IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2023-001309-V
[2024] UKUT 344 (AAC)

The Upper Tribunal has made an order prohibiting the disclosure or publication of the names of certain individuals or any matter likely to lead members of the public to identify those individuals and certain institutions; see pages 77 and 78 of the Upper Tribunal bundle for details of these orders

Between:

SCK

Appellant

- v –

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Citron, Ms Smith and Mr Hutchinson

Decided following an oral hearing on the CVP video hearing platform on 2 August 2024

Representation:

Appellant: by himself
Respondent: by Ashley Serr of counsel, instructed by DLA Piper

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the Respondent made on 19 June 2023 (DBS reference DBS6191 01002574580) to include SCK in the adults' barred list is confirmed.

REASONS FOR DECISION

This appeal

1. This is an appeal against the decision ("**DBS's decision**") of the Respondent ("**DBS**") dated 19 June 2023 to include SCK in the adults' barred list.

DBS's decision

2. The decision was made under paragraph 9 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (the "**Act**"). This provides that DBS must include a person in the adults' barred list if
    a. it is satisfied that the person has engaged in relevant conduct,
    b. it has reason to believe that the person is, or has been, or might in the future be, engaged in regulated activity relating to vulnerable adults, and
    c. it is satisfied that it is appropriate to include the person in the list.
3. Under paragraph 10, "relevant conduct" for the purposes of paragraph 3 includes conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult; and a person's conduct "endangers" a vulnerable adult if he (amongst other things)
    a. harms a vulnerable adult or
    b. causes a vulnerable adult to be harmed
    c. puts a vulnerable adult at risk of harm or
    d. attempts to harm a vulnerable adult.
4. The letter ("**DBS's decision letter**") conveying DBS's decision:
    i. stated that DBS was satisfied that
        a. on 10 February 2023 SCK restrained a vulnerable adult in his care ("**MDC**") by holding both of his hands to his chest, slapped him across the face and called his son a 'bastard'
        b. SCK had engaged in relevant conduct in relation to vulnerable adults because he had engaged in conduct which endangered a vulnerable adult or was likely to endanger a vulnerable adult;
    ii. stated that DBS was greatly concerned that if SCK were to be faced with challenging behaviour by vulnerable adults again in the future, SCK would display similar harmful behaviour, failing to put into place the techniques he had been trained to use and was expected to use.

Jurisdiction of the Upper Tribunal

5. Section 4(2) of the Act confers a right of appeal to the Upper Tribunal against a decision by DBS under paragraph 3 of Schedule 3 (amongst other provisions) only on grounds that DBS has made a mistake

a. on any point of law;

b. in any finding of fact on which the decision was based.

6. The Act says that "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" (section 4(3)).

7. Permission to appeal was given by the Upper Tribunal (Judge Citron) in a decision issued on 16 April 2024. The permission decision stated that

a. DBS's factual finding was principally based on the written statement of BG (the only other support worker present at the incident) on page 34 of the Upper Tribunal bundle

b. from what SCK said at the "permission" hearing on 3 April 2024 (and consistent with his written account on page 39 of the Upper Tribunal bundle), SCK's account of what happened differed materially from that given by BG; in particular, SCK's account was that

(i) he was, as part of putting a "pad" on an uncooperative service user with one hand, holding MDC's hands to MDC's chest with his other hand, to try to stop the service user biting him

(ii) he did not "smack" MDC (with "excessive force" or otherwise), but rather that, in reaction to MDC biting his hand, he moved his hand rapidly out of the way and, in so doing, inadvertently hit the side of MDC's face with his hand; and

(iii) in response to MDC calling him "a bastard", SCK did not call the service user's son "a bastard".

c. SCK's evidence would also be that when, as recorded on page 35 of the Upper Tribunal bundle, SCK's manager, "FO", said that he (SCK) had said on "Saturday" (the day after the incident) that he (SCK) had "hit" MDC, SCK had been using the word "hit" in the sense of unintentional, rather than intentional, physical contact (and that SCK did not always pick up the nuance of English words, as he was not a native speaker).

d. it was realistically arguable that SCK's oral evidence, which was not available to DBS, given at a substantive hearing of the Upper Tribunal, could, if deemed credible, provide information sufficient to show that DBS made material mistakes in the findings of fact on which its decision was based.

