

B 24808

The Journal of Industrial Relations

	Vol.	Page
Pelz Donald C. and Andrews Frank R., <i>Scientists in Organisations</i> . By Cecil Carr	10	83
Somers Gerald G., ed., <i>Proceedings of the Industrial Relations Research Association</i> . By R. J. O'Dea	10	172
Vaid K. N., <i>Papers on Absenteeism</i> . By Maxine Bucklow	10	173
Walker Charles R., ed., <i>Technology, Industry and Man: The Age of Acceleration</i> . By Maxine Bucklow	10	279
<i>Book Notes</i>		
	89,	176, 280
<i>Books Received</i>	91,	178, 283
<i>Society News</i>	93,	180, 285

The Journal of the Industrial Relations Society of Australia

Articles	
1 TRADE UNIONISM IN 1967— <i>I. G. Sharp</i>	
11 THE CHANGING PATTERN OF STRIKE SETTLEMENTS IN AUSTRALIA: 1913-1963— <i>Desmond W. Oxnam</i>	
25 THE PLACE OF COLLECTIVE BARGAINING IN INDUSTRIAL RELATIONS POLICY IN INDIA— <i>T. S. Papola</i>	
34 THE DETERMINATION OF A SECONDARY WAGE— <i>Raymond J. O'Dea</i>	
45 A THEORY OF UNION-GOVERNMENT RELATIONS— <i>Morton Stelcner</i>	
54 NOTES	BOOKS RECEIVED
78 BOOK REVIEWS	PUBLICATION NOTICE

Sydney University Press

Registered at the G.P.O., Sydney, for transmission by post as a periodical



9. *Gallup Poll on the Trade Unions, 1959.*
10. Ross, p. 70.
11. *Ibid.*, p. 72.
12. Leo Troy, *Trade Union Membership, 1897-1962* (New York: National Bureau of Economic Research, 1965), p. 4.
13. See "The Shorter Workweek Trend", *AFL-CIO American Federationist* (December 1964).
14. *Summary of Manufacturing Earnings, 1939-March, 1965*, BLS Report No. 229 (Washington: Bureau of Labor Statistics, 1965), p. 10.
15. See "The Holiday Gains of Union Families", *AFL-CIO American Federationist* (September 1964).
16. *AFL-CIO Legislative Goals for 1965* (Washington: American Federation of Labor and Congress of Industrial Organizations, n.d.), pp. 4-10.
17. *Ibid.*, p. 1.
18. "To Meet the People's Needs", four statements adopted by the Industrial Union Department, AFL-CIO Executive Board, Washington, D.C., July 7, 1966.

INDUSTRIAL and LABOR RELATIONS REVIEW

In the April 1968 issue:

An Investment Theory of Wages	H. M. Gitelman
Market Concentration and Wage Increases, U.S. Manufacturing, 1947-1964	Bruce T. Allen
A Framework for the Analysis of Interurban Negro-White Economic Differentials	Raymond S. Franklin
Discrimination and Occupational Wage Differences in the Market for Unskilled Labour	David P. Taylor
Soviet Experience with Shortening the Workweek	David W. Bronson
Fascism and the Industrial Leadership in Italy before the March on Rome	Roland Sarti
A Strike in the Meat Freezing Industry: Background to Industrial Discontent in New Zealand	J. M. Howells and R. P. Alexander

COMMUNICATIONS

Value Judgments in the Decisions of Labour Arbitrators:

Comment	Peter Seitz
Reply	James A. Gross

Published quarterly by the New York State School of Industrial and Labor Relations, Cornell University, Ithaca, New York 14850.

Annual Subscription	\$6.00
Single Copies	\$1.75
Student Rates	\$3.50
<i>Domestic Rates</i>	<i>Other Countries</i>
	\$7.00
	\$2.00
	\$3.50

The Future of Total Wage Reviews

C. A. FREAME
Sydney

FUTURE OF the 1967 National Wage Case decision to survive the present High Court challenge would not necessarily mean that cases of this nature would revert to any pattern that may have been discernible before 1965.

If the court's decision requires only that the Commonwealth Conciliation and Arbitration Commission continue to identify a basic wage component in its awards (and it is difficult to see what more could be required), the delineation would presumably be discoverable within the Commission's total wage awards. It would be unreal to suggest that the Commission could at any time be bound to find as a basic wage an amount that exceeded what it is prepared to award as a total wage.

