IN THE UPPER TRIBUNAL **Appeal No. UA-2024-000046-V**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 442 (AAC)**

On appeal from a decision of the Disclosure and Barring Service

Between:

SS

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: 31 October 2024

Representation:
Appellant: Mr Christopher Hamlet of counsel
Respondent: Mr Robert Cohen of counsel

ANONYMITY ORDER

On 27 July 2024, the Upper Tribunal made the following order, which remains in force:

> "Pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, and for the reasons the DBS gives in its letter of 25 July 2024, the tribunal grants the application and prohibits the disclosure or publication of: A. The name of the following individuals OR B. Any matter likely to lead members of the public to identify any of them: SS [SG], [SM], [SC], [LB], [IH], [BO], [VG].
> In this Order the Upper Tribunal has granted anonymity to the individuals listed above. Any breach of this Order is liable to be treated as a contempt of court and punished accordingly (see section 25 of the Tribunals, Courts and Enforcement Act 2007).".

Where there are initials in square brackets in that order, the names were given in the order. But those are not reproduced here since this decision will be published.

DECISION

The decision of the Upper Tribunal is to remit this matter to the DBS to make a fresh decision.

REASONS FOR DECISION

A summary of the Upper Tribunal's decision

Introductory matters

1. This is the Appellant's appeal dated 22 January 2024 against the Disclosure and Barring Service's final decision, dated 23 October 2023, 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 31 October 2024. The Appellant attended in person and was represented by Mr Hamlet of counsel. Mr Cohen 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 SS in order to preserve her privacy and anonymity. For that same reason, we continue the rule 14 Orders included at the head of this decision made by UT Registrar Kerr on 29 July 2024. 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. The Applicant is a Registered Nurse who, in July 2022, was employed at a Care Home which is part of BUPA Care Services [the 'Care Home'].

5. At 02.30 on 14 July 2022, during an unannounced night visit to the Care Home, the Applicant was found in a recliner chair, with blankets over her and apparently asleep, at a time she was supposed to be on duty. Two other staff members were located elsewhere in a similar state, also apparently asleep. Further investigation identified that repositioning charts had been pre-completed until 06.30 that morning, suggesting that residents had been repositioned when they had not.

6. An investigation report by BUPA, dated 23 August 2022, concluded that the Applicant had been asleep whilst on duty and that she had falsified records. A

subsequent disciplinary hearing on 6 September 2022 reached the same conclusions and terminated the Applicant's employment for gross misconduct, effective from 14 September 2022.

7. On 7 November 2022, an Appeal of that decision was considered. The grounds raised by the Applicant were, essentially, that the Dismissing Officer had:

(a) failed to take adequate account of her evidence that she was not, in fact, asleep as alleged;

(b) failed to take adequate account of her candour in admitting from the outset that she had pre-populated the records in question;

(c) failed to take adequate account of her unblemished career with BUPA of over 10 years;

(d) pre-judged the outcome of the appeal; and

(e) failed to give adequate consideration to a lesser sanction.

(f) None of the grounds of appeal were upheld.

Permission to Appeal

8. The threshold for a grant of permission to appeal is one of "arguability" only. That is a relatively low bar. On 18 April 2024 UT Judge Church was satisfied that the Applicant's case cleared that bar and that a grant of permission to proceed to a substantive appeal was warranted so that these issues could be aired at an oral hearing. His grant of permission extends to each of the grounds argued in the Grounds of Appeal document produced by Mr Christopher Hamlet of counsel dated 19 January 2024.

The evidence

9. We had a 186-page bundle and additional bundle of evidence, a 201-page Authorities Bundle and a skeleton Argument from both the Appellant and Respondent. The Appellant did not give 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 8 and 9) or the risk of harm they pose now and for the future (paragraph 10). 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 8 and 9 of Schedule 3 to the 2006 Act deal with behaviour or "relevant conduct" in relation to vulnerable 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:

15. The case of *PF,* as confirmed by the Court of Appeal in *DBS v RI* represents the law. 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).

16. Any mistake of fact must be material to the decision.

17. 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.

18. 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.

19. 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."

20. 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.

21. 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."

22. 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.

23. 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)".

24. 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 paragraph 102).

