DECISION

Fair Work Act 2009
s.526 - Application to deal with a dispute involving stand down

Australian Workers' Union, The
v
Superior Energy Services (Australia) Pty Ltd
(C2023/7467)

COMMISSIONER ALLISON MELBOURNE, 28 MARCH 2024

Application to deal with a dispute involving stand down – section 524 – circumstances allowing stand down – whether enterprise agreement provisions relating to stand down displace s.524(1) – whether employees could be usefully employed – whether the employer can reasonably be held responsible for the stoppage

[1] On 28 November 2023, Superior Energy Services (Australia) Pty Ltd (**SESA**) stood down approximately 90 employees usually engaged to work on off-shore platforms in the Bass Strait following a decision by Esso Australia Pty Ltd (**Esso**) to suspend SESA's services. On 1 December 2023, the Australian Workers Union (the **AWU**), who represents the majority of these employees, made an application in accordance with s.526 of the *Fair Work Act 2009* (Cth) (the **FW Act**) for the Commission to deal with a dispute over whether SESA was entitled to stand down its employees. This decision deals with that dispute.

[2] I acknowledge the hardship faced by employees as a result of a stand down lasting some two and a half weeks. However, having reviewed all the material before me, I have ultimately concluded that SESA was authorised to stand down the majority of the employees under s.524 of the FW Act. The only potential exception to this conclusion relates to a *preliminary* finding that a small, but not insignificant part of the stand down was unauthorised because of the availability of useful employment for at least nine employees. I set out my reasons below.

[3] The dispute was initially listed for conciliation with a related bargaining matter[1] on 6 December 2023. The dispute did not resolve. The dispute was then listed for hearing on 15 December 2023. Prior to that hearing the parties agreed to engage in a further conciliation conference, during which the parties reached an agreement around conditions to end the stand down. Employees returned to work and the stand down ended on 16 December 2023. However, the parties remained in dispute over whether SESA had been entitled to stand down its workforce in the circumstances, but agreed to adjourn the hearing so the parties could focus on return to work and ongoing bargaining.

[4] The hearing was rescheduled to 12 February 2024. At the hearing Mr Shaun Trew, Delegate and Floorman/Tong Operator at SESA, gave evidence on behalf of the AWU. Mr Mathew Skeen, Operations Manager gave evidence on behalf of SESA. Both Mr Trew and Mr

Skeen appeared to be honest, credible and frank, and provided insightful evidence based on their considerable experience.

Background

SESA's Operations, Workforce and Contract for Services with Esso

[5] SESA provides specialist equipment and personnel for the purpose of well service to the oil and gas industry. Esso is a major client of SESA and utilizes SESA's services on four projects located on Esso's off-shore platforms in the Bass Strait. These projects are two hydraulic workover rigs known as HWT 600 and Rig 22, Production Spread and Batch Spread.[2]

[6] SESA engages approximately 96 employees to perform work on Esso's platforms in the Bass Strait. The AWU represents the majority of the employees.

[7] A service contract between SESA and Esso sets out the services required from SESA. Clause 7 of the contract between Esso and SESA relevantly provides as follows:[3]

> *"To be Provided by Contractor:*
>
> *7.1 Contract Equipment*
> *Contractor shall provide the Contract Equipment and Personnel specified in Appendices A, B, C, D and E of Schedule C and Appendix B of Schedule D in order to perform the Services.* ***If the Services are interrupted due to Contractor not supplying the Contract Equipment and Personnel as specified, then Company at its option may require Contractor to suspend the Services.***
>
> (emphasis added)
>
> *…*
>
> *7.3 Personnel*
> *Contractor shall at all times provide, under its exclusive responsibility, fully trained, competent supervisory, technical and other Personnel, the minimum number, classification and work schedule as stated in Appendix B of Schedule D, to perform the Services properly…*

[8] Personnel is defined at Schedule A as follows:

> *"q)* ***Personnel*** *means the Personnel who are supplied by the Contractor (whether employees, Contractor's subcontractor or otherwise) in order to provide the Services in accordance with this Agreement as specified in Schedule C…."*

[9] Appendix B of Schedule D provides for the minimum number of personnel SESA is required to provide.[4]

[10] Schedule C contains a description of Services, which for the purpose of this matter relevantly includes "*Work Over and Well Services*"[5] which require crane lifts performed by SESA crane operators.

Enterprise Agreement, Bargaining and Industrial Action

[11] At the time of the application, SESA, the employees and the AWU were parties to the *Superior Energy Services (Australia) Agreement 2020* (the **Agreement**). The Agreement had a nominal expiry date of 20 August 2023. The parties to the Agreement commenced negotiations for a replacement agreement in March 2023. Negotiations were protracted, with a number of significant matters in dispute.

[12] On 20 September 2023, following an application made by the AWU, the Commission issued an Order for a protected action ballot.[6] Notably, the order included an extend notice requirement of 5 working days - as a result of SESA successfully contending that increased notice time was required for SESA to "*initiate a range of operational measures to ensure the ongoing safety of personnel on the offshore facility*."[7]

[13] On 8 November 2023 the AWU issued SESA a notice of intention to take protected industrial action to commence from 16 November 2023.[8] The notice provided for the following types of industrial action:

> *"1. An indefinite ban on overtime.*
>
> *2. An indefinite ban on issuing or completing Live Permits before commencement of rostered shift.*
>
> *3. An indefinite ban on attending Rig Pre Tower Meeting before commencement of rostered shift.*
>
> *4. An indefinite ban on taking part in training other than during rostered hours of work and during on cycle.*
>
> *5. An indefinite ban on the performance of any work outside of rostered hours.*
>
> *6. An indefinite ban on provision of Crane Lifts to any third party outside of Superior Energy personnel (other than in respect of health and safety)."*

[14] On 10 November 2023, Mr Trew, in his capacity as an AWU delegate, sent an email out to AWU members providing details of the industrial action that was to commence on 16 November 2023. The email included the following in relation to crane operation:

> *"Crane lifts will continue for any Safety related issues. If no other crane operators on platform, lifts will include diesel and food.*
>
> *No Action will be carried out if safety and Well integrity and security is to be compromised. As soon as Well is made Safe related bans will remain in place.*

…

Print and post actions in all your boot rooms, spread the word and share it with you work colleagues."[9]

[15] Attached to the email was a notice explaining the action. In relation to the ban on crane lifts the notice stated:

"THIS MEANS NO CRANE LIFTS FOR ANY 3RD PARTY OTHER THEN (sic) LIFTS RELATING TO HEATH (sic) AND SAFETY. IF ON PLATFORM WITH ESSO PSO OR OTHER COMPANIES WITH CRANE DRIVERS THEY WILL DO THE LIFTS.
WHERE ON PLATFORM WERE (sic) NO OTHER CRANE DRIVER LIFTS WILL BE PERMITED FOR HEALTH AND SAFETY FOOD AND DIESEL."

