

Memorandum of advice

Law



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The concept of natural justice has two parts: firstly that the matter is dealt with in a fair way; secondarily that the decision maker involved is unbiased. Procedural fairness involves 'looking at the route followed by the decision maker in making the decision and questioning whether the procedure was fair'¹. The principle of natural justice has been developed by common law by the courts which has further being expanded by the Human Rights Act 1998, which has introduced a source of procedural rights flowing from Article 6. However, 'it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to the scope of extent. Everything depends on the subject matter'².

To establish a fairness requirement an individual must have a right or interest that the common law will protect. *Cooper v Wandsworth*³ stated that if there was a right or interest which the common law had to protect, the decision maker was required to act within the concept of natural justice. It is clear from this case that both Paris and Sven have an interest. Paris's interest is to complete his degree to further his future career. As a student he will have a contract with the institution and therefore that institution should act in accordance with natural justice⁴. A disciplinary action is also applicable to natural justice⁵ and therefore the academic institutions will be required to abide by the criteria of procedural fairness. Sven's interest is to carry on with his employment at the university and the right to make a living. Both Paris and Sven's reputations are also at stake and therefore there will be an obligation to act fairly⁶.

A doctrine of legitimate expectation has been developed, both in the context of reasonableness and natural justice. In *Cinnamond*⁷ it was held that there

was not a legitimate expectation of being heard, where there was no requirement for a hearing. At present there is no common law duty but where a stated procedure is apparent it should be followed⁸. If a decision maker leads a person to believe particular procedure will be followed, then it should⁹. The Chairperson informs Paris that he is investigating Sven's allegation and when asked what is being done about the allegations Paris had made he is informed he will have a chance to put his story across. It was therefore expected by Paris that he would be able to do this, and it was unfair for the Chairman to depart from this and not allow Paris's lawyer to question Sven.

A. Adequate Notice

An individual shall not be penalised by a decision affecting his rights unless he has been given prior notice of the case against him, a fair opportunity to answer it and opportunity to present his own case. Paris must be given adequate notice of allegation against him so he is in a position to make representations, appear at the hearing etc¹⁰. It was also recognised in *Ridge v Baldwin*¹¹ that there is an entitlement to notice of the charge and the opportunity to be heard. Paris is giving no notice but suspended immediately without warning until the matter is cleared up.

B. Fair Hearing

This will depend on the circumstances and the type of function being exercised¹². The minimum requirement is that a person has an opportunity to present his case, but this does not mean that a person is always entitled to an oral hearing¹³. The courts are concerned to see that there is equality
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of treatment between the parties. The conduct of hearing should proceed so that the person should have an opportunity to consider, challenge or contradict any evidence and be given a chance to present own case.

Generally where there is an oral hearing the parties must be allowed to call witness and cross-examine, but there is no set law.

In *R v Commissioner for Racial Equality ex p. Cottrell*¹⁴ it was held that if the function exercised more of an administrative role the attendance and cross-examination of witness was unnecessary. Contrast to that, in *R v Board of Visitors of Hull prison ex p. St Germain*¹⁵ it was held that where a person was charged with a serious disciplinary offence they had a right to call any evidence which was likely to assist in establishing the vital facts of the issue and therefore a right to cross-examine witnesses. It is of discretion whether to allow a person to be represented at the hearing by a legally qualified person. The factors which will be taken into account include: the seriousness of the charge or penalty; the capacity of the person to present their own case; need for speed.

As this is a serious disciplinary offence in which the outcome will affect either Paris or Sven they should have a right to call any evidence and have a right to cross-examine. Relevant evidence may include employment records, exam grades and perhaps an account from Clara and Dario. The cross-examination of Sven is also refused by the Chairperson, which indicates that a fair opportunity for Paris to deny Sven's allegation and to state his case was not permitted and that this procedure fell short of fairness.

As the University Disciplinary Committee have heard from no-one but Paris and Sven and therefore based their decision to suspend Paris from the university on their account of events alone, this would seem unjust. Although a right to legal representation is not yet established, under the European Convention on Human Rights a party conducting his case in person will normally be allowed the assistance of a friend to give advice and take notes. Paris is allowed a legal representative, however Sven is denied a lawyer on the basis that he himself is an administrative lawyer.

C. No Bias

Decisions should be made free from bias or impartiality. It has been established that no man can be a judge in his own cause. 16 It will be sufficient that the decision maker appears to be biased¹⁷. To prevent bias a decision maker must be an independent person looking in from the outside, this has been fulfilled by using a visitor as the Chairperson of the Committee. However, other members of the Committee are lecturers and colleagues of Sven. Therefore although the lecturers have no pecuniary interest they may be personally involved due to their employment.

The Chairman as the decision maker may also have an interest in the result and therefore have a certain objective in mind as he will want to maintain the good reputation of the institution¹⁸. It may also be questioned on the grounds of bias, whether suspended Paris whilst pending an inquiry, but allowing Sven to continue teaching was in accordance with the law. It would seem that as Sven was needed to continue teaching his courses a pecuniary

interest on behalf of the university is apparent, as they would have had to employ a substitute lecturer.

D. Reasons

At present there is no duty to give reasons but it will depend on each individual circumstance¹⁹. However it has been shown that the closer the procedure to a judicial structure, the increase in duty to give reasons is required. The House of Lords have recognised 'a perceptible trend towards an insistence on greater openness or transparency in the making of administrative decisions'²⁰ and therefore where in the context of the case it is unfair not to give reasons, they must be given.

Paris is simply sent a letter informing him that he is suspended and due to the nature of this decision, which will affect his future education, employment and reputation, he should have been given more of a reason for his suspension so that he could discover why the decision was made in the way it was. By disclosing this Paris could then appeal on any matters which seem to be unfair in the procedure that was adopted by the Committee. Even if the decision includes a finality clause it is apparent from *R v Medical Appeal Tribunal ex parte Gilmore*²¹ that Paris could seek to use Judicial Review.

E. Article 6

Article 6 of the Human Rights Act 1998 establishes a right to a fair trial by 'an independent and impartial tribunal established by law'. The procedure must protect human dignity by ensuring that the individual is told why he is

being treated unfavourably, enabling him to take part in the decision. It will only apply if there are civil rights and obligations at stake, which is evident in this case. Therefore Paris has a right to a fair trial and must be told by the Committee why he is being treated in such a way under Article 6, Human Rights Act 1998.

It is conclusive that the concept of a fair procedure depends on the subject matter in question, but where the nature of the decision is of such importance to an individual an onus to act fairly is required. I would suggest that the recommended changes with regard to the manner in which the allegation was dealt with proceed and also propose that in the future a statutory Procedural Handbook stating the correct manner in which a disciplinary action should be handled should be issued to all.