IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001795-V**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 443 (AAC)**

On appeal from a decision of the Disclosure and Barring Service

Between:

JE

Appellant

- v –

The Disclosure and Barring Service

Respondent

Before: HHJ Simon Oliver sitting as a judge of the Upper Tribunal
Upper Tribunal Member Ms Josephine Heggie
Upper Tribunal Member Ms Suzanna Jacoby

Hearing date: 1 November 2024

Representation:
Appellant: Mr Khan S. Ehtesham Khan Lodi
Respondent: Mr Andrew Webster of counsel

ANONYMITY ORDER

On 5 May 2023, the Upper Tribunal made the following order, which remains in force:

> "Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, THE UPPER TRIBUNAL ORDERS that:
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> No one shall, without the consent of the Upper Tribunal, publish or reveal the name or address of any of the following: (a) JE, who is the Appellant in these proceedings; (b) any of the service users mentioned in the documents or during a hearing; (c) the care assistant identified as JT in the papers; 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.".

DECISION

The decision of the Upper Tribunal is to allow this appeal in full and direct the DBS to remove JE's name from both the Adult and Children's Lists.

REASONS FOR DECISION

Introductory matters

1. This is the Appellant's appeal dated 7 November 2022 against the Disclosure and Barring Service's final decision, dated 8 August 2022, to include her on the Children's Barred List and the Adults' Barred List under the Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act').

2. We held an oral hearing of the full appeal at Field House in London on 1 November 2024. The Appellant attended in person and was represented by Mr Khan. Mr Webster of counsel appeared on behalf of the Respondent Disclosure and Barring Service (or 'the DBS').

The rule 14 Order on this appeal

3. We refer to the Appellant as JE in order to preserve her privacy and anonymity. For that same reason, we have not disturbed the rule 14 Order made by UT Judge Jacobs on 5 May 2023 and confirmed by him at the Oral Permission to Appeal hearing on 23 May 2024 and included at the head of this decision. We are satisfied that neither the Appellant nor anyone else involved should be identified in this decision, whether directly by name or indirectly. We are also satisfied more generally that any publication or disclosure that would tend to identify any person who has been involved in the circumstances giving rise to this appeal would be likely to cause serious harm to those persons. Having regard to the interests of justice, we were accordingly satisfied that it is proportionate to make the rule 14 Orders. Furthermore, to avoid the possibility of 'jigsaw identification' (by which we mean pieces of evidence might be put together to identify those concerned), we refer to the venue simply as 'the care home".

A brief summary of the background to this appeal

Background

4. On the 16 August 2021, Care Assistant, JT, reported that on or around the 12 August 2021, when he and JE were supporting PF with personal care JE failed to follow the correct moving and handling support for PF. JT stated that JE refused to use the hoist when supporting PF to go to bed and that she physically lifted PF from her wheelchair to her bed. PF is not able to weight bear. It is clearly stated in PF's care plan that PF must be supported with all transfers with a hoist. JE was suspended on the 16 August 2021 pending an investigation.

5. JE was interviewed the same day during which she admitted to not following the resident's care plan and that she had physically picked PF up and put her on to the bed.

6. The investigation was concluded on the 25 August 2021 with the recommendation to proceed to a disciplinary hearing, which was held on the 16 September 2021 where the allegations where considered proven and JE was dismissed.

7. The Appellant, by way of an appeal lodged on 7 November 2022, challenges the Respondent's decision of 8 August 2022 whereby the Respondent decided to include the Appellant's name on the Children's Barred List and the Adults' Barred List.

Permission to Appeal

8. UT Judge Jacobs gave permission to appeal on 23 May 2024 in the following terms:

> "5. I have given permission under section 4(2)(b) on the ground that DBS may have made mistakes of fact. Mr Khan disclaimed any reliance on mistake of law under section 4(2)(a).
>
> 6. Mr Khan accepted that JE had not used a hoist, as required by the service user's care plan. She denies lifting the service user alone, saying that she did so jointly with JT. She denies using a headlock. She denies having handled service users in the same way previously. She says that she was confused by the service user's new chair. Mr Khan drew attention to the absence of previous complaints, JE's training record (page 47), and the absence of any investigation into the allegation of rough handling. Taking those points as a whole, I consider that there is a realistic prospect of the Upper Tribunal making findings to justify at least referring the case to DBS for reconsideration."

