THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2022-001352-V
[2024] UKUT 60 (AAC)
JA V DISCLOSURE AND BARRING SERVICE

THE UPPER TRIBUNAL ORDERS that, without the permission of this Tribunal:

No one shall publish or reveal the name or address of any of the following:

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

(b) any of the service users or members of staff mentioned in the documents or during the 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 19 February 2023

Representatives

Appellant	Ashley Serr of counsel instructed by DLA Piper LLP
Disclosure and Barring Service	David Gibson-Lee of counsel instructed by Emmanuel Solicitors

DECISION OF THE UPPER TRIBUNAL

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

DBS Reference: 00973298737
Decision letter: 17 July 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

A. History and background

1. On 17 July 2022, DBS included JA in the children's barred list and the adults' barred list on the basis of a finding that:

> On 21 January 2022, you slept on shift during your waking night shift, leaving service users in your care without support for up to 1 hour.

2. Upper Tribunal Judge Jacobs gave JA permission to appeal to the Upper Tribunal following an oral hearing of her application. He did so on two grounds:

> 5. I have given permission on two grounds.
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> 6. The first ground is an issue of law. Given that the facts as found by DBS were a one-off event in a career in caring, was it disproportionate to decide that it was appropriate to include JA in the barred lists?
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> 7. The second ground is an issue of fact. What did happen on the night of 21 January 2022? This will require JA to prove a mistake. Whatever may be the position when DBS makes a decision, JA has the burden on appeal of proving that there was a mistake in DBS's finding of fact. I make that point in view of a submission made by her counsel at the hearing.
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> 8. There is what purports to be a record of a telephone meeting between JA and her manager on 21 January 2022 (pages 90-92). JA has accused the manager of making up at least parts of what she is recorded as saying. Mr Gibson-Lee appreciates the difficulty in persuading the Upper Tribunal of that.
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> 9. JA does not recall sleeping, but accepts she may have dozed off briefly. She also challenges some aspects of the subsidiary facts on matters like her clothing and her intention to sleep on duty. These may have some relevance to the first ground of appeal and her credibility in giving oral evidence will be important in deciding whether DBS made a mistake of fact.

We have limited ourselves to those grounds as required by the decision of the Court of Appeal in *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982 at [97].

B. Section 4 SVGA

3. This section 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–
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> …
>
> (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.

…

C. Mistake in findings of fact (section 4(2)(b))

4. We begin with ground 2 (mistake of fact) and then deal with ground 1 in the light of our conclusions.

How we directed ourselves in law

5. We have dealt with section 4(2)(b) in accordance with the decision of the Presidential Panel of the Upper Tribunal in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC). That decision has been approved by the Court of Appeal in: *JHB*; *Kihembo v Disclosure and Barring Service* [2023] EWCA Civ 1547 at [26]; and *Disclosure and Barring Service v RI* [2024] EWCA Civ 95, which explains the limited scope of the actual decision in *JHB*. In particular, we have taken account of the following points.

6. A mistake of fact must be material to the outcome: *PF* at [8], [12] and [51(b)].

7. The Upper Tribunal is entitled to hear oral evidence: *JHB* at [95]. JA gave evidence in answer to questions from Mr Gibson-Lee, under cross-examination by Mr Serr, and in response to questions from the panel. The hearing lasted for half a day.

8. With regard to DBS's specialist expertise, we took the approach that the nature of the evidence and the findings that we had to make 'cannot be considered a matter of "specialist judgment relating to the risk to the public" engaging the DBS's expertise.' *RI* at [31]. The position is different when we come to mistake of law under section 4(2)(a).

