it have sought to enforce the contract and my learned friend said - and I do not take issue with that - that Esso did not have an unfettered right to just willy-nilly suspend the services. That's right. It did not have such an unfettered right, but it did not need to have an unfettered right because it had a specific right. And if I could take you to MS5 which extracts the relevant provisions of the agreement, you see the definition of personnel and then if you go to clause 7.1 and 7.3, 7.1 and 7.3 as I mentioned earlier today are actually extracts from schedule (c) which you have received in small form earlier today.

PN576

And 7.1 provides:

PN577

The company shall provide the contract to (indistinct) and personnel specified in relevantly – - -

PN578

And I am skipping over - - -

PN579

- - - appendix (b) of schedule (d) in order to perform the services. If the services are interrupted, the contractor does not supply the contractor's equipment and personnel as specified, then the company at its option may require the contractor to suspend the services.

PN580

So they have to provide the services. As part of that, they have to provide personnel schedule (d) and if they do not, contractor may suspend the services. Well, we go to schedule (d) on the next page, and you see there's one of the personnel, they have to supply the crane operator. And of course, it goes

without saying in my submission that when the contract talks about supplying a crane operator, it means supplying a crane - - -

PN581

THE COMMISSIONER: Sorry, Ms Aksu, I am not sure if you're – you're on mute. Were you trying to say something? Sorry. Sorry, Mr Ternovski.

PN582

MR TERNOVSKI: Thank you, Commissioner. It goes without saying, Commissioner that when a contract talks about supplying a crane operator, obviously he does not mean supplying a crane operator to sit there. It's supplying a crane operator to operate the cranes as required to provide the services. Now, if we go to the actual schedule (c), which has been exhibit – which is exhibit - - -

PN583

THE COMMISSIONER: SESA2.

PN584

MR TERNOVSKI: Yes. Thank you. Thank you. You will see on the first page, under 3.1. There's a general description of the services we're calling well services, machine, shop and fabrication, yard services, et cetera, by a line support personnel. And as Mr Skeen had explained in order to provide those services, they had to lift various items of equipment which they could not do. Therefore, they could not provide the services. So going back to clause 7.1, this then triggers the right of Esso to suspend the provision of services, which is what they purported to do.

PN585

Now, could one come up with some kind of a contractual argument as to why that right was not engaged? I do not know, perhaps. But ultimately, the question for you is a practical one. Esso is Superior's main client, and the only other client being that small project about to be wrapped up for Lochard.

PN586

Now, even if one can come up with some arguable point about why Esso was not entitled to suspend under clause 7.1, is it really reasonable to expect Superior to what, sue its main client? Seek an injunction? What would that cost? How long would it take? How would it impact their relationship? In my submission, that's simply not a reasonable step SESA that could have been required to take.

PN587

There was a clear arguable right to suspend and relevant – there's nothing – once that right was exercised it was not realistically practical for SESA to try to challenge it. Now, another point that is being raised now is – I will just go back to my notes and make sure I do not (indistinct) Ms Aksu – is that SESA could have prevented the client from making their decision and it's only because of SESA's inactions, and I think the word negligence was used at some point, that it came to the point where Esso decided to suspend SESA services. Well, what are the actions that SESA could have taken? Well one that's been suggested is engaging alternative crane drivers, crane operators.

PN588

Well, firstly, it was put on the basis of casuals. So he could have used the casual, but of course, casuals is part of the same workforce and they themselves have not gauged in the industrial action. Mr Trew suggested in some theoretical way, 'Oh, but not everyone is – the protected industrial action is optional. And not everyone has to engage in it. So there might have been some employees theoretically that were not engaging in it'. But of course, when asked for the specifics he was not aware of any crane operator that actually was refusing to engage in the protected industrial action was available - I am talking about SESA employees here – was available to perform that work.

PN589

Then the last point that the union has tried to rely on as well: he could have engaged a third party subcontractor. But Mr Skeen has given evidence about why he thought that was not practicable. He is an experienced operator in the industry. His evidence should be accepted particularly given that, and I come back to the company was losing \$84,000 a day, so it would be a surprising result if there were some really practicable option available, magical option available to them to get someone else to do this work and they did not take it.

PN590

The next related point being raised is that there might have been other crane operators available on the platforms. Platform services officers, or PSO's engaged by Esso itself or perhaps other contractors. But again, these are theoretical considerations. As Mr Trew conceded, who knows how many PSO's are actually there, was crane tickets at the right time, and they have got other responsibilities - it's not really their job. All right. And detail with other contractors. Who knows what the contractual arrangements are within Esso and those other contractors?

PN591

Ultimately, Esso made a commercial decision to suspend it and it's not really – there's an air of unreality about some kind of a suggestion that SESA should have been scouring the platforms trying to dissuade Esso from suspending the services, trying to find, for example, Esso's own employees that might have been persuaded to do this work.

