[HIGH COURT OF AUSTRALIA.]

CHALMERS . . . . . PLAINTIFF;

AND

THE COMMONWEALTH OF AUSTRALIA . DEFENDANT.

H. C. OF A. 1946.

SYDNEY, *Aug.* 15.

MELBOURNE, *Oct.* 14.

Latham C.J., Rich, Starke, Dixon, McTiernan and Williams JJ.

Public Service—State officer—Employment on annual basis — Temporary transfer to Commonwealth service—Overtime—Rate of remuneration—"Not less favourable" than immediately prior to transfer—Statutory proviso—"Usual office hours"—Different in State and Commonwealth service—Income Tax (War-time Arrangements) Act 1942-1944 (*No.* 21 *of* 1942—*No.* 32 *of* 1944), *s.* 6 (1)—*Income Tax (War-time Arrangements) Regulations* (*S.R.* 1942 *No.* 375), *reg.* 14 (1).

The plaintiff was an officer of the public service of New South Wales who was temporarily transferred to the public service of the Commonwealth by virtue of s. 4 of the *Income Tax (War-time Arrangements) Act* 1942-1944. Section 6 of that Act provides, with certain immaterial exceptions, that "the terms and conditions of employment of every transferred officer shall, during the period of transfer, be as prescribed" and a proviso to the section provides, so far as material, that "the rate of remuneration of a transferred officer shall be not less favourable than that to which he would be entitled if he had been transferred at the rate of remuneration to which he was entitled immediately prior to his transfer." The plaintiff was in receipt of an annual salary as an officer in the New South Wales service and the annual salary he received as a transferred officer was never less than, and at times exceeded, the annual salary to which he would have been entitled had he remained in the New South Wales service. The plaintiff was, however, by virtue of reg. 14 (1) of the *Income Tax (War-time Arrangements) Regulations* required to work longer hours on being transferred to the Commonwealth service. The plaintiff claimed (i) that, inasmuch as he was, as a transferred officer, required to work longer hours "his rate of remuneration" was less favourable, and that accordingly he had been underpaid; (ii) that reg. 14 (1) of the

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Income Tax (War-time Arrangements) Regulations contravened the proviso to s. 6 of the Act and accordingly was invalid.

Held that the plaintiff's claim failed,

By *Latham* C.J., *Rich*, *Dixon*, *McTiernan* and *Williams* JJ., on the ground that reg. 14 (1) of the *Income Tax (War-time Arrangements) Regulations* was a valid exercise of the power conferred by the Act to prescribe office hours for transferred officers and an alteration in office hours did not alter the rate of remuneration which was a rate per year and not a rate per hour.

By *Starke* J. on the ground that although the *Income Tax (War-time Arrangements) Act* 1942-1944 and the Regulations thereunder were unconstitutional and invalid, the change of hours of duty, did not change the rate of remuneration.

CASE STATED.

An action was brought in the original jurisdiction of the High Court by William Chalmers, of Randwick, New South Wales, to recover from the defendant, the Commonwealth of Australia, the sum of £116 11s. 10d. which he alleged was due to him by the Commonwealth in respect of hours worked by him in excess of the "usual office hours" provided for in a relevant State industrial award, he being an officer of the public service of the State of New South Wales who had been transferred to the public service of the Commonwealth pursuant to the *Income Tax (War-time Arrangements) Act* 1942-1944.

Upon the action coming on to be tried *McTiernan* J., at the request of both parties and pursuant to s. 18 of the *Judiciary Act* 1903-1940, stated for the consideration of the Full Court of the High Court, a case which was substantially as follows :—

1. In this action the plaintiff sues the defendant for the sum of £116 11s. 10d. alleged to be due to him.

2. The plaintiff is a transferred officer within the meaning of the *Income Tax (War-time Arrangements) Act* 1942-1944, and the plaintiff alleges and the defendant denies that the rate of remuneration received by him as such transferred officer is less favourable than that to which he would be entitled if he had been transferred at the rate of remuneration to which he was entitled immediately prior to his transfer.

Upon the action coming to be tried the plaintiff and the defendant made the following admission of facts, and they are all the material facts :—

(1) On 31st August 1942, the plaintiff was and for some years prior thereto had been an officer in the public service of the

State of New South Wales engaged in the Department of Taxation on duties connected with the assessment or collection of taxes upon income.

