BETWEEN:

PAUL ZAMULINSKI .....SUPPLIANT;

1957
Sept. 30
Oct. 1-2

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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Oct. 9

Crown—Petition of Right—Civil Service Act, R.S.C. 1927, c. 22, ss. 5, 38—Civil Service Act, R.S.C. 1952, c. 48, ss. 5, 19—Civil Service Regulations approved by Order in Council P.C. 5700, dated November 17, 1949—Section 118 of Civil Service Regulations added by Order in Council P.C. 1954-1, dated January 7, 1954—Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(d)—Appointment of servants of Crown at pleasure—Right of civil servants to have opportunity, prior to dismissal, of presenting side of case to senior officer—Denial of right a cause of action for damages.

The suppliant was a temporary employee of the Post Office Department as a postal clerk in the Post Office at Saskatoon in Saskatchewan. On September 9, 1954, the Postmaster at Saskatoon informed him by letter that on the basis of his being unable "to properly meet the physical requirements" of his classification he was to be released from the service and his services would not be required after September 25 and he was struck off strength on October 7, 1954. The suppliant complained of his dismissal and, after voluminous correspondence by himself and others on his behalf seeking relief, brought a petition of right in which he complained that his dismissal was wrongful and sought (a) a declaration that his employment in the Civil Service of Canada was still continuing and an order for wages, (b) a declaration that he was wrongfully dismissed and unstated damages and (c) damages for not having been given, prior to his dismissal, an opportunity to present his side of the case to a senior officer of the department nominated by the deputy head. The suppliant's case was based on section 118 of the Civil Service Regulations which provided that no employee should be dismissed, suspended or demoted without having been given an opportunity to present his side of the case to a senior officer of the department nominated by the deputy head and on the fact that he had not been given the opportunity to which he was entitled under the section.

Held: That section 19 of the *Civil Service Act* puts the long standing rule that servants of the Crown, in the absence of law to the contrary, hold office during pleasure into statutory effect and that the suppliant has no right to the declaration sought by him that his employment in the Civil Service of Canada is still continuing and that he is entitled to wages.

2. That the suppliant did not have a contract of employment in the Post Office, and that even if he had been a permanent employee, his appointment, under section 19 of the Act, was at pleasure, which meant that he could have been dismissed without cause or notice and even arbitrarily, and that he has no right to damages for wrongful dismissal in the ordinary sense of the term.

3. That section 5 of the *Civil Service Act* gives the Civil Service Commission a wide discretion to make regulations "as it deems necessary

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or convenient" for carrying out the Act and that section 118 of the Civil Service Regulations was within its powers.

4. That section 118 of the Regulations and section 19 of the Act must be read together and effect given to each.

5. That section 118 of the Regulations gives a civil servant whom it is proposed to dismiss the right, prior to his dismissal, to have an opportunity to present his side of the case to a senior officer of the department nominated by the deputy head and that when that opportunity has been given to him the right to dismiss him at pleasure provided by section 19 of the Act is in full force and effect.

6. That the suppliant was not given the right to which he was entitled under section 118 of the Regulations and that this gave him a valid claim against the Crown arising under a regulation made by the Governor in Council within the meaning of section 18(1)(*d*) of the *Exchequer Court Act*.

7. That since the suppliant was deprived of a right to which he was legally entitled he has a cause of action and a right to damages. *Ashby v. White* (1703) 2 Ld. Raym. 938, 1955 applied.

8. That the suppliant is entitled to damages in the sum of $500.

PETITION OF RIGHT.

The petition was heard by the President of the Court at Saskatoon.

E. N. Hughes for suppliant.

G. H. Yule, Q.C., and *D. H. W. Henry, Q.C.*, for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (October 9, 1957) delivered the following judgment:

In his petition of right the suppliant, who was employed as a postal clerk in the Post Office at Saskatoon in Saskatchewan but was dismissed from his employment, complains that his dismissal was wrongful and seeks in his amended prayer for relief

(a) A declaration that his employment in the Civil Service of Canada is still continuing and an order for wages.

(b) A declaration that he was wrongfully dismissed and unstated damages therefor.

(c) Damages for not having been given, prior to his dismissal, an opportunity to present his side of the case to a senior officer of the department nominated by the deputy head.

