Neutral citation no. [2005] IEHC 264

THE HIGH COURT

2001 No. 15653 P

BETWEEN

CONNELL M. FANNING

PLAINTIFF

AND
UNIVERSITY COLLEGE CORK

DEFENDANT

Judgment of Mr. Justice Gilligan delivered on the 24th day of June, 2005.

1. The plaintiff in these proceedings is Professor of Economics and Head of the Department of Economics at University College Cork. He joined the Department of Economics at the University in 1978 as a Junior College Lecturer and in 1980 was appointed Statutory Lecturer in Economics. From 1985 to 1989 he was the Dean of the Faculty of Commerce and in 1988 was appointed Acting Head of the Department of Economics. In 1989 he was promoted to Associate Professor of Economics and in 1990 he was appointed by statute of the National University of Ireland as Professor of Economics which post included being Head of the Department of Economics.

2. This claim arises out of an attempt by the defendant to apply certain disciplinary procedures to the plaintiff arising from an incident which allegedly occurred on 31st August, 2001, in a staff cark park on the campus of University College Cork. On the occasion in question which was outside term the plaintiff attended at the university for the purpose of work but brought his dog with him, leaving him in the car. During the lunch hour break the plaintiff was walking his dog in the car park and speaking to his wife on his mobile telephone. Ms. Buckley who works in a separate department and who did not know the plaintiff, as he did not know her, was driving her car from a parked position in the car park when the plaintiff became concerned that she might injure his dog which Ms. Buckley had failed to see. This led to an exchange of words between the plaintiff and Ms. Buckley, with Ms. Buckley alleging that the situation became heated and the plaintiff put his hand in the window and grabbed her and began tugging at her neck. While he did so, she drove off causing the plaintiff to release her. The plaintiff accepts that there was an incident with Ms. Buckley but vehemently denies that he assaulted her in anyway.

3. Ms. Buckley reported the matter to the Department of Human Resources on 6th September, 2001, and on the 7th September, 2001, attended a meeting with a number of Department of Human Resources officials and furnished a written account as to what she says occurred. Ms. Buckley made it clear that she wished merely to report the matter and was not making a complaint as such. However, on the basis of the report, the Director of Human Resources Noel Keely, at the request of the President of University College Cork Professor Gerard Wrixon, was asked to deal with the matter and he wrote to the plaintiff on 13th September, 2001. The plaintiff wrote to the President of University College Cork on the 27th September, 2001, stating that in his view he was personally unable to receive fair and impartial treatment from the Director of Human Resources and that he had referred examples of Mr. Keely's actions towards him to his legal advisor for attention.

4. In the absence of any reply to the letter of the 13th September, 2001, from the plaintiff, Mr. Keely wrote again on the 1st October, 2001. By letter of 3rd October, 2001, he received confirmation from Ms. Buckley that everything in her account of events was completely accurate and she wished to change nothing.

5. Mr. Keely informed the plaintiff that Ms. Buckley's allegation must be regarded by the University as an allegation of gross misconduct and it was proposed to invoke the University's disciplinary procedures to deal with the matter. It was pointed out however that while the disciplinary procedures provided for the suspension by the University with pay of an employee alleged to have engaged in gross misconduct, the University was anxious to consider Professor Fanning's substantive response to the allegation before contemplating such action and, with this in mind, the University retained John Horgan, a former Chairman of the Labour Court, to conduct an investigation into the matter. The reason why Mr. Horgan was appointed was due to allegations made against the University by the plaintiff's solicitors in a letter as dated 1st October, 2001, and to the allegations as made against Mr. Keely by the plaintiff in his letter of 27th September, 2001.

6. Neither Ms. Buckley nor the plaintiff participated in the enquiry as carried out by Mr. Horgan and he was left to conduct the enquiry relying on written documentation and by interviewing certain identified third parties.

7. In the background, the solicitors for the plaintiff and Ms. Buckley were exchanging heated correspondence, the plaintiff's solicitors alleging that their client had been defamed as a result of the very serious unfounded allegations made against him and threatening legal proceedings unless Ms. Buckley admitted liability, apologised and agreed to compensate the plaintiff for such loss and damage as suffered by him. Ms. Buckley's solicitors were intimating a claim for damages for personal injuries loss and damage against a background where she was shortly due to be married.

8. The plaintiff and Ms. Buckley then reached an agreement whereby neither would issue proceedings against the other, with the plaintiff's solicitors indicating that he wished to put the matter behind him insofar as it related to Ms. Buckley and he passed on good wishes in respect of her forthcoming marriage.

9. The solicitors for Ms. Buckley confirmed that she would take no further steps against the plaintiff in relation to the incident which occurred on 31st August, 2001, in the car park of University College Cork and that she would not partake in any investigation, in relation to her original report, which might be conducted by the University and it was indicated on her behalf that she had put the matter behind her and it was noted that the plaintiff was of the same view.

10. This settlement of matters as between the plaintiff and Ms. Buckley resulted in a letter of 15th October, 2001, from Ms. Buckley's solicitors to Noel Keely, Director of Human Resources at the University, wherein it was intimated that Ms. Buckley, having carefully considered all of the issues involved, had now instructed her solicitors to withdraw the reporting of the incident and pointing out that she did not wish to participate in the investigation.

11. Against this background, Mr. Horgan continued with his enquiry and on 19th October, 2001, released a report concluding that a *prima facie* case existed against the plaintiff which should be dealt with through the appropriate disciplinary procedures.

12. Subsequent to the issuing of the report by Mr. Horgan, the plaintiff applied for and obtained an interim injunction on 22nd October, 2001, from this court (Smyth J.) restraining the University from taking any steps whatsoever to discipline suspend or dismiss the plaintiff. Subsequently on 27th November, 2001, this court (Smyth J.) made an order restraining the plaintiff's suspension with pay

pending implementation of the disciplinary procedures and restraining publication of the determination of any disciplinary proceeding pending the determination of these proceedings.

13. The President of University College Cork proceeded to appoint a disciplinary committee and a hearing was subsequently held over 3 days during the months of February, March and April, 2001 at which Ms. Buckley gave evidence, the plaintiff was legally represented and the result of the enquiry has been placed in a sealed envelope in a safe pending the outcome of these proceedings.

Relief sought

14. The plaintiff seeks the following relief:

> 1. A declaration that the disciplinary procedure promulgated by the defendant and as applied against the plaintiff is unlawful and ultra vires the defendant;
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> 2 A declaration that the disciplinary procedure promulgated by the defendant does not apply to the plaintiff having regard to his statutory appointment;
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> 3. A declaration that there is in existence no matter, dispute, report or complaint involving the plaintiff which could properly be the subject of any disciplinary procedure of inquiry;
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> 4. A declaration that the appointment of Mr. John Horgan to conduct a preliminary investigation is ultra vires the defendant;
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> 5. A declaration that the defendant, its servants or agents, has pre-judged the issue against the plaintiff and in the circumstances is biased against the plaintiff;
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> 6. An injunction restraining the defendant, its servants or agents, from holding any disciplinary inquiry involving the plaintiff relating to an alleged incident;
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> 7. An injunction restraining the defendant, its servants or agents, from effecting any suspension of the plaintiff from his position as Professor of Economics and Head of the Department of Economics at University College Cork;
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> 8. An injunction restraining the defendant, its servants or agents, from taking any steps whatsoever against the plaintiff relating to the alleged incident which occurred on or about the 31st day of August 2001;
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> 9. An injunction restraining the defendant, its servants or agents, from taking any steps whatsoever to discipline, suspend or dismiss the plaintiff (arising out of the alleged incident which occurred on or about the 31st day of August, 2001);
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> 10. Damages for breach of contract;
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> 11. Costs.

15. In order to address the question of whether the plaintiff is entitled to the relief sought, it is necessary to set out in some detail the statutory framework within which he was appointed to his Professorship. In essence, the issue to be determined is whether the defendant was at any time entitled to initiate disciplinary proceedings against the plaintiff and if so permitted, were the disciplinary procedures properly complied with.

