Neutral Citation Number: [2007] IEHC 20

THE HIGH COURT

[2006 No. 3378P]

BETWEEN

PAUL CAHILL

PLAINTIFF

AND
DUBLIN CITY UNIVERSITY

DEFENDANT

Judgment of Mr. Justice Clarke delivered the 9th February, 2007.

1. Introduction

1.1 The plaintiff ("Professor Cahill") held, at all relevant times, the post of Associate Professor in the School of Biotechnology of the defendant university ("DCU") and was also Director of the Vascular Health Research Centre of the Faculty of Science and Health of DCU. Professor Cahill has had a distinguished academic career in the United States during the 1990s, culminating in the holding of Associate Professorships at Georgetown University Medical Centre and a Professorship at University of Rochester Medical Centre. As of the 1st October, 1999 Professor Cahill was appointed to DCU, initially as a senior lecturer, and later to the position of Associate Professor in 2001.

1.2 It is common case that in early months of 2006 Professor Cahill was engaged in discussions with representatives of the National University of Ireland Galway ("NUIG") with a view to exploring the possibility of Professor Cahill, together with his research team, moving to NUIG with Professor Cahill taking up the position of Chair of Molecular Medicine in that University. While there are some disputes as to the precise content of a discussion which took place between Professor Cahill and the President of DCU, Professor Ferdinand Von Prondzynski, it is common case that, at a meeting in early March 2006, Professor Cahill, at a minimum, informed Professor Von Prondzynski of the high probability that he would move to NUIG. In that context matters dragged on for a number of months with DCU pressing Professor Cahill for a definite date for his departure but Professor Cahill indicating that he was not yet in a position to resign in a formal manner. Against that background Professor Cahill received a letter on 14th June, 2006 from Marian Burns, the Director of Human Resources at DCU, which purported to give Professor Cahill three months notice of termination of his employment, as a result of which it was stated that his employment would end on 10th September, 2006. The decision was stated to be that of the President of DCU Professor Von Prondzynski.

1.3 Professor Cahill contests the validity of the termination of his contract in that manner. It is accepted by both sides that the terms of the relevant contract of employment provides for termination on three months notice. However, Professor Cahill contends that the termination of his employment is either:-

(a) invalid having regard to certain provisions of the Universities Act 1997 ("the 1997 Act"); or

(b) is invalid in circumstances where it is alleged that the notice of termination was served in breach of fair procedures.

2. Procedural History

2.1 Professor Cahill initially sought a number of interlocutory injunctions restraining DCU from treating him as having been dismissed and, furthermore, from interfering with the performance by Professor Cahill of his duties and responsibilities as Associate Professor. That application first came before the court on 31st July, 2006 when it was, by consent, adjourned to the 13th September, 2006. At that time, in accordance with the notice of termination, if valid, Professor Cahill's employment was due to terminate on the 13th September, 2006. When the case came back before the court on that date it was agreed between the parties that the interlocutory hearing should be adjourned until 13th October, 2006 and also that the substantive case be listed for mention on 2nd October, 2006 for the purposes of seeking an early trial of the full action. On that basis DCU agreed, without prejudice, to treat Professor Cahill as continuing in employment until 16th October, 2006. The process of seeking an early date for the trial of the full action continued at a pace but such a date had not been fixed as of the 16th October.

2.2 The interlocutory application came before me on that date. There was a measure of agreement between the parties subject to one matter. At the hearing before me on 16th October, DCU indicated that it was prepared to continue, until a trial which was then anticipated to be likely to occur in relatively early course, its agreement to the effect that it would continue to pay Professor Cahill's salary pending that trial. The issue between the parties at the interlocutory hearing was as to whether Professor Cahill was also entitled to an interlocutory order which would allow him to continue to perform his duties pending trial. Having heard argument and submissions on both sides I reserved judgment until the following day (17th October, 2006).

2.3 In a brief ruling delivered on 17th October I indicated that I was prepared to make that further order as sought by Professor Cahill and further indicated that I would, at a later date, give more detailed reasons for making such an order. Events were overtaken by the need to apply court time to the necessary case management measures required to ensure an early trial of the full issues between the parties. The full trial was heard before me between 13th and 21st December, 2006.

2.4 Thereafter I delivered a brief judgment on 23rd January, in which I indicated the principal conclusions which I had reached and further indicated that I proposed finding:-

(a) that the purported dismissal of Professor Cahill was contrary to the provisions of the 1997 Act and therefore invalid; and

(b) that I was not satisfied, at that stage, that it would be appropriate to make any mandatory order which would direct the duties which Professor Cahill was to carry out in the light of the finding at (a) above.

