THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2022-000992-V
[2024] UKUT 249 (AAC)
SD V DISCLOSURE AND BARRING SERVICE

THE UPPER TRIBUNAL ORDERS that:

No one shall, without the consent of the Upper Tribunal, publish or reveal the name or address of any of the following:

(a) SD, who is the Appellant in these proceedings;

(b) JW and any other person mentioned in the documents or during a hearing;

or any information that would be likely to lead to the identification of any of them or any member of their families in connection with these proceedings.

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

Decided following an oral hearing on 18 July 2024

Representatives

Appellant	Laura Herbert of counsel, instructed by Thompsons Law
Disclosure and Barring Service	Ashley Serr of counsel, instructed by DLA Piper UK LLP

DECISION OF THE UPPER TRIBUNAL

On appeal from the Disclosure and Barring Service (DBS from now on)

DBS Reference:	00949444755
Decision letter:	28 February 2022

This decision is given under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA from now on):

DBS did not make mistakes in law or in the findings of fact on which its decision was based. DBS's decision is confirmed.

REASONS FOR DECISION

1. This case raises an issue on the scope of an appeal against decisions made by DBS. The issue is: can an appellant show a mistake of fact for the purposes of section 4(2)(b) by proving something that has happened since DBS made its decision but did not obtain at that time? Our answer is: no. Whether DBS made a mistake of fact has to be decided on the circumstances at the time of DBS's decision.

A. History and background

2. On 28 February 2022, DBS included SD in both the children's barred list and the adults' barred list. DBS found that she had engaged in relevant conduct in that:

> Between August 2019 and December 2020 you failed to maintain professional boundaries and report safeguarding concerns regarding child JW, whom you supported in your role as Residential Support Worker at … Children's Home. This was by engaging in telephone calls and WhatsApp messages with him, including telling JW you loved him, and failing to report this contact to your employer.

Upper Tribunal Judge Jacobs gave SD permission to appeal and directed an oral hearing of the appeal, which took place before us on 18 July 2024.

B. The legislation

The barring provisions

3. We set out the provisions of Schedule 3 SVGA relating to children; those relating to vulnerable adults are essentially the same. Paragraph 9 is the equivalent for vulnerable adults.

Behaviour

Paragraph 3

(1) This paragraph applies to a person if–

(a) it appears to DBS that the person —

(i) has (at any time) engaged in relevant conduct, and

(ii) is or has been, or might in future be, engaged in regulated activity relating to children, and

(b) DBS proposes to include him in the children's barred list.

(2) DBS must give the person the opportunity to make representations as to why he should not be included in the children's barred list.

(3) DBS must include the person in the children's barred list if–

(a) it is satisfied that the person has engaged in relevant conduct,

(aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and

(b) it is satisfied that it is appropriate to include the person in the list.

(4) This paragraph does not apply to a person if the relevant conduct consists only of an offence committed against a child before the commencement of section 2 and the court, having considered whether to make a disqualification order, decided not to.

(5) In sub-paragraph (4)–

(a) the reference to an offence committed against a child must be construed in accordance with Part 2 of the Criminal Justice and Court Services Act 2000;

(b) a disqualification order is an order under section 28, 29 or 29A of that Act.

Paragraph 4

(1) For the purposes of paragraph 3 relevant conduct is–

(a) conduct which endangers a child or is likely to endanger a child;

(b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;

(c) conduct involving sexual material relating to children (including possession of such material);

(d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;

(e) conduct of a sexual nature involving a child, if it appears to DBS that the conduct is inappropriate.

(2) A person's conduct endangers a child if he–

(a) harms a child,

(b) causes a child to be harmed,

(c) puts a child at risk of harm,

(d) attempts to harm a child, or

(e) incites another to harm a child.

(3) 'Sexual material relating to children' means–

(a) indecent images of children, or

(b) material (in whatever form) which portrays children involved in sexual activity and which is produced for the purposes of giving sexual gratification.

(4) 'Image' means an image produced by any means, whether of a real or imaginary subject.

(5) A person does not engage in relevant conduct merely by committing an offence prescribed for the purposes of this sub-paragraph.

(6) For the purposes of sub-paragraph (1)(d) and (e), DBS must have regard to guidance issued by the Secretary of State as to conduct which is inappropriate.

