Making decisions on dishonesty charges and the professional duty of candour

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When making decisions on charges involving dishonesty, panels of the Fitness to Practise Committee must decide whether or not the conduct took place, and if so, what was the nurse, midwife or nursing associate's state of mind at the time.[1]

Any dispute over whether a nurse, midwife or nursing associate behaved dishonestly means that the panel's findings will depend on what conclusions they can draw about the nurse, midwife or nursing associate's state of mind from the basic facts.

To help the panel focus on the central issues and be able to express this in their reasoning, it needs to consider the following:

- what the nurse, midwife or nursing associate knew or believed about what they were doing, the background circumstances, and any expectations of them at the time
- whether the panel considers that the nurse, midwife or nursing associate's actions were dishonest, or
- whether there is evidence of alternative explanations, and which is more likely.

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The panel will need to consider a number of factors when making decisions about a nurse, midwife or nursing associate's state of mind when they did or said something which we say is dishonest or kept silent about something which we say is dishonest[2].

What the panel must consider to reach its decision

As part of drawing conclusions about the nurse, midwife or nursing associate's state of mind, the panel must consider what the evidence says about the background facts or circumstances, and what the nurse, midwife or nursing associate knew or believed about what they were doing.[3]

There may be evidence about what was expected of the nurse, midwife or nursing associate in the particular circumstances.

This doesn’t mean that the panel should hear evidence about the nurse, midwife or nursing associate's own standards of honesty or their own beliefs about what the prevailing standards of honesty in society are. This is not relevant to deciding whether or not the nurse or midwife behaved dishonestly.[4]

The question of what is honest or dishonest in a particular set of circumstances, is a question for the panel to determine by applying what it understands the standards of ordinary, decent people to be.

The law assumes that people from all walks of life can easily recognise dishonesty when they see it[5], and that in most situations it is not difficult to identify how an honest person would behave.[6]

It is important that the panel considers whether there is an alternative explanation for the nurse, midwife or nursing associate's conduct, which points away from them having behaved dishonestly.[7] It can be useful to ask whether their mind was engaged with what they were doing, or could they simply have made an innocent or careless mistake?

The panel must address this question by identifying evidence for any other explanations, not by speculating.

As a regulator, the burden and standard of proof mean that, for an allegation to be proved, we have to satisfy the panel that it is more likely than not, that it happened.

In a case about dishonesty, where there is evidence of different explanations for why the nurse, midwife or nursing associate might have done something, the question is which explanation is more likely?

The professional duty of candour

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Breaches of the professional duty of candour are amongst the most serious category of concerns. Within our guidance on seriousness, we list breaches of the professional duty of candour as serious concerns which are more difficult to put right. This means that we will be keen to hear from the nurse, midwife or nursing associate about any reflections and opportunities to show insight because restrictive regulatory action is likely to be necessary when concerns of this nature aren’t put right.

Although a breach of the duty of candour can amount to dishonesty, there are circumstances where there could be a breach which isn’t dishonest. An example of this could be someone telling a colleague not to report an error that had occurred. We always regard breaches of the duty of candour as very serious, whether or not they are also dishonest.

To comply with the professional duty, nurses, midwives or nursing associates must:

- Be honest, open and truthful in all their dealings with patients and the public.
- Never allow organisational or personal interests to outweigh the duty to be honest, open and truthful.
- Act with integrity and give a constructive and honest response to anyone who complains about the care they have received.
- Act without delay and raise concerns if they experience problems that prevent them from working within the Code. Also act without delay and raise concerns if they or a colleague, or any other problems in the care environment, are putting patients at risk of harm. ‘Doing nothing’ and failing to report concerns is unacceptable.
- Apologise and explain fully and promptly what has happened and the likely effects if someone in their care has suffered harm for any reason. ‘Near misses’, where a nurse's, midwife's or nursing associate’s act or omission puts a patient at risk of harm, must also be escalated as a point of concern.
- Cooperate with internal and external investigations.

We wouldn’t usually refer specifically to breaches of the duty of candour as part of the misconduct charges. Instead we would expect the fact that the misconduct charged amounts to a breach of the duty of candour to be taken into account by a panel when considering misconduct, impairment and sanction when a case reaches those stages of a hearing.

1 Uddin v General Medical Council [2012] EWHC 2669 (Admin)

2 Under the professional duty of candour, nurses and midwives must be open and honest with patients when something that goes wrong with their treatment that could cause harm or distress. This means that nurses,

midwives or nursing associates must tell the patient (or, where appropriate, the patient's advocate, carer or family) when something has gone wrong. Keeping silent when something has gone wrong is a breach of this professional duty.

3 Royal Brunei Airlines v Tan [1995] 2 AC 378, see 389C-E; Barlow Clowes International v Eurotrust International [2006] 1 WLR 1376, para 16; approved in Ivey v Genting Casinos (UK) Ltd [2017] UKSC

4 See Ivey at para 74, overruling the 'second leg' of R v Ghosh [1982] QB 1053.

5 Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67 para 53; further Ivey (para 48) restates that judges do not and must not attempt to define dishonesty, citing R v Feely [1973] QB 530.

6 See Royal Brunei Airlines as cited in footnote 2.

7 Uddin v General Medical Council, see footnote 1; R v Feely [1973] QB 530 as discussed in Ivey at para 67.