TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT BELL
DEPUTY PRESIDENT HAMPTON

C2024/91 C2024/93

s.604 - Appeal of decisions

OSM Australia Pty Ltd v Construction, Forestry and Maritime Employees Union (105N)
(C2024/91)

Tidewater Ship Management (Australia) Pty Ltd T/A Tidewater v Construction, Forestry and Maritime Employees Union - The Maritime Union of Australia Division (105N-MUA)
(C2024/93)

Melbourne

10.00 AM, WEDNESDAY, 13 MARCH 2024

PN1

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning. Mr Pollock, you're seeking permission to appear for the appellants?

PN2

MR POLLOCK: I am, Deputy President.

PN3

DEPUTY PRESIDENT GOSTENCNIK: Yes, good morning. Mr Edmonds, you're appearing for the CFMEU?

PN4

MR EDMONDS: I am thank you, Deputy President, and there's no objections to my friend appearing if that helps.

PN5

DEPUTY PRESIDENT GOSTENCNIK: Thank you. Permission is granted, Mr Pollock.

PN6

MR POLLOCK: Yes.

PN7

DEPUTY PRESIDENT GOSTENCNIK: We should indicate to the parties that we've had an opportunity to read the submissions that have been filed.

PN8

MR POLLOCK: Thank you, Deputy President. That being the case, perhaps I can get straight into the meat of the matter. I propose to deal with grounds 1 and 2 together in circumstances where, whilst they grapple with two separate statutory requirements, really, the error crystallises in the same way.

PN9

Can I ask the Full Bench to turn up the Tidewater decision? That might be the most appropriate vehicle to deal with these issues. And I pause to note that the decisions are, save for minor differences in the percentages, they're otherwise in relevantly identical form, and I don't understand there to be any difference between the parties that the issues in one are the issues in the other.

PN10

DEPUTY PRESIDENT GOSTENCNIK: Yes, at 550 of the appeal book – amended appeal book.

PN11

MR POLLOCK: Now, at paragraph 58 of the Tidewater decision, the Deputy President included that she wasn't satisfied that the amount that the appellants withheld was reasonable having regard to the nature and extent of the work then. And at 59 and 60 the Deputy President makes the corresponding finding with respect to fairness, as between the parties.

PN12

Now, the error for which we contend at ground 1 is that the Deputy President erred by failing to have any adequate regard to the impact of those partial work banks on the commercial utility of the residual duties actually performed and we say that was a mandatory consideration, in that it was a matter relevant to the nature of the work ban. That's section 472(3)(a). But instead the Deputy President confined her consideration to a temporal assessment of the duties that were, in fact, performed.

PN13

And whilst that is a matter that was relevant to the extent of the work ban, it wasn't the totality of the matters that the Deputy President was required to consider.

PN14

DEPUTY PRESIDENT GOSTENCNIK: Mr Pollock, on one view the reference to 'nature' in subsection (3) of 472 is a reference to the essential or inherent features of the industrial action. Does it have, or the innate or essential qualities of the industrial action? Does have another meaning or further meaning?

PN15

MR POLLOCK: Well, as I will canvas in an explanation some of the authorities considered it and I pause to observe that there doesn't appear to be any Full Bench consideration of 472(3), and I think neither of myself and my learned friend have turned any up. But the authorities that have considered that at first instance have understood the reference to 'nature' as something that goes beyond merely a consideration of – well, in dealing with the consideration of the quality of the band work that carries with it consideration of its relative value with respect to the duties that remain to be performed.

PN16

And as I will develop in an exploration of authorities that can encompass, and in other cases I have in mind, the Action case of Commissioner Deegan dealt with that in 2010. And more recently, Deputy President Easton in Transit New South Wales, each considered questions of perhaps the commercial impact of the employer as that flows into an assessment of – well, what is the value of the work that's actually left in circumstances where the banned duties have an impact on, in each or both cases – revenue?

PN17

Now, even we're wrong, Deputy President about - - -

PN18

DEPUTY PRESIDENT GOSTENCNIK: Yes. I understand the alternative point.

PN19

MR POLLOCK: Yes. Even if we're wrong fairness, in any event, picks up squarely those considerations which, of course, is a matter which we cavil with in ground 2.

PN20

Now, perhaps if I can step back just to examine the statutory context? Can I ask the Full Bench to turn up section 472 of the Fair Work Act. Now pausing first for subsection (1) the Commission may make an order varying the proportion by which an employee's payments are reduced.

PN21

Now, I simply put the flag in the ground now. That that is a matter that, of course, is engaged with reference to ground 3 and the form of order concerning varying leave accruals. I need not address that now but I just make the observation that the word 'payments' there assumes some significance.

PN22

If one then turns to subsection (3) –

PN23

In considering making such an order the Commission must take into account:

PN24

(a) Whether the proportion specified in the notice given under 471(1)(c) was reasonable having regard to the nature and extent of the partial work ban which the notices relates; and

PN25

(b) Fairness between the parties taking into consideration all of the circumstances of the matter.

PN26

Now, it is and just pausing here again for a moment. Its' plain from the chapeaux to subsection (3) from the words, 'must take into account' that each of subsections (3)(a) and (3)(b) are mandatory considerations and that requires proper consideration and appropriate weight to be given to all the matters that properly engage those elements.

PN27

For subsection 3(a) that means giving proper consideration and weight to matters going to the nature and the extent of the partial work ban.

PN28

In my submission, those concepts – nature and extent are distinct. Each has a role to play and the Commission is required to consider each of them. And, again, as I will develop with reference to some of the authorities that requires an assessment of both the temporal and the qualitative characteristics of the partial work ban.

PN29

We say that follows from three things. First, by contrast to the anterior analysis the employer is required to take under section 471(1) and its reference in turn to, at subsection (3) of section 471(2)(b) regulations prescribing how the proportion is to be worked out.

PN30

I don't take the Full Bench to Regulation 3.21 but I take it the Full Bench would be well aware of the fact that that regulation is a strictly temporal analysis. It is look at the time spent, as proportioned, weigh that up and that's the portion that you are required to deduct.

PN31

The section 472 is intended at a subsequent stage which might alter that analysis and that outcome. Now, that's unsurprising that the Commission would hold a backstop role to examine a broader set of factors. And, relatedly, if parliament had intended that both the employer's anterior assessment and the Commission's subsequent assessment were to be confined to temporal matters only well one would expect 472 to have used clearer statutory language and consistent language to that adopted in 471. But, of course, as we have seen the language in 472(2)(3)(a) and (3)(b) is pointedly broader.

PN32

Now, just to make good this point can I take the Bench to a small number of the authorities that have considered section 472? The first is the Action case – which is Transport Workers Union v Department of Territory and Municipal Services [2010] 197 IR, 1. And this is at tab seven of the joint bundle.

PN33

And this was a case where the relevant partial work bans were the ban by bus drivers on collecting fares. Put simply, the employers – well, the employer reduced daily pay by the percentage for which the drivers drive the routes, on the basis that, 'Well, we're making the money out of this. You're not going to be paid as a result.'

PN34

The union applied to vary the amount down to only the time taken actually receiving and dispensing fares which was said to be in the order of five to six minutes per shift.

PN35

Now, can I take the Bench first to paragraph 33, in Commissioner Deegan's reasons? In the preceding paragraphs the Commissioner sets out the operation of section 471 and Regulation 3.21. The Commissioner says this –

PN36

> *While the strict application of Regulation 3.21 preferred by the TWU might have some merit when the words of the regulation are considered in isolation, the provisions of section 472 of the Act militate against such an interpretation being applied to the application of that section. When determining an application for an order to vary the proportion by which an employee's payments are being reduced the Commission is required to take into account 'whether the proportion specified in the notice would be reasonable, having regard to the nature and extent of the partial work ban', and also take into account fairness between the parties taking into consideration all of the circumstances of the case. If all that were to be considered, as was argued by the TWU, whether the employer had properly estimated the time involved in physically performing the banned task, the matters to be taken into account by*

the Commission would have little relevance, particularly the 'nature' of the ban and 'fairness between the parties' in light of 'all the circumstances of the case.'

PN37

Paragraph 35 referred to this –

PN38

Clearly, section 472 gives a wide discretion to the Commission to deal with disputes concerning the amount of reduction an employer proposes to make and the section does not require, or allow, the Commission to determine such a dispute merely by applying the 'formula' set out in Regulation 3.21.

PN39

Now, at 39 and following, and I won't read it all out verbatim but what one sees in the Commissioner's analysis and I will draw particular attention to paragraph 41 and 42. Forty-one, in particular, goes to your question, Deputy President, around what one examines when considering the nature of the ban. The Commissioner referred to this.

PN40

In considering the 'nature' of the ban, it is clearly designed to have the greatest impact on the employer while (if the TWU proposal for reduction in the proportion is accepted) having the least possible impact on the wages of drivers. While a bus strike might cause great inconvenience to the commuting public, a ban on the collection of fares will impact on the entire community as ACTION is taxpayer funded and the lost revenue is likely to result in an additional government subsidy being required.

PN41

And the Commission then goes on. Where the Commission lands is somewhere in the middle. Ultimately, it's not accepted that the employer's estimation was reasonable. But the Commissioner has regard to these economic impacts and the value – for value of the duties in fact performed in light of the lost revenue and balances that at paragraphs 46 and 47 and reaches the land in the middle.

PN42

Now, again, obviously a different set of facts but the point here is that in examining 472(3)(a), the 'nature', there is an examination beyond simply the banned duties themselves. But, in examination, of their value vis-à-vis the duties remain to be performed and in light of the commercial impact of the banned work. And, certainly, in any event as the Commission then goes on to analyse those considerations bare on the fairness question.

PN43

One sees a similar analysis in Deputy President Easton's reasons in Transit New South Wales which is behind tab 6. This is Transport Workers Union of Australia v Transit New South Wales Services Pty Ltd. This was a strikingly similar set of facts to the ACTION case as the head note bears out.

PN44

Now, the relevant passages I wanted to draw your attention to in the Full Bench commence at paragraph 47. There the Deputy President observes this 'It is safe to assume that in most jobs there are some portions or aspects of the work performed that are more important than others. Some portions of work might be crucial to the employer's operation, some might be time-critical, some work might have direct and significant impact on the work of other employees and some work might be ancillary, less significant, perhaps even replaceable or optional.'

PN45

'It is also safe to assume that the time spent by a worker on different aspects/portions of work might not reflect the significance or relative value of that work.'

PN46

And then he goes on to draw the distinction between the time only focus of Regulation 3.21 and then the inquiry was said in (2) and (3).

PN47

At 50, the Deputy President observes that –

PN48

...472(3)(a) requires the Commission to consider whether the calculation under Regulation 3.21 is reasonable. This firstly requires the Commission to assess whether the employer's methodology and calculation of the time spent on banned work is sound. The Commission might consider whether the employer's estimations of the time... are reasonable...' and so forth.

PN49

Importantly, the Commission must consider whether the calculation is reasonable 'having regard to the nature and extent of the [partial work ban]'. The 'nature' and extent of the ban entail more than just the time usually spent on the banned work.

PN50

And this point around the relative value is borne out in the second half at paragraph 52.

PN51

Fifty-three, refers to Commissioner Deegan's reasons in ACTION. And there – 'Commission Deegan reasoned that 'work' is capable of being something more than a physical task that is banned and can include the impact of the banned task on the work of the employer. The ban considered in that case was to have a much greater impact because all the operating costs of the employer will remain the same while the revenue will be substantially diminished'.

PN52

And I won't read out the quote. But at 54 the Deputy President considers that analysis and observes this –

PN53

Considering the 'impact' of banned work is a way of considering the relative value of that work. Work that has a greater impact is likely to be more valuable to the employer, even if it can be done quickly. The impact of the work has no place in the time-based calculation under Regulation 3.21, and a close read of the decision in ACTION does not reveal any finding to the contrary by the Commissioner.

PN54

But what then follows, of course, whilst that isn't part of the calculation under Reg 3.21 it is part of the analysis for the Commission in 472(3).

PN55

So we say that the approach taken by each of Commissioner Deegan, in ACTION, and by Deputy President Easton in Transport New South Wales represents the proper approach to applying sections 472(3)(a) and (3)(b). And that questions of or the questions beyond a mere temporal analysis and questions of the commercial value of the work have a part to play. And of course they are not determinative.

PN56

And as each of the approach of each of Deputy Presidents Easton and Commission Deegan make clear, it's not simply a question where they're saying that industrial relation costs me 'x' I am going to dock you 'x'. That, of course, doesn't engage properly with the requirements of 472(3)(a) or (b). But to approach the question from the converse position and say that, it is a matter only of effectively cents checking what the employer calculated under 471 and read 3.21 with regard to the same factors, misunderstands and misapplies the statutory language in section 472(3).

PN57

Now, here, the Deputy President does appear to have acted on the assumption that section 472 required only to conduct a temporal analysis when one examines the substance of her analysis.

PN58

Can I take the Bench to – again – back to the Tidewater decision? And can I turn, first, to paragraph 42? Well, 41, first. There the Deputy President states the language of section 472(3)(a) but then goes on to extract a passage from Transit New South Wales and as I have – I think I've attempted to demonstrate – with reference to the totality of Deputy President Easton's reasons really what is captured in that extract is a very incomplete part of the picture and picks up only the temporal aspect of the analysis.

PN59

Now, that itself doesn't demonstrate error but it is an indication of where things are heading. Paragraph 54, the Deputy President touches upon the arguments that the advocate for Tidewater and OSM below ran (indistinct) involved in the case at first instance but the arguments that were ran below on this question of relative value and the commercial impact. And the Deputy President finds this –

PN60

'Tidewater also submit that the work performed by the affected employees could not be valued at more than 10 per cent and the inconvenience suffered by Tidewater outweighs the commercial value of duties which were performed.'

PN61

And then her Honour observed this –

PN62

'The statutory regime requires employees to have reference to the time that their relevant duties take to perform, not some monetary value that the employer might attach to the duties.'

PN63

That is, strictly speaking correct so far as it goes in that it captures what 471 and Regulation 3.21 require but doesn't at all grapple with the very different statutory test that 472 is required to apply.

PN64

That is those arguments that are raised which are on, we say, plainly are relevant considerations are observed and disregarded.

PN65

DEPUTY PRESIDENT GOSTENCNIK: Well, is that right? Having regard to the sentences that follow?

PN66

MR POLLOCK: I'll deal with the sentences that follow which are done, I think, Deputy President, fairly in the alternative. As I'll develop in a moment, those observations simply are not supported on the evidence.

PN67

In the result – and this is the other lintel in all of this of course – in the result the variations that the Deputy President ordered in each case reflect precisely the temporal analysis. That is, there were agreed facts by – and certainly by closing submissions – there was agreement as to what percentage of the exempt duties these employees actually performed.

PN68

DEPUTY PRESIDENT BELL: Doesn't that just reflect though that she potentially didn't accept your arguments about inconvenience, ascribed to them essentially very little and then was left with the timesheet analysis?

PN69

MR POLLOCK: Well, Deputy President, the difficulty with that proposition is again where we land and I'll develop this in just a moment. That alternative – that backstop argument of in any event – simply weren't supported.

PN70

Now to develop that can I just firstly touch upon those matters which we say the Deputy President overlooked. Firstly, and this is set out in our written submissions at paragraph 18. There was evidence from Mr Harrower around the

nature of the exempt duties. And he was cross-examined about all of that and his evidence was to the effect that those duties were able to be performed by other employees not engaging in partial work bans.

PN71

And it wasn't put to him that that wasn't the case and there was no contrary evidence adduced. And he also gave evidence about the commercial impacts being to the effect that the appellant suffered the total loss of the ability to perform their contracted function. But, again, that evidence was relatively unchallenged.

