Article Information

Authors: Tim Lange, Hannah Linossier
Service: Employment & Labour

Off the record – Failure to keep accurate records sinks employer's underpayment defence

Following the passage of the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017, the impact of a failure to keep records is much more significant in light of the new reverse onus provisions placed on employers. The recent decision of Ghimire v Karriview Management Pty Ltd (No 2) [2019] FCA 1627 has tested the new provisions, in dealing with an allegation by two former employees that their employer had failed to pay them for all hours worked under the relevant award.

Obligations to keep accurate employment records have taken on far greater importance than ever before, with any lack of accurate records of disputed pay, leave, overtime and the like resulting in a presumption by a Court that a disputed amount owing was not paid by the employer. Even where an employee's evidence of amounts owing is sketchy or not credible, the onus is on the *employer* to *disprove* that there has been an underpayment.

In the past, a failure to accurately keep employment records has been, for the most part, a regulatory compliance issue with clear but limited consequences. Records are required to be kept on a range of issues concerning pay and benefits, and those records can be required to be disclosed to an employee or Fair Work Inspector on demand. Following the passage of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*, the impact of a failure to keep records can be much more significant. That Act included a suite of changes designed to address a perception of widespread underpayment of vulnerable employees.

A recent decision of *Ghimire v Karriview Management Pty Ltd (No 2)* [2019] FCA 1627 has put those changes into practice, in dealing with an allegation by two former employees that their employer had required them to work long hours but failed to pay them for all hours worked under the relevant award.

While there were issues with the credibility and reliability of the two ex-employees about the hours they worked (and these had led an Industrial Magistrate to reject in part the underpayment claims), the Federal Court on appeal has determined that the absence of relevant employee records kept by the employer meant the focus required by the legislative change is first on whether the *employer's* evidence is sufficient to demonstrate there has *not* been an underpayment.

Karriview Management Pty Ltd (**Karriview**) operated a family-run lodge located near Margaret River, where its employees Mr Ghimire and Ms Sharma lived and worked. Mr Ghimire and Ms Sharma brought a claim for unpaid wages against Karriview in the Western Australian Industrial Relations Court.

To support their claim of underpayment for long hours, Mr Ghimire and Ms Sharma provided handwritten evidence of the hours they had worked which they said they had transposed from records kept by them at the time.

Karriview called one witness who was not able to produce any records which demonstrated the actual hours worked by the claimants, and could not give evidence about the work undertaken by them. It also emerged that no records of the claimants' employment were in fact kept by Karriview.

An Industrial Magistrate initially found for Mr Ghimire and Ms Sharma and awarded payment for some of the hours claimed, but not all, on the basis that their evidence lacked credibility, and that he should instead be satisfied that they had not worked all the hours they alleged because of those credibility issues.

On appeal to the Federal Court, Mr Ghimire and Ms Sharma were awarded the full amount alleged to be owing. The

Federal Court emphasised the purpose of employee records (and whose responsibility it is to maintain them), quoting an earlier case as follows:

The need to ensure compliance, particularly with respect to vulnerable workers, such as those on work visas, those who come to Australia without strong language skills, and those with little education is crucial to a just society, and the avoidance of exploitation.

Whilst the record keeping obligation with respect to pay slips only appears in the Regulations, its central importance in industrial matters cannot be underestimated. Proper pay slips allow employees to understand how their pay is calculated and therefore easily obtain advice. Pay slips provide the most practical check on false record keeping and underpayments, and allow for genuine mistakes or misunderstandings to quickly be identified. Without proper pay slips employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated.

The Court's approach was that the new legislative provision means that in the absence of accurate employee records, an employer must do more than raise a question about the credibility of a claimant. It must positively establish that the applicants did not work the hours they had claimed, *before* any attention is paid to whether the applicant's evidence is credible. Any lack in the evidence about what hours were in fact worked will result in a win for the employee alleging the underpayment, not the employer defending the claim.

The terms of the legislation mean that this principle extends to any benefit in respect of which a record must be maintained by the employer under the *Fair Work Act 2009*, from penalty rates and overtime to bonuses and superannuation contributions.

This greater likelihood of underpayment findings can also lead to an increase in exposure to civil penalties. Sustained periods of underpayment, if proven, can lead to multiple penalty findings, each of which can leave the employer liable to a civil penalty, which can quickly add up to significant amounts. Failure to keep appropriate records also increases the likelihood that any underpayment by the employer will be found to be a serious contravention of the *Fair Work Act 2009*, exposing the employer to the risk of much higher penalties (a ten fold increase in the maximum penalty) under section 557A(2)(d) of the *Fair Work Act*.

What does this mean for employers?

Many employers are exploring ways to streamline and enhance their record keeping practices, especially around automation of attendance records. Some attempts have come to grief, such as the ill-fated requirement of employees of a lumber mill to provide fingerprint recognition data, which was identified as contrary to the *Privacy Act 1988* (in *Lee v. Superior Wood* [2019] FWCFB 2946). Others are only partially successful and require reliance on employees always having personal mobile devices, such as geo-fenced automated time and attendance modules in popular payroll solutions.

With the increased prominence and importance now given to accurate employee records in pay claims, any exploration of alternative mechanisms to maintain time and attendance records should be undertaken only with careful consideration of how reliable and available those records will be.

It is more important than ever for employers to review their pay obligations to employees, keep accurate and up to date employee records and seek advice where there is uncertainty. Failing to do so will not only make it very difficult to successfully defend claims brought by employees which raise questions about hours worked and wages paid, but also risk exposure to significant civil remedies.

Should you have any questions concerning how the decision may affect your business, please contact a member of Piper Alderman's Employment Relations team.