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Seventh floor
St James's Buildings
79 Oxford Street
Manchester M1 6FQ

To: MPTS Associates

Cc: Tribunal Clerks
Medical Defence Organisations
Employer Liaison Advisers

Email: enquiries@mpts-uk.org
Website: www.mpts-uk.org
Telephone: 0161 923 6263
Fax: 0161 240 7199

General Medical Council v Dr Hemmay Raychaudhuri [2017] EWHC 3216 (Admin)

Learning Points

- A reiteration that the correct test for dishonesty in regulatory proceedings is as set out in the judgment of the Supreme Court in *Ivey v Genting Casinos (UK) Limited (t/a Crockfords Club) [2017] UKSC 67*;
- Although tribunals are entitled to make nuanced findings, they should ensure that their findings are consistent throughout all determinations.

Background

This was an appeal brought by the General Medical Council ('the GMC'), pursuant to section 40A of the Medical Act 1983, against a Medical Practitioners Tribunal's ('the Tribunal') decisions dated 7 February 2017, that Dr Raychaudhuri's fitness to practise was not impaired by reason of misconduct, and dated 9 February 2017, to impose a warning upon his registration.

The allegations against Dr Raychaudhuri were that, in December 2014, whilst he was working as a Locum Paediatric Registrar, he was informed of the arrival of a five month old child with Dandy Walker Syndrome ('Patient A') and:

- before taking a history from or examining Patient A, Dr Raychaudhuri made a number of entries in a pro-forma paediatric assessment form, which he did not know were correct and knew to be untrue (as he had not undertaken an examination). Dr Raychaudhuri was then called away to review another patient and left the pro-forma in the paediatric doctor's office. It was later

assumed by colleagues looking at the pro-forma that Patient A had already been seen by a doctor;

- whilst speaking with two nursing colleagues he said that he had not seen Patient A and a junior colleague had seen (or must have seen) Patient A;
- during a telephone call with Dr D, a consultant colleague to whom the matter had been reported, Dr Raychaudhuri denied writing examination findings on the pro-forma before seeing Patient A and had stated that he had only written background information based on a letter from Patient A's GP.

The GMC alleged that, in relation to his two conversations with nursing and doctor colleagues, Dr Raychaudhuri had made statements which were false (and he knew to be false) and that all of the above actions were also misleading and dishonest.

During the hearing, the Tribunal found the main facts proved and that Dr Raychaudhuri's conduct had been misleading but not dishonest. This finding was made on the basis of the test for dishonesty at the time of the Tribunal hearing, provided by *R v Ghosh* [1982] QB 1053 ('Ghosh'). When considering whether Dr Raychaudhuri's fitness to practise was impaired, the Tribunal determined that his actions amounted to misconduct (and serious misconduct in relation to his telephone call with Dr D) but were not such that public confidence in the profession would be undermined if a finding of current impairment was not made. Instead the Tribunal imposed a warning, which it said was necessary and proportionate.

Grounds of Appeal

The GMC appealed against the Tribunal's decision on the following grounds:

1. the Tribunal was wrong in not finding that Dr Raychaudhuri knew that his initial statement to nursing colleagues (that Patient A had been assessed by a junior colleague) was false and that it was dishonest;
2. the Tribunal was wrong to find that Dr Raychaudhuri's statement to Dr D (denying that he had written any examination findings in the pro-forma before seeing Patient A) which he knew was false, was misleading, but not dishonest; and
3. by reason of points one and/or two above, the Tribunal was wrong in not finding that Dr Raychaudhuri's fitness to practise was impaired and therefore in not imposing a sanction.

The GMC submitted that it was inviting the Judge to conclude that the inferences drawn from the facts, by the Tribunal, were wrong [paras 18-19, 29 and 31].

Dr Raychaudhuri's representatives argued that the GMC's appeal was without merit

on the basis that, having had the advantage of hearing live evidence from relevant witnesses, the Tribunal had given sufficient reasons for its findings and that it was an outcome that was available to it, based upon the evidence before it. They also argued that the Tribunal had erred in finding that Dr Raychaudhuri had made a statement to Dr D that he "knew to be false". Lastly they said that the overall value judgment on impairment was a matter for the specialist Tribunal to make, was properly reasoned and was available to it on the evidence before it [paras 20 and 30].

Judgment

Mr Justice Sweeney heard submissions from the parties in July 2017 and reserved judgment. In October 2017 the judgment of the Supreme Court in *Ivey v Genting Casinos (UK) Limited (t/a Crockfords Club)* [2017] UKSC 67 ('Ivey') was published, in which it was decided that the second (subjective) limb of the test of dishonesty in *Ghosh* did not correctly represent the law. Therefore, the parties made further submissions in writing [para 27-28 and 32-35].