2.5 I also gave some brief indication of the principal conclusions which lead to my forming a view as to those two findings. I further indicated to the parties that I would, in early course, deliver full reasons for so finding.

2.6 In this judgment I set out those reasons. I also propose to set out in more detail the reasons for coming to the conclusions which I did, in respect of the interlocutory application.

2.7 While there are a small number of factual matters which are either in dispute or, at least, are the subject of differing suggestions as to how they should be construed, the principal basis upon which the case was argued on behalf of Professor Cahill concerned the contention that a dismissal in the manner effected by the President of DCU was not permitted having regard to the provisions of the Universities Act 1997. I will return, in the course of this judgment, to the areas of fact upon which the parties have differing positions. However it seems to me that the key issue for resolution concerns the proper interpretation of the 1997 Act and I therefore first turn to that question.

3. The Universities Act 1997

3.1 The 1997 Act introduced a range of measures which govern aspects of the manner in which universities operate in Ireland. DCU is a university within the meaning of the Act and it is accepted that the provisions of the Act apply fully to it. The central provision of the Act, which is relevant to the dispute which I have to resolve, is s. 25. Although the key provision for the purposes of this case is to be found in subs. (6), that provision needs to be seen in context and I, therefore, set out the full terms of the section which is in the following terms:-

> "25.- (1) Subject to subsection (2), a university may, in accordance with procedures specified in a statute or regulation, appoint such and so many persons to be its employees as it thinks appropriate, having regard to-
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> (a) the efficient use of its available resources, the requirements of accountability for the use of moneys provided to it by the Oireachtas and the policy relating to pay and conditions in the Public Service as determined from time to time by the Government
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> (b) the implications of the appointments for its budget and for subsequent budgets, and
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> (c) the guidelines, if any, issued under section 50.
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> (2) A governing authority may, subject to such conditions as it thinks fit, delegate to the chief officer any of the functions of the governing authority or the university relating to the appointment of employees of the university and the determination of selection procedures.
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> (3) Except as otherwise provided by this section, the employees of a university shall be employed on such terms and conditions as the university from time to time determines.
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> (4) Subject to subsection (5), there shall be paid by a university to the employees of that university, such remuneration, fees, allowances and expenses as may be approved from time to time by the Minister with the consent of the Minister for Finance.
>
> (5) (a) A university may depart from levels of remuneration, fees, allowances and expenses approved under subsection (4) where the governing authority is satisfied that it is necessary to meet the objects of the university, but may do so only in accordance with a framework which shall be agreed between the universities and An tÚdarás.
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> (b) A corporation referred to in section 13 (2)(c) may pay to employees of a university remuneration, fees, allowances and expenses only in accordance with a framework which shall be agreed between the universities and An tÚdarás.
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> (6) A university may suspend or dismiss any employee (but only in accordance with procedures, and subject to any conditions, specified in a statute made following consultation through normal industrial relations structures operating in the university with recognised staff associations or trade unions, which procedures or conditions may provide for the delegation of powers relating to suspension or dismissal to the chief officer) and shall provide for the tenure of officers.
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> (7) A university or the National University of Ireland shall determine the terms and conditions of any superannuation scheme for its employees in accordance with the Fifth Schedule and that Schedule shall apply to an amendment to an existing scheme in the same way as it applies to a new scheme.
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> (8) For the removal of doubt, it is hereby declared that-
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> (a) the rights and entitlement in respect of tenure, remuneration, fees, allowances, expenses and superannuation enjoyed on the commencement of this section by persons who are employees, and in the case of superannuation, former employees, of a university to which this Act applies shall not, by virtue of the operation of this Act, be any less beneficial than those rights and entitlements enjoyed by those persons as employees of the university or corresponding constituent college or Recognised College immediately before that commencement, and
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> (b) the conditions of service, restrictions and obligations to which such persons were subject immediately before the commencement of this Act shall, unless they are varied by agreement, continue to apply to such persons and shall be exercised or imposed by the university or the chief officer as may be appropriate, while such persons are employed by the university."

3.2 Two key questions arise. The first is as to the construction of subs. (6) generally and in particular the manner in which a university can properly "provide" for the tenure of officers. The second issue concerns the meaning of the word "tenure" as used in the subsection.