Documentary evidence in the Upper Tribunal bundle

8. In addition to DBS's decision letter, evidence in the bundle of 85 pages included:

a. "professional concerns referral form" for referral by FO dated 14 February 2023

b. email from BG to FO dated Saturday 11 February 2023 at 9:45 am

c. minutes of a "probationary review" meeting with SCK, chaired by FO, on Monday 13 February 2023

d. letter from the employer dated 14 February 2023, terminating SCK's employment

e. letter from SCK to DBS dated 12 June 2023

f. DBS's "barring decision summary".

The Upper Tribunal hearing

9. SCK attended the hearing, as did Mr Serr representing DBS. We are grateful to them both, for presenting their respective arguments clearly.

10. SCK, representing himself, also gave evidence at the hearing, including via cross examination and answering questions from the panel.

11. The "permission" hearing was held on the CVP video platform; the case management directions that followed gave the parties the opportunity to express a preference as between "video" and "face to face" for the substantive hearing (the context being that SCK lived near Cardiff); DBS expressed a preference for "video", based in part on SCK's successfully participation in the "permission" hearing; SCK did not express a preference. Judge Citron directed that the substantive hearing be held on the CVP video platform, as it was fair and just to do so, given SCK's ability to participate in such a hearing (demonstrated by the experience of the "permission" hearing), DBS's preference, and the fact that an Upper Tribunal hearing could be listed sooner by "video" than "face to face" in a venue close to SCK's home (such as Cardiff), given delays in securing courts in venues other than the Upper Tribunal's regular venue in central London. The panel was satisfied that, in the event, SCK participated in the hearing on 2 August 2024 fully, fairly and justly.

Review of the evidence, our findings of fact, and conclusions on whether DBS made mistakes in its factual findings

12. BG's email to FO, written the morning after the incident, stated that

a. the incident occurred just after 7 pm on a Friday evening

b. BG and SCK were assisting MDC to bed; they removed his shirt and put him in a pyjama top, sitting in a wheelchair; up to that point, MDC was cooperative

c. they then stood MDC up to change his pad; MDC was "vocal" but with BG distracting him with conversation, SCK was able to change his pad without "physical outburst"

d. they then got MDC into bed; SCK was refastening the pad as it had come loose; MDC then "lashed out", screaming "ah bastard"; SCK reacted by holding MDC's hands to his chest whilst BG continued trying to distract MDC with conversation; BG noticed that MDC opened his mouth to go bite SCK's hand; BG swiftly moved SCK's hand down and said "[MDC]'s going to bite"

e. within 2 seconds of her saying that, SCK removed his right hand out from under BG's and smacked MDC on the right side of his face "with excessive force"

f. after a few seconds, MDC again called SCK "bastard"; SCK replied: "I've told you before. I am not a bastard your son is the bastard and that is the reason you are here"

g. SCK and BG then finished the personal care, collected the dirty pad, and left the room in silence.

13. The meeting minutes of 13 February 2023 recorded the following exchange:

> FO: On the Friday in question, can you start with what happened?
>
> SCK: I was working with M and was holding his hand and pulled the pad sticker, as my arm was there, he bite my hand
>
> FO: Did he actually bite or go to bite you?
>
> SCK: My hand was on his chest. I had held both his hands on his chest, and it was close to the pad and I tried to pull it up. I took my hand out and took it too fast. I came to you to help not to fight, and he was like 'I don't like you' and after that I take off the blanket and came out.
>
> FO: On Saturday you said you struck him? Those were your words. On the Saturday morning you also said 'I hit him'.
>
> SCK: It wasn't a hit really, it was not a planned hit
>
> FO: How did you feel after?
>
> SCK: He was like 'leave me, leave me' and I did take the blanket and left the room
>
> FO: Do you feel any remorse for what had happened?
>
> SCK: No because actually sometimes they hit and punch too and more days I am working he does. 5 days I am working here, I know the routine. I am not thinking about that. I come off and that is it. I am not remorseful as it isn't planned. When I come out the room, I am not thinking about it. Same with Claire, I have nothing to say to him. Everyone hits us but I am here to help. I am very sorry and was not expecting that time. The pain from his bite I was not expecting
>
> FO: I have had to put a safeguarding into the authorities, commissioners and the Police and SCW have been informed of the incident. It is our legal responsibility and he is a vulnerable adult. Do you understand that?
>
> SCK: I understand. I am always helping and I work very hard here and I have never punched people and people are happy to see me.
>
> FO: You cannot hit people, we are here to care for them
>
> SCK: I understand
>
> FO: You have been trained in PBS [positive behaviour support] training haven't you?
>
> SCK: Yes
>
> SR: Why did you not use the techniques you have been taught?
>
> SCK: He bite my hand and my mind didn't go to the PBS training
>
> FO: But you are taught how to get out of a bite safely
>
> SCK: I am not sure.
>
> FO: Do you have any questions for us?

