Article Information

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Service: Employment & Labour

A totally fabricated diary of working hours, and still no costs!

A recent decision of the Federal Circuit and Family Court serves as a reminder of just how difficult it can be to be awarded costs in the Fair Work jurisdiction. Despite dismissing an employee's claim for underpayment and adverse action and finding that the employee had fabricated his work diary, Judge Vasta declined to make an order for costs in *Jess v Cooloola Milk Pty Ltd* [2021] FedCFamC2G 165.

This case involved an employee who claimed, amongst various other claims, that they were chronically underpaid. The claim was based on a work diary that the employee said he used to keep a daily record of all the hours that he worked because he thought it "was fishy" that the employer did not keep a track of the hours being worked.

Judge Vasta found that the employee was not a witness of truth and that they had fabricated the work diary to boost their underpayment claims. However, he reasoned that, despite finding that the work diary was fabricated, it did not automatically mean that the employee was attempting to defraud the Court.

In considering the employer's application for costs, Judge Vasta explained that in order for costs to be awarded in the Fair Work jurisdiction, the Court must satisfied that:

- the employee instituted the proceedings vexatiously or without reasonable cause; or
- the employee's unreasonable act or omission caused the other party to incur the costs.

Judge Vasta focused on two key questions in his decision. They were:

- was it unreasonable for the employee to commence and continue the proceedings knowing the work diary was fabricated; and
- was it unreasonable for the employee to refuse offers of settlement made in the course of the proceedings?

The fabricated work diary

The employer argued that the employee must have known that his whole claim was based upon a document that was, in effect, a forgery. On that basis, they argued that the institution of the proceedings could not be said to be anything but unreasonable.

However, Vasta J focused on the fact that the fabricated work diary was the only document that contained any record of the hours worked by the employee.

This was significant because section 535 of the *Fair Work Act 2009* (Cth) (**FW Act**) required the employer to keep a record of the hours worked by the employee in accordance with the requirements set out in the *Fair Work Regulations 2009* (Cth) (**FW Regulations**). As this had not happened, the employer was required to disprove the employee's claim as to the hours he worked.

The reason that the employer was required to disprove the hours claimed by the employee is because of section 557C of the FW Act. This section shifts the burden of disproving allegations on to the employer where an employee commences proceedings in relation to certain civil remedy provisions, including cases involving underpayments, and the employer has failed to make or keep a record that is required by section 535 of the FW Act.

Accordingly, while the Court did not find that the employee had actually worked the hours claimed, he considered that it

was unnecessary to do so because it was the employer who had to disprove the claimed hours. Ultimately, he concluded that the employer was unable to disprove *all* the hours that the employee claimed.

Judge Vasta's finding that the employer had contravened section 535 of the FW Act, by failing to comply with their record keeping obligations, was considered as highly relevant to the question of costs. Because the employer had not kept a record of the hours worked by the employee and they could not disprove that the employee *had* worked all the hours as claimed, Vasta J concluded that he could not find that the proceedings were commenced vexatiously or without reasonable cause, nor was the commencement and continuation of the proceedings in those circumstances an unreasonable act or omission causing the other party to incur costs.

This appeared to be a significant factor in refusing to award costs, with Judge Vasta stating:

> *"this matter would not have ever seen the door of a Courtroom if the Respondent had complied with the [record keeping] provisions of the FW Act."*

This highlights the importance for employers to ensure they are properly keeping the records required under the FW Act.

Failure to accept offers

The employer also argued that continuing the proceedings and refusing to accept offers to settle the dispute, in circumstances where the work diary was known to be false, constituted unreasonable acts that caused the employer to incur costs. A number of offers were exchanged between the parties with the employer making a final offer of $15,000, which was rejected.

While Vasta J said that the employee's failure to accept the offers made by the employer was unwise, he also stated that it may have also been unwise of the employer not to accept the employee's offers as well. This is despite the employee failing on each of his claims. Judge Vasta held that:

> *"This jurisdiction is known as a "no costs" jurisdiction. The exchanging of "Calderbank" offers is far more meaningful in jurisdictions where costs are a very live issue. Notwithstanding the "dishonesty" of the Applicant in the creation of the "work diary", he was entitled to make whatever claim about hours he worked that he wished given that the legislation (from 2017) meant that the Respondents had to disprove that claim. Just because he failed in his overall claim does not mean that his failure to accept those earlier offers was unreasonable."*

This case demonstrates how rare it is for costs to be awarded in employment-related matters. The bar for "unreasonableness" is set particularly high, and is worth remembering when employers are working through their defence strategies.

If your organisation needs assistance with managing employment-related disputes, please contact a member of Piper Alderman's Employment Relations team for assistance