Why we have found that DBS did not make a material mistake of fact

9. JA worked for the same employer as a social care worker from 2017 to 2022. Her formal duties are set out at page 135. By January 2022, she had settled into a pattern of working two night shifts a week providing care for two residents who shared a facility. They were provided with 24 hour care. Each had a separate bedroom. There was also an office, a kitchen and a conservatory. There were two carers on duty overnight, from 10pm to 7am. One was on a sleeping shift, meaning that they could sleep but were on call to help the other carer if necessary. The other was on a waking shift, meaning that they were awake. This carer was required to check on the residents hourly after they had gone to bed and to send an hourly email to the employer's office. They were also required to perform domestic chores during the course of their shift at their discretion. They carried an alarm that would sound if either of the residents left their room. There was a policy to help ensure that the waking carer kept alert, such as drinking coffee. Those facts are not in dispute.

10. JA was scheduled to work a waking night shift on 20-21 January 2022. Her manager and deputy manager arrived unannounced. This is their report of the visit, with some tidying of spelling and punctuation:

> [The managers] arrived outside the property at approximately 02:12am. [They] opened the door using the spare keys. The office door was locked and it was quiet, the hallway was dirty. As we approached the lounge (conservatory) the door was closed and the light was switched off. We found JA was sleeping and heater on and she was wearing her Pyjama and covered the sofa with bed sheet and throw.
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> JA jumped up and she was shocked by seeing us and she was saying she just dozed off for a little. [One manager] went to check the service users. AN was awake and he was walking around in his room, while MC was in bed and vocalising a bit.
>
> We asked JA to go home. Then she took her belongings and left the premises at 2:17am.

11. We accept JA's evidence that the clothing she wore on the shift were the ones shown in the photographs on pages 100-102 and the ones she wore to the hearing. They consisted of trousers/leggings, a top and a shawl. DBS has followed the managers by calling the trousers and top 'pyjamas' and the shawl a 'throw'. JA said that they were not. It can be difficult to distinguish between night wear, loungers, and leisure wear. They are often made of the same kind of material and can be used interchangeably. The clothing we saw could fit any of those labels. In our view, the precise label is not material. JA was wearing clothing that was loose, warm and comfortable. It may not have been designed specifically for sleeping in, but it could be worn for that purpose.

12. The managers said, and DBS found, that JA had been sleeping. She denied this, saying that she had just dozed off. That is what she told the managers and she used the same language in evidence to us. As we understood her evidence, she accepted that she was asleep when the managers arrived, but denied that this had been intentional.

13. Leaving aside her intention for the moment, we find that JA created the conditions that would make sleep more likely. She had brought coffee with her, but had not drunk any. She was wearing comfortable, warm clothing. She had heating on in the conservatory, which was in darkness. She told us that the conservatory was cold and needed heating. She also told us that she had turned out the light so that anyone who could see into the conservatory would not know that she was a woman alone. Both those points are sensible, but form just one part of the package of conditions over which she had control.

14. When she was interviewed by her employer (pages 157-158), JA said that she had taken Codeine to ease her knee pain and this must have knocked her out. At the hearing, she qualified this by saying 'possibly' the medication had caused her to nod off. We have no medical evidence about the effects of Codeine, but JA said at interview that she always took Codeine; on that basis, this would have been an isolated reaction. At the hearing, she told us that she only used Codeine when the pain was excruciating. The best we can make of JA's evidence about the Codeine is that it may have contributed to her dozing off, but she does not definitely say that it did. This is only relevant as one factor in the assessment of whether JA intended to settle down to sleep, as DBS found (decision letter towards the bottom of page 113).

15. Whether JA intended to sleep can only be found by inference. Taking account of the evidence as a whole, we consider that it is more likely than not that she did. She was an experienced night worker and she knew that she had to stay awake. Despite that, and despite her explanation for individual things she did, in totality she was setting the conditions in which she would be able to sleep. She should have been aware of that, but still she took not a single step that would help her stay awake. She did everything conducive to sleep and nothing to avoid it.

16. Even if JA had not intentionally settled down to sleep, we do not consider that that would undermine DBS's core finding. The fact is that she did sleep and that she set the conditions in which that could happen, despite being under a duty to stay awake. That should have been apparent to her. It would have taken only a minor change to protect herself from falling asleep. Just by way of an example, she could have drunk some of the coffee she had brought with her.