Statutory Framework

16. In 1908, the Irish Universities Act was enacted, s. 1(3) of which dissolved the Royal University of Ireland and Queen's College, Belfast. In order to make provision in their stead, s. 1(1) empowered the British Crown to found two new universities by charter, one of which was to have its seat in Dublin. Section 2(3) of the 1908 Act stated that Queen's College, Cork and Queen's College, Galway were to become constituent colleges of this new university. On the 2nd December, 1909, the British Crown made two Charters – one founding the National University of Ireland, having its seat in Dublin, and the other Charter establishing University College, Cork as a constituent college of the former body.

17. Part I of the Charter of the National University of Ireland founded the University itself, with Part X setting up the Senate as its governing body with responsibility for exercising all powers of the University. In fact, the exercise of these powers by the Senate had been specifically provided for by s. 4(1) of the Act of 1908. That section states:

> "The statutes for the general government of the new universities ... shall be made in the first instance ... as respects the new university having its seat at Belfast by the Belfast Commissioners appointed under this Act, and, after the powers of these commissioners determine, by the governing bodies of the universities."

18. Part III of the Charter of the NUI set out the "Powers of the University" in greater detail, sub-part 4 stating that the NUI "shall have the power":

> "To appoint and remove the Presidents, Professors and Lecturers of the Constituent Colleges, subject to the Irish Universities Act, 1908, and to the provisions of this Our Charter and the Charters of the Constituent Colleges".

19. In pursuit of these provisions, the Senate of the NUI began to make a series of detailed governing Statutes. In 1951, it made NUI Statute 86, that statute being one in a long line of consolidating statutes. Chapter XXIV of NUI Statute 86 (1951) vested in the Senate alone the power to appoint persons to Professorships in the Constituent Colleges. It states:

> "Appointments to vacancies occurring in the Professorships and Lectureships of the University, including the University Professorships and University Lectureships of the Constituent Colleges, shall be made by the Senate…."

20. Chapter LXIV of that Statute vested in the Senate alone the power to remove persons appointed as University Professors, such removal occurring upon due cause shown in an application by the governing body of the Constituent College in question. Part 1 of that Chapter states:

> "The power of removing, under the provisions of the Charter, the President of any Constituent College, or any University Professor or University Lecturer, or any other Officer of the University, shall be exercised by the Senate only and at a

Meeting thereof called for the purpose on a date to be fixed by the Chancellor."

21. Chapter XXVII of the Statute also makes provision for the tenure of statutorily appointed Professors. It states that:

> "Every Professor of the University shall, subject to good conduct and the due fulfilment of his duties, hold office until he shall have attained the age of 65 years and may thereafter be continued in office for five further years…"

22. Chapter XXXI of NUI Statute 86 (1951) sets out the duties of statutorily appointed Professors. Part 1 states:

> "Every Professor of the University and every Lecturer of the University shall–
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> a) in respect of the lectures to be given by him, conform to the Regulations applicable to his Professorship or Lectureship as the case may be, and,
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> b) give to the Students attending his ordinary Lectures assistance in their studies, by advice, by informal instruction, by occasional and periodical examination, and otherwise, as he may judge to be expedient. For receiving Students who may desire such assistance, such stated times shall be appointed by him during the period in which he lectures, as he shall think fit to design."

23. In addition to setting out the duties of Professors, Chapter XXXI of the Statute is noteworthy as it is the only provision of the Statute which implicitly refers to the power of the constituent colleges to make statutes/regulations governing statutorily appointed Professors. Part 3 of the Chapter states:

> "A Professor or Lecturer of a Constituent College shall comply with the Statutes and Regulations of the Constituent College, as well as with those of the University, *in respect of all matters relating to his duties* (emphasis added)."

24. It is to be noted that it was pursuant to NUI Statute 86 (1951) that the plaintiff was appointed to his Professorship by the Senate.

25. Soon after the creation of the NUI, the constituent colleges also began to make their own governing statutes, setting out in greater detail the limits of their powers as well as acknowledging the extent of the NUI's power over them. On 15th April, 1911, Statute 1 for University College, Cork was made. It expands upon the powers vested in the college in relation to the supervision of the conduct of its Professors. Chapter XII of Statute 1 states:

> "The Governing Body, the Academic Council, and, subject to any directions given by the Governing Body and the Academic Council, respectively, Committees of the Governing Body and the Academic Council, respectively, may from time to time make regulations for governing their proceedings, subject to the Charter and to the Statutes."

26. Chapter IV of Statute 1 sets out the powers the President has in ensuring that statutorily appointed Professors comply with their duties. It states that:

> "15. He shall advise and remonstrate with any Professor, Lecturer, or Officer of the College, whenever it shall come to his knowledge that such Professor, Lecturer or Officer has been neglectful of his duties.
>
> 16. Should any Professor, Lecturer, or Officer of the College prove inattentive to the advice and remonstrance of the President, the President shall, after giving such Professor, Lecturer, or Officer notice of his intention, and furnish him with a copy of the official statement he proposes to make of the case, call the attention of the Governing Body to the conduct of such Professor, Lecturer, or Officer."

27. Statute 1 also sets out in more detail the powers and duties of statutorily appointed Professors which were heretofore mentioned in Chapter XXXI of NUI Statute 86(1951). Chapter XV of Statute 1 states:

> "Every Professor and Lecturer shall-
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> (a) in respect of the lectures given by him conform to the regulations applicable to his chair;
>
> (b) give the Students attending his ordinary lectures assistance in their studies, by advice, by informal instruction, by occasional and periodical examination, and otherwise, as he may judge to be expedient. For receiving Students who may desire such assistance, such stated times shall be appointed during the period in which he lectures as he shall think fit to assign; give instruction in his Department to Students; assist them in the pursuit of knowledge, and contribute to its advancement; and aid generally the work of the university."

28. Finally, Chapter XXXIV of that Statute acknowledges the exclusive power vested in the Senate to remove persons appointed to Professorships or Lectureships. It states:

> "Any President, Professor or Lecturer who shall have been appointed by the University may upon due cause shown in an application by the Governing Body of the College, in the manner prescribed by the Statutes of the University, be removed from office by the University; but any President, Professor or Lecturer so removed from office may appeal against his removal to the Visitor."

29. In 1997, the Universities Act was enacted which radically altered the whole power structure between the NUI and its constituent colleges. It allowed for the establishment of the constituent colleges as Universities in their own right and granted them the power to determine many issues which had hitherto been within the exclusive power of the NUI. One such area was that of appointing and dismissing staff. Section 25(1) of the Act of 1997 grants the constituent Universities more power than they had previously had, including the power to employ any person it deems appropriate. It states that:

> "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,

(b) the implications of the appointments for its budget and for subsequent budgets, and

(c) the guidelines, if any, issued under section 50."

30. Furthermore, section 25(6) of the Act of 1997 empowers a constituent University to dismiss or suspend employees. It states that:

> "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."

31. Thus, it appears clear that all persons employed by a constituent University after the 1997 Act came into force, including persons so appointed to Professorships or Lectureships, may only be removed by the constituent University itself. The Senate of NUI has no involvement in either their appointment or dismissal.

32. Other provisions of the 1997 Act of relevance to the instant case are that of section 25(6) and 25(8). Section 25(6) of the 1997 Act sets out the scope and limits of the constituent Universities disciplinary jurisdiction. It states that:

> "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."

33. In relation to employees whose contract of employment pre-dated the Act of 1997, section 25(8) of that Act is particularly relevant. It states that:

> "For the removal of doubt, it is hereby declared that—
>
> (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,
>
> (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."

34. Section 47(6) of the Act of 1997 states that:

> "Where the President or any other employee of a constituent college was appointed by the National University of Ireland, the powers and functions of that University in respect of his or her removal from office shall, notwithstanding anything in this Act, remain in force in relation to that person."

35. On 30th January, 2001, the governing body of UCC, under the powers conferred on it by the Act of 1997, adopted Statute E. Statute E sets out in broad terms the procedures to be followed by the University in cases where it may need to exercise its powers of suspension, demotion and dismissal. UCC later implemented a set of Disciplinary Procedures, expanding upon those procedures already set out in Statute E. Paragraph 1 of the Disciplinary Procedures states that:

> "It is the intention of the University to amicably resolve, wherever possible, disciplinary matters regarding employee conduct."

