So Long(more): An end to the re-formulated Ghosh test for dishonesty in professional disciplinary cases?

In Hussain v GMC Lord Justice Longmore suggested the objective test for dishonesty in disciplinary proceedings should reflect the standards of members of the profession rather than the general public. That suggestion was taken up with varying degrees of enthusiasm by disciplinary panels, legal advisers and the courts. Andrew Granville Stafford argues that the recent Court of Appeal case of R v Hayes has effectively ended any need to apply the Longmore formulation.

Since Bryant v Law Society [2007] EWHC 3043 it has been accepted practice for disciplinary tribunals to apply the Ghosh test when considering allegations of dishonesty. In R v Ghosh [1982] 1 QB 1053 Lord Lane CJ set out the two limb approach to the issue of dishonesty:

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.

Hussain

In Hussain v GMC [2014] EWCA Civ 2246 a doctor was charged with plagiarism and falsifying his CV. The allegations were found proved and those findings were upheld by the Court of Appeal. In the last paragraph of the judgment Lord Justice Longmore said:

‘I would only add that I am a little troubled about the Ghosh direction given by the legal assessor in this case. It would have been standard in a criminal case. But this was a professional disciplinary hearing and it seems to me that in future it would be right and proper for the first part of the direction to be adapted to read that the panel should decide “whether according to the standard of reasonable and honest doctors [not people] what was done was dishonest”. There may be a not unimportant difference between the two as shown by the decision of the judge in this very case.’

As there had been no issue on the appeal as to the correctness of the legal assessor’s advice, these words were obiter. However, it has become common (if not necessarily universal) practice for legal assessors to advise disciplinary tribunals to follow the Longmore formulation and to judge the act or omission in question against the standards of the profession in question. The courts have in some cases also accepted the Longmore approach – see Kirschner v GDC [2015] EWHC 1377 and Falodi v HCPC [2016] EWHC 328 (Admin). Mr Justice Mostyn in Kirschner set out the re-formulated Ghosh test.

‘The tribunal should first determine whether on the balance of probabilities,
a defendant acted dishonestly by the standards of ordinary and honest members of that profession; and, if it finds that he or she did so, must go on to determine whether it is more likely than not that the defendant realised that what he or she was doing was by those standards, dishonest.’

Dowson

One perceived difficulty with the Longmore formulation was this. Most disciplinary panels include, and usually have a majority of, lay members. How is a lay panellist to know what the profession would regard as honest? Would it be necessary in a case where dishonesty was alleged to call expert evidence to say whether fellow members of the profession would have regarded the conduct as such?

If so, how might that affect the outcome of the case? One might suppose that the standards of honesty in a profession are at least as high if not higher than those found in the public at large, given the trust and confidence we place in professionals. But would that prove to be so? Take the hypothetical example of a nurse charged with writing up her patient notes at the end of the shift but making them look like a contemporaneous record of the care she had provided. On the face of it she has created a false document, but would she be exonerated if she called witnesses to say that in a busy NHS ward this was common practice? Or an accountant who had signed off accounts knowing they contained some misleading figures. Would he, too, avoid disciplinary sanction if he were able to call fellow accountants to give evidence that, in the real world, this happens all the time?

These difficulties were recognised by Edis J in Dowson v GMC [2015] EWHC. He acknowledged that the Ghosh test had ‘perhaps’ been modified as a result of Longmore LJ’s observations. He pointed out, however, that in the case he was dealing with there was no evidence suggesting the standards applied by doctors differed from those of the general public. Therefore the relevant standard was the same whether it is derived from what was considered right by reasonable and honest doctors or by reasonable and honest people. What is necessary, he said, is to attribute to which ever notional group is the theoretical arbiter enough knowledge of the context and purpose of the activity involved to allow an informed judgment to be developed.

Hayes

The Defendant in R v Hayes [2015] EWCA Crim 1944 was a city trader accused of LIBOR manipulation. The central issue was whether he had acted dishonestly. He ran what has been described as the ‘everyone was at it’ defence, relying on evidence that what he did was common practice in the banking industry and regarded as legitimate by fellow traders.

In directing the jury on the objective limb of the Ghosh test, the trial judge gave a very strong warning to the jury:

‘First, was what Mr Hayes agreed to do with others dishonest by the ordinary standards of reasonable and honest people? I will say that again: Was what Mr Hayes agreed to do with others dishonest by the ordinary standards of reasonable and honest people? Not by the standards of the market in which he operated, if different. Not by the standards of his employers or colleagues, if different. Not by the standards of bankers or brokers in that market, if different, even if many, or even all regarded it as acceptable, nor by the standards of the BBA or the FXMMC, but by the standards of reasonable, honest members of society.’

The effect of this ruling, argued Mr Hayes on appeal, was to wrongly preclude the jury considering in respect of the first limb of Ghosh the evidence it had heard about the standards (or lack of) common in the market.

The argument was rejected by the Court of Appeal as being unsupported by any authority:

‘Not only is there is no authority for the proposition that objective standards of
honesty are to be set by a market, but such a principle would gravely affect the proper conduct of business. The history of the markets have shown that, from time to time, markets adopt patterns of behaviour which are dishonest by the standards of honest and reasonable people; in such cases, the market has simply abandoned ordinary standards of honesty. Each of the members of this court has seen such cases and the damage caused when a market determines its own standards of honesty in this way. Therefore to depart from the view that standards of honesty are determined by the standards of ordinary reasonable and honest people is not only unsupported by authority, but would undermine the maintenance of ordinary standards of honesty and integrity that are essential to the conduct of business and markets.'

Conclusion

Absent any evidence to the contrary, there is no reason to think that the standards of honesty adopted by a particular profession differ from those of the general public (see Dowson). If such evidence is adduced it is, as the Court of Appeal said in Hayes, irrelevant to the first limb of the Ghosh test. The logical conclusion, therefore, is that there is no need to re-formulate the dishonesty test in the way Longmore LJ suggested.

However, the Court of Appeal in Hayes said that evidence as to the practice in the market was ‘plainly relevant’ to the subjective limb of the Ghosh test. It remains to be seen what effect this will have on the way respondents present their case in disciplinary tribunals.