Calgary
1965

Oct. 12-16,
18-20

Ottawa
Dec 9

BETWEEN:

FRANK HOPSON .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

*Crown—Suspension and dismissal of civil servant—Defamation—Privilege—Threats of criminal prosecution—Suggestions of criminality—Whether torts—Whether suspension and dismissal lawful—Right to be heard—Cash gratuity—Whether mandatory—Damages—Amount of—Civil Service Act R.S.C. 1952, c. 48, s. 52—Civil Service Regulations, s. 73(1) and (5), 118(1) and (2)—Exchequer Court Act, R.S.C. 1952, s. 32.*

1. On November 19th 1958 A. M. Swan, an official of the Department of Defence Production, began an inspection of the Calgary purchasing office, of which suppliant was in charge, and on November 23rd told suppliant and his wife after dining at their home that suppliant's chief subordinate was guilty of bribery and could get 5 to 20 years for it.
2. On November 26th H. R. Kotlarsky, the Departmental Director of Administration, wrote suppliant a letter stating that suppliant was suspended for "incompetence as an office administrator in failing to be aware of existing conditions in his office" and that in accordance with s. 118(1) of the Civil Service Regulations he had ten days to state his side of the case to G. F. McKay, the officer in charge of the Edmonton purchasing office.
3. On November 27th T. J. Woods, a government security officer engaged in the investigation, delivered Kotlarsky's letter of November 26th to suppliant, who had come to Woods' hotel room with his wife. In an

ensuing discussion Woods said "there were irregularities in (suppliant's) office" and that Woods' job was to ferret out communists employed by contractors for the Defence Department.

4. On December 1st suppliant wrote McKay protesting the nebulous character of the charges against him as set out in Kotlarsky's letter of November 26th but he made no representations. On December 10th McKay informed suppliant that his dismissal had been decided on. In the course of a heated discussion which followed McKay told suppliant that he had been subjected to a full scale investigation by the R.C M.P. and had better resign.

5. On December 17th Kotlarsky in Ottawa wrote suppliant that the Deputy Minister intended to dismiss him for "mismanagement of staff and failure to administer properly the work of the office" and for "deliberate and repeated failure to carry out prescribed purchasing practices". Kotlarsky read the letter by phone to McKay in Calgary in order that he might pass the contents on to suppliant to enable him to resign before being dismissed.

6. Later in December suppliant was interviewed in Calgary by G. W. Hunter, the Assistant Deputy Minister, who had been appointed under s. 118(2) of the Civil Service Regulations to hear his side of the case before dismissal. Hunter took up with suppliant some but not all of a number of complaints which were set out in a document supplied to Hunter by the Department, but the document was not shown to suppliant The complaints not taken up with suppliant were however taken as established and formed part of the material upon which Hunter's recommendation was based.

7. On January 14th 1959 in accordance with Hunter's recommendation the Governor in Council approved a Treasury Board minute recommending suppliant's dismissal from the government service effective December 31st 1958.

8. On January 16th the Departmental Chief of Personnel wrote suppliant of the optional pension benefits available to him, and enclosed a form in which he had filled in a blank space stating "inefficiency" as the reason for suppliant's retirement from the service.

9. On January 14th 1960 the Departmental Chief of Personnel, in reply to an inquiry from a prospective employer of suppliant, wrote that suppliant left the Department "under unfortunate circumstances" and in reply to a request for an explanation of that phrase stated "mismanagement of staff due to complacency".

10. By his petition of right suppliant claimed damages for defamation, for suggestions of criminality on his part and threats of criminal prosecution if he did not resign his office, for wrongful suspension and dismissal, and for not having been given prior to his suspension and dismissal an opportunity to present his side of the case. He also claimed a cash gratuity under s. 73(5) of the *Civil Service Act* equivalent to three months' pay.

11. Suppliant had also brought an action against T. J. Woods in the Supreme Court of Alberta for defamation arising out of the first incident described in paragraph 3 above.

12. It was agreed by the parties prior to the hearing of suppliant's petition, *inter alia*, that suppliant had been suspended on November 26th 1958 and dismissed by the Governor in Council on December 31st 1958.

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*Held:* (1) Suppliant was entitled to damages, which were calculated at $400, for not having been given an opportunity to present his side of the case prior both to his suspension and to his dismissal. It is fundamental to the power to suspend and dismiss under s. 118 of the Regulations made pursuant to s. 5 of the *Civil Service Act* that the employee be advised of the subject matter relied on for his suspension and/or dismissal. Kotlarsky's letter of November 26th was insufficient for this purpose and the interview with Hunter in December similarly failed to provide suppliant an opportunity to present his side of the case. *Zamulinski v. The Queen* [1956-60] Ex C.R. 175 followed; *Shenton v. Smith* [1895] A C. 229 and *R. Venkata Rao v. Sec'y of State for India* [1937] A.C. 248, considered.

(2) Suppliant's claims for defamation failed. (*a*) The claim arising from Woods' statement that "there were irregularities in the office" was barred by s. 32 of the *Exchequer Court Act* because of the action brought by suppliant against him in Alberta. Woods was "acting under the authority of the Crown" within the meaning of s. 32 at the time he made his statements on November 26th 1958. (*b*) The statement that Woods' function was to ferret out communists, etc., was not spoken of or concerning the suppliant and did not imply that he was a communist. (c) In the other instances either the alleged publication was not proved or the defence of qualified privilege prevailed, there being no proof of malice. *Lecarte v. Board of Education of Toronto* [1959] S.C.R. 465, per Locke J. at p 471; *Osborn v. Boulter* [1930] 2 K.B. 226, per Scrutton L. J. at p. 232, applied.

(3) Suppliant's claim for damages for allegations of criminality and threats failed because in every alleged instance one or more of the ingredients of the tort was lacking, to wit: (1) that a Crown servant in the course of his employment wilfully did an act calculated to cause physical harm to the suppliant, (2) that there was no legal justification for the act, and (3) that the act in fact caused physical harm to suppliant. *Janvier v. Sweeney* [1919] 2 K B. 316; *Wilkinson v. Downton* [1897] 2 Q.B. 57, per Wright J. at p. 58, applied.

(4) In view of the agreement of the parties that suppliant was suspended on November 28 1958 the Court must take it for the purposes of this proceeding that the power to suspend under s. 51(1)(*a*) of the *Civil Service Act* had been validly exercised although, *semble,* the ground given by Kotlarsky for the suspension in his letter of November 26th was neither of the grounds specified in s 51(1)(*a*), *viz,* misconduct or negligence in the performance of duties. Similarly, the parties having agreed that suppliant was dismissed on December 31st 1958 by authority of the Governor in Council (no question having been raised as to the retroactive effect of the order in council), this brought suppliant's employment at pleasure to an end whether any reason existed or not. There was accordingly no legal basis for a claim for damages either for unlawful suspension or for unlawful dismissal.

(5) Suppliant's claim for a cash gratuity failed as s. 73 of the Civil Service Regulations made pursuant to s. 47 of the *Civil Service Act* was permissive only.

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PETITION OF RIGHT.

*Daniel M. McDonald* for suppliant.

*R. L. Fenerty, Q.C.* and *P. M. Troop* for respondent.

THURLOW J.:—This petition of right, and the several claims for damages and other relief asserted thereby, arise from a succession of events the central incident of which was the suppliant's dismissal from the service of the Government of Canada by an Order in Council passed on January 14, 1959. The suppliant had been employed in the government service from 1941 to 1946 on loan from the Canadian Pacific Railway Company and thereafter from 1946 to the end of 1958 as a member of the Civil Service of Canada and had risen by promotion to the classification of Defence Production Officer Grade 5 in that service. For two years, as District Puchasing Agent, he had been in charge of the district purchasing office of the Department of Defence Production at Calgary, his employment in that post having been of a permanent nature. By his petition of right he asserts that he was improperly and unjustly suspended from his office on or about November 28, 1958, that subsequently he was improperly and unjustly dismissed by the Order in Council already mentioned, that he was deprived of the opportunity to which he was entitled under the Civil Service Regulations to present his side of the case prior to his dismissal, that he has been defamed on numerous occasions (since limited to four such occasions) and that he has suffered damage on numerous occasions (since limited to three) by suggestions and insinuations of criminality on his part and by threats of criminal prosecution if he did not resign his office. By the portions of his prayer for relief which were not abandoned in the course of the trial he claims:

1. A declaration that his suspension and dismissal from the Civil Service of Canada were contrary to Section 118 of the Civil Service Regulations and Sections 51 and 52 of the *Civil Service Act*;

2. damages for wrongful suspension and wrongful dismissal and loss of earnings;

3. damages for mental anguish and physical suffering, injuries to his career, reputation and good name, and loss of earnings as a result;

4. an order that the Department of Defence Production pay to him a cash gratuity consisting of salary at the rate in effect on his last day of active duty for the period of three (3) months, to which he has a right as a result of performing over fifteen (15) years of pensionable service;

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5. 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.

In addition it was submitted in argument on his behalf that he was entitled to damages for not having been given a proper opportunity to present his side of the case in respect of his suspension and counsel for the Crown stated that as evidence and argument had been directed to that question it as well might be treated as before the Court.

In all, eleven separate incidents or matters, forming parts of a much larger story, are relied on in these proceedings as giving rise to liability on the part of the Crown and in what follows I shall first outline the several events in the order in which they occurred and then deal with them in a somewhat different order depending on the nature of the claim asserted.

The events in question began several days after the arrival in Calgary on November 19th, 1958 of A. M. Swan, the Assistant Supervisor of the District Offices Division of the Department of Defence Production, to conduct a routine inspection of the Calgary District Office. Certain new equipment and new or improved procedures which formed part of what was referred to as the District Office Improvement Program had recently been put into operation at the Calgary District Office and one of Mr. Swan's objects was to inspect the working of this program. By Friday, November 21st complaints respecting the conduct of C. L. Wright, the chief buyer, had been made by and written statements had been taken from Duncan Little and Murray Standish, both of whom were employed in the office as junior buyers, and on the following day Swan and the suppliant had visited the local office of the Royal Canadian Mounted Police where these statements and some eighteen purchase files, which has been produced by Little and Standish in support of their allegations, had been reviewed with Superintendent Porter of the Royal Canadian Mounted Police. On the evening of November 23rd, a Sunday, Swan and his wife were guests at the suppliant's home for about four hours during which, according to the suppliant and his wife, Swan talked of nothing but the subject matter of these complaints and matters pertaining to the office. While having dinner, Swan, in the presence of

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his wife and of the suppliant and his wife, uttered the words "Wright is guilty of bribery and could get five to twenty years for this." The uttering of these words by Swan is the first of the events in respect of which relief is sought. The suppliant swore that since he was in charge of the office and Wright was directly under him the possibility existed that he might be linked with Wright because of his association with him and be found guilty as well, that he did not "relish the idea of going to the penitentiary" and that he "was quite frightened" by Swan's statement.