PN72

Now there was also evidence from Mr Byrne by the CFMEU and I don't need to take you to those particular passages and the transcript there referred to in the written submissions. But his evidence was effectively that they were there as an extra set of eyes, and there were submissions that were based on that cross-examination to the effect that the value to the employer of the performance of those duties, in circumstances where it could be performed by others – and it was effectively an adjunct function – was minimal.

PN73

DEPUTY PRESIDENT BELL: But to be precise are you talking paragraphs 38 through to 41 of Mr Harrower's witness statement which is – is that Appeal Book 142?

PN74

MR POLLOCK: Yes, that's right. Now, what is – just to return to the alternative position that the Deputy President observed, the Deputy President said this in any event, 'It's clear from the evidence that the exempt duties included statutory duties which it had not performed and would have required the vessel to return from sea. The performance of those duties allowed the vessels to stay alongside, reducing the impact of the industrial action on Tidewater clients.'

PN75

Now, the evidence for – and I perhaps put that term in inverted commas – the evidence supporting those observations were propositions that were put in cross-examination. They weren't conceded and there was otherwise no evidence adduced on the union side of the ledger to support that position at all.

PN76

DEPUTY PRESIDENT GOSTENCNIK: But, presumably that evidence that is in relation to the exempt duties goes to the consideration in (b), not (a), because (a) is concerned with the work bans and that evidence is about duties that were not banned. So it can only be relevant as part of all the circumstances of the case, going to fairness, not – I mean it might be tangentially relevant in the sense that it might inform the nature of the banned work.

PN77

MR POLLOCK: I think that's the sense in which we put it as being relevant to 472(3)(a). That is, one sentence, the nature and extent of the banned work, at least in part with reference to its impact - - -

PN78

DEPUTY PRESIDENT GOSTENCNIK: By reference to what's left.

PN79

MR POLLOCK: - - - on what's left.

PN80

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN81

MR POLLOCK: And not to put too fine a point on it and it really is a point to which I was going to deal with later but it's worth putting it upfront right now – consistent with what was – with the approach in each of ACTION v Transit New South Wales. The point simply is where the effect of the ban is to render the vessels incapable of performing their contracted function, thereby materially impacting the revenue to be derived from the performance of work at that time that is the - - -

PN82

DEPUTY PRESIDENT BELL: Well, actually I just want to pull you up on that. Where in 38 through to 41 of Mr Harrower's statement is there any reference to revenue, or indeed any monetary impact on the two appellants here? They refer to the clients potentially being impacted and no longer being able to perform unspecified scopes of work. But there's no reference to revenue is there?

PN83

MR POLLOCK: There is – I think it's fair to say that the evidence on what actual dollar figure revenue impact flowed as a result is – or it would be – it would be putting it kindly to say that it's thin, Deputy President. There is – I think one would have to infer of the matter of common sense that a complete inability to perform the contracted function. And there was also evidence, not just that the work elective evidence that some - - -

PN84

DEPUTY PRESIDENT GOSTENCNIK: But that - - -

PN85

MR POLLOCK: - - - work might be able to have been rescheduled but others wobbled.

PN86

DEPUTY PRESIDENT GOSTENCNIK: But that would depend surely on the terms of the contract.

PN87

MR POLLOCK: That's so.

PN88

DEPUTY PRESIDENT GOSTENCNIK: And because the contract in evidence and whether or not this was something for which the appellant could be held

responsible and how the contract deals with those matters there's nothing about that.

PN89

MR POLLOCK: Deputy President, that's so. And I think it is fair to say that the state of the evidence on both sides of the ledger below, and if you have an opportunity to read the transcript there's some observations as to the other state on each side of the ledger that those were directly involved on the employer's side I note those integrated ratings that are actually involved none of them got in the witness box.

PN90

DEPUTY PRESIDENT BELL: But on this issue is 'nature and effect' an impact issue? That's an issue within your client's canvas, not the union's canvas.

PN91

MR POLLOCK: That's so. I can't take it any further than Mr Harrower's evidence in his witness statement and in his cross-examination to the effect that there was a complete inability to perform gainful work – the contracted function. I can't point to any evidence quantifying that in dollar terms. The highest I can put it is that it follows as a matter of inference that there would be an impact on revenue. I'm stuck with it.

PN92

DEPUTY PRESIDENT BELL: Well, that - - -

PN93

MR POLLOCK: I'm stuck with the evidence.

PN94

DEPUTY PRESIDENT BELL: That circles back to, I think, my initial comment a few minutes ago where I said isn't one – when I asked – isn't one – you were reading this – that the Deputy President below, in essence, didn't accept the inconvenience arguments that were put in the submissions below?

PN95

MR POLLOCK: Well, I think the difficulty with that is that there's no – the reasons don't present as – the Deputy President's reasons don't engage with those issues. That is, the Deputy President isn't saying, 'Well, you've made these arguments but you haven't given any evidence on revenue and so forth.'

PN96

The reason that the Deputy President does give in the alternative is, 'Well, the vessels could stay out and that would mitigate the impact.' But there was no evidence to support that proposition.

PN97

DEPUTY PRESIDENT BELL: But I'm now actually just looking at the written submissions below and this was at Appeal Book, page 260. These are your client's submissions. And on this issue of impact under – well, there's section (d)

reasonableness – and I have got two paragraphs which is at 90 and 91 on the inconvenience point on reasonableness. And then 94 and 96 in fairness perhaps.

PN98

MR POLLOCK: I'm sorry are these in the opening submissions or the closing submissions?

PN99

DEPUTY PRESIDENT BELL: No. I think they're closings. Yes, they're closings – at 251. And even at - - -

PN100

MR POLLOCK: The difficulty with running it here is that were the two versions in the appeal book, an initial version and an amended version. And page numbers are substantially different.

PN101

DEPUTY PRESIDENT BELL: I hope I'm not – I thought I - - -

PN102

DEPUTY PRESIDENT GOSTENCNIK: I'll endeavour to find them. I have - - -

PN103

DEPUTY PRESIDENT BELL: I've printed a revised appeal book but I might have printed the wrong one.

PN104

DEPUTY PRESIDENT GOSTENCNIK: The closing submissions are at – of the amended appeal book – at 521.

PN105

MR POLLOCK: Yes, that's the five-page number I have.

PN106

DEPUTY PRESIDENT BELL: I might have the wrong version. Apologies. I'll try and - - -

PN107

MR POLLOCK: In any event, Deputy President, if you can give me the paragraph reference within the closing submissions?

PN108

DEPUTY PRESIDENT BELL: Yes. Ninety, 91 and then 94 and 96.

PN109

MR POLLOCK: Ninety and 91. And, sorry, what was the other paragraph?

PN110

DEPUTY PRESIDENT BELL: Ninety-four and 96. This is the inconvenience point. And I perhaps even pause with some nervousness just to make sure I am looking at the right document. But these documents I am looking at is titled 'Respondent's outline and closing submissions' - - -

PN111

MR POLLOCK: No, no. I think that's right. Ninety-four to 96 picks up the Harrower evidence.

PN112

DEPUTY PRESIDENT BELL: But even at 94 the proposition stated, which is the respondent suffered the total loss of the ability to productively use the vessels to perform their contracted function, isn't borne out by Mr Harrower's statement.

PN113

MR POLLOCK: Well, we of course rely on Mr Harrower's evidence, rather than any particular - - -

PN114

DEPUTY PRESIDENT BELL: Yes.

PN115

MR POLLOCK: - - - submission.

PN116

DEPUTY PRESIDENT BELL: Yes.

PN117

MR POLLOCK: To the extent that the submission put below either put the evidence where we rely on the evidence below.

PN118

DEPUTY PRESIDENT BELL: Yes. But in terms of the inconvenience argument that the Deputy President was directed at – I suppose my other point is that it wasn't particularly expansively developed before her, at least, in these written submissions.

PN119

DEPUTY PRESIDENT GOSTENCNIK: And as I read Mr Harrower's evidence, at least, his written statement – his evidence about inconvenience is not directed to the appellant's inconvenience but the appellant's client's inconvenience. That's what he says at 41. 'As a result of the failure the company's clients suffered significant inconvenience.'

PN120

MR POLLOCK: I think that's so. I think that that would – I'm not sure, Deputy President, whether that materially changes whether those things are relevant to a fairness analysis, or indeed, relevant to assessing the nature or extent.

PN121

DEPUTY PRESIDENT GOSTENCNIK: Well, one would need to infer that some of their client's inconvenience is to be visited upon the appellant, presumably, either financially or otherwise.

PN122

MR POLLOCK: Well, indeed. I think the reference to inconvenience there is not one that we can – you know – perhaps place a great deal of weight on in so far as

we put weight on that evidence below. It's the evidence concerning the total – well, perhaps to be more accurate, the extent of Mr Harrower's evidence concerning the impact of the action on the inability to perform the contracted function.

PN123

Now, of course, I don't think anyone sensibly looking at the state of the evidence in this case – full stop – and on this issue, in particular, we'd say that this was developed in a manner that – to be fair – fulsomely developed from an evidence and a submission standpoint how that impact might manifest. But the issue that we grapple with with grounds 1 and 2 is that on the face of the Deputy President's reasons, the Deputy President despatches the impact arguments. Firstly, on the basis that the statute required a temporal analysis. We say that's wrong.

PN124

Even if one were to examine that second part of the relevant paragraph as being the – in the alternative if I am wrong in any event – we say there was a - - -

PN125

DEPUTY PRESIDENT GOSTENCNIK: But doesn't that submission require us to read the sentence, the statutory regime requires employers more broadly? Rather than simply being a statement of that which is required of employers in relation to the preparation of a notice. No more than that is required of an employer is it?

PN126

MR POLLOCK: Well, that's so. And that was the point I was - - -

PN127

DEPUTY PRESIDENT GOSTENCNIK: But your submission that the analysis is confined to a temporal analysis relies upon that as informing or suggesting that that's where the error begins. And doesn't that then require us to read that as though the Deputy President was saying something more than that? Albeit not in words. Read between the lines.

PN128

MR POLLOCK: Well, I think when – that's so, Deputy President – but I think when one examines that chain of reasoning there is, in my submission, no adequate engagement with how those matters – that is the impact on the ability to perform the contracted function. There was no adequate engagement as to how those matters engaged with section 427(3)(a) or (b).

PN129

The only grappling with that appears at paragraph 54 and it starts with, 'While the statutory regime requires temporal analysis' – you're right, Deputy President Gostencnik that, strictly speaking, that being read as a reference to employers to have reference to the time, well that is just as easily read as section 471 and reg 3.21. But one needs to ask, 'Well, where's then the analysis of how those matters inform considerations for the nature and extent and consideration and fairness between the parties.

PN130

And if those things haven't been considered through that lens well then that is, in my submission, in error because those aren't mandatory considerations. And the absence of reasons, to your point, Deputy President Bell, is indeed open to read that as just – 'Well, the Deputy President didn't consider the argument was very good.' I'm paraphrasing but that's the substance of it.

PN131

In circumstances where the statute commands as with mandatory considerations. And I've given references. Don't need to take you to the authority. They have in mind the Newlands case that Justice Katzmann handed down several years ago, references to what's required in order to – in terms of giving adequate reasons when dealing with mandatory considerations. That came up, I think, in a scope order case from memory. But I'd need to have a look at it again.

PN132

But her Honour's observations are really to the effect that one can't simply – or the absence of consideration of those things indicates that it hasn't been considered.

PN133

DEPUTY PRESIDENT BELL: But in this case she's – the Deputy President has specifically referred to inconvenience – and that's not her shorthand. That's your own client's shorthand at 91 and repeated at 96 in those submissions below.

PN134

MR POLLOCK: That's so. But simply adverting to an argument and putting to the side without considering the argument and providing adequate reasons for that in a mandatory consideration context is an appellable error.

PN135

DEPUTY PRESIDENT BELL: So what is stated in two paragraphs it was impermissible for her to state in one?

PN136

MR POLLOCK: I'm sorry, Deputy President.

PN137

DEPUTY PRESIDENT BELL: Well, I'm sorry. I withdraw that.

PN138

DEPUTY PRESIDENT GOSTENCNIK: Isn't the last sentence at 54 simply indicating the weight that she's giving to that evidence? She's saying, 'Well, yes. Inconvenience but that's the point of industrial relations. So I'm not going to give it a lot of weight.'

PN139

And earlier she says, 'Well, what's left to perform is the exempt duties and those enable the vessel to stay up.' And there she is examining the nature and extent of the partial work ban. And so hasn't she, albeit briefly, but hasn't she applied her mind to those matters required by 3(a)?

PN140

MR POLLOCK: Well, I think, Deputy President, that requires a considerable degree of reading into the reasons that the face of the reasons don't disclose - - -

PN141

DEPUTY PRESIDENT GOSTENCNIK: A bit like the evidence.

PN142

MR POLLOCK: - - - but - - -

PN143

DEPUTY PRESIDENT GOSTENCNIK: A bit like the evidence.

PN144

MR POLLOCK: Deputy President, I think I have made reasonably clear already that I don't - - -

PN145

DEPUTY PRESIDENT GOSTENCNIK: I understand.

PN146

MR POLLOCK: - - - and can't say that the state of the evidence below is a gold standard on any level and to the extent that there is – to the extent that we're successful in demonstrating appellable error there will be a real question around how a rehearing would be conducted. I've had some discussions with my learned friend on that and we can address your Honours at a later point.

PN147

But I think this is perhaps one of those cases where – and they talk about hard cases making bad law. I stated a case before, the Deputy President below, perhaps informs in part some of the difficulties that we see and the reasons. And whilst one might have a measure of sympathy with that it doesn't, in my submission, change the requirement to have regard to those matters and to provide adequate reasons with respect to them.

PN148

Now, can I just briefly touch on this question around the – just going back to that second part of paragraph 54 and the Deputy President talking about the performance of statutory duties, allowing the vessels to remain out and therefore mitigating the impact of the industrial action.

PN149

The statutory obligations, and this is contrary to what the respondents say in their appeal submissions, those obligations applied to the employer, that is, to ensure that functions would be performed. They don't say anything about which particular employees are required to perform them. And this dovetails in with Mr Harrower's evidence around those tasks being able to be performed by others.

PN150

And one sees an acceptance of that in the transcript below at paragraphs 741 to 749 and I think Mr Edmonds appearing for the below set out in some detail precisely that point. 741 to 749 of the transcript.

PN151

So whilst I would readily accept that the evidence on those matters was to put it politely – a bit thin - - -

PN152

DEPUTY PRESIDENT GOSTENCNIK: Well, you can say that because you weren't there.

PN153

MR POLLOCK: Quite right. Quite right, Deputy President.

PN154

DEPUTY PRESIDENT GOSTENCNIK: I just wanted to make the record clear.

PN155

MR POLLOCK: That's right. But it does that – the fact that that evidence was a bit thin that would change the fact that that evidence was adduced, it was unchallenged relevantly, and we're left with a situation where Mr Harrower had given evidence of the impact on the contract and function. He's given evidence about the fact that the statutory duties could be performed by others.

PN156

And it appears that – and again that might relevantly challenged and the Deputy President's analysis despatching this – these arguments – in the alternative is framed around some kind of benefit or reduction of the impact of the industrial action on Tidewater's clients around the vessels being able to stay alongside.

PN157

And we say there is nowhere in the evidence can I see a reference to any reduction of the impact on Tidewater's clients as a result of the vessel staying alongside, much less that that was a function of duties which only the employees, performing the exempt duties could perform.

PN158

DEPUTY PRESIDENT BELL: So is it – I mean what she's saying is a factual matter is that the vessels did not have to return from the sea.

PN159

MR POLLOCK: Yes.