The appeal provisions

4. Section 4 SVGA contains the Upper Tribunal's jurisdiction and powers.

4 Appeals

(1) An individual who is included in a barred list may appeal to the Upper Tribunal against–

…

(b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;

(c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.

(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake–

(a) on any point of law;

(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.

(4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.

(5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS.

(6) If the Upper Tribunal finds that DBS has made such a mistake it must–

(a) direct DBS to remove the person from the list, or

(b) remit the matter to DBS for a new decision.

(7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)–

(a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and

(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise.

…

The review provision

5. Paragraph 18A of Schedule 3 SVGA provides:

Paragraph 18A

(1) Sub-paragraph (2) applies if a person's inclusion in a barred list is not subject to—

(a) a review under paragraph 18, or

(b) an application under that paragraph,

which has not yet been determined.

(2) DBS may, at any time, review the person's inclusion in the list.

(3) On any such review, DBS may remove the person from the list if, and only if, it is satisfied that, in the light of—

(a) information which it did not have at the time of the person's inclusion in the list,

(b) any change of circumstances relating to the person concerned, or

(c) any error by DBS,

it is not appropriate for the person to be included in the list.

C. SD's grounds of appeal

6. SD did not dispute that she had engaged in relevant conduct as found by DBS. Her case was based on how she had developed since. This was Ms Herbert's summary of the grounds of appeal in paragraph 2 of her skeleton argument:

a. In light of the insight and reflection undertaken by SD this new evidence which is material to the DBS decision now makes its decision wrong (Per *PF v DBS* [2020] UKUT 256 (AAC)).

b. The additional evidence and reflection demonstrating her attendance of counselling sessions and GP undermines a key factual finding made by the DBS.

c. The additional evidence and previous exemplary conduct of SD makes the decision a disproportionate one.

It is submitted that these are mistakes of fact under section 4(2)(b) Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act') and in light of these mistakes the tribunal must remit the matter for a new decision under section 4(6)(b) of the 2006 Act.

7. Those grounds of appeal relate to these passages from DBS's decision letter:

You have acknowledged wrongdoing and provided references of your good level of care previously and current practice without concerns, however, it is not

> evident that you have been faced with similar issues whereby you have raised concerns for a child or have been met with challenge and as such have not demonstrated that you would respond differently in future.
>
> …
>
> … Although you stated that you have received counselling on these issues to ensure you are not in this position again, there is no supporting evidence of this provided in your representations. Therefore, the DBS remains concerned that you may not seek safe, suitable solutions to similar issues in future and may again find difficulty in coping appropriately with issues you may face.
>
> …
>
> … You have not demonstrated clear insight into the impact your behaviour had on JW or could have on another vulnerable person if it were to be repeated. …

8. Judge Jacobs identified the difficulty with those arguments in his direction for an oral hearing of the application for permission to appeal. He gave his provisional view that the mistake had to be shown on the circumstances as they were at the time of DBS's decision. He went on:

> If my present view of the scope of an appeal is correct, it is important to identify to what extent SD can identify a mistake at that time. It is possible to admit evidence that was not before DBS, as [*Disclosure and Barring Service v JHB* [2023] EWCA Civ 982] accepts at [95], but that would only be as evidence to show a mistake at the time of the decision. [Ms Herbert] has not limited herself to matters as at that time. See paragraph 32 of her argument, where she says that DBS's decision is *no longer* a correct one and in paragraph 40 she refers to counselling and to additional GP help *throughout 2022 and into early 2023*. The issue for me is whether there is a realistic prospect of showing, from material relevant to late February 2022, that DBS made a mistake as at that time.

9. That is how the issue arose whether developments after the date of the decision could be used to show a mistake of fact. We deal with that issue before dealing with SD's case on the evidence.

D. The arguments on the scope of the appeal issue

SD's argument

10. This was Ms Herbert's argument:

> 22. S.4(2) of 2006 Act allows an appeal in any point of law or 'in any finding of fact which it has made and on which the decision mentioned in that subsection was based.' The 2006 [Act] does not limit the scope of the finding of fact save as that it needs to be one on which the decision was based. It does not, require that the fact needs to be 'at the time the DBS made the decision.' Furthermore, section 4(6)(b) requires the panel to remit the case back for a decision to be made on the factual or legal mistakes for 'a new decision.'. The fact that s.4(6)(b) allows the DBS to go back and made a new decision could be as a result of the change in factual circumstances as found by the panel. The fact that this is similar to the power of review under Paragraph 18[A] of Schedule 3 of the 2006 does not mean that the legislative intention under s.4(6)(b) should be

undermined. It is submitted if the legislators intended to restrict the appeal to only the facts that the DBS considered at the time then this would have been specified, and is has not been.