If then total wage reviews have, in fact, become the real prospect for the future, they will inevitably supersede the two types of review that have played a major part in determining the wages and salaries share in the national economy, basic wage reviews and reviews of the general level of margins. Law-orientated minds have monopolized the decision-making in basic wage reviews, and have enjoyed at least numerical superiority in reviews of the general level of margins. Their experience and training have fitted them to perform a judicial function, but their decision-making in the reviews mentioned is recognized as being legislative rather than judicial in character.¹ Commonwealth legislation has deliberately reserved the determination of the basic wage to law-orientated minds.²

While it has left (within limits) to the President of the Commission the proportion that law-orientated minds shall occupy in reviews of the general level of margins,³ the experience has been that the proportion has been high. The remaining area in this field has been reserved for Commissioners. The orientation of Commissioners' minds before appointment has not been the subject of statutory specification, but wisdom and an association with industrial affairs can be taken as basic qualifications.

If total (award) wage reviews become established, will they be undertaken by the somewhat cumbersome joint sittings of presidential and reference benches, or will the government feel impelled to provide a more homogeneous vehicle for these reviews? Since 1956,⁴ had a stroke of the legislative pen entrusted either basic wage or general margins reviews to other than law-orientated minds, such a move would not have offended the Constitution.

If, in any tribunal set up in the future to conduct total wage reviews, the present influence of law-orientated minds is not reduced in terms of numerical proportion, there seems no reason why the transition to total wage reviews would not be taken in the Commission's stride. On the other hand, if it is to be proportionately reduced it raises the question of the orientation of the minds that will fill the gap. Should there be others trained in disciplines other than law, waiting their opportunity to make out a case for participation in the seemingly unenviable task of undertaking total wage reviews, they might well take advantage of the statutory revision of the wage reviewing machinery. If they are to influence change in their favour, they must presumably demonstrate that they will at least equal the achievement of the law-orientated.

Logically the contenders' best course is to show that any talent that is associated exclusively with law-orientation is irrelevant to the task of reviewing the total wage. This needs the isolation of the sum total of the judicial achievement, and the identification, firstly of the contributions made by exclusive law-orientation, and secondly of the contribution made by other kinds of orientation.

Talents and Judicial Achievement

In this context the judicial achievement must be looked upon as the use of precedent to develop laws by judicial decision to serve the changing needs of society. In his thesis *The Province and Function of Law*, Professor Julius Stone examines the question of how it is possible for courts, by supposedly necessary logical deduction from non-contemporaneous premises and apparently without entering upon social and ethical inquiries, to reach conclusions well adapted to contemporary problems.⁵

He deals with the proposition that "judging is an act of will . . . and that notwithstanding all the apparatus of authority the judge has nearly always some degree of choice".⁶ He goes on to demonstrate "fallacies of the logical form that serve as devices permitting a secret and even unconscious exercise by courts of what in the ultimate analysis is a creative choice, as these logical forms, not yielding any one answer, invite and compel the court to an answer based on the evaluation of the social situation confronting it."

He points out that the kind of logical deduction and demonstration which has been mainly operative in the judicial process means that granted a certain rule of law (major premise) a certain conclusion follows with regard to the facts at bar (i.e., the facts established by the evidence) accepted as a minor premise. He gives the name "legal category" to the supposed distinction, rule, principle, standard or conception that is used to form a major premise as a basis for deducing the rule to be applied to the case in hand.

Stone illustrates first his category of "meaningless reference"⁷ by which opposite results can be reached by choosing one or other arrangement of words expressing a concept, even where, being a concept created by precedent, it is nowhere to be found in an authoritative form of words.

Other categories include "concealed multiple reference"⁸ a single verbal entity encompassing several distinct concepts; the "single category with competing versions of reference"⁹ the versions being drawn from both majority and minority reasons and dicta in individual judgments; "concealed circuitous reference" and "circuitous reference".¹⁰

Of particular interest in the present context is Stone's category of "competing reference".¹¹ This is encountered where two principles are equally applicable to the case in hand but different consequences will flow depending on the choice made between them. Of interest too is his category of "indeterminate reference", as to which he points out that legal standards such as reasonableness, fairness, non-arbitrariness, just cause, due care, adequacy, hardship, etc., require that courts shall evaluate the concrete situation rather than apply a formula mechanically.¹²

Stone goes on to point out as to the concept of a "ratio decidendi" of a case, that it is possible to draw as many general propositions from a given decision as there are possible combinations of distinguishable facts in it. Simply by looking at the facts it is impossible to say which are to be taken as the basis for the decision. If there are ten facts as many general propositions will explain the decision as there are possible combinations of these facts.¹³

If we accept that Stone has sufficiently established that a degree of choice is available in judicial decision-making, it is not necessary to draw further from Stone to conclude that ethical and social evaluations have exercised their influence on the judicial mind *before* it makes its choice.

