[HIGH COURT OF AUSTRALIA.]

ALLEN AND OTHERS . . . . . PLAINTIFFS;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

H. C. OF A. 1949.

MELBOURNE, *March* 16-18;

SYDNEY, *April* 5.

Latham C.J., Dixon and Williams JJ.

Public Service (Cth.)—Repatriation Department—Regulations fixing minimum and maximum salaries of officers and annual increments—Determination of Public Service Arbitrator—Increased minimum and maximum salaries—Increments—Application of new rates and increments to officers who had acquired rights to increments under the regulations—Arbitration (Public Service) Act 1920-1934 (*No.* 28 *of* 1920—*No.* 45 *of* 1934)—*Commonwealth Public Service Act* 1922-1947 (*No.* 21 *of* 1922—*No.* 1 *of* 1947), *ss.* 81Y, 81Z—*Repatriation (Staff) Regulations* 1941-1946 (*S.R.* 1941 *No.* 259—1946 *No.* 100), *reg.* 22.

The plaintiff was an officer of the Commonwealth Public Service whose salary was fixed by statutory authority by an instrument which prescribed a minimum and maximum salary and increments, all being annual. A subsequent determination in similar form increased the annual minimum and maximum salary and also prescribed increments substantially as in the earlier instrument. The plaintiff had worked for such period under the earlier instrument that, having attained all the increments thereby prescribed, he was in receipt of the maximum salary thereunder. He claimed that he was entitled under the new determination to be treated as if he had complied with its conditions so that he was entitled to be paid on the basis of the minimum salary fixed by it, plus an increment of the amount prescribed by it for each increment to which he had become entitled under the earlier instrument.

Held that he was not so entitled.

ACTION referred to Full Court.

Thomas Kingsley Russell Allen, Arthur Adrian McKay, Robert Rene Constable Hayes and Victor Ernest Knight, medical officers of the Repatriation Department, joined as plaintiffs in an action in the High Court against the Commonwealth and the Minister for Repatriation, seeking declarations as to the amounts of their salaries. The question in dispute was as to their right to certain

H. C. OF A. 1949.

ALLEN v. THE COMMONWEALTH.

annual increments of salary under an amended determination of the Commonwealth Public Service Arbitrator (No. 74 of 1947). The precise nature of the dispute and the circumstances of the case generally appear sufficiently in the judgments hereunder. The action was directed by *McTiernan* J. to be argued before the Full Court.

Sholl K.C. (with him *Turnbull*), for the plaintiffs. Before the new determination, No. 74 of 1947, the plaintiffs' salaries were governed by the *Repatriation (Staff) Regulations*. Under the new determination they are entitled to an adjustment " peg for peg " on an examination of the document itself. The new award was for a general increase, and it shows a superimposition of new rates on those in the former regulations. Construed in the light of existing circumstances, it applies so as to confer a right to the increased salary provided for in the incremental subdivisions corresponding to the position on 24th April 1947 under the regulations. It adopts an alternative method of expressing salary range as normally prescribed in career awards in the Arbitration Court. Annual increments have the effect of creating a series of subdivisions and in Public Service parlance are regarded as one and the same thing. Subdivisions or increments create a Public Service status, and there are provisions protecting such status; see *Commonwealth Public Service Act* 1922-1947, s. 55. Increments also create a right (*Commonwealth Public Service Act*, s. 31). Annual increments create " rungs in a ladder," and the new award superimposes a new rung on the old ladder. Alternatively, the plaintiffs' rights and privileges in the Repatriation Department to have their salaries adjusted " peg for peg " to the appropriate figure in the new determination were protected by the *Repatriation (Staff) Regulations* and/or s. 81z of the *Commonwealth Public Service Act*; or, alternatively, by the operation thereon of s. 8 (*g*) of the *Acts Interpretation Act* 1901-1947. The regulations were an " instrument " within s. 46 (*a*) of the *Acts Interpretation Act*; so also was the new award. Each plaintiff retained the right (independently of the new award) of remaining on the maximum or other " peg " of the salary scale applicable to his office which he had acquired under the regulations and/or the *Commonwealth Public Service Act*; and when the new scales and intermediate figures were laid down by No. 74 each plaintiff, by virtue of such retained right, was and is entitled to be transferred to the appropriate corresponding figure. [He referred to *Martin* v. *Attorney-General* (1); *Patton* v. *Attorney-General* (2).]

(1) (1945) V.L.R. 91.

(2) (1947) V.L.R. 257.