3.3 It should be noted that in the definition section (s. 3) "officer" is defined as including:-

> " (a) a permanent, fulltime member of the academic staff of the university; …"

It is common case that Professor Cahill was a permanent fulltime member of the academic staff of DCU and, as such, was an officer of DCU to whom the provisions of s. 25(6) applied. It is also obvious that he was an employee of DCU and those aspects of the provisions of subs. (6) which apply to all employees clearly apply equally to him as well. Some reliance was also placed by Professor Cahill on the provisions of s. 14 of the 1997 Act, which provides for academic freedom and requires a university, in performing its functions, to "preserve and promote the traditional principles of academic freedom in the conduct of its internal and external affairs".

3.4 While that provision is expressed in somewhat general terms, it is worthy of note that the second portion of s. 14 provides that if, in the interpretation of the Act, there is a doubt regarding the meaning of any provision, a construction that would promote that ethos and those traditions and principles "shall be preferred to a construction that would not so promote". It is clear that the principles referred to are the principles of academic freedom. Thus it is clear that s. 14 requires the court, in construing any provision of the Act, to favour a construction (in case of doubt) which would have the effect of the promotion of the principles of academic freedom.

3.5 Against the background of those statutory provisions it is necessary to turn to the arguments made by the parties concerning the meaning and effect of s. 25(6).

4. The Meaning of s. 25(6) – The Arguments

4.1 As indicated above, the first question which arises is as to the proper overall approach to the construction of the subsection. This requires an analysis of the terms of the provision. The initial part of the subsection does not, it seems to me, give rise to any difficulty. The subsection entitles a university to dismiss (or suspend) any employee (which would clearly include, but not be limited to, officers). However the proviso which follows makes it clear that such a dismissal (or suspension) can only be done in compliance with procedures and conditions specified in a statute of the university concerned. Therefore it is clear that any dismissal (or suspension) which is not in accordance with procedures and conditions specified in such a statute will be invalid.

4.2 The next portion of the subsection requires that the relevant university statue must be made following consultation through normal industrial relations structures and goes on to permit (though not necessarily to require) that such procedures or conditions can allow for the delegation of dismissal (and suspension) powers to the chief officer. Nothing turns, on the facts of this case, on that aspect of the subsection.

4.3 Both of the issues which are in dispute between the parties as to the proper construction of the subsection concern the next portion of the provision. It reads "and shall provide for the tenure of officers".

4.4 The two questions which arise are as to who or what is to "provide" for the tenure of officers and as to the meaning of "tenure".

4.5 On one view subs. (6) may be analysed in a manner which allows it to be read as:-

> "a university may suspend or dismiss any employee and shall provide for the tenure of officers".

On that reading, all of the intermediate wording is simply a qualification or proviso to the entitlement to dismiss (or suspend), requiring that it be done in accordance with procedures and conditions established after consultation. This was the construction urged on behalf of Professor Cahill. On another view it is the "procedures or conditions", referred to in the third last line of the subsection, which must provide for the tenure of officers in addition to permitting the delegation of dismissal and suspension powers to the chief officer. However it is clear that the "procedures or conditions" referred to on that line are the same procedures and conditions referred to earlier in the subsection. The subsection, at that point reads "which procedures or conditions". The reference is, therefore, to the procedures and conditions which provide for "the dismissal or suspension of an employee".

4.6 If the "procedures and conditions" under which an employee can be dismissed or suspended can be said to also provide for the tenure of officers then it follows that it is necessary to interpret "tenure" in a manner which allows for dismissal.

4.7 It, is therefore, suggested that subs. (6) contains two independent requirements. It is said that:-

> In the case of all employees (including officers), the employee concerned can only be dismissed in accordance with a process which is in accordance with the subsection. The process must therefore be specified in a statute, arrived at following consultation. Secondly and independently a university is required to provide for the tenure of officers.

4.8 The second issue which arises between the parties as to the proper construction of subs. (6) is as to the meaning of the word "tenure". In that context it is also important to note the provisions of subs. (3) which provides that all employees of a university "shall be employed on such terms and conditions as the university from time to time determines". This requirement is stated to arise "expect as otherwise provided by this section". Therefore s. 25(3) is a sufficient statutory authority for the employment of any employee (including an officer) and for the university to specify the terms and conditions of the employment of such employee (again including an officer). The only limitations on the freedom of the university to specify terms and conditions are as set out in the section. In that context it is necessary to look at the other subsections. In the case of subsections (4) and (5), and subject to the terms of those subsections levels, of remuneration may be regulated. In the case of subs. (8) the preservation of existing entitlements is provided for. Subsection (7) only concerns the National University of Ireland and has no application to the facts of this case. Subs. (2) does not impose any limitation and subs. (1) only very general financial limitations. Therefore subject to financial limitations and the preservation of existing entitlements universities are given wide latitude as to the terms and conditions that can be imposed under s. 25(3).

