

IRELAND / JUDGMENT

Fanning -v- UCC [2008]

IESC 59 (28 October 2008)

[2008] IESC 59

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[2008] IESC 59 Supreme Court Record Number: 323/05 High Court Record Number : 2001 15653 P
Date of Delivery: 28 October 2008 Court: Supreme Court Composition of Court: Hardiman J., Geoghegan J., Kearns J. Judgment by: Kearns J. Status of Judgment: Approved
Judgments by Result Concurring Kearns J. Appeal dismissed - affirm High Court Order
Hardiman J., Geoghegan J. Outcome: Dismiss THE SUPREME COURT Hardiman J.
Geoghegan J. Kearns J. [S. C. No. 323 of 2005] BETWEEN CONNELL M. FANNING
PLAINTIFF/RESPONDENT AND UNIVERSITY COLLEGE CORK DEFENDANT/APPELLANT
JUDGMENT of Mr. Justice Kearns delivered the 28th day of October, 2008 This is an appeal
brought from the judgment and order of the High Court (Gilligan J.) made on 24th June,
2005 wherein it was held that the defendant was precluded from implementing its
disciplinary procedures against the plaintiff arising out of an incident which occurred in
the staff car park on the campus of University College Cork (UCC) on 31st August, 2001.

BACKGROUND

On the 31st August, 2001, which was outside term, the plaintiff, who is a professor of economics employed in UCC, was walking his dog in the car park of the college campus during the lunch hour break and speaking to his wife on his mobile telephone. Ms. Joan Buckley, a staff member who worked in a different department and who did not know the plaintiff, had just got into her car in the car park and started the engine. As she went to drive forward, the plaintiff made a sudden gesture to her to stop the car which she duly did. A dog then appeared from directly in front of her and she realised the man had intended to warn her as she had not seen the dog in front of her car prior to that moment. The plaintiff then approached the car window at the driver's side and began conversation with the driver. It is common case that a fairly heated exchange then ensued between them. In her subsequent report to the Department of Human Resources of UCC, Ms. Buckley claimed that the plaintiff in the course of this altercation stuck his

hand in the window and grabbed Ms. Buckley by the neck, squeezing and shaking her. According to Ms. Buckley the man was shouting and roaring while this occurred but because she was panicking she could not make out what he was saying. She reported that she drove off. The man, on her account, ran alongside the car as it moved persisting with the shaking motion until she lost him by driving off. The plaintiff for his part accepts that there was an incident with Ms. Buckley but vehemently denies that he assaulted her in the manner alleged or at all. There were no witnesses to the event and the relevant security camera was out of operation. Having returned from lunch, Ms. Buckley reported the matter to security and provided a description of the man in question from which it became possible to identify the plaintiff. Ms. Buckley reported the matter to the Department of Human Resources on 6th September, 2001 and on 7th September, 2001 attended a meeting with a number of Department of Human Resources officials and furnished a written report of what she said occurred. At this meeting Ms. Buckley made it clear that she wished merely to report the matter and was not making a complaint as such. On the basis of the report, however, the Director of Human Resources, Mr. 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 stating that “a serious allegation has been made by Ms. Joan Buckley (a member of staff of the University) that you assaulted her on Friday, 31 August, in the Aras ni Laoi car park on University property”. The letter continued:- “Ms. Buckley has stated that she does not want to make a complaint regarding the alleged incident. However, she has, as the enclosed documentation makes clear, put the University on notice of her allegation against you. Therefore, I must, on behalf of the University, put to you this allegation and request your urgent written response to it.” With that letter was enclosed a report of the meeting between Ms. Buckley and the members of the Department of Human Resources and a letter written by Ms. Buckley dated 4th September, 2001, together with the record of a meeting between various departmental staff in relation to the complaint on 7th September, 2001. The plaintiff wrote to the President on 27th September, 2001 stating that in his view he was unable to receive fair and impartial treatment from the Director of Human Resources and further stating that he had in the past referred examples of Mr. Keely’s actions towards him to his legal advisors for attention. He did not in that letter respond specifically to Mr. Keely’s request that he furnish an urgent written response to the allegation advanced by Ms. Buckley. Mr. Keely wrote a further letter to the plaintiff dated 1st October fixing a deadline of 5 p.m. on Wednesday, 3rd October for a response. This letter may have crossed with a letter of the same date sent by the plaintiff’s solicitors to the Secretary of UCC wherein it was claimed that Mr. Keely’s letter and the statements attached thereto were grossly inaccurate, defamatory and contained very serious unfounded allegations which had damaged their client’s reputation. The letter called upon the College authorities to apologise to the plaintiff and compensate him for his alleged loss and damage. A letter which is critical to everything that followed was then sent to the plaintiff by Mr. Keely on 5th October, 2001. It states:- “Allegation by Ms. Joan Buckley I refer to a letter which the University has received on your behalf from Stokes & Co., Solicitors, dated 1st October, 2001 regarding the above matter. A copy of this letter was forwarded by me to Ms. Buckley on 2nd October accompanied by a letter requesting her to respond to your solicitor’s assertions that her version of the event was “grossly inaccurate, defamatory and contained very serious unfounded