This opens the way for the contending minds to allege that the only talent exclusively associated with the law-orientated mind is the handling of precedent, and that a capacity for ethical and social evaluation can be better, or equally well developed, by training in some other discipline.

To support the irrelevance of a talent for handling precedent to the tasks of the Conciliation and Arbitration Commission, they might well say the Commission in total wage reviews "is not dealing with principles or rules of law in which the settled practise is for one Judge to accept and loyally carry out the decisions of another Judge of equal authority until reversed by higher authority. It is dealing with matters of fact; with what is just and proper in the circumstances of a given case."¹⁴

Their argument would not lose much force if they accepted the position Beeby, J. took in respect of the court that preceded the Commission:

"While bound to pay great respect to the decisions of their predecessors, Judges of this Court as now constituted are not controlled by precedent."¹⁵

Finally they could invoke the accepted distinction that "judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist . . . whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not to enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other."¹⁶

In some aspects of its wage reviews the Commission may appear to examine its position with such deference for previous decisions that it appears to be treating them with all the obligation of a precedent-bound court. Where jurisdiction is in question, for example, where it has to consider the scope of its statutory mandate, this seems to be a necessary incident of the Commission's work.

These incidental matters are, however, severable from the central task of reviewing wage levels in settlement of a dispute, and the contenders could point to other instrumentalities performing functions within limits defined by statute, yet requiring no special built-in machinery to keep within these limits. In this way they could isolate the pure function of wage reviewing as a matter requiring no more than talent for ethical and social evaluation, and *prima facie* enter the contest on an equal footing with the law-orientated.

The 1966 Cases

In the 1966 Wages Cases there was implicit in the submissions on behalf of the unions represented by Mr Hawke and the employers represented by Mr Robinson, an attempt to force the Commissioner closer to a judicial approach to wage reviews. The attempt was so steadfastly and emphatically resisted by the Commission that it left no doubt that precedent had no part in its central purpose.

In Schedule 1 attached to the Reasons for Decision of Gallagher, J.¹⁷ are set out extracts from Mr Hawke's submissions. The key is found in Extracts (13) and (41) which suggest the Commission should reject the departures in 1953 and 1965 from the principles effective in achieving the purpose that "real value" of award wages should increase through time in line with the

increased output of goods and services". Extract No. (8) indicates that Mr Hawke thought it at least worthy of mention that the Basic Wage Judgment of 1961, the Margins Judgment of 1963, and the Majoriry Judgment of 1964 support the conclusions that form the basis of his submissions. In Extract (31) he appeals expressly "in terms of logical reasoning and on an analysis of the past", and in Extract (33) he says "This Tribunal itself has laid down criteria which are fundamental in the settlement of industrial disputes".

These submissions necessarily assume that the decisions made throughout the period "up to 1953" and until the present time, have involved the application of principles and also that the principles fall into two groups: (1) those applied up to 1953 and between 1961-1965, and (2) those applied between 1953 and 1960. The whole thrust of his submissions on wage levels is directed towards persuading the Commission to apply the 1961-1965 principle. Moreover, he seeks to bring the Commission to this choice with its mind satisfied as regards any obligation to ethics or society. His ethical appeals to the Commission's conscience are found in Extracts (3), (19), (21), (33), and (77), and his reassurances as to the Commission's social (economic) obligations are in Extracts (20), (24), and (33).

It is not intended here to decide whether Mr Hawke's submissions in fact identified principles that were truly the determining factors that had influenced the decisions made over the years. Rather it is meant to suggest that the extracts demonstrate very clearly that the approach he chose in putting these submissions is the approach that a lawyer would make to a precedent-bound court where a body of case law yields a "category of competing reference". This is the case, when in his submissions on margins, he refers to:

"... the important criterion which has been laid down since the very beginning—1907, that the Tribunal cannot, in regard to margins, let itself be too far away from what is the market reality."