[16] Members of the AWU commenced industrial action as outlined in the notice of protected action at 18.01pm on 16 November 2023.

[17] To assist with planning at the start of each shift, SESA employees completed a form indicating whether they would or would not be taking part in specific bans.[10]

[18] SESA and Esso took steps to identify alternative duties SESA employees could perform in lieu of banned work. A list of repair work was put together by the supervisors.[11]

[19] It is contested how much impact the bans had on the ability of SESA to continue services on the projects. However, it appears clear that ban 6, relating to the provision of Crane Lifts to any third party outside of SESA had a considerable impact. Mr Skeen gave evidence as follows:

"*The core operations on Rig 22 could not proceed from 22 November 2023 due to the inability to pick up the milling BHA. The core operations on HWT600 could not proceed from 23 November 2023 due to the inability to remove the riser from the well. Around the same time, the core operations on Batch 1 could not proceed due to inability to remove third-party equipment from the well*."[12]

[20] During the action SESA did not look into hiring external contractors to perform the crane operation duties.[13]

[21] At 7:52AM on 24 November 2023, Ms Loretta O'Brien, on behalf of SESA emailed the AWU requesting that it cease its protected industrial action. The email stated as follows:[14]

"As committed Superior Energy has circulated the written offer presented in yesterday's negotiation to all employees to be covered by the Superior Energy Services (Australia) 2023 Agreement.

At the conclusion of yesterday's meeting, the AWU committed to discuss the offer with employees and provide feedback to Superior Energy next week. Superior Energy will also be addressing the actions discussed in the meeting and will update the group next week.

For these reasons Superior Energy requests the AWU temporarily suspend all PIA until feedback from the workforce is obtained and the parties meet again. Superior Energy considers this a fair and reasonable request as we work towards reaching an agreement.

*Please advise by **5pm today** whether the AWU is willing to agree to Superior Energy's request.*

[22] At 12:30PM on the same day, Mr Warren Jones, AWU Organiser, replied to Ms O'Brienas follows:[15]

"Loretta

We are currently seeking instructions from our members. We except (sic) we will be in a position to get members responses next week, at which time we can also seek their view about your request to suspend any current PIA.

We would be reluctant to ask our members to suspend any PIA until the company provides a firm commitment that it will next meet on the 30th November with a response to the outstanding claims raised yesterday.

At this time we can confirm that we will not notify of any new actions we had intended to notify in good faith and in the spirit of progressing the negotiation if the meeting proposed for the 30th November proceeds."

[23] At 2:52PM on the same day, Ms O'Brien sent a second email to the AWU. The email stated as follows:[16]

"Superior Energy have confirmed we will meet at 11am Thursday 30 November 2023 via videoconference. At this meeting Superior Energy will provide responses to the outstanding claims and discuss the actions Superior Energy committed to in yesterday's meeting.

I trust this correspondence provides a 'firm commitment' of our intention to meet next week. As such we request you provide a notice to temporarily suspend all current PIA effective from 5pm today and to remain in place until after the meeting on 30 November 2023."

[24] The AWU did not cease protected industrial action.

Correspondence from Esso and Stand Down

[25] At 10:29AM on Monday 27 November 2023, ESSO sent SESA an email stating as follows:[17]

"Mat
Thanks for the collaborative nature in which we have worked through the Superior workforce industrial action that commenced on 16 November 2023. We have

significantly adapted our plans to enable the workforce to continue critical path and non-critical path operations during the industrial action. As we approach day 12 of the industrial action we are no longer in a position to conduct meaningful work under the constraints of the protected industrial action on Rig 22 or the HWT600 rig sites. We anticipate these activity fronts will be placed on non-productive time from the 28 November onwards and limited individuals would be required to monitor the equipment. The Batch 1 worksite is expected to have approximately 7 days of remaining activities before reaching the same status. We look forward to further discussions and a rapid resolution of the enterprise agreement.
Regards"

[26] Mr Skeen has given evidence that after receiving this email, he called the Wells Operation superintendent at Esso to confirm next steps for each Project. On his evidence, during that telephone conversation the following was confirmed:[18]

"(a) The Projects will be suspended from 28 November 2023;

(b) Esso requires SESA to provide individuals to maintain SESA's equipment on Rig 22 and HWT600;

(c) Esso requires SESA to provide a crew to perform residual activities on Batch 1, alternative to what was scheduled for the Project; and

(d) Esso requires that SESA demobilise all unnecessary personnel and that helicopters be arranged to take them onshore."[19]

[27] At 3:46PM on Monday 27 November, Mr Skeen sent an email to Esso as follows:

"[Redacted]

Appreciate your below email and comments.

As discussed this morning, please find attached plan of personnel to change out on location. If there has been to (sic) change to the PIA once Batch 1 works are completed, we will demobilize the crews and look at where we can situate [redacted].

SESA are endeavoring to have a speedy resolution in coming to an agreement with the work group and continuing to provide the services as expected.

Regards"

[28] On the morning of 28 November 2023, SESA began relocating and rescheduling staff without consultation with the AWU. At 10:10AM on that day, Mr Trew emailed SESA management to inquire about the staff movements as follows.[20]

"Morning Matt,

Could you please assist with some clarification as to the current crew movements and mobilization, myself and the other delegates are receiving calls and messages as to what is going on with crews, We understand currently Covid is affecting some operations, but also some employees advised they are going to the yard where others are going home until further notice.

Could you please assist with details so everyone can be informed with the same information, reports from employees is some have not been given information as to why and how long these crew changes will take place"

[29] In the afternoon on 28 November 2023, SESA issued a Stand Down Notice to its employees (**Stand Down Notice**). The Stand Down Notice relevantly stated:[21]

"Dear Employees,

Important Notice to Employees – Stand Down Effective on and From 28 November 2023

*The purpose of this notice is to advise all employees that, unless you are advised in writing to the contrary, you will be stood down effective on and from **28 November 2023**.*

*Superior Energy Services (Australia) Pty Ltd (**the Company**) has been advised by Esso Australia Pty Ltd (**the Client**) that the Client's offshore facilities in Bass Strait Victoria will cease normal operations on and from 28 November 2023, until further notice. On and from that date, the Client will place the facilities on Non-Productive Time for a period, with limited number of individuals required to monitor equipment and complete residual work activities associated with Batch 1 Operations. This stoppage of work will impact most of the Company's employees who normally perform work activities on the Client's offshore facilities.*

*The Company has carefully assessed alternative work options following the stoppage of work. Other than for a limited number of employees who will be separately advised about their alternative work duties, the Company has been unable to source options whereby employees can be usefully employed during the stoppage of work. As a result, unless specifically advised in writing to the contrary, all employees will be stood down effective on and from **18:00 Hours 28 November 2023**, until further notice.*

During the period of stand down, employees who are usually rostered to work will not receive any payments. Employees may utilise their accrued annual leave entitlements (if available) to ensure continuity of remuneration if they so wish. Employees will be required to submit a 'Leave Request' form, as per the normal channels / process.