allegations”, in addition to requesting Ms. Buckley in that context to confirm her recollection of the incident. I attach a copy of that letter and a copy of Ms. Buckley’s response dated 3 October. As Ms. Buckley has confirmed her original statement regarding this matter and in the absence of a substantive response from you, the University has no option but to consider the letter of 1st October from your solicitors as a denial of her allegation. I am writing to advise you that the University must now consider Ms. Buckley’s allegation as an allegation of gross misconduct on your part and, that given the circumstance, the University must now invoke its disciplinary procedures (attached) to deal with this matter. While the procedures provide for the University to suspend with pay an employee alleged to have engaged in gross misconduct, the University is anxious to consider your substantive response to Ms. Buckley’s allegation before contemplating such action. To that end the University has engaged the services of an independent person, namely Mr. John Horgan, former Chairman of the Labour Court, to conduct an investigation into this matter in line with its procedures. Mr. Horgan has indicated that he will commence the investigation on Thursday, 11th October and I would request that you make yourself available as required by him. He will be contacted early next week with respect to an appointment. Every effort will be made to complete this investigation in as timely a manner as possible. Should you require further information as to the form the investigation process might take and your rights as an employee under the University’s disciplinary procedures, I suggest you contact Mr. Paul Ryan, Employee Relations Manager, who will be able to provide further information. Having regard to the letter written on your behalf to the Secretary/Bursar of 1 October, I am contemporaneously faxing a copy of this letter to your solicitors, Stokes & Co. I also confirm that we have written to Ms. Buckley notifying her of the investigation by Mr. Horgan.” As appears from the foregoing, the disciplinary procedures which it was proposed to apply to the plaintiff were attached to the said letter. It is important to interrupt the narrative at this juncture for the purpose of setting out the detail of those disciplinary procedures.

DISCIPLINARY PROCEDURES INVOKED The written disciplinary procedures are contained in an eight page document which commences with an introduction wherein it is stated that “It is the intention of the University to amicably resolve, wherever possible, disciplinary matters regarding employee conduct”. Having recited that the conduct of employees is expected to contribute towards the achievement of the University’s goals and objectives, the document states that where an employee’s conduct is unsatisfactory in the course of his employment, the employee may be subject to disciplinary action, and the document purports to set out the procedure which will be followed where an employee of the University is subject to disciplinary action. “Gross misconduct” is defined in the document 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”. “Assault” is thereafter listed as one such act at para. 15(b). Para. 18 of the document provides for the formation of a Disciplinary Hearing Committee to investigate the conduct of an employee. This Committee is appointed by the President of the University and para. 18 provides that the members of the Committee shall comprise three ‘appropriate’ senior members of staff. At para. 21 it is provided that, in the case of alleged gross misconduct, an employee “shall be advised of his/her suspension, pending a full disciplinary hearing, at a meeting for which he/she shall receive at least 24 hours prior notice.” At para. 23 the disciplinary sanctions available to the

University are recited. They include a verbal warning, a written warning and a final written warning. They also provide for suspension, demotion or dismissal in the following circumstances:- “(a) Disciplinary suspension An employee may be subject to disciplinary suspensions in cases which involve a serious breach of conduct or where an employee has not responded to progressive disciplinary action.