(2) On 31st August 1942 the plaintiff's remuneration as such officer was regulated by the *Public Service Act* 1902 (N.S.W.) as amended, and the regulations and notifications made thereunder and by certain awards including the Crown Employees (Clerical) Award (published on 23rd December 1927) and the Crown Employees (Assessors &c.—Department of Taxation) Award and variations thereof, such awards and variations having been made in pursuance of or continued in force under the provisions of the *Industrial Arbitration Act* 1912 (N.S.W.) as amended, and the *Industrial Arbitration Act* 1940 (N.S.W.) as amended. The plaintiff's rights in respect of overtime were solely governed by the said *Public Service Act* and the regulations and notification made thereunder and by the said Crown Employees (Clerical) Award. That award provided, so far as material, as follows :—" (1) ' Overtime ' shall mean all time, whether before or after the usual office hours, necessarily occupied by direction of the permanent head or other responsible officer on his behalf, in the performance of work which, from its character, or from special circumstances, cannot be performed during the ordinary working hours of the office to which the officer is attached. . . . (3) . . . The following officers shall not be entitled to claim payment for any overtime worked by them without the special approval of the Public Service Board, viz. :— (*a*) Officers whose salary and allowances in the nature of salary exceed £625 per annum. Payment not to be made to an officer receiving £525 per annum unless the working of the overtime has been previously authorized by the permanent head or other responsible officer on his behalf. . . ."

(3) On 31st August 1942, the plaintiff was receiving salary in excess of £525 per annum, but less than £625 per annum, within the meaning of clause (3) par. (*a*) of the said Crown Employees (Clerical) Award.

(4) The working of overtime by the plaintiff had been prior to 31st August 1942, and still was on that date, authorized by the permanent head or other responsible officer on behalf

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of the permanent head, within the meaning of clause (3) (*a*) of the last-mentioned award.

(5) The remuneration to which the plaintiff was entitled on 31st August 1942, by virtue of the said Acts, regulations notifications and award as varied was as follows :—

(*a*) A salary at an annual rate as prescribed.

(*b*) Overtime payments at rates prescribed in the Crown Employees (Clerical) Award for all work performed by him before or after " the usual office hours " within the meaning of that award.

(6) At the said date the usual office hours as determined by the Public Service Board and within the meaning of the last-mentioned award in the Department of Taxation were from 8.30 a.m. to 5 p.m. (with a break of three-quarters of an hour for luncheon) on Monday to Friday. There were no usual office hours on Saturday or on Sunday or on public holidays. Pursuant to the said award the Public Service Board authorized work in the Department as overtime without payment on every sixth Saturday (between the hours of 8.30 a.m. to 11.30 a.m.).

(7) On 1st September 1942, the plaintiff as such officer as aforesaid was temporarily transferred to the public service of the Commonwealth under and in pursuance of the *Income Tax (War-time Arrangements) Act* 1942, of the Parliament of the Commonwealth of Australia ; and from 1st September 1942 to 29th August 1945, both days inclusive, he remained in the public service of the Commonwealth, being employed as a transferred officer in the Commonwealth Department of Taxation, and was not reduced in status.

(8) On 28th August 1942, the Governor-General, in pursuance of powers vested in him under the *Income Tax (War-time Arrangements) Act* 1942, promulgated the *Income Tax (War-time Arrangements) Regulations* being statutory rule No. 375 of 1942.

(9) The regulations referred to in par. (8) hereof contained the following amongst other regulations :—

" 14 (1). Subject to the Act and to these Regulations, the relevant laws, conditions and practices in force in the public service of the Commonwealth relating to the following matters shall apply, *mutatis mutandis*, to transferred officers . . . (*c*) Increments of salary

and conditions of advancement . . . (*p*) Attendance and hours of duty. (*q*) Overtime, Sunday and holiday duty and payments therefor."

(10) By virtue of such laws, conditions and practices the usual office hours in the Commonwealth Department of Taxation throughout the period of the plaintiff's employment as aforesaid in the public service of the Commonwealth were from 8.30 a.m. to 5.0 p.m. (with a break of one hour for luncheon) from Mondays to Fridays and from 8.30 a.m. to 11.30 a.m. on Saturdays; there were no usual office hours on Sundays or public holidays.

(11) The annual salary paid to the plaintiff by the defendant in respect of his employment as such transferred officer was never less than, and at times exceeded, the annual salary to which he would have been entitled if he had remained in the public service of New South Wales.

(12) Between 1st September 1942 and 29th August 1945 the plaintiff worked on each week-day between the hours of 8.30 a.m. and 5.0 p.m. and between the hours of 8.30 a.m. and 11.30 a.m. on every Saturday and on numerous occasions the plaintiff at the request and by the direction and with the approval of the permanent head of the Commonwealth Department of Taxation worked as such officer other and additional hours.

(13) The plaintiff, had he remained in all respects an officer of the State public service and not been subject to the provisions of the *Income Tax (War-time Arrangements) Act* 1942-1944, would have been entitled under the said Crown Employees (Clerical) Award by reason of the hours actually worked by him between 1st September 1942 and 29th August 1945, in excess of the usual office hours mentioned in par. (6) of the case, to overtime payments totalling £359 15s. 8d. in addition to the said annual salary.

(14) The plaintiff was paid by the defendant for overtime worked by him during the said period and for any excess of salary over the said annual salary the sum of £243 3s. 10d. only in addition to the said annual salary, the said sum of £243 3s. 10d. being the sum payable to him in accordance with the laws, conditions and practices in force in the Commonwealth Public Service regulating the payment of overtime together with certain additional amounts calculated in accordance with directions of the Commonwealth Public Service Board.