Tait K.C. (with him *Gillard*), for the defendants. The new determination does no more than to prescribe minimum and maximum rates and increments for the officers to whom it applies. It neither expresses nor implies anything which would support the plaintiffs' argument. On the contrary, in view of its incorporation of reg. 22 of the *Repatriation* (*Staff*) *Regulations*, it should as a matter of construction, be destructive of the plaintiffs' claim. At any rate, for all that appears on the face of the determination, the plaintiffs would only be entitled, as from the date when it operated, to the minimum salary prescribed for the respective office. That would be the effect of the determination itself apart from the operation of s. 81z of the *Commonwealth Public Service Act*; but, in view of that section, it is not contended that the plaintiffs are not presently entitled to the higher salaries they were in fact receiving when the new determination came into operation. Otherwise, however, they are bound by the new determination read as in the defendants' submission it should be read.

Sholl K.C., in reply.

Cur. adv. vult.

April 5.

The following written judgments were delivered:—

LATHAM C.J. This is an action referred to the Full Court by *McTiernan* J. The plaintiffs are four medical officers now belonging to the Commonwealth Public Service and employed in the Repatriation Department. The defendants are the Commonwealth of Australia and the Commonwealth Minister of State for Repatriation. The plaintiffs are paid certain salaries as public servants. They claim that they are entitled to higher salaries by reason of a determination of the Public Service Arbitrator (No. 74 of 1947) made under the *Arbitration* (*Public Service*) *Act* 1920-1934. A question to be determined is whether officers who, when employed by the Repatriation Commission, were in receipt of a certain number of increments (determined by length of service in an office) in addition to the then minimum salaries of their offices, became immediately entitled under the determination, in addition to the new minimum salaries, to the same number of increments (of the amounts specified in the determination) as formerly. A distinct question is whether an officer who was in receipt of a maximum salary prior to the determination is entitled to the new maximum salary specified in the determination. An associated question which, however, has not been raised in the present case, is whether an officer who had

H. C. OF A. 1949.

ALLEN v. THE COMMONWEALTH.

Latham C.J.

served, for example, in an office for nine months, was entitled to an increment as for twelve months' service if he served an additional three months after the determination took effect.

Until the coming into operation of certain provisions of the *Commonwealth Public Service Act* (No. 1 of 1947) these officers were employees of the Repatriation Commission under the *Australian Soldiers Repatriation Act* 1920-1946 and were not members of the Commonwealth Public Service. Their salaries were fixed by regulations made under the last-mentioned Act—*Repatriation (Staff) Regulations*, S.R. 1941 No. 259 as amended from time to time. Regulation 15 provided that the Service should consist of four Divisions, and reg. 17 (1) provided that the limits of standard salary payable to an officer of the Second Division (all the plaintiffs are officers of the Second Division) should be the limits respectively specified in columns two and three of the Third Schedule to the regulations. Regulation 17 (2) provided that the amount which might, subject to the provisions of reg. 22, be paid to an officer of the Second Division by way of an increment of salary should be the amount specified in column four of the Third Schedule. Similar provisions applied to officers of the Third Division (reg. 18) and the Fourth Division (reg. 19).

Regulation 22, so far as relevant, provided as follows :—" (1) Increments of salary which are prescribed within the salary limits of any particular office shall be annual except where the Commission otherwise determines, and no increment shall accrue to any salary until the officer in receipt of the salary has received the salary for a period of twelve months. (2) The right to receive an increment in any year shall depend upon the good conduct, diligence and efficiency of the officer and his period of attendance for duty during that year. (3) If, in the opinion of the Deputy Commissioner, an officer is not entitled to receive an increment from the due date, the Deputy Commissioner shall forthwith notify the Commission of the circumstances, and the Commission may order that the officer be deprived of the increment for such time as the Commission considers justified." It is admitted that all the plaintiffs are qualified under the regulation to receive increments. It will be seen hereafter that Determination No. 74 of 1947 kept reg. 22 in operation in relation to the determination.

Regulation 109 provided that an officer might be deprived by the Repatriation Commission of pay by way of penalty for certain offences.