PN160

DEPUTY PRESIDENT BELL: Putting aside what it means about being alongside other clients. But are you saying it's a factual matter that's incorrect? That the evidence is that they did return from sea?

PN161

MR POLLOCK: No. We don't say that they did return from sea. The point is that in assessing, again, the relative value of assessing the nature and extent of the

banned duties and looking at the relevant value, vis-à-vis the work that was left to be performed.

PN162

DEPUTY PRESIDENT GOSTENCNIK: There was no evidence that that was of benefit to the company.

PN163

MR POLLOCK: Correct. In circumstances – yes, that's right. They've no evidence at all that that actually mitigated the impact on Tidewater's clients. And in circumstances where there's no evidence or the unchallenged evidence was to the effect that those exempt duties could be performed by others. One just has to ask the question, 'Well, where's the value in having these particular employees perform those duties?'

PN164

DEPUTY PRESIDENT GOSTENCNIK: Particularly in light of, I suppose, Mr Harrower's evidence at 41, putting aside the inconvenience point where he says some – the company's clients were able to amend their timetables to accommodate the industrial action period which is a different thing to the ships – boats being out there.

PN165

MR POLLOCK: Yes.

PN166

DEPUTY PRESIDENT GOSTENCNIK: Others were not able to do so and the vessels were not able to service the contracted scopes.

PN167

MR POLLOCK: Correct. That's right. And we say those are matters which were relevant considerations and were not adequately dealt with. And certainly nothing in the reasons supports the fact that they were adequately dealt with.

PN168

DEPUTY PRESIDENT GOSTENCNIK: So, in substance, what appears to be an inference drawn by the Deputy President that there's some benefit, you say essentially wasn't available and is in some respects contrary to the evidence?

PN169

MR POLLOCK: I think that's right. What we say is that it appears to – it appears to summarise a line of cross-examination which wasn't conceded. I think we were given the relevant transcript references and Mr Edmonds had - - -

PN170

DEPUTY PRESIDENT GOSTENCNIK: Well, which? Sorry I missed the transcript note.

PN171

MR POLLOCK: Bear with me just one moment.

PN172

DEPUTY PRESIDENT HAMPTON: It's before page 481.

PN173

DEPUTY PRESIDENT GOSTENCNIK: This is at 741 onwards?

PN174

MR POLLOCK: No. It is – the perils of dealing with all of this electronically.

PN175

DEPUTY PRESIDENT GOSTENCNIK: Yes. I deal with my electronic needs virtually.

PN176

MR POLLOCK: Yes. This is footnote 14 – paragraph 836 to 837 in transcript. Yes, 836 and 837 and that's really the – at least on my reading of the evidence that's as high as it gets. There's no proposition squarely put to the witness that that was, in fact, the case and there's no positive evidentiary case adduced.

PN177

DEPUTY PRESIDENT BELL: Are you talking about the statement in paragraph 54 of the primary decision? That it's clear from the evidence that the exempt duties included statutory duties which, if not performed, would have required the vessel to return let's say?

PN178

MR POLLOCK: Yes. And then I think - - -

PN179

DEPUTY PRESIDENT GOSTENCNIK: And at 837 the proposition is put but the answer is, 'I can't answer that.'

PN180

MR POLLOCK: Correct. There's no further evidence adduced and you're left – all you're left with is Mr Harrower's evidence to the effect that you referred to, Deputy President Gostencnik, and no positive proposition put to it and saying, 'No, that's wrong.' In fact there was some benefit. There was no evidence adduced from the union to the effect that there was such benefit.

PN181

DEPUTY PRESIDENT BELL: Yes. But these duties are contingent duties. Is that what we're talking about? On an emergency? Or are we talking different duties?

PN182

MR POLLOCK: They are – we're talking watch-keeping duties, fire rounds and so forth. These were the exempt duties in the notice. There are and I'm sure - - -

PN183

DEPUTY PRESIDENT GOSTENCNIK: Well, if they are undertaken, presumably because the boat's out there. They wouldn't be undertaken if the boat's not.

PN184

MR POLLOCK: Well, I think that's so. And, again, I don't think anyone is putting the proposition that all these boats had to return.

PN185

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN186

MR POLLOCK: Return to port – no one's suggesting that.

PN187

DEPUTY PRESIDENT BELL: Well, just – sorry, then – and maybe I am looking at a different factual issue but what does 37 of Mr Harrower's statement - - -

PN188

MR POLLOCK: I'm sorry. I was talking 836 and 837 of the transcript.

PN189

DEPUTY PRESIDENT BELL: No, no. And I'm talking of paragraph 37 of Mr Harrower's statement. Hopefully – at 36 he's talking about maintenance and safety equipment and he talks about the extinguishers, oxygen tanks et cetera. And then in 37 he says, 'Well, the employees remained ready, willing and able to perform the other applicable exempt duties' – other applicable exempt duties. These duties were unlikely to be performed he says, in the absence of emergency or the relevant vessel being in port.'

PN190

He's at least stating there that they're ready, willing and able to perform other applicable exempt duties, isn't he?

PN191

MR POLLOCK: Well, that's so. But I'm not sure how that engagement's relevantly with - - -

PN192

DEPUTY PRESIDENT BELL: Well, I was looking 54. Isn't that what potentially 54 is about where it's stated it's clear from the evidence that exempt duty is included in statutory duties which it had not performed and I suppose would have required that - - -

PN193

MR POLLOCK: Yes. The point was there was unchallenged evidence to the effect that that – those duties weren't required to be performed by this cohort. And there is no evidence to suggest that performance of those duties, allowing them to stay alongside, reduced the impact of the industrial action on Tidewater's clients. There's nothing to that effect.

PN194

DEPUTY PRESIDENT GOSTENCNIK: Because on the evidence one couldn't even discern whether any boat stayed this side. He was asked that question in the transcript.

PN195

MR POLLOCK: Yes.

PN196

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN197

DEPUTY PRESIDENT BELL: Yes. I see. Actually, in fairness to you, I think 32 Mr Harrower's statement it is more reflective of the proposition.

PN198

MR POLLOCK: Yes.

PN199

DEPUTY PRESIDENT BELL: That he was saying that they can be undertaken by other employees.

PN200

MR POLLOCK: Yes.

PN201

DEPUTY PRESIDENT BELL: Well, it's qualified but anyhow - - -

PN202

MR POLLOCK: Yes. If I can share the level of frustration trying to pass some of this? That is really all I need to say, I think, about ground 1 and 2. Just before I move off ground 1 and 2, can I just deal very briefly? I think my learned friend in his written submissions suggests while Mr Harrower's evidence, putting aside the valid criticisms that might be made around it's reasonably thin but I think my learned friend goes so far as to say, 'Well, it was so general it could apply to any employer.'

PN203

That, with respect to my learned friend, is simply wrong. It's couched with specific reference to vessels as defined and the industrial action period is defined. Now, again, if there was a contest on the evidence about the loan, whether Mr Harrower – what Mr Harrower has said about the commercial impact and the inability to perform contract and functions, well those are matters that could have been cross-examined on and evidence could have been adduced in answer.

PN204

DEPUTY PRESIDENT BELL: Well, I mean you talk about the evidence being thin. But I mean it's arguably more than that. I mean Mr Harrower wasn't even there. I mean these paragraphs 38 through to 41, at least on paragraph three of his statement, he's saying he makes from a combination of his own direct observations which, presumably, is not the case. His review of company business records and information received from Mr Clarence Paul, and the company vessel masters. 'Where I refer to matters from information and belief I state the source of the information and believe it to be true.'

PN205

Well, I meant that's not done at least but these affect paragraphs at 38 through to 41. I mean it might be that you're correct on some perhaps interesting constructional issues of nature and effect for the purposes of 472. But what's the factual alternative that we've got to consider that there's the error?

PN206

MR POLLOCK: Well, we don't – I'm not sure. In order to establish - - -

PN207

DEPUTY PRESIDENT BELL: Let me put it a different way.

PN208

MR POLLOCK: - - - appellable error, I don't think we need to go so far as to say, well what should probably have been the percentage reduction. It is enough for us to establish that there was an error in the Deputy President's evaluative judgment, having regard to the mandatory considerations that she was required to consider. And she was required to give adequate reasons for that consideration.

PN209

Where things ultimately land on rehearing and might be potentially of fresh evidence from both sides around it to deal perhaps more fulsomely with these matters. That is certainly a live question for rehearing but it's not something that - - -

PN210

DEPUTY PRESIDENT BELL: Yes. Is that in the public interest to grant permission to appeal on a ground that it seems clear it might require fresh evidence to be led? I mean there may be an error but not all errors lead to permission.

PN211

MR POLLOCK: Well, we would say and I think I have set out the written submissions. It would be an appropriate ground for permission to appeal in circumstances where on – if we're right on what we say about grounds 1 and 2, well there's inconsistency or there's inconsistency in the approach of the Deputy President with several decider first instance cases. There is no Full Bench authority on this question. But those considerations would point to it being in the public interest to grant permission to appeal.

PN212

Where things ultimately land on the rehearing is a question for the member on rehearing.

PN213

DEPUTY PRESIDENT BELL: Thanks, Mr Pollock.

PN214

MR POLLOCK: Thank you. Unless there's anything further on ground 1 and 2 I propose to deal briefly with ground 3. This really is a short point and I paused, I

think, at the outset when I was taking you through section 472(1), the reference to payments.

PN215

DEPUTY PRESIDENT GOSTENCNIK: As I understand the appellant's contention on this point, there's no dispute is there that a payment in respect of a period of leave accrued during the imposition of partial work bans might be reduced when the payment is made?

PN216

MR POLLOCK: Subject to one caveat which arises, I think, on the Deputy President's reasons. That's speaking generally. Speaking generally, I wouldn't cavil with that proposition.

PN217

DEPUTY PRESIDENT GOSTENCNIK: No. But you say what the Deputy President did was to not amend or reduce the payment.

PN218

MR POLLOCK: Correct.

PN219

DEPUTY PRESIDENT GOSTENCNIK: But to fiddle with the accrual not to get paid.

PN220

MR POLLOCK: That's right. That's exactly right.

PN221

DEPUTY PRESIDENT GOSTENCNIK: Yes. Where was it specified in the notice that annual leave payments would be affected?

PN222

MR POLLOCK: I think the evidence is clear that it wasn't. Now, one might well say that - - -

PN223

DEPUTY PRESIDENT GOSTENCNIK: And is it or was it the appellant's intention to reduce annual leave payments in respect of periods that accrued during the industrial action?

PN224

MR POLLOCK: I'm not certain there was evidence below as to that intention. I think one can - - -

PN225

DEPUTY PRESIDENT GOSTENCNIK: Well, is it going to do that? Let me be direct.

PN226

MR POLLOCK: Well, Deputy President, I will need to take some instructions on - - -

PN227

DEPUTY PRESIDENT GOSTENCNIK: Because if it's not going to do that then one immediate question arises – what's the utility in the question on appeal?

PN228

MR POLLOCK: Deputy President the way in which – and I think that this is just a matter of the effluxion of time – the way in which these – this is a variant of an even time of dates (indistinct) 1.153 is opposed to a true even time. But the way in which these rosters operate is you'd be well aware is that the off-duty time because like it's - - -

PN229

DEPUTY PRESIDENT GOSTENCNIK: Yes. So the times this could be passed.

PN230

MR POLLOCK: Like it's taken in its applicable period.

PN231

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN232

MR POLLOCK: And so they're – and I'll need to get instructions on this but I last suspected that those – they haven't been.

PN233

DEPUTY PRESIDENT GOSTENCNIK: Yes. They haven't. Yes.

PN234

MR POLLOCK: That's right. Now, what might – just to go back to your first observation around whether or not it's included in the notice and this is coming at this point with fresh eyes on appeal – I'm looking at it. One needs to ask the question if it was not – if a leave accrual was not a matter which comes within the rubric of 471, 472 – put these other questions of payments.

PN235

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN236

MR POLLOCK: That wouldn't be something that would be included in a notice. Rather, whether or not those accruals would be deduced is a matter of the operation of the enterprise agreement.

PN237

Now, whether or not the employer was right, or the employers were right or wrong to reduce those amounts accordingly are matters that are up for grabs. They could be up for grabs in the 739. They could certainly be up for grabs with court proceeding. The point is that they are not matters which power is vested in the Commission under 472 to vary.

PN238

DEPUTY PRESIDENT GOSTENCNIK: In relation to the accruals.

PN239

MR POLLOCK: To the accruals. That's right. Now - - -

PN240

DEPUTY PRESIDENT GOSTENCNIK: Well, speaking for myself only, I can see the merit in that proposition, but let's assume that the Deputy President was wrong about that. One solution would simply be to either amend the order so that it refers to payments in respect of annual leave, periods accrued during the industrial action, or read the totality of the order as having that affect, because of the introductory words in the recital to substantive reduction orders.

PN241

But, fundamentally, stepping away from all of that, in the end because the employer hasn't deducted anything, and because the Deputy President's order is to the effect that you shouldn't deduct anything. What is the utility beyond suggesting that she was beyond power in making the form of order that she made?

PN242

MR POLLOCK: Well, I think that payment issue has sailed given what we've – given the point that we've just made - - -

PN243

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN244

MR POLLOCK: - - - around how the rosters operate. But the one – I think I said at the outset, subject to one caveat that appears to arise from the Deputy President's reasons and something I think might engage with the reasons why might need to look at it. At paragraph 55 of the reasons – this is getting the Tidewater reasons.

PN245

The Deputy President observes this. 'Clause 26.2 herein provides employees accrued time off at a rate of 1.5 to 3 – 1.153 days – leave to compensate employees public holidays, (indistinct) leave, annual leave, personal care leave, compassionate leave, and time spent travelling in off-duty time. The evidence is that leave accrues each day an employee is on a vessel, regardless of the number of hours actually worked on the day. If there is no nexus between hours of work and leave accruals it is difficult to establish how leave accrual can be withheld for partial performance.'

PN246

Now there was a contention that grappled with that point below which is one of the limbs to ground 4. But just pausing for a moment – assuming, for the sake of argument that that's correct, that there is no nexus between the hours actually worked on the day and the accrual, then there's a real Mahmood problem I think because any payment with respect to that balance would be dependent, not on the actual performance of services in the industrial action period, but on the Deputy President's analysis is compensation for other things on other days.

PN247

And that is something that is dependent on, rather than subsistence with the contract to employment or the subsistence of that contract of employment as it relates to the enterprise agreement and the entitlements it confers, rather than dependent upon the service on the day. And if that's right then there's no power to vary, even with respect to those payments.

PN248

DEPUTY PRESIDENT GOSTENCNIK: Yes. Well, at least some of it must be related to the performance of work because clause 36 provides that this agreement, under subclause 26.2 et cetera, gives full effect to the NES entitlement.

PN249

MR POLLOCK: Yes.

PN250

DEPUTY PRESIDENT GOSTENCNIK: So at least part of it must relate to accrual during ordinary hours worked, because that's how the NES operates.

PN251

MR POLLOCK: Well, it's intended to discharge those – that provision is intended to discharge those obligations.

PN252

DEPUTY PRESIDENT GOSTENCNIK: Including its accrual - - -

PN253

MR POLLOCK: Yes.

PN254

DEPUTY PRESIDENT GOSTENCNIK: - - - which can only be fair in respect of - - -

PN255

MR POLLOCK: Yes.

PN256

DEPUTY PRESIDENT GOSTENCNIK: So there's some nexus. But as the clause makes clear it's to compensate for other things as well.