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Certain facts are not in dispute. On August 6, 1951, the Postmaster at Saskatoon assigned the suppliant to the position of postal clerk at the Post Office at Saskatoon with effect from August 13, 1951, the assignment being made from an eligible list established in Ottawa on which the suppliant's name appeared.

The Civil Service Commission at Ottawa accordingly issued a certificate for his appointment as a postal clerk, grade 2, at an initial salary of $2,028 per annum for temporary employment for a period not exceeding September 30, 1951. The temporary employment was authorized under section 38 of the *Civil Service Act*, R.S.C. 1927, chapter 22. Pursuant to this section the period of employment was extended from time to time, the last extension, so far as the suppliant was concerned, being to March 31, 1955.

On September 9, 1954, Mr. L. H. Duggleby, the Postmaster at Saskatoon, wrote to the suppliant as follows:

> I am today advised by the Department that on the basis of your being unable to properly meet the physical requirements of your classification you are to be released from the Service.
>
> You are therefore notified that your services will not be required after Saturday, the 25th instant.

and caused this letter to be delivered to the suppliant by hand. Mr. Duggleby wrote this letter pursuant to instructions contained in a letter, dated September 7, 1954, from Mr. R. H. MacNabb, the Director of Operations in the Postal Services Division of the Post Office Department at Ottawa. In this letter Mr. MacNabb agreed with Mr. Duggleby's recommendation against the suppliant's retention in the service, contained in a letter from him, dated July 7, 1954, and instructed him to give the suppliant two weeks' notice of release on the basis of being unable to properly meet the physical requirements of his classification and to furnish the Department with the usual separation from the service form. After Mr. Duggleby had caused his letter of September 9, 1954, to be delivered to the suppliant he notified the Director of Operations on a form headed "Separation from the Service" that the reason for the suppliant's separation was that he was "unable to properly meet the physical requirements of classification" and that the last day worked by him was September 25, 1954. After a grant of compensatory time and annual leave the suppliant was struck off strength on October 7, 1954.

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The suppliant immediately complained of his dismissal and a voluminous correspondence took place between the suppliant on the one hand and several persons on the other, such as the Chairman of the Civil Service Commission, the Deputy Postmaster General and the Department of Labor, all at Ottawa, and Mr. Duggleby at Saskatoon. Other persons also wrote on the suppliant's behalf. For example, there was correspondence between Mr. R. R. Knight, then Member of Parliament for Saskatoon and the Chairman of the Civil Service Commission, and the Postmaster General, between the Army and Navy Veterans and the Chairman of the Civil Service Commission and the Postmaster General, and between the Saskatoon firm of Moxon and Company and the Deputy Postmaster General. Finally, there was lengthy correspondence between the suppliant's solicitors and the Civil Service Commission and the Deputy Postmaster General. The correspondence extended from September 17, 1954, to June 8, 1956, but the Post Office Department did not recede from its position and the suppliant then brought his petition on June 22, 1956.

The suppliant's case is based on section 118 of the Civil Service Regulations which provides as follows:

116. No employee shall be dismissed, suspended or demoted without having been given an opportunity to present his side of the case to a senior officer of the department nominated by the deputy head.

and his complaint is that he was dismissed without having been given an opportunity to present his side of the case to a senior officer of the department nominated by the deputy head.

The Civil Service Regulations, hereinafter called the Regulations, were made by the Civil Service Commission under the authority of section 5 of the *Civil Service Act*, providing as follows:

5. The Commission may make such regulations as it deems necessary or convenient for carrying out the provisions of this Act, including regulations governing the performance by the Commission of its own duties hereunder.

2. All such regulations shall be subject to the approval of the Governor in Council and shall be published in the *Canada Gazette*.

This section was carried forward into section 5 of the *Civil Service Act*, R.S.C. 1952, chapter 48, reading as follows:

5. (1) The Commission may make such regulations as it deems necessary or convenient for carrying out this Act, including regulations governing the performance by the Commission of its own duties hereunder.

(2) All such regulations are subject to the approval of the Governor in Council.

The Civil Service Regulations were originally approved by Order in Council P.C. 5700, dated November 17, 1949, and amended from time to time. Section 118 was added by Order in Council P.C. 1954-1, dated January 7, 1954, and was in effect at the date of the suppliant's dismissal.

It is also necessary to keep in mind section 19 of the *Civil Service Act* which provides in part as follows:

19. Except where otherwise expressly provided, all appointments to the Civil Service shall be upon competitive examination under and pursuant to this Act, and shall be during pleasure; . . . .