Mr Justice Sweeney allowed the appeal.

1. In relation to the first ground of appeal, he held that the GMC had failed to demonstrate that the Tribunal had been wrong to make the decision it did in relation to Dr Raychaudhuri's discussions with nursing colleagues [para 41]. The Tribunal had found the statement to Nurse B and C was false, but that Dr Raychaudhuri did not know it was false, for the following reasons:
 - a. that it could not be satisfied that Dr Raychaudhuri knew the nurses were talking about Patient A when he had referred to his junior colleague. The Judge said he was "wholly unpersuaded" by the GMC's submission that this reason was inconsistent with the Tribunal's other findings as, if there could have been a mistake as to the identity of the patient, then the allegation that Dr Raychaudhuri advised the nurses that Patient A had been seen by a junior colleague should not have been found proved and with the Tribunal's finding that Nurse A was entirely credible and reliable. The Judge found that "there was appropriate nuance" in the Tribunal's findings;
 - b. Dr Raychaudhuri's good character. The GMC submitted that this was given too much weight as the Tribunal had found that Dr Raychaudhuri had known that his statement to Dr D was false. Therefore, his good character had not been intact when the Tribunal had made its findings of fact. This argument was also rejected by the Judge.

Therefore, the GMC's first ground of appeal failed [para 42].

2. When considering the second ground of appeal, the Judge noted that the Tribunal had concluded that:
 - a. during the telephone call with Dr D, Dr Raychaudhuri had denied writing examination findings on the Pro-forma before seeing Patient A (rather than with no intention of seeing Patient A as he had claimed), which he maintained when pressed, and that he knew this denial was false - underlining that it did not accept that there was scope for misunderstanding;
 - b. Dr Raychaudhuri was more likely than not to have known that his statement to Dr D was false as it did not reflect the full entry that he made in the pro-forma [para 44];
 - c. the denial had not been dishonest on the basis that while an ordinary and honest member of the public might consider Dr Raychaudhuri's actions to have been dishonest, it was not satisfied that he was aware that his actions would have been considered to be dishonest by those standards (on the basis of matters including that there may have been some confusion on his part regarding the subject matter).

The Judge held that for the reasons submitted by the GMC (that it was difficult to reconcile finding that Dr Raychaudhuri knew his denial to be false with the position that ordinary and honest people would not regard it as dishonest), even applying *Ghosh*, the Tribunal's decision on this point was not an appropriately nuanced finding open for it to make. Instead, it was one that was "inconsistent with the MPT's other findings and wrong" [para 47]. In addition, the Tribunal had found that Dr Raychaudhuri had made the denial in "the face of clearly and repeatedly expressed concerns by Dr D about his probity" [para 48].

The Judge said that the position was "even clearer when *Ivey*...is applied for the test of dishonesty" and that he could "see no basis upon which [Dr Raychaudhuri's] state of knowledge or belief as to the essential facts could lead to any conclusion other than that, by the standards of ordinary decent people, [his] denial was dishonest" [para 50].

He went on to say that whether applying the test in *Ghosh* or *Ivey*, when Dr Raychaudhuri denied to Dr D having written examination findings on the pro-forma before seeing Patient A, he had been acting dishonestly. Therefore, the Tribunal's determination to the contrary was wrong and, consequently, the second ground of appeal was successful [para 51].

3. In relation to the third ground of appeal, the Judge accepted that not every dishonest action requires a finding of impairment, but that "each case turns on

its own facts, and the need to have in mind not only fitness to practise looking forward, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment was not made" [para 52-53].

The Judge noted that, as the Tribunal had emphasised, "probity and integrity are at the heart of the medical profession" [para 54]. He concluded that, even without a finding of dishonesty, the Tribunal had taken the view that Dr Raychaudhuri's misconduct had only just fallen short of a finding of impairment. The Judge held that, with a new finding of dishonesty to also consider, he had no doubt that "the relevant line has been crossed, and that a finding of impairment must be made" [para 54]. Therefore, the third ground of appeal was also successful.

The GMC's appeal was allowed on Grounds 2 and 3, and a finding of dishonesty was substituted in relation to Dr Raychaudhuri's denial to Dr D. In addition, the Tribunal's finding of no impairment and the warning issued were quashed. A finding of impairment was substituted and the matter was remitted back to a Tribunal for consideration as to sanction [para 57].

Tribunal Development Section

0161 240 7292

Tribunaldevelopmentsection@mpts-uk.org