The next event in respect of which relief is claimed occurred on or about November 26th when, as a result of reports received from Swan, the first of which may have been received as early as November 21st, D. M. Erskine, the Director of the Regional Purchasing Branch of the Department of Defence Production at Ottawa, whose field of responsibility include the operations of the district offices as well as the work of Swan and of Swan's immediate superior, recommended to D. A. Golden, the Deputy Minister of the Department that the suppliant be suspended from his office. Mr. Erskine says that he communicated his recommendation to the deputy minister and obtained his approval to pass it on to Mr. Kotlarsky, the Director of Administration of the Department whose duties included that of informing personnel of the Department of anything that affected their future employment. On November 26th Mr. Kotlarsky wrote and sent to Swan for delivery to the suppliant a letter which read as follows:

PERSONAL & CONFIDENTIAL OTTAWA, 26 November 58

Mr. F. Hopson,
Department of Defence Production,
Room 731, Public Building,
Calgary, Alberta.

Dear Mr. Hopson:

Mr. D. M. Erskine, your Director, has recommended your suspension from this Department as of Friday, 28th of November, for the following reason:

Incompetence as an office administrator in failing to be aware of existing conditions in his office.

Your suspension will be in force until the completion of all investigations.

The following is to advise you of the provisions of Section 118 of the Regulations which read as follows:

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118(1) An employee who has been suspended pursuant to Section 51 of the Act shall, within ten days of the commencement of a suspension, be given an opportunity to present his side of the case to the Deputy Head or to a senior officer of the Department nominated for that purpose by the Deputy Head.

If you intend to take advantage of section 118 you should so inform the undersigned before a period of ten days from commencement of your suspension and arrange a time satisfactory to you to present your side of the case to Mr. G. F. McKay the officer of the Department who has been nominated by the Deputy Minister for this purpose.

DATED AT OTTAWA, Ontario, this 26 day of November, 1958.

LF: MJM
c.c. Mr. A. Swan
c.c. D. M. Erskine

H. R. Kotlarsky,
Director,
Administration Branch.

The legality of this suspension is challenged and the suppliant claims damages for wrongful suspension.

The third event upon which a claim for relief is based occurred on November 27th. On receiving Mr. Kotlarsky's letter, Swan had passed it to T. J. Woods for delivery to the suppliant. Mr. Woods was a field representative of the Industrial Security Branch of the Department who had been sent to Calgary to assist in an investigation of matters which Swan had reported. He had arrived in Calgary on the morning of November 25th and had interviewed several members of the staff of the Calgary District Office and in a telephone conversation with the suppliant on the evening of November 26th had asked him to come to the Palliser Hotel the following morning saying that he wanted to talk to him. He also wanted to deliver Mr. Kotlarsky's letter. The suppliant, accompanied by his wife, accordingly attended at Mr. Woods' hotel room on the following morning when Woods introduced himself to them and delivered the letter. Woods knew its purport but had not read it. After opening and reading it and passing it to his wife the suppliant asked Woods if he was in a position to tell him "what these existing conditions were" and in what way his "failure to be aware of these existing conditions constituted incompetence" whereupon (according to the suppliant) Woods "railed" at him for having retained Wright as a member of the staff, questioned him as to whether he had ever had occasion to take Wright to task for anything and on receiving an affirmative reply asked why the suppliant had not made a record of each instance when he had taken Wright to task and sent it to Ottawa. Either then or after

some further discussion Woods said "There were irregularities in the office" and when asked to define the irregularities said, "There were irregularities in the office and that is all I am going to tell you." According to the suppliant, Woods at some point in the conversation in response to a question as to what his function in the Department was replied that he was an investigator of the Industrial Security Branch of the Department, that he was located in Toronto and that "his function was to ferret out communistic activities among employees of plants and factories engaged in the production of material or supplies ordered by the Department of Defence Production on behalf of the Department of National Defence". The suppliant claims damages in respect of both statements by Woods on the grounds that they were defamatory, the first in implying that the suppliant tolerated or condoned irregularities in the office and the second in implying that the suppliant was a communist. He also claims damages in respect of the latter statement on the basis of its having given him the impression that searching out communists might be part of the investigation which Woods had come to Calgary to conduct and that he, the suppliant, was suspected of being a communist or of having communistic tendencies. The suppliant says that he was emotionally wrought up at the time, that he became quite ill and that the uttering of these words by Mr. Woods aggravated his condition.

The fourth matter in respect of which complaint is made is that the suppliant was not given an opportunity to present his side of the case with respect to his suspension, to a senior officer of the Department nominated for that purpose by the deputy minister as required by s. 118(1) of the Civil Service Regulations. Mr. Kotlarsky's letter, it will be recalled, had quoted the regulation and had named Mr. G. F. McKay as the officer nominated by the deputy minister. Mr. McKay was well known to the suppliant having been employed under him for some years in the Calgary office prior to being transferred to Regina and subsequently to Edmonton where he had reached the same classification as the suppliant and had been placed in charge of the Edmonton District Purchasing Office of the Department. On November 24th, at the request of Swan, Mr. McKay had come to Calgary to take over the

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management of the office there while the investigation which had been instituted was being carried out. Whether Mr. McKay's appointment as a Defence Production Officer Grade 5 was senior to that of the suppliant does not clearly appear but he was plainly junior to Mr. Swan on the strength of whose reports the suppliant had been suspended. I mention this because one of the points taken on behalf of the suppliant was that Mr. McKay was not a "senior officer of the department" within the meaning of the Regulation. However, on November 28th the suppliant replied to Mr. Kotlarsky's letter and among other things said to him:

> You are hereby informed that it is my intention to take advantage of s 118 of the Regulations, and that I will be making representations to Mr. G F McKay shortly.

Thereafter on December 1st the suppliant, after having spoken with Mr. McKay by telephone and having been told that he might present his side of the case either orally or in writing, sent the following letter to Mr. McKay.

339 Scarboro Avenue,
Calgary, Alberta,
December 1, 1958.

Mr G. F. McKay,
c/o Department of Defence Production,
Room 725, Calgary Public Building,
Calgary, Alberta

Dear Mr McKay:

With reference to Mr. Kotlarsky's letter of November 26, 1958, I hereby submit my appeal against the suspension, based on the following reasons:

(1) The charge is nebulous, as it does not state specifically what "existing conditions" are referred to. I can only assume that what is meant is the clash of personalities of some of my male subordinates, a condition of which I was quite aware and had instituted corrective action which was effective until the matter was revived during Mr Swan's visit.

(2) My suspension was unnecessary, as no accusations had been levelled against me. Any investigation of allegations against other members of the staff could have been carried out while I was on duty in the office.

(3) No definite time limit has been placed on the suspension, as it is stated that it "will be in force until the completion of all investigations".

(4) My unexplained absence from my office could undermine the confidence of the requisitioning officers (DND) in the department (DDP).

(5) I am not bruiting my absence about—in fact, I am endeavoring to keep it a secret Phone calls from suppliers, who receive evasive answers from the staff, are resulting in unnecessary publicity of

the simultaneous absences of the two senior members of the Calgary district office. None of our suppliers is simple enough to accept without reservation the dubious explanations offered, as evidenced by the phone calls Mr. Wright and myself are receiving at home. All this is creating a public awareness of differences which could and should be self contained and resolved within our department.

(6) If my suspension is not lifted retroactive to its effective date, it will represent a fine levied prior to investigation or proving of charges. Penalties imposed before conviction are illegal.

(7) I feel no necessity to apologize for my actions with reference to a squabble between two members of my staff. My steadfast resolve was that there should be an awareness of the rights of each and every individual on my staff, with no preconceived judgments nor opinions without just grounds or before sufficient knowledge had been acquired.

As I do not have copies of the Regulations and the Act referred to in Mr. Kotlarsky's letter, I have no guide to proper procedure. Therefore, it should be understood that this letter is a protest only against my suspension, which I urge be lifted immediately retroactive to its effective date. Furthermore, this letter is not intended as a defence against any charges, and I reserve my defences against the time when it may be decided to set up a board or other authority for the purpose of questioning or examining me.

Yours very truly,
"F. Hopson"
Frank Hopson

Mr. McKay, who regarded his appointment under s. 118 (1) as involving the authority to recommend either that the suspension be lifted or that it be continued but, in view of matters in the office which had come to his attention since he had taken charge, "saw no point" in recommending that the suspension be lifted, treated the letter as a protest rather than as a presentation of the suppliant's side of the case. He held the letter for a day as Mr. Swan who had gone to Vancouver would be passing through Calgary on his return journey and passed the letter to him to take to Ottawa "to see what would be appropriate for the occasion".

According to the suppliant the letter of December 1st represented what he wanted to say to Mr. McKay and no further statement by the suppliant of his side of the case was made to Mr. McKay though it is clear that Mr. McKay would have been prepared to receive any oral or written representation which the suppliant might have wished to make. On December 4th after telephoning Mr. McKay to find out what disposition had been made of his letter the suppliant telephoned Mr. Kotlarsky and was told that the letter had been received and that it was not what was wanted of the suppliant. Mr. Kotlarsky, who also gave

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evidence, stated that in the course of the conversation the suppliant referred to the letter of suspension and to what he considered the unfairness of the investigation and expressed the hope he would have an opportunity to answer specific charges and to come to Ottawa to do so. Mr. Kotlarsky also said that he told the suppliant of a proposed meeting with the deputy minister to be held on December 8th and suggested he write a letter outlining his feelings about the investigation and that he, Kotlarsky, would present it to the meeting. The suppliant wrote no letter but on December 7th he again telephoned Mr. Kotlarsky and according to Mr. Kotlarsky said that he had been unable to get a letter off and suggested that he was prepared to fly to Ottawa on December 10th in the hope that he might see the deputy minister to convey his impressions of the investigation and present his feelings about it and the general charges and to try to get more details about the specific nature of the charges. He was told that the proposed trip would be of little use as the deputy minister would be away from Ottawa on December 10th and it was then left with Mr. Kotlarsky to try to present the suppliant's feelings at the meeting on the following day. The meeting was held and resulted in a decision by the deputy minister to take steps to dismiss the suppliant immediately. The suppliant takes the position that he was not afforded the opportunity to present his side of the case provided for by s. 118(1) of the Regulations and that he is entitled to damages for the denial of his right.