The *Commonwealth Public Service Act* 1947, s. 9, inserted s. 81z in the principal Act—the *Commonwealth Public Service Act* 1922-

1946. That section provided for the transfer of the employees of the Repatriation Commission to the Commonwealth Public Service. Provision was made for the giving of a certificate by the Chairman of the Commission to the Public Service Board specifying the classified offices in the service of the Commission, and the section further provided that upon the certificate being given the offices specified should become offices in the Commonwealth Public Service and that an office so specified should have allotted to it subject to the Act " the same salary or limits of salary as were allotted to it " in the service of the Repatriation Commission. Section 81z (3) provided that when it was certified that immediately before the date of the transfer of offices a person specified in the certificate was the occupant of an office that person should as from that date become the occupant of that office in the Commonwealth Service and should, " subject to this Act, be entitled to receive salary at the rate applicable to him immediately before the date of the transfer."

An association of Repatriation Department Medical Officers was formed and registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1946. A claim was made by the Association on behalf of Resident Medical Officers for alterations in salaries and a determination upon this claim was made by the Public Service Arbitrator on 29th January 1947—Determination No. 3 of 1947. By this determination it was ordered that the rates of pay should be as specified. The determination fixed a " range of salary " stated as—" minimum per annum £790; maximum per annum £1,012; rate of increment two of £36; three of £50." To these standard rates cost of living allowances were added. Clause 3 of the determination was as follows :—" Officers shall be eligible for incremental advancement at the rates specified . . . in accordance with the relevant provisions of the *Repatriation (Staff) Regulations*."

The amending *Commonwealth Public Service Act* 1947 was assented to on 14th March 1947. 1st September 1947 was fixed as the date of transfer of employees of the Repatriation Commission to the Commonwealth Service by proclamation under s. 9 of that Act, which inserted s. 81y in the principal Act.

On 30th July 1947 the Association made a claim for a variation of Determination No. 3 of 1947 so as to include all medical officers and to specify salaries for them. The Public Service Arbitrator made a determination (No. 74 of 1947) on 28th August 1947. This determination altered the rates of pay as fixed by the *Repatriation*

H. C. OF A. 1949.

ALLEN v. THE COMMONWEALTH.

Latham C.J.

(*Staff*) *Regulations* and was therefore a determination which was not in accord with the regulations of the Commonwealth relating to the salaries of the employees in respect of which it was made. Accordingly the determination was laid before Parliament: *Arbitration* (*Public Service*) *Act* 1920-1947, s. 22. It was not disapproved by either House and therefore came into operation at the expiration of thirty days from the time when it was laid before Parliament. The determination provided that unless disapproved by the Parliament it should come into operation on the expiration of thirty days after it had been laid before both Houses of the Parliament and should have effect on and from the beginning of the pay period ended on 7th May 1947. The result was that the determination came into operation on 16th November 1947 and had effect on and from 24th April 1947.

The determination assumed the form of a variation of Determination No. 3 of 1947. Clause 2 provided that the table of rates of pay in clause 1 of Determination 3 of 1947 (which related only to Resident Medical Officers) should be deleted and that another table should be inserted in its stead. The table set out the titles of offices and range of salary under the three headings—Minimum per annum; Maximum per annum; and Rate of Increment.

On 24th April 1947 (the date when the determination took effect) the salary of the plaintiff Dr. Allen under the regulations was £1,162, being a minimum salary of £1,012 plus three annual increments of £50. This was the maximum salary under the regulations for the office held by this plaintiff. Under the determination the minimum salary of his office was specified at £1,262, maximum £1,412 and rate of increment £50. Dr. Allen claims that he is entitled to the new maximum salary—£1,412. He is being paid £1,262—the new minimum. The salary of the plaintiff Dr. McKay was, when the determination took effect, the maximum of £1,062—being minimum salary £962 plus two annual increments of £50. He claims the new maximum salary of £1,412 which, under the determination, consists of the minimum salary of £1,262 plus three increments of £50. He is being paid £1,262—the new minimum. The salary of the plaintiff Dr. Hayes when the determination took effect was £864—consisting of minimum salary £720 plus four annual increments of £36. He claims the new minimum (£790) plus four increments, i.e. £962. He is being paid £912—which is more than his former salary but which, on the basis of the determination, includes only three increments. The salary of the plaintiff Dr. Knight when the determination took effect was £828,

consisting of minimum salary £720 and three annual increments of £36. He claims the new minimum (£790) plus three increments, two increments of £36 and one increment of £50, namely £912. He is being paid £862, which is higher than his former salary but which, on the basis of the determination, includes only two increments of £36. All these amounts are stated with reference to the date when the determination took effect and without reference to further increments earned by subsequent service.

The increments were not described as annual increments in Determination No. 74, but the salary scales specified in Determination No. 74 were inserted as a variation in Determination No. 3 of 1947, and clause 3 of that determination provided, as already stated, that officers should be eligible for incremental advancement at the rates specified in the salary scale set out in the determination in accordance with the relevant provisions of the *Repatriation (Staff) Regulations*. Regulation 22 (1) of those regulations provided for annual increments.

