Appeals Circular A02/19

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28 February 2019

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Raychaudhuri v General Medical Council *[2018] EWCA Civ 2027*

Learning Points

- Tribunals should ensure that that they give clear reasoning in their determinations to show how they have weighed and evaluated the particular circumstances of the case, especially in relation to the question of whether a practitioner's conduct is dishonest.;
- The learning points from the earlier judgment still stand:
    - 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 a practitioner, Dr Raychaudhuri ('R'), against the decision of the High Court dated 11 December 2017, allowing the General Medical Council's (GMC's) appeal against a Medical Practitioners Tribunal's ('the Tribunal's') decisions dated 7 February 2017, that his fitness to practise was not impaired by reason of misconduct, and dated 9 February 2017, to impose a warning upon his registration. Mr Justice Sweeney substituted a finding of dishonesty in respect of an account R had given to a colleague and, in light of this, substituted a finding that R's fitness to practice is impaired, and remitted the matter back to a tribunal to consider sanction.

Tribunal hearing

The allegations against R 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, R 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). R 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, R 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, R 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 in February 2017, the Tribunal found the main facts proved and that R's conduct had been misleading but not dishonest. It should be noted that the test for dishonesty in use at the time was that set out in R v Ghosh *[1982] QB 1053*. When considering whether R's fitness to practice was impaired, the Tribunal concluded that R's 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.

High Court Appeal

The GMC appealed against the MPT's decision on the basis that the MPT was wrong to find that R's statements to nursing staff and Dr D were false and/or misleading but not dishonest and, consequently, the Tribunal was wrong in not finding R's fitness to practise to be impaired.

In between the appeal hearing and judgement being handed down, the Supreme Court's judgment in Ivey v Genting Casinos (UK) Ltd *[2017] UKSC 67* was published

which clarified the test for dishonesty to be used in regulatory proceedings.

The appeal was heard by Mr Justice Sweeney, who allowed the GMC's appeal. He held that, whether applying the test for dishonesty in *Ghosh* or *Ivey*, R's statement to Dr D was dishonest, that the Tribunal's decision was not an appropriately nuanced finding open to it to make and that it was one which was inconsistent with its other findings. The Judge said that there was no basis upon which R's state of knowledge or belief as to the facts could lead to any other conclusion that his denial to Dr D was dishonest.

The High Court substituted a finding of dishonesty in relation to R's denial to Dr D and a finding of impairment and quashed the warning). The matter was to be remitted back to a Tribunal for consideration on sanction[1].

Grounds of Appeal

R appealed against the High Court's decision on the grounds that the High Court:

1. had no jurisdiction under section 40A of the Medical Act 1983 (as amended) to consider an appeal by the GMC against a finding by a Tribunal that a doctor's fitness to practise is not impaired;

2. was wrong to substitute a finding that R had behaved dishonestly when the Tribunal had found he was not dishonest;

3. was wrong to substitute a finding that R's fitness to practice was impaired and to remit the case back to a Tribunal on sanction.

Judgment

The appeal was heard by Lord Justices Underhill, Bean and Sales, with lead judgment being given by Lord Justice Sales. The judgment in respect of each ground of appeal is as follows:

1. Ground 1- R's representatives contended that the wording of section

[1] see General Medical Council v Raychaudhuri *[2017] EWHC 3216 (Admin)* and Appeals Circular A04/18

40A(1)(d)[2] limits the appeals which could be brought by the GMC to where a tribunal finds that a practitioner's fitness to practice is impaired, but decides not to give a direction for erasure, suspension or conditional registration or to vary conditions. They also submitted that that to construe the scope of section 40A any other way would create an imbalance between the rights of the parties (as the right of appeal for practitioners under s40 of the Act does not apply in situations where a tribunal has not imposed a sanction) which would be incompatible with Article 6 of the European Convention on Human Rights.