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(15) The defendant has been requested to pay to the plaintiff the sum of £116 11s. 10d. which is the difference between the amounts respectively set out in pars. (13) and (14) hereof but the defendant has refused to pay the same.

The following questions were stated for the opinion of the Full Court of the High Court :—

1. Should—
   (*a*) the usual office hours mentioned in par. (6) of the case ; or
   (*b*) the usual office hours mentioned in par. (10) of the case

   be treated as " the usual office hours " for the purpose of applying the said Crown Employees (Clerical) Award in calculating the overtime payments to which the plaintiff became entitled in respect of his above-mentioned employment by the defendant ?
2. Is the plaintiff entitled to be paid by the defendant at rates not less favourable than those prescribed for overtime by the said Crown Employees (Clerical) Award as varied :—
   (*a*) for all work done by him as above stated before 8.30 a.m. or after 5 p.m. on any day, Monday to Friday, in any week.
   (*b*) for all work done by him on any Saturday other than between the hours of 8.30 a.m. and 11.30 a.m. on any sixth Saturday.
   (*c*) for all work done by him on any Sunday or public holiday ?
3. If upon these facts and upon the true construction of the said regulation the plaintiff is precluded from recovering the moneys alleged to be due, is that regulation or any part thereof invalid ?
4. The parties are agreed that if it be determined that the plaintiff is entitled to be paid at rates not less favourable than those prescribed for overtime by the said Crown Employees (Clerical) Award for all work done by him in excess of the usual office hours mentioned in par. (6) of the case judgment shall be entered for the plaintiff for the sum of £116 11s. 10d. and that if it be not so determined judgment to be entered for the defendant.

Barwick K.C. (with him *Downing*), for the plaintiff. The word " remuneration " as used in the proviso to s. 6 of the *Income Tax (War-time Arrangements) Act* 1942-1944, is a wider term than

" salary " or " wages " (*R.* v. *Postmaster-General* (1); *Skailes* v. *Blue Anchor Line Ltd.* (2)). To increase the hours of work without increasing the amount of pay results in a decreasing of the rate of remuneration. An extension of time required for earning the ordinary salary amounts to a decrease in remuneration for the work done. *Bond* v. *The Commonwealth* (3), *Cousins* v. *The Commonwealth* (4), and *Le Leu* v. *The Commonwealth* (5) deal only with the rights of transferred officers and do not touch upon the question now before the Court. The Commonwealth is not entitled to alter the " usual office hours " when paying overtime according to the State standard. Upon its true construction reg. 14 (1) of the *Income Tax* (*War-time Arrangements*) *Regulations* is subject to the Act and therefore does not preclude the plaintiff. If upon its true construction the regulation purports to and, subject to the Act, would reduce the plaintiff's rate of remuneration, it is invalid. The questions in the case should be answered as follows: 1. (*a*) Yes; 1. (*b*) No; 2. (*a*), (*b*), (*c*) Yes; and 3. Yes.

Kitto K.C. (with him *Macfarlan*), for the defendant. There are two points for consideration, namely, one as to the construction of the Act, and one as to the construction of the award. The broad general provision of s. 6 of the *Income Tax* (*War-time Arrangements*) *Act* 1942-1944 is that all the terms and conditions are to be the subject of prescription by regulation. To that broad principle there was one qualification only, namely, that the rate of remuneration should not be less favourable. From the category of things comprised within terms and conditions one only was selected for special treatment and that one was the rate of remuneration. The question of construction is whether the expression " the rate of remuneration " is confined in its meaning to the annual or periodic salary, or, on the other hand, is wider than that and includes all forms of remuneration or emolument. It is submitted that the first alternative is correct. The proviso to s. 6 clearly shows an intention to deal only with the periodic salary, the annual salary. The expression is not " remuneration " alone, it is " the rate of remuneration." It deals with a rate which assumes the existence of an ascertained sum payable in respect of an ascertained period. The finding in the case stated is that the plaintiff was in receipt, at the date of transfer, of only one sum in respect of any particular or ascertained period. He was receiving a salary at an annual rate as prescribed and, in addition, he was receiving what was

(1) (1876) 1 Q.B.D. 658, at p. 663; on appeal (1878) 3 Q.B.D. 428, at p. 431.
(2) (1911) 1 K.B. 360.
(3) (1903) 1 C.L.R. 13.
(4) (1906) 3 C.L.R. 529.
(5) (1921) 29 C.L.R. 305.