The Evidence

9. We had a 115-page bundle of evidence, a 79 page Authorities Bundle and a skeleton Argument from both the Appellant and Respondent. The Appellant also gave evidence.

The statutory framework

Introduction

10. There are several ways under Schedule 3 to the 2006 Act in which a person may be included on one or other of the two barred lists. This appeal is concerned with what might be described as discretionary barring. This may be on the basis of either an individual's "relevant conduct" – in effect their past behaviour – paragraphs 9 and 10) or the risk of harm they pose now and for the future (paragraph 11). This appeal concerns the former of those two discretionary routes to barring, which we now consider in more detail.

The basis for a "relevant conduct" barring decision

11. Paragraphs 9 and 10 of Schedule 3 to the 2006 Act deal with behaviour or "relevant conduct" in relation to adults, and are in issue in the present case. So far as is relevant, they provide as follows:

> 9.(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 vulnerable adults, and
> (b) DBS proposes to include him in the adults' barred list.
>
> (2) DBS must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.
>
> (3) DBS must include the person in the adults' 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 vulnerable adults, and
> (b) it is satisfied that it is appropriate to include the person in the list.
>
> 10.(1) For the purposes of paragraph 9 relevant conduct is—
> (a) conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult;
> (b) conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him;
> ...
> (2) A person's conduct endangers a vulnerable adult if he—
> (a) harms a vulnerable adult,
> (b) causes a vulnerable adult to be harmed,
> (c) puts a vulnerable adult at risk of harm,
> (d) attempts to harm a vulnerable adult, or
> (e) incites another to harm a vulnerable adult.

Rights of appeal

12. An individual's appeal rights against a DBS barring decision are governed by section 4 of the 2006 Act:

> 4.(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
> (a) …
> (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.

13. We highlight sub-section (3), namely 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" and so, in effect, is non-appealable.

The Case Law

14. In respect of mistake of fact pursuant to SVGA 2006 S.4 (2) (b) the law in this area is comprehensively set out in a series of Court of Appeal cases: *AB v DBS* (2021) EWCA Civ. 1575; *Kihembo v DBS* (2023) EWCA Civ. 1574; *DBS v JHB* (2023) EWCA Civ. 982; and *DBS v RI* [2024] EWCA Civ. 95. In summary:

> (i) As approved by the Court of Appeal in *DBS v RI* the case of *PF* represents the law.
>
> (ii) The Upper Tribunal is entitled to make a finding that an appellant's denial of wrongdoing is credible, such that it is a mistake of fact to find that he/she did the impugned act. In so doing, the Upper Tribunal is entitled to hear oral evidence from an appellant and to assess it against the documentary evidence on which the DBS based its decision. That is different from merely reviewing the evidence that was before the DBS and coming to different conclusions (which is not open to the Upper Tribunal).
>
> (iii) Any mistake of fact must be material to the decision.
>
> (iv) The UT needs to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness.
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> (v) The UT should remit back if the appeal is allowed unless no other decision but removal from the Adults' Barred List and Childrens' Barred List is permissible following the UT's decision.

15. An assessment of risk however is generally speaking for the DBS and what is

and is not a fact should be considered with care. In *DBS v AB* (2021) EWCA Civ. 1575 Lewis LJ at para 55 stated:

> "the Upper Tribunal may set out findings of fact. It will need to distinguish carefully a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to a marriage being a "strong" marriage or a "mutually-supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact."

16. The appropriateness of a barring decision is not a matter for the Upper Tribunal on appeal. Unless the DBS has made either an error of law or of material fact, the Upper Tribunal may not interfere with the decision [see *R v (Royal College of Nursing and Others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin)]. Further, if it is argued that a decision to include a person on a barred list is disproportionate to the relevant conduct or risk of harm relied on by the DBS, the Upper Tribunal must afford appropriate weight to the judgement of the DBS as a body enabled by statute to decide appropriateness [see *SA v SB & Royal College of Nursing* [2012] EWCA Civ 977]; *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982; *Kihembo v Disclosure and Barring Service* [2023] EWCA Civ 1547; *and Disclosure and Barring Service v RI* [2024] EWCA Civ 96 [2024] 1 WLR 4033