The next incident relied on as a basis for a right to relief occurred on December 10th. Following the meeting at Ottawa on December 8th Mr. Kotlarsky had telephoned the suppliant and had told him that action was to be taken to dismiss him but that as an alternative he would be given an opportunity to resign. The call was a lengthy one and several matters were discussed including the suppliant's right to present his side of the case with respect to his proposed dismissal and the advantages which might be gained by the suppliant resigning, one of which was that under s. 73 of the Civil Service Regulations he would be eligible for a cash gratuity in lieu of retiring leave. The suppliant regarded the suggestion that he would be eligible for the gratuity if he resigned as an attempt to bribe him to

obtain his resignation and reacted against it. Mr. Kotlarsky on the other hand, while endeavouring to make it clear that the opportunity to resign was a concession he had obtained for the suppliant at the meeting and that he thought it would be the better course for the suppliant to take, got the impression that the suppliant was under great stress and was unable to believe that so harsh a decision could have been made against him. On the following day, Mr. McKay had been requested by Mr. Drouin, the supervisor of District Offices to contact the suppliant and in a friendly way to tell him that a recommendation for his dismissal was to be put forward and if possible to indicate to him the advantages of resigning rather than being dismissed. Accordingly on December 10th Mr. McKay telephoned the suppliant and passed on this message whereupon the suppliant expressed his view that this required talking over in person and arranged to come, with Wright, whose dismissal was also to be recommended and who had been given the like opportunity to resign, to McKay's office. When they arrived McKay called in Little to witness what might take place and a discussion began. As McKay had once been under the suppliant and Little had been one of Wright's accusers it is not surprising that tempers should flash and that is what appears to have occurred. McKay became angry as a result of a remark made by the suppliant and the suppliant agreed that he was angry as well. At one point in the discussion McKay, according to the suppliant, said to him: "Like Wright you have been subjected to a full scale investigation by the R.C.M.P. and you had better resign. I will have the stenographer type out your resignation and all you will have to do is sign it." This utterance by McKay is relied upon as a threat entitling the suppliant to damages.

The sixth event relied on was the alleged publication by D. A. Golden, the Deputy Minister of the Department to Mr. Kotlarsky and the publication by Mr. Kotlarsky, in the course of writing a letter to the suppliant and advising certain persons in the department of the grounds upon which a recommendation for the suppliant's dismissal was to be made. The letter read as follows:

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DEPARTMENT OF DEFENCE PRODUCTION

REGISTERED
AIRMAIL
SPECIAL DELIVERY

OTTAWA, December 17, 1958

Mr. F. Hopson,
339 Scarboro Avenue,
Calgary, Alberta.

Dear Mr. Hopson:

Further to my letter to you of November 26, 1958, this is to inform you that the Deputy Minister has considered the situation which existed in the Calgary District Office prior to your suspension and, as a result, has instructed that steps be taken to dismiss you from office on the following grounds:

1. Mismanagement of staff and failure to administer properly the work of the office.
2. Deliberate and repeated failure to carry out the prescribed purchasing policies and practices of the Department and permitting others to fail to carry out such policies and practices, including failure to adhere strictly to the policies and practices of the Department governing invitations for, and handling of, competitive tenders.

Accordingly, a recommendation for dismissal is being made to the Governor-in-Council under Section 52 of the Civil Service Act, Revised Statutes of Canada 1952, Chapter 48. Your suspension without pay, which commenced on November 28, 1958, will continue until the matter has been dealt with by the Governor-in-Council.

In accordance with Section 118 of the Civil Service Regulations (a copy of which Section I sent you on December 1, 1958) Mr. G. W. Hunter, Assistant Deputy Minister, has been designated as the senior officer to whom you may present your side of the case. Please advise me by collect telegram before Tuesday, December 23, 1958 if you intend to proceed under Section 118.

Yours truly,
"H. R. Kotlarsky"
H. R. Kotlarsky,
Director,
Administration Branch.

The suppliant's complaint in respect of this item is that he has been defamed by the publication by Mr. Golden to Mr. Kotlarsky and by Mr. Kotlarsky to others of the words contained in the subparagraphs numbered 1 and 2. The evidence shows that the letter was composed by three persons, viz., Mr. Erskine, the Director of the Regional Purchasing Branch of the Department, Mr. Waddell, the Director of the Legal Branch of the Department and Mr. Kotlarsky, the Director of Administration of the Department within a day or two after the meeting of December 8th when the deputy minister had decided that action should be taken to have the suppliant dismissed. At the meeting Mr. Kotlarsky had interceded on behalf of both

the suppliant and Wright and had obtained the approval of the deputy minister of their being given an opportunity to resign, and the events of December 8th and 10th to which I have already referred had followed. On December 17th, as the suppliant had not resigned, Mr. Kotlarsky sent the letter to the suppliant but on the same day, in order to give the suppliant a final opportunity to resign, he also telephoned Mr. McKay and asked him to communicate the contents of the letter to the suppliant so that the suppliant would know the contents before he received it and be able to resign if he wished to do so before it arrived. It was apparently suggested that if the suppliant should resign he might return the letter unopened. In order to insure that the suppliant would be acquainted fully with the contents of the letter Mr. Kotlarsky read and dictated the letter verbatim by telephone to Mr. McKay's stenographer who was instructed to transcribe it without making additional copies and to destroy her shorthand notes. She accordingly prepared a single copy which later that day Mr. McKay passed to the suppliant. The publication of the contents of the letter to Mr. McKay, to his stenographer, to Mr. Kotlarsky's stenographer and to other members of the staff of the Department at Ottawa is complained of and is relied on as entitling the suppliant to damages for defamation.

The seventh matter of which complaint is made is that the suppliant was denied a proper opportunity to present his side of the case in respect of his dismissal. Following receipt of Mr. Kotlarsky's letter of December 17th, there had been an exchange of telegrams in which it had been proposed at first that the suppliant go to Ottawa at public expense to present his side of the case to Mr. Hunter but the suppliant had replied that it would be impossible for him to fully present his side of the case in Ottawa and that it was imperative that a hearing be held in Calgary as he proposed to call witnesses and to refer to documents located at Calgary. Mr. Hunter had thereupon agreed to come to Calgary to hear the suppliant and arrangements had been made for the suppliant to meet him at his suite in the Palliser Hotel. The interview lasted about an hour and a half in the course of which the suppliant first presented an eleven page closely typewritten letter which he had prepared as a chronicle of events which had transpired since

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Mr. Swan had arrived on November 19th to make his inspection. Mr. Hunter read the letter and about an hour was taken up in doing so and in discussing with the suppliant some of the matters mentioned therein. After reading the letter Mr. Hunter asked the suppliant if it represented his full side of the story and he replied in the affirmative. However, as the letter had not covered certain points of the grounds upon which dismissal action was to be taken Mr. Hunter then proceeded to invite the suppliant to comment in turn on a number of subjects which were set out in a memorandum prepared for his use by officers of the Department stating details of respects in which breaches of departmental policy and procedures were alleged to have occurred. The memorandum which was marked "secret and confidential" and applied to both the suppliant and Wright, was set up under five headings as follows.

1. VIOLATION OR COMPLETE DISREGARD OF DEPARTMENTAL PURCHASING POLICY AND PROCEDURES REGARDING THE RECEIPT, CUSTODY AND OPENING OF TENDERS. THE CORRECT PROCEDURE HAS BEEN CLEARLY DETAILED IN THE DEPARTMENTAL MANUAL, BRANCH DIRECTIVES AND BULLETINS.

Under this heading six sets of details were noted and the suppliant was asked to comment on or explain his position with respect to each of them in turn.

2. FAILURE TO COMPLY WITH THE DISTRICT OFFICE IMPROVEMENT PROGRAM, WHICH WAS IMPLEMENTED IN SEPTEMBER 1958.

Under this heading there were four sets of details the first two of which were discussed with the suppliant. The other two were:

(*c*) Service unit employees were performing buyers functions such as filing copies of contracts and closing the files.

(*d*) The flexowriter tapes which were provided when the district office improvement program was implemented were altered.

Mr. Hunter stated in evidence that he did not discuss these with the suppliant, that they were borne out as matters of fact and he saw no special reason to discuss them.

3. FAILURE TO TRAIN AND SUPERVISE STAFF.

Under this heading there were four sets of details the first two of which had been discussed while going over the suppliant's letter. The remaining two were not discussed. They were:

(*c*) Employees other than Messrs. Hopson and Wright were not permitted to read the departmental manual, bulletins and directives from this headquarters.
Messrs. Standish and Little (present employees) and Mr. Dove

(former employee) stated that this compelled all junior staff to secure individual guidance and direction from Messrs. Wright and Hopson. The Bulletins and Directives were not indexed which would appear to support this charge.

(*d*) The Civil Service Commission representative, Mr. Alex. McKinnon, reports receiving numerous complaints from present and former employees of DDP, Calgary, regarding the treatment they received from Mr. Wright and Mr. Hopson took no action to correct this situation.

With respect to (*c*) Mr. Hunter said he mentioned to the suppliant that in his tour of the office he had noticed that manuals and departmental directives were kept in the suppliant's office and that the staff were not given very ready access to them but he did not recall any discussion of the item with the suppliant. He does not appear to have mentioned to the suppliant that this was one of the grounds upon which action was to be taken to dismiss him. With respect to (*d*) Mr. Hunter said he felt he would discuss the subject with Mr. McKinnon, which he did later, but he did not discuss it with the suppliant.

4. INFLATING WORKLOAD STATISTICS.

5. FAILURE TO ADMINISTER THE WORK OF THE OFFICE.

There were three sets of details under the heading numbered 4 and two sets under the heading numbered 5 none of which were discussed with the suppliant as they seemed to Mr. Hunter to be matters of fact and he assumed that further discussion of these matters would not help.

After discussing the matters mentioned as having been discussed Mr. Hunter told the suppliant he had covered the points he had and asked if the suppliant had anything further he would like to add either to the matters referred to in his letter or to the points which he (Hunter) had raised. According to Mr. Hunter the suppliant then expressed himself as satisfied that his side of the case had been presented. Earlier in the course of the interview the suppliant had asked if he would be permitted to call witnesses but had been told that the terms of reference were for Mr. Hunter to see the suppliant and such other persons as he thought necessary. The suppliant had then asked that Mr. Hunter see a Mr. French who was a former employer of Little, and Mr. McKinnon. As previously mentioned Mr. McKinnon was interviewed by Mr. Hunter before he left Calgary. The suppliant's account of what occurred at his interview with Mr. Hunter is not so full and

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differs in some details from that given by Mr. Hunter, the material parts of which I have summarized. In view of the conclusion I have reached on the question it does not appear to me to be necessary to set out the suppliant's account, a particular feature of which was that Mr. Hunter at the conclusion of the interview assured him that he (Hunter) would be calling Mr. Golden that afternoon and that the suppliant would soon be back at his job. This is denied by Mr. Hunter who also said that most of the explanations given by the suppliant in respect to the matters which he raised with him were unsatisfactory and that on his return to Ottawa he wrote a report to the deputy minister recommending that the dismissal action proceed. The suppliant's position is that his right to an opportunity to present his side of the case was denied and that he is entitled to damages.

