[HIGH COURT OF AUSTRALIA.]

THE CHIEF INSPECTOR OF FACTORIES (VICTORIA) . . . . . } APPELLANT;

RESPONDENT.

AND

WATSFORD . . . . . RESPONDENT.

APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1936.

MELBOURNE. *June* 5, 8; *July* 6.

Starke, Dixon, Evatt and McTiernan JJ.

Factories and Shops—Wages board—Determination—Hours of work—Power to fix "hour of beginning and the hour of ending work on each day"—Week of five days appointed—Factories and Shops Act 1928 (*Vict.*) (*No.* 3677), *sec.* 145 (1) (*c*) (ii).*

Sec. 145 (1) (*c*) (ii) of the *Factories and Shops Act* 1928 (Vict.) does not empower a wages board appointed under that Act to limit the ordinary hours of work at ordinary rates to five days of the week, viz., Monday to Friday inclusive, so that all work on Saturday must be at overtime rates.

So *held* by *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting).

Decision of the Supreme Court of Victoria (Full Court): *Watsford* v. *Chief Inspector of Factories*, (1936) V.L.R. 185, affirmed.

* Sec. 145 (1) of the *Factories and Shops Act* 1928 (Vict.) provides:—"Every wages board in relation to the trade specified in and in accordance with the terms of its appointment—(*a*) shall determine the number of hours which shall constitute an ordinary week's work and notwithstanding that in this Act or in any regulations hereunder the number of hours for which any person may be employed in any week or the overtime rates of pay for any class or classes of workers are fixed may fix a less number of hours or higher overtime rates (as the case may be); (*b*) shall fix the lowest rates per hour or per week to be paid for an ordinary week's work (hereinafter referred to as 'ordinary wages rates') and, in the case of any trade not usually carried on in a factory or shop, determine the question whether it is expedient to fix rates for casual labour and may fix them accordingly; (*c*) shall fix higher wages rates to be paid for overtime; and for that purpose it shall exercise the powers set out in any one

APPEAL from the Supreme Court of Victoria.

A rule nisi to quash a determination of the Gas Meter Board (Victora) dated 17th March 1936 was obtained by Frederick James Watsford, the industrial officer for the Metropolitan Gas Co., on the ground that the provision contained in clause 3 thereof was beyond the powers conferred on the Gas Meter Board either by the *Factories and Shops Acts* (Vict.) or by the Order in Council appointing the board.

Clause 3 was in the following terms :—" Hours of Duty.—The ordinary hours of work shall be 44 hours per week, to be worked on five days between the hours of 7.30 a.m. and 5.15 p.m. from Monday to Friday inclusive." Clause 4 provided :—" Overtime.—All work done outside the hours fixed as the times of beginning and ending work, or within such hours in excess of 44 hours in any week, shall be paid for at the rate of time and a half."

The Metropolitan Gas Co. had in its employment a number of employees whose hours of work were subject to the determination of the board, and the place where such men worked was a " factory " within the meaning of the *Factories and Shops Act* 1928.

The rule nisi was, on its return, discharged by *Gavan Duffy* J. On appeal to the Full Court of the Supreme Court of Victoria this decision was reversed and the determination was quashed : *Watsford* v. *Chief Inspector of Factories* (1).

From this decision the Chief Inspector of Factories, by special leave, appealed to the High Court.

Fullagar K.C. (with him *Hudson*), for the appellant. The application to quash the determination was made under sec. 178 of the *Factories and Shops Act* 1928 (Vict.). The determination is attacked on the ground of its invalidity. It is said by those attacking it that

but not more than one of the sub-paragraphs (i) (ii) (iii) (iv) or (v) of this paragraph :—(i) It may fix an overtime rate for any hour or fraction of an hour worked in any week in excess of the number of hours determined for an ordinary week's work ; or (ii) It may fix the hour of beginning and the hour of ending work on each day ; and in that case shall fix higher wages rates to be paid for any hour or fraction of an hour worked in any week—outside the hours so fixed ; within the hours so fixed, in excess of the number of hours determined for an ordinary week's work ; or (iii) It may fix the hour of beginning and the hour of ending each shift ; and in that case shall—fix the rate to be paid for work done on each shift : and fix a higher rate to be paid to any employé for each hour or fraction of an hour worked by him before or after his shift ; or (iv) It may fix a higher rate to be paid for any hour or

(1) (1936) V.L.R. 185.