On the evidence before me I find as a fact that prior to his dismissal from the service the suppliant was not given an opportunity to present his side of the case to a senior officer of the department nominated by the deputy head but whether this fact gives him any cause of action in view of the fact that his appointment was at pleasure is the basic issue in this case.

Before I proceed to consider it I should refer to the controversial questions of fact raised by the witnesses at the trial, even although, strictly speaking, the question whether there were valid grounds for dismissing the suppliant is not before me for determination in view of the fact that under section 19 of the Act his employment was at pleasure and he could, consequently, be dismissed without any grounds.

When the suppliant received the letter of September 9, 1954, it came as a shock to him and he thought that he was being improperly dismissed. He explained that a war disability from which he had suffered had recurred when he was working at the Post Office and that on January 26, 1954, he had a seizure in his back and was admitted to a D.V.A. hospital. He was there for 10 days and had a cast on for 10 weeks after that, but reported back to duty on May 29, 1954, and remained on full duty until his dismissal. Prior to the receipt of the letter he had not received any indication of the possibility of his release from the service for being unable to meet the physical requirements of his classification. He had had a discussion with Mr. Duggleby late in 1953 who then told him that he was recommending his release because he was not capable of doing city sortation but there had not been any mention of his physical

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classification. After he got the letter he did not discuss it with anyone in the office. Mr. Appleton, his supervisor, knew his condition and had not said anything about it to him and he believed that Mr. Duggleby thought that he was physically capable of doing his work. He was doing the same work as the other postal clerks in city sortation and doing as much and as good work as they. The suppliant complained that prior to his dismissal he was not given any opportunity to present his side of the case to a senior officer of the department nominated by the deputy head and his evidence that he had not been given such opportunity is uncontradicted. He felt that he was capable of doing his work and wanted to convince a senior officer that he was able to carry it.

The failure to give him the opportunity to which he considered himself entitled under section 118 of the Regulations engendered in him a deep feeling of grievance, the intensity of which is manifest in his lengthy correspondence.

Mr. Duggleby gave his account of why the suppliant came to be dismissed. He was first assigned to the sorting of letters for outgoing mail and later transferred to city sortation. In the meantime, he had been tried in the registration, money order and postage stamp branches but, according to his supervisors, his performance there had not been quite average. Mr. Duggleby said that he was unable to learn city sortation, his capacity being much below the average. He spoke to the suppliant repeatedly urging him to learn city sortation but his reply was that he could not. On September 5, 1953, he wrote to Mr. MacNabb, the Director of Operations, reporting the suppliant's inability to master sortation and expressing the opinion that he should be advised that unless his services improved during the coming three months consideration would be given to his release from the service. On September 11, 1953, Mr. R. H. MacNabb wrote to Mr. Duggleby concurring in his recommendation. Mr. Duggleby read his letter of September 5, 1953, to the suppliant, who claimed that the statements in it were all wrong and that he had been performing excellent duties. On September 12, 1953, Mr. Duggleby wrote to the suppliant putting him on probation for three months and informing him that during that period he would be required to improve his knowledge and practice of sortation of mail

for city deliveries and that, failing such improvement, consideration would be given to his release from the service. In December, 1953, Mr. G. Appleton, the suppliant's supervisor, reported that the suppliant was unable to take his sortation test because of his physical condition and had refused to take a miniature one on medical grounds. On December 31, 1953, Mr. Duggleby wrote again to the Director of Operations reporting that the suppliant had made no improvement in his services and stating that it was evident that he was determined not to do manipulative duties and hoped that if he maintained his attitude stubbornly he would eventually be assigned to some type of bookkeeping or desk work. In this letter he recommended that the suppliant be released as being unsuitable for continued employment in the Postal Service. On February 3, 1954, the Director of Operations informed Mr. Duggleby that the suppliant should be given until July 1, 1954, to pass a case examination, otherwise consideration would be given to releasing him from the service and on February 5, 1954, Mr. Duggleby wrote to the suppliant accordingly. At the time, the suppliant was in hospital on sick leave. On May 29, 1954, the suppliant reported back for duty and on June 23, 1954, passed his sortation test. But this did not satisfy Mr. Duggleby. On July 7, 1954, he wrote again to the Director of Operations, enclosing reports from Mr. G. Appleton and Mr. W. R. Van Veen. Mr. Appleton's report was that neither the quantity nor the quality of the suppliant's work had improved, that his normal output was far below the average of the staff, that his attitude to the work and other members of the staff was not satisfactory, that his physical condition appeared to be not fit to perform the duties required of his position, that the effect on the rest of the staff was bad, that they resented having to work overtime, part of which was caused by having to carry the suppliant, and he recommended the suppliant's immediate release. Mr. Van Veen's report was that the suppliant's physical condition was not improving and he was unable to properly perform the duties of his position, that his work was mediocre and that his continued employment was having a detrimental moral effect on the staff and he recommended that unless his physical condition improved he be demoted or serious consideration be given to his release

