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Volume 6, No. 3 NOVEMBER 1964

THE JOURNAL OF INDUSTRIAL RELATIONS

The Journal of the Industrial Relations Society of Australia

ARTICLES

Goodwill Instead of Illwill

General-prosperity increases could be promised readily in advance with goodwill; employees could look forward to them confidently without having to fight for them in a long series of cases, all involving illwill and industrial discontent.

FOOTNOTES

1. Total Wage Case Judgments, 1964.
2. N. Kaldor, Prospects for a Wages Policy for Australia, *Economic Record*, June 1964, p. 146.
3. N. Kaldor, *op. cit.*, p. 153.
4. *Ibid.*, p. 149.
5. R. I. Downing and J. E. Isaac, The 1961 Basic Wage Judgment and Wage Policy, *Economic Record*, December 1961, p. 491.
6. *Wage Rates and Earnings*, published by the Com. Bur. of Census and Stats.

LEGISLATION AND DECISIONS AFFECTING INDUSTRIAL RELATIONS

"Advocatus"

Sydney

Existence of an Industrial Dispute

THE judgments of the High Court in the prohibition proceedings relating to long service leave claims in the Graphic Arts and Metal Trades industries[1] provide a welcome reminder of the fact that the existence or non-existence of an industrial dispute extending beyond the limits of any one State is not in the last analysis to be determined by any artificial criterion or concept. The question whether or not such a dispute exists is one of fact in all cases. The fact may be inferred from the existence of actual strikes or stoppages of work but those strikes or stoppages are not themselves the dispute referred to. The fact may also be inferred from the failure or refusal to accede to a log of claims, but again the log of claims is not the dispute. It is merely a useful form of evidence of the existence of a dispute and of the subject matters of the dispute.

Windeyer, J., in his reasons for judgment, said:

> "There must be a real, not merely a fictitious, dispute: and it must be an industrial dispute. That there is such a dispute may be *evidenced* by the fact that a log of claims put forward by one side is not acceded to by the other side. But it does not follow that merely because a particular claim in a log of claims is not formally contested, or as a matter of tactics is withdrawn, a dispute is at an end. Whether or not there be a dispute is a question of fact."

These considerations emphasise the importance of the task committed to Federal arbitration tribunals of enquiring into the question and of making and signing at the outset a record of findings of the existence of a dispute, the parties to the dispute, and the subject matter of the dispute.[2] While in many cases the subject matter of the dispute is fully set out in a log of claims, the log of claims is not conclusive evidence as to the subject matter of the dispute, and some inquiry may well disclose that a dispute in fact exists which is somewhat wider than the terms of the log of claims would indicate. On the other hand, evidence may show that despite the service of a log of claims, no genuine dispute exists.

Failure to examine these questions at the outset has sometimes led parties, in the course of proceedings, to seek to amend their log of claims, and this request has, quite properly, been rejected on the basis that logs of claims cannot be amended. Their only value is as evidence that the demands contained therein have been refused or not acceded to. But this is not the only way in which the facts as to the dispute can be ascertained. The tribunal may be satisfied by any other proper evidence of the subject matter of the dispute though it is usually more convenient to serve a new claim on all of the parties to ensure that they are in fact parties to the wider dispute.

Evidence of another kind was used by the late Mr. Justice Foster when a union was pursuing demands against employers but refused to take the necessary steps to institute proceedings for an award. As a result of conferences His Honour was aware of claims which the union sought of employers and of claims which the employers sought of the union. Representatives of both parties being before him in Court one day he asked the union representative if the union agreed to the employers' claims which he read out. He then read out the union claims and asked if the employers

agreed to them. On receiving a negative reply in each case he thereupon made and signed a record of findings and proceeded to arbitrate.

More difficult problems sometimes arise when there is no log of claims but the existence of a dispute is demonstrated by strikes or stoppages. Usually there is other evidence that the strikes are in support of some claim relating to an industrial matter, though the precise terms of the claim are by no means clear. In such a case the preliminary inquiry into the subject matter is of the utmost importance, because whatever dispute in fact exists, it is that dispute and that dispute only which the tribunal is entitled to deal with.