36. Chapter 1, para. 1 of Statute E states that:

> "The University may suspend, demote or dismiss any employee but only following the application of such disciplinary procedures as may be adopted from time to time by the Governing Body."

37. Chapter 1, para. 6 of Statute E states:

> "In the case of a Professor, Associate Professor or lecturer appointed, in accordance with the statutes of University College Cork, prior to the sixteenth day of June, 1997, a proposal for demotion or dismissal shall be considered by the governing Body and the provisions of Statute 1, Chapter XXXIV., of University College Cork shall apply."

38. Paragraph 44 of the Disciplinary Procedures echoes this section in stating that:

> "Where an employee was appointed prior to the commencement of the Universities Act on the 14th day of May 1997 and was appointed subject to statue, and where the matter at issue is such that demotion or dismissal may be an appropriate course of action, the provisions of Chapter XXXIV of Statute 1 of University College Cork shall apply."

39. As the defendant decided that Ms. Buckley's allegation would be treated as an allegation of "gross misconduct", the provisions of Statute E and the Disciplinary Procedures which apply to cases of "gross misconduct" are relevant. Paragraph 15 of the Disciplinary Procedures defines "gross misconduct" as:

> "any act or omission which is so serious as to permit the university to terminate the employee's contract of employment without having to go through other steps in the disciplinary process."

40. It goes on to specifically include "assault" as an act of gross misconduct.

41. Chapter 1, para. 4 of Statute E sets out the procedure to be followed in cases of gross misconduct. It states that:

> "(a) In a case where, following the application of the procedures, a final written warning has been issued and unsatisfactory conduct persists, or in a case of gross misconduct, the matter shall be reported to the President.
>
> (b) The President shall then consider the matter in accordance with the procedures referred to in section 1., which procedures shall provide that the President shall establish a Disciplinary Committee to conduct a disciplinary hearing.
>
> (c) The Disciplinary Committee shall report to the President, who shall decide whether disciplinary action should be taken and, if so, what type of disciplinary action, whether by way of suspension, demotion or dismissal, should apply.
>
> (d) In the event of the President determining that an employee be suspended, demoted or dismissed, the employee shall have a right to appeal."

42. Para. 18 of the Disciplinary Procedures provides that:

> "Disciplinary Hearing Committee is a committee appointed by the President to investigate the conduct and/or performance of an employee. The members of a Disciplinary Hearing Committee shall comprise three appropriate senior members of staff, one of whom shall act in the role of chairperson. In the case of Academic staff, such members will ordinarily hold the title Professor or Associate Professor. Both genders will, where possible, be represented on all such Disciplinary Hearing Committees."

Submissions of the parties

Submissions as to the extent of the defendant's disciplinary jurisdiction over the plaintiff

43. It is submitted on the plaintiff's behalf that section 25(6) of the Universities Act, 1997 expressly provides that Statute E "shall provide for the tenure of officers". It is asserted that rather than providing for the tenure of officers, Statute E, if anything, undermines them. This is primarily due to the fact that Article 4 of Statute E purports to provide that statutorily appointed Professors now hold office at the pleasure of the President of UCC.

44. It is further submitted that as his tenure pre-existed the Act of 1997 and as he was appointed pursuant to the Statute of the NUI, it is the NUI alone, or to be more specific the Senate of the NUI, who has the power to remove him. The plaintiff asserts that this point is reinforced by Chapter XII(v) and XXXIV of Statute 1 of the Charter of UCC. Further, the powers of the President are limited by Chapter IV(xv) of Statute 1 to "advising" and "remonstrating" with any Professor whenever it shall come to his knowledge that such professor has been neglectful of his duties. Thus, to permit the President to act beyond the remit of his powers by dismissing or demoting the plaintiff would be to breach the terms of section 25(8) of the Act of 1997. In simple terms, it would place the plaintiff in a "less beneficial" position than he would have been prior to the enactment of the Act of 1997. It would in turn deprive him of those rights and entitlements he enjoyed prior to the enactment of the Act of 1997, namely, to be removed by the Senate of the NUI alone.

45. It is further submitted on behalf of the plaintiff that Chapter 1, paragraph 6 of Statute E could be interpreted to exclude pre-1997 statutorily appointed Professors from the remit of Statute E and any disciplinary procedures adopted hereto. The plaintiff submits that what Statute E permits to be considered by the Governing Body in UCC is a proposal to dismiss a Professor but that body does not have the power of dismissal. The plaintiff argues that section 47(6) of the Act of 1997 supports this assertion.

46. Counsel for the plaintiff also submits that both the Charter of NUI and NUI Statute 86 (1951) explicitly state that it is the Senate alone who has the power to remove statutorily appointed Professors, such dismissal occurring upon due cause being shown on an application by the governing body of the Constituent College. Further it is submitted that it is clear from those documents that no disciplinary powers are afforded to the constituent colleges over statutorily appointed Professors. If these arguments are to be accepted, Statute E and the Disciplinary Procedures ought not to have been applied to the plaintiff's case at all. In simple terms, the defendant has no disciplinary jurisdiction over him with the result that the procedure visited upon him is ultra vires.

47. The plaintiff contends that the dismissal/suspension procedures must be specified in a statute in accordance with the provisions of s. 25(6) of the Act of 1997 and that the word 'specified' implies a level of precision or specificity which is absent. It is contended that it follows from the wording of s. 25(6) of the Act of 1957 that the disciplinary procedures must as a matter of law be specified in a statute. Statute E itself provides for sanction in the case of alleged gross misconduct "the definition of which shall be specified in procedures". The plaintiff contends however that the definition of "gross misconduct" cannot be delegated out of the statute and that in essence the whole point of s. 25(6) is that the procedures themselves should be specified in the statute. It is submitted that it follows that the purported definition of "gross misconduct" is (a) not a definition and accordingly outside the delegated power of Statute E, (b) void for uncertainty, and (c) non-compliant with the statutory mandate of specification.

48. The defendant concedes that the plaintiff cannot be removed from office save by the NUI and in accordance with the procedures set down in NUI Statute 86 (1951). This was clearly what was meant by Paragraph 6 of Statute E and there is a similar provision at Paragraph 44 of the Disciplinary Procedures. Thus, the plaintiff is entitled to the benefit of Chapter XXXIV of Statute 1 of the UCC Charter and to the NUI Charter and Statutes as he always has been. Although the governing body of UCC may consider a proposal for the plaintiff's dismissal and may vote in favour of it, the governing body must then apply to the Senate of the NUI for his removal. The power of removal is expressly reserved to the Senate of the NUI.

49. It is submitted on behalf of the defendant that this does not mean that the defendant is prevented from exercising any disciplinary jurisdiction over the plaintiff. In the first instance, it is submitted that there has never been any bar to the constituent colleges exercising disciplinary jurisdiction short of removal over NUI appointed Professors, either prior to or after the enactment of the Act of 1997. The NUI Charter and Statutes conferred protection in respect of removal and never prevented constituent colleges from exercising disciplinary jurisdiction short of that. Further, it argues that s. 47(6) of the Act of 1997 reinforces this point as it is clear from that provision that it is only the powers and functions of the NUI "in respect of [persons such as the plaintiff's] removal from office" that remain in force. It has no relevance to any other powers and functions exercised by the NUI. It is submitted that s. 25(6) expressly provides for a university to suspend any employee and this express power is impossible to reconcile with the idea that the defendant is to have no disciplinary remit over the plaintiff. Further, it is asserted that the introduction of an intermediate layer of disciplinary procedure is entirely necessary for the protection of persons in the plaintiff's position. If it did not exist the governing body of a constituent college would have to proceed straight to the Senate with a complaint recommending removal. It is contended that, that in itself, would hardly constitute a fair procedure. Thus the defendant was entitled and indeed, under an obligation to

exercise disciplinary jurisdiction over the plaintiff short of his removal. The defendant submits that this is all it has ever attempted to do.