Following the interview with Mr. Hunter the action to dismiss the suppliant did proceed, a recommendation, said to have contained wording similar to that of the paragraphs numbered 1 and 2 in Mr. Kotlarsky's letter, went forward and on January 14th, 1959 the Governor in Council approved a Minute of a meeting of the Treasury Board recommending that the suppliant be dismissed from the Government Service, effective December 31st, 1958. On the question of the validity of the suppliant's dismissal it was conceded in the course of argument that if a Civil Servant may be dismissed without cause the question would be answered in favor of the Crown and no point was made with respect to the retroactive feature of the dismissal. It was not, however, conceded that the suppliant's dismissal was lawful and the claim for wrongful dismissal must accordingly be dealt with in its turn.

A further ground relied on by the suppliant as entitling him to relief is that he was not disentitled under s. 73(5) to the cash gratuity provided for by s. 73(1) and that he is entitled to recover it. It is not in dispute that if entitled thereto the amount of such gratuity would be equal to three months salary. The suppliant's right to recover the gratuity is thus another matter to be determined.

The tenth matter relied upon as a basis for relief occurred shortly after the approval by the Governor in Council of the suppliant's dismissal. On January 16, 1959,

G. E. Radbourne, the chief of the personnel division of the Department of Defence Production, wrote to the suppliant a letter outlining the optional benefits available to him under the *Public Service Superannuation Act* and with it enclosed a form for use in making his election, which had been partially completed at the top by inserting particulars relating to such matters as the suppliant's name, date of birth and term of service. This form had been prepared and some of these details had been typed in it by the superannuation section of the personnel division of which Mr. Radbourne was the chief and it had then been passed on to him. Before sending it to the suppliant Mr. Radbourne had his secretary type in a space headed "Cause of Retirement" the word "Inefficiency" and in the ordinary course of dealing with the matter a copy of the form was thereafter sent to the Public Service Superannuation Branch of the Department of Finance and another copy would have been seen by the head of the superannuation section of Mr. Radbourne's division and by a clerk who would have had occasion to put it on file. The suppliant asserts that the publication by Mr. Radbourne of the word "inefficiency" in these circumstance was defamatory and he claims damages.

The last of the events relied on occurred about a year later. The suppliant had applied to Pillsbury of Canada Limited for employment and in so doing he had disclosed that he had been dismissed from the government service and had given the personnel division of the Department of Defence Production as the branch of the Department to which an enquiry for a reference might be made. The following correspondence ensued.

PILLSBURY OF CANADA LIMITED
CALGARY—CANADA

January 14, 1960

Mr. G. E. Radbourne,
Chief Personnel Division,
Department of Defence Production
No. 2 Temporary Building,
Ottawa, Ontario.

Dear Sir:

Mr. Frank Hopson of 339 Scarboro Avenue, Calgary, Alberta, has made application for employment with this company, and has given the Department of Defence Production as his most recent employer.

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It will be very much appreciated if you would kindly let us know whether, in your opinion, Mr. Hopson would make a suitable employee, having particular reference to his character, habits, ability and cause of his separation from the government service.

With thanks in advance for your courtesy, we are,

Yours very truly,
"D. C. Campbell"
Assistant Manager

D. C. Campbell:ew

OTTAWA, January 27, 1960.

Mr. D. G. Campbell,
Assistant Manager,
Pillsbury of Canada Limited,
CALGARY, Alberta.

Dear Sir:

RE Mr. Frank Hopson.

Mr. Hopson worked with this Department from its inception in April, 1951 to December 31, 1958. He was in charge of our Calgary District Office and as such, was responsible for the procurement of a large number of commodities for the local military units. He was a skilled buyer and was generally considered to have performed his buying duties in an acceptable manner.

Although Mr. Hopson left the Department under unfortunate circumstances, I personally feel that he has much ability and could be usefully employed in an organization such as yours. Although you have not indicated in your letter the position for which he has applied, I feel that he could be profitably considered for any position for which his knowledge and experience qualifies him.

Yours very truly,
G. E. RADBOURNE,
Chief, Personnel Division

PILLSBURY OF CANADA LIMITED
CALGARY—CANADA

February 1, 1960

Mr. G. E. Radbourne,
Chief, Personnel Division,
Department of Defence Production,
Ottawa, Ontario.

Re: Mr. Frank Hopson

Dear Sir:

Many thanks indeed for your letter of January 27th replying to our enquiry regarding the above Mr. Hopson from whom we have received an application for employment.

If at all possible would appreciate your enlarging on the unfortunate circumstances under which Mr. Hopson left the employ of the Department. We of course do not desire to give employment to anyone if there is a possibility that they might have to leave our employ also under similar unfortunate circumstances. If you are able to furnish us with this information it would certainly be appreciated.

Yours sincerely,
"D. G. CAMPBELL"
Assistant Manager.

D.G.C.:ew.

OTTAWA, February 11, 1960.

Mr. D. G. Campbell,
Assistant Manager,
Pillsbury of Canada Limited,
CALGARY, Alberta.
Dear Mr. Campbell:

RE Mr. Frank Hopson.

Mr. Hopson was released from this Department because of mismanagement of staff. In my opinion, this was due to complacency on his part; the result of being in the same position for eighteen years.

I personally, feel that the complacency will not happen again.

Yours very truly,
G. E. RADBOURNE
Chief, Personnel Division

Complaint is made of the publication to Mr. Campbell of the words "Mr. Hopson left the Department under unfortunate circumstances" in Mr. Radbourne's letter of January 27th, 1960 and of the words of the first paragraph of his letter of February 11th, 1960 as being defamatory of the suppliant and entitling him to damages.

I shall deal first with the several claims for damages for defamation, beginning with that arising from the two statements said to have been uttered by T. J. Woods at the Palliser Hotel on November 27th, 1958. Neither in this instance nor in any of the other instances of alleged defamation nor in any of the three instances of alleged threats does any issue arise as to the liability of the Crown under the *Crown Liability Act* for the damages sustained if the particular person alleged to have committed the wrong is liable therefor, the Crown having admitted that in each case the person was a servant of the Crown for whose tort the Crown would be liable under the statute.

With respect to the alleged statement "there were irregularities in the office" the evidence of all three persons who were present, that is to say, the suppliant, Leona Hopson, his wife, and Woods himself shows that Woods uttered these words at least once in the course of the interview. It is, however, admitted that the suppliant has an action pending against Woods in the Supreme Court of Alberta in which damages are claimed for defamation by the uttering of these words on the occasion in question and s. 32 of the *Exchequer Court Act* is raised in bar of the suppliant's claim in this Court.

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The section provides:

> 32. The Court shall not entertain any claim in respect of which the claimant has a suit or process against any person pending in another court, if such person, at the time when the cause of action alleged in such suit or process arose, was, in respect thereof, acting under the authority of the Crown.

This provision was first enacted by S. of C. 1887, c. 16, s. 19, which also for the first time imposed on the Crown liability for the tortious act of a Crown servant and though I doubt that the vicarious liability of the Crown under the *Crown Liability Act* for the tort of a Crown servant is necessarily limited to cases in which it can fairly be said that the person was in respect of the cause of action "acting under the authority of the Crown" in the present case there was evidence that Woods had been sent to Calgary to take part in an investigation relating to personnel of the Calgary office, of whom the suppliant was one, and that besides wanting to deliver Mr. Kotlarsky's letter, as he had been instructed by Swan to do, he wanted to talk with the suppliant. There is also evidence that he enquired about the suppliant's supervision of Wright. I would accordingly infer that the interview was part of the investigation which Woods was making pursuant to his instructions and that what he said to the suppliant was said in the course of carrying out those instructions. I might add that it was not disputed by the suppliant that in making the statement Woods was acting under his instructions. I therefore find that Woods was acting under the authority of the Crown in respect of the alleged cause of action and that because the suppliant has a claim pending against Woods in another court in respect of it the jurisdiction of this Court to entertain the claim is barred by s. 32 of the *Exchequer Court Act*.

There is a conflict of testimony with respect to the other statement allegedly made by Woods. According to the suppliant at some point in the conversation Mr. Woods stated that his visit to Calgary was not prompted by the immediate dissatisfaction of Little and Standish but that he had been alerted by Mr. Swan to be prepared to come to Calgary at a day's notice as there was going to be trouble in the Calgary office, and that in answer to a question as to what his function was in the Department, Woods replied that he was an investigator of the Industrial Security

Branch of the Department of Defence Production, that he was located at Toronto and that "his function was to ferret out communistic activities among employees of plants and factories engaged in the production of material or supplies ordered by the Department of Defence Production on behalf of the Department of National Defence".

Leona Hopson's evidence varies somewhat from this. She says that Woods introduced himself and said he was from a branch of the Department, the exact name of which she was unable to remember though she seems to have remembered the word "industrial", that Woods said "actually he had no connection" with the investigation at the Calgary office, that he was a "Commie hunter" and "his usual duties were to check various factories and industries which had got orders for defence contracts to see if they had communist infiltration of their staff", that his visit was not prompted by the complaints of the junior buyers, Little and Standish and that he had been alerted in July by Swan to be ready to come to Calgary at a moment's notice. In cross-examination she testified that Woods said "I am a Commie hunter" and that he started to laugh and that at some point, not necessarily immediately afterwards, he said that it was outside his regular duties investigating or having anything to do with employees of the Department of Defence Production.

Mr. Woods' evidence was that the interview occurred on November 28th rather than on the 27th, that some years earlier his duties had included the investigation of communism but that at that time they had nothing to do with such investigations but were to control the security and protection of information and work in the hands of contractors for the Department of Defence Production and also to investigate on direction, internal matters respecting employees of the Department. He denied having said that he was a communist hunter or what his duties were and he also denied having made any such statement as that attributed to him by the suppliant adding that he had no reason whatsoever to make such a statement. He also said that he had not known Swan before coming to Calgary and denied making any statement that he had been alerted in July by Swan to be ready to come to Calgary on a day's notice.

