Harassment and cross-examination in the House of Lords

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One aspect of particular interest to employment lawyers during the recent House of Lords debate about the allegations of misconduct made against Lord Lester of Herne Hill was the question of whether fairness requires a person accused of wrongdoing to be entitled to cross-examine witnesses and, indeed, the complainant.

Background

Lord Lester was accused of sexual harassment of the complainant, offering her a corrupt inducement to have sex with him, and warning her of unspecified consequences if she did not accept his offer. The independent Commissioner for Standards found that Lord Lester's alleged conduct, which he strenuously denied, was in breach of the requirement of the applicable code of conduct that all members of the House of Lords must observe. The Sub-Committee on Lords' Conduct recommended that Lord Lester should be expelled from the House but the Committee for Privileges and Conduct upheld his appeal against this sanction and recommended suspension until 2022.

The guide to the code of conduct states (para 124) that the relevant 'proceedings are not adversarial, but inquisitorial in character' and (para 127) that: 'Complainants have no formal locus once an investigation is under way: they have no right to be called as a witness, though they are expected to co-operate with any investigation and to supply all the evidence in their possession when asked to do so. Nor do members accused of misconduct have any entitlement to cross-examine complainants, though they are given an opportunity to review and, if they so wish, challenge the factual basis of any evidence supplied by complainants or others.'

Lord Pannick's amendment

Leaving aside the various other criticisms made of the Commissioner's approach to her investigation and of the conclusions of her report, when the matter came for debate in the House, Lord Pannick moved an amendment that the report be 'remitted to the Committee for Privileges and Conduct because the Commissioner for Standards failed to comply with paragraph 21 of the Code of Conduct which required her to act in accordance with the principles of natural justice and fairness'.

It was argued that, notwithstanding the express wording of the code, Lord Lester should not have been denied the right to cross-examine the complainant in order to address what were contended to be issues of credibility and gaps and inconsistencies in the evidence upon which the Commissioner had relied upon in reaching her decision. The Committee for Privileges and Conduct had considered, and unanimously rejected, this argument at the appeal stage.

In the debate, Lord Pannick, who had, of course, declared his interest in the matter as a longstanding professional colleague and close friend of Lord Lester, acknowledged that the code provides no entitlement to cross-examine complainants and that fairness does not require cross-examination in all cases. However, in contending that the process adopted had been 'manifestly unfair', he argued that this provision could not 'mean that the Commissioner lacks any power or duty to allow for cross-examination if and when fairness so requires' in order to ensure that the Commissioner, as required by para 21 of the code, acts in accordance with 'natural justice and fairness'. Despite at one point conceding that fairness does not require cross-examination in all cases, Lord Pannick nonetheless contended that the opportunity for cross-examination is 'inherent in the very concept of fairness' arguing: 'If you are going to assess the credibility of competing contentions as to what occurred nearly 12 years ago, apply a very serious sanction against someone and destroy their hitherto unblemished reputation, you have to allow them, through their counsel, to cross-examine the person making the allegations, which turn on credibility. At the very least, the commissioner should appoint independent counsel to perform that cross-examination; that would also be acceptable.'

'Lord Hope argued that, in practice, the principles of natural justice were complied with'

The Deputy Speaker had made the point in opening the debate that, in relation to complaints of expenses fraud made some years previously against Lord Taylor of Warwick, Lord Lester had defended the provisions of the code in the face of a similar complaint concerning the inability of the subject of the complaint to cross-examine witnesses, arguing that the principles of natural justice or fairness are 'flexible principles'. Lord Pannick responded by arguing that what Lord Lester said in 2009 could not be determinative of the standards of fairness and, perhaps more cogently, that what is fair depends on the context, which in this case was an allegation of misconduct some 12 years earlier 'dependent on the competing credibility of two people'.

Universal principles of natural justice

In opposing Lord Pannick's proposed amendment, Lord Hope of Craighead identified two principles of natural justice that he described as 'universal' – first, that the person complained against shall have fair notice of the case being made against him and, secondly, that the person complained against shall have a fair opportunity to answer to the complaint. More specifically with regard to the procedure established by the code, he argued that the House should be taken to have appreciated the inquisitorial nature of the process that it had adopted and that this was to 'keep the adversarial element – counsel and all the rest of it – out of it and put it in the hands of the Commissioner so that she could conduct the inquiry as best she could.'

Lord Hope argued that in this case the process conducted was not flawed by virtue of the failure to permit cross-examination and that the principles of natural justice were complied with. The Commissioner interviewed Lord Lester to discuss aspects of his statement and gave him the opportunity to tell her anything else that he thought was relevant. She then contacted witnesses, provided Lord Lester with copies of the witnesses' statements and then considered his numerous challenges to the progress of the investigation at that stage. The Commissioner then showed Lord Lester her draft report, which was only finalised after she had considered and dealt with his further representations.