> SCK: If I can work more or if you will sack me?
>
> FO: We'll take a break here and we'll need to make a decision on your probation.
>
> SCK: I know it is my fault and if I work with you in the future, it won't happen again. It won't be without any problem. It is my fault. I know these people and I know in my heart not to hit.

14. The key differences between SCK's account of what happened, and BG's email, was that SCK said that when MDC bit his hand, SCK quickly moved his hand away and, in so doing, inadvertently made contact with MDC's head. SCK's evidence was that when he told FO on the Saturday that he had "hit" MDC, he meant "hit" in the sense of "come into contact with", rather than intentionally strike. SCK also said that he did not call MDC's son a "bastard".

15. SCK acknowledged that, during the incident, he was holding down MDC's hands to MDC's chest (to stop MDC from lashing out at him whilst he was adjusting MDC's pad); SCK described his grip on MDC's hands as "gentle".

16. It seems to us on the balance of probabilities that what happened here was that SCK, on having his hand bit by MDC, responded to the pain with a flash of anger and intentionally slapped MDC on the face. We come to this view based on the detailed and near-contemporaneous evidence in BG's email, as well as the record of his interview with the employer two days later which, in our view, is consistent with reluctant acceptance that he had, in a flash of anger, slapped MDC – we note the following statements by SCK (with italicised words emphasised by us): "it wasn't a hit really, it was *not a planned hit*"; "I am not remorseful *as it isn't planned*"; "I am very sorry and was not expecting that time. The pain from his bite *I was not expecting*"; "It is my fault. I know these people and I know *in my heart* not to hit").

17. We also find that SCK's grip on MDC's was firm and tight, rather than "gentle": it had to be, in order to stop MDC using his hands to lash out at SCK whilst SCK was changing his pad.

18. Finally, we find, on the balance of probabilities, that SCK did, in his flash of anger, call MDC's son a "bastard" in the immediate aftermath of the incident, as we find the account in BG's near-contemporaneous email more persuasive than SCK's (in part because, as we have just found, BG's email account was more accurate on the question of whether SCK hit or slapped MDC).

19. It follows that, in our view, DBS did not make a mistake in finding that SCK restrained MDC by holding both of his hands to his chest, and that SCK slapped MDC across the face and called MDC's son a 'bastard'. We have considered whether it was a mistake for DBS to have omitted to make findings about the context, namely that MDC was trying to, and then did, bite SCK's hand, as he was upset that SCK was trying to affix MDC's pad. We note that DBS's decision letter stated that

> "… the challenging behaviour shown by MDC at that time was normal and at first you [SCK and BG] were both utilising distraction techniques due to known triggers around personal care, all of which were said to be documented in the care plan. Whilst we have not had sight of the care plan, the employer states in the Probationary Review a few days

> later, that the plan details that carers were to leave MDC and then go back in and give him time."

In our view, this indicates that DBS was aware of, and took into account, the relevant context of SCK's conduct, being MDC's "challenging behaviour": there was therefore no mistake with regard to making findings about that context.

No mistake on point of law

20. We acknowledge that DBS's decision rested on a single incident, in which SCK reacted in a flash of anger to being bitten by a vulnerable adult. However, given the self-evident seriousness, from a safeguarding viewpoint, of what SCK did and said (as found by DBS, and as to which we have found no mistake) in that incident, it cannot be said that DBS's decision to include SCK in the adults' barred list was wrong in law by being irrational, perverse, or a decision no reasonable barring body could have made on the evidence before it. As to whether DBS's decision was disproportionate (and so mistaken in law), proportionality is at heart a balancing exercise, with, on the one side, the risk SCK posed to the safeguarding of vulnerable adults, and, on the other side, the detriment to SCK of his being barred (being that he would be unable to work with vulnerable adults). It is well established that in striking this balance, appropriate weight must be given to DBS's views on safeguarding risk, as this is its specialist field; as well as to public confidence in the safeguarding of vulnerable persons. In our view, and given that DBS's decision was a rational one, the balance is struck in favour of avoiding the safeguarding risk posed by SCK. DBS's decision was not, therefore, mistaken in law by reason of being disproportionate.

Conclusion

21. DBS's decision involved no mistake either in a factual finding on which it was based, or on a point of law. DBS's decision is accordingly confirmed.

Zachary Citron
Judge of the Upper Tribunal

Rachael Smith
John Hutchinson
Members of the Upper Tribunal

Approved for release on 4 November 2024