- (b) Demotion In exceptional circumstances an employee may be subject to demotion, temporarily or permanently, where his/her conduct consistently fails to meet expected standards and he/she has failed to respond to progressive disciplinary action.
- (c) Dismissal An employee may be subject to dismissal where he/she has not responded to progressive disciplinary action or where the nature of misconduct or performance deficiency is so serious that it merits such action.” At para. 24 it is provided:- “In cases of alleged gross misconduct where an employee is the subject of an investigation to determine the actual chain of events, the employee will be suspended with pay pending the result of the investigation. Where it is found that the employee has been guilty of gross misconduct, he/she may be dismissed without having gone through warnings, suspensions or demotion.” Para. 27 of the document provides:- “All the functions of the University set out under this procedure are delegated to the President.” Para. 44 of the document also provides:- “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 statute, 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.” Finally, the document also provides that “should the President decide upon the implementation of suspension, demotion or dismissal, the employee will be advised of his/her right of appeal as stated under this section of the procedures.” While I will address the terms of the plaintiff’s employment with the University at a later point, it is clear, firstly, that the defendant was treating Ms. Buckley’s “allegation” as amounting to one of “gross misconduct” and as such sufficient, as the letter stated, to enable the defendant to suspend with pay an employee alleged to have engaged in such behaviour. Secondly, the letter clearly also put the plaintiff on notice that other more draconian consequences, such as demotion or dismissal, might also ensue. BACKGROUND (CONTD) By letter dated 9th October, 2001 the plaintiff’s solicitors set out the plaintiff’s account of the incident, repeating and categorically denying that he assaulted Ms. Buckley or that he placed his hand inside her car. Acknowledging that Ms. Buckley had said she did not want to make “a thing of it, just wanted to report it” the letter proceeded to enquire as to how the mere reporting of an incident had led to a threat of suspension with pay pending investigation and the further threat of a subsequent possibility of dismissal. The letter further queried the entitlement of the University to delegate the proposed investigation of this or any other matter to an outsider, such as Mr. Horgan. The letter referred to the disciplinary procedures which required for such a purpose the establishment of a disciplinary committee which must consist of three senior members of staff. As this had not happened, the letter made it clear that the plaintiff would not attend with Mr. Horgan. The letter also suggested that where no complaint had been made against