23. Upper Tribunal caselaw in relation to this is mixed. Although the Upper Tribunal considered in *KB v DBS* [Case no: V/2719/2019] 'the tribunal is not tasked with assessing the Appellant's risk of harm to vulnerable grounds as at the date of the hearing nor the proportionality of her remaining on the list at the current time' this is inconsistent with cases such as *XYZ v DBS* [2024] UKUT 85 (AAC) where Tribunal were considering material from a TRA FTP [Teachers Regulatory Authority Fitness to Practise] hearing and admitted and considered additional material to determine whether the decision of the DBS was wrong '89. Since the date of the Barring Decision further evidence in relation to the allegations has become available. We are entitled to consider that evidence to decide whether, notwithstanding that the findings made by the DBS were open to them on the evidence before them, any of those findings were mistaken. That includes the TRA Decision.' The Tribunal in *XYZ* properly did not ignore relevant evidence which was not available to the DBS, and as a result were making the decision not at the date of the DBS decision (as that material didn't exist then). It is submitted that *XYZ* is the proper approach, as is consistent with *RI* (supra) and *PF* (supra.)

24. Neither of the leading authorities of Court of Appeal case of *RI* which confirms the position in *PF* limit the scope in the terms set out in *KB*. *PF* specifically does not limit the scope of the appeal or evidence and it is submitted clearly contemplates a wide interpretation and scope of receiving and considering new evidence, 'The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.' (para 51(g)).

DBS's argument

11. This was Mr Serr's argument:

45. There is of course no doubt that the UT can take into account evidence not before the decision maker when determining whether the DBS has made a mistake of fact/law. The paradigm example of this is the oral evidence of the Appellant themselves or other witnesses that may exculpate them and demonstrate that they did not do the impugned act(s).

46. There is no authority for the proposition that the UT can consider ex post facto material such as reflective pieces, courses undertaken, medical treatment etc. to determine that the appellant no longer presents a risk and allow the appeal on this basis. The DBS would rely on the following.

46.1 None of the recent CoA cases on mistake of fact cited above supports this proposition.

46.2 SD appears to confuse the statutory role of the DBS with that of a health care regulator. The SVGA 2006 has no concept of 'current impairment' similar to that of the GMC/NMC etc. The only questions for the DBS are whether the Appellant has engaged in relevant conduct, whether the test

for regulated activity (TRA) is met and whether it is appropriate to include on the list, with appropriateness being solely a question for the DBS.

46.3 KB v DBS is authority for the proposition that the UT is limited to examining material that the DBS had or could have had at the date of decision. It cannot rely on new material to use hindsight to assess proportionality at the

date of the decision. Further or alternatively the assessment of risk is a matter for the DBS not the UT- AB v DBS [2022] UKUT 134 (AAC) at paras 50-51.

46.4 The Appellant's position appears to sidestep the statutory need to identify a mistake in the decision pursuant to s.4 SVGA 2006.

46.5 It would rely to some extent on the vagaries of listing of the appeal. Appeals that were heard a long time after when the barring decision took place would be more likely to have ex post facto material demonstrating insight etc.

46.6 The SVGA 2006 has a specific provision dealing with new material post decision. Schedule 3 Part 3 Paragraph 18A specifically states that on a review, the DBS may remove the person from the list if it is satisfied that, in the light of information which it did not have at the time of the person's inclusion in the list or any change of circumstances relating to the person concerned, it is not appropriate for the person to be included in the list.

E. KB v Disclosure and Barring Service [2021] UKUT 325 (AAC)

12. Judge Jacobs drew the parties' attention to this decision. We set out the tribunal's reasoning on proportionality. As the reasoning shows, the tribunal limited itself to considering whether DBS had made a mistake of law at the time when the decision was made. It did not deal with mistake of fact.

53. We begin by making factual findings in light of all the evidence before us at the hearing rather than only that evidence available to the DBS at the time of making its decision in June 2019.

…

132. In assessing whether there was an error of law in relation to proportionality in June 2019, we can have regard to the material available at the time of the decision and the material which might have been available, because it existed at the time and is now available to us.