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Having observed their demeanour in giving their evidence I prefer the evidence of the suppliant to that of Woods and I find that Woods did utter the words attributed to him by the suppliant. In the circumstances described, however, I regard the words as having been uttered as a boast in answer to the suppliant's question as to Woods' function and for the purpose of impressing the suppliant and the suppliant's wife with his experience as an investigator and I do not think the words can reasonably be regarded as having been spoken of or concerning the suppliant or as implying that the suppliant was suspected of being a communist or of having communistic tendencies. Moreover, I am not satisfied on the evidence that Mrs. Hopson in fact interpreted the remark as referring to the suppliant or as implying either that the suppliant was a communist or that he was suspected of being a communist or of having communistic tendencies.

On the issue as to defamation by the uttering of these words I accordingly find for the respondent.

The next matter relied on as the basis of a right to damages for defamation is the alleged oral publication by D. A. Golden to H. R. Kotlarsky on or about December 17th and the publication by Kotlarsky both orally and by his letter of December 17th of the words:

1. Mismanagement of staff and failure to administer properly the work of the office.
2. Deliberate and repeated failure to carry out the prescribed purchasing policies and practices of the Department and permitting others to fail to carry out such policies and practices, including failure to adhere strictly to the policies and practices of the Department governing invitations for, and handling of, competitive tenders.

As previously mentioned these expressions were composed by Messrs. Kotlarsky, Erskine and Waddell following the meeting of December 8th at which the decision to take steps to dismiss the suppliant was made by the deputy minister. On the evidence I see no reason to think that Mr. Golden uttered these particular expressions to Mr. Kotlarsky at or about the time alleged and so far as this alleged publication of them is concerned I find it has not been established. It is otherwise, however, with respect to the alleged publication by Mr. Kotlarsky. There is evidence that he wrote the letter and in so doing dictated it to his secretary. It is not unlikely that a copy may have been seen

as well by one or more clerks who might have had occasion to deal with it in the course of their duties. In respect of the publication to these particular individuals I find that the defence of privilege succeeds. But the publication did not end there. Mr. Kotlarsky also telephoned Mr. McKay at Calgary and read the letter to him and dictated it to Mr. McKay's secretary after enjoining her to make but one transcript and to destroy her notes. I have had some doubt as to whether the publication of the letter to these persons was on an occasion of privilege but I have come to the conclusion that the principle which applies to the other publications applies to these as well.

In *Lacarte v. Board of Education of Toronto*[1] Locke J., speaking for the majority of the court said at page 471:

> The letter was written and the reasons for the termination of the appellant's services stated for the reasons to which I have referred. In the ordinary course of business, the letter was dictated to a stenographer and copies were undoubtedly seen by the filing clerks. The ground upon which the privilege rests in a case such as this is stated by Baron Parke in *Toogood v. Spyring* (1834), 1 C.M. & R. 181 at 193, 149 E.R. 1044. That it is not lost by such communications is shown by the cases referred to by the learned trial judge: *Osborn v. Boulter* [1930] 2 K.B. 226, 232 and *Edmondson v. Birch* [1907] 1 K.B. 371, 380, which, in my opinion, accurately state the law. In the last mentioned case it was said by Fletcher Moulton L. J. (p. 382) that if a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.

In *Osborn v. Boulter*, Scrutton L.J. summed up the law in the following passage at page 232:

> In my view, on the question whether privilege is lost by communicating to a staff of clerks the alleged defamatory matter, the rule we have to apply has been laid down by this Court after a consideration of *Pullman v. Hill & Co.* [1891] 1 Q.B. 524, in *Edmondson v. Birch & Co., Ld.* [1907] 1 K.B. 371, and again adopted in this Court in *Roff v. British and French Chemical Manufacturing Co.* [1918] 2 K.B. 677. In *Edmondson v. Birch & Co., Ld.*, a company in England wrote and cabled to a company in Japan about the character of a person whom it was proposed to employ. The letter and cable, which contained defamatory matter, were, in the ordinary course, communicated to the clerks of the company sending the letter and cable, by dictation, copying and coding. Collins M.R., after considering the previous cases of *Pullman v. Hill & Co.* and *Boxsius v. Goblet Frères* [1894] 1 Q.B. 842, said [1907] 1 K.B. 380: "The result of the two cases to which I have alluded, taken together, appears to me to be that, where there is a duty, whether of perfect or imperfect obligation, as between two persons which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons where that is reasonable and in the ordinary course of

[1] [1959] S.C.R. 465.

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business; and if so, it will not destroy the privilege." Cozens-Hardy L.J. said Ibid. 381: "I think that, if we were to accede to the argument for the plaintiff, we should in effect be destroying the defence of privilege in cases of this kind, in which limited companies and large mercantile firms are concerned; for it would be idle in such cases to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only. In the ordinary course of business such a document must be copied and find its way into the copy letter-book or telegram-book of the company or firm. The authorities appear to me to show that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business." Fletcher Moulton L.J. said [1907] 1 K.B. 382: "I agree. In my opinion the law on the subject, as laid down in the cases, amounts to this: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business" The same was said in *Roff v. British and French Chemical Manufacturing Co.* If the principle is as there laid down, the decision in *Pullman v. Hill & Co.* is merely that in 1890 it was not a usual and reasonable thing for a member of a business firm to dictate a letter containing defamatory statements to, and have it copied by, a clerk.

In the opinion of the Court of Appeal in that case if a member of a business firm wished to send such a letter he must write and copy it himself. That is a decision of fact. The principle laid down in *Edmondson v. Birch & Co., Ld.,* applies, while the decision on fact is not binding on any Court in 1930. I am glad to find that in Salmond on Torts and in Odgers' Libel and Slander the same view is taken of *Pullman v. Hill & Co.* as an authority.

The question then, as I see it, is whether in the circumstances of this case the communication of the contents of the letter in question to the suppliant by communicating it first to Mr. McKay was a reasonable means of doing so and was in the ordinary course of business. "Business" is perhaps not strictly appropriate in the present situation but I do not think anything turns on that. "Practice" might be more accurate and would, I think, be equally well within the principle. It is, I think, to be taken as well that the question whether the transmission or treatment of the communication is in accordance with the reasonable and usual course of practice is not affected by the fact that the communication may be defamatory of the suppliant. What is reasonable and in accordance with the usual practice in making the particular communication appears to me to depend only on the reasonable and usual course for making communications of the kind in question rather than upon the characteristics of the particular communication.

I turn then to the circumstances in the present case leading up to the communication in question. Mr. Kotlarsky's

evidence is that at the meeting on December 8th he had obtained for the suppliant the concession that he be given an opportunity to resign and that he had formed the opinion that it would be in the suppliant's interest to resign because in that case he would be eligible for a cash gratuity and he would not have a record of dismissal to contend with in seeking employment and because on the other hand he felt that in the event that the suppliant should choose not to resign his chances of retaining his position after presenting his side of the case to a senior officer were forlorn. On December 8th he had called the suppliant and had told him this but had got the impression that the suppliant had not been able to appreciate his situation properly. That seems to have been the last occasion on which he spoke directly with the suppliant. Thereafter arrangements had been made for Mr. McKay to contact the suppliant and in a friendly way to tell him again that a recommendation for his dismissal was to be made and if possible to show him the advantages of resigning rather than being dismissed. To that end McKay had had the conference of December 10th with the suppliant and by December 17th, McKay's position in the matter as described by the suppliant on discovery was that "he was the officer appointed, nominated, and he was acting as the go-between as well. He was occupying my chair and they naturally were in communication with him by telephone". I take it from this that McKay was at that stage regarded by the suppliant as a sort of liaison officer between himself and the Department and that it was not regarded by the suppliant as anything but natural or ordinary that an urgent message for the suppliant from officials of the Department in Ottawa should be transmitted to him through McKay.

When speaking with Hopson on December 8th Kotlarsky had told him that he would have a few days to consider what course he would take but a week had passed and there had been no answer. On the 15th Kotlarsky had phoned McKay to enquire if Hopson had resigned and had been told that he had not but was prepared to fight. Considering that more than the few days he had conceded had elapsed Kotlarsky thereupon decided to put an end to the indefinite period during which it would be open to the suppliant to resign by sending the letter to him. However, in order to

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extend the opportunity to resign to the moment of receipt of the letter and at the same time to afford to the suppliant an opportunity to see in advance and consider the grounds upon which it was proposed to put forward the recommendation for his dismissal, he also decided to make the contents of the letter known to the suppliant before the letter would reach him in the course of post. The occasion to communicate the contents of the letter to the suppliant in advance is the occasion here in question rather than the occasion to formally notify him of the decision to recommend his dismissal and it was, in my opinion, an occasion of qualified privilege. There were, however, at least two methods by which the desired object might have been accomplished. Kotlarsky might have telephoned the suppliant himself and told him all that was necessary. He might also have asked the suppliant to take the letter down in writing so that he could see and reflect on the contents. Had this course been taken there would have been no publication and the present problem might not have arisen. The other course, and the one adopted, was to pass the message to McKay for transmission to the suppliant. This course, as I see it, presented the advantages that McKay could make sure that the suppliant would see the reasons on paper and that McKay being in Calgary might be expected to have a better chance than Kotlarsky of persuading the suppliant that it was to his advantage to resign. In these circumstances having regard to the occasion and to the object of the communication I regard the means adopted for making it as reasonable. Then was the course usual? This to my mind presents the more difficult question of the two but there is the admitted fact that McKay at the time had the character of a "go-between", and the further fact that in case the suppliant should resign, the arrangement proposed, as I understand it, was that the official notice should be returned unopened by sending it to McKay. There is also the evidence that the suppliant on hearing the contents of the letter from McKay by telephone asked if he might come to the office and get a copy of it without prejudicing his opportunity to resign and return the original when it arrived and that he went to the office that afternoon and got possession of the copy which Mr. McKay's secretary had made. From this I would infer both that the suppliant did not regard the method of

communication to him through McKay as anything but usual and that after hearing the contents of the letter he adopted the procedure by taking advantage of the communication without objection as to the method followed. In these circumstances the method of communication used seems to me to have been quite usual and ordinary and had the message not been defamatory I do not think anyone would be prompted to suggest otherwise. Accordingly I hold that the occasion was one of qualified privilege which was not lost by the communication to McKay and it also appears to me that the publication of the letter to McKay's secretary for the purpose of having a copy of it made is protected by the same qualified privilege.

There is no proof of malice on the part of Mr. Kotlarsky. On the contrary I think the evidence establishes that there was no malice on his part and indeed in the course of argument counsel for the suppliant said he would not presume to point to anything malicious in Mr. Kotlarsky's action.

The evidence of Mr. McKay also suggests that a Mr. J. B. Ross, the administrative officer of the Purchasing Branch of the Department, may have been listening on the telephone at the Ottawa end during the conversation between Kotlarsky and himself and thus may have heard the letter read but while McKay seems to have had that impression, he also said that his memory of the transaction was not clear and as there is no other evidence of Mr. Ross or anyone else in Ottawa hearing the letter read, I do not find any such publication proved.