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the award is invalid and that the board had power only to determine rates of pay. The other ground of attack is that the board, whatever its powers, had no power to make a determination in the terms of clauses 3 and 4 of the determination. The board had power to make the determination in this case. The board has fixed "the hour of beginning and the hour of ending work on each day," as it was empowered to do under sec. 145 (1) (*c*) (ii) of the *Factories and Shops Act* 1928. No more and no less than the power given has been exercised by the determination of the board. It is unlikely that Parliament intended the board to be precluded from dealing with Saturdays and Sundays.

Wilbur Ham K.C. (with him *Ellis*), for the respondent. The *Factories and Shops Act* 1928 interferes with the common law right of contract as to working times and rates of payment. Where an Act does interfere with common law rights it is not to be extended beyond its necessary meaning. There is no power to do what has been attempted here, because on the construction contended for this gives power to prescribe a five-day week. If the lowest wage is fixed, it is implicit that the times of work must also be fixed. Power is given to fix ordinary working hours. The whole purpose of sec. 145 (1) (*c*) is to arrive at a method of fixing hours for an ordinary week's work. The only power given under sec. 145 (1) (*c*) (ii) is to fix the daily hours: It does not contemplate fixing varying hours for different days. "Each day" means "every day." Clause (*c*) does not contemplate the naming of particular days of the week. It simply refers to the daily hours of work. The board must accept the ordinary working week as it finds it. The section refers to the fixation of hours, not to the fixation of days. There is no reference in the Act to the fixation of days. There is no warrant in the Act

fraction of an hour worked on any day in a factory before or after the ordinary working hours of the factory; or (v) It may fix the number of hours to be worked on each day; and in that case shall fix a higher rate to be paid to any employé for any hour or fraction of an hour worked by him in excess of the number of hours determined for a day's work; (*d*) shall determine the question whether it is expedient to fix the lowest piece-work prices and may fix them accordingly; (*e*) may exercise either or both of the following powers, namely:—(i) It may fix special rates for work to be done on a Sunday or public holiday; (ii) It may fix special rates to be paid to any employé who works away from his employer's place of business for time occupied in travelling between the employer's place of business and work or between the employés residence and work."

for telling people on what days they shall work (*Bishop* v. *Ford and Petrie* (1)). If this were a possible exercise of power it would in effect give power to the board to declare additional holidays, but the Act provides special ways for decreeing extra holidays. Part XI. of the Act relates to holidays. The *Imperial Acts Application Act* 1922, Div. 23, makes Sunday a *dies non*, and sec. 49 of the *Police Offences Act* 1928 directs its due observance. The alternative construction is that if the section does not mean to fix daily hours, it means to fix them in a particular trade as ordinary working hours. The board is appointed to consider the working of a particular industry and reference is made to the ordinary week's work. This shows that reference is made to the ordinary week's work recognized in that industry. The power given by sec. 145 (1) (*c*) (ii) is a power to regulate, not a power to prohibit. The board cannot so regulate the hours of work that it could provide that on certain days there should not be any work. The board may fix hours, rates of wages and overtime, and it may do this in any one of the five ways provided in sec. 145 (1) (*c*), but this is the extent of the power conferred. Even if the word " shall " were substituted for the word " may " in sec. 145 (1) (*c*) (ii) no greater power would be conferred.

Fullagar K.C., in reply. Sec. 145 of the *Factories and Shops Act* provides a continuous process. The power under clause (*c*) must be based on that in clauses (*a*) and (*b*). Under clause (*c*) it must spread the hours in the manner which will be most suitable and convenient for employer and employee. Clause (*e*) is in contrast with clauses (*a*) to (*d*), because it begins with the word " may." If the Legislature had intended to exclude Sunday work under clause (*e*), the clause would begin with " shall," not " may." There are three possible interpretations of this provision :—(1) " On each day " in sec. 145 (1) (*c*) (ii) means on each day the board chooses ; (2) it means on each working day, i.e., according to the custom of the trade ; and (3) it means power to fix hours for each day of the week. The last construction must be rejected because of the practical difficulties which it would entail.

Cur. adv. vult.

(1) (1925) 36 C.L.R. 322, at pp. 331, 338, 339.

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July 6.