*We recognise this news may be difficult for employees and we would like to remind you of the services of our Employee Assistance Program (**EAP**) with 'Converge international' via telephone 1300 687 327 or email at eap@convergeintl.com.au*

> *If you have any questions or require further information, please contact Mathew Skeen or myself. The Company will continue to keep employees updated.*

[30] Aside from limited employees to maintain SESA's equipment on Rig 22 and HWT600, and a crew to perform residual activities on Batch 1, all other personnel were removed from the platforms on 28 November 2023.

Alternative Duties and impact of the Stand Down on SESA

[31] Whether employees could have been usefully employed in alternative duties is a matter of contest between the parties and is considered in detail later in the decision. At this stage it is enough to note that some employees were offered alternative duties during the stand down period.

[32] SESA also had a number of other operations where stood down employees were not offered work. This included:

- A yard located in Wurruk.
- A short term campaign for Lochard Energy which ran from 7 September 2023 to 21 December 2023. The project's crew included nine casual workers, who had been working on the project since commencement.

[33] Mr Skeen provided uncontested evidence that during the stand down SESA had a decrease in revenue of approximately $84,000 per day.[22]

Stand down and Ongoing Bargaining

[34] On 30 November 2023, two days after the stand down commenced, SESA initiated the access period for employees to vote on a SESA proposed agreement. In the subsequent ballot, a majority of employees voted against the proposed agreement.

[35] As noted above at [3], the parties reached agreement around terms for the end of the stand down on 15 December 2023 and arrangements were made for employees to return to work from Saturday 16 December 2023. The stand down from 28 November – 16 December ("stand down period") lasted a period of 2 weeks and 4 days. During this time some employees elected to take annual leave to maintain continuity of wages.

[36] The parties have since reached agreement on their new enterprise bargaining agreement.

Legislative Framework

[37] Section 524 of the Act entitles employers to stand down employees in certain circumstances. Section 524 provides as follows:

> **Employer may stand down employees in certain circumstances**

(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:

(a) industrial action (other than industrial action organised or engaged in by the employer);

(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;

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

(2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:

(a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and

(b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.

Agreement Provisions Dealing with Stand Down

[38] Several provisions in the Agreement also relate to stand down. These are:

9. CONTRACT OF EMPLOYMENT

…

(e) Attendance

(i) Employees (other than Casual Employees) are expected and required to work on a 24 hour basis of an on duty period of two weeks, followed by

an off duty period of two weeks. The roster will provide for a rotation of crews to carry out such work.

…

(iv) Except in the circumstances specified in paragraph 9(e) (vi) below, an Employee may not be absent from work on any normal rostered day or shift without prior approval of the immediate supervision to do so.

…

(vi) The provisions of this clause will **not affect the right of the Employer to deduct payment for any day the Employee cannot be usefully employed because of any strike or through any breakdown of machinery or any stoppage of work by any cause for which the Employer cannot reasonably be held responsible.** Provided that, in the event of storm, cyclone or other conditions which result in the abandonment of an oil well workover rig, the conditions of Clause 27 of this Agreement will be applicable.

(Emphasis added)

27. STORM ABANDONMENT

In the event of storm or cyclone or other conditions which result in the abandonment of an oil well workover rig the following will apply:

(a) Employees will carry out their normal duties until such time as normal duties become impracticable due to any reasons including safety factors.

(b) Full Time Employees who are prevented from carrying out their normal duties will be put on to alternative duties, maintaining their ordinary wage rate in clause 10 above.

(c) Employees for whom no alternative work can be found will be stood down.

(d) Full Time Employees stood down will maintain their ordinary wage rate as prescribed in clause 10 for a maximum period of five ordinary working days (i.e. five days as the daily rate).

(e) In the event of work not resuming at the conclusion of the five day period referred to in sub-clause (d) above, the Employer will consult with the affected Employees or where applicable the Union.

(f) Notwithstanding the above, an Employee may elect not to accept alternative duties in which case sub-clause (d) above will not apply.

28. STAND DOWN FOR RIG REPAIRS

Where it is necessary for an offshore workover rig to lay up for repairs, survey or maintenance, the Employer may close down the operation and allow annual leave to a Full Time Employee in accordance with the following provisions:

(a) The Employer may, by giving notice as soon as is practicable but not less than one week's notice of an intention to do so, stand down for the duration of the repairs, survey or maintenance period all Employees and allow to those who are not then qualified for annual leave pursuant to sub-clause 19 (a) of this Agreement, paid leave on a proportionate basis as prescribed by sub-clause 19 (d) of this Agreement. No Full Time Employee will be stood down whilst casual labour is still engaged. Where the required personnel from the Full Time Employee workforce are not available to fill the positions, Casual Employees may be utilised for such. The "required personnel" means those Full Time Employees with the required skills, competencies and experience. For the avoidance of doubt this provision applies to Bass Strait only.

(b) An Employee who has been allowed leave pursuant to sub-clause (a) above will commence the next twelve month period as from the day work resumes.

(c) Where an Employee has not accessed leave pursuant to sub-clause (a) above, the Employee will be stood down without pay. Provided that all time during which an Employee is stood down without pay for the purpose of this clause will be included as service in the next twelve month period.

Stand Down Dispute

[39] Broadly, AWU submits that SESA was not entitled to stand down its employees during the stand down period because:

a) Pursuant to s.524(2) of the FW Act, the stand down provisions in the Agreement prevent SESA from relying on s.524(1) to stand down its employees. Further, the requirements of the stand down provisions under the Agreement which would give SESA a right to stand down its employees have not been met.

b) In the alternative, SESA was not entitled to stand down employees pursuant to s.524(1) of the FW Act because:

- The employees could be usefully employed (s.524(1)); and/or
- There was no stoppage of work (s.524(1)(c); and/or
- SESA could reasonably be held responsible for the stoppage of work (s.524(1)(c)); and/or
- The “period” of stand down was not defined.

[40] SESA submits it was entitled to stand down employees under s.524 of the Act, or alternatively in accordance with subclause 9(e)(vi) of the Agreement.

[41] I will now consider each of these arguments.

I. Was SESA prevented from relying on s 524(1) of the Act because of provisions relating to stand down in the Agreement?

AWU submissions

[42] The AWU submits that clause 28 of the Agreement (Stand down for Rig Repairs), provides for circumstances in which SESA is authorised to stand down its employees during a specific period if employees cannot be usefully employed. It relies on the decision of *AMIEU v Wingham*[23] *(Wingham)* as authority to establish that in circumstances where the parties have "established particular arrangements for stand down of employees" in an agreement, the stand down provisions in s.524(1) of the FW Act are displaced pursuant to s.524(2). Accordingly, the requirements of clause 28 of the Agreement must be met for SESA to lawfully stand down its employees, rather than the requirements in s.524.

