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The General Medical Council v Dr Kennedy Krishnan [2017] EWHC 2892 (Admin)

Learning Points

- Confirmation that:
 - the test for dishonesty is as set out in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67;
 - the second limb of the former test for establishing dishonesty, as set out in *R v Ghosh* [1982] Q.B. 1053, should no longer be used;
 - The first (objective) limb of the Ghosh test was not the same as the second (objective) limb of the Ivey test.

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 ('the Tribunal') decision dated 27 April 2017 that Dr Krishnan was not dishonest in relation to working for another employer while on sick leave and that his fitness to practise was not impaired.

Dr Krishnan opposed the appeal and purported to file a cross-appeal (which was ultimately dealt with as an application for judicial review at the hearing) on the ground that the Tribunal was wrong in finding that the first (objective) part of the two-stage (Ghosh) test for dishonesty was met.

The allegations against Dr Krishnan were that he did not provide information to identify patients in cases where he had suggested patient safety was a concern

and that he undertook locum work whilst on sick leave and failed to inform his employer, which was misleading and dishonest. The legal assessor proffered advice, which was accepted by the Tribunal and reflected the general understanding of the law at the time, to consider the two stage Ghosh test when considering if Dr Krishnan had been dishonest. The Tribunal found the first allegation proved but that his conduct in relation to locum work was not (subjectively) dishonest. The Tribunal found both allegations constituted misconduct but that his fitness to practise was not impaired and imposed a warning.

Grounds and Judgment

1. His Honour Judge Sycamore heard submissions from the parties on 17 October 2017 and reserved judgment. A few days later the judgment of the Supreme Court in *Ivey v Genting Casinos (UK) Limited (t/a Crockfords Club)* [2017] UKSC 67 ('Ivey') was published. In the light of the relevance of that judgment to this case in relation to the test for dishonesty set out in *R v Ghosh* [1982] QB 1053 ('Ghosh'), he invited the parties to provide further written submissions, which they did.
2. Both parties agreed in those written submissions that the test as set out in *Ivey* applies to disciplinary proceedings and sets out the correct test for dishonesty [para 3]. That test is:
 - a. the fact finding Tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts;
 - b. once his/her actual state of mind as to knowledge or belief as to facts is established, the question whether his/her conduct was honest or dishonest is to be determined by the fact finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he/she has done is, by those standards, dishonest.
3. The Judge considered that the advice given by the legal assessor was in error, but that *Ivey* has superseded both:
 - a. the grounds of the GMC's appeal; that the Tribunal erred in applying the second limb of the Ghosh test. The Judge said it was inappropriate for him to determine that question and both parties accepted this approach [para 24]; and

- b. Dr Krishnan's 'cross-appeal'/application for judicial review; that the Tribunal wrongly applied the first limb of the Ghosh test. His Honour Judge Sycamore agreed with the submission made on behalf of Dr Krishnan that the first stage (objective) Ghosh test is not the same as the second stage (objective) Ivey test [para 25]. The objective test in Ghosh had to be applied without reference to the actual state of mind as to knowledge or belief as to facts of the individual concerned. However, in light of the analysis by Lord Hughes in Ivey, it is clear that (post Ivey) "in order to determine the honesty or otherwise of a person's conduct, one must ask what he knew or believed about the facts affecting the area of activity in which he was engaging"¹ [paras 25 and 26].
4. Dr Krishnan invited the Court to draw on the findings of the Tribunal and uphold the finding that he was not dishonest. Conversely, the GMC invited the Court to conclude that, in the light of its findings, the Tribunal has in fact answered the relevant questions as identified in Ivey and, as a consequence, Dr Krishnan was dishonest [para 27].
5. The Judge concluded that, as the decision of the Tribunal was based on a Ghosh direction which is now acknowledged to have been the wrong test, "it is inappropriate for the Court to substitute its own decision drawing on the findings of the Tribunal. That is a determination which should be made on reconsideration...by the Tribunal, which has heard all of the evidence, applying the correct legal and factual approach in accordance with Ivey" [para 28].

The Judge quashed the decision of the Tribunal that Dr Krishnan was not dishonest and remitted the case to the same Tribunal to re-determine the issue of dishonesty, together with the question of impairment and sanction [para 29].

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¹ Lord Hughes at paragraph 60 of Ivey