The following written judgments were delivered :—

STARKE J. A wages board called the Gas Meter Board was appointed pursuant to the *Factories and Shops Act* 1928, sec. 136, of Victoria, " to determine the lowest prices or rates which may be paid to any person or persons or classes of persons employed in the process, trade, business, or occupation of making or repairing gas meters." It made a determination fixing certain wages rates and piece-work prices. It also fixed special rates for Sundays and holidays. It further fixed the hours of duty and overtime as follows :—" Hours of Duty.—The ordinary hours of work shall be 44 hours per week, to be worked on five days between the hours of 7.30 a.m. and 5.15 p.m. from Monday to Friday inclusive." " Overtime.—All work done outside the hours fixed as the times of beginning and ending work, or within such hours in excess of 44 hours in any week, shall be paid for at the rate of time and a half." It follows from these provisions that work done on a Saturday must be paid for at overtime rates. The question is whether the authority conferred upon the board by sec. 145 of the Act warrants the provision made in the determination as to hours of duty and overtime.

That section provides that the board shall determine the number of hours which shall constitute an ordinary week's work, that it shall fix the lowest rates per hour or per week to be paid for an ordinary week's work (referred to as ordinary wages rates), that it shall fix higher wages rates to be paid for overtime and for that purpose shall exercise the powers set out in any one, but not more than one, of five numbered subdivisions. The power which the board purported to exercise in the present case is that numbered *c* (ii) : " It may fix the hour of beginning and the hour of ending work on each day ; and in that case shall fix higher wages rates to be paid for any hour or fraction of an hour worked in any week—outside the hours so fixed ; within the hours so fixed, in excess of the number of hours determined for an ordinary week's work." No express power can be found in the Act enabling a board to fix the days of work. But it is contended that a board has power under sec. 145 (1) (*c*) (ii) to fix the hour of beginning and ending work on one or more days to the exclusion of any other days, and then to prescribe that outside the hours so fixed or within such hours

in excess of 44 hours in any week overtime rates should be paid. That, however, is not the natural and ordinary signification of the expression "each day": grammatically it signifies every day, "regarded and treated separately." It was suggested that the words "worked in any week" which follow are a sufficient indication to the contrary. But I see nothing in those words which displaces the primary meaning of the expression "each day." It is more applicable to the phrase "within the hours so fixed, in excess of the number of hours determined for an ordinary week's work"; but it is not quite inappropriate to the phrase "outside the hours so fixed": it refers in that case to the time period of one week, and requires that overtime rates shall be paid if work be done in any week outside the hours fixed for work on any day of that week. Further, I should add that "each day" in sec. 145 (1) (*c*) (ii) covers, I think, every day of the calendar week. It depends upon other considerations and provisions whether work can be lawfully carried on upon every day of the week, and whether special rates can or cannot be provided for some of those days, such as Sundays and public holidays.

Some argument was addressed to the question whether the hours fixed under sec. 145 (1) (*c*) (ii) must be uniform for each day. It is unnecessary to decide this question, but I am not satisfied, as at present advised, that uniformity is required.

The result is that this appeal should be dismissed.

DIXON J. The question upon this appeal is whether a determination of a wages board was rightly quashed by the Full Court of Victoria in the exercise of the jurisdiction given by sec. 178 of the *Factories and Shops Act* 1928.

The wages board was appointed to determine the lowest prices and rates which may be paid to persons employed in making or repairing gas meters. It made a determination fixing the lowest rates of pay for the various descriptions of employees doing that work. The determination prescribed the ordinary hours of work at forty-four a week. It fixed special rates of pay for work done on Sundays and public holidays, namely, rates at double time for Sundays and certain holidays and at time and a half for other holidays. Under the heading "overtime," it fixed the rate of time

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and a half for all work done outside the hours fixed as the times of beginning and ending work, or, within such hours, in excess of forty-four hours in any week.

It is in the provision fixing such times of beginning and ending work that the ground for quashing the determination appears. The provision fixes times which exclude Saturday so that for any work done on Saturday the overtime rate of time and a half must be paid.

The Full Court, consisting of *Mann* C.J., *Macfarlan* and *Lowe* JJ., held, reversing the decision of *Gavan Duffy* J., that no power was conferred upon a wages board to require the payment of overtime rates for all work done upon a Saturday.