PN257

MR POLLOCK: Yes. That's right. And I think the analysis in Mahmood and that's tab one of the bundle. And I'm having particular regard to paragraph 51 of the joint reasons, 'An employee engaged in industrial action does not (indistinct) in industrial action render the services on which the entitlement to remuneration commonly depends. But to say that is distinctly not to say that entitlement to the employee which are dependent on the subsistence of the contract of employment, rather than the actual performance of services, even if sensibly described as payments are payments in relation to the total duration of industrial action. I think you're right, Deputy President, that in some way, of course, there is that connection but - - -

PN258

DEPUTY PRESIDENT GOSTENCNIK: A portion of it, yes.

PN259

MR POLLOCK: Yes. I think that's right. But for that issue I think you'd be right to say that conceivably one could deal with those matters by way of varying the order.

PN260

DEPUTY PRESIDENT GOSTENCNIK: Well, there have been – there was a sweeping order without regard to that portion of the payment that would have been attributable to the ordinary hours during which the partial work bans were imposed.

PN261

MR POLLOCK: Well, I think I would go a step further. There would be two errors. The first is expressing the order in terms of - - -

PN262

DEPUTY PRESIDENT GOSTENCNIK: I understand.

PN263

MR POLLOCK: - - - varying the accrual. And then - - -

PN264

DEPUTY PRESIDENT GOSTENCNIK: Yes. Yes.

PN265

MR POLLOCK: But I think on either view that is – I mean how that would – how that issue would impact the proportional variation.

PN266

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN267

MR POLLOCK: Is really a matter that would properly be ventilated on rehearing, Deputy President. It wouldn't be something that you would - - -

PN268

DEPUTY PRESIDENT GOSTENCNIK: Well, would you even have a rehearing on that issue given that the horse for deduction has bolted? You can't take it out of future payments. The annual leave that accrue and the leave it accrued has been taken, hasn't it?

PN269

MR POLLOCK: I'm sorry, Deputy President. Give me just one moment.

PN270

DEPUTY PRESIDENT GOSTENCNIK: You'll get some instructions – yes, I heard.

PN271

MR POLLOCK: Indeed. I mean subject to that issue, Deputy President, I'm not sure I can take that terribly much further - - -

PN272

DEPUTY PRESIDENT GOSTENCNIK: You can come back to that. Yes.

PN273

MR POLLOCK: I think it's tolerably clear, at least, from – well, we pointed to two aspects of which there is appellable error, the extent to which that standing on its own you would rehear is another matter.

PN274

Can I just, again, on the related point – ground 4 – if we're wrong and there is power to have made an order to that effect or perhaps even approaching it from the alternative lens of – well, even if one were to vary the terms of the order such that it was expressed with reference to payments.

PN275

I think I touched on earlier that there was the contention below that was advanced around why the leave accrual rose and fell with the performance of work. And that concerned the definition of a duty day in clause three of the two agreements, which is to the effect that a duty day is a day's work, attracting a day's pay and accruing a day's leave. And what was advanced, in essence was that leave accrues commensurately on that basis. And if a day pay is reduced because the employee hasn't performed a day of work as they've been provided – well, then the accrual drops accordingly.

PN276

There is - - -

PN277

DEPUTY PRESIDENT HAMPTON: So, Mr Pollock, are you inviting the Commission to read for each day spent on duty under the two-day duty system as meaning a duty day? Is that the effect of the submission?

PN278

MR POLLOCK: I am simply, Deputy President – I am just simply canvassing that the argument that was put below we say that there was no engagement or no consideration of that contention. Now the way in which the agreement deals with the definition of duty day as opposed to a 'dead' day. Now there's some subtlety in all of that. I'm not going so far as to advance that as the proper construction - - -

PN279

DEPUTY PRESIDENT HAMPTON: I see.

PN280

MR POLLOCK: - - - here because to be frank, Deputy President - - -

PN281

DEPUTY PRESIDENT GOSTENCNIK: But there's payment on a 'dead' day as well, isn't there?

PN282

MR POLLOCK: Yes, there is. Really, the nub of all of that is that – well, if the construction below as to clause 3 is right, well all that sat outside the operation 471, or 472 it would just follow as a matter of the construction in the agreement.

PN283

DEPUTY PRESIDENT HAMPTON: Yes. Well, the agreement raises I think in the submissions below and on appeal it says with a bob each way on that - - -

PN284

MR POLLOCK: Well - - -

PN285

DEPUTY PRESIDENT HAMPTON: - - - so it was put in the alternative that in any event the agreement wouldn't require - - -

PN286

MR POLLOCK: - - - I think that's - - -

PN287

DEPUTY PRESIDENT HAMPTON: - - - the reduction. That's why I'm sort of raising the issue with that.

PN288

MR POLLOCK: Yes. No, I think that's so. And to be frank, Deputy President, I haven't canvassed that argument in considerable detail on appeal because of, at least in my judgment – that, really, is a separate – in a sense – a separate issue but one which would have provided – again, if correct – would have provided more basis for that accrual to have been reduced accordingly.

PN289

There's just nothing on the face of the Deputy President's reasons that she's given any consideration to any of that.

PN290

DEPUTY PRESIDENT HAMPTON: But you're not asking us to do that though?

PN291

MR POLLOCK: No. Well, we say that the failure to engage with that contention at all, if they give any reasons for what needed engagement with it or despatching it reveals our appellable error.

PN292

DEPUTY PRESIDENT GOSTENCNIK: Do you say that construction is wrong?

PN293

MR POLLOCK: That the construction advanced below - - -

PN294

DEPUTY PRESIDENT GOSTENCNIK: No. The Deputy President's construction, which is in essence they accrue for every day they're on the vessel.

PN295

MR POLLOCK: Well - - -

PN296

DEPUTY PRESIDENT GOSTENCNIK: I mean clause 26.2 is couched in terms of each day spent on duty. 26.5 then defines 'on duty' as periods of employment commences the day the employee joins the vessel and they come off duty when they leave the vessel. So, presumably, every day on the vessel – whether they're working or not - - -

PN297

MR POLLOCK: Well - - -

PN298

DEPUTY PRESIDENT GOSTENCNIK: So when they're sleeping is it they're on duty – as defined?

PN299

MR POLLOCK: Bear with me one second, Deputy President.

PN300

DEPUTY PRESIDENT GOSTENCNIK: It seems that the day they joined the vessel is a 'dead' day and the day they leave the vessel is a 'dead' day but they're paid nonetheless and at least the first day is an on-duty day.

PN301

MR POLLOCK: Yes.

PN302

DEPUTY PRESIDENT GOSTENCNIK: And so would the last - - -

PN303

MR POLLOCK: But it would be – but the difficulty, Deputy President, in construing in that fashion saying that they accrue from the moment that they – that commence on the day that they join the vessel and they accrue regardless of whether or not they're performing any work at all gives no contextual force to clause 3 in the definition of a duty day.

PN304

DEPUTY PRESIDENT GOSTENCNIK: Yes. Except it doesn't say 'duty day'. It says 'spent on duty'

PN305

MR POLLOCK: That's - - -

PN306

DEPUTY PRESIDENT GOSTENCNIK: And then it goes to the trouble of defining those terms.

PN307

MR POLLOCK: It does. Of course - - -

PN308

DEPUTY PRESIDENT HAMPTON: Mr Pollock, you don't have to go as far as your suggestions that reach the certain conclusions the Deputy President did below though.

PN309

MR POLLOCK: I'm sorry, Deputy President?

PN310

DEPUTY PRESIDENT HAMPTON: You don't have to go as far as your suggestion to agree with the conclusion with Deputy President below because these were partial work bans, not total work bans. In other words, some duty was performed by them each day.

PN311

MR POLLOCK: That's so. Yes. Well, I think that is right and you see in some of the – I think some of the reliance is on some cross-examination of Mr Harrower had suggested well, say on a day that there was a cyclone and there was no work to be performed. Well, they would still accrue. And he said, 'Well, yes. That would be the case.' That grapples with quite a different scenario to what we're dealing with here where the employees are not really willing and able to perform all of their duties. So you're dealing with, as you say, a partial – a partial work ban.

PN312

I think, Deputy President, without going so far as to provide a fulsome argument as to what the proper construction is of 26 in light of clause 3. I think we can say at the very least that one's arguable, and it was argued, and there was no engagement with that argument. And that, again, demonstrates error.

PN313

I set out, I think, in writing two of the difficulties arising from the Deputy President's reasons at – this is at 55 – and this is the basis of where the Deputy President is dealing with clause 26.2 when she says, 'The evidence is that leave accrues each day an employee is on a vessel regardless of the number of hours actually worked on that day.' But the footnoted transcript doesn't contain any of that evidence.

PN314

I think I deal in writing with well there is some evidence from Mr Harrower which was that, in effect that passage of cross-examination that I summarised a moment ago, but it's dealing with a very different set of circumstances.

PN315

There was also evidence or cross-examination of Mr Harrower on that accrual issue. This is at paragraph 875 of the transcript but, again – well, that evidence was admitted only on the basis of industrial practice. It certainly wasn't something that went to what the proper construction in the agreement was.

PN316

It seems that the Deputy President has relied on that evidence of industrial practice as informing whether or not there was a nexus, that is for the purposes of the proper construction of 26.2 between the accrual and the performance of work. So we cavil with the reliance on that evidence of providing a basis to reach that conclusion.

PN317

That's all we wish to say with respect to ground 4. As far as permission to appeal was concerned I think I have addressed, at least, a couple of those points in running, we would say the apparent divergent approach on 472(3), in this case when compared with the approaches in each of ACTION and Transit New South Wales.

PN318

There's also the – I didn't take the Bench to it – but these are in Vice President Catanzariti in the United Voice case where he refers to several other authorities. I didn't take the Bench there on the basis that the actual analysis is not particularly enlightening but the broad points that those series of cases take that broader review, that isn't confined to a temporal assessment, and does examine the question of the relevant value of the duties.

PN319

We'd say that the Deputy President's approach is contrary to that. That coupled with the absence of Full Bench authority on the question would provide a basis for permission to appeal on those grounds.

PN320

As far as ground 3 is concerned, subject to the finessing that might be done to the order to describe it as a payment or otherwise, we'd say it's a reasonably straight-ahead example of the Commission acting in excess of jurisdiction. Sorry – I should say in excess of power – and it's not something that can be simply cured by varying the order given that Mahmood issue that I raised.

PN321

And ground 4, for the reasons I've just touched upon, again demonstrates appellable error. You know, sir, I'm not sure I'd be able to advance ground 4 as a stand-alone ground warranting a ground of permission be on just – it shows – appellable error but when you put all those things together, in my submission, there's a compelling basis for a ground of permission to appeal.

PN322

Unless there's anything else I can assist with those are the submissions of the appellants.

PN323

DEPUTY PRESIDENT GOSTENCNIK: Has your instructor been able to obtain instructions about the - - -

PN324

MR POLLOCK: As I understand the position, Deputy President – I'm sorry – as I understand the position my client's still ascertaining what the position is. What I would - - -

PN325

DEPUTY PRESIDENT GOSTENCNIK: Well, if you're able to - - -

PN326

MR POLLOCK: I think if I can address it in reply I will - - -

PN327

DEPUTY PRESIDENT GOSTENCNIK: - - - before the end. If you're able to, otherwise we'll give you a short period – a short note. Yes. All right. In the event that you're right on both your construction point and ground 3 what do you say should happen in respect of this appeal?

PN328

MR POLLOCK: Well, in those circumstances we would think the matter should go on the hearing, as I think my learned friend and I are on a unity ticket that there would be at least an opportunity for each of the parties to apply to adduce fresh evidence. And I think on any sensible reading of the transcript that's a fair approach to take.

PN329

DEPUTY PRESIDENT GOSTENCNIK: So grant permission, uphold the appeal, quash the decision, remit for rehearing.

PN330

MR POLLOCK: Yes. Now, whether that's most appropriately dealt with by way of remitting to the primary member or whether it's dealt with by way of an allocation to payment or of a Full Bench there's always that perennial question around whether a rehearing is a part of the appellate function or not. For my part I don't have a firm view as to how that should proceed. I think that's going to be a question of the administrative convenience of the Commission.

PN331

DEPUTY PRESIDENT GOSTENCNIK: Thank you. Mr Edmonds, I'm minded to just take a short 10-minute break to allow people to have a break and you can organise your thoughts. We'll adjourn for 10 minutes.

SHORT ADJOURNMENT **[11.37 AM]**

RESUMED **[11.56 AM]**

PN332

DEPUTY PRESIDENT GOSTENCNIK: I'm sorry, Mr Edmonds, before you launch into your submissions, Mr Pollock, assuming we're with you on Deputy President having made errors of the kind that you identified below.

PN333

MR POLLOCK: Yes.

PN334

DEPUTY PRESIDENT GOSTENCNIK: Given the state of the evidence, which on one view, would lead the Deputy President or leave the Deputy President with nothing more than a mathematical exercise and which below was agreed that the mathematical exercise conducted by the employer, initially, was flawed. What's the public interest in us granting permission to appeal, the effect of which would be to allow your clients to effectively run a better evidentiary case than it did in the first instance.

PN335

Now, because we caught you on the hop I'll have you think about that and perhaps deal with it in reply. If you want a few moments?

PN336

MR POLLOCK: Yes. I'll develop in further reply. I think the overarching observations throughout that, Deputy President, is that – I mean I understand the force of the observation. I don't think it grapples with – it doesn't undermine the combined weight of the permission factors that I'd identified previously. It might provide a moment to – a moment of pause in light of those matters.

PN337

I certainly don't think it would outweigh the combined effect of those considerations and the extent to which those matters, or there would be a concern about the effectively giving an opportunity to run a better case. Well, those would be matters that the member on rehearing could appropriately deal with by way of rather than – you know – rolling out carte blanche to run a new evidentiary case. There might be a limited grant of leave to adduce fresh evidence. That might be a way that it would be sensibly dealt with.

PN338

DEPUTY PRESIDENT GOSTENCNIK: All right. Thank you. Mr Edmonds?

PN339

MR EDMONDS: Thank you, your Honour. I of course have the poor fortune to have appeared, first instance, in the matter which probably has not covered any participant in a great amount of glory. And, indeed - - -

PN340

DEPUTY PRESIDENT GOSTENCNIK: A win is a win, Mr Edmonds.

PN341

MR EDMONDS: Yes. I tend to grind out a lot of ugly half centuries, your Honour. Look, it's clear the decision is probably not a greatly crafted decision. But we certainly suggest that it reflects the state of the hearing which occurred below, which became a bit of a mess, unfortunately, from the start because at the very start of the hearing it had proceeded on the basis, well, certainly the actual matters themselves had proceeded on the basis that they were going to be heard separately.

PN342

Despite the commonality of the parties the witnesses – the facts, the submission and the evidence – but were eventually merged at the last or at the very end, which led to the state of the appeal book you see today - which is two court books effectively being merged into one – which reflect the same evidence across both the court books. The same submissions across both court books. The same material being produced often twice which was not a particularly helpful exercise to the Deputy President and it made things difficult, we say, for her to make sense of the matter.

PN343

In addition to that there were various witnesses that were changed over the last minute due to lack of availability which means that the evidence, itself, became a bit of a mess. And in the end we heard from – anyway – a lawyer an integrated rating who wasn't involved in the action and a HR manager who wasn't employed at the time the events occurred.

PN344

So it's not a helpful case on either side for the Deputy President.

PN345

DEPUTY PRESIDENT GOSTENCNIK: I mean which party brought the crystal ball for the hearing?

PN346

MR EDMONDS: Look, I think in the end my view is that the documents adduced by the respondent as a consequence of the order to produce became the facts that we really relied upon. And those documents went to the work that were actually performed by the employees, the subject of the protected industrial action, on the days the protected industrial action occurred.