[43] The AWU further contends that the clause 28 requirements were not met. In particular, the stand down was not for rig repairs as required by clause 28, SESA did not provide the AWU notice of the stand down in accordance with subclause 28(a), and casual employees were still engaged while full time employees were stood down, contrary to subclause 28(a). Therefore, SESA had no right to lawfully stand down its employees.

[44] In relation to clause 9(e)(vi), the AWU submits that the clause only relates to attendance at work and did not confer a right upon SESA to stand down its workforce in the circumstances.[24]

SESA submissions

[45] SESA's position is that the clauses in the Agreement do not displace the statutory stand down provisions. It argues that for an agreement stand down term to engage the exclusion in s.524(2), it must provide the employer a right to stand down its employees in the same circumstances referred to in s.524(1). Clauses 27 and 28, relating to storm abandonment and rig repairs respectively, are narrower provisions which do not cover the same circumstances as contemplated by s.524(1), and therefore do not displace s.524(1).

[46] SESA opposes the AWU's contention that *Wingham* stands for authority that *any* stand down provision in an enterprise agreement will displace s.524(1). It refers to extracts of the explanatory memoranda of the *Fair Work Bill 2008* to support its submissions on s.524(2).

[47] SESA's primary construction of clause 9(e)(vi) proposes that rather than conferring a right on SESA to stand down its employees in a particular circumstance, it preserves the pre-existing right to stand down found in the FW Act. If the statutory stand down provisions are displaced by the Agreement, SESA alternatively relies on clause 9(e)(vi) as its source of power to stand down its employees.

Consideration

[48] It is helpful to again set out s.524(2) to consider whether it applies in these circumstances:

> (2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a **circumstance referred to in that subsection** if:
>
> (a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and
>
> (b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of **that circumstance**.
>
> (Emphasis added)

[49] It is apparent that the reference to "circumstance" in s.524(2) is a reference to the circumstances referred to in s.524(1) – namely industrial action; a breakdown of machinery or equipment; or a stoppage of work for any cause for which the employer cannot reasonably be held responsible. In other words, the exclusion in s.524(2) only applies if the provision/s in an agreement or contract deals with the same "circumstances" as outlined in s.524(1). This reading is supported by the explanatory memoranda which state:

> "An enterprise agreement or a contract of employment may provide for stand down in a wider range of circumstances than as provided in this Part (subclause 524(2)). **If an enterprise agreement or a contract of employment does not provide for stand down, or authorises stand down in more limited circumstances, or does not deal with one of the specified circumstances in subclause 524(1), then the provisions for stand down set out in this Part will apply**."[25]
>
> And
>
> "This reinforces the notion that the stand down provisions under the Bill are default provisions, and may be replaced in certain circumstances by stand down provisions under an enterprise agreement or contract of employment (i.e., **to the extent the provisions deal with each of the circumstances provided for under subclause 524(1) of the Bill**)."[26]
>
> (Emphasis added)

[50] I note the AWU's reliance on *Wingham* as standing for the proposition that any enterprise agreement stand down provisions usurp the statutory entitlement. The circumstances in *Wingham* can be distinguished from the current matter. In particular, in *Wingham* the Commission was dealing with a dispute about the operation of a stand down provision under an Agreement (which notably included a form of industrial action, breakdown of machinery and stoppage of work that the employer cannot be held reasonably responsible for) and Commissioner Cambridge was not specifically determining whether the stand down provision displaced s.524(1).

[51] Accordingly, I have concluded that the provisions in an enterprise agreement relating to stand down will only displace s.524(1) (or part of s.524(1)) to the extent that the circumstances in s.524(1) are dealt with by the agreement. If the circumstances are not dealt with by the agreement, s.524(1), (or the part of s.524(1) which is not dealt with by the agreement) will continue to apply.

[52] I will now turn to consider the specific Agreement provisions in this matter and whether they deal with the circumstances in s.524(1).

[53] Clauses 27 and 28 of the Agreement, which provide for stand down in relation to storm abandonment and rig repairs respectively, do not cover the circumstances listed in s.524(1) and therefore, do not displace s.524(1).

[54] Clause 9(e)(vi) of the Agreement (see above at [38]) does refer in some regard to all the circumstances in s.524(1). However, this clause is worded to "not affect the right" of SESA. I agree with the Respondent that this subclause does not establish a right to stand down, but rather acknowledges SESA's right under s.524(1) of the Act.

[55] Accordingly, I have determined that SESA was not excluded from relying on s.524(1). I will now turn to consider whether SESA was entitled to stand down employees under s.524(1) of the Act in the circumstances before me.

II. Was SESA entitled to stand down employees under s.524(1)?

[56] In determining whether SESA was entitled to stand down employees under s.524(1), I have adopted the process set out by the Full Bench in *The Peninsula School v Independent Education Union of Australia*[27], namely I will consider matters in the following order:

- Could employees have been usefully employed during the stand down?
- Was there a stoppage of work?
- Could the employer have been reasonably held responsible for the stoppage?

Could employees have been usefully employed during the stand down?

[57] The AWU submits employees could have been usefully employed either in relation to outstanding duties on Esso's off-shore platforms or in a range of alternative duties.

[58] SESA submits once Esso suspended work, the majority of employees could not be usefully employed, but SESA offered alternative duties where they became available. SESA relied on *Nicholas Van Der Linden v LDA Group Pty Ltd (Van Der Linden)*[28] to argue that whether employees can be usefully employed is a relatively broad brush analysis, and the Commission should not go through the evidence with a fine tooth comb to find a few hours here and there.[29]

[59] Both parties have provided evidence and submissions regarding a range of duties and/or alternative projects including:

1. Rig repair, preservation and maintenance work on Esso platforms; and

2. Rig 47, located at SESA's yard in Warruk;

3. Residual activities on Batch 1, located on the Kingfish A platform;

4. Barry's Beach Marine Terminal, for the Wireline Doghouse;

5. A pump job at the Barracouta platform;

6. A job at the West Kingfish platform;

7. Work for Lochard Energy, being another of SESA's clients. The Lochard Energy campaign ran from 7 September – 21 December 2023. Nine casual employees were engaged for the entirety of the campaign.

[60] In relation to item 1, both parties agreed that while the industrial action was being undertaken, a comprehensive list of rig repair, preservation and maintenance works was created. The AWU submits that the employees stood down could have been usefully employed carrying out these works. SESA submits that these works became unavailable after 28 November 2023, when Esso required the majority of SESA's employees to be removed from its platforms (with the exception of 10 employees not covered by the Agreement who remained to monitor equipment).[30]

[61] In relation to items 2-6, Mr Skeen gave detailed evidence regarding the available work, the duration of work and the number of employees required to perform that work. In summary, the available projects were on a small scale and offered to small crews of 2-4 employees and/or for limited periods of time. These details were not contested, whether by Mr Trew in evidence or otherwise by the AWU.