In the case of a medical officer appointed after the determination took effect, it is clear that his commencing salary would be the minimum salary and that he would be entitled (if not penalized for an offence) to advance by annual increments of the amounts stated in Determination No. 74 of 1947.

The questions in this case arise with respect to officers who were employees of the Commission and who are now members of the Commonwealth Public Service to whom the determination applies. They have completed varying periods of service in their present offices. They were entitled to and have received increments under the regulations in accordance with their relevant respective periods of service. They contend that under the determination they are entitled to the minimum salary of their office plus the increments which under the determination are appropriate to their period of service in those offices. The defendants agree that upon its true construction the determination alters minimum rates of salary, and they concede that all officers are entitled at least to the minimum salary therein specified for their office. But they further contend that the plaintiffs are not entitled to carry forward under the determination the benefit of their years of service so as to become entitled as a matter of right to increments under the determination calculated on the basis of past years of service as if they had been years of service completed after the determination.

The respective contentions may be illustrated by reference to the plaintiff Allen. His salary when the determination came into

H. C. OF A. 1949.

ALLEN v. THE COMMONWEALTH.

Latham C.J.

operation was £1,162. It included three increments of £50. He had reached the maximum salary for his office. The plaintiff contends that the determination fixed the salary of the office at £1,262 and provided for three increments of £50, reaching a salary of £1,412. It is contended for him that he became entitled under the determination to £1,412, that is he should be treated as entitled to the minimum salary plus three increments as was the case under the staff regulations. It is also argued that he had reached the maximum salary for his office under the regulations and that he became entitled to the new maximum under the determination. The defendants, on the other hand, contend that on the true construction of the determination he became entitled only to the minimum salary of £1,262, and that he will, by reason of the incorporation in the award of reg. 22 of the *Repatriation (Staff) Regulations*, become entitled to the maximum salary of £1,412 only if he serves for another three years, so as to earn three annual increments of £50. In this case an officer on the maximum salary under the regulations would, according to this contention, be entitled to be paid the minimum salary under the determination, which happens to be higher than his former maximum salary. In the case of other officers who had not served long enough to earn all the increments for which the regulations provided, the effect of applying the proposition for which the defendants contend would be that where the new minimum salary was less than the salary of which they were in actual receipt at the time when the determination came into operation they would be entitled under the determination only to a lower salary than that which they formerly received. (All the new minimum salaries are higher than the former minimum salaries.) The Public Service Board has not in practice applied such a rule, but has paid and is willing to pay to all officers salaries which are not lower than the salaries which they were formerly receiving. The defendants' contention is that though the only salary to which an officer is entitled under the determination is the minimum salary provided for his office, the Public Service Board may in its discretion, if it thinks fit, pay a higher salary, at least up to and possibly beyond the maximum salary for which the determination provides. Thus, for example, the plaintiff Dr. Hayes, who had earned four increments of £36 added to his salary of £720, was receiving £864 when the determination took effect. The new minimum salary for his position (Medical Officer Branch Office) was £790 with two annual increments of £36 and four of £50. He therefore claims that he is entitled to £790 plus four increments, two of £36 and two of £50, bringing his salary up to £962. The defendants, on the other

hand, contend that he is entitled only to the minimum salary of £790, although the Public Service Board is in fact prepared to pay him, in the exercise of its discretion, a salary of £912—which is the salary (not less than his previous salary) which is nearest to the salaries specified in the determination for his office. Thus he would, on this basis, receive a higher salary than before, but it would include only three increments (under the new scale), whereas he was entitled to four increments under the previous scale.

The decision of the Public Service Board to pay under the determination rates of salary higher than the minimum salary was apparently based upon the view that s. 81z of the *Commonwealth Public Service Act* preserved existing rights and prevented any reduction of salaries which had formerly been payable. It is true that s. 81z provides that officers shall have allotted to them the same salary or limits of salary as were allotted to them in the service of the Repatriation Commission, and that officers shall be entitled to receive salary at the rate applicable to them immediately before the date of transfer to the Commonwealth Public Service. But these provisions do not exclude the jurisdiction of the Public Service Arbitrator. Reference has already been made to s. 22 of the *Arbitration (Public Service) Act*, which allows, subject to the conditions therein provided, the making of determinations which are inconsistent with statutes of the Commonwealth. Thus there is no doubt that by a determination of the Public Service Arbitrator the salaries of the transferred officers could, if the arbitrator thought fit, be not only increased but reduced. Accordingly, whether or not the Public Service Board can be regarded as having a discretion to pay higher salaries than those specified in a determination, the proposition for which the defendants as a matter of law must contend is that all the transferred officers are under the determination *entitled* only to the minimum salary specified for their respective offices and that they must serve for further annual periods before they can become entitled under the determination to any increments.