17. In considering the 2023 and 2024 cases in more detail, we note that in *JHB* (at paragraph 90) the Court confirmed that absent a finding of a mistake, the Tribunal is "not free to make its own assessment of the written evidence". The latest of the Court of Appeal's decisions is *DBS v RI*. In that case the Court approved the observations (in the earlier case of *PF v DBS* [2020] UKUT 256 (AAC)) that:

> "There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact. This includes matters such as who did what, when, where and how. It includes inactions as well as actions. It also includes states of mind like intentions, motives and beliefs.
>
> The mistake may be in a primary fact or in an inference. There was a discussion at the hearing about primary and secondary facts and about inferences. It became clear that these terms were used in different senses, so we need to make clear what we mean. A primary fact is one found from direct evidence. An inference is a fact found by a process of rational reasoning from the primary facts as a fact likely to accompany these facts. One way, but not the only way, to show a mistake is to call further evidence to show that a different finding should have been made. The mistake does not have to have been one on the evidence before the DBS. It is sufficient if the mistake only appears in the light of further evidence or consideration."

18. In *PF* the Tribunal also confirmed that the onus is on the Appellant to show that a mistake occurred (at paragraph 51(g)). This aspect of the Tribunal's reasoning was approved by the Court of Appeal in *Kihembo* at paragraph 26.

19. The Court in *RI* then proceeded to hold that an accurate description of the mistake of fact jurisdiction is:

> "The Upper Tribunal is entitled to make a finding that an appellant's denial of wrongdoing is credible, such that it is a mistake of fact to find that she did the impugned act. In so doing, the Upper Tribunal is entitled to hear oral evidence from an appellant and to assess it against the documentary evidence on which the DBS
>
> based its decision. That is different from merely reviewing the evidence that was before the DBS and coming to different conclusions (which is not open to the Upper Tribunal)".

20. A feature of this is that any mistake of fact must be material to the ultimate decision meaning that it may have changed the outcome of the decision (*ME v Disclosure and Barring Service* [2022] UKUT 63 (AAC*); R (Royal College of Nursing and others) v SSHD* [2010] EWHC 2761 (Admin) at paragraph102).

The DBS decision to bar

21. The Respondent's primary findings of fact, as contained in its Final Decision Letter of 8 August 2022, are as follows:

> We have considered all the information we hold and are satisfied of the following: On 12 August 2021 at the Care Home…you manually lifted a service user by placing your hand under her arm, using her knickers to lift her up and carried out personal care. This demonstrates a failure to follow a service user care plan by not using the hoist and also placing her at increased risk by moving her alone. We are also satisfied that you have previously adopted similar approaches by failing to use a hoist with other service users, despite the physical and emotional harm this may have caused...
>
> …We have received credible reports, that your general approach to service users was "rough", "abrupt" and "brusque (sic). There does not appear to be any evidence to suggest that you have demonstrated any credible remorse, regret or insight for your actions to your former employer. During disciplinary hearing you stated you would try to follow care pans (sic) in future however you did not state that you would follow them, only that you would try…
>
> …Although it is acknowledged that you have previously worked in care, for approximately 3 years without any known concerns, it is also noted that additional concerns were raised in the disciplinary process which related to your previous practice within the setting.
>
> Whilst this disciplinary was the first formal intervention from your employer your actions appear to have been intentional as you admit the hoist was outside of the door and you also confirmed you were aware of the care plan but chose not to follow it...

Appellant's case and submissions

22. As indicated above, we heard from the Appellant who was questioned by both the DBS representative and us. She confirmed, when questioned, the details she had set out in her statement to the DBS and Skeleton Argument.

23. There is only one reported incident as opposed to numerous incidents, this is the first error of fact. The only incident is that of 12 August 2021. There are no other known or reported incidents whatsoever. This incident itself suffers from a severe lack of evidence, there is no CCTV and there are no independent witnesses. The only source of information is an unverified source namely JT. There are no witness statements from any individual against the appellant and there are no verified and corroborated interview notes from any individual against the appellant.