50. It is conceded on the defendant's behalf that section 25(6) places it under a duty to "provide for the tenure of officers". Further, section 25(8) obliges the defendant to ensure that the "rights and entitlements in respect of tenure" in existence before the enactment of the Act of 1997 remain unaffected after its enactment. It is contended on behalf of the defendant that Statute E and the Disciplinary Procedures do not adversely affect the plaintiff's rights of "tenure". The defendant states that the term "tenure" as defined in the Oxford English Dictionary is defined 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."

51. It is contended that as a result of this definition there is nothing in Statute E or the Disciplinary Procedures which adversely affects the plaintiff's tenure rights. It asserts that the most the defendant is empowered to do in the plaintiff's case is put forward a proposal for his demotion or dismissal to the Senate of the NUI pursuant to Chapter 1, paragraph 6 of Statute E. This is further confirmed by paragraph 44 of the Disciplinary Procedures which make it clear that the provisions of Chapter XXXIV of Statute 1 of UCC apply. It is contended that Chapter XXXIV of Statute 1 makes ample provision for the tenure of officers. Such persons may only be removed from office by the NUI, due cause having been shown on an application by the governing body of UCC.

52. Further, counsel for the defendant rejects the plaintiff's argument that the procedures applicable in the case of an allegation of gross misconduct against an officer appointed prior to the Act of 1997 are contrary to section 25(8) of that Act. It is submitted that this contention cannot be correct on a proper construction of the statutory provision. The defendant argues that section 25(8) does not prohibit any change in the plaintiff's rights and entitlements of tenure. Rather, its effect is such that the rights enjoyed by the plaintiff in respect of tenure after the enactment of the Act of 1997 can be no less beneficial than they were prior to the commencement of that Act. In any event, as has already been noted, the defendant argues that it has not breached the terms of section 25(8). The reality is that the plaintiff's rights and entitlements in respect of tenure remain unaffected since the enactment of the Act of 1997. His tenure is protected by both Chapter 1, paragraph 6 of Statute E and Chapter XXXIV of Statute 1 of UCC.

53. It is further submitted on the defendant's behalf that the exercise of its right to suspend the plaintiff under section 25(6) does not affect the plaintiff's tenure rights. It claims that if this argument were to succeed, there would be a fundamental inconsistency in section 25(6) since it enables a university to suspend an officer in accordance with procedures which must provide for the tenure of officers. The defendant submits that as section 25(6) vests it with the power to suspend officers only in circumstances where this is in accordance with procedures providing for the tenure of officers, this fact tends to supports the argument that a suspension under that section does not diminish any rights in respect of tenure and thus does not breach section 25(8)(a). Finally it is submitted that section 25(8)(b) has no relevance to the instant case as that sub-section applies to restrictions and obligations to which employees were subject before the commencement of the Act of 1997 and those conditions, restrictions and obligations remain in force.

54. The defendant contends with regard to the provisions of s. 25(6) of the Universities Act, 1997 that the plaintiff's argument is incorrect as the allegation made against the plaintiff is a serious one and there can be no doubt but that the allegation was one falling within the natural and ordinary meaning of the term "gross misconduct". The defendant contends that Statute E as adopted by the Governing Body of UCC on the 30th January, 2001 sets out the provisions governing suspension, demotion and dismissal and sets out the procedures with which an employee may be suspended or dismissed and that this is especially so in the case of alleged gross misconduct. The defendant contends that what is left to be covered by the disciplinary procedures are the procedures applicable to steps prior to or lesser than suspension or dismissal and there is nothing in the disciplinary procedures applicable to the procedures to suspension or dismissal as opposed to these other steps that is not also contained in Statute E. In the alternative the defendant submits that if the court were to conclude that the procedures were not specified in Statute E then there has been substantial compliance with the statutory requirement in s. 25(6) of the Act of 1997 and that in essence the procedure laid down has been "fairly and substantially followed".

55. It is further submitted on the defendant's behalf that the plaintiff's argument is unfounded as regards the delegating of the definition of gross misconduct out of Statute E because the term "gross misconduct" is not a procedure in accordance with which a university may suspend or dismiss an employee pursuant to s. 25(6) of the Act of 1997. The "procedures" are specified in Statute E. The presence or absence of a definition of "gross misconduct" in Statute E cannot take away from the fact that Statute E specifies the procedures to be applied in the case of an allegation of gross misconduct.

Submissions as to whether Mr. Horgan's appointment was ultra vires

56. It is submitted on the plaintiff's behalf that the appointment of Mr. John Horgan is *ultra vires*. There is no provision for his appointment or investigative role either under the Acts of the Oireachtas, Statute E or the Disciplinary Procedures. Further, the appointment of Mr. Horgan by Mr. Keeley was *ultra vires* as the latter had no authority to make such an appointment. It is contended on the plaintiff's behalf that the need to appoint Mr. Horgan reveals an obvious lacuna in Statute E and the Disciplinary Procedures as it could never have been intended by the Oireachtas that, for example, a malicious, patently false, or ridiculous allegation of assault should automatically lead to suspension and disciplinary procedures. One would normally expect that there should be some type of prior determination as to whether or not there was a *prima facie* case. In any event, it is submitted that, in the absence of such a procedure, the Director of Human Resources, Mr. Keeley, decided to "make one up himself". This was quite simply *ultra vires*.

57. In relation to the validity of Mr. Horgan's appointment, despite conceding that Mr. Horgan's appointment was irrelevant to the disciplinary proceedings against the plaintiff, it is contended on the defendants behalf that it is important to remember the reasons why Mr. Horgan was so engaged. It is claimed that in the absence of Mr. Horgan's appointment, it was open to the President (or his delegate, the Director of Human Resources) on receipt of the report of the incident from Ms. Buckley, to immediately put in place the procedures specified in Statute E applicable to cases of gross misconduct. That would have involved the plaintiff's suspension with pay and a hearing before the Disciplinary Committee. Rather than doing so, the defendant had engaged Mr. Horgan's services in order to determine whether a *prima facie* case against the plaintiff existed such that the disciplinary procedures ought to be put into operation.

58. In essence, it is contended on the defendants behalf that Mr. Horgan's function was to act as a filtering device. If Mr. Horgan concluded that no *prima facie* case existed, then disciplinary proceedings would not be initiated. Although conceding that this process was not provided for by Statute E or the Disciplinary Procedures, the defendant seeks to justify Mr. Horgan's appointment by claiming it was "in ease of Professor Fanning". Had Mr. Horgan not been engaged, his function would have been carried out by the President or his delegate, the Director of Human Resources. Having regard to the allegations contained in the plaintiff's letter dated the 27th September, 2001, and in his solicitor's letter dated the 1st October, 2001, the defendant felt it appropriate that an independent person should carry out this initial filtering function.

Submissions as to whether John Horgan's involvement contaminated the entire procedure

59. The plaintiff argues that Mr. Horgan's involvement contaminated the entire procedure as it was his determination which led to the application of the Disciplinary Procedures and the constitution of the Disciplinary Hearing Committee before whom the plaintiff attended on a without prejudice basis and whose decision has yet to be published having been enjoined by order of the court.

60. The defendant submits that there is no basis for this claim, especially when one considers that Mr. Horgan's appointment was, in any event, irrelevant to the disciplinary procedure in the present case. Although his report concluded that there was a *prima facie* case against the plaintiff, it was not furnished to the Disciplinary Hearing Committee and they were unaware of is contents.

Submissions relating to the applicability of disciplinary procedures where the acts did not occur in the course of employment

61. It is emphasised on the plaintiff's behalf that Clause 2 of the Disciplinary Procedures provides that an employee may be subject to disciplinary action when their conduct is "unsatisfactory in the course of his/her employment". The phrase "in the course of his/her employment is not defined by either Statute E or the Disciplinary Procedures. In any event the plaintiff submits that the act which is the subject of the disciplinary procedures did not occur in the course of employment and cites a number of factors which are relevant in this regard. Such factors included that at the time of the incident both the plaintiff and Ms. Buckley were on their lunch breaks, that the incident occurred out of term time, that the incident occurred while the plaintiff had been walking his dog and Ms. Buckley had been driving her car and that neither party had, up until this point in time, any contact with each other in the course of their respective employments with the defendant. The plaintiff's employment did not oblige him to interact with Ms. Buckley or to walk his dog in the car park or even be on the premises during his lunch break. Nor did the terms of Ms. Buckley's employment require that she park her car in UCC car park or require her to move it during her lunch break. Furthermore, it is submitted on the plaintiff's behalf that the fact that the incident occurred in the UCC car park is entirely irrelevant as it could have easily occurred outside the gate of UCC either on the public roadway or in a public car park. As a result, the plaintiff submits that the incident did not occur in the course of employment.