PN592

So those are my submissions on the question of whether – I will just finish one second. On the question, sorry, I have missed one point that Ms Aksu had made which is the communication with the union and the workforce. I think the point as I understand it at all, had the union been told that this was going to happen they would have lifted the ban. I think Mr Trew said that in terms.

PN593

There's a couple of problems with that. The first is it's not like SESA knows in advance that Esso's decision is coming. They find out when Esso makes a decision. Up until then, they try to work with Esso to come up with alternative work. A plan which succeeds for about a week. So how can SESA approach the union and say, 'We're going to stand - we're going to stand everyone down unless the crane ban is lifted if it's Esso's decision to suspend that leads to the stand down

and SESA does not have advanced notice of that decision. Up until that point they are trying to find alternative work.

PN594

And the other problem with this proposition is that, as Mr Skeen explained in re-examination their employees were in fact well aware that the core work had stopped, all right, so they knew the same as what my client knew. Core work had stopped, they are no longer working on the wells and instead, they are doing maintenance. They know that, we know that. One of the union delegates is on one of the platforms, so the union knows that. Right.

PN595

And then the next thing that happens is Esso's decision to suspend which we do not have any advanced notice about, my client does not have any advanced notice about any more than the union and the employees. So in my submission, let us say the FO should have spoken to the workforce and – is an interesting – you know, it sounds nice in theory, but once you zoom in and look at what actually happened, it is not really something that – it's not really something that could have occurred.

PN596

And had the facts been different, had Esso told us, 'Look, you need to sort this out within the next week. Get rid of the crane ban, otherwise we are going to kick you off the platforms', sure. Then it would have been reasonable to expect SESA to raise that specifically with the union. And to try to refer the union to Esso's impending decision and get them to try to lift the item 6 of the industrial action, but that's just not – these are not the facts that – that is just simply not what happened.

PN597

The next point that is being made – you have got it's absurd that an employer can just rely on the decision of the client to stand down the work force. Well, in my submission, the authorities cited in our submissions make it clear that the client's decision to suspend is precisely the kind of stoppage of work to which section 524 is directed. And so the proposition does not work at that level of abstraction.

PN598

Now, it's possible to imagine a scenario where a client engineers – sorry, where the employer conspires with the client for example, to engineer a situation where the work stops, but that is not what happened here. So as a general proposition, there is no difficulty legally with an employer relying on the decision of the client to suspend the employer's services in order to stand down the workforce, provided the employer cannot reasonably be held responsible for the client's decision. And I have already addressed you on that issue.

PN599

Moving to the next point. Issue 5. The indefinite duration of the stand down. Now, that's a point which is made in the union submissions but Ms Aksu did not develop orally. I want to address it briefly. As I understand it, this indefinite duration point it seems to be made at two levels. One is that as a general proposition, section 524 requires a stand down notice to specify some

fixed end date for the stand down, which this one does not and therefore it's invalid. So the point of the matter is a question of principle, as I read the union submissions. And the other layer is on the facts, if there is an indefinite lockdown, well, that is not justified. You have to show that that is necessary and you have not shown that on the facts.

PN600

Now, I will address those two points in turn. In my submission, there is no basis for the submission that section 524(1) requires a stand down notice with some fixed end date. Section 524 does not deal with stand down notices at all. It does not prescribe any form of requirements for a stand down notice. It does not say anything about modifying employees, how long the stand downs will continue. It simply prescribes conditions that must be satisfied in order for the stand down to be valid. So long as those conditions are satisfied, the stand down is valid. Once they cease being satisfied because work becomes available for example, the stand down ceases to be valid. But there is no requirement anywhere in section 524(1) for any kind of fixed end date.

PN601

Now, it's unlikely in my submission that parliament intended to only authorise stand downs with fixed and a sustainable duration in circumstances when it's obvious that causes of the stand down will often if not usually be such that the duration is unknown. Does a break down in machinery have to be fixed? How long will that take? Who knows? There is an industrial action 524(1)(a), when will that be fixed? Well, it depends. Might be – might be indefinite. The stoppage of work for any cause for which the employer cannot be reasonably held responsible, again, there's a wide variety of causes and some of them may not have a fixed end date. So what is the employer supposed to do there? Issue a stand down notice for a few days and then a new one and then a new one? Well, the Act just does not say that and the cases in my submission are all against the AWU because the indefinite stand downs have been routinely upheld by this Commission and we cite a bunch of examples in footnotes 38 and 39 of our submission.

PN602

The second issue is on the facts, was indefinite stand down justified and the answer is it was, because Esso suspension was indefinite. So the stand down duration simply reflects the duration of Esso's suspension. Now, I need to distinguish here between indefinite and forever. Indefinite does not mean forever, it just means you do not know when the end date is. Of course, once Esso suspension which was indefinite for starters, once that finishes, work becomes available and the stand down has to end and that's – well, that's exactly what happened.