133. As will become clear, we have heard evidence in relation to subsequent events, in particular an incident in September 2020 where the Appellant took cocaine, suffered psychosis and was admitted to hospital. We have also received the section 37 reports of the Children's Services in September and November 2020 recommending supervised contact with her children. Therefore, our approach to this subsequent evidence is simply as a check against the decision made in June 2019. We are not using hindsight to assess proportionality as at June 2019. However, there would be an element of unreality not to admit evidence and take into account the fact that subsequent events have supported the risk assessment made by the DBS in June 2019.

134. Nonetheless, we are not making a decision as to whether there is an error of law in the Appellant remaining on the list as at the date of hearing in 2021 but only at the time of her inclusion in 2019. The ongoing review will address the current circumstances.

135. We are not conducting a review of proportionality of inclusion as of date of this appeal for two reasons: a) because that is not what statute permits us to do – only to consider mistakes of law, hence the proportionality assessment – as of the date of inclusion on the lists; and b) in any event, there is an outstanding paragraph 18A, Schedule 3 review ongoing. The outcome of that review has yet to be notified to the Appellant, thereafter she will have 8 weeks to make representations and will have a separate right of appeal against that decision. We therefore do not comment on that process.

Proportionality as at June 2019 – evidence available at the time of the decision and now

136. It was apparent that as at June 2019 the DBS had considered a number of factors in relation to the proportionality of including the Appellant on both barring lists. Its structured judgment process was set out in detail at the time in the Barring Decision process document.

137. The Respondent took into account the allegations regarding the Appellant's own children, which resulted in her children being placed on a child protection plan; and contacting the ambulance service but not accepting any assistance when they arrived. It also took into account the triggers to the Appellant's condition being difficulty tolerating stress. It did acknowledge that the Appellant had by that time overcome her postnatal psychosis however her behaviour had continued to deteriorate due to additional mental health issues. While this was not necessarily directed towards vulnerable groups it added weight to the concerns that she would not be able to act appropriately if employed in regulated activity. This was supported by the most recent information available as at June 2019 that the Appellant was not allowed unsupervised access to her own children. This added weight to the assessment that she was still at risk of causing harm, whether that be emotional, psychological or physical harm to her children.

138. The DBS's decision on proportionality was set out in its Final decision letter of June 2019 which is quoted at paragraph 9 above.

139. However, we are also entitled to take into account the subsequent material which was not relied upon or available at the time but still relates to the time the Respondent made the decision. The DBS considered the Appellant's late representations of July and September 2019.

…

215. To the extent that these submissions address the present position we make no findings. As we have consistently emphasised, our task is not to determine the proportionality and risk of harm that the Appellant currently poses at the time of the hearing of the appeal. Those are questions that are the subject of the ongoing review by the DBS under paragraph 18A of Schedule 3 to the Act. The Appellant will have a right of appeal against any decision not to

remove her from the list. Nothing we say should be taken as expressing any view on that decision.

F. The scope of an appeal

SD's argument

13. Broadly, we accept the points made by Ms Herbert. We agree that:

- Section 4 does not expressly provide that the mistake must be decided on the circumstances as they were at the time of the decision.
- If DBS makes a new decision under section 4(6)(b), this may involve taking account of a change of circumstances that has occurred since the decision under appeal.
- DBS's power to take account of a change of circumstances under paragraph 18A of Schedule 3 does not mean that the Upper Tribunal may not also have that power.

14. We do not accept Ms Herbert's argument that *XYZ* supports her case. As she accepted in response to Mr Serr's argument, the case does not decide that the Upper Tribunal may take account of a change of circumstances when deciding that DBS made a mistake of fact.

DBS's argument

15. Broadly, we accept the points made by Mr Serr. We agree that:

- The Upper Tribunal is entitled to take account of evidence that was not before DBS when the decision was made.
- There is no authority that expressly authorises the Upper Tribunal to take account of a change of circumstances when deciding whether DBS made a mistake of fact.
- There is no equivalent to the power or requirement given to other regulators to consider whether an appellant's fitness to practise is currently impaired at the time of the appeal.
- *KB* limited itself to the circumstances at the time of the decision.
- The Upper Tribunal's jurisdiction is based on identifying a mistake of fact.
- Taking account of a change of circumstances would leave the outcome dependent on the vagaries of listing.
- Paragraph 18A of Schedule 3 allows DBS to take account of a change of circumstances after the decision.