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described as overtime payments at rates prescribed by the award, a receipt the nature of which, it is submitted, does not satisfy the notion expressed in the words " rate of remuneration." The words " rate of remuneration " refer only to the ordinary salary received by the officer immediately prior to his transfer. The section does not mean that rates of remuneration must be exactly proportionate to all the terms and conditions of the employment but that they are something separate and that they refer to payments per period irrespective of when work is done during the period, either in point of time or in point of quality of work or of the conditions under which the work is performed. In short what the section means is : hours may be more or less, work may be harder or easier, conditions may be better or worse, but the one thing that must remain unaltered is the thing that is called the " rate of remuneration." The only way in which it can be construed in order to render that proposition intelligible and workable is to interpret " rate of remuneration " as meaning the annual salary. Even if the rights as to overtime are guarded by the award and do apply by reason of the proviso and the construction of the award, no overtime payment is to be made unless it is found that the time which is alleged to be overtime falls outside the " usual office hours." The expression " usual office hours " means the office hours that are usual for the time being. During the period with which this case is concerned the " usual office hours " included three hours on each Saturday morning. On the construction of the award the hours in respect of which the plaintiff is now suing are not overtime because of the definition in the award of the word " overtime " as meaning " time before or after the usual office hours," that is, the office hours usual at the particular time ; in this case, the usual office hours applying in the Commonwealth public service whilst the plaintiff was an officer thereof. The questions propounded should be answered as follows :—1. (*a*) No ; 1. (*b*) Yes ; 2. No ; 3. No. If the Court should hold that Question 2 should not be answered with a plain negative, the alternative submission is that it should be answered " No, only for so much of the work as was done outside the Commonwealth office hours," and then, of course, Question 1 (*b*) would be in accordance with that.

Barwick K.C., in reply. It is important to note that the officer was only temporarily transferred. The intendment of the Act was that an officer so transferred should not be in any way prejudiced by the fact that he had, in effect, been compulsorily transferred. If the meaning of the word " remuneration " is limited to salary then the use in the proviso to s. 6 of the word " favorable " is quite inappropriate

and unnecessary. At the date of his transfer the plaintiff was entitled to an overtime rate as part of his remuneration; he had a salary rate and an overtime rate, hence the use of the word "favorable."

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. This is a case stated under the *Judiciary Act* 1903-1940, s. 18. The plaintiff is an officer of the public service of New South Wales who was temporarily transferred to the Commonwealth Service under the *Income Tax (War-time Arrangements) Act* 1942-1944. That Act provides in s. 6 that, except in relation to pensions and similar payments, "the terms and conditions of employment of every transferred officer shall, during the period of transfer, be as prescribed." Under the power conferred by this provision the Governor-General has made regulations applying to transferred officers which, *inter alia*, apply to such officers the relevant laws, conditions and practices in force in the public service of the Commonwealth relating to attendance and hours of duty and payments therefor. Under the provisions which are so applied the usual office hours of the plaintiff were from 8.30 a.m. to 5 p.m., with a break of one hour for lunch on week days, and from 8.30 a.m. to 11.30 a.m. on Saturdays.

Section 6 (1) contains the following proviso :—

"Provided that, except where he is reduced in status in consequence of inefficiency or misconduct, the rate of remuneration of a transferred officer shall be not less favorable than that to which he would be entitled if he had been transferred at the rate of remuneration to which he was entitled immediately prior to his transfer and, in the case of an officer entitled to advance to a maximum rate of remuneration by periodical increments, had continued to advance by those increments."

The plaintiff when in the service of the State of New South Wales received an annual salary of £525. He has received that salary or more from the Commonwealth, but he was also entitled while employed by the State of New South Wales to overtime payment under an award applying to clerical Crown employees, "overtime" being defined as meaning "all time, whether before or after the usual office hours, necessarily occupied by direction of the permanent head or other responsible officer on his behalf, in the performance of work which, from its character, or from special circumstances, cannot be performed during the ordinary working hours of the office to which the officer is attached." Rates of overtime were provided

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by the award and by variations of the award, in some cases at the rate of ordinary time, in other cases at the rate of time and a half, and in other cases at the rate of double time. Usual office hours were fixed in the public service of New South Wales by the Public Service Board in pursuance of a power conferred on the Board by the *Public Service Act* 1902, s. 20 (1) (*d*). The hours so fixed in the New South Wales service were 8.30 a.m. to 5 p.m., with a break of three-quarters of an hour for lunch on Monday to Friday. There were no usual office hours on Saturday (except on every sixth Saturday).

In the Commonwealth service the plaintiff had to work on Saturdays and he has not been paid overtime in respect of such work. If he had continued in the State service, he would have been paid overtime for that work. He contends that this variation in the terms of his employment involves a " less favourable rate of remuneration " than that to which he would have been entitled if he had been transferred at the rate of remuneration to which he was entitled immediately prior to his transfer. While in the State service he received £525 for working from Monday to Friday during certain hours. In the Commonwealth service he received £525 for working from Monday to Friday during substantially the same hours, but with an addition of three hours' work on Saturday. Therefore, as more work was done, it is argued, his rate of remuneration was less, and therefore the rate of remuneration was less favourable than the rate which had applied to him when he was in the New South Wales service. In my opinion this argument fails because the officer was not employed and paid on an hourly basis, but on an annual basis. A rate for remuneration for work may be determined in relation to periods of time worked, or in relation to quantity of work done, or according to some other standard. An officer employed and paid by the hour would be paid more money if he worked for more hours, his rate of remuneration per hour remaining the same. In the case of an annual salary, the period in respect of which the remuneration is paid is one year and if, as is the case, the plaintiff received in respect of each year's work payment at the same annual rate as that which he was entitled to receive before he was transferred to the Commonwealth, he was paid at the same rate of remuneration, even though he did more work during the year in order to earn that rate. He works during more hours for the same pay, but his only " rate of remuneration " is a rate per year and not a rate per hour.