The suppliant's claim accordingly fails.

The third incident of alleged defamation was the publication by Mr. Radbourne of the word "inefficiency" as the cause of the suppliant's retirement. Mr. Radbourne explained that the optional benefits available on retirement differed according to whether the retirement was a voluntary retirement before reaching the age limit or was compulsory because of age or because of disability or was by dismissal in which case the superannuation benefits available differed according to whether the dismissal was for misconduct or was for some other reason. For this purpose the word "inefficiency" was the less serious of the two expressions "inefficiency" or "misconduct" commonly used

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on such forms as indicating the cause of retirement in cases of dismissal. Mr. Radbourne had read the reasons set out in Mr. Kotlarsky's letter of December 17th to the suppliant, which, according to his evidence, were the same as those put forward in the submission to the Governor in Council, and as there was insufficient room to put all these words in the space provided therefor on the form he chose and inserted the word "inefficiency" as being his interpretation of the reasons. A copy of this form would be seen in the ordinary course of their duties by Mr. Radbourne's secretary, by a record section clerk of the Deparment of Defence Production, whose duty it would be to put the copy on file, and by the chief of the superannuation section. In addition a copy was forwarded to the superannuation branch of the Department of Finance where it may be assumed that it was seen by persons having occasion to see it in the course of their duties to deal with the suppliant's rights to superannuation benefits. These are the only publications which have been established and in my opinion they were all publications on privileged occasions. As malice has not been proved the defence of privilege succeeds and the claim fails.

The remaining incidents of alleged defamation are those involved in Mr. Radbourne's letters to D. G. Campbell of Pillsbury of Canada Limited in reply to the enquiries of that company as to the character, habits and ability of the suppliant and the cause of his separation from the government service. Each of these enquiries was addressed to Mr. Radbourne in his capacity as chief of the personnel division of the Department of Defence Production and was answered by him in that capacity in the discharge of duties in the Department which included the answering of such enquiries. The social obligation to answer such enquiries is recognized as affording a qualified privilege for the answer so made and in my view the occasion of making each of the answers here in question was a privileged occasion. As there is no proof of malice on the part of Mr. Radbourne on either occasion the defence of privilege succeeds and the claim fails.

I turn now to the three claims for damages which are based on the principle of *Janvier v. Sweeney*[1] and *Wilkinson v. Downton*[2]. In the *Wilkinson* case[3] Wright J., explained the basis of such an action in the following terms.

[1] [1919] 2 K.B. 316. [2] [1897] 2 Q.B. 57. [3] p. 58.

> The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

In that case the defendant as a practical joke had sent word to the plaintiff that her husband had met with an accident and had been seriously injured. The shock of hearing this news had caused the plaintiff to become seriously ill and in the result she recovered damages in respect of the physical harm so occasioned to her.

The passage which I have quoted from the judgment of Wright J., in the *Wilkinson* case was expressly approved by the Court of Appeal in *Janvier v. Sweeney* where the facts were somewhat more closely akin to those in the present instances in that the latter are all put forward in respect of the application of the alleged statements to the suppliant himself rather than as statements in respect of some other person so near to the suppliant in family or other relationship that his injury or peril could be expected to cause harm to the suppliant. In the *Janvier* case the plaintiff was a French woman living in England who for some years prior to 1917 had been engaged to marry a German. The German had been interned in the Isle of Man and the plaintiff had visited him on two occasions and had corresponded with him there. In order to persuade the plaintiff to obtain for them certain letters in the possession of another person which the defendants wished to see, one of the defendants said to the plaintiff: "I am a detective-inspector from Scotland Yard and represent the military authorities. You are the woman we want, as you have been corresponding with a German spy." The plaintiff became seriously ill as a result of this utterance and at trial obtained a verdict for damages which was upheld on appeal.

In order for the suppliant to succeed in an action of this kind, it would thus be necessary to find (1) that some servant of the Crown (in the course of his employment) wilfully did an act calculated to cause physical harm to the suppliant; (2) that there was no legal justification for the

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act; and (3) that the act in fact caused physical harm to the suppliant.

The first of the incidents relied on as giving rise to such a cause of action is the uttering by A. M. Swan while at dinner at the home of the suppliant on November 23rd of the words "Wright is guilty of bribery and could get five to twenty years for this". That these words were uttered by Swan is not in doubt. Both the suppliant and his wife stated in evidence that Swan had spoken them and in Mr. Hopson's version besides the words mentioned, Swan also said that he was going to see that he (Wright) got it. Swan was not called as a witness.

However, in my opinion the utterance of these words was not calculated to cause physical harm to the suppliant. Assuming that there was no justification for Swan uttering them the words whether true or not (and there is no evidence that they were true) referred not to the suppliant or to any peril that he or anyone near or dear to him might be in but to Wright. While the uttering of the remark on the particular occasion or even the discussing of matters which were under investigation in the suppliant's office on that occasion may be regarded as having been of questionable delicacy and may have been calculated to cause embarrassment to the suppliant, particularly in view of the fact that Swan was senior to him in the Department, the embarrassment, which I think the remark was calculated to produce, is a long reach from physical harm and in my view the first of the conditions for maintaining such an action is not fulfilled. I am, however, also of the opinion that the third condition is unfulfilled as well. The suppliant testified that since he was in charge of the office, there was a possibility of his being linked in some way with Wright's actions and that he might be charged and might even be found guilty and that he was quite frightened by the remark. Accepting this as true, it is, in my opinion, quite inadequate to found a claim for damages for personal harm. A passing fright resulting from reflection upon possible implications of the statement but not producing illness or other describable injury does not appear to me to be sufficient to sustain such a claim.[1]

[1] Cf Pollock on Torts, 15th Ed., pp. 37-39; Salmond on Torts, 13th Ed., pp. 16, 419; Fleming on The Law of Torts, 3rd Ed., pp. 33-35.

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The claim therefore fails.

The second of the matters relied on occurred in the course of the interview at the Palliser Hotel on November 27th when Mr. S. J. Woods delivered the notice of suspension to the suppliant. While there is evidence that Mr. Woods did not want to discuss the letter of suspension it appears to me that he wanted to accomplish more than merely to deliver it and this is, I think, indicated not only by the fact that Woods told the suppliant that he wanted to speak with him but by the circumstance that he asked the suppliant to come to the hotel to see him. Moreover, it seems probable that in the course of the interview, which was said to have lasted about half an hour, much more conversation took place than that deposed to by Woods and I discount as well his evidence that he had very little to say. The complaint is with respect to the uttering by Woods of the statement that "his function was to ferret out communistic activities among employees of plants and factories engaged in the production of material or supplies ordered by the Department of Defence Production for the Department of National Defence" and, as already mentioned when discussing this incident in connection with the suppliant's claim for defamation, I find that Woods did utter the words in question. As it was no part of Mr. Woods duties to investigate communists, or communistic infiltration, I would infer that the words were spoken for the purpose of giving the suppliant the impression that he (Woods) was a man of experience in dealing with difficult kinds of investigations who would not be easily satisfied and that he wished to produce this impression in order to put the suppliant in fear of him in the hope of eliciting from the suppliant some statement which would form part of his report to his superior. He stated at one point in his evidence that the suppliant had said that he could possibly have been more strict in the supervision of his office but that was a matter which could have been straightened out between him and Mr. Swan and in my view the hope or expectation that he would be able to elicit remarks of that nature was the reason why he wanted the interview with the suppliant as well as the reason why he uttered the words in question. In this case, the words complained of as having been spoken by Woods were, in my opinion,

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calculated to produce fear in the suppliant which if severe enough to produce bodily harm would have been sufficient to sustain the claim. Moreover, it is, I think, plain that there was no legal justification for the uttering of such a remark. I am, however, of the opinion that the third of the conditions required for recovery has not been met. Instead of raising fear and shock with resultant bodily harm, according to the suppliant, it produced resentment. The suppliant's evidence is that Woods' statement "kind of gave [him] the impression that possibly this was part of his investigation out here and that [he] was suspected of being a communist or of having communistic tendencies," and that in his mind he resented the implication. He also said that he was in a wrought up state and that the utterance of this remark added to his wrought up state, that he was "quite upset and quite ill at the time", and that his physician, who attended him at his home, prescribed sedatives and bed rest and enjoined him to try living one day at a time. Having regard to the fact that he was already in a wrought up state as a result of the investigation going on in his office and that he had just received a notice of his suspension, which in my view would be a much greater source of stress than the statement here in question, I find the evidence unsatisfying and insufficient to establish either that the illness which he described was due to the utterance by Woods of the words in question or that the suppliant in fact suffered shock or consequent physical injury as a result of their utterance.

The claim accordingly fails.

The remaining incident in respect of which relief is sought on this basis was the occasion in Mr. McKay's office on December 10th when, according to the evidence of the suppliant, McKay said to him "Like Wright you have been subjected to a full scale investigation by the R.C.M.P. and you had better resign. I will have the stenographer type out your resignation and all you will have to do is sign it." Mr. McKay, while conceding that he may have uttered the second of these two sentences at some point during the course of the interview, denies having spoken the first sentence and he also denies having said anything in the nature of a threat to the suppliant. Neither Wright nor Little was called by either party. On the question whether

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the statement was uttered by McKay, I prefer the evidence of the suppliant and find that McKay did utter the words attributed to him. I also find that the words were intended to be and constituted a vague threat and that they were used in the hope of persuading the suppliant to resign his position. They were, however, uttered while tempers were aroused and under the provocation of what McKay regarded as an unwarranted suggestion by the suppliant that he (McKay) was in some way responsible for the difficult position the suppliant was in and that he (McKay) ought to be grateful to the suppliant for interceding on McKay's behalf in times past to prevent his being dismissed. In these circumstances, I do not think that the uttering of such a threat can properly be regarded as the basis of a cause of action for damage but in any case, it does not appear to me that any damage was sustained. I do not doubt that the suppliant was annoyed by the remark, but he did not impress me as being a person who can be easily frightened and I do not think that the remark caused him either fear or bodily harm. This conclusion is I think borne out by the statement in his description of the incident in his letter of December 28th, 1957, to Mr. G. W. Hunter that "around 5 p.m. we parted from Mr. McKay on an apparent note of cordiality". This claim as well accordingly fails.

I turn next to the question of the legality of the suppliant's suspension and of his subsequent dismissal from his office, both of which turn on provisions of the *Civil Service Act*[1] then in force.