Our analysis

16. Section 4 creates an appeal. An appeal can only be created by statute and its scope must be conferred by that statute. The scope of an appeal is its jurisdiction and the Upper Tribunal has no authority to operate beyond its jurisdiction. In this case, our authority is limited by the language of section 4. We have to interpret that section, especially section 4(2)(b). The points made by counsel provide a background against which we must undertake that task, but they do not provide the answer to the question we identified in the first paragraph of this decision.

17. The language of legislation must be interpreted in its context. See the decision of the Supreme Court in *R (O) v Secretary of State for the Home Department* [2023] AC 255 at [29]. Although the focus is on section 4(2)(b), the legislation has to be interpreted as a whole. That will include the rest of section 4, especially section 4(1), and the whole of Schedule 3.

18. Section 4(1) creates the right of appeal against a *decision* under specified paragraphs of Schedule 3. Surprisingly, Schedule 3 is not structured around decision-making. Instead, it specifies conditions and imposes a duty on DBS to include a person in a list if those conditions are satisfied. Taking paragraph 3 of Schedule 3 as an example, the conditions in summary are: (a) relevant conduct; (b) regulated activity; and (c) appropriateness. Once these conditions are satisfied, paragraph 3(3) imposes a duty on DBS to include the person in the children's barred list.

19. The *decision* made under Schedule 3 will consist of a mixture of facts, law and judgment. It is possible for Parliament to create an appeal that allows a tribunal to reconsider and decide afresh any or all of those matters. The language of section 4 prevents that approach. It provides that the Upper Tribunal only has jurisdiction if DBS made a mistake. That prevents a general reconsideration approach.

20. The natural focus when looking for a mistake is on the circumstances at the time when the decision was made. It is at that moment that the duty arises to include a person in a list. In this case, the duty arose under paragraph 3(3)(b) of Schedule 3. And for the purposes of section 4(2)(b), the findings must be those on which the decision was based.

21. The classic findings of fact on relevant conduct will relate to something that has been done or not done before the decision was made. So, a carer had failed to attend to an injury or a support worker had used funds for their own purpose. Those are things that happened or did not happen at a particular moment. Nothing that happens afterwards can alter that. The failure to treat an injury was still a failure and the misuse of funds was still a misuse of funds. Further evidence may show that DBS was wrong to make the finding, but that is a different matter. The evidence now shows that the carer did not fail to attend to the injury and the support worker did not misuse the funds.

22. There are, of course, other types of fact. They include characteristics of a person rather than their conduct. So, a person's attitudes, skills, insights and mental states can also be the subject of findings of fact. As with lack of care or misuse of funds, it is possible for further evidence to show that DBS was wrong to make the finding it did. But there is a further possibility, one that cannot apply to the standard of care or the use of funds. A person's characteristics are potentially subject to change. The person may change their attitudes, acquire new skills, gain new insights, and so on. The important word is *change*. This is not just a matter of further evidence about the past. There is a conceptual difference between making a mistake about the facts as they were at the time of the decision and those facts being out of date through a later change. Change looks to the future and does not operate retrospectively to rewrite the past. It cannot show a mistake of fact in a decision that reflects a duty that arose on the conditions satisfied at a particular time under Schedule 3.

23. Those are the reasons why we have decided that whether or not DBS made a mistake in a finding of fact must be judged on the circumstances as they were at the time of the decision.

24. There are two further points that confirm our conclusion. First, our decision is consistent with the approach taken in *KB* to proportionality. Second, the kind of facts that can be subject to a change are likely to be closely linked to the assessment of appropriateness, which is excluded from the Upper Tribunal's jurisdiction by section 4(3).

25. We accept that our analysis makes the outcome depend on the vagaries of the referral to and investigation by DBS before it makes a decision. It is, though, different from the vagaries of the listing of an appeal in the Upper Tribunal, to which Mr Serr referred. Listing is essentially an administrative process with no statutory significance. The making of a decision by DBS, in contrast, fixes the moment when the duty to include a person in a list arises.