Section 6 (1), in its substantive provision, provides for the fixing by Commonwealth regulations of the terms and conditions of employment of transferred officers. The proviso prevents the payment of

less favourable rates of remuneration. The section, therefore, contemplates the maintenance of rates of remuneration at not less than a prior standard, but the possible variation by regulations of other terms and conditions of employment. Ordinarily it would not be contested that, if one authority had power to fix rates of remuneration and another authority had power to fix terms and conditions of employment, the former authority could fix wages and salaries and the latter authority could fix hours of work. This practice had, as already pointed out, been adopted in New South Wales, where an industrial tribunal determined rates of pay and the Public Service Board determined hours of work.

It is contended for the plaintiff that a variation in the hours of work necessarily affects the rate of remuneration for that work. In my opinion this argument is not well founded. The same argument might be used if any variation at all were made in any of the terms and conditions of employment. But s. 6 is based upon a contrary assumption, viz. that terms and conditions of employment may be varied without thereby changing rates of remuneration.

Accordingly, in my opinion, the Commonwealth Act permitted the Governor-General to prescribe office hours, and an alteration in office hours does not alter the rate of remuneration of the plaintiff. The first question submitted to the Court, which inquires whether the usual State office hours or the usual Commonwealth hours are to be treated as the usual office hours for the purpose of applying the relevant award in calculating overtime payments, should be answered on the basis that the hours prescribed by the Commonwealth regulation are the usual office hours for the purpose stated. This means that the first question should be answered : 1. (*a*) No ; 1. (*b*) Yes.

The second question inquires whether the plaintiff is entitled to be paid by the Commonwealth at rates not less favourable than those prescribed for overtime by the said award for work done outside the hours prescribed by the State award. In my opinion this question should be answered : (*a*) as to work done by him before 8.30 a.m. or after 5 p.m—Yes, because the Commonwealth hours were the same as the State hours in respect of times of beginning and ceasing work on Mondays to Fridays ; (*b*) as to work done by him on any Saturday other than between the hours of 8.30 a.m. and 11.30 a.m. on any sixth Saturday—No, because these were the Commonwealth usual office hours ; (*c*) for all work done by him on any Sunday or any public holiday—Yes, because the Commonwealth regulations did not prescribe any usual office hours on these days.

These questions relate only to the hours in respect of which overtime rates should be paid. No question as to rates of overtime

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payment—whether they were alterable by Federal regulation or not —arose in the present case. The answers to the questions asked should be framed so as to limit their effect to the former subject.

The third question enquires whether the Commonwealth regulation fixing office hours is invalid. This question should be answered—No.

The case stated contains an agreement of the parties that judgment should be entered for the defendant in the event of the questions being answered as above stated. There is no agreement as to costs. The most convenient course therefore will be to remit the case with the answers to *McTiernan* J.

RICH J. This case depends upon the force to be given to the words " the rate of remuneration to which he " (that is the officer) " was entitled immediately prior to his transfer." The words occur in the proviso to sub-s. (1) of s. 6 of the *Income Tax (War-time Arrangements) Act* 1942-1944. The transferred officers claim that the award for Saturday work performed by them in the Commonwealth service should be at overtime rates which if it had been done in the State service would have been payable under the State award. In the State service Saturday work is paid for at overtime rates. In the Commonwealth service at the material time Saturday morning work fell within usual office hours and entitled the officer to no extra remuneration beyond his salary. It will be seen that the claim involves two propositions, viz. : first, that the word " remuneration " includes overtime rates, and secondly, that what is overtime for the purpose of applying such rates is to be decided according to the regulations, awards and practices of the State service when the officer was transferred into the Commonwealth service. Whatever there may be to be said in favour of the first proposition I am clearly of opinion that the second is not well founded.

It is necessary to remember that we are dealing with a proviso. Its meaning is, therefore, not to be enlarged by implications or unnecessarily wide readings of uncertain terms. The leading paragraph in sub-s. (1) is unequivocal in its intention of empowering the Commonwealth authorities to prescribe the terms and employment of the transferred officer. What are usual hours during which the officer must attend in order to earn his salary is a question conspicuously forming part of the terms and conditions of employment so to be prescribed. The purpose of the proviso is to preserve to the transferred officer his rate of pay. It should not be read as going beyond that and cutting down the power to prescribe usual office hours to be worked for the Saturday.

I therefore answer the questions as follows :—

1. (*a*) No. (*b*) Yes.
2. (*a*) Yes. (*b*) No. (*c*) Yes.
3. No.

and I would direct judgment to be entered for the defendant.