him by the alleged victim it was not open to the University to conduct any enquiry whether by way of an investigation or otherwise. The letter concluded by stating that any attempt by the University to effect a suspension of the plaintiff would be met by an application to the High Court for an injunction. A lengthy reply followed from Mr. Keely on 10th October, 2001 which stated, *inter alia*, that the “categorisation of an allegation of assault is dictated expressly by para. 15(b) of the disciplinary procedure.” The letter further stated that Mr. Horgan had been invited to carry out the investigation as a consequence of the assertions made against the University by the plaintiff in his letter of 1st October, 2001. It was further pointed out that Mr. Horgan’s role was to simply consider whether or not a *prima facie* case had been sufficiently made out in order for the case to be submitted to a disciplinary hearing committee which would be appointed pursuant to para. 18 of the Disciplinary Procedures. Mr. Keely called upon the plaintiff to reconsider his decision not to meet with Mr. Horgan. He pointed out that the question of the plaintiff’s suspension would not fall to be considered pursuant to the disciplinary procedure until Mr. Horgan had completed his investigation and presented his report to the University indicating whether or not he considered there had been a *prima facie* case of alleged gross misconduct appropriate for consideration by a disciplinary hearing committee. By letter dated 11th October, 2001 the plaintiff’s solicitors contended that the allegations made by Ms. Buckley did not occur in the course of their client’s employment. A further letter sent by the plaintiff’s solicitors on the same date invited confirmation that Mr. Horgan’s investigation would be cancelled in the circumstances. While the correspondence continued in this fashion, a major development occurred on 16th October, 2001 when solicitors acting on behalf of Ms. Buckley confirmed to the plaintiff’s solicitors that, further to certain conversations which had taken place between the legal representatives, their client would take no further steps against the plaintiff in relation to the incident which had occurred in the campus car park and “further that our client will not partake in any investigation in relation to her original report which might be conducted by UCC. On behalf of our client we wish to state that our client wishes to put this matter behind her and we note that your client is of the same view”. On 16th October, 2001 the plaintiff’s solicitors wrote in response to Ms. Buckley’s solicitors in the following terms:- “We confirm that our client will not issue any proceedings against your client arising out of those matters and further that we will not involve your client personally in any proceedings already in existence between UCC and our client. In this latter regard however we should point out that the correspondence which has passed between your client and on behalf of your client and UCC is correspondence which may well be discovered in any proceedings and which may be referred to. We of course are not in a position to give an undertaking to limit what documents might or might not be discovered in any proceedings however our client has no wish whatsoever to involve your client personally in any dispute which is already in existence between him and the University authorities. We confirm unreservedly the views expressed by you in your letter of even date that our client wishes to put this matter behind him in so far as it relates to your client and our client has asked us to pass on to your client through you his good wishes in respect of her forthcoming marriage”. By separate letter, the plaintiff’s solicitors wrote to Mr. Keely stating they were aware that Ms.

Buckley had written to the University withdrawing her report and inviting confirmation by return that the investigation by Mr. Horgan had now been cancelled. In a letter written by Ms. Buckley's solicitors to Mr. Keely dated 15th October, 2001 it was stressed that Ms. Buckley did not require the matter to be investigated and at no time had she requested that an investigation be carried out. The letter went on to state that their client was getting married on 20th October and felt that the pressure which is being placed on her was unreasonable. The second paragraph of the letter stated:- "We are further instructed by our client that there is ongoing legal proceedings between Professor Connell Fanning and UCC to which our client has no involvement in (sic). However, it would now appear that our client is being used as another part of those ongoing proceedings." The letter went on to state that Ms. Buckley, having carefully considered all of the issues involved had now instructed her solicitors to withdraw the reporting of the incident. One might have thought that this whole incident would, in consequence of this development, have been deemed closed, but this was far from the case. By letter dated 17th October Mr. Keely made it clear that Mr. Horgan's investigation would proceed to completion that very day. An indication as to why this line was taken may perhaps be gleaned from the affidavit subsequently sworn by Mr Keely in these proceedings in which he referred in some detail to other disputes between Professor Fanning and the University. Mr. Keely deposed to the existence of two other sets of proceedings involving Professor Fanning and UCC. The first set of proceedings was commenced against Professor Fanning and UCC by three members of the Economics Department. The second set had been commenced by Professor Fanning against UCC in May, 1999 consequent upon the University establishing a mediation process with a view to settling the first set of proceedings and the issues raised therein. There is no need to go into these other disputes in any detail but it would be an exercise in unreality not to acknowledge that there was a significant background of unhappy differences in this case between the plaintiff and the defendant. Thus it transpired that neither Ms. Buckley nor the plaintiff participated in the enquiry carried out by Mr. Horgan who was left to conduct the enquiry relying on written documentation and by interviewing certain identified third parties. On 19th October, 2001 Mr. Horgan released a report concluding that a prima facie case existed against the plaintiff which should be dealt with through the appropriate disciplinary procedures. Subsequent to the issuing of the report by Mr. Horgan, the plaintiff applied for and obtained an interim injunction on 22nd October, 2001 from the High Court (Smyth J.) which restrained the defendant from taking any steps whatsoever to discipline, suspend or dismiss the plaintiff. Subsequently on 27th November, 2001 the High 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 proceedings pending the determination of the present case. Thereafter the President of UCC proceeded to appoint a disciplinary committee as provided for by the disciplinary procedure and a hearing was subsequently held over three days during the months of February, March and April, 2001 at which Ms. Buckley gave evidence and at which the plaintiff was legally represented. The result of that enquiry was, by agreement between the parties, placed in a sealed envelope and placed in a safe pending the outcome of the present proceedings. The