That statute, which has since been replaced by S. of C. 1960-61, c. 57, provided in s. 3 for the establishment of a Civil Service Commission the members of which were to be appointed by the Governor in Council and, subject to certain express provisions, were to hold office during good behaviour. It also provided in s. 5 for the appointment by the Governor in Council of a deputy head for each department to hold office during pleasure. The authority to appoint or promote other persons to positions in the Civil Service and the procedure for so doing were prescribed in sections 18, 19 and 20 which read as follows:

18. Except as otherwise provided in this Act or in any regulation, neither the Governor in Council nor any minister, officer of the Crown,

[1] R.S.C. 1952, c. 48.

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board or commission, shall have power to appoint or promote any employee to a position in the Civil Service.

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;

20. (1) Every deputy head shall notify the Commission of every vacancy in any position in his department immediately after the vacancy occurs, and when such vacancy is to be filled, the deputy head shall request the Commission to make an appointment.

(2) The Commission shall thereupon appoint the person whose name stands highest upon the Commission's list of eligible persons for the class in which the position is found and who is willing to accept the appointment; . . .

The effect of these provisions was that in general, except for the appointment of the members of the Commission and deputy heads of departments, the power to make an appointment to the Civil Service was withdrawn from the Governor in Council and from ministers, officers, boards and commissions and was vested in the Civil Service Commission which was itself restricted in the exercise of the power to doing so only at the request of the deputy head of a department and by appointing (subject to rejection under the probationary provisions of s. 23) the person whose identity was to be ascertained by reference to s. 18(2). Turning to the question of the power to dismiss persons who had been appointed to the Civil Service it is to be observed that while dismissal is referred to in ss. 35, 36 and 55, which, however, have no application to the present situation, no express power of dismissal was conferred by the statute on the Commission or on any head or deputy head of any department or on any other officer. Once appointed a Civil Servant became a servant of the Crown holding office during pleasure and in my opinion (save to the extent that a person holding an appointment of a temporary nature may have been subject to dismissal by the Treasury Board in the exercise of authority conferred by regulations made under s. 5 of the *Financial Administration Act*) the power to dismiss remained vested in and only in the Governor in Council. That this was the situation appears to be borne out by the stringent provisions of s. 51 with respect to suspension authorizing only a minister, or in particular instances certain other officials, to suspend an employee of his department for cause and by s. 52 which expressly refers to the power of the Governor in Council with respect to dismissal. These sections provided:

51. (1) The head of a department, and in his absence the deputy head, or in respect of officers, clerks or employees employed in any remote district, any officer of the department authorized in that behalf by the head of the department, may

(a) suspend from the performance of his duty any officer, clerk or employee guilty of misconduct or negligence in the performance of his duties, and

(b) remove such suspension,

but no person shall receive any salary or pay for the time or any part of the time during which he was under suspension unless the Commission is of opinion that the suspension was unjust or made in error or that the punishment inflicted was too severe.

(2) All cases of suspension, with the reasons therefor, shall be reported in writing by the deputy head to the Commission.

52. Subject to section 3, nothing herein contained shall impair the power of the Governor in Council to remove or dismiss any deputy head, officer, clerk or employee, but no such deputy head, officer, clerk or employee, whose appointment is of a permanent nature, shall be removed from office except by authority of the Governor in Council.

In the scheme of the statute s. 51 appears to me to confer on the persons therein mentioned a power to suspend which in the absence of such a provision such persons would not have and that the power so conferred is exercisable only within the limits of and in the manner prescribed by the section. In contrast with this the first part of s. 52 appears to have been enacted to expressly preserve the existing authority of the Governor in Council to terminate the service of any member of the Civil Service, other than a member of the Civil Service Commission, whether for any stated cause or without cause, and to do this notwithstanding the fact that such civil servant may have been lawfully appointed in the exercise by the Commission of powers committed to it by the statute.

In the present case, while the ground set out in Mr. Kotlarsky's letter of November 26th does not appear to me to be an allegation of either misconduct or neglect in the performance of duties, it was expressly agreed between the parties that the suppliant was suspended from his office on November 28th, 1958 and this, on reflection, appears to me to admit of no conclusion but that the power to suspend him was validly exercised since otherwise the purported suspension would be beyond the power conferred by s. 51 and therefore of no effect whatever in law. In view of the agreement therefore I am unable to reach the conclusion that the suppliant's suspension was illegal or that he has any cause of action for damages for illegal suspension.

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It was also expressly agreed that the suppliant was dismissed on December 31st, 1958 by authority of the Governor in Council and it appears to me to follow from this that from the time of the exercise of the authority by the Governor in Council the suppliant's employment at pleasure was at an end whether any reason for such termination existed or not. *Vide Zamulinski v. The Queen*,[1] *Peck v. The Queen*[2] and *Ridge v. Baldwin*[3]. The minute, a copy of which was appended to the agreement indicates that the Governor in Council did not in fact approve of the suppliant's dismissal until January 14th, 1959 but no issue was raised with respect to the purported retroactive effect of the Order in Council and in view of the agreement I can see no reason to think that the suppliant was not lawfully dismissed or that he has any cause of action for damages for wrongful dismissal.

This brings me to the suppliant's claims for damages "for not having been given" "an opportunity to present his side of the case to a senior officer of the Department nominated by the deputy head" both in respect to the reason for his suspension and in respect of the reasons for his dismissal. These claims arise under s. 118 of the regulations made by the Commission pursuant to s. 5 of the Act which authorizes the making of such regulations as the Commission deems necessary or convenient for carrying out the Act. At the material time s. 118 read as follows:

> 118. (1) An employee who has been suspended pursuant to section 51 of the Act shall, within ten days of the commencement of the suspension, be given an opportunity to present his side of the case to the deputy head or to a senior officer of the department nominated for that purpose by the deputy head.
>
> (2) An employee shall, before being demoted or dismissed, be given an opportunity to present his side of the case to the deputy head or to a senior officer of the department nominated for that purpose by the deputy head.

This regulation differs from the corresponding regulation which was considered in *Zamulinski v. The Queen*[4] and *Peck v. The Queen*[5] mainly in that unlike the earlier regulation it contemplates that in the case of a suspension the opportunity for the employee to present his side of the case is to be afforded after the suspension has occurred. The

[1] (1957) 10 D.L.R. (2d) 685. [2] [1964] Ex. C.R. 966.
[3] [1964] A.C. 40 at p. 65.
[4] (1957) 10 D.L.R. (2d) 685. [5] [1964] Ex. C.R. 966.

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question whether s. 118(1) of the regulations is not *ultra vires* insofar as it may purport to abrogate the right of a civil servant arising by implication of law[1] under s. 51 of the statute to an opportunity to be heard as a preliminary to the exercise of the power of suspension was not raised, both parties having proceeded on the basis of the regulation being *intra vires* and having treated the issue of liability as turning on whether the opportunity contemplated by the regulation for the suppliant to present his side of the case had been afforded or denied.

The nature of the opportunity to which an employee was entitled under the earlier regulation was discussed in *Peck v. The Queen* where Cattanach J., said at page 996:

> To paraphrase Lord Loreburn's expression in *Board of Education v. Rice* [1911] A.C. 179, there must be an opportunity to present the case and a fair opportunity to controvert statements prejudicial to the suppliant's point of view.
>
> Such an opportunity may be denied where the adverse case is not made known. The nature of the allegations against the suppliant must have been clearly specified beforehand so that she may have had a proper opportunity to prepare her defence, but the degree of particularity may vary according to the degree of informality with which the proceedings are conducted and even when they are inadequately specified, the defect may not be fatal if the suppliant was not thereby prejudiced, e.g. because she was already conversant with their general nature.

To my mind it is fundamental to the sufficiency of any such opportunity that the case of which the employee is to have an opportunity to present his side be brought to his attention so that he may know what it is that he is to answer. It may be that the opportunity required by the regulation need be neither a trial nor a quasi trial. It may also be that it need involve neither the presentation of evidence in the employee's presence nor an opportunity to cross-examine those who may have made statements detrimental to his side nor an opportunity to call witnesses to establish his case. With respect to these features no concluded opinion appears to me to be necessary in the present case. But the minimum that is required is that the employee be advised what the subject matter is that is relied on as the reason for his suspension so that he can present his side of that question. Until this much is in some way

[1] Cf *Ridge v. Baldwin* [1964] A.C. 40 at p. 66; *Bernard Randolph et al. v. The Queen* [1966] Ex. C.R. 157.

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made known to him no opportunity to speak can be regarded as an opportunity to present his side of the case even by the minimum and most elementary standards.

The facts in the present case present an example of what in my opinion is not a proper or sufficient opportunity within the meaning of the regulation. I leave aside the question whether Mr. McKay was an officer of the Department who was eligible for appointment by the deputy minister under s. 118(1) as there is evidence from which waiver by the suppliant of his right to object thereto might be implied. But I would not infer from anything in the evidence that the suppliant ever waived his right to be told the reason for his suspension. By Mr. Kotlarsky's letter he was advised that the reason was:

> Incompetence as an office administrator in failing to be aware of existing conditions in his office.

In this he was being accused of incompetence in failing to know something the identity of which the accuser was not prepared to disclose and the suppliant was being left to guess at what the reason was. How the suppliant could know from this statement what the reason for his suspension was I am at a loss to understand and I am also led to wonder how the composer of the words would have reacted to a similar accusation made against himself.

The suppliant's reaction to this was what might have been expected. He asked Woods, who delivered the letter, if he was in a position to tell him what was referred to. He wrote a letter to Mr. Kotlarsky asking for the regulations. He wrote to Mr. McKay complaining of the nebulous character of the accusation and declined to attempt a defence. Several days later on December 4th he telephoned Mr. Kotlarsky and expressed the hope he would have an opportunity to answer specific charges and as late as December 7th when he again telephoned Mr. Kotlarsky he pointed out that he still had no charges to reply to and that all he could do was to protest and he proposed that he would come to Ottawa at his own expense in the hope of seeing the deputy minister when he might convey his impression of the investigation and present his feelings about it and try to get more details about the specific nature of the charges. If indeed there were considered to be existing conditions in the office of which the suppliant had

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failed in a duty to be aware I do not see why the conditions referred to were not notified to him but he does not appear to have ever been informed of what the existing conditions referred to in the letter were. There is a considerable volume of evidence given by Mr. McKay of conditions which he found in the office when he took charge of it but I am unable to conclude on the evidence that these or any of them were the conditions referred to in the letter or that the suppliant was ever informed that they or any of them were the ones of which he was charged with having failed to be aware. I am accordingly of the opinion that the suppliant was not afforded a fair or any opportunity to present his side of the case in answer to the stated reason for his suspension and that on the authority of *Zamulinski v. The Queen*[1] he is entitled to recover the damages occasioned to him thereby. I should add that if anything but the reason as stated was in fact the reason for the suspension (as Mr. Erskine's evidence suggests) the conclusion that the suppliant was not given an opportunity to present his side of the case applies *a fortiori*.