62. In support of this argument, the plaintiff cites a number of authorities – *Buckley's Stores Limited and another v. National Employers Mutual General Insurance Association Limited and others* [1978] IR 351; *Nottingham v. Aldrigde and another,* [1971] 2 QB 739; *Lister and others v. Hesley Hall Limited* [2002] 1 AC 215; *Trotman v. North Yorkshire County Council [1999]* LGR 584.

63. It is submitted on the defendants behalf that there is no requirement that in cases of alleged gross misconduct the conduct in question must have occurred in the course of the employee's employment. It is claimed that no such requirement is contained in the Act of 1997, any of the Statutes pre-dating the Act, Statute E or in the Disciplinary Procedure itself. It is contended that there are certain acts, which irrespective of whether they are alleged to have occurred in the course of employment or otherwise would nevertheless constitute gross misconduct. Such acts would include where an employee of the defendant was guilty of a serious criminal offence, even where that occurred over the weekend and off campus. Furthermore the defendant submits that the facts the subject of the allegation made against the defendant constitute gross misconduct whether or not they occurred in the course of his employment.

64. In any event, the defendant submits that, assuming this is not the case and one must show the acts occurred in the course of employment, it is clear that the alleged incident did in fact occur during the course of employment. This was an incident between two members of the defendant's staff, on the defendant's premises, in a car park to which only members of staff had access. The fact that the incident occurred outside of term time and at lunch hour is irrelevant as the nature and duties of a college professor are not confined to term time or pre-determined standard working hours. The defendant submits that there is no case for construing the requirement of the disciplinary procedures strictly in determining what is "in the course of employment". With this in mind, the defendant argues that, with the exception of the decision in Lister and others v. Hesley Hall Limited [2002] 1 AC 215, the remaining cases cited on behalf of the plaintiff do not apply to the instant case. Indeed, the defendant argues that if the test in Lister and others v. Hesley Hall Limited is applied then it is satisfied in the instant case due to the fact that there is a sufficient connection between the alleged act and the employment. Finally, the defendant argues that in any event there is authority for the view that the term "in the course of employment" should be construed in a broad sense in cases not involving vicarious liability in tort and cites *Jones v. Tower Boot Co.* Limited [1997] 2 All ER 406 in that regard.

Submissions that the disciplinary procedures are inapplicable as the matter between the plaintiff and Ms. Buckley has been amicably resolved.

65. It is contended on the plaintiff's behalf that Paragraph 1 of the Disciplinary Procedures makes it clear that the amicable resolution of the dispute is the object of the disciplinary procedures. This is emphasised by use of the phrase "wherever possible". The plaintiff argues that as all issues between himself and Ms. Buckley have since been amicably resolved, with both parties agreeing not to take further steps in relation to the complaint, the defendant cannot apply the disciplinary procedures. It is submitted that whether a matter is "amicably" resolved is primarily a question of law, although it may also depend to some extent on the facts. "Amicable" does not mean that the parties are embracing each other having settled the dispute. Rather it means that they have resolved the disputes themselves without any determination as to who was right or wrong by any third party.

66. It is submitted on the defendants behalf that there has been no amicable resolution. The Oxford English Dictionary defines the term "amicable" as "friendly" and "of mutual arrangements – done in a friendly spirit, with mutual goodwill, and without quarrelling or employment of force, peaceable, harmonious." The defendant claims that whatever the plaintiff may have thought of the matter, it is clear that Ms. Buckley did not consider the resolution to be "amicable".

67. In any event, the defendant contends that even if there is such an amicable resolution this does not render the disciplinary procedure inapplicable as paragraph 1 of the Disciplinary Procedure clearly refers to the University and the employee as the relevant parties to any amicable resolution. It states in full that:

> "It is the intention of the University to amicably resolve, wherever possible, disciplinary matters regarding employee conduct."

68. Thus, the defendant contends that the University must be a party to any amicable resolution. That is not the case here. Furthermore, paragraph 1 qualifies the extent to which amicable resolutions may render a disciplinary procedure unnecessary by stating that they need only be pursued "wherever possible". Where this is not possible the defendant submits that the sentiments expressed in paragraph 1 do not apply. Finally it is argued on the defendants behalf that even had the University amicably resolved matters between itself and the plaintiff, the wording of paragraph 1 does not prohibit the University in such circumstances from

instituting disciplinary proceedings against the plaintiff.

Conclusion

The extent of defendant's disciplinary jurisdiction over the plaintiff

69. It is clear that, until the enactment of the Universities Act, 1997, the power to appoint and remove persons from a Professorship in one of the constituent colleges was solely vested in the Senate of the NUI. Chapter XXIV(1) of the NUI Statute 86 (1951) states that appointments to vacancies occurring in the Professorships of the University, including Professorships of constituent colleges, "shall" be made by the Senate. Chapter LXIV of that Statute vests in the Senate alone the power to remove such persons from office. The wording of Chapter XXXIV of UCC Statute 1 confirms that this is the case. As the plaintiff was appointed pursuant to the provisions of NUI Statute 86 (1951), it is clear that the terms of his employment are governed by the provisions of that Statute and any statutes or charters of UCC which were made pursuant thereto. The cumulative effect of these provisions is that the plaintiff may only be removed from office by the Senate pursuant to those procedures outlined in NUI Statute 86 (1951). Indeed, the defendant has conceded that this is the case.

70. However, the main thrust of the defendants' argument is that the fact that the Senate alone may remove the plaintiff does not prevent it from exercising disciplinary jurisdiction over the plaintiff short of his removal. Whether this is in fact correct depends upon the determination of three distinct issues. In the first instance, it has to be determined whether NUI Statute 86 (1951) empowered the constituent colleges, prior to the enactment of the Act of 1997, to make statutes/regulations governing the conduct of statutorily appointed Professors. Prior to 1997, the NUI was the all encompassing body under which the constituent colleges operated and to whose powers they were at all times subject. As a result, in order for the defendant to succeed in its claim that it was entitled to exercise disciplinary jurisdiction over the plaintiff, it must show that NUI Statute 86 (1951) made provision accordingly. In simple terms, it must be clear from NUI Statute 86 (1951) that the defendant was empowered to make statutes/regulations governing the conduct of statutorily appointed Professors. If such provision was made, it may be held that, for the period prior to the enactment of the Act of 1997, it was entirely within the defendant's powers to create statutes and regulations by which it could exercise disciplinary jurisdiction over the plaintiff short of removal.

71. The second issue to be determined is whether, assuming the defendant had the power to make such statutes/regulations, were they in fact made prior to the enactment of the Universities Act, 1997.

72. Finally, where such statutes/regulations have been made, it must be clear that the defendant's decision to apply Statute E and the Disciplinary Procedures to the plaintiff's case does not infringe the requirements of s. 25(8) of the Universities Act 1997.

73. *Did NUI Statute 86 (1951) empower the defendant to make statutes/regulations governing the conduct of statutorily-appointed professors for the period prior to the enactment of the 1997 Act?*

74. Chapter XXXI of the NUI Statute 86 (1951) implicitly refers to the power of the constituent colleges to make statutes/regulations governing the conduct of statutorily appointed Professors. However, due to the use of the qualifying phrase "in respect of all matters relating to his duties" contained in Part 3 of that Chapter, it appears that a statutorily appointed Professor need only comply with those statutes/regulations of a constituent college where they relate to his duties as specified in Part 1 of Chapter XXXI. In simple terms, constituent colleges can only regulate the plaintiff's conduct insofar as such conduct relates to his specified duties. A statutorily appointed Professor's duties are limited to those concerning the lectures to be given by him and assistance to be given by him to his students. As a result, any statutes/regulations which could have been made by the defendant before the enactment of the Act of 1997 can only be enforced against the plaintiff where they seek to regulate his duties to give lectures and/or to provide his students with assistance. The consequence of this reasoning is that as the impugned incident in the instant case had nothing whatsoever to do with a failure on the plaintiff's part to give lectures or provide his students with assistance, the defendant would thus, have been prevented from exercising disciplinary jurisdiction over the plaintiff in relation to said incident.