4.9 The dictionary definition of tenure is of some (but perhaps limited) assistance. A number of meanings are given as follows:-

> "1. Condition, form of right or title, under which (especially real) property is held; or
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> 2. (period of) holding ("during his tenure of office"); or
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> 3. permanent appointment of teacher etc". See Oxford English Dictionary.

4.10 This very dictionary definition sets out the competing contentions of the parties. It is agreed that the first definition has no relevance to the use of the term in the 1997 Act. Counsel on behalf of Professor Cahill argues that tenure, when used in the educational (and in particular in the university) context, conveys a level of permanence which only permits the person concerned to be removed from office for stated reason involving misconduct or incapacity (i.e. the third meaning). Counsel for DCU argues that tenure merely carries with it a connotation of the term of office and does not bear any necessary requirement that that term of office have any significant degree of permanency (i.e. the second meaning).

4.11 There is very limited authority which is of any assistance in relation to the proper construction of the term tenure. Counsel for DCU drew attention to *R. v. Hull University Visitor* (1991) 1 WLR 1277 and (1993) AC 682, in which the Court of Appeal and the House of Lords in the United Kingdom respectively had to consider the status of an academic employee of Hull University. The first citation refers to the judgment of the Court of Appeal with the latter referring to the judgment of House of Lords. The initial determination of

the issues which arose had been by the Lord President of the Council acting on behalf of the visitor of the University. That decision rejected the petition of the lecturer concerned. In his petition he had argued that he could only be removed "for good cause". The university had, purportedly, terminated the applicant's contract of employment on the grounds redundancy, giving him three months written notice.

4.12 The petition having been rejected, the applicant sought judicial review. A Divisional Court of the United Kingdom High Court held that, on a proper construction of the university's statutes, there was no entitlement to dismiss the applicant in the absence of good cause and further held that the court retained a supervisory power over the decisions of the university visitor in the exercise of its judicial review jurisdiction.

4.13 The Court of Appeal agreed with the Divisional Court in relation to that aspect of the court's decision which determined that the courts retained a judicial review jurisdiction but disagreed with the interpretation of the true construction of the relevant provision of the university's statutes. The Court of Appeal was of the view that those statutes permitted a determination of the applicant's contract of employment either for good cause or in accordance with a letter evidencing the terms of his employment. That letter provided for three months notice. On that basis the Court of Appeal was of the view that the dismissal of the applicant was valid.

4.14 The House of Lords took the view that the decision of the visitor was not amenable to challenge by judicial review on the ground of error in fact or law and on that basis the question of the true construction of the university's statues did not arise for the court.

4.15 It is, therefore, clear that each of the decisions of the courts were about questions concerning the extent to which judicial review lay in relation to decisions of a university visitor and questions concerning the proper construction of the statutes of the university concerned. While it would appear from the reports that questions concerning the meaning of the term "tenure" were raised in the course of proceedings, it does not seem to me that any of the decisions give any significant guidance which might be of assistance in construing the term "tenure" as used in the 1997 Act.

4.16 Counsel for Professor Cahill places reliance on *Fanning v. University College Cork* (Unreported, High Court, Gilligan J. June 2005) in which this court was concerned with disciplinary proceedings against a senior member of the staff of that university. However that case appears to have turned on the provisions of the relevant statutes of the National University of Ireland and, in particular, the requirements of s. 25(8) of the 1997 Act, which preserve the existing status and entitlements of university employees. At p. 22 of the judgment Gilligan J. notes a somewhat different definition of "tenure" contained in (a presumably different edition of) the Oxford English Dictionary as:-

> "Guaranteed tenure of office, as a right granted to the holder of a position (usually in a university or school) after a probationary period and protecting him against dismissal under most circumstances".

4.17 However, the relevant reference is clearly one which refers to an argument raised on behalf of one of the parties, rather than to a determination by the learned trial judge. It is also clear from the conclusions reached that the case turned principally on the construction of the interaction of the 1997 Act with the relevant provisions of the statutes of the National University of Ireland together with the provisions of s. 25(8) of the 1997 Act concerning the preservation of existing entitlements. In those circumstances it does not appear to me that Gilligan J. made any determination as to the precise meaning of "tenure" as used in s. 25(6) still less the extent to which the use of that term in that subsection might constrain what would otherwise be the freedom of a university to enter into whatever contractual relations it might agree with its employees (including officers).