[62] In relation to item 7, the AWU submits that SESA should have replaced the casual employees engaged to work on a project with Lochard Energy with some of the permanent employees who had been stood down. Mr Skeen gave evidence for SESA to the effect that this project was expected to be completed on 21 December 2023, and that SESA had been instructed by Lochard to retain the existing casual crew until the project's completion.[31] Accordingly, SESA argues that there were no vacancies available during the stand down period.

Consideration

[63] In considering whether employees can be usefully employed, I have had reference to *Re Carpenters and Joiners Award* where Spicer CJ and Smithers J held at [34]:[32]

> *"…The expression 'usefully employed' necessarily connotes that by the employment in contemplation there will be a net benefit to the employer's business by reason of the performance of the particular work done."*

[64] The parties have agreed that prior to the stand down, a list of rig repair, preservation and maintenance tasks on Esso's offshore platforms was created, which would have constituted useful employment for the employees. I accept that before the stand down occurred, these duties were being undertaken by employees and both parties were of an understanding that this would continue.

[65] However, following Esso's decision to suspend SESA's services on 28 November 2023 and the subsequent removal of SESA employees from the platforms, this work was no longer available. This left SESA in a position where even if it had wanted to, it was unable to offer the previously agreed repair, preservation and maintenance works to its employees. Accordingly, I am unable to conclude that the employees could have been usefully employed doing this work as of 28 November 2023.

[66] I accept SESA's evidence that it provided work to employees as it arose in respect of the small projects as outlined in items 2-6 of paragraph [59] above. These projects largely amounted to work for small crews of 2-4 employees each. Neither party led evidence regarding the number of crew members allocated to Rig 47 in Warruk, but in any event I note Mr Skeen's uncontested evidence that the work was completed in two days. While these projects allowed SESA to provide useful work for a small number of employees, I am unable to conclude that these projects, considered individually or as a whole, could have constituted useful employment for the majority of the 96 employees.

[67] The final outstanding matter in relation to useful employment relates to the work performed by 9 casual employees, employed by SESA on the Lochard Energy project. The AWU submitted permanent employees should have been allocated to this work. SESA led evidence that Lochard "instructed" it to maintain the existing crew to finalise its work, noting that the project came to an end on 21 December 2023.[33]

[68] SESA did not lead any evidence to suggest that the stood down employees did not have the skills to perform the duties at Lochard Energy or that a switch of personnel would cause significant delay. The sole reason given for not engaging SESA's permanent workforce on the project appears to be that Lochard Energy requested that the casual staff continue and that the end of the project was near.

[69] SESA also did not lead any evidence to suggest it was contractually bound to provide Lochard Energy with particular staff. In fact, both SESA and Lochard Energy would be aware that the nature of casual employment means that there is no ongoing guarantee of a particular employees' engagement. In comparison, SESA is contractually bound to provide useful work to permanent workers when it is available.

[70] While I accept that the project had only a short time to run – at the date employees were first stood down there was still estimated to be another three weeks of the project remaining. This is not insignificant.

[71] For the above reasons I am of the *preliminary* view that there was useful employment for at least 9 of the employees who were stood down, and accordingly a small, but significant section of the stand down was potentially unauthorised. I say I have a preliminary view because none of the matters outlined in paragraphs [68] and [69] above were put to SESA during the

hearing and I am of the view that prior to making a final finding on this particular matter, both parties should have the opportunity to make further submissions and potentially provide further evidence.

[72] In coming to this preliminary view, I have had regard to *Van Der Linden* where Commissioner Bissett considered authorities around useful employment. While *Re Carpenters* sets out the general rule that no single employee cannot be usefully employed if there is a category of work available to be performed – this is not a "hard and fast rule with the facts of a matter requiring balancing" and the ambit of the general rule being limited to the amount of useful work available to be performed.[34] In this instance, on the evidence, it is clear the amount of useful work in question would only cover a small percentage of the workforce.

[73] I recognise that should this preliminary finding be upheld, there are a number of difficulties in determining a "fair" remedy. I deal further with this matter below from [114] to [120] when I consider the application of s.526(4) and fairness between the parties concerned.

Was there a stoppage of work within the meaning of s.524(1)(c)?

AWU Submissions

[74] The AWU submits that the bans engaged in by its members did not lead to a stoppage of work. It relies on the evidence of Mr Trew, to the effect that while the industrial action included bans on some work, there was no overall stoppage of work.[35] It referred to the commentary of Deputy President Gostencnik in *CEPU & Anor v FMP Group (Australia) Pty Ltd*[36] and Commissioner Bissett in *Van der Linden v LDA Group Pty Ltd*[37] to support its argument that while the industrial action may have caused a reduction in work, it did not cause a stoppage of work or "complete withdrawal of labour."

[75] The AWU further argues that the stoppage of work took place at the initiative of the employer and only after it stood down the employees "effective on and from 28 November 2023."[38]

SESA submissions

[76] SESA submits that there was a stoppage of work when Esso suspended SESA's services on its projects on 28 November 2023. It relies on previous Commission decisions to support its assertions that:[39]

- A stoppage does not need to be a stoppage of all work, just some particular business activity;[40]
- The stoppage of work need not occur in the employer's own business;[41] and
- A stoppage can include a situation wherein the employer's client directs it to suspend the provision of services due to industrial action.[42]

[77] SESA concurs with the AWU in that there was no stoppage of work caused by the AWU's protected industrial action, prior to 28 November 2023.

Consideration

[78] I have determined there was a stoppage of work.

[79] I accept Mr Trew's evidence, and the submissions of the AWU, that the industrial action did not cause a stoppage of work at any time from the date it commenced (16 November 2023) to the day before the stand down (27 November 2023). However, the stand down occurred on and from 28 November 2023. That is the period for which I must determine whether a stoppage of work occurred.

[80] I am satisfied on the material before me that there was a stoppage of work which commenced on 28 November 2023. There is a clear causal link between Esso's decision to suspend SESA's services on and from 28 November 2023, and the stoppage of work. Esso's decisions did not lead to a "mere reduction of work." The majority of work performed by the employees related to the Esso contract. Once Esso suspended services and required employees to be removed from the offshore platforms, the substantive work employees were engaged by SESA to perform had been removed.

Can SESA reasonably be held responsible for the stoppage?

