

## BOOK REVIEW

### **Ron McCallum, *McCallum's Top Workplace Relations Cases: Labour Law and the Employment Relationship as Defined by Case Law* (CCH, 2008)**

'[T]ruth is usually far more interesting than fiction'. So states Ron McCallum in his introductory remarks to *Faccenda Chicken Ltd v Fowler*,<sup>1</sup> one of the 35 cases he has gathered together in this new book from CCH publishers. The stories revealed by the legal cases he has selected will undoubtedly prove to be both interesting and enlightening to anyone interested in the legal realities of the employment relationship.

As Joellen Riley points out in the foreword, Professor McCallum is well-known, both locally and internationally, as Australia's most eminent labour law scholar. Professor McCallum has strong connections with Monash University as he notes in the book. He commenced his law studies at the Faculty of Law in 1967 and went on to become a valued academic member of the Faculty in the 1980s and 1990s, before taking up the Blake Dawson Waldron professorship in industrial law at the University of Sydney. Over his long career, he has demonstrated not only a high level of scholarship, but an ability to communicate the law and the findings of his research to a wide range of people. This book is a good example of his ability to engage the layperson in the issues and debates around the employment relationship, whilst still offering stimulating new insights to those who have knowledge of labour and employment law.

Professor McCallum has managed to address many of the central themes and principles of Australian labour and employment law through this careful selection of case law and the accompanying commentary. The book is not intended to be a standard casebook or textbook on labour law. Rather, its purpose is to present a range of key decisions and to 'unpack and explain these decisions to [an] audience of students, human resources practitioners, trade union officials, lawyers and interested employees and employers'.<sup>2</sup> The synthesis and analysis of the cases in the chapters that follow recognise that many who need to know this important area of the law do not have time to read the decisions in detail.

All of the key areas of employment law are dealt with in the book. Chapter 2 addresses the legal distinction between employment and independent contracting. Chapter 3 deals with what the author calls the 'architecture of the employment relationship'. This includes the formation of binding contracts, the interaction of awards and agreements with the individual contract, and the controversial issue of when company policies may become enforceable terms of the contract. Chapters 4 and 5 focus on the special nature of the employment relationship, examining

1 [1987] 1 Ch 117.

2 Ron McCallum, *McCallum's Top Workplace Relations Cases: Labour Law and the Employment Relationship as Defined by Case Law* (CCH, 2008) 2.

in particular the employee's duty to obey the employer's lawful and reasonable orders and his or her duty of good faith and fidelity to the employer's interests. The issues surrounding ownership of inventions and literary works created by employees are also elucidated through a number of cases.

On the employer's side, two important cases illustrate the employer's developing duty not to destroy the trust and confidence necessary to foster an ongoing, productive relationship with the employee. The cases chosen also show how problematic it is for employees to get a satisfactory remedy if there is a breach of the duty of trust and confidence due to longstanding principles governing the employer's right to terminate the contract that the common law courts are not yet prepared to overturn. The final chapters deal with termination more fully, as well as highlighting some contemporary issues, including the right of employees to work from home, the sometimes difficult distinction between 'work conduct' and private conduct, and the ability of employers to restrain former employees from establishing or working in a business that competes with the former employer.

Most of the cases are the decisions of Australian courts and tribunals, supplemented by a small selection from other jurisdictions. The author sets out the facts of each case in some detail because it is only with a full understanding of the facts that the legal issues and conclusions can really be understood (something that, in my experience as a law teacher, is not always appreciated by law students!). The legal issues and findings are explained clearly and in a way that makes the material readily accessible to an interested reader, irrespective of the lack of a legal background. Many of the case examples include generous excerpts from the case reports. This adds an important dimension for the reader, as well as demystifying the judges, especially for those less well-versed in the law. The author provides well-reasoned commentaries on each of the cases, as well as helpful introductory and concluding remarks in each chapter that give necessary background information, give shape to each chapter and provide useful links between the chapters.

Professor McCallum writes in a pleasant conversational style that makes for easy reading. However, he is also tough-minded and prepared to explain why he believes a case is wrongly decided, or when he considers that the law is heading in the wrong direction. A couple of examples, taken from Chapter 6, *Beyond the Boundaries of the Employment Relationship*, are sufficient to illustrate his approach.

Chapter 6 deals, amongst other things, with the rights of employers to control how their employees behave in their private lives. This has been a particular interest of Professor McCallum's – he wrote a short book on the subject, *Employer Controls over Private Life*, which was published in 2000 by the UNSW Press. The two cases selected for discussion address the employer's power to discipline or dismiss their employees for conduct that might legitimately be characterised as private conduct.

The first case *McManus v Scott-Charlton*<sup>3</sup> deals with the legality of orders given to a public servant that he must not make any out-of-hours contact with named female co-workers. McManus had made harassing telephone calls. The Federal Court found that the employer's orders were lawful and reasonable. The out-of-hours harassment was a consequence of the relationship of the parties as co-workers and the conduct 'has had and continues to have substantial and adverse effects on workplace relations'.<sup>4</sup> As Professor McCallum notes, the facts of the case are not particularly remarkable – what is important is the carefully reasoned judgment of Finn J, who stressed the caution that should be exercised in extending the supervision of employers over the private activities of their employees. Such supervision, in the words of Finn J, 'needs to be carefully contained and fully justified'.<sup>5</sup>

The case of *Telstra Corporation Ltd v Streeter*<sup>6</sup> arose in very different circumstances. Here a group of Telstra shop employees had a Christmas function, partially subsidised by the employer, at which the employees drank a lot of alcohol. They spent the night at a hotel, where sexual activities occurred between Streeter and another employee whilst the others were believed to be asleep. A female employee had to use the toilet whilst Streeter and two male employees were in the bathroom. Complaints were made to Telstra management the next day about Streeter's behaviour. She initially lied about the activities that had taken place and she was subsequently dismissed. She made a complaint of unfair dismissal before the Australian Industrial Relations Commission.

The Commission's initial finding was that the dismissal was harsh because the dishonesty alleged was about activities of an inherently personal nature and there was no reason to think Streeter was dishonest in any of her work activities. The conduct did not constitute harassment of other employees. The trust and confidence between employer and employee had not been destroyed. Streeter won the right to be reinstated, although at a different Telstra shop. A majority of the Full Bench overturned that decision, holding that Streeter had an obligation to answer Telstra's reasonable enquiries honestly and her failure to do so destroyed trust and confidence.

Applying the principles espoused by Finn J, it is arguable that there was an insufficient connection between the private conduct and the performance of the paid work to justify dismissal, particularly in the light of the effect on the employee (something the Commission can take into account). Professor McCallum observes that it is unsurprising that Streeter was reluctant at interviews to 'tell all' about intimate events. He concludes that '[w]ithout more, I am of the view that the mutual trust and confidence between employer and employee remained intact'.<sup>7</sup>

This is but one example of many stimulating areas dealt with by the book, where settled principles often need to be applied to new and difficult cases. Professor

3 (1996) 140 ALR 625.

4 McCallum, above n 2, 104.

5 Ibid. See also *McManus v Scott-Charlton* (1996) 140 ALR 625, 636.

6 [2008] AIRCFB 15.

7 McCallum, above n 2, 109.

McCallum deals with the issues with warmth and humanity. His enthusiasm for his subject as well as the breadth and depth of his knowledge of labour and employment law shines through. The book is highly recommended to anyone interested in the subject who has an urge to know more.

**KAREN WHEELWRIGHT**

Lecturer, Faculty of Law, Monash University