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from the service. On the basis of these reports and his own comments on the physical condition of the suppliant, Mr. Duggleby said that he could not recommend his retention in the service. On September 7, 1954, the Director of Operations wrote to Mr. Duggleby, as I have already stated, and then Mr. Duggleby wrote the letter of September 9, 1954, to which I have referred, and had it delivered to the suppliant.

Mr. Duggleby's statement was generally supported by Mr. G. Appleton, the suppliant's immediate superior, Mr. R. L. Lane, a postal clerk, and Mr. W. R. Van Veen, Mr. Duggleby's assistant. Mr. Appleton and Mr. Van Veen each confirmed the statements in the reports which they had made to Mr. Duggleby which he forwarded to the Director of Operations with his letter of July 7, 1954.

I do not attempt to make any decision on the controversial questions referred to beyond saying that the evidence before me does not support the reason for the suppliant's dismissal assigned in the letter of September 9, 1954, namely, that he was unable to properly meet the physical requirements of his classification. I have already referred to the suppliant's emphatic statement that he was able to meet them. He denied the truth of statements to the contrary made by Mr. Duggleby and Mr. Appleton. His assertion of his physical fitness is supported by other evidence. For example, the annual efficiency report of August 26, 1953, signed by Mr. Duggleby, contains the statement that the suppliant was physically fit to carry out the necessary duties. And Mr. Duggleby admitted on his cross-examination that he believed that on September 9, 1954, the suppliant was physically fit to carry out the necessary duties if he was willing to do so and he agreed with the suppliant in his statement that he was then physically fit. It was his opinion that on September 9, 1954, the suppliant was able to perform his duties if he was willing to do so. And on his re-examination he repeated his opinion that the suppliant had the necessary ability and physical capacity to perform his duties. A similar opinion was expressed by Mr. Appleton. On his cross-examination he admitted that he thought that the suppliant could have done his full work if he had wanted to. He mentioned that at times he noticed him walking on the street and did not think that there was anything wrong

with him. He noticed a steady improvement in his physical condition between July 7, 1954, and September 9, 1954, and thought, as a layman, that on September 9, 1954, the suppliant was in as good physical condition as he was himself and there was nothing wrong with his own condition. Mr. Lane said that the men who were working with the suppliant figured that he was capable of doing his job but was not doing it. He thought that the suppliant's physical condition was improving. And Mr. Van Veen also admitted on his cross-examination that he thought that the suppliant was capable of doing postal clerk work if he wanted to do it. Indeed, if I had been called upon to decide the matter I would have found on the evidence that on September 9, 1954, the suppliant was able to meet the physical requirements of his classification and that the reason for the suppliant's dismissal assigned in the letter was not a true one. It is, therefore, easy to understand the suppliant's sense of grievance for he felt that if he had been given an opportunity pursuant to section 118 of the Civil Service Regulations to present his side of the case to a senior officer nominated by the deputy head he would have been able to convince him that the reason given for his dismissal was not a true one and the likelihood is that he would have been able to do so. Whether that would have prevented his dismissal in view of the fact that his appointment was at pleasure is another matter. His complaint is that he was not given the opportunity to which he considered himself legally entitled.

Here I may, I think, properly interject the opinion that the Post Office Department at Ottawa has only itself to blame for the unfortunate situation that has arisen. If the Deputy Postmaster General had obeyed the requirements of section 118 of the Regulations and nominated a senior officer of the department and given the suppliant an opportunity to present his side of the case to him before the dismissal went into effect, as he ought to have done, the likelihood is that the suppliant would not have launched any proceedings. It cannot be said that the matter was not brought to the Deputy Postmaster General's attention. On September 17, 1954, the suppliant sent a letter of complaint about his dismissal to the Chairman of the Civil Service Commission and he replied on September 22, 1954, saying that since

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the matter of the release came within the jurisdiction of the employing department he was forwarding the correspondence to the Deputy Postmaster General "so that he may nominate a senior officer of the Department to review your case above your Local Office level and subsequently reply to you direct." But it is apparent that the Deputy Postmaster General did not take any action in the matter. Indeed, I find, notwithstanding his statements appearing in correspondence subsequent to the dismissal, that he did not comply with the requirements of section 118 with the result that the suppliant's dismissal went into effect without the suppliant having been given the opportunity which the section prescribed.