And in his submissions as to quarterly adjustments in Extracts (43) to (58), he is inviting the Commission to accept 1947 relativities in competition with relativities from the decision of any other year.

Whereas the foregoing might be regarded as attempts to invoke past precedent, in Extract (76) the unions are apparently attempting to establish precedent for the future, as Mr Hawke says:

"We say in total about the indicators that this case is infinitely more concerned with the question of the principles upon which this Commission is going to proceed into the future . . ."

In Schedule 3 Extracts (3) and (8) of Mr Robinson's submissions urge upon the Commission a "productivity-g geared" formula. His ethical reassurances are found in Extracts (12), (13), (15), (18), (19), (21), (22), (29), (42), and (80). His plea on social (economic) grounds are found in Extracts (22), (30), (31), (52), (89), and (91).

There was nothing in the submissions put on behalf of the Commonwealth that savoured of a "dead hand from the past", but an ethical note is sounded in Extract No. (6), and social (economic) matters are put in Extracts (3), (4), (7), (8), (14), and (16). The Commission's approach to its central task is epitomized in the following passage from the Reasons for Decision of Wright, J.:

"In the multitude of complex considerations submitted for our consideration on behalf of parties and interveners during this long hearing any pretence on my part

of confident exactness would be patently absurd. In my view the estimation of a fair and reasonable increase in the basic wage rates must be what in other cases I have joined in calling a matter of impression and judgment. To set down all the prevailing and countervailing considerations which have had their influence on one's mind would tax one's stamina and industry beyond endurance."¹⁸

In expressing his views on adoption of the concept of a total wage he was careful to say:

"It is not my province, or desire, to appear to impose a philosophy having a duration longer than the life of today's order."

Refusing to commit the Commission to adjust award wages in accordance with trend lines in productivity Moore, J. said:¹⁹

"Unfortunately though it may be, the Commission cannot simply talk of increases which are 'moderate', 'within a range', or 'which continue a trend line'. It has to put actual sums of money in legally enforceable documents. Again, the use of trend lines for productivity projected into the future might in itself cause injustice. . . ."

"In the field of industrial relations the Commission has a wider experience and more understanding than many of the economists who are propounding the theorem. The Commission must make decisions which are practical, and which will achieve the best results in the field in which the Commission works."

Referring to the competing formulae pressed by the unions and the employers Gallagher, J. said:²⁰

"But in the absence of an income policy designed to make either formula practicable, the long-standing method of forming a judgment upon what the nation can afford cannot safely be subordinated."

The picture that emerges of the Commission's achievement in the Wages Cases to date is of one attained by ethical and social evaluation, within a framework of standards that, in the judicial context, would be categories of indeterminate reference. Nevertheless, it has faced up to the task of putting "actual sums of money in legally enforceable documents". Standards such as "the highest level which the capacity of the economy is likely to be able to sustain", "equity, good conscience and the substantial merits of the case", and "what is right and fair having regard to the interests of the persons immediately concerned and of society as a whole", loom large.

The Economic Indicators which are looked at, domestic demand, employment, prices, wages, incomes, non-rural output, rural production and incomes, balance of payments, and monetary conditions, are compilations of statistics reflecting many facts. There is no inflexible relationship between any of these indicators, nor between the facts reflected by the components of each. No one can say, for example, that a movement of x points in one of the indicators is offset, or outweighed, by a movement of y points in another.

We can only speculate whether, in the light of Stone's observations on the scope of judicial choice, any different adjustment than that which we have in 1967 would have been arrived at, if the constitutional power had been available in 1900 to charge a court with the task of developing, from statute-defined bases, wage-fixing principles applicable to all the Australian work force.

The many facts that go to make up the economic indicators would, on Stone's analysis, have provided as many possible combinations of those facts as a source for general propositions to explain a decision on them.

The Point of Intervention

There are three levels at which disciplines other than law might influence

total wage reviews. The first is the witness level, with witnesses called by the parties before the Commission (as presently constituted) to give expert evidence. This was the level at which members of the Vernon Committee were introduced in the 1966 Cases. For reasons explained in detail by the bench, it found there was not much it could draw from the expertise of the witnesses to assist it in its central task. This does not say that there might not be discoverable some expert knowledge or theorem introduced in this way that the Commission would adopt.