On this basis, Lord Hope's view was that the Commissioner conducted the process in accordance with fairness and the principles of natural justice. Echoing this analysis, Lord Mackay of Clashfern made the following observation: 'As far as I can see, there is nothing unfair about the rules, so long as both sides get the full account of what the other side has said. In my opinion, that is natural justice: that you have the full account before you.'

A legal right to cross-examine

Of more specific interest to employment lawyers is Lord Pannick's assertion that 'in every other regulatory, disciplinary or employment context in this country, if you are accused of serious misconduct where the issue turns on credibility and you face a serious sanction, you are entitled to your legal right to cross-examine the person making the allegations against you so that their credibility – and yours, because you must be cross-examined as well – can be properly assessed and determined.' This suggests that there is a right to cross-examination in all serious cases, including those relating only to employment as distinct from regulatory or professional disciplinary matters.

The view from Acas

The Acas Code of Practice on Disciplinary and Grievance Procedures does not explicitly address the issue of cross-examination, stating (at para 12): 'At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.'

While the 'reasonable opportunity to ask questions' might be construed as allowing for questions to be asked of witnesses – in effect, cross-examination – the statement that employees 'should also be given an opportunity to raise points about any information provided by witnesses' can be taken to suggest that, rather than provide for cross-examination, the reasonable employer should test and assess the witnesses' evidence itself on the basis of any challenges raised by the employee. The Acas Guide on Discipline and Grievances at Work is no more specific.

Case law

The case law on the issue makes clear that what is reasonable will depend on the context. In *Santamera*, it was considered to be relevant that, in the context of an unfair dismissal claim,

'the competing arguments of Lord Pannick and Lord Hope will no doubt continue to be played out in challenging disciplinary situations'

the employer does not need to prove, for example, that gross misconduct was, in fact, committed but rather that it had a genuine and reasonable belief to that effect.

Wall J observed: 'The employer has to act fairly, but fairness does not require a forensic or quasi-judicial investigation, for which the employer is unlikely in any event to be qualified, and for which he, she or it may lack the means' (para 35); and that 'cross-examination of complainants by the employee whose conduct is in question (or even confrontations between them) are very much the exception' (para 36). However, he did not 'exclude the possibility that there will be cases in which it would be impossible for an employer to act fairly or reasonably unless cross-examination of a particular witness is permitted' (para 42).

In *Close*, the employee had been allowed to cross-examine two – but not all – of the witnesses who gave oral evidence at a disciplinary hearing. The EAT commented: 'It is not generally incumbent on an employer to allow cross-examination of witnesses. To some extent that was permitted here since two witnesses were called, but the failure to make all the witnesses available for cross-examination could not in our view render the dismissal unfair.'

While the express terms of an employer's disciplinary policy may provide for cross-examination, it should also be noted that, in the public sector context, the right conferred by Article 6 of the European Convention of Human Rights to a 'fair and public hearing', where the proceedings in question may, as *Bonheoffer* demonstrates, have the potential to terminate the civil right to practise the individual's profession may also entail a right to cross-examination.

Whether or not John Henry Wigmore, quoted by Lord Pannick in the House of Lords debate, was correct to say that cross-examination is 'the greatest … engine ever invented for the discovery of truth', many employers will wish to resist the formality of and potential for confrontation cross-examination in their internal disciplinary processes. This may particularly be the case where witnesses may be reluctant to be confronted in cross-examination by individuals about whom they have been reluctant to make a complaint, especially where sexual harassment or bullying allegations have been made against the complainant's superior, or where witness statements have been anonymised due to the concerns of the witnesses. Consistent with the argument that there is no absolute right to cross-examination of witnesses, the case law has addressed how employers should address the handling of evidence provided by informants who, with good reason, wish to remain anonymous (see *Linfood* and subsequent decisions).

There may be, as Mostyn J recently put it in *Sait* (at para 49) in relation to a decision of the Medical Practitioners Tribunal, a 'long-established common-law consensus that the best way of assessing the reliability of evidence is by confronting the witness' in what Scalia J described in *Crawford* (at para 62) as 'the crucible of cross-examination'.

Conclusion

The question remains of whether what is appropriate for the court or a formal regulatory tribunal will also be appropriate in an employer's internal procedure. In the absence of more definitive guidance from case law or an updated Acas code, the competing arguments of Lord Pannick and Lord Hope will no doubt continue to be played out in challenging disciplinary situations, given that what is considered to be a reasonable approach is inevitably intensely fact-sensitive.

KEY:

House of Lords debate	House of Lords (2018) 15 November Debate (vol 793, col 1993-2031)
Santamera	*Santamera v Express Cargo Forwarding* [2003] IRLR 273 EAT
Close	*Rhondda Cynon Taf CBC v Close* [2008] IRLR 868 EAT
Bonheoffer	*R. (on the application of Bonheoffer) v General Medical Council* [2011] IRLR 37 QBD
Linfood	*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518 EAT
Sait	*Sait v General Medical Council (GMC)* [2018] EWHC 3160 (Admin) (27 November 2018)
Crawford	*Crawford v Washington* (2004) 541 US 36