[81] The AWU submits it is unreasonable for the employer to claim that the stoppage of operations by Esso was out of its control. The AWU submits that the stoppage took place because of the action or inaction of SESA.[43]

[82] SESA submits that ultimately it was Esso's decision to suspend work, and SESA cannot be held responsible for Esso's decision. SESA submits that in considering whether an employer can reasonably be held responsible for a stoppage, the relevant test is what a reasonable person in the circumstances might do and that it is not for the Commission to apply "*a standard of perfection, sitting here with the benefit of hindsight…"*[44] . SESA submits that the Commission can be comfortable that SESA did not encourage Esso's decision and in fact, took reasonable steps to deter a stoppage, because Esso's decision resulted in significant financial loss for SESA.

[83] The parties' submissions broadly fit under the following themes. I will deal with each in the order listed below.

a) Did SESA encourage Esso's decision to suspend SESA's services on its platforms?

b) Is SESA responsible for the stoppage because it failed to take steps to mitigate disruption caused by the ban on crane lifts?

c) Is SESA responsible because it did not communicate with or consult the AWU before the stand down occurred?

a) Did SESA encourage / not discourage Esso's decision?

[84] Firstly, the AWU submits that SESA should reasonably be held responsible because it could have taken steps to contest Esso's decision to suspend SESA's services. It refers to the emails between Esso and Mr Skeen on 27 November 2023 (set out at paragraphs [25] and [27] above) and argues that at that time, Esso only "*anticipate[d]*" needing to cease its operations on the platforms. It submits that this exchange suggests it was possible for SESA to continue collaborating with Esso to work through the industrial action,[45] and that SESA has not been able to show they took reasonable steps either to discourage Esso from making the decision to suspend SESA's services, or to enforce its contractual entitlement to provide services to Esso. It relies on the provisions of the commercial contract between SESA and Esso, in particular that Esso had no unfettered right to suspend all services under the contract.[46]

[85] SESA submits that it was not possible for it to "collaborate" with Esso around the industrial action as contemplated by the AWU. Mr Skeen gave evidence to the effect that when the industrial action commenced, a list of alternative duties on the platforms was created through collaboration with Esso. However, following the email on 27 November 2023 and the accompanying phone call between Mr Skeen and Esso (set out at [26] above), Mr Skeen was of the view that Esso had "kind of made their minds up."[47]

[86] SESA further argues that it did not encourage Esso to make the decision to cease SESA's services. It relies on the uncontested evidence of Mr Skeen that SESA's revenue was decreasing by approximately $84,000 per day while the stand down was in effect, and submits that this alone supports "*a reasonable inference, absent some specific evidence to the contrary, that if there was something that could have… practically been done, it would have been done to.. save money."*[48] Similarly, SESA claims that it would not be legally or financially reasonable for it to take purported legal action against Esso, as it was "plainly in breach" of its contract with Esso.[49]

Consideration

[87] It is clear on the evidence that SESA and Esso have a close working relationship. This was acknowledged by both Mr Skeen and Mr Trew. It is also clear SESA and Esso spoke regularly about the industrial action. Mr Skeen gave evidence that he provided regular updates to Esso by phone[50] and was in discussions with Esso about the industrial action daily.[51]

[88] However, there is no evidence before me to suggest that SESA encouraged Esso in the decision to stand down employees. I accept Mr Skeen's evidence that he did not encourage Esso to make the decision and did not want Esso to suspend services.[52] Mr Skeen's position is supported by the evidence that SESA faced substantial economic losses as a result of the stand down.

[89] I also do not think it was reasonable in the circumstances to expect SESA to pursue Esso for breach of contract. While the parties' have different views regarding the impact of the AWU industrial action bans on the SESA operations, it appears clear on the evidence that the ban on crane lifts had considerable impact. Mr Skeen has provided evidence that the bans on crane lifts had caused significant disruption to operations (see [19] above) and that in his view SESA was not meeting its contractual commitments to Esso.[53] When Mr Trew was asked whether he could

deny that certain operations had been impacted because of the bans on crane operations, he was unable to refute this.[54] I find that the bans did have an impact on SESA's services. An interruption to SESA's services prima facie enlivened clause 7.1 of the contract between Esso and SESA and allowed Esso to suspend SESA's services if it chose to do so. SESA pursuing Esso in this context would not be a legally sound strategy and would also impact on its relationship with its major client.

[90] Accordingly, I do not find that SESA encouraged or unreasonably failed to discourage Esso's decision.

b) Is SESA responsible because it failed to take steps to mitigate disruption to crane lifts?

[91] Secondly, the AWU submits that SESA should be reasonably held responsible for the stoppage of work because it has failed to take reasonable steps to ensure that operations proceeded during the period of industrial action. In particular, the AWU argues that had SESA engaged replacement crane operators, operations would not have been disrupted to the point that Esso demobilised the platforms. It argues that SESA's choice not to engage alternative crane operators was a "significant failure" and that had it done so, it could have prevented Esso from making that decision.

[92] The AWU relied on Mr Trew's evidence regarding the use of alternative crane operators in the past. Mr Trew gave evidence that:

- In addition to SESA crane operators, there would often be other licenced crane operators engaged by Esso or a third party company on site who assisted with crane operations;
- In situations where a SESA crane driver has been unable to fulfil their duties, the duties have been performed by another crane driver on the platform;[55]
- The SESA workforce worked very closely with Esso company representatives;[56]
- He believed that if there had been any trouble with crane lifts caused by the ban, Esso employees or third party employees would have been able to operate the cranes.

[93] On crane drivers, Mr Skeen gave evidence that:

- Esso's company representatives who were on site would have varying levels of certification regarding crane operations, to the effect that there was no guarantee a licensed operator from Esso would be available at all times;[57]
- Esso's company representatives did not perform crane lifts that SESA was contracted to perform as part of their usual duties;[58]
- SESA's normal operations did not have third party crane drivers handling SESA equipment;[59]

- Esso had reached out to crane providers and it "took them some time to get a third party crane driver to Batch 1", noting that "quite a few people had refused to come and work on the site that SESA was attending";[60]

- SESA did not make any enquiries to locate alternative crane drivers.[61]

Consideration

[94] It is not completely clear on the evidence whether finding alternative labour to perform the crane lifts would have stopped Esso's decision to suspend services. Ultimately, even if crane lifts were operating, other industrial action that had any sort of impact may have sparked Esso's decision. However, in any event, in the particular circumstances, it was not unreasonable for SESA not to pursue alternative labour to perform the crane lifts.

[95] I do not believe engaging crane drivers employed by Esso or other third-party contractors on the platform was a viable option. While in the past, SESA has been able to rely on such crane drivers to fill in for short periods, there was no evidence before me to suggest that this was a viable longer-term arrangement. I accept SESA's argument that there was no way for them to guarantee that crane drivers engaged by Esso or another contractor were going to be available to perform SESA work, or would be released from duties to perform SESA's work.