The provision by which the determination attempts to do so is as follows:—"Hours of Duty.—The ordinary hours of work shall be 44 hours per week, to be worked on five days between the hours of 7.30 a.m. and 5.15 p.m. from Monday to Friday inclusive." As the hours for beginning and ending work are by this clause confined to the five days from Monday to Friday, the overtime rate becomes payable for all work done on Saturday, under the provision fixing a rate of time and a half for all work done outside the hours fixed as the times of beginning and ending work.

The power under which the wages board acted in adopting this course is contained in sec. 145 (1) (*c*) (ii) of the *Factories and Shops Act* 1928, and no other authority for it can be found. Par. *c* of sec. 145 (1) provides that every wages board shall fix higher wages rates to be paid for overtime, and for that purpose shall exercise the powers contained in one, but not more than one, of five numbered sub-paragraphs which the provision then sets out. The power given by sub-par. ii is expressed as follows:—"It may fix the hour of beginning and the hour of ending work on each day; and in that case shall fix higher wages rates to be paid for any hour or fraction of an hour worked in any week—outside the hours so fixed; within the hours so fixed, in excess of the number of hours determined for an ordinary week's work."

It is under the last limb of this paragraph that the determination makes overtime payable for any time worked in excess of forty-four hours fixed as an ordinary week's work; fixed under par. (*a*) of sec. 145. It is under the earlier limb, the limb relating to wages

rates payable for work done outside the hours fixed for beginning and ending work, that the determination attempts to place Saturday outside the time when ordinary rates may be paid and inside the time when overtime rates must be paid. It is said that the attempt is justified by a construction which the language of sub-par. ii of sec. 145 (1) (*c*) should receive. According to that construction the phrase " It may fix the hour of beginning and the hour of ending work on each day " means that the wages board is to have a discretionary power exercisable with respect to each day to fix the hour of beginning and the hour of ending work on that day. It may fix such times on any day or days to the exclusion of any other day or days, that is, of the week. Then the ensuing phrase is construed to mean that the board must fix higher rates for work done in the periods of time during the week which fall outside the hours so fixed for the days chosen.

I do not think this is the proper construction of the language of sub-par. ii. It appears to me to be dealing with the hours of work within the day, not the days of work nor the times of work within the seven days. The first phrase is a natural way of expressing a power to fix the daily hours of work. Its meaning is that the wages board may fix the daily hour of beginning and the daily hour of ending work. The expression " each day " avoids the repetition of the word " daily " and is, I think, used on that account. The ensuing phrase means that for work done on any day at a time falling outside the daily hours of work so fixed the overtime rate payable shall be determined.

The expression " worked in any week " is used because of the second limb of the paragraph, namely, that which applies the overtime rate to time worked in excess of the ordinary week's work. The expression " in any week " is placed where it occurs, namely, after the word " worked," because, by that arrangement of words, the two descriptions of time worked to which the overtime rate is applied may be set out in succession. The words " in any week " are necessary only in relation to the second of the two descriptions of time worked. The meaning of the words preceding them is not altered by their presence or absence and, therefore, no reason existed for placing them in a less convenient position. The meaning

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which appears to me to be expressed by sub-par. ii of par. *c* of sec. 145 (1) is borne out by par. *e* (i), which gives a wages board a particular power to fix special rates for work done on a Sunday or holiday. For not only does such a power treat Sundays and holidays as if they were not the subject of overtime rates and must be dealt with specifically, but it also operates, by giving an express and special authority to increase Sunday rates, to make it unlikely that the legislation intended to include, in the power relating to overtime, authority enabling a wages board to increase Saturday rates.

Another consideration supporting the meaning that I think sub-par. ii bears is the fact that the power is expressed as given for the purpose of fixing higher wages rates to be paid for overtime. No doubt " overtime " is now often used in a very wide and general way of extra or increased pay, but one might reasonably expect the enactment to apply the word only to higher rates for hours worked in excess of standard hours of labour or beyond or outside the daily hours of work.

These are only confirmatory matters. The meaning of sub-par. ii is found in its language and, in my opinion, that meaning does not authorize a wages board to do more than fix the daily hours of work and fix an overtime rate for time worked on any day outside those hours and for time worked, although within those hours, beyond the hours of an ordinary week's work.