24. The appellant has shown clear awareness that there was a procedure to be used, that she should have used it but could not do so on this occasion because the equipment was new and thus, she was not trained to use it. The appellant has also shown clear remorse about her conduct and recognised that she must not repeat her conduct again.

25. This was a one-off isolated incident in the appellant's lengthy career and should have been treated as such. The appellant's actions were not malicious and the appellant's act did not bring or cause any harm to any individual.

26. The appellant's experience, qualifications and training show that the appellant is a responsible professional who kept herself up to date of the requirements of her role.

27. The appellant is of previous good character and has no previous convictions, civil action, disciplining actions or complaints against her whatsoever.

28. In the circumstances, it was not open to the Respondent to arrive at the conclusions they made especially in the light of the weaknesses in the existing evidence and the lack of substantive corroborating evidence.

29. It is inconceivable, how in the light of the above, a right-minded individual could arrive at a decision on the balance of probabilities, that the Appellant’s conduct warranted the decision of 8 August 2022 to be made.

DBS Case and submissions

30. The Respondent did not make a material mistake of fact in a *PF v DBS* [2020] UKUT 256 paragraph 51(b) sense.

31. Having regard to the material that was before the Respondent, its material factual findings were ones that were reasonably open to it on the balance of probabilities. The Respondent acknowledges the ratio in *DBS v RI* [2024] EWCA Civ 95 and, in particular, paragraphs 28-37.

32. Without prejudice to the generality of the foregoing, taking the individual alleged mistakes of fact referred to by UT Judge Jacobs at the permission hearing in turn: a. JE denies lifting PF alone, saying she did so jointly with JT. See, in particular, JT’s evidence.

33. In her investigation interview, JE said that "JT and I picked her up". The Respondent assessed the credibility of JT's evidence and considered it to be reliable.

34. JE denies using a headlock: The Respondent did not find that JE used a headlock. In the Barring Decision Summary document, the Respondent stated: She denied the use of a "headlock" and whilst we take JT's account to be credible we must consider the use of terminology in that there was no suggestion from JT that she had PF in a head lock. It was more about stance and approach to the lift which was followed by her reaction to PF falling during the transfer. Both provided consistent descriptions that tally with the description of lifting a service user. We have already established that it was an underarm lift which fits this description. The use of the term headlock appears to be a misrepresented interpretation on JT's part. As a result, this subjective terminology is not evidenced. This misuse of the term appears to have also been considered by the employer who made no established finding in relation to this.

35. JE denies having handled service users in the same way previously. In her fact find interview JE materially stated:

1. She had read and understood PF's care plan and she was aware that it was a requirement to use the hoist to move PF.
2. She did not use the hoist.
3. The hoist was awkward and it was easier not to use it.
4. This was something that she had "sometimes" done before.

36. In her disciplinary hearing, JE denied having done so previously. Having regard to JE's aforesaid inconsistency and the fact that JE had offered a reason not to use the hoist (it was easier not to), the Respondent's conclusion was reasonably open to it.

37. As to the other factors referred to by UT Judge Jacobs when he granted permission:

(a) JE says that she was confused by PF's new chair.
(b) JE mentioned this in her investigation interview and in her disciplinary hearing.
(c) It is not clear why JE was confused. PF's care plan was unambiguous as to the requirement to use a hoist.
(d) JE's employer was unimpressed by this explanation.

38. Even if JE's case as to this issue is considered to be credible (which the Respondent rejects,) as an experienced healthcare assistant JE should have known to take advice / seek assistance if she was unsure what to do rather than to flagrantly breach the care plan. There is not even a suggestion that JE raised the issue after the fact.

39. Absence of previous complaints. The Respondent did not find that there had been previous complaints. It did note, however, that the disciplinary process had thrown up some other examples of what appeared to be poor practice.

40. JE's training record: It is unclear what point was made on JE's behalf at the permission hearing in this regard. The training record confirms that JE had had up to date manual handling training. JE confirmed in her interview that she had completed her moving and handling training twice. Insofar as JE may be asserting that she ought to have received training directly relating to PF's new chair (as JE's witness statement in support of her appeal perhaps suggests) or that JE may be seeking to imply that she had not been trained as to how to use the hoist:

i) She has not said so explicitly.
ii) She did not raise that with her employer.
iii) It seems highly unlikely given that she had had manual training for the setting.
iv) Even if JE had not received such training (which is not conceded), JE should not have ignored the care plan and proceeded to lift PF without a hoist. She should have taken advice / sought assistance.