The assessment of damages for the denial of such a right is, as Thorson P. points out in the *Zamulinski* case, one of some difficulty. The possibility of course exists that the failure to afford the suppliant a proper opportunity to present his side of the case with respect to his suspension may have had a direct causal connection with the subsequent decision to recommend his dismissal since it is impossible to say that the suppliant might not have been able to answer whatever the accusation was and in that case the likelihood of such a decision being made might have been decreased, but the evidence leaves me unsatisfied that the decision to dismiss the suppliant resulted from the failure to give him a proper opportunity to present his side of the case with respect to his suspension and a conclusion to that effect would I think be based on nothing but speculation. I am therefore unable to take such a possibility into account. The possibility also exists that the suppliant might have been able to satisfy the person hearing his side that the suspension was unwarranted and should be removed and that in that case the Commission might have acted to restore his right to pay for the period of his suspension but

[1] (1957) 10 D.L.R. (2d) 685.

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that too in my view is mere speculation. Moreover, the evidence indicates that he later received his pay for all but three days of the period during which he was under suspension.

On the whole I see no firm basis on which the suppliant's damages may be measured and as I see it I can take into account only the probability that there was some expense incurred by the suppliant for telephone calls and the fact that the suppliant's right was denied in the circumstances which I have related coupled with the consideration that the denial of such a right is something to which encouragement should not be lent by making the award of damages trifling in amount. Taking these matters into account I assess the suppliant's damages at $200.

Turning next to the opportunity afforded to the suppliant to present his side of the case prior to his dismissal, I am also of the opinion that the opportunity afforded him in his interview with Mr. Hunter was not adequate to satisfy the requirement of s. 118(2) of the regulations. Apart from the undefendable generalities set out in Mr. Kotlarsky's letter of December 17th the suppliant was not furnished with details of the several matters upon which steps were to be taken to dismiss him until about an hour after the interview with Mr. Hunter began. Even then the suppliant was not provided either with a statement of the matters in question or with a copy of the memorandum on which the matters were stated nor does it appear that he was told that these were the matters in respect of which an opportunity was being afforded to him to present his side. Moreover, about half of the matters stated in the memorandum were not raised or discussed. It is apparent from Mr. Hunter's evidence that the matters which were not discussed were regarded by him as established facts and it is therefore, I think, to be inferred that they were taken into account by him along with the other facts and explanations in reaching his conclusion and making his recommendation. It may be that the same conclusions would have been reached and the same recommendation made even after hearing what the suppliant had to say about them but, that, as I see it, is not the point. The material fact, in my view, is that these matters were not brought to his attention so that he would know they formed part of the case of which

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he was being given the opportunity to present his side and this to my mind admits of no conclusion but that he was denied the opportunity for which s. 118(2) provides.

It would follow from this conclusion that on the authority of the *Zamulinski*[1] case the suppliant is entitled to recover such damages as may have been occasioned by the denial of the opportunity to which he was entitled. Counsel for the Crown, however, submitted that when regulation 118(2) is interpreted, as the corresponding regulation was in the *Zamulinski* case, that is to say, as conferring a legal right upon a civil servant to an opportunity to be heard, it operates as a clog upon or an impairment of the right of the Governor in Council to dismiss the servant without cause, that even the probable delay in effecting a dismissal, which was the basis for the calculation of damages in the *Zamulinski* case, would be an impairment of the right to dismiss without cause and that as interpreted in the *Zamulinski* case regulation 118 was repugnant to the statute and was therefore *ultra vires*, that s. 52 was not drawn to the attention of the Court in the *Zamulinski* case or in the *Peck*[2] case and that on the authority of *Shenton v. Smith*[3] and *R. Venkata Rao v. Secretary of State for India*[4] the correct interpretation of s. 118(2), if it is *intra vires*, is not that it creates a legal right in favor of the civil servant but that it simply prescribes administrative procedure the breach of which confers no right of action on the servant but merely leaves the person committing the breach accountable to higher authority therefor.

Regardless of what conclusion I might have reached on this question had the matter been unaffected by the decisions of this Court in the *Zamulinski* and *Peck* cases (and I do not wish it to be taken that I have reached any concluded view on the question) I do not think on the whole that I would be justified at this stage in treating the *Zamulinski* case as incorrectly decided and I shall therefore follow it and hold that the suppliant is entitled to such damages as have been occasioned by the denial of the opportunity to which he was entitled. On the material before me, however, I see no reason to think that the loss of his position can be regarded as having been caused by the denial of such

[1] (1957) 10 D.L.R. (2d) 685.
[2] [1964] Ex. C.R. 966.
[3] [1895] A.C. 229.
[4] [1937] A.C. 248.

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opportunity nor can I see anything to take into account in assessing his damages beyond the fact that his right was denied him in the circumstances related, that he incurred some further expense for telephone calls and that the importance to be attached to the right in this instance is greater than in the case of the right to present his side with respect to suspension. Taking these elements into account I assess his damages at $200.

The remaining matter to be dealt with is the suppliant's claim for the cash gratuity for which provision is made in s. 73 of the Civil Service Regulations.

Section 47 of the *Civil Service Act* provided as follows:

47. (1) The Commission, with the approval of the Governor in Council, shall make regulations under which the deputy head may in case of illness or for other sufficient reason grant leave of absence to any officer, clerk or employee for the period or periods, with or without pay, or with reduced pay, during such period or periods, or such part of the same, as the regulations may prescribe.

(2) The Commission, with the approval of the Governor in Council, may make regulations providing that whenever any officer, clerk or other employee may be granted a period of leave of absence with pay on his retirement from the Service, he shall, in lieu of such leave of absence with pay, be paid out of the Consolidated Revenue Fund a gratuity equal to the amount of his salary for the period of such leave of absence, and, in such case, the position occupied by him shall become vacant as from the date of payment of the gratuity.

Regulation 73 which was made pursuant to the authority of s. 47, read in part as follows:

73. (1) A deputy head may grant retiring leave or a cash gratuity in lieu thereof to an employee who is being retired, but such grant may not in any case exceed the maximum amount of retiring leave or cash gratuity specified hereunder, nor shall it in any case exceed the unexpended portion of the employee's accrued sick and special leave:

. . .

(2) A cash gratuity shall consist of salary at the rate in effect on the employee's last day of active service for the period indicated, less the amount, if any, of the immediate allowance set under the provisions of the Public Service Superannuation Act.

. . .

(5) Retiring leave or cash gratuity shall not be granted to an employee whose service is terminated because of inefficiency or misconduct.

The position taken by the suppliant was that he was entitled to a cash gratuity under s. 73(1) unless it was established in evidence that his service was "terminated because of inefficiency or misconduct" within the prohibition of s. 73(5). To reach this position it is necessary to read the word "may" in s. 73(1) as mandatory and counsel

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submitted that such was its proper interpretation. For the argument to succeed it would also seem to be necessary to read as mandatory the word "may" in s. 47(1) of the Act, where both "shall" and "may" are used. Counsel for the Crown on the other hand while admitting that if the suppliant were entitled to a cash gratuity the amount would be three months' salary, submitted that the granting of retiring leave or of cash gratuity in lieu thereof was discretionary and that even if mandamus might lie to compel the deputy head to exercise his discretion no right to enforce the granting of either leave or gratuity existed.

In my opinion the Crown's position on this issue is sound. Apart from the conclusion suggested by the word "gratuity" that the payment is a matter of grace rather than of right, I am unable to see either in s. 47(1) of the Act or in s. 73(1) of the regulations any basis for interpreting the word "may" otherwise than as enabling and as importing an authority to the deputy head to grant, if he sees fit to do so, rather than as creating a right in an employee to insist on the leave or the gratuity. To my mind the only thing that militates in favor of the suppliant's position is what I assume to be the regularity with which the power is exercised in favor of retiring employees but this plainly cannot affect the interpretation to be put upon the law[1].

As the result of this conclusion is that the suppliant's claim must fail it is not strictly necessary for me to deal with the question whether payment of the gratuity was barred by s. 73(5) of the regulation but as this was pleaded as a defence and as it is not inconceivable (particularly in view of the proposal to pay the gratuity if the suppliant had resigned) that the belief that s. 73(5) applied may have been the only reason why action was not taken to grant the gratuity I do not think I should part with the matter without expressing my view on it. For the purpose of considering the matter it may I think be assumed that the person who put forward the recommendation to the Governor in Council believed that the grounds set out in Mr. Kotlarsky's letter of December 17th were true in fact. It may even be assumed that they were true

[1] Cf *Matton v. The Queen* (1897) 5 Ex. C.R. 401; *Balderson v. The Queen* (1897) 6 Ex. C.R. 8, affirmed (1898) 28 S.C.R. 261; *Miller v. The Queen* [1931] Ex. C.R. 22.

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in fact. It may also be taken that they were the reasons why the person putting the recommendation forward recommended the suppliant's dismissal and that it was so stated in the submission. One may I think go one step further and assume that the representation to the Governor in Council of the facts so set out had some bearing on the final decision. But even when all this has been assumed it would in my opinion be mere speculation to say that the suppliant was dismissed by the Governor in Council for the reasons set out in the submission when the Order in Council does not say so. What the minute says is that the Governor in Council approved the recommendation, that is to say, the recommendation that the suppliant be dismissed, but the reasons why the Governor in Council did so, when not set out in the Order are unsearchable and all that may properly be affirmed is that the Governor in Council for reasons not stated considered it expedient to dismiss the suppliant. To my mind it is quite impossible to say in this situation that the service of the suppliant was "terminated because of inefficiency or misconduct" within the meaning of the prohibition of s. 73(5) of the regulation. While the Court is not in a position to review the matter or to give the relief claimed, if the only reason why the gratuity was withheld was a belief that the granting of it was prohibited by s. 73(5) the matter ought to be reconsidered by the appropriate authority on the basis that s. 73(5) did not apply[1].

In the result there will be judgment declaring that the suppliant is entitled to damages in the total amount of $400 being part of the relief claimed in his petition of right. The suppliant is also entitled to the costs of the respondent's motion to amend made on the opening day of the trial, to the costs, fixed at $200 awarded him during the course of the trial and to the general costs of the petition and proceedings thereon but subject with respect to the last mentioned costs to a deduction of two-thirds to cover the costs of issues on which he did not succeed and is therefore not entitled to costs and the costs to which the Crown would otherwise be entitled on those issues.

[1] *Vide R. Venkata Rao v. Secretary of State for India* [1937] A.C. 248 at 257-8.