The determination might have provided for salaries in accordance with length of service in a particular office, e.g. £1,000 first year, £1,050 second year, £1,100 third year. This, however, has not been done. The determination provides for the payment of minimum salaries with annual increments. The precise terms of reg. 22 of the *Repatriation (Staff) Regulations* are: "No increment shall accrue to any salary until the officer in receipt of the salary has received the salary for a period of twelve months." When reg. 22 is applied to the salaries specified in the determination the increments to which reg. 22 applies must be taken to be the increments specified

H. C. OF A. 1949.

ALLEN v. THE COMMONWEALTH.

Latham C.J.

in the determination and not any past increments. The increments are increments which accrue to "any salary." The salary to which reference is here made must, I think, be the salary to which the scale in the schedule provides that an increment may be added. In the case of the plaintiff Allen, for example, the only salary provided in respect of his office is a minimum of £1,262, a maximum of £1,412, with increments of £50. Thus the only salary to which under the determination increments can be added is the salary for which the determination provides, namely £1,262. Regulation 22 provides that no increment shall accrue to any salary until the officer in receipt of the salary has received the salary for a period of twelve months. Accordingly, Dr. Allen cannot, under this provision, claim that an increment has accrued to his salary of £1,262 until he has received the salary of £1,262 for a period of twelve months.

The contrary view is that, in the case of Dr. Allen, the determination really provides for four salaries—£1,262 for the first year; £1,262 plus £50, that is £1,312, for the second year; £1,312 plus £50, that is £1,362, for the third year; and the maximum £1,412, that is £1,362 plus £50, for the fourth and subsequent years of service in the relevant office; and that, as Dr. Allen has served for more than four years in his office, he is entitled to all the increments for which the determination provides. It may be conceded that the determination in this case may be read as providing for four salaries. But it is still the case that the determination speaks only with respect to the future. It makes no reference, directly or indirectly, to the past. It preserves no accrued rights. There is, in my opinion, no ambiguity in the determination. It provides simply that certain minimum salaries shall be attached to certain offices, with specific minimum and maximum salaries, and increments accruing to those salaries only after an officer shall have served in an office for one year, two years, &c., as the case may be. The determination might have provided that officers who had already become entitled to increments under the regulations or otherwise should be entitled to the same number of increments under the determination or that length of service should be carried on into the period after the determination. But the determination contains no such provision, and I do not see how such a provision can be implied.

It is not necessary in this case to decide whether the Public Service Board is entitled, when a range of salary with regular increments and a maximum is fixed by a determination of the Public Service Arbitrator, to apply public moneys at will in the

payment of higher or more frequent increments or in paying salaries beyond the maximum.

For the reasons which I have stated the action should be dismissed.

DIXON J. In this suit four medical officers of the Repatriation Department seek declarations of right which will fix the amounts of their respective standard annual salaries.

They are entitled under an amended determination made by the Commonwealth Public Service Arbitrator to standard annual salaries to which the cost of living adjustments are added. The amended determination fixed ranges of salaries for a list of offices which it named including offices which the plaintiffs occupied. This was done by fixing for each office an annual minimum and an annual maximum salary and a rate of increment. The addition of a given number of increments would bring the annual minimum salary up to the annual maximum salary. Before the amended determination came into operation the rates of remuneration of the plaintiffs were governed by an instrument similarly fixing for each of the offices occupied by the plaintiffs respectively an annual minimum and an annual maximum salary and a rate of increment, The increments were annual. By the date as from which the determination became applicable in the ascertainment of the plaintiffs' remuneration, their salaries under the previous instrument had all advanced by annual increments from the minimum rates prescribed. Some had advanced through the salary range to the maximum rates; some not so far. It is hardly necessary to say that the new minimum and maximum rates for standard salaries fixed by the amended determination are higher than the old. The plaintiffs' contention is that in applying the new rates to them they should be treated as having already advanced in the same way through or within the new salary range prescribed for the offices they occupy. Thus if a plaintiff had advanced through the old salary range belonging to his office by increments to the maximum rate, he does not, so the plaintiffs say, begin in the new salary range at the minimum but he goes from the old maximum rate to the new maximum rate. If he had, by what the determination calls incremental advancement, reached the second increment, so that his annual standard salary consisted under the former instrument of the minimum rate and two increments, then under the new determination his salary would be calculated on the same footing, namely by adding to the new minimum rate two increments at the new rate of increment. Presumably if an officer had become entitled to one or more increments and had also served some months of a year at the end of

H. C. OF A. 1949.

ALLEN v. THE COMMONWEALTH.