STARKE J. Case stated pursuant to the *Judiciary Act* 1903-1940. The questions stated arise upon the *Income Tax* (*War-time Arrangements*) *Act* 1942-1944 which, I cannot think, is within the constitutional power of the Parliament of the Commonwealth despite the decision of this Court in *South Australia* v. *The Commonwealth* (1). Assuming, however, for the day that s. 6 of the Act was validly enacted the question is whether certain officers transferred from the service of the State of New South Wales to the Commonwealth pursuant to the Act are entitled to overtime pay for time worked on Saturdays. Except in relation to any pension, payment or other benefit to be paid or granted on or after the retirement or death of any transferred officer, that section provides that the terms and conditions of employment of every officer transferred from a State service to the public service of the Commonwealth pursuant to the Act shall during the period of transfer be as prescribed, that is, as prescribed by regulations made by the Governor-General in Council. Regulations (Statutory Rules 1942 No. 375) were made prescribing that the laws, conditions and practices in force in the Public Service of the Commonwealth relating to attendance and hours of duty, overtime, Sunday and holiday duty, and payments therefor, should apply to transferred officers. The hours of duty of the Commonwealth public service were from 8.30 a.m. to 5 p.m., with a break for luncheon, from Mondays to Fridays, and from 8.30 a.m. to 11.30 a.m. on Saturday.

The plaintiff claims overtime rates of pay for work done between 8.30 a.m. to 11.30 a.m. on Saturday because in the State service work on Saturday did not fall within his hours of duty and he would have become entitled to overtime if he had worked in the State service on that day. The claim is based upon the proviso to s. 6, " Provided that . . . the rate of remuneration of a transferred officer shall be not less favorable than that to which he would be entitled if he had been transferred at the rate of remuneration to which he was entitled immediately prior to his transfer."

The Commonwealth in prescribing hours of duty for Saturdays has changed the hours of duty of transferred officers which is within the power conferred upon it by s. 6 of the Act. That of course

(1) (1942) 65 C.L.R. 373.

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affects the amount payable in respect of overtime, but it does not change the rate of remuneration of transferred officers nor even the overtime rates, so far as appears from the case, when work is done beyond the hours prescribed pursuant to s. 6.

The questions stated should be answered :—

1. (*a*) No ; (*b*) Yes.

2. (*b*) No ; (*a*) and (*c*) should not be answered.

The regulations made under the *Income Tax (War-time Arrangements) Act* 1942-1944 (Statutory Rules 1942 No. 375) may affect overtime rates (See regs. 14 and 25). But these regulations were not discussed and the parties assumed, perhaps rightly, that the Crown Employees (Clerical) Award of the Industrial Commission of New South Wales governs the matter.

3. The whole of the Act and the regulations are, in my opinion, unconstitutional and invalid, but the plaintiff has not any right of action against the Commonwealth for the moneys which he claims.

DIXON J. The proviso to s. 6 (1) of the *Income Tax (War-time Arrangements) Act* 1942-1944 qualifies the power given by the principal clause of the sub-section to prescribe the terms and conditions of the employment of officers transferred under the Act from the State to the Commonwealth service. The material part of the qualification requires that the rate of remuneration of a transferred officer shall not be less favourable than that to which he would have been entitled if he had been transferred at the rate of remuneration to which he was entitled immediately prior to his transfer.

Certain officers of the New South Wales service, of which the plaintiff is one, were at the date of their transfer entitled to an annual salary and to payments for work done outside usual office hours at overtime rates reckoned by a formula in which the daily equivalent of the annual salary and the time worked formed factors. In the State service which they left, all Saturday work was outside usual office hours, while, at the time, in the Federal service to which they were transferred there were on Saturday mornings certain usual office hours.

The question for decision is whether for time worked on Saturday within the usual office hours of the Commonwealth service these officers were entitled under the proviso to be paid overtime at the rate calculated according to the formula applicable to them whilst in the State service.

It is a question which, in my opinion, depends upon the interpretation of the proviso in s. 6 (1). What needs interpretation is the expression " rate of remuneration . . . to which he would be entitled " and the expression " rate of remuneration to which he was entitled immediately prior to his transfer." The question, as I see it, is whether these expressions apply to extra pay for work defined as overtime by the conditions of employment by the State independently of what is defined as overtime by the conditions of employment by the Commonwealth and mean that for such work the Commonwealth shall remunerate the officer by such extra pay. In my opinion that is not the meaning of the expressions. The operation of the proviso is to place a qualification upon the generality of the principal clause and, accordingly, the proviso should not be read more widely than the natural sense of its words requires. The plain object of the principal clause of the sub-section is that, except for pension, payment or other benefit on retirement or death, the Commonwealth executive may prescribe all the terms and conditions of employment and not be bound by the conditions prevailing in State services. Hours of work form a prominent example of the conditions of employment. The qualification contained in the proviso is, on its face, directed to remuneration and its purpose clearly enough is to ensure that the change from one service to the other shall not reduce the rate at which the officer is paid in his employment. It would enlarge the operation of the proviso beyond its purpose if the expressions in question were interpreted as meaning that no change from the State hours of work could be required except on condition of paying overtime for so much of the Federal hours as did not fall within the State hours. Even if the word " remuneration " covers the rates payable for whatever is overtime in the Federal service, it ought not, in my opinion, to be understood as fixing by implication the period of the day, the days or the amount of time which constitutes ordinary work for the purpose of defining work for which overtime rates are payable.