4.18 In those circumstances it seems to me that the question of the meaning of the word "tenure", insofar as it arises in these proceedings, falls to be determined largely from first principles.

4.19 Finally, it is necessary to turn to the relevant statute of DCU. DCU Statute No. 3 of 2001 ("Statute No. 3") is headed "suspension and dismissal of employees" and is expressed to be made by the governing authority of DCU pursuant to the powers conferred on it by s. 33 of the 1997 Act. Statute No. 3 provides for the delegation of the powers of the university relating to suspension and/or dismissal to the President in his capacity as chief officer of the university. It will be recalled that such a delegation is permitted under s. 25(6) of the 1997 Act. Statute No. 3 then sets out a number of general provisions which provide for a process for determining whether persons should be dismissed or suspended for misconduct or incapacity.

4.20 However of particular relevance to this case are the provisions of Article 5.1 of statute No. 3 which simply state that:-

> "The tenure of officers of the university shall be such tenure as is conferred on each such officer in his or her individual contract with the university".

4.21 It is clear from the evidence that most, if not all, of the officers of the university have a contract in broadly similar terms to that held by Professor Cahill and are, therefore, as a matter of contract, subject to dismissal on the giving of a relatively short period of notice. On that basis it is contended on behalf of DCU that the university has complied with its obligations under s. 25(6) to provide for the tenure of its officers and has done so by reference to the contractual entitlement of the officers concerned. It is, therefore, said that the tenure of officers with a contract such as that held by Professor Cahill is such as allows the holding of their office to be terminated on the giving of three months notice without there necessarily having to be any basis for the giving of such notice.

4.22 In addition a number of the witnesses gave evidence concerning their understanding of the use of the term "tenure" in a university context. It would appear that the term has a particular connotation most especially in American universities. It would seem that most staff are appointed initially on what is termed a "tenure track" which is a process which, it is hoped, will lead, after a period of time, to the person concerned achieving a full "tenured" position. It would certainly seem that in the United States at least, it is not normally considered possible to terminate the office of a tenured member of the academic staff save for reasons such as serious misconduct or incapacity. At least in the United States context the words "tenure" seems to have a meaning along the lines argued for in these proceedings on behalf of Professor Cahill.

4.23 It is not, however, quite so clear that the term only has that meaning in those European countries (such as the United Kingdom and Ireland) which have a broadly similar university structure to that of the United States. Despite the absence of any definitive ruling on the question there seems to have been a significant debate on that issue in the *Hull University* case. Furthermore it should be noted that the Oireachtas, (in the Civil Service Regulation Act, 1956) provided, in s. 5, that "every established civil servant shall hold office at the will and pleasure of the government". The marginal note suggests that the relevant section provides for the "tenure of office of established civil servants". It is clear, therefore, that at least in one context the Oireachtas has used the term "tenure" in a manner which allows for the holding of office at will.

The Meaning of S. 25 - Conclusions
5.1 However, it seems to me that before going on to consider the meaning of the word "tenure", as used in the 1997 Act, it is necessary to determine whether the issue of its construction truly arises on the facts of this case at all.

5.2 Section 25(6) clearly only permits a dismissal in circumstances where the dismissal concerned is in accordance with procedures specified by the subsection. While statute No. 3 specifies detailed procedures for dismissal on the grounds of misconduct or incapacity, no procedures are specified in relation to the termination of a contract of employment by reason of the expiry of tenure.

5.3 Clearly if "tenure" is taken to mean only a fixed period of holding office (which terminates either on the expiry of a fixed term or upon the attaining of a particular age or by virtue of some other external factor not being a unilateral decision taken by the university) then there would be no need for any procedures in any event. If, therefore, "tenure" has, in general terms, the sort of meaning argued for on behalf of Professor Cahill, there would be no need for any procedures to be followed in order to determine when that tenure expired. The officer holder's period in office would come to an end by operation of whatever mechanism determined it to end (age, period of office or the like). On the other hand, if, as is contended for on behalf of DCU, it is permissible for a university to specify "tenure" by reference to a contract of employment which in turns permits termination by the unilateral act of the university, then it is difficult to see how such a concept of tenure can fit within the requirements of s. 25(6).