75. In response to this reasoning, the defendant can counter that, simply because NUI Statute 86 (1951) specifically requires statutorily appointed Professors to adhere to statutes/regulations governing a particular type of conduct, that does not mean that constituent colleges are therefore *prohibited* from regulating additional forms of conduct on the part of such persons. In support of this assertion, the defendant points out that there has never been any bar to the constituent colleges exercising disciplinary jurisdiction short of removal over NUI appointed Professors, either prior to or after 1997. An examination of the Charter of the NUI and NUI Statute 86 (1951) supports this assertion. Neither contain an express prohibition on the making of statutes/regulations by a constituent college for the purpose of regulating the conduct of statutorily appointed Professors.

76. Thus, the court has to determine which is the correct approach to be adopted. On the one hand, the absence of an express prohibition on the adoption of procedures governing all non-specified conduct of statutorily appointed Professors could be interpreted to mean that the defendant can apply disciplinary procedures in the plaintiff's case. On the other hand, the court must be mindful of the fact that Chapter XXXI of NUI Statute 86 (1951) only requires statutorily appointed Professors to adhere to those statutes/regulations of a constituent college which relate to the conduct specified in Part 1 of that Chapter. As a result, statutes/regulations governing non-specified conduct (i.e. conduct not specified in Part 1 of Chapter XXXI) cannot be enforced against statutorily appointed Professors and, in turn, any attempt to so enforce them will be ultra vires.

77. In order to determine this issue, the court will rely on the principles of statutory interpretation, in particular the maxim *expressio unis est exclusio alterius* ("to express one thing is to exclude another"). This maxim was applied in *Kiely v Minister for Social Welfare* [1977] IR 267 and again in *O'Connell v An t-Ard Chlaraitheoir High Court*, Unreported, 21 March 1997. Its effect was succinctly illustrated by Henchy J. in Kiely where he said at page 279 of his judgment:

> "The fact that article 11 (5) allows a written statement to be received in evidence in the specified limited circumstances means that it cannot be received in other circumstances: expressio unis *est exclusio alterius*."

78. As Part 1 of Chapter XXXI only requires statutorily appointed Professors to adhere to the statutes/regulations of a constituent college where they apply to certain specified forms of conduct, the application of this maxim means that any statutes/regulations purporting to regulate non-specified conduct of such persons will be *ultra vires*.

79. The Law Reform Commission has noted in its Consultation Paper on *Statutory Drafting and Interpretation: Plain Language and the Law* (CP14-1999), at page 20:

> "The maxim *expressio unis est exclusio alterius (*"to express one thing is to exclude another") allows the courts to imply that where an Act applies a rule to a particular situation, the Oireachtas intended to confine the rule to that situation,

and not to apply it in any wider context."

80. However, although not actually enacted by the Oireachtas, NUI Statute 86 (1951) has much in common with a piece of legislation. Much of the language used in the Statute is of a legal nature and many of the procedures set out therein are so precise and technical that it appears probable that its drafters had a legal background. It is to be noted that although NUI Statute 86 (1951) was not enacted by the Oireachtas itself, the Universities Act, 1908 expressly vested power in the Dublin Commissioners, and subsequently the Senate, to create it. As a result, I am satisfied that it is correct for this court to apply the maxim *expressio unis est exclusio alterius* when interpreting the statute.

81. Thus, upon applying the maxim it is clear that NUI Statute 86 (1951) only requires statutorily appointed Professors to comply with the statutes/regulations of a constituent college where they relate to the duties specified in Part 1 of Chapter XXXI. This necessarily prevents the defendant from applying disciplinary procedures governing other non-specified conduct on the part of such persons. Thus, where statutes/regulations were to be made pursuant to NUI Statute 86 (1951), they could only regulate conduct of the plaintiff where it related to the carrying out of his lectures or a failure on his part to provide assistance to students. It follows accordingly that an incident such as allegedly occurred in this case in the car park of the university could not be regulated.

82. *Did the defendant in fact make statutes/regulations by which it could exercise disciplinary jurisdiction over statutorily appointed Professors prior to the enactment of the Universities Act, 1997?*

83. It is clear that NUI Statute 86 (1951) only vested the constituent colleges with the power to exercise disciplinary jurisdiction over statutorily appointed Professors where such persons failed to carry out their "specified" duties. The question which has to be addressed is whether the defendant in fact made statutes/regulations pursuant to NUI Statute 86 by which it could exercise this disciplinary jurisdiction. Indeed, it is arguable that one of the purposes for which Statute 1 of UCC was made was that of expanding upon the precise requirements of statutorily appointed Professors' "specified" duties. Chapter XV of Statute 1 in particular expands upon the specified duties of a statutorily appointed Professor to give lectures and provide assistance to his students. It requires such Professors to give students attending their lectures assistance in their studies, by advice, by informal instruction and occasional and periodical examination. It also requires them to give instruction in their Department to Students, assist them in the pursuit of knowledge and contribute to its advancement.

84. However, despite expanding upon the content of these "specified duties", Statute 1 does not set out the disciplinary procedures to be followed in the event that a Professor fails to fulfil them. In fact, although the use of the word "shall" in Chapter XV implies that Professors are obliged to carry out these duties, the consequences of a failure to do so are uncertain. Statute 1 refers to statutorily appointed Professors duties in greater detail, but it fails to set out any procedure for dealing with a Professor who fails to carry them out. The situation accordingly is that in fact the defendant did not make any statues/regulations by which it could exercise disciplinary jurisdiction over the plaintiff prior to the enactment of the Universities Act, 1997. In circumstances where a Professor had neglected his specified duties, the only recourse open to the defendant was that the President of UCC was empowered to "advise" or "remonstrate" with such a Professor pursuant to Chapter IV of Statute 1.

85. Is the defendant's decision to apply Statute E and the Disciplinary Procedures in substitution of any pre-1997 disciplinary procedures in breach of the requirements of s. 25(8) of the Universities Act 1997?

86. Even if the court assumes that Chapter XV of Statute 1 of UCC is comprehensive enough as to entitle the defendant to exercise disciplinary jurisdiction over the plaintiff for a failure to carry out his specified duties, an issue still exists as to whether such statues/regulations continue to apply in the plaintiff's case or whether the provisions of Statute E and the Disciplinary Procedures may now be applied in their stead. It is clear from the Act of 1997 that this may be done where all the requirements of section 25(8) have been complied with. As has already been noted, that section obliges the defendant to ensure that the tenure rights of the plaintiff which existed prior to the enactment of the Act of 1997 are not adversely affected by the introduction of Statute E and the Disciplinary Procedures and further, that the conditions of service, restrictions and obligations to which the plaintiff was subject immediately before the commencement of the Act of 1997 shall, unless varied by agreement, continue to apply.

87. In relation to the first requirement, it is arguable that Statute E and the Disciplinary Procedures do not adversely affect the plaintiff's rights of tenure as existed prior to the Act of 1997. In order to ascertain whether this is the case it is necessary to determine what exactly the plaintiff's rights of tenure were prior to 1997. Chapter XXVII(1) of NUI Statute 86 (1951) defines the "Tenure of Office by Professors" in the following terms:

> "Every Professor of the University shall, subject to good conduct and due fulfilment of his duties, hold office until he shall have attained the age of 65 years and may thereafter be continued in office for five further years…."

88. Essentially the right of tenure which the plaintiff enjoys is that of security of office. It entitles him to expect that he shall remain in office save in circumstances where a proposal may be made by the governing body of the university to the Senate of the NUI for his removal due to a lapse in good conduct on his part or a failure to fulfil his duties. The proper interpretation of remaining in office would also preclude the defendant from attempting to demote the plaintiff as such demotion would essentially amount to the plaintiff being assigned a different office.