DIXON J.

which he would have received another increment, the contention would apply to him so as to place him in the same position under the new determination and give him the same number of increments to the new rate of salary at once and the next increment at the same future date, namely at the end of the year some months of which he had already served.

The Commonwealth contests this view of the application of the new determination and maintains that the new range of salaries simply provides for each office a lower and an upper limit and a rate of increment; where the officer is placed within the range is a matter for the Public Service Board. According to the Commonwealth, so far as the plaintiff's legal rights under the amended determination are concerned, they cannot claim to be placed in receipt of more than the new minimum. But the application of the Commonwealth's interpretation of the amended determination to the plaintiffs is so to speak intercepted and limited by a further feature of the case which is independent of the determination. That feature is found in the circumstance that pending the amended determination the plaintiffs were transferred from the employment of the Repatriation Commission which they had been serving to the Department of Repatriation, that is to the Public Service. This was done by or under Act No. 1 of 1947, which inserted in the *Commonwealth Public Service Act* 1922-1946 ss. 81Y and 81Z. The latter section in effect entitles an officer so transferred to a salary at the rate applicable to him immediately before the date of the transfer. In consequence of this provision the Commonwealth does not contend that the Public Service Board could place an officer upon a new minimum if it would result in his receiving less than his old salary under the Commission.

From this account of the question between the parties it is now necessary to turn to the instruments containing the materials upon which the question must be decided.

At the time as at which the amended determination took effect the rates of salary and of increments and the relevant conditions affecting the plaintiffs were contained in the *Repatriation (Staff) Regulations*: S.R. 1941 No. 259 as affected by S.R. 1944 No. 11, S.R. 1946 No. 16 and No. 100. In the third schedule to these regulations the standard salaries of the various offices of the second division of the Repatriation Commission's staff are set out. The offices held by the four plaintiffs were all within the second division. They held the following offices respectively:—Dr. Allen, Senior Medical Officer South Australia; Dr. McKay, Assistant Senior Medical Officer Victoria; Dr. Hayes, Medical Officer Branch

Office; Dr. Knight, Medical Officer Branch Office. The third schedule showed the standard salaries for these offices thus :—

Designation and Location of Office	Standard Salary Range		
	Minimum	Maximum	Increments
Column 1	Column 2	Column 3	Column 4
	Per annum £	Per annum £	Per annum £
Senior Medical Officer South Australia	1,012	1,162	50
Assistant Senior Medical Officer Victoria	962	1,062	50
Medical Officer Branch Offices	720	960	£36 where rate of salary is under £864. £48 where rate of salary is £864 or over.

The following regulations provided for the application of this schedule :—" 17—(1.) The limits of standard salary payable to an officer of the Second Division shall be the limits respectively specified in Columns 2 and 3 of the Third Schedule to these Regulations opposite to the designation of his office in Column 1 of that Schedule. (2.) The amount which may, subject to the provisions of regulation 22 of these Regulations, be paid to an officer of the Second Division by way of an increment of salary shall be the amount specified in Column 4 of the Third Schedule to these Regulations opposite to the designation of his office in Column 1 of that Schedule." " 22—(1.) Increments of salary which are prescribed within the salary limits of any particular office shall be annual except where the Commission otherwise determines, and no increment shall accrue to any salary until the officer in receipt of the salary has received the salary for a period of twelve months. (2.) The right to receive an increment in any year shall depend upon the good conduct,

H. C. OF A. 1949.

ALLEN v. THE COMMONWEALTH.