legal proceedings in this case were first heard in the High Court (Lavan J.) in June, 2002 and were dismissed. An appeal of the defendant against the judgment and order of Lavan J. was granted by this Court on 30th January, 2003 and the matter was remitted to the High Court to be heard by another judge. That hearing took place before Gilligan J. in January, 2005. As already noted, he granted a declaration in favour of the plaintiff to the effect that the disciplinary procedures adopted by the defendant and as applied against the plaintiff were unlawful and ultra vires the defendant.

THE PLAINTIFF'S EMPLOYMENT The plaintiff is a Professor of Economics and Head of the Department of Economics in University College Cork. UCC is a constituent university of the National University of Ireland but has enjoyed independent status since 1997. He joined the Department of Economics in UCC in 1978 as a Junior College Lecturer and in 1980 was appointed as a Statutory Lecturer in Economics. From 1985 to 1989 he was Dean of the Faculty of Commerce and in 1988 was appointed Acting Head of the Department of Economics. In 1989 he was promoted to an Associate Professorship of Economics and in 1990 was appointed by statute of the National University of Ireland as Professor of Economics which post includes the headship of the Department. In his grounding affidavit sworn on 21st October, 2001 Professor Fanning freely acknowledges that there were difficulties in the Economics Department which led to legal proceedings separate from the present ones. At para. 3 of his affidavit the plaintiff asserts that since the appointment of Professor Wrixon as President of UCC his position as Professor had been marginalised and that he had received little or no support in relation to certain problems which he had identified within the Department of Economics. Setting out the background of those other proceedings, Professor Fanning deposed that he did so because he believed the manner in which the University had dealt with the incident the subject matter of the present proceedings discloses what he described as "an extraordinary attempt to take disciplinary sanctions" against him which led him to believe that the same must have been influenced by the existence of the other proceedings. Given that the plaintiff's appointment was made prior to the introduction of the Universities Act 1997 (which established the constituent colleges as universities in their own right: see section 7 of the Act) the plaintiff is an officer of the University who holds office under pre-existing statutes of both University College Cork and the National University of Ireland. The relevant statutes will now be considered in turn to determine the terms of office of the plaintiff and the disciplinary procedures available under those statutes in relation to the plaintiff. (A) UCC Statute 1 (1911) Chapter XV para. 9 provides that:- "Each professor shall, subject to good conduct and the due fulfilment of his duties, continue in office until he has attained the age of sixty-five years, and may thereafter be continued by the Senate in office for five further years." Chapter IV contains the following provisions of relevance in relation to the powers of the President of the College:- "12. He shall have the power of appointing, suspending and dismissing the servants of the College, and shall regulate their duties and control their conduct....