In some cases, the strikes may be partially or wholly related to claims which are not industrial matters. For example, a claim that prices should be fixed or that legislation should be amended is clearly not an industrial matter. If the strikes were solely related to such a claim the tribunal could not deal in any way with the subject matter of that claim. But the question arises whether or not there is some other industrial element in such a situation. Can it be said that the employees are in that case refusing to work for extraneous, non-industrial reasons and can there be an industrial dispute between such employees and their employers as to whether in the whole of the circumstances the employees have any justification for withholding their labour from their employers? Although the non-industrial claim cannot be the subject matter of an industrial dispute, can the question whether the employees are justified in interrupting the employer-employee relationship nevertheless form the subject matter of an industrial dispute, capable of being dealt with by the tribunal?

The Basic Wage

The decision of the Commonwealth Conciliation and Arbitration Commission on the applications for an increase in the basic wage was delivered on 9th June, 1964.[3] The four members of the Bench were unanimous in their view that the basic wage should be increased, but were equally divided in their opinions as to the amount of the increase to be granted. There was no real divergence between their views as to the satisfactory state of the economy at the present time. Kirby, C.J., and Moore, J., referred in some detail to the principles laid down in the 1961 Basic Wage Case and to the course of conduct followed by the parties since that decision was given. They noted that there was no request for a reversion to the kind of annual review which the Court and the Commission undertook between 1956 and 1959, and ultimately concluded that an increase of 20/- was warranted. Gallagher and Nimmo, JJ., inclined to the view that a smaller increase with the possibility of more frequent review would provide a better solution and that the amount of the increase should therefore be 10/-. Had it not been for the three-year time interval between 1961 and 1964, during which the basic wage remained stationary while the economy expanded and productivity improved, there might well have been a lesser divergence between these two views.

The Total Wage Case

The decisions in the Total Wage Case, also handed down by the Commonwealth Conciliation and Arbitration Commission on 9th June, 1964,[4] do not appear to have been intended to establish any new principles or concepts. The employers' claim for the adoption of a total wage approach was rejected on the basis that no case had been made out for such a change. There was considerable discussion of the problems involved in what might have amounted to adopting the Commission as the instrument to determine and administer a national wages policy. The Commission's rejection of the employers' claim may stimulate further consideration of the question whether

there should be a new permanent body charged with the function, not of determining policy, but of examining and reporting on economic trends of national importance in order to provide a continuous background of information and discussion in the light of which the Government, the Commission and all interests in the community could better perform their respective functions.

Federal Long Service Leave Provision

Having stayed its hand on contested issues concerning long service leave since 1959,[5] the Commonwealth Conciliation and Arbitration Commission has now decided that the time is ripe to enter the field. The decision in 1959 expressed the view that Federal entry into the field would not help to produce uniformity and would tend to destroy the degree of uniformity then existing under State legislation. However, in the light of the current situation the Commission decided, on 11th May, 1964,[6] to make awards in respect of long service leave in the Metal Trades and Graphic Arts industries. The prohibition proceedings in the High Court referred to above having been rejected, the Commission decided that it would no longer refrain from determining the issue in respect of these two industries and awards were made granting 13 weeks' leave after 15 years' service, provided that service before 11th May, 1964, only carries the right to leave on the basis of 13 weeks for 20 years' service.

Wages in the Highly Prosperous Industries

Union claims that industries showing above-average degrees of prosperity should be required by award to pay wage rates higher than the rates which would normally be fixed are being given somewhat diverse answers by arbitration tribunals throughout the country.

A detailed consideration of this question by the Commonwealth Commission in relation to the stevedoring industry last year was rather inconclusive: their Honours there, while not agreeing that the prosperity of particular industry was a relevant factor in the wage-fixing process, decided that the material adduced did not support the union's claim.[7] Earlier, Senior Commissioner Taylor had been more definite: in his opinion, consideration of overall capacity by the Commission in basic wage and margins cases exhausted the subject, and since it would not be proper to award lower margins for below-average industries it would likewise not be proper to award higher margins for above-average industries.[8] However, Gallagher, J., sitting as the Coal Industry Tribunal, found nothing anomalous in more productive mines paying higher wages (by means of bonus schemes) than the marginal ones.[9]

More recently the same issue emerged in the Steel Industry Case in New South Wales,[10] where Kelleher, J., rejected the contention that he should adopt a generous approach to union wage claims because of the importance of the industry and its great economic prosperity: pleas of high or low capacity were simply not relevant, he said, except where an employer claimed lack of capacity and was able to support this by production of his books as prescribed in the statute. The judgment provides material for much more comment than can be attempted here, but one point is worthy of mention: the rejection of the union claim does not accord very well with the preference, which Richards, J., expressed last year, for consideration of the economic conditions of the particular industry, over submissions which had been put to him then that he should consider as relevant the findings of the Commonwealth Commission on the economy of Australia.[11]

