Appeal No. UA-2024-000498-V
[2025] UKUT 029 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

JH

Appellant

- v -

DISCLOSURE AND BARRING SERVICE

Respondent

Before: Upper Tribunal Judge Stout, Tribunal Member Stuart-Cole and Tribunal Member Hutchinson
Hearing date(s): 9 December 2024
Mode of hearing: By video (CVP)

Representation:
Appellant: Mr Yates (trade union representative)
Respondent: Mr Lewis (counsel)

On appeal from:
DBS ID number: P0007J5YF9N
Customer Ref: 01011825323
Decision Date: 5 January 2024

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify: (i) the appellant in these proceedings; (ii) any other individual identified in the evidence before the Tribunal in these proceedings; and (iii) the name of the pre-school at which the appellant worked. This order does not apply to any person exercising statutory (including judicial) functions where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

SUMMARY OF DECISION

SAFEGUARDING VULNERABLE GROUPS (65)

The Disclosure and Barring Service (DBS) included the appellant on the children's barred list because it considered that, while working as an early years practitioner at a preschool, the appellant pulled a 4-year-old child by the hair in response to him pulling her hair. The Upper Tribunal finds that there was no mistake of law or fact in the decision of the Disclosure and Barring Service and confirms the decision.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of DBS is confirmed.

REASONS FOR DECISION

Introduction

1. The appellant appeals under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA 2006) against the decision of the Disclosure and Barring Service (DBS) of 5 January 2024 including her in the children's barred list pursuant to paragraph 3 of Schedule 3 to the SVGA 2006. DBS had considered it appropriate and proportionate to include the appellant on the barred list in the light of its conclusion that, while working as an early years practitioner at a preschool, the appellant pulled a 4-year-old child by the hair in response to him pulling her hair.

2. The judge granted permission to appeal in a decision sent to the parties on 24 June 2024, the material part of which was as follows:-

> 15. In this case, the appellant was included on the barred list because DBS concluded that she had pulled a four-year-old child's hair in response to the child pulling her hair. DBS considered there was a risk that she would in future "be likely to make poor choices or struggle to cope with certain behaviours, resulting in acting in a way that would be harmful to children, with a lack of regard for this impact". DBS's assessment of future risk appears to have been based not simply on the hair pulling but on various remarks that it was satisfied she had made to other staff, including expressing frustration about the lack of 'consequences' for children at the school and saying "what else was I supposed to do" when challenged about it.
>
> 16. The appellant denies the incident and the remarks. She appeals on the grounds set out in the grounds of appeal. Using the statutory language, the appellant appears to me to be raising grounds based principally on mistake of fact.
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> 17. However, she also raises arguments that may be categorised as errors of law (essentially procedural errors) in terms of reliance by DBS on anonymous witness statements, hearsay, failure to obtain CCTV evidence and failure to deal with her representations as to the reasons why staff members may have made up allegations against her.
>
> 18. The appellant also, as I read the grounds of appeal, argues that the barring decision was disproportionate given that "there has been no previous or subsequent issue with [her] performance that would demonstrate a pattern of concerns to appropriately justify a decision". That should be regarded a separate error of law ground.

> 19. All of the appellant's grounds seem to me to be reasonably arguable. There is, it seems to me, a realistic prospect that the Upper Tribunal, after hearing/receiving evidence, will conclude that DBS made a mistake in some aspect of the material facts and/or that the Upper Tribunal will consider the decision to bar was disproportionate in this case.

3. The structure of this decision is as follows:-

Rule 14 Order

4. The reasons for the Rule 14 Order are set out in an Annex to this decision.

Background

5. The appellant was born in November 1989 and was aged 33 at the time of the incident ("the hair incident") that led DBS to make the barring decision in her case. She had been employed as an early years practitioner at a pre-school for two months when she was dismissed on 23 June 2023 as a result of the incident. She had previously worked as a teaching assistant at a school for four years with no safeguarding concerns raised. The pre-school referred her to DBS.

6. The pre-school provided DBS with the evidence it had obtained as part of its internal disciplinary investigation, together with certain further information in answer to the standard questions in the referral form.

7. The pre-school described the appellant's role as being to care for children aged 0-5 years, supporting their physical and emotional wellbeing (including hygiene/nappy-changing) and supervising children during their play and scaffolding their learning.

8. The pre-school included eight anonymous witness statements that had been considered as part of the disciplinary investigation. In summary, the witnesses gave the following evidence about events of 14 June 2023:

    a. Witness MN (Witness Statement 1) reported a conversation with the appellant before the hair incident in which the witness said that the appellant had expressed frustration because "these children have no

consequences to their actions; they get told off and do the same things over and over again". Witness MN responded that there were consequences, that the pre-school 'used timers' and also that the heat makes the children 'feral'. The appellant responded that the heat was 'just an excuse'.

b. Witness LBD (Witness Statement 2) described another encounter with the appellant before the hair incident (focused on a child who became upset about painting/not being allowed to paint under the appellant's supervision). Witness LBD described the appellant expressing frustration at the children not having consequences to their actions, the heat being an 'excuse' and the children being 'feral'.

c. Witness LC (Witness Statement 3) reported Witness LBD coming to speak to her about the appellant following the events described in Witness LBD's statement and Witness LC and LBD then meeting with the appellant to emphasise that she needed to follow the pre-school's behaviour policy.

d. Witness MN gave a second statement (Witness Statement 4) describing being in a classroom "with a clear view of outside". She said she overheard the appellant talking to a child ("A"), mentioning that Child A had pulled her hair and the appellant "explained to him that it hurt then said 'here feel' and took his hat off pulling a clump of hair on the right side of his head towards the back". Child A then came inside and Witness AL asked him if he would take his hat off because he was inside and was touching his head. Witness AL asked Child A if he was ok and if he had hurt his head. Child A said that he had and pointed to the appellant saying 'she did it'.