89. It is clear that Statute E and the Disciplinary Procedures do not adversely affect the plaintiff's tenure rights in this regard. They preserve the Senate's sole jurisdiction to remove or demote the plaintiff, while acknowledging the defendant's already existing power to put forward a proposal for the plaintiff's removal. This is further supported by the fact that the defendant concedes that it is unable to demote or dismiss the plaintiff.

90. The question then arises as to whether the application of Statute E and the Disciplinary Procedures to the plaintiff's case comply with section 25(8)(b) of the Act of 1997. It is clear that the requirement that the plaintiff carries out his specified duties constitutes a condition of service, restriction or obligation to which he is subject. Similarly, where the plaintiff fails to comply with this requirement and the defendant initiates the disciplinary procedures against him, the initiation of such procedures will also constitute a condition of service, restriction or obligation to which the plaintiff is subject. However, as has already been noted, prior to 1997, no statutes/regulations were ever made by which the defendant could exercise disciplinary jurisdiction over the plaintiff for a failure to carry out his specified duties.

91. This lack of jurisdiction has a consequent effect on the defendant's contention that the provisions of Statute E and the Disciplinary Procedures do apply to the plaintiff's case. If they are to so apply, the defendant must show that their application to the plaintiff's case complies with section 25(8)(b). Thus, as the defendant could not exercise any disciplinary jurisdiction over the plaintiff prior to 1997, it must now show that the application of Statute E and the Disciplinary Proceedings to the plaintiff was explicitly agreed

between the parties. This is not the case. It is clear that there was no agreement between the parties which purported to state that the plaintiff was from that point on subject to Statute E and the Disciplinary Procedures of the defendant. As a result of that fact, the application of Statue E and the Disciplinary Procedures to the plaintiff's case would be in breach of section 25(8)(b). In turn, their application to the plaintiff's case is simply of no effect and therefore *ultra vires*.

92. For the sake of completeness I propose to deal with the remaining issues.

93. *Was it necessary for the defendant to specify its post 1997 disciplinary procedure with regard to suspension or dismissal of the plaintiff in a statute.*

94. I am satisfied that the purpose of s. 25(6) of the Universities Act, 1997 is that the University may suspend or dismiss any employee but only in accordance with procedures and subject to any conditions which are clearly defined or identified in a statute and the relevant statute in this instances is Statute E as adopted by the governing body of UCC on 30th January, 2001. In my view, Statute E in order to comply with s. 25(6) of the Act of 1997, should have specified the relevant procedures which would govern the situation leading to the suspension or dismissal of any employee such as the plaintiff herein. In my view it was necessary for the defendant University to set out the disciplinary procedures in Statute E or an alternative Statute and it was not open to them to rely on such disciplinary procedures as may be adopted from time to time by the governing body outside of a Statute which is the situation that occurred here with the details setting out the relevant disciplinary procedure being contained in a separate document subsequent to the introduction of Statute E. Accordingly in my view the procedures which the defendant University applied have not been specified in Statute E or any Statute and in my view accordingly are *ultra vires* and contrary to the provisions of s. 25(6) of the Act of 1997. It further follows in my view that the relevant definition of gross misconduct in the manner in which events transpired, needed in order to comply with the provisions of s. 25(6) of the Act of 1997, to have been defined in a Statute and it was not open to the defendant University in s. 3(b) of Chapter 1 of Statute E to delegate the definition out of Statute E into the disciplinary procedure when the very disciplinary procedure itself, including the definition of "gross misconduct", should have been set out in Statute E.

95. There is no doubt but that the disciplinary procedure is very fully set out in the separate document entitled "disciplinary procedure" but I do not accept having regard to the clear intent of s. 25(6) of the Act of 1997 that it could reasonably be said that the procedure as laid down by the Oireachtas was fairly and substantially followed in the circumstances of this case. While it may well be that the situation pertaining to the plaintiff's suspension is moot because of the earlier decisions of this Court the reality of the situation is that what is at stake is the suspension and/or dismissal of the plaintiff and it is clear that the Oireachtas considered it appropriate that in a matter of such importance the suspension/dismissal procedure was to be specified in a Statute and was to be clearly defined or identified and this was a procedure which was well established historically.

96. Accordingly I come to the conclusion that the defendant has not in the circumstances of this case complied with the requirements of s. 25(6) of the Universities Act, 1997 and, insofar as it has purported to act pursuant to certain disciplinary procedures not set out in a statute, it has acted *ultra vires*.

97. *Was the appointment of Mr. Horgan ultra vires?*

98. It has already been established that the plaintiff was not required to adhere to the provisions of Statute E or the Disciplinary Procedures. Similarly, the defendant had no power to apply them to the plaintiff's case. However, even if it is accepted that the defendant had jurisdiction to apply Statute E and the Disciplinary Procedures to the plaintiff's case, it is clear that there is no provision for the appointment of Mr. Horgan. In fact, as has already been noted, the defendant concedes that this is the case. Rather it seeks to justify Mr. Horgan's appointment by claming it was necessary to afford the plaintiff a layer of protection not provided under Statute E or the Disciplinary Procedures. The defendant claims that this decision was "in ease of Professor Fanning". If Mr. Horgan concluded that no *prima facie* case existed, then disciplinary proceedings would not be initiated. In my view this submission is without foundation in law. Neither Statute E nor the Disciplinary Procedures afforded the defendant the power to appoint Mr. Horgan. As Mr. Horgan's appointment was ultra vires, the President of UCC/Director of Human Resources at UCC should not have allowed themselves to be influenced by Mr. Horgan's finding when no provision had ever been made for his involvement in any way.

99. *Did Mr. Horgan's involvement contaminate the entire procedure?*

100. In light of the fact that there was no provision made for the appointment of Mr. Horgan, I am satisfied that his involvement in the disciplinary proceedings and more specifically, his decision that there was a prima facie case against the plaintiff, had the effect of contaminating the entire disciplinary procedure. Statute E and the Disciplinary Procedures state quite clearly that responsibility for deciding whether an investigation by the Disciplinary Committee of an allegation of gross misconduct should be pursued vests solely in the President of UCC or other such person as he may appoint. As the President chose to allow his decision to be determined by whether or not Mr. Horgan found a *prima facie* case to exist, this was in essence a contamination of that decision. I note in particular Professor Wrixon's evidence on this topic to the effect "Well, we asked Mr. Horgan to do this investigation for us and he came back and said, you know, in his opinion there was a *prima facie* case of assault there, and I had no option then but to start naming the committee…." This decision in turn contaminated the remainder of the procedure. The reasons why the defendant chose to appoint Mr. Horgan are irrelevant – the requirements of fair procedures insist that where procedures have been laid down by the parties they must be followed.

101. *Did the alleged "assault" in the car park occur in the course of the plaintiff's employment?*

102. An issue arises as to whether or not the alleged incident occurred within the course of the plaintiff's employment. Although it is arguable that if one applies the test in Lister v. Hesley Hall Limited [2002] 1 AC 215, the result is that the impugned incident must be held not to have occurred within the course of the plaintiff's employment, I take the view that the facts in this case can be distinguished from those in Lister and furthermore, that the test in Lister is fashioned to a large extent by the rationale behind the doctrine of vicarious liability. The conflicting policies which the courts have sought to reconcile in applying the concept of vicarious liability do not arise in cases where an employer is seeking to enforce their entitlement to institute disciplinary proceedings against an employee. As a result, the test in determining what conduct falls within the course of employment will be different.

103. The question which fell to be determined in *Lister v. Hesley Hall Limited* [2002] 1 AC 215 was whether intentional wrongdoing on the part of the employee (i.e. conduct which does not come within the terms and conditions of their employment) falls within the "course of employment" such that vicarious liability will attach. The claimants in that case were residents in a boarding house attached to a school owned and managed by the defendants. Over a period of years the warden of the boarding house, unbeknownst to the defendants, systematically sexually abused the claimants. Although the trial judge found the defendants vicariously liable for the warden's torts, the defendants successfully appealed this finding to the Court of Appeal. The claimants in turn appealed to the

House of Lords.