5.4 It was accepted on behalf of DCU, correctly in my view, that a decision by a university to terminate a person's contract of employment by giving them the requisite contractual notice was nonetheless a "dismissal" in the sense in which that term is used in s. 25(6). Such an act being a "dismissal", it clearly can only come about in conformity with the subsection and must, therefore, follow on from the application of procedures specified in a university statute. The only way in which a dismissal could be said to have occurred, on the facts of this case, as a result of procedures specified in a statute, is if the fact that tenure is defined in the statute, by reference to the contract of employment coupled with the fact that the contract of employment provides for, amongst other things, termination on the unilateral action of the university for no reason, amounted to the specification of a procedure for the purposes of s. 25(6). It seems to me that such a construction would make a nonsense of the use of the term "procedure". A unilateral decision can hardly be a procedure. No other process is described in the statute. Therefore the decision making process leading to a decision to exercise a unilateral entitlement to terminate the contract of employment (save in cases where the decision was made in respect of misconduct or incapacity and having being through the process described in the statute) could not, in my view be said to be a dismissal coming about as a result of a procedure.

5.5 For that reason alone it seems to me that, irrespective of the meaning of the word "tenure" as used in s. 25(6), what occurred on the facts of this case amounts to a dismissal which did not occur in accordance with procedures specified in a statute. For that reason alone it seems to me that the dismissal is in breach of the provisions of s. 25(6).

6. Tenure
6.1 Lest I be wrong in that conclusion, it is also necessary for me to address the question of the meaning of the word "tenure" as used in s. 25(6). It seems to me that the term as used must go further than a mere specification of the terms of employment. As pointed out a university already has (under subs. (3)) an entitlement to fix the terms and conditions of all employees (including officers). If the obligation to provide for tenure merely meant, as argued by DCU, an obligation to provide for the terms and conditions of employment so far as the length of that employment was concerned, then it would be a redundant obligation as that obligation is already covered by subs. (3). It seems to me, therefore, that the Oireachtas must have used the term "tenure" to mean something more than simply delineating terms and conditions as to the length of employment.

6.2 I am, therefore, satisfied that the term "tenure" brings with it an obligation to give a greater degree of permanency to the status of officers of a university, than would be the case in circumstances where, as a matter of contract, such officers could have their contract terminated on three months notice. I am, therefore, also satisfied that the purported specification by DCU in Statute No. 3 of tenure by reference to contracts of employment which, on the facts, provide for termination on three months notice, was an invalid exercise of the undoubted entitlement of the university to specify tenure. Precisely what limitations there may be on removal from office by virtue of the meaning of the term "tenure" is a matter which I will leave for consideration to a case in which the issue specifically arises.

6.3 Evidence was given by Professor Von Prondzynski as to the needs which universities have to be able to reorganise in an efficient manner. There is a clear obligation on those charged with running a university to operate the university in both an efficient manner and for the purposes of furthering the objects of the university both as specified in its own internal constitutional documentation and in the provisions of the relevant sections of the 1997 Act (such as ss. 12 and 13). Similarly the university has financial obligations relating to numbers and type of staff under the 1997 Act and not least under s. 25 itself. It may well be that the statutes of a university could properly provide for the circumstances in which established offices might have to be extinguished, amalgamated, or otherwise dealt with in a way which could effect the holders of those offices. It does not appear to me to be the case that such provisions, even were they to affect office holders, could be said to be in breach of the "tenure" of such of office holders provided that the circumstances which might lead to the office holder being so affected were specified in a statute of the university.

6.4 However it should be noted that where such a process might lead to the termination of the contract of employment of an office holder, on foot of a decision of the university, then s. 25(6), in any event, requires that the statutes make provision for a procedure which would lead to such a dismissal decision.

6.5 It, therefore, seems to me to follow that even if it is permissible to curtail the tenure of office holders by, for example, providing that certain offices may be extinguished upon reorganisation, amalgamation of departments, or the like, it is necessary that the statutes of the university provide for the procedures which will lead to such a decision and that such procedures have to be put in place following consultation with (though not necessarily with the agreement of) relevant representatives.

6.6 For those reasons it does not seem to me that the extent of the limitation which the requirement for a university to specify "tenure", places upon its freedom to act, needs to be dealt with in anything more than the most general terms on the facts of this case.

7. Fair Procedures
7.1 Lest again I be wrong, it is also necessary to deal with the question of fair procedures raised on behalf of Professor Cahill. Under this heading it is suggested, placing reliance on authorities such as *Garvey v. Ireland* [1981] I.R. 75, that Professor Cahill was at least entitled to be heard as to whether his contract of employment, as an office holder, was going to be brought to an end. It is in that context that the factual issues between the parties arise. As I indicated earlier in the course of this judgment a series of communications (largely by email) passed between Professor Cahill and Ms. Burns, (who was acting on behalf of Professor Von Prondzynski) in the period between the initial March meeting (when Professor Cahill intimated the possibility of his move to NUIG) and

the letter giving notice of dismissal.