I now proceed to consideration of the issues of law involved in this case. Some of them are simple. The suppliant was a temporary employee of the Post Office Department and had no right to permanent employment. Moreover, even if he had become a permanent employee his appointment was during pleasure. Section 19 of the *Civil Service Act*, to which I have already referred, puts the long standing rule that servants of the Crown, in the absence of law to the contrary, hold office during pleasure into statutory effect. Consequently, it may be said offhand that the suppliant has no right to the declaration sought by him that his employment in the Civil Service of Canada is still continuing and that he is entitled to wages and his claim for such a declaration must be dismissed.

I am likewise of the opinion that the suppliant has no right to any damages for wrongful dismissal. Such a claim connotes in its ordinary sense breach of contract, but in this case the suppliant did not have any contract of employment in the Post Office Department and certainly not a contract that was not terminable at pleasure. The fact that his appointment was at pleasure under section 19 of the Act means that he could have been dismissed without cause or notice and even arbitrarily. The suppliant has, therefore, no right to any damages for wrongful dismissal in the ordinary sense of the term and his claim for damages therefor must also be dismissed.

This leaves only the suppliant's claim for damages for not having been given an opportunity, prior to his dismissal, of presenting his side of the case to a senior officer of the department nominated by the deputy head.

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It was submitted that this is a claim under section 118 of the Regulations. Indeed, the suppliant's whole case depends on whether he has an enforceable right under this section. That is the real issue in this case. It is a novel one. It is also an important one and not free from difficulty.

Mr. Henry for the respondent, with his usual careful preparation, submitted that the regulation was *ultra vires* and, in any event, did not create a legally enforceable right, but was merely an administrative direction and that the sanction for failure to obey the direction was merely a matter for disciplinary action.

The nature of the service of a civil servant and the right of the Crown to dismiss him at pleasure has been carefully considered by the courts in many cases. Mr. Henry referred to the following ones, namely, *Smyth v. Latham*[1]; *De Dohse v. The Queen*[2]; *Shenton v. Smith*[3]; *Dunn v. The Queen*[4]; *Gould v. Stuart*[5]; *Young v. Adams*[6]; *Young v. Waller*[7]; *In re Hales and Hales v. The King*[8]; *Denning v. Secretary of State for India in Council*[9]; *Reilly v. The King*[10]; *R. Venkata Rao v. Secretary of State for India*[11], on which Mr. Henry specially relied; *Genois v. The King*[12]; *Lucas v. Lucas and High Commissioner for India*[13]; *Rodwell v. Thomas et al.*[14]; *Terrell v. Secretary of State for the Colonies et al.*[15]; and *Inland Revenue Commissioners v. Hambrook*[16]. Mr. Henry submitted that these cases established certain propositions or principles, namely, that the principle of employment by the Crown at pleasure can be impaired only by statute; that purported agreements and rules as to procedure on dismissal, notice, term of office and the like are without legal effect if they are not statutory;

[1] (1833) 9 Bing. 692.
[2] (1886) 3 T.L.R. 114.
[3] [1895] A.C. 229.
[4] [1896] 1 Q.B. 116.
[5] [1896] A.C. 575.
[6] [1898] A.C. 469.
[7] [1898] A.C. 661.
[8] (1918) 34 T.L.R. 341 and 589.
[9] (1920) 37 T.L.R. 138.
[10] [1932] Ex. C.R. 14; [1932] S.C.R. 597; [1934] A.C. 176.
[11] [1937] A.C. 248.
[12] [1937] Ex. C.R. 136.
[13] [1943] P. 68.
[14] [1944] K.B. 596.
[15] [1953] 2 Q.B. 482.
[16] [1956] 1 All E.R. 807.

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that an employee of the Crown has no right of action against the Crown if there has not been any breach of statute; and that an employee of the Crown has no legally enforceable right to continued employment by the Crown in the absence of a statutory security of tenure.