PN347

In the end, that was the basis of our case, which was a temporal analysis of the work actually performed. And, in the end, those matters ended up being agreed. The other difficulty, I think, with the way the hearing proceeded is we ended up in a situation where the parties deal with this industry. So the law firm concerned, the operators concerned, the union concerned deal with this industry a lot. We deal with each other a lot. I don't deal with any other firm more often than Mills Oakley. But in front of the same Deputy President a lot, and sometimes the parties, having engaged so routinely together means that some stuff is taken as read in circumstances where another member might not understand the operation of the industry or might not understand the enterprise agreements which have been in place in one form or another for 20 years.

PN348

And perhaps the parties proceeded on the basis that there was a certain – we certainly proceeded on the basis, I would say, that there was a certain amount of knowledge that everyone had in the room which perhaps wasn't reflected in the evidence or the submissions. But a certain amount of knowledge about how these things operate, including a certain amount of knowledge, for example, about how the provisions around the accrual and taking of leave operate, how the two crew duty system operated and how that interacts together.

PN349

And perhaps everyone in the room knew how that operated, but when we get here, probably in hindsight it doesn't look great and it probably doesn't look like it's constructed pretty well. And certainly it's probably a salient lesson for me to make sure that perhaps some of those aspects which are understood are perhaps included in the agreed facts a bit more moving forward.

PN350

So that's probably a little bit of a mea culpa. I accept some responsibility for the fact it's proceeded on that basis.

PN351

With respect to the background to this matter, on the 14 March 2023, the CFMEU notified of action by way of partial work bans which were stoppages of work, excluding those exempt matters to take place in relation to both employers from 06:00 hours on the 22 March 2023 and to cease at 06:00 hours on 27 March 2023. And those notices can be found your Honours at appeal book 12 and appeal book 248. I don't take you to them but they're certainly there and they're available for you.

PN352

In response to those notices, OSM and Tidewater, the appellants today issued the payment reduction notices on the 21 March 2023 to the employees affected and to the MUA, or to the MUA division of the CFMMEU as it was then. It's now the CFMEU. And those payment reduction notices can be found at page 10 and page 252 of the appeal book.

PN353

And perhaps if I might take you to one of those particular notices? Perhaps I might take you to the Tidewater one which is found at 250 - - -

PN354

DEPUTY PRESIDENT GOSTENCNIK: You say 10 – you mean 16 - - -

PN355

MR EDMONDS: Yes, sorry. I beg your pardon.

PN356

DEPUTY PRESIDENT GOSTENCNIK: Ten is the statement of agreed facts.

PN357

MR EDMONDS: Yes. Sorry, yes. At 16. So if I could take you to this? To the payment reduction notice that's found at 16. And that's the one that applies to OSM. The notices were in the same terms for both appellants, and indeed, signed by the same person.

PN358

And those payment reduction notices provide that – and if I can ask you to turn to the second page of that which is at page 17? And the second last paragraph from the bottom says, 'OSM has considered these exemptions. It's extremely difficult to know what duties fall within the exemptions and what duties do not. OSM has

considered this and estimates that the usual time an employee would spend during any given day performing these duties would be 10 per cent.'

PN359

So that's the temporal analysis required by the Acts and by Regulation 3.21 of the Act. But of course what we know is from the evidence that was adduced at the hearing there was no temporal analysis done whatsoever.

PN360

The approach taken by both appellants in that matter was to simply copy someone else's home link. So it was a reproduction of the notices that had been issued previously in relation to the previous industrial action. I believe it might have been the last round of enterprise agreements which would have been in 2017 or thereabouts I suspect or 2020 or thereabouts. And they effectively rolled over the calculation done at that time.

PN361

There was no evidence as to why that was done, other than hearsay evidence from Mr Harrower. Because, of course, he wasn't employed by the appellants at the time the analysis was done. And he simply says, 'Well, look this was the notice we used last time. The MUA didn't object last time. So we just rolled over and effectively went with that.'

PN362

We certainly say that that analysis doesn't – sorry, the task undertaken by the appellants didn't accord with their obligations pursuant to the regulations. And as a consequence pursuant to the Act. The requirement is to conduct an analysis of the exempt duties, estimate the time they would spend performing them and then issue a notice on that basis. And that did not occur at all. They simply just rolled over the notices from the previous time.

PN363

So that goes, we say, to the question as to whether it was a reasonable – having regard to the extent and nature of the partial work bans to which the notice relates. The reasonableness of this would include how that analysis was done. And that feeds into how that analysis was done.

PN364

So the action then took place. It went ahead. The pay was docked accordingly, in accordance with the actual notices issued and the respondent to this matter, the CFMEU or the MUA then made applications in identical terms to the Fair Work Commission, pursuant to 472 of the Act – sorry, pursuant to 471 of the Act to deal with the reductions in the pay.

PN365

And they can be found at 2 and 237 of the appeal book. I don't take you to them but you can find them there. The appellants then filed identical responses in the Fair Work Commission and they can be found at appeal book 7 and 243. And they were responses filed in the Fair Work Commission in response to the application that has been made. And you will see there signed by Mr Harrower, who is now employed with the responsibility for both companies.

PN366

As I understand that Tidewater remains a separate company but have outsourced their HR functions to OSM, as I understand that to be the case. And I do take you to the document filed by the appellants in the Commission. I you, in particular, to paragraphs 5 of that where they say at the bottom of paragraph 5 of that response, 'OSM had estimated that the proportion of duties that was set out in the PIA notice as exempt was 10 per cent of the duties required of their position.' Of course no such analysis was done.

PN367

At paragraph 6 they say, in the agreement a duty day is – it talks about day work on a vessel that attracts a day's pay and accrues a day's leave because they were sent and estimated that 10 per cent of a duty day was effectively being performed it followed that the equivalent amount of leave should be accrued.

PN368

Now there was no estimate that was done in relation to the work that was actually being performed. And then at their last paragraph they say 'OSM asserts the payment of 10 per cent is reasonable and fair for the proportion of work performed.'

PN369

So, again, everything to this point talks about the time-based analysis conducted by the employer. The response in the Commission talks about the time-based analysis, the temporal analysis. Every element of the appellant's response to this point is purely temporal. That's the approach that they took to these matters.

PN370

Now, the requirement of the Commission pursuant to 472 of the Act – 472(3)(a) – the first step is whether to – is for the Commission to consider whether the proportion specified in the notice was reasonable having regard to the nature and extent of the partial work ban to which the notice relates. And we say that that includes an analysis of the circumstances in which that particular notice was given.

PN371

And it's relevant there that the analysis conducted by the appellants to produce the notice was no analysis at all. It's hard, we say, for the appellant to stand there and say that was a reasonable assessment when there was no assessment conducted at all.

PN372

And, certainly, we say that the task of the Commission, when considering whether it is reasonable, shouldn't disregard the temporal element at all and shouldn't effectively reward an employer understating the work to be performed at 10 per cent when it was obvious, we say, to the parties that it was going to be higher than that. And look, we certainly know it was obvious because we ultimately ended up agreeing the proportion of work that was conducted.

PN373

And you can find those agreed factors at 512 and 520 of the appeal book attached to the submissions of the respondent to this matter. Those figures ended up being agreed, as a consequence, and the Deputy President at the hearing asking the parties to go away and figure out how much work was performed by the employees to do that temporal task.

PN374

To say, 'Look, I don't want to have to try and map this out. Because shifts and swings were crossing across midnight and crossing across midday it's harder to do that analysis.' And the parties ended up agreeing the proportions of work that were done by each employee engaged in the action. Averages were produced and those averages ended up being reproduced in the decision of the Fair Work Commission.

PN375

So what we say in relation to that assessment of whether the notice produced pursuant to 471 was reasonable in having regard or in having the most regard to the temporal elements. We say it's certainly reasonable giving regard – well, certainly – it was certainly reasonable having a regard to the status of the evidence that was produced to the Deputy President on the day. The only decent evidence in front of her was the temporal element – the time spent by employees performing the work. That was agreed. It was incontrovertible and certainly it was the rock upon which she could base her decision as opposed to those other elements.

PN376

And we say that the time-based assessment should be given a significant weight given that it is the task imposed by Regulation 3.21 on the employer and we say it should operate as a default position almost with any consideration of other matters would have to have sufficient enough weight to disturb that primary principle, that default position. And the default position should be employees should be paid for the work that they perform.

PN377

And we say that that's the case because that's the task required by the employer. If that task was done properly and a proper analysis that was done by the employer, employees would be paid for the work that they performed. And, certainly, Regulation 3.21 doesn't create a license for the employer to say, 'Well, on a time-based analysis they'll be doing 50 per cent of the work but I don't particularly value that. So I'll change that analysis and say 25 per cent.' That's not the task that 3.21 imposes on the employer.

PN378

The task that 3.21 imposes on the employer is you should do a time-based analysis of the work to be done by the employees. That should be what's contained in your notice and employees should be paid on that basis. If that's not an accurate assessment we say that lends considerable weight to the proposition that it's not reasonable, having regard to the nature and extent of the partial work ban to which the notice relates.

PN379

Now, the evidence that was produced to try and disturb that proposition was evidence from Mr Harrower. And Mr Harrower was, of course not employed by the appellants at the time the action occurred, and it's not clear why the employees who were employed at the time, the HR managers who were employed at the time, weren't called to give evidence. So Harrower's evidence is really a combination of hearsay evidence, opinion evidence, and really just some very general evidence about the facts that rolled out.

PN380

At paragraph 12 of Harrower's evidence – and if I could direct you perhaps to page 347 of the appeal book, that might be the easiest way to do it. The evidence is more or less the same across both witnesses. At paragraph 12 he says the performance of these duties are mandatory duties. They're obligations which arise under the various Acts and regulations that he produces there. And he says:

PN381

If they weren't contained in the action notice employees would have to do them anyway.

PN382

I'm not sure that that proposition is right, and I'm not sure the Commission should necessarily accept that as a statement of fact, a statement of interpretation of those Acts and those regulations, but - - -

PN383

DEPUTY PRESIDENT HAMPTON: Is that because you say the obligation's on the operator, not on the employees?

PN384

MR EDMONDS: We say the obligation is on the operator to ensure those duties are performed. It's not an obligation on the employees to ensure that they perform the duties. Those regulations and those Acts don't bind the employees; they bind the employer. And that evidence from Harrower in that paragraph is a legal conclusion. It's not something that is within his particular knowledge.

PN385

DEPUTY PRESIDENT HAMPTON: Did it matter? Did that finally matter?

PN386

MR EDMONDS: Well, no, it doesn't. No, it doesn't because the employees did that anyway, and that's why it doesn't matter. So any submission which says other people could perform these important functions, is not particularly relevant for the analysis required to be – it's got to be done by the Fair Work Commission because it's not who could have done these or what other alternatives were available to the appellants. It's what work did the employees do.

PN387

We accept that these are important functions, and these are functions that need to be done to keep employees safe at sea, and to keep vessels safe at sea. And not just these vessels but every vessel at sea. Keeping a look out is a – it's probably the most important function to be undertaken by seafarers. And the STCW

Regulations set out the number of hours that can be done by each employee on a watch, and they're very strict as to the rest periods required. They're very strict as to the hours you can spend keeping watch. If an employee is colour blind or has vision difficulties, they can't become a seafarer because the task is so important, to actually keep watch.

PN388

So these are essential functions to be performed by someone. Certainly Mr Harrower says, 'Well, they could be done by someone else but they weren't.' Now, if they weren't essential to the employer, and they were available to be done by someone else, the employer could have given a notice to the employees that said, 'We won't be accepting the performance of any duties from you for the period of industrial action. We won't be accepting the performance of these partial works because we've got other people that can perform these duties, and so we won't be paying you at all.'

PN389

Then employees are then faced with the choices as a consequence of that, to say, 'Well, do we continue to take the action and don't do any work or do we then pull the industrial action concerned so that we can be paid for performing those duties? Or do we put in a different notice which says that we won't do other things?' But, of course, no such notice was given by the employer, and of course no such notice was given because these are important functions. They do need to be performed, and they do need to be performed by these employees, amongst other employees, and they can be performed by other employees on the vessel perhaps for a day, perhaps for a short period of time, before those other employees then run into problems with the amount of time they're spending on watch, and that being in breach of the STCW Regulations.

PN390

And it's instructive that the employer didn't issue that particular notice and still accepted the performance of those duties, and you should infer from that, we say, that the performance of those duties were important. Harrower goes to that at 32, and my friend had a discussion with you about that and about Harrower's evidence in that respect. And we put a different complexion on his particular evidence in that respect. He says at 32:

PN391

The performance of these exempt duties can be undertaken by other employees, especially in circumstances where a vessel is anchored and otherwise not engaged in providing services to clients.

PN392

When he's talking about these exempt duties, he's talking about those listed at paragraph 31 which is what watch-keeping duties, fire rounds, the provision of meal services, the maintenance inspection of safety and emergency equipment, which is not a fulsome list of the exempt duties undertaken by employees. It's a partial list. And then he goes on to explain the watch-keeping duties, for example, seem to require an IR on the bridge to act as a look-out:

PN393

The IR will then conduct a safety round, walking through the engine room to check everything's running correctly. As previously detailed at paragraph 12, the watch-keeping duties are part of a seafarer's duties under the Regs and STCW. Fire rounds require an IR to conduct a walking round of the vessel as a precaution, and the provision of meal services sometimes require an IR to prepare food and undertake some tasks associated with preparation of food. For the industrial action period all cooks continued to perform full duties.

PN394

I don't have instructions on this, but the maritime crew or the crew covered by the maritime on these vessels include the IRs, the ratings, ship's cooks and stewards. And the ship's cooks and stewards are involved in the provision of meal services, those sorts of things. A steward is also involved in a certain amount of cleaning dealing with perishable stores, those sorts of things, as well. I don't think the ship's cooks formed the basis for this application because they were paid as per normal because their duties were 100 per cent exempt. Then Mr harrower says at 36:

PN395

The maintenance and safety of emergency equipment requires inspection.

PN396

He says:

PN397

This work is not always done by IRs.

PN398

The important question is whether it was done by IRs in these circumstances. The question is: what is the work that was performed? And the other employees – sorry, employees also were willing and able to perform the other applicable exempt duties in the absence of emergencies. Well, the vessel being in port, they probably didn't arise. So port security watches doesn't arise unless you're in port. But safety – the safety matters do arise, we say, and indeed that was conceded by my friends in the transcript.

PN399

I'll ask you to turn to AB 432, and in particular to paragraph 179. This is the manifestation of the issue I raised with you earlier on, which is the parties being familiar with each other, understanding how the industry operates. Indeed, at paragraph 179, counsel for the appellants conceded whilst convenient and, yes, allowed the vessels to stay out in the field, the fact that none of them performed any such work during the period of industrial action, the hours performed by the employees, save I think on one vessel there was 30-minute safety meeting which the employees attended, is all about the watch-keeping duties.

PN400

So that's about being available to do emergency safety work while the vessel is in the field, and the acknowledgment from Mr Rogers that that allowed the vessels to

stay in the field. I don't criticise him for making that observation or that acknowledgment. That's all correct in the circs, and that's - - -

PN401

DEPUTY PRESIDENT GOSTENCNIK: So does that concession effectively support the Deputy President's conclusion at 54, the second-last sentence?

PN402

MR EDMONDS: Look, I think it does. I think it does. As to whether that's convenient for the employers, there was no evidence that - - -

PN403

DEPUTY PRESIDENT GOSTENCNIK: I'm not talking about the last sentence.

PN404

MR EDMONDS: Yes.

PN405

DEPUTY PRESIDENT GOSTENCNIK: Just the second-last.

PN406

MR EDMONDS: Yes.

PN407

DEPUTY PRESIDENT GOSTENCNIK: Because we were taken to some other transcript of Mr Harrower where he said he couldn't say because he didn't have any - - -

PN408

MR EDMONDS: Yes.