7.2 The first factual issue between the parties concerns what actually transpired at that initial meeting. Professor Von Prondzynski suggested in evidence that Professor Cahill made it absolutely clear that he was leaving and that the only matter which remained for decision was the date. Professor Cahill accepted that he indicated that he was minded to go to Galway but rejected the suggestion that he made it clear in absolute terms that the matter was a certainty.

7.3 I have come to the view that this is one of those cases where two persons came away from the same meeting with very different impressions, by reason of the fact that their perspective on the meeting, both in advance of and during it, came from very different positions. Professor Cahill stated in evidence, and I accept, that his primary motivation in bringing his contact with NUIG to the attention of Professor Von Prondzynski, was designed towards insuring that DCU knew, at the earliest possible date, of the likelihood of his departure. Equally I have little doubt but that upon receiving an intimation of Professor Cahill's imminent departure, Professor Von Prondzynski was, understandably, principally concerned with the consequences for DCU and, in particular those aspects of the universities teaching and research functions that were part of Professor Cahill's remit. I have no doubt but that Professor Von Prondzynski got the clear impression from the meeting that Professor Cahill's departure to NUIG was a certainty. However I am equally satisfied that Professor Cahill, from his perspective, was anxious not to, there and then, do anything which might be taken to be the giving of notice. I am not sure, in any event, that any legal consequences flow from the distinction made by the two Professors as to the proper interpretation on what passed between them at the meeting in question.

7.4 Professor Cahill's contract of employment makes clear that a resignation by him can only be in writing. It is not contended on behalf of DCU that any such resignation occurred. DCU expressly disavowed, in the course of these proceedings, any contention that it was being suggested that Professor Cahill had, in fact, resigned. The distinction between the two parties as to what transpired at the meeting is, therefore, only relevant to their perception of the course of events which followed. For that reason it seems to me that I need do no more than accept that both genuinely operated on a somewhat different perception of what had passed between them. It is not possible to attribute blame to either party for that difference of impression.

7.5 In any event it is clear that, as a matter of fact, no prior notice was given to Professor Cahill of an intention to terminate his contract. The stated reason for this, as given in evidence by Professor Von Prondzynski, was that he operated, at all relevant times, on the assumption that the only matter outstanding was a date. The correspondence had pressed Professor Cahill for a date. He had, however, made it clear that he was not in a position to give a date. While it is true to state that Professor Cahill was well aware that DCU were pressing for a date, he had no advance warning that DCU intended imposing a date unilaterally.

7.6 In those circumstances it does seem to me that, even if I am wrong concerning the contractual/statutory basis for Professor Cahill holding office, he would also be entitled to a determination from this court to the effect that his contract of employment was not validly determined on the basis of a failure to at least give him some opportunity to make representations as to why his contract of employment should not have been determined.

8. The Welcome Trust

8.1 Before passing on to the question of the nature of the order which I should make, I should also touch on one other aspect of the evidence which was the subject of some controversy. It is common case that Professor Cahill's initial employment with DCU was on foot of a so called "new blood" fellowship, put in place in Ireland by the Welcome Trust as part of an agreement between that trust and the Health Research Board ("HRB"). The scheme was designed to boost capacity into biomedical research in Ireland. Professor Cahill was a so called "new blood fellow" under that scheme. Evidence was given by Dr. Ruth Barrington who is the Chief Executive of the HRB and who indicated that it was her view (and that of the HRB and the Welcome Trust) that one of the terms of the receipt by any university of the benefits of a new blood fellowship (which included significant funding and other assistance from the Welcome Trust) was that the new blood fellow would receive "tenure" which, in her understanding, was used in a sense which implied a significant degree of permanency along the lines in which that term is undoubtedly used in the United States. I do not doubt but that that was the understanding of the Welcome Trust and the HRB. It is not, however, quite so clear from the documentation which seems to have passed between the HRB and the Welcome Trust on the one hand and DCU on the other hand, at the relevant time, that what was required was more than that the fellow become a permanent member of staff. As pointed out by Budd J. in *Walsh v. Dublin Health Authority* 98 ILTR 82 (1964) at p. 86-87 the word "permanent" has various shades of meaning. In any event it does not seem to me, on the evidence, that anything that passed between DCU and the Welcome Trust and the HRB at the relevant time was such as would have altered the terms and conditions of the contractual relations between Professor Cahill and DCU.