Since the conclusion of the hearing at Saskatoon last Wednesday, which lasted three days, I have reviewed all the cases to which Mr. Henry referred and agree that they lay down the principles stated by him but I have some observations to make. In Canada the right of the Crown to dismiss persons employed in the Civil Service of Canada is statutory and it is not necessary to consider its source or whether it is a term imparted into the contract of employment of the civil servant or whether consideration of public policy demand its unimpaired maintenance. So far as employees of the Civil Service of Canada are concerned the right to dismiss them at pleasure is specifically set out in section 19 of the *Civil Service Act* and no further enquiry into the existence of the right is necessary.

And I have come to the conclusion that the case at bar is distinguishable from the *Venkata* case (*supra*) on which Mr. Henry specifically relied. In that case the appellant, who held office in the civil service of the Crown in India as a reader in the Government Press, Madras, fell under suspicion of being concerned in a leakage of information in respect of certain examination papers, and was dismissed from the service and claimed damages for wrongful dismissal. Section 96B of the *Government of India Act* provided that "subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, ..." and the rules made under the section were certain classification rules. One of them, Rule XIII, provided that without prejudice to the provisions of any law for the time being in force, the Local Government might for good and sufficient reasons dismiss any officer holding a post in a provincial or subordinate service or a special appointment. And another rule, Rule XIV, provided that without prejudice to the provisions of the *Public Servants Inquiries Act*, 1950, in all cases in which the dismissal, removal or reduction of any officer was ordered, the order should, except when it was based on facts or conclusions established at a judicial trial, or when the officer concerned

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had absconded with the accusation hanging over him, be preceded by a properly recorded departmental enquiry, and the rule went on to prescribe how such enquiry was to be made. It was established that in the appellant's case the requirements of Rule XIV had not been satisfied. Accordingly, the appellant contended that the statute gave him a right enforceable by action to hold his office in accordance with the rules, and that he could only be dismissed as provided by the rules and in accordance with the procedure prescribed thereby. His contention was denied by the Courts in India and their decision was affirmed by Lord Roche who delivered the judgment of their Lordships of the Judicial Committee of the Privy Council.

I must say that if the suppliant's only claim had been for damages for wrongful dismissal by reason of failure to comply with a procedural requirement the decision in the *Venkata* case (*supra*) would have been against him. I have already dismissed his claim for wrongful dismissal. But that is not his claim in paragraph (*c*) of his prayer for relief. He does not in that paragraph claim damages for wrongful dismissal. His claim is for damages for not having been given the opportunity, prior to his dismissal, to present his side of the case to a senior officer of the department nominated by the deputy head. That is a different kind of a claim from a claim for wrongful dismissal. That kind of a claim was not in the *Venkata* case (*supra*) and there is nothing in the decision in that case that denies it. The kind of claim that the suppliant makes in paragraph (*c*) of his prayer was not considered in any of the cases to which Mr. Henry referred. Indeed, so far as I have been able to ascertain, it has not been considered in any case previous to this one.

Nor should the suppliant's claim under paragraph (*c*) be considered as the assertion of a right not to be dismissed without having been given the opportunity to present his side of the case to a senior officer of the department nominated by the deputy head for a claim on such a basis would, in effect, be a claim for wrongful dismissal and the decision in the *Venkata* case (*supra*) would be conclusive against it.

There is, in my opinion, an essential difference between the kind of a claim that was disallowed in the *Venkata* case (*supra*) and the suppliant's claim in paragraph (*c*) of his

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prayer for relief. The former was a claim for damages for wrongful dismissal and was, in effect, a denial of the Crown's statutory right to dismiss at pleasure. But the suppliant's claim under section 118 of the Regulations is simply a claim for damages for the denial of a right given by the section and does not deny or impair or lessen the right of the Crown under section 19 of the *Civil Service Act* to dismiss the suppliant at pleasure. When the opportunity prescribed by section 118 of the Regulations has been given the Crown's right to dismiss at pleasure is not affected in any way.