26. We have not relied on paragraph 18A of Schedule 3. That paragraph was added by amendment to allow DBS to review a person's inclusion in the list and, if appropriate, remove them. One ground for review is if DBS is satisfied that there has been a change of circumstances (paragraph 18A(3)(b)). If that were the only ground, it would be possible to interpret the scope of an appeal under section 4 and of a review under paragraph 18A as mutually exclusive, with a change of circumstances only relevant on a review. However, a change of circumstances is not the only ground for review. There are other grounds for review and both overlap with an appeal. One ground is when information becomes available to DBS that was not before it when it made its decision (paragraph 18A(3)(a)). Such evidence can be taken into account on an appeal. The Court of Appeal has rejected arguments by DBS that sought to limit the scope of an appeal to evidence that was before DBS. See *Kihembo v Disclosure and Barring Service* [2023] EWCA Civ 1547 at [26] and *Disclosure and Barring Service v RI* [2024] EWCA Civ 95 at [30]-[31]. The other ground for review is any error by DBS (paragraph 18A(3)(c)). That is wide enough to include the whole of section 4(2). So, read as a whole, it is not possible to treat appeals and paragraph 18A reviews as mutually exclusive. Nevertheless, for the reasons we have given, a change of circumstances is outside the scope of an appeal.

27. To avoid any misunderstanding, the Upper Tribunal is entitled to hear evidence that relates to the time of DBS's decision. That is so whether or not: (a) it was known to or available to DBS when it made its decision; (b) whether it was known to or available to the appellant at the time; (c) whether it existed at the time. What matters is whether the evidence can be related to the facts as they obtained at the time of the decision.

G. The relevant conduct

28. SD did not challenge DBS's finding that she had engaged in relevant conduct. We need, though, to summarise what that was in order to provide the context for the grounds of appeal.

29. SD worked in care from 2013. She was employed at the Children's Home as a support worker from 13 April 2015, before being suspended on 10 December 2020

and dismissed on 4 March 2021. The Home provided support for boys who had displayed sexualised behaviour, often abusing other children. SD's role was to support the boys in education, activities of living such as cooking, social skills and hygiene.

30. JW was a resident at the Home from August 2019 to September 2020. As much of that time was subject to a lockdown during the Covid pandemic, SD was on the site. Her contact with JW continued after he left the Home.

31. There was a meeting of concern with SD on 30 January 2020. She told us that this was just a chat, but it was recorded as a meeting of concern and the form was signed by her on 29 May 2020. (Pages 135-136) There were concerns that SD was sharing too much information with JW relating to her own upbringing and mentioning the possibility of fostering him. There were concerns about her attachment style.

32. On 1 May 2020, SD was removed from JW's care team (page 79). This resulted from concerns about SD not maintaining professional boundaries or following the positive behaviour plan. There was a risk of JW becoming over dependent on SD. (Page 122)

33. An investigation on 30 June 2020 following a whistle blower allegation (made by SD) found that 'There were concerning reports from the entire staff team of SD speaking with JW privately and JW repeatedly stating that they kept secrets.' (Page 129) There was a recommendation that 'SD to complete a refresher course on safeguarding to reinforce her understanding around not keeping secrets and to safeguarding herself from putting herself into vulnerable positions where she is alone with young people.' (Page 130)

34. There was another meeting of concern on 16 July 2020 when SD had not supported a colleague by providing information required by the police (page 134). SD explained this as arising from a confusion over email addresses.

35. Personal boundaries were discussed with SD's manager on 8 October 2020. The manager recorded that 'There have been numerous [sic] a number of examples where others feel that you have minimized behaviours in JW's presence leading to your colleagues feeling undermined. This therefore emphasizes to JW's perception of having a collusive and special relationship – this should not be the case.' The manager recommended an immediate improvement in respect of personal boundaries. (Page 147)

36. Both SD and JW initiated telephone calls and sent WhatsApp messages after he left the Home. There is evidence of calls between October and December 2020 (pages 241-247). They included:

> 'I am so disappointed with you JW, you haven't been returning my calls.'
>
> 'You don't want to talk to me?' Then 23 minutes later: 'You know I'm always here for you JW. Don't you. I'm guessing you don't feel like talking right now. You have been through so much in your young life. Things have happened to you that didn't deserve. You are a good boy and very precious. Life will be good for you. You have to believe that sweetheart. God Bless You xxxxx'
>
> 'I'm so disappointed with you JW. You have rejected my calls and hung up on me. I guess this is good bye forever. I hope life treats you good and that you will

> always be happy. Take good care of yourself JW, lots of love SD xxxxx' Then 4 minutes later: 'If I don't hear from you in the next hour I'm gonna block you. Good bye JW xxxxx

SD later described her language when speaking to JW as figures of speech and said that using kisses to end a message was just what she did. (Page 97).