I am aware that there is an ambiguity or uncertainty of application in such expressions as " to fix the daily hours of work ", " to fix the hour of beginning and the hour of ending work on each day," or " on every day," but, in the view I take, it does not affect the present question. Such expressions leave it uncertain whether, on the one hand, the times are to be fixed without reference to specific days of the week or month, so that they apply whenever work is performed and therefore are uniform, or, on the other hand, the times may be fixed differently for different days. I am disposed to think that the first is the true meaning or application of the expression " each day " in sub-par. ii. But, in either view, one day, Saturday, cannot be excluded altogether from the days on which ordinary wages may be paid for work done between defined

hours. The suggestion seems to me quite untenable that if different times of beginning and times of ending work may be fixed for different days, then, as there is no limit set to the diminution which may be made in the hours of work for any day, e.g., Saturday, the hours may be diminished to nothing.

Another contention is that the power to fix hours of work each day, unless it means daily hours of work, does not involve the fixing of hours for every day on which work may be done. Even if I thought the first phrase in par. ii meant that days might be selected, I should still think the paragraph did not enable the wages board to exclude Saturday from the days when ordinary rates might be paid. If it bore such a meaning, the result of fixing no hours for a given day of the week would be that throughout the whole of that day ordinary wages without overtime would be payable.

For these reasons I think that the decision of the Full Court of the Supreme Court was right and should be affirmed.

EVATT J. This is an appeal from a judgment of the Full Court of the Supreme Court of Victoria which reversed the judgment of Mr. Justice *Duffy* and made absolute a rule nisi quashing a determination of the Gas Meter Wages Board bearing date March 17th, 1936.

Such determination was made by the board under the provisions of the *Factories and Shops Act* 1928. As appears from clause 2 of the determination the wages fixed were upon a weekly basis of 44 hours. Clause 3, headed "Hours of Duty," expressly provided that the ordinary hours of work should be 44 hours per week "to be worked on five days between the hours of 7.30 a.m. and 5.15 p.m. from Monday to Friday inclusive." The spread of hours thus granted to the employer aggregated $48\frac{3}{4}$ hours. Clause 4, headed "Overtime," provided that all work done outside the hours fixed as the times of beginning and ending work, or within such hours in excess of 44 hours in any week, should be paid for at the rate of time and a half.

It must not be forgotten that the powers conferred upon wages boards in sec. 145 of the *Factories and Shops Act* 1928 have to be expressed so as to cover industrial conditions greatly varying in

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character. Under sec. 145 (1), every wages board is required to perform three duties, first, to determine the number of hours which shall constitute an ordinary week's work, second, to fix the minimum rate of pay per hour or per week for the ordinary week's work and, third, to fix higher rates to be paid for overtime. These duties are set out in pars. *a*, *b* and *c* respectively.

Here it is to be observed that the Gas Meter Board proceeded to carry out these three main duties. It determined the ordinary week's work at 44 hours, it fixed the minimum rates of pay per week upon such basis and in clause 4 it fixed higher rates for overtime.

It must have been quite obvious that merely to empower a board to fix higher rates for overtime might produce anomalous and unjust conditions because if an employer could distribute the aggregate working hours of the week as he thought fit, his employee might be compelled to work at times entailing considerable hardship and inconvenience. Accordingly each board in proceeding to fix the higher rates for overtime (which are the real sanction designed to secure the observance of maximum working hours per week) was given authority to act in any one of five methods specified in sub-pars. i to v inclusive of sec. 145 (i) (*c*).

The present determination was made in pursuance of the power granted by sub-par. ii. This power was stated in the following terms: "It may fix the hour of beginning and the hour of ending work on each day; and in that case shall fix higher wages rates to be paid for any hour or fraction of an hour worked in any week—outside the hours so fixed; within the hours so fixed, in excess of the number of hours determined for an ordinary week's work."

The ground upon which the present determination has been challenged may fairly be summed up by the contention that the phrase in the sub-paragraph—"on each day"—means "on each and every day of the week," that accordingly a time for beginning and for ending work must be fixed in respect of Saturday, that Sunday would also have to be included except that by virtue of legislation not contained in the *Factories and Shops Act* at all it might be found unlawful for certain trades to be pursued on Sunday and that the present determination, by restricting the ordinary hours of

work to certain hours on Monday to Friday inclusive, travelled outside the power conferred by the sub-paragraph.