The second level is appointment of experts to the Commission. This seems to be the level that the protagonists of more direct participation by economists have in mind.²¹ Any economist so appointed would be expected to bring, as well as expertise in a particular area of economics, a capacity to co-ordinate all the economic aspects of the Commission's task, and, most important, a capacity to "put actual sums of money in legally enforceable documents".

The third level is the legislative level. It was reported in the press in January 1967 that employers had approached the government to amend the Arbitration Act to require a wages bench to consider the general economic effects of any increases it might award. An indeterminate requirement "to consider general economic effects" would seem to be capable of withstanding challenge on constitutional grounds, as a law with respect to conciliation and arbitration, etc. Presumably a more specific limitation on the area of the Commission's wage-reviewing authority would be equally defensible on the ground that it did no more than reduce an area of the Commission's activity that was already within constitutional limits. For example, had the Vernon Committee persuaded the government that rises in award wages should not exceed certain ratios ascertainable from Commonwealth Statistics, could not the government have constitutionally reduced the area of the Commission's authority to that extent specifically? Even in this direction there may be scope for the legislative device of "shall have regard to . . .".

Two notes of caution must be sounded to protagonists of disciplines who might seek to crib, at this level, some of the influence that law-orientated minds now exercise. The first is that any drastically restrictive legislation could be expected to come in for attention from the High Court at an early stage of its operation. There law-orientated minds, with all the scope that Stone has described, will pass judgment on it.

The second is the comment the then Prime Minister, Sir Robert Menzies, made following the government's qualified acceptance of the Vernon Report. Sir Robert said:

" . . . in a free and self-governing country policies will be political . . . In no case is a political policy the product of purely expert opinion on technical matters. It must cover a wide area of localities and circumstances. It must be flexible enough to meet the problems of international and domestic change. It is commonly pursued and applied in the light of much accumulated experience and political judgment.

.

" . . . if the only problems in dealing with economic policy in a nation were purely technical, Parliament, which is not technical, and a Cabinet which is not technical might as well hand over to a group of technicians. In such a case democracy would have ceased and a technocracy would have begun."²²

The Contenders

Disciplines that might be a source of contenders are economics and psychology, and there may be others; the coming of economists has already

been heralded. It may be that there will emerge from the current transformation of the stewarding industry a clearer definition of the place of psychology in industrial relations. It does not seem possible to dissociate the concept of dispute, the basis of the Commonwealth's jurisdiction in the industrial field, from psychology.

The Mating of Disciplines

Having regard to all the complexities of National Wage Reviews the ideal vehicle for these reviews would seem to be one in which the best available expertise of all the relevant disciplines are co-ordinated and balanced.

This balancing deserves attention from universities, particularly those in which the relevant disciplines have tended to become more isolated from each other as expertise in a particular discipline advances.

It should also command the attention of Industrial Relations Societies, in which interest in the other fellow's discipline is encouraged and developed.

The mating of disciplines could provide a key to the identification, development and co-ordination of principles appropriate to total wage reviews, but a caution from those who hold in high esteem the past achievement of the law-orientated would be that the traditional stigma might well attach to the progeny if it is not carried out under the auspices of the law.

REFERENCES

1. *W.F.F. v. Gilchrist Watt & Sanderson* (34 C.L.R. at 528-9).
2. Conciliation and Arbitration Act 1904-1966, Secs. 7 (1) and 33 (1).
3. Conciliation and Arbitration Act 1904-1966, Sec. 34.
4. Division of the judicial and arbitration functions formerly vested in the Commonwealth Court of Conciliation and Arbitration following the *Boilermakers' Case*.
5. I. Stone, *The Province and Function of Law*, Maitland Publications, Sydney, Third Printing, 1961, p. 170.
6. *Ibid.*, p. 170.
7. *Ibid.*, p. 171.
8. *Ibid.*, p. 174.
9. *Ibid.*, p. 179.
10. *Ibid.*, p. 181.
11. *Ibid.*, p. 176.
12. *Ibid.*, p. 186.
13. *Ibid.*, p. 187.
14. (1920) 14 C.A.R. at 567.
15. (1935) 36 C.A.R. 39.
16. 25 C.L.R. 434.
17. I.I.B. Vol. 21, No. 6, p. 712.
18. *Ibid.* at p. 700.
19. *Ibid.* at p. 749.
20. *Ibid.* at p. 709.
21. *Review*, Institute of Public Affairs, Vol. 20, No. 3, p. 81.
22. Hansard, House of Representatives, Sept. 21, 1965, pp. 1079-80.