41. Absence of any investigation into the allegation of rough handling: JT referred to JE's approach as "often very rough". In the Barring Decision Summary document, the Respondent stated: "In establishing the above findings we can equally determine the admitted actions, as described by JT, amount to physical handling that is "rough". The act of lifting someone by their arm, when they are unable to weight bear, then moving them by their underwear, amounts to unnecessary physical handling that is excessive."

42. Having assessed the use of terminology in JT's statement, it is reasonable to conclude that when coupled with the admissions from [JE], the admitted actions were representative of a "rough", "abrupt" and "brusque" approach on 12 August 2021 and more generally in her interactions with service users.

43. Insofar as, contrary to the Respondent's case, the Upper Tribunal may find that the Respondent made a mistake of fact: fundamentally, JE admits that, contrary to an unambiguous care plan (which she had read and understood), JE made the decision to lift a vulnerable service user without a hoist, thereby placing her at considerable risk. None of the impugned matters in this appeal speak to that central issue.

44. The Respondent made no mistake of fact within the meaning of s.4(2) SVGA 2006 so that the Respondent's decision must be confirmed pursuant to s.4(5) SVGA and the appeal dismissed. If the UT finds, contrary to the above, that the Respondent did make any material mistake of fact, the UT is invited (subject to the nature and scope of the mistake) to:

a. remit the matter to the Respondent for a new decision pursuant to s.4(6)(b) SVGA; and
b. direct, pursuant to s.4(7)(b) SVGA, that the Appellant should remain on the Lists pending the Respondent's new decision.

Conclusion on the grounds of appeal

45. In considering the evidence we have found nothing to suggest that the person lifted without the hoist came to any harm. We also note that it was only JT who saw JE do this but they did not complain. We appreciate that she did not follow the care plan and did not lift the patient using the hoist.

46. JT's evidence about JE requiring the patient to stand and change the pad at the same time is not accepted by us as we think it is impossible to do both. We feel that there is missing evidence about what happened here. We question JT's reliability and thus find him not to be particularly credible. We wonder if he had a motive in doing what he said. We note that there seems to have been no verification of JT's evidence by the DBS, rather a simple assertion by them that they found him "credible".

47. We note that JE has done nothing like this before. We also note that she said to us when she gave evidence that she lifted the patient under the arm and did not act in the way that JT suggested.

48. The suggestion that JE was brusque with patients is only one person's view (that of JT) and we can find no evidence that this suggestion was ever put to her. This suggests to us that DBS were relying on an assertion, not a fact.

49. We also note the suggestion made by JT that JE lifted the person up by her knickers is not supported by evidence and we do not find it credible. She did admit to not using the hoist but that does not mean that she was in any way compromising the safety and well-being of the patient in the steps she took. Our concerns about the credibility of JT's assertion on this point leads us to question the credibility of all his evidence.

50. The appropriate course of action may have been disciplining or dismissing JE but that was an internal matter for the care home to consider and not for us to comment upon.

51. We are not satisfied that the DBS had sufficient reliable evidence upon which to base their decision and given what we concluded in regards to JT's evidence about JE's handling of PF, the DBS have, therefore, clearly made a mistake of fact in reaching the decision that they did. In addition, the assertions (as we find them to be) about JE being "rough", "abrupt" and "brusque" are not based on reliable (or even any) evidence and are likewise mistakes of fact.

52. Bearing in mind the legal framework and, in particular, paragraphs 17 to 20 above, in light of our findings, we considered whether to remit the matter to the DBS for further consideration. Given the length of time since the incident (three years) and the nature of the one-off incident and that our findings of mistakes of fact go to the nature of the decision and may have resulted in a different decision, we have come to the conclusion that JE should be removed from both lists.

Disposal

53. The DBS is directed to remove JE's name from both the Adults' and Children's Barred Lists.

HHJ Simon Oliver sitting as a judge of the Upper Tribunal
Upper Tribunal Member Ms Josephine Heggie
Upper Tribunal Member Ms Suzanna Jacoby

Authorised for issue on 30 December 2024