DBS referrals, investigation and decision to bar

25. On 17 August 2023, the Applicant received notification from the Respondent that it was minded to include her in the Adults' and Children's barred lists. On 12 October 2023, the Applicant provided written representations in respect of that. It made reference to, inter alia, her 16 year unblemished career in nursing, 11 of which were with BUPA as well as:

(a) Her continuation of employment as a registered nurse, without further concerns, after her dismissal from BUPA;

(b) Her passion for nursing and commitment to providing high quality care;

(c) A sincere, unreserved apology to the residents of the Care Home, their relatives, her colleagues, BUPA, her professional body and to the public at large;

(d) An acknowledgement of personal responsibility for the conduct that led to her dismissal and the impact on patient care;

(e) A commitment to learn from the matter, to reflect, and to prevent a recurrence;

(f) Gaps in her practice having remedied;

(g) There being no risk of repetition;

(h) The disproportionate impact on her personally and professionally of a barring decision.

26. On 23 October 2023, the Respondent issued a Final Decision letter to the Applicant, confirming that she was to be included indefinitely on the Children's and Adults' Barred Lists. The crux of the DBS decision was as follows:

> "DBS is satisfied you engaged in relevant conduct in relation to vulnerable adults. This is because you have engaged in conduct which endangered a vulnerable adult or was likely to endanger a vulnerable adult. It is also considered that you have engaged in relevant conduct in relation to children, specifically conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him or her.

We are satisfied a barring decision is appropriate. This is because we are satisfied [that your actions involved] not ensuring that the residents in your care received appropriate care and supervision. We are satisfied that this behaviour endangered a number of vulnerable adults and as such that it would represent relevant conduct.

Your behaviour was assessed and this raised concerns about irresponsibility and lack of empathy, your representations were then considered alongside the existing case information as follows: Whilst it is acknowledged that during your disciplinary hearing you apologised for your behaviour, we are satisfied that you did not ensure that routine checks and re-positioning of immobile service users was carried out as required, either by yourself or the two care assistants you were responsible for supervising, or that it was accurately recorded. We are satisfied that many charts and notes were pre-filled ahead of time, collected up for staff convenience and left stacked insecurely on a trolley, we are also satisfied that you had indicated that this was your usual working method on night shift. We are satisfied that you left immobile service users, some of whom were unable to buzz for assistance, completely unattended by taking a break at the same time as you knew the other two staff on duty were doing the same. During this period all three of you had prepared chairs with bedding and were stated to be asleep in darkened rooms, with the doors shut, when an unannounced night visit occurred. Further concerns were raised that you stated you would assume everything was OK unless a resident used their call buzzer and as such would not routinely check upon them. Following your representations it is acknowledged you had worked for BUPA for 11 years before this incident without prior referral to DBS, however, due to this experience you would have been fully aware that such behaviour was unacceptable as it endangers service users. Whilst you inform that you have continued working in the health sector without concerns being raised, you have provided no documentary evidence of this. It is also acknowledged that you state you have reflected upon your practice, including how you would manage things differently in the future, however, other than referring in a general manner to patient-centred practice you have provided no insight into what these changes might look like. As such we are satisfied that you had failed to fulfil the responsibilities of your role as the nurse in charge, and it is likely you would again cut corners for convenience in any future regulated activity roles. As such our concerns remain about irresponsibility. Whilst we are satisfied that you did not intend to cause harm to the vulnerable adult residents in your care, we are also satisfied that you gave little regard to the emotional and physical experiences of residents, some of whom appear to have been unable to turn themselves or call for assistance. We are satisfied that you gave a higher priority to making the shift easier for yourself and your colleagues, than you did to the needs of the residents. We are also satisfied that you placed a higher priority upon paperwork having the appearance of being fully completed, than upon the accuracy of that paperwork and were either unable or unwilling to understand or elaborate upon the potential consequences of it being pre-filled or inaccurate. It is acknowledged that within your representations, you offer unreserved apologies to all concerned for your behaviour and that you say you now know that patient safety is paramount in all circumstances, however, we are satisfied that your representations do little to demonstrate an understanding of the lived experience of the vulnerable adults whom were effectively left unsupported whilst you, and the colleagues you were responsible for supervising, slept. The pre-filling of paperwork further emphasises the deliberate nature of your disregard for their welfare. As such we are satisfied that you were willing to overlook the feelings of the residents for your own convenience, and concerns remain regarding a lack of empathy for others.