PN409

DEPUTY PRESIDENT GOSTENCNIK: He didn't have knowledge. But there it seems to be at least a submission from the bar table that, in fact, it allowed the boats to stay out in the field.

PN410

MR EDMONDS: Yes. Yes. And that wasn't challenged by us because that's just simply a statement of fact. And the safety matters that it refers to, emergency matters, are not just those which affect this vessel. It's those which affect the clients as well. So that is if there's a fire on an oil and gas rig, if there's a man overboard on a rig or another vessel, if there's a need to evacuate an injured person from the rig, these vessels are on stand-by, including to perform those functions, and those are the activities that are exempted as a consequence of the notice.

PN411

And those activities are exempted because from the point of view of the MUA, the reason why they're included in the notice is because they're our members. They're our members that'll be on the rig that's on fire. They're our member that will be lost overboard. They're our members that need to be evacuated. So we exempt our members from any safety matters, let me assure you. We exempt our

members from any food-related matters as well. The idea is to be cause inconvenience to the employer; not to put our members at risk.

PN412

Whether they're employed on board that vessel, whether they're employed on board an oil and gas risk, whether they're employed on board an FPSO, whether they're employed on another vessel unaffected by the action, I can assure you we will continue to exempt our members from the effect of our action as far as we possibly can. But that's a proper concession from my friend to make.

PN413

With respect to the commercial impact that ought to have been taken into account, we say that that evidence, it just doesn't exist. The evidence from Harrower goes to a very general statement about the effect of industrial action on work under contract. And but for the inclusion of the word 'vessels', those statements could apply to any employer who is being subject to industrial action who provided services to employees.

PN414

Whether it was someone making widgets, to send it to another factory. Whether it was someone unloading containers at a port. Whether it was someone – I don't know – brewing beer or making bricks or doing anything, which is, at a general level with the vessels:

PN415

We couldn't perform our contracted scopes of work. We couldn't deliver on our contracts. We need everybody on board.

PN416

At 39:

PN417

We need everyone to be working to enable us to meet our contracted functions.

PN418

At 40:

PN419

As a result, for the duration of the industrial action the company was unable to service its contracted scopes of work.

PN420

Then at 41:

PN421

The company's clients suffered inconvenience.

PN422

I don't know what the Deputy President was supposed to do with that. What percentage reduction was she supposed to make? There's no evidence that there was a financial penalty for the employer as a consequence of that. There's no evidence that they went off hire. Indeed, he doesn't say they went off

hire. There's no evidence that the employers were penalised in that they had to source someone else to perform those functions. It's just a general statement about the effect of industrial action on the employer. In response to that, the Deputy President gave a general response:

PN423

I've considered this and it hasn't disturbed the temporal elements of the industrial action –

PN424

what we say should be a default position. And all of those factors, we say, ultimately lead to a correct conclusion from the Deputy President, albeit it could have been worded in a better way, but a correct conclusion. And it would have been worded in a better way had we produced some better evidence, or had the other side produced some better evidence, or had the submissions not effectively meandered a little bit to get to the end point.

PN425

But certainly the decision takes a difficult path to get to the conclusion that the proportions specified in the notice was not reasonable, but that conclusion is not wrong. And it's not wrong because at the very least the proportions specified in the notice was not constructed in any way by reference to work to be performed by employees. It was constructed by reference to some notice in the past that had been given by someone else, and the overwhelming characteristic that it hadn't been challenged by the MUA to that point. That's the basis upon which they got to 10 per cent.

PN426

That's not the way that notice should have been constructed. When one then looks at the work actually performed by employees, it's apparent that 10 per cent is not reasonable because we get to I think 29 per cent and 30 per cent was the – or 25 and – 29 and 35. Look, it's in the orders. But we get to a percentage of work that was performed by the employees that was threefold that that would be estimated by the employer.

PN427

So that just appears on the face of it to be not reasonable, and there's nothing compelling in the evidence that would disturb that proposition, we say. Having determined that the proportion specified in the notice was not reasonable, the Commission then needs to undertake a task to vary the proportion, taking into account fairness between the parties.

PN428

Again, the lack of evidence is a problem the respondent suffers in that regard. It's not a problem that we suffer, we say, because we say that what's fair is that employees should be paid for the work that they performed. We say that that's a fair proposition. We say had the payment reduction notice been produced in accordance with the regulation 3.21, that that would have been the result. Had that specified that particular result, we wouldn't be here today and we wouldn't have been in a hearing in front of the Deputy President. We would have been in

the position we said employees were paid for the work they performed. That seems a fair proposition.

PN429

Reams of densely packed submissions at first instance is not a substitute for evidence that the Deputy President can properly take into account when considering fairness between the parties. We say that she has considered fairness between the parties. That is reproduced in her decision, albeit with not an in-depth detailed analysis.

PN430

But when you look at, for example, the decision of Vice President Catanzariti in United Voice v the Commissioner for Public Employment for the Northern Territory, he more or less goes through the same analysis at the end of that decision. He considers whether it's reasonable, runs throughs some of the circumstances and then says:

PN431

Having regard to the evidence and submissions –

PN432

this is paragraph 26 of that decision:

PN433

Having regard to the evidence and submissions of both the parties, the correct amount by which the payment should be reduced is 15 per cent of the amount that would otherwise be paid for the completion of the shift.

PN434

There's no great analysis to that. It's a conclusion. It's a vibe. And in - - -

PN435

DEPUTY PRESIDENT GOSTENCNIK: I'm not sure that's helpful to refer to a decision which simply says, 'Having regard to the submissions of the parties, I reach this conclusion.' There's ample authority to suggest that that's usually indicative of error.

PN436

MR EDMONDS: Well - - -

PN437

DEPUTY PRESIDENT GOSTENCNIK: But, in any event, understand what you're putting.

PN438

MR EDMONDS: I'm just not sure the Deputy President could have done much more in this respect.

PN439

DEPUTY PRESIDENT GOSTENCNIK: That might be so.

PN440

MR EDMONDS: And I think she's done the best that she had, and if you read the transcript she has significant complaints about the evidence that's in front of her, and I take that on the chin. I think I was certainly part of the problem in that respect. So I suppose in that respect I'm just not sure the Deputy President could have said much more about the fairness between the parties point, given the paucity of the evidence in that regard. And certainly we say there was nothing to disturb the temporal analysis.

PN441

Her analysis in that respect, of fairness between the parties, is probably best set out at paragraph 58 and 59 of the respective decisions.

PN442

DEPUTY PRESIDENT GOSTENCNIK: Mr Edmonds, the analysis of the hours or the work performed at 512 and 520.

PN443

MR EDMONDS: Yes. Yes.

PN444

DEPUTY PRESIDENT GOSTENCNIK: I mean, obviously some people have worked significantly more as a proportion than others.

PN445

MR EDMONDS: Yes.

PN446

DEPUTY PRESIDENT GOSTENCNIK: And the average is taken.

PN447

MR EDMONDS: Yes.

PN448

DEPUTY PRESIDENT GOSTENCNIK: A couple of things. One, is that analysis indicative of the time spent by the employees to perform watch duties because, as I understand it, there were no other duties that were performed?

PN449

MR EDMONDS: It's the time taken to perform exempt duties.

PN450

DEPUTY PRESIDENT GOSTENCNIK: Yes, but as I understand it – I don't think it was controversial – that no other emergency duties, as such, were performed other than - - -

PN451

MR EDMONDS: Some did do some safety rounds. Some did some fire drills. Those sorts of thing. In the notice to produce there was analysis produced by the employer, by the vessel masters on each day of the work they asked employees to do, and the work that was performed by those employees. I think we largely agree with them. We largely adopt them. They were not all watch-

keeping, but the vast majority of the work that was performed was watch-keeping duties, that's for sure.

PN452

DEPUTY PRESIDENT GOSTENCNIK: My second question is, is it permissible to take an aggregate because 171 is directed to the question of whether an employee is engaged. Then the notice is in respect of that employee's payments. And so that's the notice, and then the variation of the notice must surely relate to the impact of that notice, vis-à-vis each employee, rather than as a collective. It seems to me that what the Deputy President has done is adopted your analysis which is an average, not an actual. I'm not sure that on any view one can say that an employee who works 66 per cent of the time - - -

PN453

MR EDMONDS: Yes.

PN454

DEPUTY PRESIDENT GOSTENCNIK: - - - should only be paid for 21 per cent of the time, as a matter of fairness.

PN455

MR EDMONDS: Yes. Yes.

PN456

DEPUTY PRESIDENT GOSTENCNIK: Putting to one side the impact of those other interruptions, but it just seems to me that there was a collective assessment on an average basis done, rather than ascertaining the question vis-à-vis each employee, which is what I think the section 5 - - -

PN457

MR EDMONDS: Yes. Well, I hadn't turned my mind to that, Deputy President, but that may well be correct. It may well be that the – certainly 471 talks about an employee, and 472 talks about:

PN458

The Fair Work Commission may make an order varying the proportion by which an employee's payments are reduced.

PN459

But my view would be – well, I think it's permissible - - -

PN460

DEPUTY PRESIDENT GOSTENCNIK: It might be that the order meets that description because the employees are scheduled.

PN461

MR EDMONDS: Yes.

PN462

DEPUTY PRESIDENT GOSTENCNIK: But the analysis undertaken is an average.

PN463

MR EDMONDS: Yes.

PN464

DEPUTY PRESIDENT GOSTENCNIK: It doesn't bear upon the actual - - -

PN465

MR EDMONDS: It doesn't then go to - - -

PN466

DEPUTY PRESIDENT GOSTENCNIK: Well, doesn't that go to the nature and extent of the industrial action? That is, some employees, in effect, participated in industrial action more than others.

PN467

MR EDMONDS: Yes. Yes. But it goes to whether the notice was reasonable. The nature and extent question goes to whether the notice of reasonable. The variation goes – the consideration would be fairness between the parties, taking into consideration all the circumstances.

PN468

DEPUTY PRESIDENT GOSTENCNIK: The first question, that the notice itself was produced on the basis that each employee will work exactly the same period or not work exactly the same period. And that turns out, as a matter of fact, not to have been correct.

PN469

MR EDMONDS: Yes. Yes.

PN470

DEPUTY PRESIDENT GOSTENCNIK: So that when one looks at whether or not the notice was reasonable, having regard to the nature and extent of industrial action, then the collective approach might be problematic.

PN471

MR EDMONDS: Only in relation to one or two employees perhaps.

PN472

DEPUTY PRESIDENT GOSTENCNIK: Well - - -

PN473

MR EDMONDS: Perhaps in relation to - - -

PN474

DEPUTY PRESIDENT GOSTENCNIK: I mean, where you're a class I accept that, but you do have differences of - - -

PN475

MR EDMONDS: Yes.

PN476

DEPUTY PRESIDENT GOSTENCNIK: - - - not insignificant periods. Sixty-six per cent, I think, in one case.

PN477

MR EDMONDS: Yes.

PN478

DEPUTY PRESIDENT GOSTENCNIK: Yes, 64 per cent, 39 per cent, 73 per cent.

PN479

MR EDMONDS: Yes, 8.75 per cent and 4.17 per cent.

PN480

DEPUTY PRESIDENT GOSTENCNIK: Yes, that's right. So you've got extremes.

PN481

MR EDMONDS: Yes.

PN482

DEPUTY PRESIDENT HAMPTON: I mean, one might speculate how an employer would do that in practice. How an employer would actually make a compliant notice when it doesn't know the actual practical impact of the bans until that happens, let alone the variation between the workers.

PN483

MR EDMONDS: Yes.

PN484

DEPUTY PRESIDENT HAMPTON: And there could be coincidences between their shift, if you like, and whatever contingencies may or may not occur.

PN485

DEPUTY PRESIDENT GOSTENCNIK: Yes, and, Deputy President Bell has pointed out, at least for the purposes of the calculation, regulation 3.21 provides that the percentages may be worked out or the proportion may be worked out for an employee or a class of employees, and then you have the following steps.

PN486

MR EDMONDS: Yes. Yes. Well, that's probably right for the notice.

PN487

DEPUTY PRESIDENT GOSTENCNIK: The next question, whether it's a valid regulation, but that's for another player.

PN488

MR EDMONDS: Yes, and I've struggled with this, Deputy President, because of the apparent disconnect between what the regulation says and then the task that the Commission is required to undertake at 472.

PN489

Yes. My friend, he made some submissions about the Commission having a backstop role to consider the reasonableness of the notice and the fairness between the parties, but that's only at the instigation of the employee. The employer can't issue the notice and say, 'I've complied with the regulation but I don't think this is fair, and I would like the Commission to consider whether or not the variation should be made in the circumstances.'

PN490

DEPUTY PRESIDENT GOSTENCNIK: It's an interesting provision because looking at the powers, there's nothing to stop the Commission from increasing – not just decreasing.

PN491

MR EDMONDS: Yes, well, and in actual fact I checked the – my mind's gone completely blank. Those matters that were in front of parliament.

PN492

DEPUTY PRESIDENT GOSTENCNIK: The memorandum, you mean?

PN493

MR EDMONDS: Yes, yes, and that said – it made it quite clear it could be adjusted up or down.

PN494

DEPUTY PRESIDENT GOSTENCNIK: Yes, but it's only an employee and an employee's bargaining representative who can make an application.

PN495

MR EDMONDS: Yes, yes, yes, which seems - - -

PN496

DEPUTY PRESIDENT GOSTENCNIK: I've yet to encounter somebody who's going to come along and say, 'No, you didn't take enough. Sorry, you should take more.'

PN497

MR EDMONDS: Yes. Well, and if anything, Deputy President, that – it tends to an approach where the employer is almost incentivised to make an estimate that's not in accordance with the regulations. Now, I don't know whether that's what's occurred here, and I don't make that submission, but it appears that the discretion of the employer is to say, 'I'll either pay you for the hours you work or I won't accept the performance of any duties whatsoever', and there's no middle ground whatsoever. But it incentivises an estimate which is less than that set out by the regulations, and I don't think - - -

PN498

DEPUTY PRESIDENT GOSTENCNIK: One of the circumstances here, it seems to me, in accepting the regulation for a moment was valid so the employer was entitled to do what it did on a global sense, and then they've come into consider the matter, one of the circumstances plainly is that the employees worked significantly different periods in that.

PN499

MR EDMONDS: Yes.

PN500

DEPUTY PRESIDENT GOSTENCNIK: That's a relevant matter which must be taken into account, and I'd say on the face of it that it was.

PN501

MR EDMONDS: Yes. Well, I think there's certainly no argument to be made that averaging of the amount paid so employees don't get a windfall as a consequence of where they fall on a roster is, on one view, fair because employees don't work a straight 12-hour night shift, straight 12-hour day shift. If they're keeping watch, for example, they keep watch for six hours at one point, three hours at another, and so they jump around in terms of where they keep watch, where they do other functions. So perhaps employees shouldn't be penalised more as a consequence of where they fall in the roster, and as a consequence of complying with the - - -

PN502

DEPUTY PRESIDENT GOSTENCNIK: That might be so, and that's a nice argument that it could have been in port.

PN503

MR EDMONDS: Yes. Yes. Well, that was never advanced.

PN504

DEPUTY PRESIDENT GOSTENCNIK: I understand.

PN505

MR EDMONDS: Yes. Look, it certainly wasn't advanced in front of the Deputy President by either side, so I don't criticise her for not having - - -

PN506

DEPUTY PRESIDENT GOSTENCNIK: Well, I mean, she proceeded on the basis that the parties agreed that these were the percentages and that there is the average.

PN507

MR EDMONDS: Yes.