The position in Queensland seems to have been complicated, rather than simplified as was perhaps hoped, by the recent amendment which prohibits the award of any bonus payment (defined as "a payment by way of the

division of the profits of an industry or undertaking, being a payment in excess of a just wage including all proper allowances such as are ordinarily and usually prescribed by an award or industrial agreement"), but the Commission is authorised to consider the prosperity of the economy.[12] In a decision given last June[13] the Industrial Court said that "economy" as used here referred to an economic unit, whichever unit is relevant to the case under consideration. It is well established in Australia that the prosperity of the calling could be the basis of a wage increase, and the Act does not require that this practice is to cease in Queensland. The definition requires that a bonus be an amount determined by the process of dividing profits, and it is not sufficient to show that any wage increase would ultimately come out of the employer's profit. Hence a 10% increase of wage rates which had been determined in the past by reason of the prosperity of the industry was not an order for the increase of bonus payments.

With such an unequivocal statement of the law, the Australian Workers' Union must have been greatly surprised when the Industrial Commission refused its application for a £4 p.w. increase in wages under the Mount Isa Mines Ltd. Award. The application has been based mainly on the ground of the prosperity of the mining industry, but the Commission said that any amounts over and above the rates awarded for comparable employees under other awards would be simply bonuses; the employees "are entitled to their general standard and they have it"!

Some indication of the approach to be expected on the part of the newly established Western Australian Industrial Commission is given in two decisions of the Commission. In a railways case, heard in April last, Commissioner Cort accepted the view that the employer's capacity was a factor to be taken into account, but this should not be allowed to deny to the workers concerned just and reasonable conditions of employment.[14] More recently the Commission in Court Session reduced the industry allowance in the gold-mining industry in the light of the relative capacity of that industry.[15]

How Permanent Is the "Tapering" Principle?

From the very first decision to apply a percentage formula to general margins increases, Commonwealth tribunals have sought, by scaling the percentage figure down as the margin increases, to remedy the anomaly which results when one applies the percentage to higher margins, and this is now firmly embedded in the Commonwealth Commission's principles. It seems, however, that not all employers have been willing (or perhaps able) to hold the line in this matter. In a decision given last July[16] Commissioner Findlay demonstrated that employers in banking and other clerical employment subject to Federal regulation had themselves implemented wage increases which ignored the tapering principle. Accordingly when dealing with a claim by brewery clerks he felt that the circumstances allowed him to use the principle of comparative wage justice so as to increase margins in that award by a flat 10%, following the 1963 Metal Trades Margins Case, without any tapering for higher margins.

FOOTNOTES

1. The Queen v. Commonwealth Conciliation Commission and Others; ex parte Printing Industry Employees' Union of Australia and Others. 20th March, 1964; Vol. 19, *Industrial Information Bulletin*, p. 239.
2. Conciliation and Arbitration Act 1904-1961, section 28; Conciliation and Arbitration Regulations, Regulations 17 and 21 (1) (a).
3. Basic Wage Decision 1964; Vol. 19, *I.I.B.*, p. 482.
4. Total Wage Decision 1964; Vol. 19, *I.I.B.*, p. 516.
5. See *Journal of Industrial Relations*, Vol. I, p. 113.
6. *I.I.B.*, Vol. 19, p. 532.

7. *Waterside Workers' Award*, 1963, *Australian Industrial Law Review* Rep. 276; 18 *I.I.B.* 1089.
8. *Railways, Traffic Staff Case*, 1963 *A.I.L.R.* Rep. 10; 18 *I.I.B.* 3.
9. 1963 *A.I.L.R.* Rep. 344; 18 *I.I.B.* 1434.
10. 1964 *A.I.L.R.* Rep. 297.
11. *Concrete Pipe Case*, 1963 *A.I.L.R.* Rep. 264; 18 *I.I.B.* 1180.
12. Industrial Conciliation and Arbitration Act 1961, ss. 5, 12.
13. *Brisbane Abattoir Award*, 1964 *A.I.L.R.* Rep. 189.
14. *Railways Employees' Award*, 1964 *A.I.L.R.* Rep. 152.
15. *Gold Mining Industry Awards*, 1964 *A.I.L.R.* Rep. 353.
16. *Re Clerks' (Breweries) Award*, 1964 *A.I.L.R.* Rep. 251.