If you were to be afforded a further regulated activity role with vulnerable adults, you would always be expected to ensure that those adults were provided with the

required level of care to keep them safe and comfortable. However, we are satisfied that in this role you failed to meet these needs for frail, elderly residents, failed to properly account for care given or not given, and also allowed staff under your supervision to do the same. We are satisfied that this behaviour endangered those vulnerable adults and as such would represent relevant conduct for Adults. We are satisfied that this was done for staff convenience and without empathy for the impact upon the vulnerable adults, and concerns remain that you are likely to repeat similar behaviour. As such we are satisfied that it is appropriate to include you on the Adults' Barred List. Whilst this behaviour was not against or in relation to a child, in any regulated activity role with children you would be required to ensure that service users receive all the recommended support and supervision, and that this is properly documented. We are satisfied that in this role you did not do so, and that this was for the convenience of yourself and other staff. As such concerns remain that it is likely to be repeated, given the opportunity. If such or similar behaviour, were to be repeated against or in relation to a child it could cause harm to or endanger that child and as such we are satisfied that it would represent relevant conduct for Children also. As such we are satisfied that it is appropriate to include you on the Children's Barred List."

The Appellant's case and Submissions

27. We did not hear from the Appellant.

28. Although the Applicant disputes the factual finding that she was asleep at the relevant time, as opposed to merely resting, that decision is not the subject of this appeal. It is recognised that that was a finding reasonably open to the BUPA disciplinary committee and, by extension, to the DBS, on the evidence received.

29. This appeal is founded, however, on the basis that DBS erred in law by failing to take any, or adequate, account of the features set out in the Applicant's representations, (summarised at paragraph 25 above) in determining the outcome. In doing so, it reached a decision that was disproportionate and unfair.

30. Specific issue is taken with the following features of the decision:

(a) The central conclusion that the conduct was 'likely' to be repeated. There was no evidence, or findings made, by the BUPA investigators to support the conclusion that this was part of a wider pattern of behaviour by the Applicant such that it presented a real risk of being repeated. Her dismissal was founded on the isolated finding of misconduct on 14 July 2022;

(b) The reference to the Applicant's early apology without any consequential analysis of its significance to, inter alia, her insight and the risk of repetition;

(c) The reference to the Applicant's long and unblemished record, without any acknowledgement of the fact that this characterised the conduct in question as isolated, outwith her usual practice and the impact this had on the risk of repetition. Instead, her long experience was factored in only as an aggravating feature on the basis that she "would have been fully aware that such behaviour was unacceptable";

(d) The absence of any consideration of whether the public interest lay in retaining the services of an otherwise valued and experienced professional;

(e) The fact that no weight appeared to be placed on the Applicant's submission that she had worked successfully since her dismissal, without further concerns being raised, because she "provided no documentary evidence of this". This rationale was wrong and unfair and placed an improper evidential burden on the Applicant to prove a negative;

(f) The reference to the Applicant's reflections on the matter, for which no credit appears to have been given. They were deemed to be inadequate, without setting out clearly what ought to have been done or said to show 'good' insight, before concluding that she was 'likely' to cut corners in future;

(g) The recognition that the Applicant did not intend to cause harm to the residents in question, without distinguishing this from cases where intentional harm is present, or attempting to analyse the significance of that as regards the overall seriousness of the case and the risk of repetition;

(h) The reference to the Applicant's unreserved apologies in her written representation, without any reference to its relevance to insight or any exploration of the impact of that on the risk of repetition;

(i) The lazy assumption that the conduct in question, which was confined to her role in the Care Home, would likely be repeated in the context of the care of children.

31. In summary, it is submitted that the Respondent failed to conduct an effective and fair analysis of the facts of the case. In doing so, its decision to place the Applicant on the Children's and Adult's barred lists was unreasonable, irrational and disproportionate.

32. Though the conduct in question was undoubtedly serious and led, quite justifiably, to the Applicant's dismissal by BUPA, it was an isolated incident in an otherwise unblemished and lengthy career. It is submitted that it was neither necessary nor in the public interest to place an indefinite bar on further practice with children and adults, with the inevitable consequences that has on the Applicant personally and professionally.

The DBS case and submissions

33. SS's appeal is replete with disagreement and challenge to the DBS's assessment of the risk she poses and the need for her to be included on the barred list at all. These are challenges which amount to an invitation to the Tribunal to 'merely review the evidence that was before the DBS and come to different conclusions'. Such an invitation is expressly one that the Tribunal ought to decline (see RI).

34. It is not correct to characterise the DBS's conclusion that there was a risk of the misconduct being repeated as a mistake of fact. By definition, such a conclusion is not looking to the past and seeking to determine, as a matter of fact, what has happened. Rather it is looking to the future and making a judgment or evaluation as to what is likely to occur. It follows that this point is an attempt by SS to challenge the evaluation of risk made by DBS as opposed to a finding of fact.