104. Steyn LJ. at p. 230 of the judgment refers to the application of the correct test for determining whether an act falls within the course of employment in the following terms:

> "My Lords, I have been greatly assisted by the luminous and illuminating judgments of the Canadian Supreme Court in Bazley v. Curr 174 DLR (4th) 45 and Jacobi v. Griffiths 174 DLR (4th) 71. Wherever such problems are considered in the future in the common law world these judgments will be the starting point. On the other hand, it is unnecessary to express views on the full range of policy considerations examined in those decisions.

105. Employing the traditional methodology of English law, I am satisfied that in the case of appeals under consideration the evidence showed that the employers entrusted the care of children in Axelhome House to the warden. The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axelhome House. Matters of degree arise. But the present cases clearly fall on the side of vicariously liability."

106. Both Steyn LJ. and Clyde LJ. note that the "close connection" test adopted in the cases referred to stem from the proposition laid down in Salmond, Law of Torts, First edition (1907) at p. 83 that "a master … is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes – although improper modes – of doing them".

107. An act of deliberate wrongdoing may not sit easily as a wrongful mode of doing an authorised act. But recognition should be given to the critical element in the observation, namely the necessary connection between the act and employment. The point is made by Salmond, Law of Torts, First edition (1907), at p. 84, where he states:

> "On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible."

108. As I have already pointed out, the test to be applied in the instant case will necessarily change due to the fact that it does not involve a claim based on vicarious liability. If the instant case was one which involved a claim based on vicarious liability, then, having regard to the rationale in Lister, it is eminently arguable that the alleged incident did not occur in the course of the plaintiff's employment. In simple terms, had Ms. Buckley sought to sue the defendant on the basis of vicarious liability she would have, in my view, as a probability have failed having regard to the circumstances surrounding the alleged incident.

109. However, as we are dealing in this instance with the question of whether the defendant is entitled to institute disciplinary proceedings against the plaintiff, in my view a test based on vicarious liability is inappropriate. Vicarious liability is a legal responsibility imposed upon an employer, although he is himself free from blame, for a tort committed by his employee in the course of employment. Fleming has observed in The Law of Torts 9th ed., (1998), at p. 409-410, that this formula represents a:

> "compromise between two conflicting policies: on the one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business enterprise".

110. Thus, when determining whether an act or omission has been committed within the "course of employment" for the purpose of imposing vicarious liability upon an employer, the fact that the act or omission is closely connected to the employment is not the only factor which the court must take into account. It is also necessary to consider the damage suffered by the plaintiff and the undesirability of foisting an undue burden on the defendant.

111. It is clear that the same conflicting policies which operate behind the doctrine of vicarious liability do not come into play where the institution of disciplinary proceedings is at issue. In my view, in the latter circumstance different policy issues arise for consideration. Thus, the application of the test of what constitutes conduct in the course of one's employment must differ. Unlike, in vicarious liability cases, one cannot say that in the instant case that an undue burden is being foisted on the defendant – rather the defendant is seeking to institute disciplinary proceedings against the plaintiff. Furthermore, the defendant argues that in instituting disciplinary proceedings against the plaintiff it is at all times acting in the interest of its other employees. A failure on its part to carry out a thorough investigation of Ms. Buckley's allegations could have the potential to leave its other employees open to a risk of danger in the course of their employment. In addition, it cannot be argued that the plaintiff is an innocent tort victim nor can it be said that by seeking to restrain the institution of disciplinary proceedings the plaintiff is seeking financial recompense against the defendant.

112. Thus it is clear that a number of different and conflicting policies arise in this case when compared to Lister. When deciding whether or not the alleged incident occurred in the course of employment, the court must balance a number of colliding interests – those of the defendant, the plaintiff, Ms. Buckley and that of the defendant's other employees on campus. In the particular circumstances of this case, I take the view that the term "course of employment" must be construed in a broad manner and I follow the rationale as laid down in *Jones v. Tower Boot Co. Limited* [1997] 2 All ER 406.

113. In that case, the complainant started work in the defendant's factory and was, for the duration of his employment, subjected by two fellow employees to severe physical and racial abuse which eventually caused him to resign. He made a complaint to the industrial tribunal against the employers, contending that the employees' conduct amounted to racial discrimination within the provisions of ss. 1(1)(a) and 4(2)(c) of the Race Relations Act, 1976 for which the employers were responsible by virtue of s. 32(1) as each had been acting "in the course of his employment."

114. In the Court of Appeal, Waite LJ. was satisfied that the acts in question had been committed within the course of employment. He rejected the argument that that phrase must be given the meaning it had acquired in the field of vicarious liability merely because both types of case involved employer's liability. In his opinion, ascertaining the meaning of the phrase involved the application of two principles:

> "The first is that a statute is to be construed according to its legislative purpose, with due regard to the result which it is the stated or presumed intention of Parliament to achieve and the means provided for achieving it ("the purposive construction"); and the second is that words in a statute are to be given their normal meaning according to general use in the English language unless the context indicates that such words have to be given a special or technical meaning as a term of art ("the linguistic construction")."

115. Bearing these principles in mind, I am satisfied that, having regard to the fact that the intention of the defendant in instituting disciplinary proceedings against the plaintiff was to ensure that other members of its staff were protected, the phrase "in the course of employment" must be interpreted in a manner which takes that aspect into account. As a result, in deciding whether the plaintiff's conduct fell within the course of employment, the court must take into account a number of different factors, including:

1. the extent of the connection between the act and the employment;

2. the nature of the allegation which is the subject of the disciplinary proceedings;

3. the employer's interest in seeking to protect its other employees;

4. the employer's interest in seeking to ensure the employee's standard of work remains at a satisfactory standard;

5. the employee's interest in seeking to resist the potential consequences of the disciplinary proceedings.

116. Taking these different factors into account against the background where the alleged inter-employee assault incident occurred on both the plaintiff's and Ms. Buckley's employer's premises, that they were both employed by the same employer, that the nature of the allegation is, on the plaintiff's own admission, if true, an extremely serious allegation against any academic, and in particular the employer's interest in seeking to protect its other employees while on campus, I take the view that the incident in question does fall within the course of the plaintiff's employment such that any disciplinary procedure as may be provided for and may be applicable to the plaintiff may be instituted for the purpose of ascertaining the voracity of Ms. Buckley's allegations and as to whether or not if proven disciplinary measures as may be appropriate and provided for be applied against the plaintiff.

117. *Were the matters between Ms. Buckley and the plaintiff amicably resolved thereby rendering any relevant disciplinary procedures inapplicable?*

118. Paragraph 1 of the Disciplinary Procedures makes it clear that amicable resolution of disputes is the object of the disciplinary procedure but subject to such amicable resolution taking place wherever possible. In the particular circumstances of this case I am quite satisfied there was no "amicable" resolution of matters between Ms. Buckley and the plaintiff. Each was threatening the other with substantial court proceedings in the strongest possible terms and Ms. Buckley was clearly under considerable pressure having got herself into the particular situation and her marriage was imminent. There was nothing "friendly" as regards the arrangement arrived at nor was it done in a friendly spirit with mutual goodwill and I am quite satisfied on the evidence that Ms. Buckley never considered the resolution in itself to have been amicable. I find that the dispute between Ms. Buckley and the plaintiff was not amicably resolved. In any event, I am satisfied that the intention of the wording of paragraph 1 of the Disciplinary Procedures is that the university would be involved in the "amicable resolution" of the matter which is not the case in this instance.

119. Accordingly it follows that the plaintiff is entitled to a declaration that the disciplinary procedure promulgated by the defendant and as applied against the plaintiff is unlawful and *ultra vires* the defendant and the result of the disciplinary inquiry which has been placed in a sealed envelope and placed in a safe pending the outcome of these proceedings is to be destroyed in accordance with the agreement as reached between the parties subject to the decision of this court and it follows that the plaintiff is entitled to judgment against the defendant in the sum of €51,342.41 being the agreed costs to him of legal representation at the disciplinary inquiry arising on the alleged assault incident.