That is a matter governed by the principal clause in the sub-section and the proviso does not control or affect it.

The form of the questions in the case stated appears to suggest that the parties assume that nothing in reg. 14 (1) (*q*) of the *Income Tax* (*War-time Arrangements*) *Regulations* operates to make the overtime rates fixed by the Crown Employees (Clerical) Award inapplicable to whatever work is overtime work, if those rates are the more favourable and I should be content to accept that assumption. But there was no discussion before us of the question whether

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the rates payable for whatever is overtime work according to the usual hours of the Commonwealth service must be not less favourable than those fixed by the Crown Employees (Clerical) Award. It is better, therefore, to frame our answers to question 2. so as not to affect the question even by implication.

I think that the questions should be answered as follows :—

1. (*a*) No ; (*b*) Yes.
2. The plaintiff is entitled to be paid by the defendant for overtime : (*a*) For all work done by him before 8.30 a.m. or after 5 p.m. on any day Monday to Friday in any week ; (*c*) for all work done by him on any Sunday or public holiday ; (*b*) but not for work done by him on any Saturday within the usual hours of work of the Commonwealth service.
3. No.

This means that judgment should be entered for the defendant.

McTIERNAN J. In my opinion Question 1. should be answered (*a*) No and (*b*) Yes.

Two assumptions are involved in this question. The first is that, in order to calculate the overtime payments mentioned in the question, it is necessary to apply the State award, also mentioned in the question. The second assumption is that in the Federal as in the State public service, overtime is the time occupied by an officer in performing official work beyond the usual office hours.

The answer to the questions in the case is governed by the construction of s. 6 (1) of the *Income Tax (War-time Arrangements) Act* 1942-1944. The case comes down to this question : Is it necessary, in order to comply with the proviso, to make the calculation of the overtime payments, now in question, by reference to hours worked in excess of the usual office hours of the Commonwealth or of the State ?

The power conferred upon the Commonwealth Government by s. 6 (1) extends to prescribing the terms and conditions of employment of every transferred officer in relation to usual hours of duty, overtime and remuneration ; but the proviso requires that any terms and conditions, which are prescribed under the sub-section, should secure to the officer a " rate of remuneration " not less favourable than that to which he would be entitled if he had been transferred " at the rate of remuneration " to which he was entitled immediately prior to his transfer.

The ordinary meaning of " rate of remuneration " covers rate of remuneration for overtime. In my opinion that expression in the

proviso includes overtime rates. The proviso gives the transferred officer a guarantee of a minimum rate, *inter alia*, for overtime. The relevant comparison is between the Federal and State rates of remuneration for overtime. But it would not determine the issue whether the plaintiff has been treated less favourably than the proviso requires to make a comparison between the actual amount of his Federal remuneration and a hypothetical amount of State remuneration, or in other words, between his total receipts in the Federal service and what he would have received if he had attended for the performance of duty in the State service for the same total number of hours as he attended for duty in the Federal service. In the present case the question comes down to a comparison between the rate prescribed under s. 6 (1) for overtime, that is, time beyond the regular office hours prescribed under this sub-section, and the overtime rate under the State award. As regards overtime, the proviso does not require that the hours worked by a transferred officer in the Commonwealth service be apportioned on the basis of State law between usual office hours and overtime, and the State overtime rate be applied to overtime ascertained in that way. I think that the proviso requires that in respect of overtime determined according to Federal law the overtime rate prescribed by Federal law for any transferred officer in pursuance of s. 6 (1) should not fall below the standard mentioned in the proviso. Regarding the matter in that way, upon the facts of the present case, there has been no departure from the proviso. So far as work done during the hours mentioned in Questions 2 (*a*) and (*c*) is concerned, this would be Commonwealth " overtime " because it was not done during usual office hours fixed under Commonwealth law ; but so far as the hours mentioned in Question 2 (*b*) are concerned, these were Commonwealth " usual office hours." I think, therefore, that the answers to Questions 2 (*a*), (*b*) and (*c*) should be Yes, No, Yes, respectively. The answer to Question 3 should in my opinion be No.

WILLIAMS J. The plaintiff is a taxation officer of the public service of New South Wales who was temporarily transferred to the public service of the Commonwealth under s. 4 of the *Income Tax (War-time Arrangements) Act* 1942-1944. Section 6 of this Act provides that, except in relation to any pension, payment or other benefit to be paid or granted on or after the retirement or death of any transferred officer, the terms and conditions of employment of every transferred officer shall, during the period of transfer, be as prescribed. There is a proviso to the section which provides, so far as material, that the rate of remuneration of a transferred officer

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shall be not less favourable than that to which he would be entitled if he had been transferred at the rate of remuneration to which he was entitled immediately prior to his transfer.