In my opinion this contention is unsound. The true position may be illustrated by reference to sub-par. iii of sec. 145 (i) (*c*). Under that sub-paragraph, a board may, in fixing the higher overtime rates, fix the hour of beginning and the hour of ending "*each* shift." It is certain that, in exercising this power, a board's power necessarily includes a discretionary authority to fix the number of shifts as well as the number of hours to be worked in each shift otherwise the ordinary working week could never be constituted. Once the board has determined the total number of ordinary hours to be worked in a week, its function under par. iii is so to distribute the total number of ordinary hours among shifts to be fixed by the board that the result will be fair and just to employer and employee alike.

Why does not the same method of distribution apply to sub-par. ii? That sub-paragraph postulates that the board has already fixed the total number of ordinary hours per week. It becomes its duty to fix a daily spread of hours which will enable the total number of ordinary hours per week to be worked by reference to a day instead of by reference to a shift. If the ordinary working week was one of 30 hours the board might think it just to distribute those hours among 4, 5, 6 or 7 days as it thought most expedient, for that process of distribution is necessarily involved in fixing the hour for beginning and the hour of ending work on each ordinary working day. In other words, "each day" in the sub-paragraph does not necessarily mean "each and every day in the week" but "each working day" and it is for the board and for the board alone to determine what should be the working days of the week necessary and proper for constituting the ordinary week's work. The power in sub-par. ii is not a special power to exclude Saturday or Sunday but is a power to spread the ordinary maximum hours of the working week over the working days. Otherwise a reduction of the ordinary working week could never result in any week-day being outside the ordinary hours of duty.

It is important also to note that the overtime rates made payable under sub-par. ii are in respect of time worked "in any week", not "in any day." This provision reinforces the general conclusion

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that Parliament has committed to the board the function of determining how the hours making up the ordinary working week are to be worked so that employees working at any time *in the week* after the ordinary maximum of hours per week has been exceeded or at any time *in the week* outside the hours fixed as the ordinary working hours of the day, shall be paid higher rates as for overtime.

I see great difficulty in the constructions of sub-par. ii suggested on behalf of the respondent. One was that under the sub-paragraph the board's duty could only be performed by carrying the phrase " on each day " into every determination so that it would provide as follows : " For each day in the week, the hour of beginning work shall be (a fixed hour) and the hour of ending work shall be (another fixed hour)." But this construction would prevent even that degree of elasticity which is quite necessary for any rational regulation of hours and wages. Moreover it takes away from the phrase " each day " that implication of separate and independent treatment which usually attaches itself to the word " each."

A second argument was that the phrase " on each day " should be taken as a legislative reference to the days which, in the particular trade being regulated, had been ordinary working days. But this overlooks the fact that each board has quasi-legislative powers conferred upon it and it is not the permanent maintenance of industrial conditions but rather the possibility of their substantial change, which characterizes this portion of the legislation under consideration. The opinion I have expressed is supported by the consideration that if " each day " were treated as an equivalent of " every day of the week " Sunday as well as Saturday would have to be accorded its quota of the maximum working hours. Everyone seems to agree that Sunday as well as Saturday *may* be included in the scope of the board's fixation of the hours of the working week, and that, if it is included, the board may fix, but need not fix, special rates for work on that day (sec. 145 (1) (*e*) (i)). *Lowe* J. said : " Had I thought that this expression included Sunday and that the board had power to refrain from fixing hours for the beginning and ending of work on Sunday, I should have felt difficulty in understanding why it could not also refrain from fixing such hours for any day of the week " (1).

(1) (1936) V.L.R., at pp. 188, 189.

In my opinion the hypothesis upon which this reasoning of *Lowe* J. proceeded is correct.

Finally it was argued that, assuming that the board has power to exclude Saturday as an ordinary work day, its duty to fix overtime rates extends only to those days for which the times of beginning and ending work have already been fixed ; so that in respect of (say) work done on Saturday, there being no hours fixed for beginning and ending work on that day, no overtime is payable in respect of work done on that day.