Dixon J.

diligence and efficiency of the officer and his period of attendance for duty during that year. (3.) If, in the opinion of the Deputy Commissioner, an officer is not entitled to receive an increment from the due date, the Deputy Commissioner shall forthwith notify the Commission of the circumstances, and the Commission may order that the officer be deprived of the increment for such time as the Commission considers justified." At the date as at which the amended determination took effect Dr. Allen was in receipt of a standard salary of the maximum amount of £1,162, having received three increments; Dr. McKay was in receipt of a standard salary of the maximum amount £1,062, having received two increments; Dr. Hayes was in receipt of a standard salary of £864, having received four annual increments of £36 upon the minimum salary of £720; and Dr. Knight was in receipt of a standard salary of £828, having received three increments of £36. The date as at which the amended determination took effect was 24th April 1947. But it did so retrospectively, having been actually made, as amended, on 28th August 1947 and not coming into binding force until 16th November 1947. In the meantime, namely on 1st September 1947, the transfer from the Repatriation Commission to the Public Service took effect. The amended determination states that the rates of pay and other conditions of service should be as in a table it proceeds to set out. So far as concerns the offices the plaintiffs occupy, the table is as follows :—

RATES OF PAY

Office	Grade	Range of Salary		
		Minimum	Maximum	Rate of Increment
		Per annum £	Per annum £	£
Senior Medical Officer South Australia		1,262	1,412	50
Assistant Senior Medical Officer Victoria		1,262	1,412	50
Medical Officers Branch Office		790	1,062	2 of 36 3 of 50

All this appears in clause 1 (1) of the determination. Correcting a clerical error, clause 3 is as follows :—" 3 Increments. Officers shall be eligible for incremental advancement at the rates specified in clause 1 (1) in accordance with the relevant provisions of the *Repatriation (Staff) Regulations*."

The case for the plaintiffs is that the table in the amended determination meant to do no more than write in, opposite the names of their respective offices, new and higher figures and that these would be applicable to the existing circumstances of each individual occupying one of those offices just as the figures replaced by the new amounts had been. Thus, as Dr. Allen had passed by incremental advancement, to use the expression employed by the determination, to the maximum salary named in the third schedule to the Regulations, so the new maximum salary named for his office in the table in clause 1 (1) of the amended determination applied to his case. In lieu of the maximum standard salary of £1,162 per annum he would thus receive the new maximum standard salary £1,412. As Dr. McKay had passed by incremental advancement to the old maximum standard salary for his office of £1,062 the new maximum for that office of £1,412 would, according to the plaintiffs, apply to him. As Dr. Hayes had obtained four increments upon the former minimum standard salary for his office of £720 he, so it was said, stood in a position entitling him under the amended determination to a standard salary consisting of the new minimum for his office of £790 with four increments, two of £36 and two of £50, that is £962. Another increment would have accrued to him on 4th January 1948 under the third schedule to the Regulations. Accordingly it is claimed that on that date he became entitled to a further increment under the amended determination. As Dr. Knight's incremental advancement had put him in a position of receiving a standard salary composed of the minimum for his office and three increments, an annual amount of £828, his salary under the amended determination would, according to the plaintiffs, be similarly composed of the new minimum of £790 and three increments, two of £36 and one of £50, an amount of £912.

All this is denied on the part of the Commonwealth as based on an interpretation of the amended determination which there is nothing in the text to justify. The case for the Commonwealth is that the amended determination means only to prescribe minimum and maximum rates and increments. It says nothing and implies nothing as to the place within the salary range where any individual will stand as on the date from which it operates. On the contrary clause 3 of the amended determination incorporates reg. 22 and that

H. C. OF A. 1949.

ALLEN v. THE COMMONWEALTH.

Dixon J.

regulation, so the Commonwealth says, in terms disentitles an officer in receipt of a salary from any increment until he has received the salary for twelve months. The salary must, says the Commonwealth, mean the minimum rate. In its application of reg. 22, required by clause 1 (1), to the new rates, so the Commonwealth contends, reg. 22 means that the then existing occupants of the respective offices should receive the new minimum at first. Accordingly if it were not for the controlling effect of s. 81z of the *Commonwealth Public Service Act* 1922-1947 (inserted by No. 1 of 1947) the Commonwealth might have placed Dr. Allen upon the minimum standard salary of his office or £1,262 ; Dr. McKay upon the new minimum standard salary of his office or £1,262 ; Dr. Hayes upon the new minimum standard salary of his office or £790, that is £74 less than he was receiving ; Dr. Knight upon the new minimum standard salary of his office or £790, £38 less than he was receiving. I am not prepared to accept so much of the argument for the Commonwealth as depends on the operation ascribed to reg. 22 in its application to the amended determination. Clause 3 of the amended determination gives the provisions of reg. 22 an application with reference to the eligibility of officers for incremental advancement at the rates of increment specified in the new table. But that appears to me to mean that the provisions of reg. 22 shall be used for the purpose of determining an officer's title to future increments. I do not think that it is concerned with the ascertainment of the immediate salary to which the new amended determination entitled an officer as on the date of its taking effect. Clause 3 incorporates reg. 22 by reference for the purpose of determining " eligibility for incremental advancement." That means advancement in the future from the salary to which the amended determination entitled an officer as on the date of its taking effect. If it were correct that an intention was disclosed by clause 1 (1) and the table it contains to prescribe for the occupant of an office a new initial salary calculated on the basis of the incremental advancement he had already made under the Regulations, I would see nothing in the operation clause 3 gives to reg. 22 inconsistent with that intention. In that case reg. 22 would have served its purpose in the determination of the incremental advancement the officer had made in the past under the Regulations. It would have been used to fix his position. Its only use resulting from its incorporation by clause 3 would be in the determination of his future advance from that position.