8.2 If there was documentation in clear and unequivocal terms suggesting that Professor Cahill would have tenure in the sense in which that term is used in the United States and if there was evidence that Professor Cahill had been induced to take up his post with DCU by representations on the part of DCU in accordance with such documentation, then the situation might be different. Whatever may be the position between DCU on the one hand and the Welcome Trust and the HRB on the other hand, in relation to this issue, it does not seem to me that it can, on the facts, effect the contractual position of Professor Cahill.

9. Conclusion

9.1 Therefore, for the reasons which I have indicated earlier, I was satisfied that the purported termination of Professor Cahill's employment was invalid principally because it did not occur following appropriate procedures specified in the university statute so as to comply with s. 25(6) or alternatively by virtue of the reasons identified concerning the meaning of the word "tenure" or, as a further alternative on the procedural grounds which I have also addressed.

9.2 The next question concerned the nature of the order which I should make. It is at this point appropriate to refer to the circumstances in which I made an order at the interlocutory stage.

10. The Form of Order

10.1 So far as the question of whether there was a fair issue to be tried between the parties at the time of the interlocutory hearing is concerned, then I need do no more than refer to the issues which I have addressed in the course of this judgment and to make clear that I was satisfied, at that time, that there was a fair issue to be tried for the propositions being put forward on behalf of Professor Cahill.

10.2 It was also accepted, as I have indicated earlier in this judgment, by DCU that a so called "Fennelly order" could be made. That term derives from the case of *Fennelly v. Assicurazioni Generali Spa* (1985) 3 ILTR 73, in which an order was made by the court requiring the continuance of the payment of salary pending trial. As indicated earlier the difference between the parties at the interlocutory stage was as to whether I should go further and direct that Professor Cahill be entitled to carry out his duties pending trial.

10.3 It seems to me that it follows from the provisions of the 1997 Act, which limit the power to dismiss officers, and which require the court, in construing the statute, to lean in favour of a construction which favours the maintenance of academic freedom, that a court should, in turn, lean in favour, in an academic context, of making an order which preserves the entitlement of the academic office holder concerned to continue to operate as an academic in the university world. To take any other view would be to countenance a situation where, in an appropriate case, a university could exclude an academic from the ability to carry out his or her duties in the academic world in circumstances where the sanction imposed (either dismissal or suspension) was in breach of statute.

10.4 I am, therefore, of the view that where it is established that a suspension or dismissal of an academic office holder is in breach of the provisions of the 1997 Act, the court should lean in favour of making an order which would restore the academic concerned to their duties. In those circumstances the situation which pertains in the case of those office holders who are governed by the 1997 Act, may well differ from the situation which might ordinarily obtain in relation to an ordinary contract of employment.

10.5 However, as I have indicated, what the court is required to do is to lean in favour of such a position. There may well be, on the facts of any individual case, practical reasons why it may not be possible to make an effective order which would preserve the entitlement of the person concerned to perform their academic duties.

10.6 At the time when the interlocutory application was being heard, no compelling reasons were put forward for suggesting that Professor Cahill could not carry out his duties. I, therefore, came to the view that there was a strong arguable case for the proposition that, in the event that Professor Cahill should succeed, it was likely that I would be persuaded to make an order which would have the effect of ensuring that he continued with his academic duties. It was for that reason that I took the unusual step of making an order which went beyond a so called *Fennelly* order.

10.7 However by the time when I gave initial judgment after the full hearing, it was clear that much water has passed under the bridge in DCU since the events of spring and early summer of last year. It was by no means clear that it was any longer possible to restore Professor Cahill to the precise academic position which he once held. In those circumstances it did not appear to me to be, at present, appropriate to make any order beyond declaring that Professor Cahill remained in office and was entitled to the payment of salary.

10.8 It does seem to me that it follows from that declaration that DCU is obliged to take reasonable steps to ensure that appropriate academic duties are given to Professor Cahill. For understandable reasons (having regard to the fact that DCU took the view that Professor Cahill was dismissed) no such steps were taken prior to the resolution of these proceedings. However it seems to me that they must now be taken. Whether there may remain in place insurmountable barriers to Professor Cahill taking up appropriate academic duties in the future depends on how that process develops. I should also say that it seems to me that there is an equivalent obligation on Professor Cahill to be reasonable in the way in which he deals with such matters in all the circumstances of the case.

10.9 For the purposes of the situation as it presently obtains I should do no more than to indicate, in very general terms, that if it were to be established that DCU were to have acted unreasonably, and Professor Cahill to have acted reasonably, in relation to a process designed towards identifying whether it is possible to provide Professor Cahill with appropriate academic duties, then it might well be the case that a further order could be made by the court. In that context I will give the parties liberty to apply.