

## Appeals Circular A01/22

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## Learning points from recent appeals

### Facts

- ▶ The effect of the Supreme Court's decision in [Ivey v Genting Casinos \(UK\) Ltd 2017\] UKSC 67](#) (in October 2017) is to clarify and "declare" the law as it has always been ([Naqvi v SRA \[2020\] EWHC 1394 \(Admin\)](#)). From the date of the Supreme Court's judgment, the legal test for dishonesty as declared in that judgment, applies to conduct whenever it took place, even if it was before the judgment itself. [Ali v Solicitors Regulation Authority Limited \[2021\] EWHC 2709 \(Admin\)](#)
- ▶ When considering the test for dishonesty in *Ivey*: the objective standards of ordinary and decent people must involve the expectation that registered professionals will have at least some regard to the professional standards under which they are required to operate, pursuant to a system of regulation that is designed to protect the public. Ordinary and decent people would not conclude that a registered professional could flout professional standards, merely because the registered professional has reached the conclusion that they know better than those responsible for their regulation. [Professional Standards Authority for Health and Social Care v GDC, Mohamed Amir \[2021\] EWHC 3230 \(Admin\)](#)
- ▶ Lies in themselves do not necessarily mean that the entirety of the evidence of a witness should be rejected. However, a tribunal must explain why, having rejected significant parts of the evidence of a witness, it is nevertheless able to accept other parts of their evidence. [R. \(on the application of Mokhammad\) v General Medical Council \[2021\] EWHC 2889 \(Admin\)](#)

- ▶ Procedural fairness requires that a tribunal gives reasons for the adverse findings it makes against a registrant. If the tribunal prefers another witness(es) version of events over the registrant's, then it should make clear why the registrant's evidence has been rejected; if the tribunal doubts the registrant's credibility whether generally or by reference to specific allegations, it should expressly say so and give its reasons for doing so, even if only relatively briefly. [R. \(on the application of Mokhammad\) v General Medical Council \[2021\] EWHC 2889 \(Admin\)](#)
- ▶ Where a registrant has been convicted of an offence, and a conditional discharge has been imposed, any disciplinary proceedings brought by the regulator against the registrant must relate to mis/conduct and not conviction; therefore, it is not open to the regulator to rely upon the fact of the conviction as such. In a case relating to such mis/conduct:
  - ▶ the conduct in question can be the conduct which provided the reason for the registrant's prosecution and the basis for their conviction
  - ▶ it is for the regulator to allege and prove the facts that are said to amount to misconduct. This may include that the underlying conduct complained of amounted to a criminal offence
  - ▶ if the facts alleged are not admitted by the registrant, they must be proved by the regulator. The regulator cannot rely upon the fact of the conviction as proving the elements of the conduct which is said to amount to misconduct; but they can prove the facts by reference to any properly admissible evidence
  - ▶ admissible evidence may include the fact that the registrant has on a previous occasion admitted either all or some of the material facts, for example by pleading guilty to a criminal charge that incorporates allegations of some or all of the facts relied upon by the regulator as amounting to misconduct or in other circumstances eg in responses to the regulator. The fact that a registrant pleaded guilty to a criminal charge may also be admissible evidence that the conduct alleged against them amounted to criminal conduct, because it amounts to an admission against interest of the essential elements of the offence with which they were charged.

[Wray v General Osteopathic Council \[2021\] EWCA Civ 1940](#)

### Impairment and Sanction

- ▶ When considering impairment of fitness to practise, tribunals:
  - ▶ should provide clear reasons for their findings/decisions in relation to future public risk
  - ▶ must provide a clear explanation of how their adverse findings (eg on unexplained dishonesty or a lack of insight) can be reconciled with optimism about the future. Insight is an essential prerequisite to a confident conclusion that a problem has been properly understood, addressed and eliminated for the future
  - ▶ should not rely on a subjective, rather than objective, evaluation of the remedial steps taken by a registrant
  - ▶ should note that the worse the failings and the more disastrous the ultimate outcome, the greater the need for public reassurance about the future. The more fundamental the failings and the worse the outcomes and consequences,

does not mean that more confidence may be had that lessons will have been learned and the risk of repetition will be low.

[Professional Standards Authority for Health and Social Care v General Optical Council \(Rose\) \[2021\] EWHC 2888 \(Admin\)](#)

- ▶ When considering the question of maintaining public trust, 'the public' refers to the public at large, not for example to the professional's individual client/patient for any specific transaction/treatment or indeed by other particular individuals involved in particular transactions/treatment [Ali v Solicitors Regulation Authority Limited \[2021\] EWHC 2709 \(Admin\)](#)
  
- ▶ A registrant dishonestly stating in a job application that they are not subject to an ongoing fitness to practise investigation has the potential to undermine patient safety (as well as confidence in the profession and upholding proper professional standards). Employing a doctor in ignorance of the fact that they were subject to a fitness to practise investigation risks exposing patients to a doctor who might not be fit to practise medicine. Further, if patients do not trust their doctors, care may be compromised. [Bakare v General Medical Council \[2021\] EWHC 3278 \(Admin\)](#)
  
- ▶ A reminder of the principle in *Bolton v Law Society* [1994] 1 WLR 512, that personal mitigation should be given limited weight as the reputation of the profession is more important than the fortunes of an individual member. [Bakare v General Medical Council \[2021\] EWHC 3278 \(Admin\)](#)
  
- ▶ Sanctions Guidance gives tribunals an 'authoritative steer' on the determination of sanction. When a tribunal decides to depart from the steer of the Sanctions Guidance it should give clear and case-specific reasons for doing so. [Professional Standards Authority for Health and Social Care v General Optical Council \(Rose\) \[2021\] EWHC 2888 \(Admin\)](#)

Kind regards

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