35. The core of SS's appeal is to point to the apology, the length of her service, and other aspects of her conduct since the incident and to allege that these matters were not given due weight. But this submission is not correct. There are several elements to this.

36. First, as a matter-of-fact DBS considered each of these points. The decision twice referred to SS's apology and recognised its relevance. The decision letter also expressly referred to the length of SS's employment, her previous good character, and her ongoing work in the health sector. In other words, DBS was aware of SS's representations on these matters and gave them due weight.

37. Second, DBS was entitled to reach a judgment that the apology showed limited insight into the lived experience of vulnerable adults and that it was insufficient to mitigate the risk of repetition. The fact that an apology has been made may be relevant to risk but cannot be viewed as a 'trump card' which expunges DBS evaluation of risk.

38. Third, DBS' conclusion on the length of SS's service was properly open to it. It concluded that this was equally capable of meaning that SS ought to have known how inappropriate her actions were. It follows that SS has not shown an error of fact or law in relation to the apology of SS's length of service. In truth the height of her objection is as to the conclusions that DBS reached as to future risk, which are not properly before the Tribunal.

39. Fourth, DBS were aware of SS's contention that she 'ha[s] continued working in the health sector without concerns being raised] but noted that SS, 'ha[d] provided no documentary evidence of this'. In the circumstances of this case this was sufficient to address SS's submissions. There was clear evidence of relevant conduct, clear evidence of a lack of insight, and clear evidence that the risk subsisted. The fact that that risk had not come to fruition in a short period between SS being dismissed and a barring decision being made did not alter this conclusion.

40. Fifth, DBS was aware of SS's reflections, apology, and lack of intent to harm residents. All of these matters of fact were acknowledged and considered in favour of SS. In that respect there was no error of fact in respect of any of them. Instead, SS seeks to encourage the Tribunal to consider the DBS's evaluation of these factors and to urge a different evaluation onto the Tribunal. This is not open to SS in this appeal. Moreover, DBS's conclusions were plainly properly open to it.

41. A consideration of the public interest is inherent in decisions of this type. The whole purpose of the DBS is to represent the public interest in ensuring the protection of the most vulnerable in society. More strikingly, SS cannot show a mistake of fact or law in the DBS's analysis of risk. Having found a risk to vulnerable adults and children, the public interest militated in favour of a barring decision. This was self-evident.

42. Finally, the DBS did not make an assumption (still less a lazy one) about SS's risk to children. Rather, DBS considered the nature of the misconduct that SS had committed and evaluated how that misconduct (if repeated) would affect children. DBS properly concluded that the nature of SS's misconduct was such that it would pose a real risk to children. Its conclusions in this respect were lawful.

43. The DBS conclusion is that the appeal should be dismissed. However, if, contrary to DBS's position, the UT concludes that there was a material error of fact or law and is minded to uphold the appeal:

(a) DBS's position would be that the matter ought to be remitted to DBS for it to make a fresh decision. The UT has no jurisdiction to remove unless there is no remaining basis upon which DBS could lawfully bar (see *AB v DBS*).

(b) Upon such remittal, DBS's position would be that the UT ought to make an order that the Appellant's name be retained on the Adults' Barred List and Children's Barred List pending a fresh decision on remittal. The findings made by DBS are serious and there is a clear safeguarding risk.

44. In the event the UT is considering upholding the appeal and remitting to DBS with the Appellant's name removed from the ABL/CBL in the interim, the UT is invited to provide its factual findings to the parties and invite submissions on the issue, so that submissions can be made on the basis of any relevant factual findings of the UT, before a conclusive decision be made by the UT on whether to remove the Appellant from the CBL/ABL.

Conclusion of the Tribunal on the appeal

45. Looking at the 9 grounds of appeal as set out at paragraph 30 above, we make the following findings:

46. In relation to Ground A, that the DBS concluded that the conduct was likely to be repeated and this was a mistake of fact, we find that in falsifying the records SS appears to have been acting out of character because previous concerns were not dishonest but more behavioural. We note that dishonesty is attitudinal in nature.

47. We did not hear from SS but would like to have done so. Because we did not hear what she had to say, our decision has to be based on the reading of the papers. It would have helped us to have heard her express remorse and to ascertain whether SS had any in-depth insight into her actions as well as understand whether she had any insight into what might have been the consequences of her behaviour.

48. The DBS have said that the conduct was likely to have been repeated. We are unclear as to how high or low the bar of "likely" should be set. Is it based on the premise that past behaviour is the best indicator of future behaviour or could it be said that it is less likely that she would repeat the actions because she has been found out?