There are in the public services of New South Wales and of the Commonwealth, as one would expect, the ordinary hours of work for public servants and other hours which are classed as overtime. At the date of the transfer the ordinary hours of work in the public service of New South Wales were from 8.30 a.m. to 5 p.m. (with three-quarters of an hour for lunch) from Mondays to Fridays inclusive. Apart from an additional quarter of an hour for lunch, similar hours were worked in the Commonwealth public service on these days. But the war was on and the public servants of the Commonwealth, as part of their ordinary hours, were also required to work on Saturdays from 8.30 a.m. to 11.30 a.m.

By statutory rule No. 375 of 1942 notified in the Commonwealth *Gazette* on 28th August 1942, the Federal Executive Council made regulations under s. 6 of the Act called the *Income Tax (War-time Arrangements) Regulations* prescribing the terms and conditions of employment of transferred officers. Regulation 14 provides, *inter alia*, that the conditions in the public service of the Commonwealth relating to attendance and hours of duty, overtime, Sunday and holiday duty and payments therefor shall *mutatis mutandis* apply to such transferred officers. The plaintiff did not therefore qualify under the regulations for overtime at the rate of time and a half for his work on Saturday mornings as he would have done had he remained in the public service of New South Wales. He now claims that his rate of remuneration will have been reduced in breach of the proviso to s. 6 unless he is paid at the rate of time and a half for this work. It will be seen that the proviso does not give a statutory right of action. It operates to invalidate a regulation made in breach of its provisions. But the parties have agreed that the plaintiff's right to this extra payment shall be tested in this manner.

In my opinion the claim is misconceived. The first paragraph of s. 6 confers a positive authority upon the Executive couched in the most general terms to prescribe the terms and conditions of employment of transferred officers. One of the most important terms and conditions would be the ordinary hours to be worked. As explained in the *Uniform Tax Case* (1), Federal and State income tax prior to the *Income Tax (War-time Arrangements) Act* was being collected in all the States, except Western Australia, by the State income tax departments, whereas in Western Australia it was being collected by the Commonwealth income tax department. The ordinary

(1) (1942) 65 C.L.R., at p. 465.

hours of work of public servants and their rates of pay for ordinary work and for overtime presumably differed in each State. The purpose of s. 6 was, it seems to me, to empower the Executive to fix the same terms and conditions of employment for officers transferred in each State and to make them conform to the terms and conditions of employment of its own public servants except, in relation to pensions and other payments on retirement or death and provided that their rates of remuneration were not less favourable than those which they were receiving from the State at the date of transfer.

The ordinary meaning of remuneration is pay for services rendered. At the date of transfer the plaintiff was receiving an annual salary in excess of £525 but less than £625 per annum. To earn this salary he had to work the ordinary hours that public servants were required to work from time to time in his department. He was not paid by the hour but at an annual rate. If he was paid at the same annual rate for working the usual hours in the Commonwealth public service his rate of annual remuneration would not be less favourable than his former rate. If he was required to do work classed as overtime in the public service of the Commonwealth, he would be entitled to be paid for this work at a rate not less favourable than the State rate. It appears that he was required to do such work and that he was paid at such rates. In my opinion he has received everything to which he is entitled. His whole claim rests on the proviso. A proviso excepts out of the earlier part of the section which contains it something which would otherwise have been within the enacting part. In *Wood* v. *Wood* (1), *Scrutton* L.J. said (in a passage recently cited by the Court of Appeal in *Wilson* v. *Chatterton* (2)) : " I am rather disposed to think, although I do not know of any express authority for it, that when you have an Act which is intended to lay down a general principle, you construe the exceptions rather against those who put them forward."

For these reasons I would answer the questions asked : 1. (*a*) No ; (*b*) Yes ; 2. The plaintiff is entitled to be paid by the defendant for overtime : (*a*) for all work done by him before 8.30 a.m. or after 5 p.m. on any day Monday to Friday in any week ; (*c*) for all work done by him on any Sunday or public holiday ; (*b*) but not for work done by him on any Saturday within the usual hours of work of the Commonwealth service ; 3. No.

It follows from these answers that there should be judgment for the defendant.

(1) (1923) 93 L.J. K.B. 538, at p. 542. (2) (1946) 1 K.B. 360, at p. 365.

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Questions answered as follows :—

Question 1. (*a*) *No.*

(*b*) *Yes.*

Question 2. *The plaintiff is entitled to be paid by the defendant for overtime :—*

(*a*) *for all work done by him before* 8.30 *a.m. or after* 5 *p.m. on any day Monday to Friday in any week ;*

(*c*) *for all work done by him on any Sunday or public holiday ;*

(*b*) *but not for work done by him on any Saturday within the usual hours of work of the Commonwealth service.*

Question 3. *No.*

Case remitted to McTiernan J.

Solicitors for the plaintiff, *W. C. Taylor & Scott.*

Solicitor for the defendant, *G. A. Watson,* Acting Crown Solicitor for the Commonwealth.

J. B.