The answer to the argument has already been illustrated by the fact that, under sub-par. ii, overtime is to be paid (*inter alia*) in respect of work done " in any week " outside the hours fixed as the times of beginning and ending work. The work " week " is defined by sec. 3 as meaning *prima facie* " the period between midnight on Saturday night and midnight on the succeeding Saturday night " so that all work performed on Saturday (and Sunday also) is work done during the relevant week. Accordingly work performed on Saturday is work " in any week " outside the hours fixed for beginning and ending work, those hours being fixed solely from Monday to Friday inclusive. With all respect to those who have expressed a contrary opinion, I think that the case for the attack made on the validity of the present determination rests upon the theory that the board has attempted to say: " No Saturday work in this industry," and that there is no express power to say this. But the board has not prohibited Saturday work. It has merely so fixed the times of the ordinary week's work of 44 hours that any work performed on Saturday would have to be paid for at overtime rates. The only legislative sanction for the observance of the shorter working week is the fixation of overtime rates, and, under sub-par. ii of sec. 145 (1) (*c*), overtime can only be fixed by first fixing the ordinary hours into which the ordinary week's work must be fitted. And that is precisely what the board has done in this instance.

In my opinion the determination was valid, the appeal should be allowed and the decision of *Duffy* J. should be restored.

McTIERNAN J. The hours of work in the trade of making and repairing gas meters have been the subject of a determination of

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a wages board made under sec. 145 of the *Factories and Shops Act* 1928 of Victoria. The determination was published in the Government *Gazette* on 28th March 1936, and the question for decision is whether the Gas Meter Board, which made the determination, acted within the powers conferred upon it by sec. 145 (1) (*c*) (ii).

A wages board has a threefold duty under sec. 145 (1). It is to determine the number of hours which should constitute an ordinary week's work (sec. 145 (1) (*a*)), to fix the lowest rates per hour or per week to be paid for an ordinary week's work, these being called " ordinary wages rates " (sec. 145 (1) (*b*)), and to fix the higher wages rates to be paid for overtime (sec. 145 (1) (*c*)). For the purpose of fixing such higher rates it is authorized to proceed according to any one of five distinct methods. The Gas Meter Board purported to follow the second of these methods, which is contained in sec. 145 (1) (*c*) (ii). The determination as a whole relates to wages, hours of work, overtime and other matters. The part which relates to hours of duty and overtime rates is in these terms :—" (3) Hours of Duty.—The ordinary hours of work shall be 44 hours per week, to be worked on five days between the hours of 7.30 a.m. and 5.15 p.m. from Monday to Friday inclusive. (4) Overtime.—All work done outside the hours fixed as the times of beginning and ending work, or within such hours in excess of 44 hours in any week, shall be paid for at the rate of time and a half."

No point is made in this appeal that there is a variance between the language of the determination and the terms of sec. 145 pursuant to which this part of the determination was made. But it may be observed that on any view it would appear to be less incongruous to apportion what are called " the ordinary hours of work " between specified periods of five named days than to make a similar apportionment of " an ordinary week's work " as the determination does.

The appeal centres round the validity of confining the ordinary week's work to the five days named in the determination. Sec. 145 (1) (*c*) (ii) enacts that for the purpose of fixing higher rates for overtime a wages board may fix the hours of beginning and the hours of ending work " on each day." Here it fixed those hours on five days. The word " each " signifies one of two or more things taken separately. The exercise of the authority conferred

by sec. 145 (1) (*c*) (ii) is a prerequisite to providing for the payment of overtime rates for time "worked in any week (*a*) outside the hours so fixed, and (*b*) within the hours so fixed in excess of the number of hours determined for an ordinary week's work." The word "week" is defined to mean "the period between midnight on Saturday night and midnight on the succeeding Saturday night." I can find nothing in the sub-section to suggest that the wages board is given a discretion to select any days of the week, whether consecutive or not, which it chooses to adopt, for the purpose of fixing the hour at which work is to start and the hour at which it is to stop. Nor does sec. 145 authorize the board to make a determination prohibiting work to be done on any day. A determination made thereunder enforces minimum "ordinary wages rates" and higher wages for overtime in the trade to which it is applied. In my opinion the words "on each day" refer to each day of the weekly period during which it is lawful to carry on the trade to which the determination is to apply. There is no other criterion for determining to what days the words "on each day" relate. It is said that the expression "worked in any week" contemplates the determination of overtime rates for work done outside the days, that is, as it is submitted, not on the days on which hours are fixed, and hence suggests that the sub-section empowers the wages board to fix hours on some days only without fixing hours on any other lawful working days in the same week. If this construction were correct it would not afford a sufficient reason for saying that the expression "on each day" was intended to mean on each day of any number of days, presumably not more than a week and not less than two days, and thus leave the days on which hours may be fixed to the arbitrary discretion of the wages board.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Moule, Hamilton & Derham.*

H. D. W.