The Court of Appeal rejected this ground of appeal [paras 47-53] on the basis that:

a. the Divisional Court had interpreted section 40A correctly in General Medical Council v Jagjivan *[2017] EWHC 1247 (Admin)* as providing a right for the GMC to appeal a tribunal's finding that a practitioner's fitness to practice is not impaired;

b. this interpretation is strongly supported by the wording of other parts of the Act including:

   i. s40A(1)(3) which "provides positively that the GMC "may appeal against a relevant decision" if it considers that the decision is not sufficient "whether as to a finding or a penalty or both" for the protection of the public"; and

   ii. s40A(1)(4) which amplifies what it means when considering whether a decision is sufficient for the protection of the public, the natural inference from which "is that the GMC is to have a right of appeal in relation to a finding by a MPT that a doctor's fitness to practise is not impaired" [para 48];

c. this interpretation was not incompatible with Article 6.

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[2] S40A(1): This section applies to any of the following decisions by the Medical Practitioners Tribunal -

(a) a decision under section 35D giving …..[a direction for suspension, conditional registration, or varying conditions imposed]

(d) a decision not to give a direction under section 35D….

(2) a decision to which this section applies is referred to below as a relevant decision

(3) The General Council may appeal against a relevant decision to the relevant court if they consider that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public…..

2. Ground 2 – the Court of Appeal held that:

    a. the Judge adopted an approach which was too 'cut and dried' in analysing the Tribunal's findings. The Tribunal plainly regarded the case as "finely balanced involving circumstances which required subtle but important and morally significant distinctions to be drawn" and had given 'anxious consideration' to whether R's conduct could be regarded as dishonest [para 56];

    b. "the evaluative judgment made by the MPT in this regard should be given great weight. That is both because it had the advantage of seeing the appellant and the witnesses, so that it was well placed to make an evaluative judgment regarding the nuances of their interactions and the nature and seriousness of what [R] did, and because of the practical expertise of a MPT in being able to understand the precise context in which and pressures under which a doctor is acting in a case such as this" [para 57];

    c. while the Tribunal's reasoning was not easy to understand in all respects [para 58], it gave good and sufficient reasons for its finding that R knew his statement to Dr D was false [para 59] and that "the tensions in its reasoning reflect the anxious care with which it sought to weigh and evaluate the moral significance of [R's] conduct in the particular context of the this case". Therefore:

        i. there was merit in giving weight to the manner in which the Tribunal had characterised its findings; and
        ii. the Judge "should have given greater weight" to the Tribunal's findings that R had given a full and honest account of what he had done to another doctor and nursing colleagues before speaking with Dr D and it was wrong to discount it [para 60];

    d. R had understood that Dr D was raising a very serious allegation with him that R had filled in the form without ever intending to see Patient A; R answered that allegation truthfully but was "deliberately and knowingly evasive….about precisely what entries he had made and in which sections of the assessment form" [para 63]. However, the Tribunal's reasons provided a legitimate basis upon which to find that R had not been dishonest in his discussion with Dr D and it was not part of a deliberate and dishonest plan by R to cover up what he had done, whichever test of dishonesty was applied; *Ghosh* or *Ivey* [para 64-66];

e. therefore, the Tribunal's reasoning is sufficiently clear and as it had been entitled to find R's fitness to practice was not impaired, the appeal on this ground was allowed and the Tribunal's finding that R was not dishonest in his conversations with Dr D was restored [paras 67-68].

3. Ground 3 – as the appeal was allowed on the second ground of appeal, the Court of Appeal considered that the question of whether the Judge was entitled to substitute a finding that R's fitness to practise was impaired by reason of his dishonesty did not arise and considered it was not necessary or appropriate to say anything further about this ground [para 69].

In summary, the Court of Appeal allowed R' s appeal on the basis of the second ground of appeal only, dismissed the appeal on the first ground (relating to jurisdiction) and did not consider the third ground, as it did not arise. Accordingly, the Tribunal's decision was reinstated and R has not been found dishonest and as a result his fitness to practise is not impaired [para 71].

Kind regards

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