[96] In relation to sourcing other external crane drivers I accept SESA's evidence that they had had limited success in the past finding external crane drivers,[62] Esso had also had limited success trying to source external crane drivers for Batch 1, and that external crane drivers were unlikely to want to become involved in the industrial action dispute.[63]

[97] SESA did take some steps to mitigate the impact of industrial action, including compiling a list of maintenance tasks outside of the bans which employees could usefully work on. However, I do not find their failure to source external labour during industrial action unreasonable.

c) Is SESA responsible because it did not communicate or consult with the AWU about the stand down?

[98] Thirdly, the AWU submits that SESA failed to communicate or consult with the AWU in relation to the impending stand down. It argues that had the AWU been made aware that a stand down was imminent, it may have modified or stopped the bans entirely and alleviated the need for demobilisation. On this basis, it claims that SESA's failure to communicate supports a conclusion that it should be held responsible for the stoppage of work. This is supported by Mr Trew's evidence that if SESA had raised the possibility of a stand down, the AWU "certainly would have discussed" the modification or removal of certain bans.[64]

[99] Separately, the AWU submits that SESA's failure to communicate with the AWU constitutes a breach of the consultation clause (Clause 38) in the Agreement.[65] It claims that a stand down constitutes a "major change" as contemplated by Clause 38 and should be subject to consultation with the AWU before it can be decided on by the employer.

[100] The AWU submits that SESA did not communicate with the AWU regarding the stand down, but rather commenced moving employees early on the 28 November 2023 before employees were even informed of the stand down. Mr Trew gave evidence that he sent an email to Mr Skeen asking why staff were being reallocated on the morning of 28 November 2023 prior to any Stand Down Notice.

[101] SESA submits that the sudden decision by Esso to suspend services afforded it no reasonable opportunity to consult with the AWU. It argues that had Esso given SESA a longer notice period, such as 7 days, a failure to consult with the AWU may have indeed led to SESA being held responsible.[66] It relies on Mr Skeen's evidence that he was not aware of Esso's decision to suspend SESA's services until the email and phone call on 27 November 2023, in support of this proposition.

[102] SESA advances an alternative analysis of the consultation clause of the Agreement. It argues that it is unlikely a general consultation provision could stand in the way of a legislative stand down provision, particularly because it could cause significant delay and effectively defeat the purpose of a stand down right.[67] It relies on the Full Federal Court decision in *ALAEA v Qantas Airways Ltd and Another*[68] *(Qantas)* to support this proposition. Furthermore, SESA submits that a stand down does not meet the requirements set out in clause 38.

[103] While SESA concedes some employees were moved prior to the Stand Down Notice - SESA relies on evidence from Mr Skeen to establish that those employees were moved because of a Covid out-break, not the stand down.[69]

[104] SESA also contends that it had previously asked the AWU to stop industrial action, and the union refused.

Consideration

[105] In my view, SESA's communication of the stand down was not at all ideal.

[106] SESA waited until the afternoon of Friday 28 November to relay the Stand Down Notice, even though it had been notified of Esso's intention to suspend services and remove SESA employees from the platforms the day before.

[107] I accept the AWU submission that SESA started moving people shortly before the AWU and employees were given notice regarding the stand down. SESA provided some explanation for this movement - Mr Skeen gave evidence that the crew originally on Rig 22 were moved to Rig 47 due to a COVID outbreak.[70] However, Mr Skeen also gave evidence that he did not respond to the email from Mr Trew on the basis that he felt the notification sent out on 28 November "*answered the questions that that email was asking."*[71] This indicates that employees were being moved prior to notification of the stand down.

[108] If SESA had communicated with the AWU immediately after receiving Esso's email on 27 November 2023, there could have been a more collaborative approach to the demobilisation and the AWU and its members would have had an opportunity to discuss whether they wanted to continue industrial action in the face of an imminent stand down. It would have also helped to avoid any appearance of SESA using the stand down as a negotiating tactic in bargaining.

[109] However, even if SESA had communicated about the impending stand down on the Thursday afternoon instead of the Friday, on the balance of probabilities I am not persuaded this would have resulted in the removal of the bans, and/or Esso lifting its decision to suspend the contract. Mr Trew gave evidence that if SESA had raised the possible stand down the Union "*Certainly would have …. discussed*" modifying actions.[72] In retrospect, we can only speculate where this discussion might have gone. In a bargaining context the AWU had previously refused to lift the bans when asked by SESA. Even after the stand down was notified, the AWU did not approach SESA to discuss lifting the bans. Ultimately it was not in SESA's reasonable control whether the union would or would not stop action.

[110] I note the AWU's submission that the major change provision should have applied to the stand down. Whether SESA breached the major change provision in relation to consultation around the stand down is not a matter for this decision because s.524(1) does not specify consultation requirements. However, I do note it is easy to conceive of times where a stand down may not leave any time for consultation (e.g as a result of a natural disaster or safety issue).

[111] Accordingly, I have found that SESA cannot reasonably be held responsible for the stoppage.

Length of Stand Down

[112] The AWU submitted that the phrase "during a period" in s.524(1) 'suggests a definite or ascertainable start and end date'[73] and as such, the standdown was not valid because the stand down period had not been defined. In response, SESA argued that there was no requirement under s.524(1) for a stand down to have a fixed end date.

[113] Stand downs by nature are for a temporary "period".[74] The Commission has previously recognised fairness concerns regarding ongoing stand downs with indeterminate end dates.[75] However, given this stand down was for a limited period, this is not a matter I need to consider in this decision.

Fairness between the Parties Concerned

[114] Pursuant to s.526(4) in dealing with a dispute about the operation of the stand down provisions, the Commission must take into account fairness between the parties concerned.

[115] In considering the application of s.526(4), I have had reference to Anderson DP's comments in *Ball v Thomas Foods International Murray Bridge Pty Ltd*[76] in relation to this section of the Act:

> *"[92] Fairness involves what is just and right between the parties having regard to the relevant statutory framework and the facts and circumstances established by evidence.*

> *[93] Importantly, fairness in this statutory context is expressed as fairness "between the parties". It is not a narrow question of what is fair to Mr Ball or fair to Thomas Foods. It concerns fairness having regard to their dual circumstances and interests. In the case of a stand down this is a point of particular importance. By definition, a stand down (at least one reliant on section 524(1)(b) or (c)) involves a disruption to production not caused by the conduct of the person being stood down nor the conduct of the business employing them. In those circumstances, it would not be unsurprising if a fair outcome involves some or both parties feeling that they are required to bear a burden or sustain a loss that is not theirs or their responsibility. Fairness between the parties, objectively assessed, may not displace some sense of lingering injustice felt by one or both sides."*

[116] SESA submits that s.526(4) is of particular relevance in the event that a stand down is found to be unauthorised. In such circumstances, SESA submits, the framing of a remedy should be a "*fair outcome between the* parties"[77] and points to the Full Bench decision in *Carter v Auto Parts Group Pty Ltd (Carter)*[78], as quoted by Colman DP in *ASU v Helloworld Travel Limited.*[79]

[117] In *Carter* the Full Bench of the Commission stated at [27]:

> *"Applying the principles stated in Re Cram to the Commission's functions under s.526, it seems to us that while the Commission cannot make a monetary order in grant of a claim for an entitlement to wages said to be owing under an award or a contract of employment, the Commission is empowered to make a monetary order to resolve a stand down dispute based on its consideration of what is a fair outcome between the parties and other issues relevant to the industrial merits of the matters and , in doing so, is entitled to take into account whether, in its opinion, the stand down was authorised by s.524(1)."*

[118] As flagged above, I have come to the preliminary view that a small, but not insignificant section of the stand down may have been unauthorised because of the potential availability of useful employment for nine permanent workers at Lochard Energy.