49. We find it difficult to understand why or identify on what evidence the DBS are basing their conclusion upon. If it is the one single incident reported incident, we concluded that it is hardly likely to create propensity. There has been no repeat

incident and there was no prior incident, either of which would be needed to reach a conclusion of “likely”.

50. The falsifying of records does concern us, and that she said she had populated the record in advance to make it easier, we do not regard as a good defence. It is possible that she will never do it again as we note that she has not denied it and admitted it straight away.

51. If the DBS are relying on what SS said in her evidence that the practice of populating records in advance was done regularly, the evidence was actually contradictory. There was no evidence before the DBS from any source other than SS’s one comment, which was later contradicted by her. In trying to ascertain how the DBS came to the conclusion that it was ”likely to be repeated” we could find no evidence to support that assertion and are satisfied that this means there has been a material mistake of fact.

52. Ground B is that the DBS failed to consider that SS’s apology meant that it was less likely that she would act in this manner again. Following from the conclusions we have reached in relation to the first ground of appeal we note that there was an immediate admission and also note that it is unusual for someone in such a situation to admit it. We can find no evidence that the DBS have taken into consideration the apology when weighing their determination about the likelihood of repetition. This is a mistake of fact.

53. Ground C states that the DBS failed to give weight to her long and unblemished record. This point is a two-edged sword. On the positive side there is the point that she has been nursing for a long time without a problem. However, it can also be said that, given that she has been a nurse for 11 years, she would know what was wrong in what she did. We also note that there have been concerns in the past that her record is not entirely unblemished but again these concerns are not quantified or specified.

54. Ground D is that the public interest was not considered. We believe that there are two elements to public interest. There is the need for the public to have confidence in the nurses being professional and appropriate but there is also the public interest in not losing an effective and hitherto safe nurse practitioner given the shortage. We question whether there is actually a need for the DBS to consider public interest at all. We dismiss this ground of appeal.

55. Ground E is that no weight was given to the suggestion that SS had worked without issue since the incident. Unfortunately given that we did not hear from SS, we had no objective evidence in the bundle to rely upon apart from this assertion. As we have said before we would have benefited from hearing from her. We dismiss this ground of appeal.

56. Ground F states that the DBS did not give SS credit for her reflections on the matter. It is correct that the DBS did not give her credit for her reflections but we are unclear whether they have a duty to do so in any event. It is correct that we did not hear of her remorse and we had limited evidence of her insight. It would have helped, for example, for SS to have given us examples of what she had learned. For example, by doing X, the positive outcome was Y and by not doing A, the positive outcome was

B. This point lacks substance and needs to be evidence based, which it was not and so we dismiss this ground of appeal.

57. Ground G is that the DBS recognised that she had not intended harm to residents but did not give this due weight. If SS had intended to do what she did, that would have been a far different matter with different considerations and paths to be taken. We question what weight the DBS should give to this. It cannot be that a lack of intention means it outweighs all the other considerations and issues and consequently there should be no listing. Paragraphs 9 and 10 of Schedule 2 of the 2006 Act does not require 'intention', just that the person's conduct endangers a vulnerable adult. This ground of appeal is dismissed.

58. Ground H is that the DBS failed to consider the relevance of SS's apology to the future risk she could pose. An apology does not ameliorate risk. The only way to ameliorate risk is to have insight and understanding, which needs to be evidenced. By not hearing from SS we did not have that available to us. We dismiss this ground of appeal.

59. Ground I is that there was 'lazy assumption' that the conduct would be repeated towards children. The problem with this ground is that although SS has not worked with children and only worked with adults, it is always possible that her next job could be working with children, especially if she was barred from working with adults. Her failings are not age specific but more context specific and are attitudinal. If SS was to work in an environment with children who needed overnight nursing care it could be relevant to consider the risk that her failings might have posed. We dismiss this ground of appeal.

Disposal

60. We have come to the conclusion that some of the grounds of appeal have no merit and have dismissed them. However, we have also identified some mistakes of fact for the reasons set out above.

61. That being so, we thought about whether the mistakes of fact we have identified are such that they completely undermine the decision so that no other outcome but removal from the lists is permissible following our decision. We do not reach that conclusion. Whilst these mistakes of fact have been found as they are material to the ultimate decision, we have come to the conclusion that we will remit this matter to the DBS to make a fresh decision but direct that SS's name be retained on both the Adults' and Children's Barred Lists whilst that decision is taken.

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 29 December 2024