professional standards authority

Learning points

Digest July-December 2017

2,102
Determinations received

177
Learning points fed back

In this digest, we will concentrate on two themes that we have noticed from the high volume of learning points; dishonesty and offering no evidence.

Most common sanctions we have fed back on:

- Erasure 1
- Suspension 34
- Conditions 16
- Further conditions/ suspension 25
- Caution 30
- Other 25
- No further sanction 28
- Not impaired/ no misconduct/ case closed 38

We are still feeding back a large number of learning points that relate to the amendment of allegations. Fairness and good case management require regulators to have drafted the charge in good time prior to the case being heard. Where allegations are withdrawn, public confidence in regulation requires full reasons to be provided.

DISHONESTY

Given the recent Supreme Court ruling in the case of Ivey v Genting Casinos, we would remind panels that as of 25 October 2017, reference to the test for dishonesty should be to the test as set out in the case of Ivey and it is no longer appropriate to use the Ghosh test. Below is a reminder of the tests in these cases.

R v GHOSH
[1982] EWCA Crim 2

Essentially, in this test, Lord Lane CJ stated: 'In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.'

IVEY v GENTING CASINOS (UK)
t/a Crockfords[2017] UKSC67

However, in this case, Lord Hughes set out six reasons why he considered that the second limb of the Ghosh test for dishonesty was no longer valid. He concluded at paragraph 74 that 'the second leg of the test propounded in Ghosh does not correctly represent the law and that directions based upon it ought no longer be given.' He went on to say that: 'when dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts . . . . When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his 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 has done is, by those standards, dishonest.'

You can read the full judgment at:
www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2017/67.html&query=(Ivey)

OUR KEY CONCERNS:

1 **Convictions and dishonesty.** We highlighted a number of learning points across all regulators where registrants had failed to disclose convictions, either when renewing their registration or within a timeframe specified by the regulator. In a number of cases these omissions resulted in a finding of no dishonesty or no misconduct. In these cases, we felt that the panel did not give sufficient weight to the importance of maintaining the integrity of the register and the system of registration, nor to the need to protect the public and maintain public confidence in the profession. We would encourage panellists to appreciate the seriousness of such acts and to carefully consider the way in which the Indicative Santions Guidance and case law suggests that dishonesty may be treated.

HARRIS V THE REGISTRAR OF APPROVED DRIVING INSTRUCTORS
[2010] EWCA Civ.808
'Registration carries with it an official seal of approval…the maintenance of public confidence in the register is important. For that purpose, the registrar must be in a position to carry out his function of scrutiny effectively, including consideration of the implications of any convictions of an applicant…that is why there are stringent disclosure requirements. If an applicant…fails to disclose convictions or makes a false declaration that he has no convictions, it strikes at the heart of the registration process and the reliability of the register.'

2 **Dishonesty and retrospective amending of records.** We have seen several cases where registrants are going back to patient records and making retrospective amendments, without stating that such amendments are retrospective. Dishonesty in such matters is not always alleged.

The case of Moneim v GMC (2011 WL 664393) concerned retrospective amendments by the registrant to patient medical records. The Court held that in assessing dishonesty, regard must be had to the nature of the entry and to the circumstances in which it was made. According to the Court, a panel would be entitled to infer dishonesty if the amended entries were false (e.g. by referring to a consultation that had not taken place). However, the Court also held that a panel would be entitled to infer dishonesty even if the amended entries were not false, but where the registrant had nevertheless amended the records for a dishonest motive; that of 'improving the record' and making it appear better; correcting an apparent oversight; making his or her actions look better; or pointing the finger of blame to a colleague (even if the author believed the colleague to be responsible).

3 **Offering no evidence.** Where a regulator's case examiners or Investigating Committee have referred a case to a hearing, we would generally expect that hearing to go ahead. If a decision is made to cancel the case before the hearing takes place, we would also expect full and cogent reasons to be given. We have been concerned about the number of cases in which submissions by the regulator, that there is no case to answer, have been accepted by fitness to practise panels and the case dismissed, without any evidence being heard.

In the recent case of X [Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council and X EWHC 70 (Admin)], the Court considered that the approach adopted by the regulator in that instance, which was to to make a submission of no case to answer without first opening the case was wrong; the absence of an opening of the case deprived the Committee of important information about the case, and 'prevented the Committee from supervising the decision to offer no evidence'. →

Despite the statement agreed by regulators in 2015, it is concerning that regulators and their fitness to practise panels still do not appear to be making any reference to **Duty of Candour** in the charge or determination.

... Offering no evidence (cont)

The Court also reiterated that the test to be applied by the Committee in determining the application is not whether the regulator could prove the charge; rather, the question is whether or not there was evidence which raised a case to answer.

In X, the Court also referred to the principle stated by the Court of Appeal in Ruscillo v CHRP [2004] EWCA Civ 1356 that a disciplinary committee should 'play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and the relevant evidence is placed before it.'

Much will depend on the wording of the individual regulator's Fitness to Practise Rules. However we would emphasise to all fitness to practise panel members the importance of 'supervising the decision to offer no evidence' and the duty to ensure that all relevant evidence is placed before them.

Get in touch

The Authority's Scrutiny and Quality team has given presentations about our scrutiny work and what we look out for when reading determinations. If you are interested in asking us to deliver presentations to panel members, please contact Georgina Devoy by email (address as below).

Do let us know what you think about this digest. We would welcome any feedback. If you would like more information, please get in touch with Georgina by emailing: **Georgina.Devoy@professionalstandards.org.uk**

Key fitness to practise statistics 2017

2,102 DETERMINATIONS RECEIVED

125 DETAILED CASE REVIEWS

15 CASE MEETINGS

4 CASES APPEALED

Useful links:

- Latest issue of our e-newsletter
- Response to *Promoting professionalism, reforming regulation*
- A summary of our views on reforming fitness to practise processes, taken from *Right-touch reform*
- Our special report *Right-touch reform*
- Our research paper on *Categorisation of fitness to practise data*