PN603

Once was the benefit of Commissioner – your conciliation, the union agreed to lift the industrial action, Esso agreed to lift the suspension and everyone – and of course, then my client entered the stand down. And everyone went back to work. But there's no problem either conceptually or factually, with no fixed end date being specified for the end of the stand down.

PN604

There was also a curious submission the union makes that the redundancy clause 33 is engaged and that SESA sort of retrenched its whole workforce. I assume that's not pressed but to the extent it is, I think we refer to paragraphs 44 and 46 of my submission.

PN605

Issue 6, the consultation provision. Again, this point was not really developed orally, but there is a reference to it in the union's written submission. And the point seems to be the stand down is invalid because SESA has not followed the consultation process in clause 38 of the enterprise agreement which provides for consultation in the event of a major work place change. Now, I am going to take you Commissioner to the text of clause 38. But before we get into the details of the text, I just want to say as a general proposition, it would be a surprising result if the general consultation provision and enterprise agreement was applied to limit the stand down power. And that's because stand downs are often of sudden - occur suddenly as happened here. Esso suspends on 27th, stand down happens on the 28th. And they can be of limited duration, for example, a break down of machinery could only be for a few days until it's fixed.

PN606

If you have to go through the steps of some general consultation procedure, designed to deal with much slower moving things like the introduction of (indistinct) technology, the whole point of the stand down would be defeated and a similar point was made by Justice Besanko in the Qantas case which is at tab 15 of the bundle:

PN607

In relation to the general status quo term and an enterprise agreement.

PN608

And I refer you, Commissioner, to paragraph 78 of that decision. Now, consistently with this analysis the union has not pointed you to a single case for a general stand down provision – sorry – a general consultation provision like clause 38 was held to limit the stand down power in section 524(1). Nor have we been able to find a case like that.

PN609

So the general submission I want to make is given the inconvenient and uncommercial result that would follow if a general consultation procedure had to be followed before a stand down, you would want to see clear words in that clause before you construed it in that way. And here, there are no such clear words, and on the contrary clause 38 does not engage on its own terms.

PN610

Now, if I could take you to clause 38 – excuse me – which is found on page 99 of the court book - if you look at sub (1), you will see that clause 38 has two limbs. It's engaging one of two circumstances: (1) that the employer has made a definite decision to introduce and I quote:

PN611

A major change to production, program, organisation, structure or technology in relation to this enterprise.

PN612

Pausing there. That's simply not the case here. This is a stand down in response to a temporary suspension of superior services. There is no change to production program or organisation or structure or technology. The second limb is if the employer proposes to introduce a change to, and I quote:

PN613

The regular roster for ordinary hours of work of employees.

PN614

Now, in my submission this wording assumes that work is still being performed and the employer proposed a change when it is being performed. Change the regular rosters. Change the ordinary hours. Well, that's not the case here. There's no change in rosters' ordinary hours, except the suspension of the work altogether.

PN615

A further confirmation that clause 38 does not apply to a stand down, can be found in 27(e) which you will see on page 94 of the enterprise agreement. Now, 27 – sorry – 27. 27 storm abandonment is a clause that provides for a special stand-down-like procedure in the event of a storm or a cyclone. And you will see if you go through the steps, paragraph (c):

PN616

Employees for whom no alternative work can be found will be stood down; subclause (d) full time employees stood down will maintain the ordinary wage rates as prescribed in clause 10 for a maximum period of five ordinary working days.

PN617

And then we go to (e):

PN618

In the event of work not resuming at the conclusion of the five day period, refer to the subclause (d), employer will consult with the affected employees or where applicable, with the union.

PN619

So this is a specific consultation provision which is limited and abridged, compared to the more extensive one in clause 38. But that only applies in clause 27, and it only applies at a certain point after five days. All right. So that itself shows in my submission that general consultation provision in 38 does not apply to stand down.

PN620

If I may do it for the last issue which is not dealt with in our submission and that's a question of remedy. The relevant authority which will assist you Commissioner, on that issue, is found in the bundle at Tab 6. And that's the decision of Deputy President Cormann in the Australian Municipal Administrative Clerical Services

Union v Halal World Travel where compensation for a stand down was unsuccessfully sought.

PN621

And the relevant principles are set out extracted from the decision of the Full Bench in Carter v Auto Parts Group Pty Ltd and which is extracted at paragraph 34 of the Halal World decision, which you will find on page 77 and 78 of the bundle. And I will read you the quote:

PN622

It seems to us that while the Commission cannot make a monetary order, in granting the claim from entitlement to wages said to be owing under an award or contract of employment, the Commission is empowered to make a monetary award to resolve the stand down dispute based on its consideration of what is a fair outcome between the parties and other issues relevant to the industrial narrative matters. And in doing so, is entitled to take into account whether in its opinion, the stand down was authorised by section 524(1).