PN508

DEPUTY PRESIDENT GOSTENCNIK: And acted in that fashion without - - -

PN509

MR EDMONDS: I'm not sure if you've had the chance to deal with seafarers and stevedores much, your Honour, but the idea that everyone should get paid the same is one that's pervasive and significant. One would – I would certainly hate to advance the submissions that one should be disadvantaged or advantaged from where they fall in the particular roster.

PN510

DEPUTY PRESIDENT GOSTENCNIK: Well, I wonder if their attitude would be the same when they got it in their pocket. Would they pull it out and share it amongst their colleagues?

PN511

MR EDMONDS: The attitude would be very different from the different employees. Anyone who works 4.17 per cent to 8.75 per cent but then didn't receive as much as their colleagues would be outraged.

PN512

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN513

MR EDMONDS: So those are my submissions on those two grounds, I suppose. The submissions I make in relation to ground 3 is really I just repeat what's set out in the submissions we filed. The question I suppose is whether leave is a payment within the meaning of section 472 of the Act, and we say it is. And I know the argument perhaps moved a little bit today as to whether or not it's properly framed as an accrual.

PN514

Leave operates a little bit differently within this sector. So in addition to permanent employees accruing 1.153 days of leave for each day of service, which takes into account public holidays over time and those sort of elements, your annual leave your personal leave, casual employees also accrue a day of leave for each day of service. So not the 1.153 but a day of leave for each day of service, and also get a casual loading too. So it's not just the permanent employees that have been affected by this; it's the casual employees as well.

PN515

DEPUTY PRESIDENT GOSTENCNIK: Mr Edmonds, sorry, I'm just noticing the time. How much longer? I'm not meaning to hurry you up but - - -

PN516

MR EDMONDS: I don't have much longer.

PN517

DEPUTY PRESIDENT GOSTENCNIK: You don't?

PN518

MR EDMONDS: Perhaps no more than five or 10 minutes.

PN519

DEPUTY PRESIDENT GOSTENCNIK: Continue.

PN520

MR POLLOCK: I'll be very brief in reply.

PN521

DEPUTY PRESIDENT GOSTENCNIK: So are you content to continue?

PN522

MR POLLOCK: I think, unless there's a contrary view, I think we'd press on.

PN523

DEPUTY PRESIDENT GOSTENCNIK: Go ahead.

PN524

MR EDMONDS: So the provisions around leave are curious and peculiar to this particular industry. The leave is taken immediately following the on-duty period, and there was some discussion of dead days and duty days this morning. A dead day is a day for which you get paid but you don't accrue a day of leave. An off-duty day is a day in which you use a day of leave. And an on-duty day is a day – sorry, a duty day is a day which you are paid for a day or work and accrue a day of leave as well on that day.

PN525

So there's a curious mix and particular days are allocated particular functions. You are on duty on the vessel from the day you arrive to the day you leave. You are paid a dead day on the day you leave. I think you're paid a duty day on the day you arrive on board the vessel because you're expected to perform work on that day.

PN526

Then on certain days of travel you're paid a dead day. And on certain days of training or attending other functions or other activities, whether it's medicals or training or something else, you're paid a dead day if they're performed in your off-duty time.

PN527

The question we saw is really a question of whether or not leave fell within the payment provisions of section 472, such that the Commission was empowered to deal with it. We recognise there's a sting in the tail for us in that regard. If leave doesn't fall within the question of payment within 472, then it can't be deducted as a consequence of a 471 notice. And if it is deducted, it's a question for a court or somewhere else as to how the enterprise agreement is framed.

PN528

But it appears to me that on those High Court authorities that leave is a payment within the meaning of 471 and 472 of the Act, including in particular because it's taken directly after your on-duty period. I don't have anything more I can add to that.

PN529

DEPUTY PRESIDENT GOSTENCNIK: But do you accept that to the extent that the Commission is empowered to deal with it under those provisions, that the order needs to be directed to the payment?

PN530

MR EDMONDS: Yes.

PN531

DEPUTY PRESIDENT GOSTENCNIK: Not the accrual?

PN532

MR EDMONDS: Yes, but that might just be a matter of - - -

PN533

DEPUTY PRESIDENT GOSTENCNIK: When.

PN534

MR EDMONDS: Well, simply amending the order, yes.

PN535

DEPUTY PRESIDENT GOSTENCNIK: I understand that, but you accept that proposition at least?

PN536

MR EDMONDS: Yes. But, look, I don't have full instructions on that point, but as I understand the underpaid leave, for want of a better phrase, was used in the off-duty swing that followed the on-duty swing, which is the general state of affairs. There's not a huge bank of leave there, that employees have sitting there, and that that leave comes out at some point in the future.

PN537

There's generally for a permanent employee a smaller accrual of leave. So employees will move from an on-duty time to an off-duty time, and they're just paid as they go. And at the end of the year – I haven't done the exact calculations but I think it's about two and a-half weeks or so. If you worked a precise on-duty/off-duty period, and if one followed the other and there was no breaks in between, at the end of the year a permanent employee might have another couple of weeks accrued, and a casual employee wouldn't have any because they get one for one.

PN538

So that leave will have been used already and that will have manifested itself as an underpaid series of days after that on-duty swing in March 2023. I'm not sure how helpful that is, though, because I'm just - - -

PN539

DEPUTY PRESIDENT BELL: Presumably, well, there's no analysis as to the breakdown of the proportion of the leave accrued each day which goes to the various components.

PN540

MR EDMONDS: No. It's just pulled out of the award, Deputy President. The Maritime Offshore and Gas Award, at least at one point in the past kept that 1.153 analysis.

PN541

DEPUTY PRESIDENT GOSTENCNIK: yes.

PN542

MR EDMONDS: I haven't gone back and unpicked it. I'm reluctant to do so.

PN543

DEPUTY PRESIDENT GOSTENCNIK: And some portion of that relates to the actual performance of work, but not all of it.

PN544

MR EDMONDS: Yes. So some proportion of that relates to employees working four-hour swings or five-hour – sorry, not four-hour swings. Four-week swings or five-week swings, up to 12 hours a day.

PN545

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN546

MR EDMONDS: Then that gets averaged out over a period of time, plus there's a little bit of annual leave chucked in and a little bit of personal leave chucked in, and some bits and bobs for public holidays, and then we get a number.

PN547

DEPUTY PRESIDENT HAMPTON: I suspect it's more of an art than a science.

PN548

MR EDMONDS: As all these things are. I'm told that at some point someone in the past has done it, and when I ask for any sort of breakdown or analysis or anything, people just say, 'Don't. Don't. Don't look at it.' It's like an annualised salary, your Honour.

PN549

DEPUTY PRESIDENT GOSTENCNIK: But to the extent that – and let's assume a day's leave is deducted, you take 10 per cent of that, so you take 90 per cent of that away.

PN550

MR EDMONDS: yes.

PN551

DEPUTY PRESIDENT GOSTENCNIK: You're talking about 90 per cent of a number which is greater than just the hours of work on that day. It includes - - -

PN552

MR EDMONDS: Yes.

PN553

DEPUTY PRESIDENT GOSTENCNIK: - - - public holiday, etcetera.

PN554

MR EDMONDS: Yes. Yes.

PN555

DEPUTY PRESIDENT GOSTENCNIK: A proportion of it.

PN556

MR EDMONDS: Yes.

PN557

DEPUTY PRESIDENT GOSTENCNIK: And that analysis wasn't done.

PN558

MR EDMONDS: No. No. No. It wasn't done.

PN559

DEPUTY PRESIDENT HAMPTON: I don't know how you would do it, actually.

PN560

MR EDMONDS: Sorry?

PN561

DEPUTY PRESIDENT HAMPTON: I don't know how you would do it.

PN562

MR EDMONDS: Well, the good news is the Deputy President is not conduct that analysis and really reached a view, I think, that as a consequence of it not being included in the notice in the first place - - -

PN563

DEPUTY PRESIDENT HAMPTON: Yes.

PN564

MR EDMONDS: - - - it wasn't reasonable to make any reduction. And we adopt that view.

PN565

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN566

MR EDMONDS: As to whether or not the next payment reduction notice includes that, I'm not sure, but at some point in the future it may well do so. So, look, I don't have anything more to add on ground 3, Deputy Presidents. On ground 4 I've made some submissions about that. I think your Honours have actually looked at the clause and are comfortable with the fact that it's a reasonable analysis of the meaning and effect of those clauses. Unless there was anything - - -

PN567

DEPUTY PRESIDENT GOSTENCNIK: Mr Edmonds, do you want to say anything about the question that we put to Mr Pollock when we resumed about why permission should be granted?

PN568

MR EDMONDS: I think fresh evidence would need to be – sorry, if the appeal is upheld and the Commission – the Full Bench was not satisfied you could determine the matter or re-determine the matter on the evidence that was already in front of you, then it would be appropriate to send it back to a Commission member to deal with the matter afresh.

PN569

DEPUTY PRESIDENT GOSTENCNIK: I'm sorry, perhaps you've misunderstood me. I asked Mr Pollock why, given the state of the evidence, even if we were to be satisfied that there was error why we should grant permission at all, the effect of which would be simply to give Mr Pollock's client an opportunity to run a better case on a re-hearing than it did in the first instance.

PN570

MR EDMONDS: Yes. Well, I think that's right. I don't think permission should be granted for that purpose.

PN571

DEPUTY PRESIDENT GOSTENCNIK: Well, that's a startling, surprising submission.

PN572

MR EDMONDS: No. You may be aware, your Honour, I've stood here many times and said, 'We would have liked to have run a better case in first instance', and I've been told, 'Well, you should have done that.' So it's not controversial that it's a usual approach to not give parties an opportunity to re-run a better case.

PN573

DEPUTY PRESIDENT GOSTENCNIK: Of course here we have the additional potential complexity in the sense that if we accept Mr Pollock's contention that the conclusions the Deputy President reached weren't supported by the evidence, then what we don't know is how much that influenced the Deputy President's decision.

PN574

MR EDMONDS: Yes.

PN575

DEPUTY PRESIDENT GOSTENCNIK: So it might be unfair to the appellants not to grant permission where they're stuck with an order that wasn't supported by the evidence.

PN576

MR EDMONDS: Well, that might be the case, but in addition to the order not being supported by the evidence potentially, the contentions of the appellants at first instance and in front of you today are not supported by the evidence either. So perhaps the Bench just needs to do with it what it can.

PN577

DEPUTY PRESIDENT GOSTENCNIK: Yes. All right.

PN578

MR EDMONDS: I'm not sure I can add much more to that.

PN579

DEPUTY PRESIDENT GOSTENCNIK: No, thank you.

PN580

MR EDMONDS: Thank you, your Honours.

PN581

DEPUTY PRESIDENT GOSTENCNIK: Mr Pollock.

PN582

MR POLLOCK: Thank you, Deputy President, I'll be brief. I have, I think, seven short points and, then, very briefly on the public interest question that you raised with my learned friend a moment ago. Firstly, just my learned friend made some observations around the initial employer assessment process being based on – back in 2017.

PN583

Just for accuracy, the reference was to a previous instance of industrial action in December of 2022. You'll see that in Mr Harrower's statement at paragraphs 18 through to 20. The relevant notifying action in that case was identical to that raised here.

PN584

Now, that's not to say that that, of itself, demonstrates that the employer's assessment was reasonable, and you haven't heard me today advance a case to say, you know, that 10 per cent based purely it would seem on the state of the evidence on – well, the same action was taken 12 months ago, therefore, we're going to take the same thing for consistency. But that, of itself, would be reasonable.

PN585

I haven't advanced that submission, but this really dovetails to my second point which is that of course it isn't necessary for us to positively establish that the employer's 471 assessment and reg 3.21 assessment was reasonable in order to establish appealable error here. That's not the question that we're required to address.

PN586

It may well be that in this case, as it was in Action and as it was in Transport New South Wales, that the outcome properly applying section 472(3)(a) and (b) would yield somewhere in the middle between the employer's initial assessment and that for which the applicant union contends.

PN587

The third point, my learned friend made a submission that the Deputy President's temporal analysis was the rock on which the outcome was based. We would certainly embrace that as a proposition. We don't say, of course, that the temporal analysis is irrelevant. We say simply that it is a matter to be weighed in the reasonableness assessment, having regard to the mandatory considerations that are prescribed in 472(3)(a) and (b).

PN588

We would cavil with the characterisation that my learned friend gives, that the temporal analysis is the default position, if my learned friend's advancing that, that it's to be given some more significant weight in the 472(3) assessment than other considerations. In my submission, that employer's initial assessment is neither determinative, nor given any greater or lesser weight than any other mandatory

considerations in 472(3)(a). The task is to apply a statutory test to give appropriate weight to the conditions that are there prescribed.

PN589

DEPUTY PRESIDENT GOSTENCNIK: But subsection (3)(a) requires an objective assessment about the nature and extent of the relevant partial bans. And that, in turn, requires there to be some evidence about all of that. The Deputy President can't be criticised for not taking the matter into account if probative evidence about that matter wasn't led.

PN590

MR POLLOCK: I would accept that. I would absolutely accept that, Deputy President. My submission there was really answering what I understood to be a suggestion that the 471 analysis is elevated to - - -

PN591

DEPUTY PRESIDENT GOSTENCNIK: No, I do understand that.

PN592

DEPUTY PRESIDENT BELL: You were red-flagged by Mr Edmonds' I think use of the word 'default' - - -

PN593

MR POLLOCK: Yes.

PN594

DEPUTY PRESIDENT BELL: - - - and everything else hinges on it. I understand.

PN595

MR POLLOCK: Yes, I think that's right. It's a default only in the sense that it is the precondition to the Commission's assessment under 472, but beyond that it takes no greater significance. Now, again, we don't make any – well, we don't make any criticism of the Deputy President's approach below beyond what I've already advanced around the evidence that was overlooked, and the findings that are made absent evidence.

PN596

I think both of us at the bar table here have attempted to express a significant degree of sympathy to the Deputy President for having to grapple with the state of the materials below, and I wouldn't want there to be any suggestion that what I'm advancing goes beyond what I've put already.

PN597

Now, the fourth point, there was some exchange between the bar and bench around the performance of the exempt duties, and whether or not it mattered that other employees could have performed those exempt duties. And I think you asked the question, Deputy President Hampton, about that, and my learned friend says, 'Well, no, it doesn't matter because they, in fact, performed those things.'

PN598

DEPUTY PRESIDENT HAMPTON: Well, I think the question was about whether or not the crew were obliged by the maritime regulations or - - -

PN599

MR POLLOCK: That's so. That was the context in which that was asked, and I think the – well, certainly the evidence and some extensive submissions on transcript from my learned friend below are to the effect that the regulations impose obligations on the employer. They don't say those tasks have to be performed by integrated ratings who would then take in this – or take part in these bans.

PN600

That is significant, in my submission. It matters. It matters that other employees could have performed that work because that diminishes the – there's a material difference between the performance of statutory duties which are required to be performed in order for a vessel to stay out at sea. There's a material difference between those duties being performed by employees who have to perform that work and where the employer has got no other option but to – but for those employees to do it. Or a situation where they can sub someone else in to do it.

PN601

That, in my submission, does have an impact on the relative value of the work, in fact, performed in light of the bans, to the employer. And, as I think I've addressed previously in my principal submissions - - -

PN602

DEPUTY PRESIDENT GOSTENCNIK: Well, that might be right, but coming back to the evidence, what was the evidence about how many other employees were able on a particular vessel to perform the duties, because that would impact the assessment about the value of the duties actually performed?

PN603

MR POLLOCK: Again, the state of the evidence isn't great, but the evidence such as it was, was that there was unchallenged evidence from Mr Harrower that those duties could be performed by others. And it wasn't cavilled with. There was no - - -

PN604

DEPUTY PRESIDENT GOSTENCNIK: I accept that.

PN605

MR POLLOCK: Yes.