17. DBS found that she had left the residents 'without support for up to 1 hour.' JA told us that both residents were in their rooms by 1am, and the managers arrived at 02:12 am. The precise length of time is not material and DBS has only made a finding about the maximum time. It allows time for JA to settle once she was on her own. There is no evidence that would allow us to be more precise or, to put it in legal terms, no basis on which we could find that this part of the finding was mistaken.

18. We have not taken account of JA's accusation that the managers were biased against her on account of a dispute about her leave over Christmas and that at least parts of the interview at pages 157-158 had been made up. JA did not rely on these matters in her evidence to us. If we were to take account of them, it would not have helped JA to show a mistake of fact.

D. Mistake on a point of law (section 4(2)(a))

19. Mr Gibson-Lee argued that it was disproportionate to include JA in the barred lists. If the decision was disproportionate, that would be a mistake on a point of law

under section 4(2)(a): see the decisions of the Administrative Court in *R (Royal College of Nursing) v Secretary of State for the Home Department* at [104] and the Court of Appeal in *B v Independent Safeguarding Authority* [2013] 1 WLR 308 at [14].

20. We have approached this issue in accordance with *B*. It is not for us to make our own assessment of appropriateness. Our role is to decide if DBS's decision was disproportionate and thereby in error of law. Unlike our approach to section 4(2)(b), we have taken into account that the judgment of appropriateness does engage DBS's specialist role under the legislation. We have also taken account of the fact that we have found no mistake in the findings of fact that formed the basis for DBS's decision.

21. Mr Gibson-Lee referred us to the decision of the Medical Practitioners Tribunal in the case of Dr Thomas Herbst, an anaesthetist who had fallen sleep while in charge of an anaesthetised patient in an operating theatre. The tribunal imposed a suspension for six months. That decision is not binding on us and Mr Gibson-Lee did not suggest it was. We have not found it useful in making our decision. Although there is some similarity on the facts, that tribunal was applying different principles under a different statutory regime.

22. DBS made a short assessment of JA's human rights:

> Consideration has been given to the effects a bar would have on JA human rights and right to a private life under Article 8 of the European Convention of Human rights. It is acknowledged that a bar on both lists would significantly reduce her employment opportunities in a sector that she has worked in for a long period of time and this could have a significant impact upon her earning potential and standard of living.
>
> It is also acknowledged that the barred lists, whilst not made public, have a negative stigma associated with them and this could have a further negative impact against her.
>
> However, there are no other safeguards in place and we are satisfied that a bar is a necessary and proportionate safeguarding measure.

23. Those reasons are sketchy, but they convey the essence of the matter. We consider that DBS made a proper assessment of JA's Convention right under Article 8. This was the only occasion on which JA had fallen asleep on duty. She had been subject to numerous spot checks in the past and had always been awake at the time of the visits, although she told us that it was usual for the managers to ring the door bell. In those circumstances, it may seem harsh to ban her from any work in regulated activity with children and vulnerable adults. But the legislation allows only two options: to bar or not to bar. Unlike other regulators, DBS has no power to suspend a care worker for a period or to impose conditions on her working in the sector.

24. When JA fell asleep, it was not just something that could have happened to anyone. She did not suddenly find herself overcome by illness or fatigue. She was not exhausted after a long run of night shifts. She was not inexperienced at adjusting to staying awake throughout the night. She was a seasoned night worker, she knew it was her responsibility to stay awake, and she had her own experience as well as her employer's policy to rely on to help her remain watchful. Although she could call on her fellow carer, it was her duty to ask for help. Her co-worker was entitled to sleep and was not responsible for overseeing or checking on JA. JA was the first line of protection

for the residents should anything happen. Despite that, she set herself up to fail without taking even the simple precaution of having a mug of coffee to keep her awake. In those circumstances, we consider that it was proportionate for DBS to exercise its protective role as it did and include her in the lists.

Authorised for issue
on 27 February 2024

Edward Jacobs
Upper Tribunal Judge
Josephine Heggie
Elizabeth Stuart-Cole
Members