PN623

So to the extent that you find that the stand down was not authorised, we are then in the sphere of framing a remedy that is a fair outcome between the parties. And what the Commission cannot do is to make some kind of a compensatory order and say, 'Well, everyone gets recredited the exact amount of annual leave that they have lost' - bearing in mind, mind you, that some of those employees would have used that annual leave usefully to go on a holiday - 'Or everyone gets – everyone who lost wages and did not take annual leave gets recredited those wages'. That's not the kind of compensatory exercise the Commission can do and that is the kind of compensatory exercise that was knocked back in the Halal World case.

PN624

I cannot really develop my remedy submission further because it's not – not particularly clear exactly how the – the union puts its claim for remedy. Unless there are any further questions, those are my submissions, Commissioner.

PN625

THE COMMISSIONER: Thank you. So Mr Ternovski, you say that 526(4), the requirement for the Fair Work Commission to take into account fairness between the parties concerned is in relation to any decision that goes to remedy. Do you say there is any – do you say the Commission should take it into account on any other basis?

PN626

MR TERNOVSKI: If I could take you back to the authorities. To the ASU case. Sorry, the Halal World case, I am sorry. The way in which the Full Bench in Carter has screened it in that quite (indistinct) paragraph at hand.

PN627

THE COMMISSIONER: Sorry, what paragraph was it?

PN628

MR TERNOVSKI: Thirty-four.

PN629

THE COMMISSIONER: Yes.

PN630

MR TERNOVSKI: It is – the validity of the stand down itself is merely a matter to be taken into account in arbitrating the dispute. However, it's a practical matter if you look at the way in which the Commission has approached these issues under section 526. It's really a threshold question because there may be some circumstances in which it could be appropriate to order a remedy in response to a valid lockdown. But it's not suggested, I don't think, that this is – hard to see what those circumstances might be and it's not suggested that this is the case here.

PN631

THE COMMISSIONER: Thank you. Thank you, Mr Ternovski. Ms Aksu, we'll give you an opportunity if you wanted to reply to anything before finalising today.

PN632

MS AKSU: Commissioner, I might just make a few points, just in reply. We would obviously say that you know, SESA's submissions should be rejected. It seems to me to be a circular argument and it's starting backwards with all due respect. Essentially, the argument as I understand it is, well, the stand down was permissible because the work stopped because Esso decided so. And Esso decided so because we could not deliver the services. Well, if SESA could not deliver the services, why not and you know, the services could not be delivered because SESA made a conscious decision to not communicate with the work force or the union. I mean, that is really what has happened. Work could have continued had SESA taken steps to facilitate that work. Even if it is accepted that, you know, there was no work or some work et cetera. That SESA could have taken certain steps to facilitate it. So there were a series of obvious blatant failures which directly caused the client to stop operations, you know, and we would say the evidence of Mr Skeen was in fact, somewhat inconsistent because first he appeared to admit that he could foresee that a stand down was going to be possible but then said, 'Well, we didn't know it would eventuate.' So I thought that the material seemed a bit inconsistent. The point is they should – the company knew about this industrial action, it could have put in place some contingency plans as I have already said.

PN633

Even if it could not have known until after the 28, you know, that there was going to be a closure or part ceasing of operations, Mr Skeen's evidence was well, it was too late because the client already made the decision to stop operations. So it seems to be an absolute abrogation of responsibility to the work force. I mean, the evidence from Mr Skeen seems to be that the decision was already made and the company essentially took, effectively took most steps to stop or prevent or minimise any of the result of you know, closure or reduction in operations, you know, so what we again reiterate is that this is a situation where the employer can be held reasonably responsible for Esso taking its decision to ultimately stop or cease operations. And in terms of remedying the questions there, I mean, that may have to be something we may need to – depending on your decision

following this matter – make further submissions on – Commissioner, at a later point. And that's all I would like to say in that sense.

PN634

THE COMMISSIONER: Okay. Thank you. All right. Parties, I am going to adjourn the matter. Before I do, are there any other matters either side wants to raise?

PN635

MR TERNOVSKI: There is the question of the union's section 240 application. Which is, as I understand, is also listed for today and Commissioner, you have had the update. You have had the update from us and from Ms Aksu about the enterprise agreement.

PN636

THE COMMISSIONER: Yes. Mr Ternovski, the union has notified the Commission to discontinue that matter.

PN637

MR TERNOVSKI: I see. I was not aware of that.

PN638

THE COMMISSIONER: Yes.

PN639

MR TERNOVSKI: All right. Thank you.

PN640

THE COMMISSIONER: Okay. Thank you, parties. On that basis, I will now adjourn to consider the matter. Thank you.

ADJOURNED INDEFINITELY

[3.54 PM]

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