PN606

DEPUTY PRESIDENT GOSTENCNIK: But in order to assess the import of that evidence, how does one do that? Do you say, 'Yes, well' – what value does one ascribe to that?

PN607

MR POLLOCK: I think there's – and, again, there's only so far I can take that point, but to make this observation, I mean, if the Deputy President had simply said, 'Well, that evidence, had made those' - - -

PN608

DEPUTY PRESIDENT GOSTENCNIK: 'It's not helpful for this reason.'

PN609

MR POLLOCK: Exactly.

PN610

DEPUTY PRESIDENT GOSTENCNIK: Yes, I understand.

PN611

MR POLLOCK: And it's said, 'Well, what do I make of all that? I'm going to give that limited weight for those reasons.' Well, likely as not I wouldn't have much of a ground on that point. But the way that the Deputy President approached her reasoning on that issue was, in the first part of that paragraph to – again you've heard the submissions as to how I characterise that reference to the statutory regime.

PN612

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN613

MR POLLOCK: But even taking the balance of that paragraph, what the Deputy President goes on to do is to make findings about what, in fact, those vessels were able to do and its mitigatory effect on the Tidewater clients, which wasn't supported by evidence, and where that analysis doesn't grapple at all with the fact that on the state of the evidence before her, other employees could have done it. And for those reasons it's that part of the analysis that is erroneous.

PN614

Now, there was, I think, a reference to a paragraph in the transcript and what my learned friend described as a concession from Mr Rogers to that effect. And I think, Deputy President, you answered some questions.

PN615

DEPUTY PRESIDENT GOSTENCNIK: PN 179, I think.

PN616

MR POLLOCK: About, yes, PN 179.

PN617

MR EDMONDS: Do you know what page number that is?

PN618

MR POLLOCK: Page 432.

PN619

MR EDMONDS: Four hundred and thirty-three?

PN620

MR POLLOCK: Four-thirty-two.

PN621

MS SAYED: Four-thirty-two.

PN622

MR POLLOCK: Yes. Now, I mean, that particular passage I think – two things I can say about it. One, it is – certainly I've been to a few constructions, and this is starting from about the middle of the paragraph.

PN623

DEPUTY PRESIDENT GOSTENCNIK: Are you talking about annual leave?

PN624

MR POLLOCK: Yes, and it says:

PN625

Because the employee wasn't performing the functional duty when they weren't performing the tasks, the fact they were ready and available to perform emergency safety work is neither here nor there. Whilst convenient and, yes, allowed the vessel to stay out in the field, the fact that none of them performed any such work –

PN626

that, at least on one view, appears to be a reference to the performance of the emergency safety work was what allowed those vessels to stay out without answering – without going so far as to make a concession that those particular employees were the only ones who could have performed it. I accept that's open to multiple constructions.

PN627

DEPUTY PRESIDENT GOSTENCNIK: Sure.

PN628

MR POLLOCK: I think to be fair - - -

PN629

DEPUTY PRESIDENT GOSTENCNIK: I read Mr Rogers' submission as saying that the fact that these employees were available to perform the exempt duties or part of them, is neither here nor there, was simply confirming it, no more.

PN630

MR POLLOCK: Yes.

PN631

DEPUTY PRESIDENT GOSTENCNIK: Etcetera. But where he says, and, yes, 'Allowed the vessels to stay out in the field', that seems to be a basis on which the Deputy President was able to conclude that that was the consequence of performing those duties.

PN632

MR POLLOCK: Well, yes, that is a reading of that passage.

PN633

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN634

MR POLLOCK: One - - -

PN635

DEPUTY PRESIDENT GOSTENCNIK: And are not watch duties part of the emergency safety work?

PN636

MR POLLOCK: They're part of the exempt duties, yes.

PN637

DEPUTY PRESIDENT GOSTENCNIK: But are they not also part of the emergency safety work?

PN638

MR POLLOCK: When you say, 'emergency safety work', you mean - - -

PN639

DEPUTY PRESIDENT GOSTENCNIK: What he says here, 'emergency safety work'.

PN640

MR POLLOCK: Well, again, that appears to be really a shorthand rather than - - -

PN641

DEPUTY PRESIDENT GOSTENCNIK: Then he goes on to say they've performed the work:

PN642

...but none was in fact performed, save for the watch-keeping duties.

PN643

So reading all of that together, he seems to be suggesting that the watch-keeping duties form part of the emergency safety work.

PN644

MR POLLOCK: Well, I mean, that's, I suppose, a difficulty when one examines the terms of the notice, that is the industrial action notice. This is paragraph 14 of 15 on the appeal book.

PN645

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN646

MR POLLOCK: Addressed watch-keeping and emergency-related issues as discrete points. I think that the submission I make here, though, Deputy President, really is that one can pass that submission and construe it in a few

different ways. I think it would be a stretch to say that that is a relevant concession to the effect that the performance of those duties by these people could only have been performed by them and that was what allowed those vessels to stay out.

PN647

DEPUTY PRESIDENT GOSTENCNIK: That wasn't the proposition that I was - - -

PN648

MR POLLOCK: No.

PN649

DEPUTY PRESIDENT GOSTENCNIK: - - - putting to the union. The proposition was that to the extent that the Deputy President found at the second-last line of 54, for example, of the Tidewater decision, that, 'The performance of those duties allowed the vessels to stay alongside', that part of it. At least that concession supports that part of that conclusion. It may not support the rest of it, reducing the impact of the industrial action.

PN650

MR POLLOCK: I think on one reading it could support that. I think it would be – it's certainly contrary to Mr Harrower's unchallenged evidence on that issue.

PN651

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN652

MR POLLOCK: Just picking up on my learned friend's observation, he said words to the effect, 'Reams of submissions at first instance are not substitute for evidence.'

PN653

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN654

MR POLLOCK: And I would embrace that here.

PN655

DEPUTY PRESIDENT GOSTENCNIK: Absolutely. Yes.

PN656

MR POLLOCK: My learned friend also made some reliance on the fact that the appellants hadn't issued any notices for – effectively no work is directed, no pay notices. It seemed to be that there was some significance to be read into that choice. Simply because the Act provides that as a mechanism, it doesn't provide, in my submission, a basis to infer, on submissions from the bar table, as to why that course was adopted and whether or not that would impact the criticality or otherwise of the exempt duties that were performed. It simply doesn't give a basis to infer one way or the other. There may be many reasons why an employer would make that particular choice.

PN657

DEPUTY PRESIDENT GOSTENCNIK: In any event, none of that formed part of the Deputy President's decision.

PN658

MR POLLOCK: Yes. Quite right. Now, there was, I think, a rhetorical question that was asked around what the Deputy President was supposed to do with the evidence of commercial impact. I think I've addressed that already. It's a question of considering it and giving adequate reasons for its acceptance or rejection.

PN659

Now, as to the question of amending the leave accrual order to refer to payment, I think my learned friend sought to embrace that as an avenue. Again, that grapples with one aspect of the error but doesn't grapple with the point in light of 26.2 and effectively the multiple entitlements that are sought to be satisfied by that accrued leave. And it follows whether or not that – even if it were amended to be a payment, whether it would be in relation to a period of industrial action.

PN660

That simply leaves us with the public interest question. I'm not sure I can take it terribly much further than I've already put it, save to make perhaps – save perhaps for this observation. Of course, the Commission doesn't readily grant - - -

PN661

DEPUTY PRESIDENT GOSTENCNIK: Sorry, before you do – and I meant to ask this earlier, but you said 56 of the Tidewater decision, and at 55 of the OSM decision, the Deputy President makes the statement that, 'The relevant employer withheld 90 per cent of the employee's accrued during the' – but that's not right, is it? Withheld leave accruals?

PN662

MR POLLOCK: Well, that's not right, as I understand how the position has unfolded. I think we're still attempting to get instructions on precisely how it was processed, and I was going to ask for an indulgence for perhaps a short note - - -

PN663

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN664

MR POLLOCK: - - - to clarify how that had played out.

PN665

DEPUTY PRESIDENT GOSTENCNIK: But as I understand it, if there was any intention to do anything, it would be to withhold payments.

PN666

MR POLLOCK: Well, I think in practice it's hard to see how it would have been done in any other way given that the two-crew duty system operates in a way that you have – it would be – and this is subject to the instructions we might obtain, would seem to me to be a very odd situation where the accrual was, in fact, reduced such that you would be pulling those guys back 10 per cent of the time, in

order to come back and throwing the two-crew duty system into chaos. Rather, the situation is, one would think more likely to be, that they were paid a lesser amount with respect to that off-duty period.

PN667

DEPUTY PRESIDENT GOSTENCNIK: Correct. Yes.

PN668

MR POLLOCK: Now, again, I'll need to get some instructions to clarify that but, speaking for myself, I would be surprised if it was done in any other way.

PN669

DEPUTY PRESIDENT GOSTENCNIK: Well, there's no reference to any evidentiary basis for that first sentence.

PN670

MR POLLOCK: I think that's right. Now, just returning to that public interest point.

PN671

DEPUTY PRESIDENT GOSTENCNIK: But fundamentally – sorry, Mr Pollock, fundamentally the reason the Deputy President reduced it to zero appears to be – putting aside what she said at 55 – appears to be that – whether it's an accrual or payment, it wasn't supported by the notice.

PN672

MR POLLOCK: I think that – well, that's one of the factors that she considers.

PN673

DEPUTY PRESIDENT GOSTENCNIK: But if she's right about that, isn't that the end of the day?

PN674

MR POLLOCK: I'm sorry, Deputy President?

PN675

DEPUTY PRESIDENT GOSTENCNIK: If she's right about that, isn't that the end of it? You weren't authorised. If you didn't give notice, you couldn't do it.

PN676

MR POLLOCK: If there wasn't a valid notice to that effect, then there's no power for the Commission to make any variation at all.

PN677

DEPUTY PRESIDENT GOSTENCNIK: Well, that's true, but she appears to be doing it on the basis that she is of the belief that you've done something. That's the first sentence. So, 'I need to fix that', she says.

PN678

MR POLLOCK: Yes.

PN679

DEPUTY PRESIDENT GOSTENCNIK: And, 'I can't see it in the notice that that supports it, so I'm going to make an order.' So she may well be wrong on the first one, in which case she definitely has no power.

PN680

MR POLLOCK: Yes.

PN681

DEPUTY PRESIDENT GOSTENCNIK: But if the notice is invalid but the employer intended the notice to have that effect, why doesn't she have the power to vary the notice?

PN682

MR POLLOCK: Well, she has power to vary the – to make an order varying the proportion of a payment.

PN683

DEPUTY PRESIDENT GOSTENCNIK: Yes. Sorry.

PN684

MR POLLOCK: Two things. One, if relevantly, there's validly been a notice.

PN685

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN686

MR POLLOCK: And, two, if what is sought to be varied is a payment in relation to a period of industrial action.

PN687

DEPUTY PRESIDENT GOSTENCNIK: And the appropriate course would have been if she had concluded that there's no reduction specified in the notice for the annual leave component, that's a matter for elsewhere, not - - -

PN688

MR POLLOCK: Yes, that's right.

PN689

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN690

MR POLLOCK: That's exactly right. Yes.

PN691

DEPUTY PRESIDENT GOSTENCNIK: Although a dispute under the agreement could be brought to the Commission presumably.

PN692

MR POLLOCK: I think it would – appropriately, one would think an application to court would be the way to deal with accrued – a dispute that concerns past rights and liabilities, but subject to any – perhaps an argument around the extent

of 739 to deal with those sorts of scenarios and judicial power and so forth. It would otherwise be a matter for 739, the application.

PN693

MR EDMONDS: In circumstances where one is withholding.

PN694

MR POLLOCK: Well, that's a matter for another day. Does that answer - - -

PN695

MR EDMONDS: Yes.

PN696

MR POLLOCK: - - - the questions you had on that point, Deputy President?

PN697

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN698

MR POLLOCK: So that just leaves the public interest question. Now, it's trite to say the Commission wouldn't readily grant permission simply to allow a party to fix up their evidentiary case. I don't think anyone would suggest that that would be the appropriate course. That being said, this isn't simply a scenario where the parties are seeking to pull a case up by its bootstraps and effectively say, 'Well, here's all the fresh evidence that we could produce, and that would demonstrate an error.'

PN699

Notwithstanding that, of course, the High Court tells us in Aldi that one can demonstrate error and status of satisfaction with reference to fresh evidence, and there's been several instances in recent memory, for better or worse, cases where - - -

PN700

DEPUTY PRESIDENT GOSTENCNIK: It happens frequently with agreement approvals.

PN701

MR POLLOCK: Correct. That's exactly right. That's exactly right. And often times – I should also make the observation, Deputy President, often times where, you know, the union's had a seat at the table at first instance and has run a more threadbare case, and things come up on appeal or have been granted unlimited right to intervene, they get the better opportunity as a person aggrieved under 604 and a better opportunity is had at that point. So it's not an unknown course.

PN702

But here we're not talking about simply fixing up and demonstrating the error by reference to the fresh evidence. The errors themselves are manifest even on the state of the evidence currently. We're talking about errors that are not simply marginal or fine toothcomb type errors. We're talking about certainly an excess of power in ground 3, and, in my submission, errors which – where the outcome

rests on factual propositions that aren't supported on evidence. It would be a very odd scenario if those outcomes were permitted to stand, and still less so where, for the reasons I think I've already addressed, we've got a conflict in the authorities at the first instance, and we have no Full Bench determination on a question.

PN703

Again, insofar as there's residual concern around allowing one party or the other to fix up their case and noting my learned friend's very gracious and perhaps proper observations in accepting some responsibility for the state of things below, and certainly I can only look at the materials afresh and suggest that both sides didn't cover themselves in glory on that point. It seems to me that this isn't a scenario where one party is getting a free kick to fix up the case. The reality is that if permission to appeal is granted and the appeal is allowed, and we go to a re-hearing, each party stands a fighting chance of actually putting on a more fulsome and robust evidentiary case that can support the issues.

PN704

DEPUTY PRESIDENT GOSTENCNIK: I'm sure Mr Edmonds doesn't want to give away the 15-metre penalty he has already got accrued.

PN705

MR POLLOCK: Unless I can assist further, those are the submissions in reply.

PN706

DEPUTY PRESIDENT GOSTENCNIK: So in relation to the other issue, which is whether or not an actual deduction occurred, do you want to provide a short notice?

PN707

MR POLLOCK: Yes, I'm content to – well, subject to your preference. Would you be content, Deputy President, if it just came as effectively a note on, 'Our instructions are X' rather than putting on a witness statement?

PN708

DEPUTY PRESIDENT GOSTENCNIK: Yes, subject to this. What I had in mind is perhaps if you could do that by close of business Monday the 18th.

PN709

MR POLLOCK: I think that should be fine.

PN710

DEPUTY PRESIDENT GOSTENCNIK: Then if it's necessary for anything to be said in reply, Mr Edmonds, we can give you until Friday, the 23rd. Would that work?

PN711

MR EDMONDS: It might be easier – if my friends run it past me, we could probably reach an agreed position as to how that was treated.

PN712

DEPUTY PRESIDENT GOSTENCNIK: All right. Well, if you're able to do so, then you can indicate that by close of business Monday.

PN713

MR EDMONDS: Yes.

PN714

DEPUTY PRESIDENT GOSTENCNIK: If you need to reply, then close of business on the 23rd.

PN715

MR EDMONDS: Thank you.

PN716

DEPUTY PRESIDENT GOSTENCNIK: All right. Well, thank you to both parties for their helpful written and oral submissions. Subject to the receipt of the additional note, we propose to reserve our decision and we will publish our decision in due course. We'd adjourned. Have a good day.

PN717

MR POLLOCK: Thank you.

ADJOURNED INDEFINITELY **[1.36 PM]**