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 advise and remonstrance of the President, the President shall, after giving such professor, lecturer, or officer notice of his intention, and furnishing him with a copy of the official statement he proposes to make at the case, call the attention of the governing body to the conduct of such professor, lecturer, or officer.” Chapter XXXIV deals with “removals from office” and provides:- “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.” In the last mentioned paragraph the reference to the “University” is a reference to the National University of Ireland (NUI). It is not in dispute in the present proceedings but that the Senate of the NUI is the only body empowered to dismiss Professor Fanning from his employment. On the face of it, this statute does not purport to give any power to UCC to either suspend or demote an officer to whom this statute applies, and may only bring about his dismissal in accordance with the provisions of Chapter XXXIV. (B) NUI Statute 86 (1951) Chapter XXIX of this statute reconfirms that each full-time lecturer in UCC shall, subject to good conduct and the due fulfilment of his duties, hold office until he shall have attained the age of sixty-five years, and may thereafter be continued in office for five further years. Chapter XXXI deals with the duties of professors and lecturers and provides that:- “Every professor of the University and every lecturer of the University shall –
- (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
- (b) give to the students attending his ordinary lectures assistance in their studies, by advice, by informal instruction, by occasional and periodic examination and otherwise as he may judge to be expedient”. Chapter XXXI (3) provides that:- “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.” Chapter LXIV deals with removals from office and provides:- “1. 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.” Again, this statute does not purport to address issues of suspension or demotion of a College employee in the position of the plaintiff. (C) The Universities Act 1997 This Act brought about the reconstitution of constituent colleges which in consequence became and now are universities in their own right. Chapter IV of the Act contained important provision for disciplinary action when it provided at Section 25(6) as follows:- “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.” This was an important new provision, conferring power on UCC to suspend or dismiss one of its employees. Section 25(8) contains the following important provision:- “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.” Of particular importance to the plaintiff’s circumstances was the following provision contained at Section 47(6) of the Act which provides:- “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.” The plaintiff is such a person. (D) Statute E, Adopted by UCC in 2001 By this statute, the governing body of UCC provided at Chapter I for disciplinary procedures, including suspension, demotion and dismissal as follows:- “1. 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.” The statute further provided (at 3(b)) that:- “In cases of alleged gross misconduct, the definition of which shall be specified in the procedures, where an employee is the subject of an investigation to determine the actual chain of events, the employee will be suspended with pay pending the result of the investigation. Where it is found that the employee has been guilty of gross misconduct, he/she may be dismissed without the need to apply a sequence of warnings, suspension and demotion.” Chapter I(4) provides that, in a case of gross misconduct, the matter shall be reported to the president who 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. By par. 4(c) it is provided that 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. Chapter I(6) provided

however that:- “In the case of a professor, associate professor or a lecturer appointed in accordance with the statutes of University College Cork prior to the 16th 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.” Thereafter UCC adopted the disciplinary procedures consisting of the eight page document already referred to, which was forwarded to the plaintiff by Mr. Keely with his letter dated 4th October, 2001. (E) Statute N Adopted by UCC in 2008 While enacted subsequent to the present dispute and thus of no direct relevance to the issues herein, it is interesting to note how the tenure of pre-Universities Act officers is separately dealt with in this document. Further, Chapter 3, which relates to disciplinary procedures, is expressly dis-applied to pre-Universities Act officers unless agreed. Chapter 3 (4) provides:- “Unless otherwise agreed by any such person, this Chapter shall not apply to any Officer referred to in Section 1 of Chapter 2 (ie., a pre-Universities Act Officer). For Officers to whom Section 1 of Chapter 2 applies and who are not subject to this Chapter by agreement, the provisions of the following shall apply: Statute 1, Chapter IV, Sections 15 and 16 of University College Cork Statute 1, Chapter XXXIV, of University College Cork Statute 86, Chapter LXIV of the National University of Ireland”

DECISION This is a case which ultimately presents no great difficulty in terms of understanding the disciplinary procedures which were available to the defendant in relation to the plaintiff. The plaintiff at all times was an officer who had been appointed prior to the Universities Act 1997 and as such was subject to a disciplinary regime of a very limited nature. Firstly, he could only be removed from office by the Senate of NUI pursuant to the procedures outlined in NUI Statute 86 (1951). That does not of course mean that the plaintiff was immune from any disciplinary process whatsoever. As was pointed out by the learned trial judge herein, Chapter XXXI of NUI Statute 86 (1951) grants power by necessary implication to the constituent colleges to make statutes or regulations governing the conduct of statutorily appointed Professors. This statement requires to be qualified in two respects. Firstly, it seems clear from Para. 3 of Chapter XXXI that a Professor appointed under statute is bound only by those statutes or regulations of a constituent college which relate to his duties as specified in para. 1 of Chapter XXXI. Those duties are limited to those concerning the lectures to be given by him and the assistance to be given by him to his students. Any statutes or regulations which might have been made prior to the enactment of the Act of 1997 would thus have been valid only insofar as they sought to discipline an officer in relation to the performance of his duties and obligations as defined by the statute. Secondly, and perhaps more importantly, no statutes or regulations were enacted by the University whereby it could seek to exercise some other disciplinary jurisdiction over the plaintiff prior to the enactment of the Universities Act 1997. It seems to me therefore that the only recourse open to the defendant in respect of an officer who was not properly performing his duties was that the President of UCC was empowered to advise or remonstrate with such a Professor pursuant to paras. 15 and 16 of Chapter IV of UCC Statute 1 (1911). In an appropriate case he could also initiate steps under Chapter XXXIV of Statute 1 whereby the Governing Body could seek the removal of an officer by the Senate of NUI if the non-observance or non-performance by an officer of his duties was of such gravity as to