[119] If this preliminary finding were to be upheld, it raises a number of issues in determining a "fair" remedy. For example, neither party clearly identified specific permanent employees who would have been engaged on the Lochard project in lieu of the casual employees.

[120] In dealing with this outstanding part of the dispute in accordance with s.526(4) considerations, I have determined to direct the parties to confer about my preliminary finding, including discussions relating to potential remedy, with the aim of reaching an agreed outcome. The matter will be set for a report back conference before me. In the event the parties have not been able to resolve the matter between them, I will program the matter for a further hearing, including directions for the parties to provide submissions and if necessary, evidence, on my preliminary finding and remedy.

Conclusion

[121] For the reasons given above, I find that SESA was entitled to stand down the majority of its employees under s.524 (1) of the FW Act.

[122] I have made a further preliminary finding that a small, but not insignificant section of the stand down was unauthorised because of the availability of useful employment. I will issue directions in relation to this outstanding matter.

COMMISSIONER

Appearances:

L Aksu for the Applicant
D Ternovski for the Respondent

Hearing details:

2024
Melbourne (Video)
February 12.

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[1] AWU v Superior Energy Services (Australia) Pty Ltd B2023/1326.

[2] *Statement of Shaun Trew* (Trew) at [6], Digital Hearing Book (DHB), 45 and *Statement of Mathew Skeen* (Skeen) at [10], DHB 72.

[3] Skeen, Annexure MS-5, DHB 108-110.

[4] Ibid.

[5] Exhibit SESA 2, *Superior Subagreement - Schedule C: Description of Services.*

[6] PR766351.

[7] [2023] FWC 2406, at [40], [46].

[8] *Notice of Intention to Take Protected Industrial Action*, DHB 9.

[9] Trew, Annexure ST-2, DHB 51-2.

[10] Trew at [16], DHB 46 and Trew, Annexure ST-3, DHB 54-5.

[11] Trew at [32], DHB 47 and Skeen at [43], DHB 77.

[12] Skeen at [20], DHB 73.

[13] C2023/7467 Transcript, *Australian Workers' Union, The and Superior Energy Services (Australia) Pty Ltd* (B2023/1326) 12.02.2024 (Transcript), PN 494.

[14] *Request for Temporary Suspension of PIA*, DHB 126.

[15] Exhibit AWU 3

[16] Ibid.

[17] Skeen, Annexure MS-3, DHB 106.

[18] Skeen at [24], DHB 74.

[19] Ibid.

[20] Skeen, Annexure ST-4, DHB 107.

[21] *Important Notice to Employees – Stand Down Effective on and From 28 November 2023*, DHB 11.

[22] Skeen at [26], DHB 74.

[23] *Australasian Meat Industry Employees Union v Wingham Beef Exports Pty Ltd* [2021] FWC 4641.

[24] Transcript, PN 533.

[25] Fair Work Bill 2008, *Explanatory Memorandum* at [2080].

[26] Fair Work Bill 2008, *Supplementary Explanatory Memorandum* at [229].

[27] [2021] FWCFB 844.

[28] *Nicholas Van Der Linden v LDA Group Pty Ltd as trustee for LDA Group Trust trading as Levitch Design Australia* [2020] FWC 3531.

[29] Transcript, PN 558 to PN 561.

[30] Skeen at [33(a)], DHB 76.

[31] Ibid at [32], DHB 75.

[32] (1971) 17 FLR 330.

[33] Skeen at [33(e)], DHB 76.

[34] *Van Der Linden v LDA Group Pty Ltd* [2020] FWC 3531, [26]-[[27].

[35] Transcript, PN 45 to 47.

[36] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Anor v FMP Group (Australia) Pty Ltd* [2013] FWC 2554, [31].

[37] *Van Der Linden v LDA Group Pty Ltd* [2020] FWC 3531, [24].

[38] *AWU Submissions* at [34], DHB 32.

[39] *SESA Submissions* at [32], DHB 64-5.

[40] *La Plume v Thomas Foods International Pty Ltd* [2020] FWC 3690, [49].

[41] *Peninsula School v Independent Education Union of Australia* [2021] FWCFB 844, [32].

[42] *Pantalleresco v John Beever (Aust) Pty Limited* [2022] FWC 1541.

[43] Transcript, PN 18.

[44] Transcript, PN 563.

[45] *AWU Submissions* at [43(a)], DHB 33.

[46] Transcript, PN 538.

[47] Transcript, PN 491.

[48] Transcript, PN 574.

[49] *SESA Submissions* at [39], DHB 66.

[50] Skeen at [22], DHB 73.

[51] Transcript, PN 401.

[52] Ibid, PN 447.

[53] Skeen at [28], DHB 75.

[54] Transcript, PN 126 to 133.

[55] Ibid, PN 55 to 58.

[56] Ibid, PN 68.

[57] Ibid, PN 358.

[58] Ibid, PN 359.

[59] Ibid, PN 478.

[60] Ibid, PN 493.

[61] Ibid, PN 494.

[62] Ibid, PN 515.

[63] Ibid.

[64] Ibid, PN 63.

[65] *AWU Submissions* at [14], DHB 28.

[66] Transcript, PN 595 to 596.

[67] *SESA Submissions* at [49], DHB 69.

[68] *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd* [2022] FCAFC 50; (2022) 291 FCR 531, at [61].

[69] Skeen at [40], DHB 77.

[70] Ibid.

[71] Transcript, PN 356.

[72] Transcript, PN 63.

[73] AWU Submissions at [48], DHB 34.

[74] *Textile, Clothing and Footwear Union of Australia v Tuftmaster Carpets Pty Ltd* [2011] FWA 1891 at [69].

[75] *Ball v Thomas Foods International Murray Bridge Pty Ltd* [2018] FWC 2483 at [128].

[76] Ibid at [92]-[93].

[77] Transcript, PN 623.

[78] *Carter v Auto parts Group Pty Ltd* [2021] FWCFB 1015.

[79] *Australian Municipal, Administrative, Clerical and Services Union v Helloworld Travel Limited, Viva Holidays II Limited* [2021] FWC 6535.