H. Was there a mistake of fact in DBS's findings?

37. No. The evidence does not show any mistake of fact at the time of DBS's decision. Nor, if we are wrong on the scope of the appeal, does it show any change since.

38. Ms Herbert referred to:

- counselling SD had undertaken;
- support from her GP;
- her self-reflection;
- references provided.

39. In assessing these arguments, we have had the benefit of the practical knowledge and experience that the specialist members bring to this jurisdiction. We refer to what the Upper Tribunal said about their qualifications for appointment in *CM v Disclosure and Barring Service* [2015] UKUT 707 (AAC) at [59] to [64].

40. We accept the references provided as the genuine opinions that the writers hold of SD's qualities. We do not doubt that she has those qualities. We also accept that she has worked in care since 2013, including after she was dismissed by the Children's Home in March 2021, without incident. And, in the course of her work, she has no doubt satisfactorily completed the numerous training courses that employers arrange.

41. SD is entitled to credit for all of that, but it cannot alter what she did. And – this is important – she acted as she did despite possessing the qualities evidenced by the references, despite having the experience of working in care for almost a decade, and despite having the benefit of the training that she had received.

42. Not only did she act as she did, she persisted in doing so for at least a year. We say 'at least', because we cannot be sure when her behave towards JW began. It was certainly sufficiently noticeable to require a meeting of concern at the end of January 2020 and, on the evidence of the WhatsApp messages, it continued into December 2020. And – again this is important – she persisted in her conduct despite all the steps taken by her employer to remove her from contact with JW and to remedy the deficiencies in her understanding of safeguarding practices.

43. We accept that SD signed on 17 May 2020 to confirm that she had read and understood the Policies and Procedures of the Children's Home. It did not change, though, her behaviour.

44. We also accept on the evidence of SD's GP that she attended 10 appointments at her GP's surgery 'regarding her mental health issues attributable to work related stress.' The first appointment was on 12 July 2022 and the last on 19 January 2023. We have no further evidence of the nature of the issues, their causes, the contents of the sessions or their benefit to SD.

45. Similarly, we have little information about the counselling. We accept on SD's own evidence, supported by text messages, that she had telephone counselling sessions beginning on 8 February 2021. That was a year before DBS's decision. We have no more information about the contents or effects of those sessions. SD told us that the sessions were arranged by her GP and related to the death of a child (a service user) in July 2020. There were six sessions and that her goals had been to avoid repeating what had happened, to learn how to do things differently. Her concern, as far as her answers disclosed it, was to identify the circumstances surrounding what had happened and that she had allowed it to happen. She emphasised that the staff were criminalising JW by reporting incidents to the police, when other residents would be sent to their rooms or have their pocket money docked. She showed no concern beyond the external causes, no interest in understanding what was happening in her mind that led to her behaviour.

46. As evidence of her ability to conduct herself appropriately, SD told us of an incident that occurred when she was employed after leaving the Children's Home. She checked a young person's phone and found texts suggesting she was using drugs. She reported this immediately to the manager and to the social worker and, the following day, to the school. She also recorded the details. We accept that evidence, but it is of little help on this appeal, as the circumstances were so different.

47. Finally, we have read SD's reflection in her witness statement.

> 17. I have reflected on this incident for a long time and wish I hadn't done it. I realise that I did not act in a professional manner. In hindsight I should have contacted JWs social worker to escalate the situation straight away. I should also have informed my line manager.
>
> 18. I realise how this could be perceived by the public as I am the person who was in a position of employment to support and provide care for JW and it could come across as an abuse of power, it was not my intention at any time.
>
> 19. In my heart I was trying to get JW to call me as soon as possible because I was worried that something bad was going to happen to him. I realise now that the message I sent was based on an emotional persuasion and may have created a dependency.
>
> 20. My intentions were good, I just wanted JW to contact me so that I knew he was safe.
>
> 21. I have worked in the care sector for 9 years with no issues. The situation regarding JW was pretty unique in the fact that he was treated badly by staff at [the Children's Home]. I escalated my serious concerns to management and took it further by sending an anonymous letter to Social Care Wales when I felt nothing was being done about it.
>
> 22. I realise the consequences of my actions may have had a negative impact on JW and could have created a dependency with him to me. It was not done

purposefully and was not my intention. I realise my behaviour and use of words may have caused hurtful feelings and for that I am deeply sorry. I have caused unnecessary upset and I wish I could change it. JW did not deserve these comments from me. I feel embarrassed and ashamed.