It was agreed that the term "employee" in section 118 of the Regulations covered the suppliant, even although his employment was of a temporary nature, but it was argued by Mr. Henry that section 118 of the Regulations was *ultra vires*. He reviewed the scheme of the *Civil Service Act*, referring to its various sections, and submitted that the function of dismissing employees of the civil service was not vested in the Civil Service Commission, that section 118 of the Regulations tended to frustrate the policy of the Act and operated as a clog on the right of dismissal of civil servants prescribed by section 19 of the Act and, consequently, was beyond the power of the Civil Service Commission to make and the Governor in Council to approve. I do not agree. Section 5 of the Act gives the Civil Service Commission a very wide discretion. It may make regulations "as it deems necessary or convenient" for carrying out the Act. Under the circumstances, I do not see how the Court could contradict its expression of opinion and say that section 118 of the Regulations was beyond its powers. In my opinion, its decision that section 118 was necessary or convenient for carrying out the Act cannot be challenged and must prevail.

So I find that section 118 of the Regulations was *intra vires*. That being so, it follows that the provisions of the *Civil Service Act* and the regulations made under it, having the force of law, must be read together and effect given to each. Section 118 of the Regulations ought not, therefore, to be construed as inconsistent with section 19 of the Act. In that view of section 118 of the Regulations all that it does is to give the civil servant whom it is proposed to dismiss an opportunity, prior to his dismissal, to present his side of the case to a senior officer of the department nominated by the deputy head. When that opportunity has

been given the right to dismiss at pleasure provided by section 19 of the Act is in full force and effect. The intendment of section 118 of the Regulations is plain, namely, that before the right of dismissal at pleasure under section 19 of the Act is exercised the employee proposed to be dismissed should be given the opportunity prescribed by the section. To the extent that it is of importance in the matter of interpretation it may properly be said that if it is not contrary to the public policy that a civil servant may be dismissed at pleasure that before his dismissal goes into effect he should be given the opportunity prescribed by section 118 of the Regulations.

I, therefore, find that an employee of the Civil Service of Canada has the right under section 118 of the Regulations to be given the opportunity, prior to his dismissal, of presenting his side of the case to a senior officer of the department nominated by the deputy head. This gives him a claim under section 118 of the Regulations and brings him within the jurisdiction of this Court under section 18(1)(*d*) of the *Exchequer Court Act,* R.S.C. 1952, chapter 98, which provides:

> 18. (1) The Exchequer Court also has exclusive original jurisdiction to hear and determine the following matters:
>
> (*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

In my opinion, the suppliant has a claim arising under a regulation made by the Governor in Council, namely, a claim under section 118 of the Civil Service Regulations. He had a right under that section to be given the opportunity, prior to his dismissal, to present his side of the case to a senior officer of the department nominated by the deputy head. I find as a fact that this right was not given to him. It is a fundamental principle that the violation of a right gives a cause of action: *vide Ashby v. White.* Here there was a denial of a right to which the suppliant was legally entitled and he has a right to damages therefor.

It is difficult in a case such as this to determine the quantum of damages, but the difficulty of assessing damages is not a reason for not assessing them. I do not think that this is a case for nominal damages. The damages were real but they are difficult to determine. While I think it is obvious from the evidence of Mr. Duggleby that he was determined to get rid of the suppliant out of his Post Office and that if

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the reason assigned for his dismissal had been found to be unsound another reason would have been given or the suppliant would have been dismissed in any event, the suppliant had a right to the opportunity given to him by section 118 of the Regulations and compliance with that right would, in all likelihood, have given him longer employment in the Post Office than that which he had and the wages for such continued employment. It is difficult to say how long that might have been. If the delay between Mr. Duggleby's recommendation of July 7, 1954 that he could not recommend the suppliant's retention in the service and Mr. MacNabb's instruction of September 7, 1954, that he should be dismissed with two weeks' notice is any criterion, the time of continued employment of the suppliant while the machinery was being set up for giving him the opportunity prescribed by section 118 of the Regulations might have been substantial. And while it is not likely, in view of Mr. Duggleby's determination to get rid of the suppliant, that even if he had been able to satisfy the senior officer of the department appointed by the deputy head that the reason assigned for his dismissal was not substantiated, he would not have been dismissed on other grounds, or even without grounds, the possibility that his ultimate dismissal might have been delayed is a factor to be considered.

In view of these contingencies, all of them of an imponderable character, I think it would not be unfair to assess the suppliant's damages at $500 and I award this amount.

There will, therefore, be judgment declaring that the suppliant is entitled to damages in the sum of $500. He is also entitled to costs to be taxed in the usual way without regard to limitation by reason of the amount awarded.

Judgment accordingly.