merit this course of action. Any such removal would be subject to the right of appeal by the officer to the Visitor to the University. The new provisions of the Universities Act, 1997, followed thereafter by the introduction of Statute E and the Disciplinary Procedures which were invoked against the plaintiff, can not adversely affect the plaintiff's rights of tenure which existed prior to the Act of 1997. The plaintiff's rights in this particular respect are guaranteed by s. 25(8) of the Act of 1997. Thus while the provisions of the Universities Act 1997 apply to the plaintiff, any disciplinary procedures enacted thereunder can not trench upon those rights adversely. A different situation would arise where and if an officer appointed prior to the Universities Act, 1997 agreed that he would become subject to the full regime provided for by Statute E and the Disciplinary Procedures which were invoked in this case. There is, of course, no such agreement in this case. Thus, those provisions of Statute E or the Disciplinary Procedures which provide that an officer may be suspended can not be applied to him. Still less can a demotion. Both are circumstances which may be seen as potential interferences in respect of tenure and conditions of service. Nor does any implied right arise in law whereby such terms can be read into the plaintiff's contract of employment (Cook & Halvey (eds.), Halsbury's Laws of England (4th ed., London) Vol. 16 (1B), p. 38, para. 584). Of course the Disciplinary Procedures which were furnished to the plaintiff with Mr. Keely's letter of 4th October, 2001 did contain the reference (at para. 44) to the rights which he possessed under Chapter XXXIV of Statute 1 of UCC. However, this provision relates only to removal by the Senate of NUI upon application made by the Governing Body. Mr. Keely's letter did not purport to direct the plaintiff's attention to this provision which was, in reality, the only one of real relevance, but rather dwelt instead upon the nature and characterisation of the allegation raised against him, with its implications for suspension and dismissal. It was never open to the University to discipline the plaintiff in the omnibus manner suggested by the terms of the letter. I must stress that I am far from holding that other provisions of the Disciplinary Procedures do not apply to a pre-Universities Act officer. The system of warnings elaborated in the Disciplinary Procedures seems eminently sensible and appropriate to deal with any of the forms of misconduct which would prompt the invocation of severe disciplinary action, whether related to the conduct of an officer appointed prior to the Universities Act 1997 or thereafter. It is impossible to avoid the conclusion in this case that the defendant, initially at least, believed it could both suspend and dismiss the plaintiff, and this is apparent from the language of the letter itself. As time and events went on, the defendant changed its position so that before this Court its case effectively transformed itself into one whereby the guidance of this Court was sought as to precisely what disciplinary measures were open to the University in respect of a pre-Universities Act employee. I have already given the answer to that question and indeed the introduction in 2008 of Statute N is the clearest possible acknowledgement by the defendant of the position of officers such as the plaintiff where matters of discipline are concerned. They can be dealt with only on the basis of pre-1997 statutes where any action proposed interferes with their rights of tenure or conditions of service. I do not find it necessary to adjudicate on other matters which were discussed during the course of the appeal which, in the light of my conclusions, are moot in nature. I would uphold the decision of the learned High Court Judge herein and dismiss the

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