23. As I am supposed to work as part of a team, I also realise the impact that it may have had on my colleagues as I took matters into my own hands without sharing it or escalating it further. My actions could be viewed as an abuse of power to the public as I was a responsible key worker and JW had previously been a service user. My use of language to JW in the text was not appropriate and I could have phrased it better and then I should have informed Senior Management.

24. Since the incident the counselling I have had has enabled me to talk through the issues I had, helping me to understand myself better and to make sense of the way I was thinking at the time and the way I acted.

25. It has helped me to recognise that the way I acted was unhelpful. It helped me to plan ways of making positive changes and realise that I can do better and how to act differently if a similar situation were to occur.

26. For the past 3 years I have been able to stand back and understand the stupidness of my behaviour. I had face to face counselling. This has helped me to ensured that I have fully reflected on what happened and of course would make me alter any similar situation developing in the future. It has helped give me my confidence back and the ability to manage stress and anxiety effectively. Also, to improve my ability to deal with conflict and resolve problems more effectively.

27. I have also been to see my GP more frequently in 2022 and into 2023. These appointments were for work related stress, and they have helped me deal with strong emotions and give me a place to cry it all out to offload and a way to manage the stress I have felt about my actions and how I deal with things.

28. Having reflected on the incident here are the key things I would do differently in the future:

- If a service user was to obtain my number /contact details and contacted me I would report it straight away to manager
- I would not respond to the service user, but would ensure if they were in distress that the appropriate people were contacted
- If the information that was disclosed caused concern about that the individuals welfare and safety I would contact the local authorities and social worker
- Keep up to date with training and apply the training to practice, particularly in relation to attachment training. If I felt there was an attachment issue arising immediately seek supervision from management and follow the guidelines.
- Acknowledge in times of stressful or frustrating situations recognise and address my emotions and take responsibility by seeking the right form of help and support from my managers or outside services.

48. What we find lacking in this is any understanding of why she responded as she did to this particular teenager. True insight and understanding would require a focus on her thinking process in order to address the underlying cause of what led her to behave as she did throughout 2022. That is absent from the written evidence that was put before us and for the most part in SD's oral evidence. It was only when Mr Serr was taking her through the WhatsApp messages that we noticed any change. At first, she responded to his questions. Then she stopped responding, her shoulders slumped and her head fell. After a while she muttered quietly: 'This is terrible.' When Mr Serr asked her to explain, she said that this was how she wrote to a grandchild. That, we hope, was the beginning of understanding.

I. Proportionality

49. Ms Herbert dealt with this issue briefly in her skeleton argument:

> It is submitted that in light of SD's lengthy career in regulated activity, without prior allegations such as these being raised against her that it is disproportionate to include her on both bars list. The impact of the DBS decision has been severe on SD as she has lost her job, hasn't been able to work and almost ended up losing her house. To bar SD from working with both children and vulnerable adults over a single incident in relation to JW which arose as a result of her genuine concern about how JW was being treated by other employees and her inappropriate reaction to this is not a proportionate response. People make mistakes, and they learn from them, SD has done this and therefore there is no unacceptable risk of repetition.

We can follow suit by dealing with the argument briefly.

50. *KB* has decided that proportionality must be judged at the time of DBS's decision. Proportionality refers to SD's Convention right to a private and family life: see the decision of the Court of Appeal in *B v Independent Safeguarding Authority (Royal College of Nursing intervening)* [2013] 1 WLR 308 at [14]-[24]. The Court adopted this analysis of that right:

> four questions generally arise, namely: (a) is the legislative object sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?

51. Even accepting all the points that Ms Herbert has made in SD's favour, there is still the issue of protecting children and vulnerable adults. The case for SD has to be put into the balance with the protection of the vulnerable. Given our analysis of her conduct, the balance has to be struck in favour of protecting the vulnerable.

Authorised for issue
on 17 August 2024

Edward Jacobs
Upper Tribunal Judge
Suzanna Jacoby
Rachael Smith
Members