But what appears to me to be the crux upon which the case hangs is the absence of anything in the amended determination

which expresses any intention upon the question whether or not the new table is, so to speak, to be fitted upon the occupants of the various offices in their then respective states of incremental advancement. There is nothing in the amended determination which adverts in any way to the difference between an officer who had obtained some or all of the increases of salary by which he would progress through the old salary range and an officer who had obtained none of them. There is only a bare statement that the rates of pay and other terms and conditions of service should be as set out and then the new table. For the plaintiffs to make out their claim that the amended determination meant the new table to be applied to the officers of the service on the footing that the stages of former incremental advancement made by each should be recognized as the basis for calculating the new initial standard salaries, it is necessary for them to point to some sufficient indications in the instrument of such an intention or to rely upon necessary implication. In the instrument itself I cannot find any indications from which the intention could be safely deduced. Within the salary ranges there are no subdivisions, grades or steps amounting to a distinct status or position which an officer might be considered as occupying, and that is true equally of the old third schedule and of the new table. There is nothing but a standard salary range from minimum to maximum and a money rate of increment. Regulation 22 dealt with no more than the conditions of the officers' qualified right or expectation of increment.

To my mind the plaintiffs are forced to rely upon an implied intention. It must be implied if at all from the structure of the table, the existence and structure of the previous schedule, the extent and nature of the service including the certainty that officers would have already moved in different degrees within the old limits of standard salary, the general circumstances surrounding the making of the determination and perhaps an accepted administrative or arbitral practice, if any there were, in applying awards, determinations and tables similarly constructed. As to this last possible element investigation showed that for over thirty-five years similarly constructed tables have been used for various purposes in the Public Service. The same question must have arisen before when changes in the salary ranges have been made. But the plaintiffs were not able to show any practice in applying the instruments in the Public Service which would support the implication they seek, though it was claimed that the Repatriation Commission had applied the schedule and table in conformity with the interpretation for which the plaintiffs contend.

H. C. OF A. 1949. ALLEN v. THE COMMONWEALTH. Dixon J.

An examination of the circumstances surrounding the making of the determination fails to reveal more than that the amended determination was in the end the result of agreement. But from that I think nothing can be deduced except that both parties were prepared to accept the table *quantum valeat.*

To imply an intention of the kind now in question there must be a reasonable degree of certainty that it was so intended or that it is a necessary or rational consequence to be deduced from the nature of the instrument, the provisions it contains and the situation in which the parties concerned stood.

After consideration I have come to the conclusion that in the materials before us no sufficient grounds can be found for implying the intention upon which the plaintiffs' case depends.

Little is to be gained by discussing the remaining considerations urged in support of an implication. They consisted really in a claim that a full and practical understanding of the situation upon which the determination was meant to operate and of the character of the determination was the source of an inference in favour of the intention sufficiently vehement to warrant the making of the implication. It is not difficult to see how the plaintiffs come to place such a complexion upon the arbitral instrument. But it is to my mind a speculative inference resting on no firm ground. There is no cogent logical basis for it : nothing to warrant a legal implication. I think that the suit should be dismissed. But having regard to the issues raised by reason of par. 10 of the defence and the matters raised before *McTiernan* J. by the defendants and to the nature and source of the controversy I think that we should not award costs to the defendants.

WILLIAMS J. I have read and substantially agree with the reasons for judgment of the Chief Justice and of my brother *Dixon* and have nothing to add. In my opinion the action fails and should be dismissed.

Judgment for defendants. No order as to costs.

Solicitors for the plaintiffs : *Arthur Phillips & Just.*

Solicitor for the defendants : *H. F. E. Whitlam,* Crown Solicitor for the Commonwealth.

E. F. H.