e. Witness AL (Witness Statement 5) described coming back into the classroom after dealing with other children, when Witness MN came up to her and asked to borrow a pen for a blue form. Child A came up looking worried and Witness MN asked Witness 5 to check his head for any marks. Witness AL said to Child A 'it's too hot for your hat inside, can I take it off?'. He replied 'yes', Witness AL asked him if his head was okay. Child A said 'no'. Witness AL asked 'where?'. Child A pointed to top right. Witness AL looked and said 'it's not red what happened?'. Child A "immediately and quickly turned pointing to [the appellant] saying in a cross voice 'SHE PULLED MY HAIR'". Witness AL asked why and Child A replied that he 'didn't know'.

f. Witness EB (Witness Statement 6) described Witness MN coming to her with a disclosure form stating that she had witnessed the appellant pulling Child A's hair. Witness EB read the form out to Witness LC and after speaking to Witness MN they decided they needed to start an investigation and asked the appellant to come to the office. Witness EB reports the appellant as becoming "very defensive stating 'no I didn't hurt

him; I tugged his hair to explain when it wasn't nice. But I didn't pull it and hurt him'. She says that the appellant then demonstrated 'tugging' a piece of her own hair and saying "He was pulling my hair, what was I supposed to do?". Witness LC then asked "so if he had hit you would you hit him back?", to which the appellant replied "no of course not I wouldn't do that". Witness EB then describes the appellant becoming teary and saying "I know how this goes, if you are going to fire me just fire me, I'd rather just know". The appellant was then suspended while an investigation took place.

g. Witness LC (Witness Statement 7) then gave a second statement (numbered 7 in the documents) which deals with the same meeting as Witness EB describes.

h. Witness KN (Witness Statement 8) describes speaking to the appellant after the hair incident, having found the appellant on the floor in the rainbow room kitchen with her head in her hands. Witness KN asked if she was ok and says the appellant said "I've fucked up, I've fucked up big time" and explained "[Child A] was pulling my hair, I asked him to stop over and over. I explained it hurts. I then said how would you like it if I pulled your hair. Then pulled the front part of his hair".

9. At 4.48pm on 14 June 2023, the appellant emailed Witness LC as follows (sic):

> I wanted to sincerely say I didn't mean any harm at all and I appreciate and respect that the following procedure needs to take place.
>
> I can honestly say that I would never hurt or harm a child and did not inflict harm to the young person whom made the allegation however I take full responsibility and acknowledge my error.
>
> I'm deeply sorry and really hope to have a second chance as I honestly didn't mean any harm at all.
>
> I'm so so sorry.

10. The pre-school contacted the Local Authority Designated Officer (LADO) and, following a meeting with the LADO, invited the appellant to a disciplinary meeting on 22 June 2023. The appellant was provided with the anonymous staff statements in advance of that meeting. She did not attend the meeting.

11. Following that meeting, the pre-school decided to dismiss the appellant on notice and she was informed of that by letter of 23 June 2023. The pre-school then referred the appellant to DBS. In the referral, the pre-school identified the discussion between Witness LC, Witness LBD and the appellant earlier in the day on 14 June as being "previous misconduct, disciplinary action or complaints". The pre-school categorised the hair incident as harm or risk of harm to a child and added the information that Child A was generally "very shy" and that he "came in the next day very very quiet but came out of himself when he saw [the appellant]

was not present but later flinched when a member of the team tried to touch his head as he had toothpaste in it".

12. DBS sent the appellant an early warning letter on 22 July 2023 and a 'minded to bar' letter on 20 November 2023. The appellant made representations in response to that letter on 20 December 2023. In her representations, the appellant denied pulling Child A's hair. She said that the evidence of this consisted solely of the unreliable testimony of a four-year-old and "hearsay" evidence in the statements of staff. She questioned why there was no CCTV evidence as this would show that she did not interact inappropriately with a child. She complained that the witness statements used had been anonymous and that that this was not fair to her as she did not know who had given evidence and there could have been collusion. She set out detailed criticisms of the statements, noting in particular what she said was an inconsistency about whether Child A had has hat on or off when he came into the classroom after the hair incident. Regarding the evidence of Witnesses EB and LC about her meeting with them on the day, she denied that the conversation had gone into detail and "I certainly did not indicate that I had pulled or tugged a child's hair and did not give a demonstration of this". She denied speaking to Witness KN at all. She closed her representations by stating "Someone within the school decided to orchestrate a campaign against me and the school endorsed that campaign presumably because I had been critical, albeit in a measured and constructive way, about some aspects of the school's organisation".

13. The appellant also in her representations stated that she had "enjoyed a career in early years education spanning 6 years so far and have received positive references from all my previous employers", including for work she did with children with additional physical, social, emotional and mental health issues.

DBS's decision

14. In accordance with its usual practice, the decision-maker at DBS recorded the evidence, the appellant's representations and their thinking in relation to the appellant's case in detail in its Barring Decision Summary document. This has been provided to the appellant as part of these appeal proceedings but was not provided to the appellant prior to her commencing the appeal.

15. In its final decision letter of 5 January 2024, DBS stated that it had decided it was appropriate and proportionate to include the appellant on the children's barred list. DBS explained that it was satisfied that whilst working as an early years practitioner at a pre-school, the appellant pulled a four-year-old child by the hair in response to him pulling her hair. DBS stated it was satisfied that this was relevant conduct in relation to a child because the conduct endangered or was likely to endanger a child, causing physical and emotional harm.

16. DBS rejected the appellant's denials that this had occurred because it was satisfied that there was sufficient witness evidence that the incident had occurred,

and that there was no reason to doubt the credibility of the witnesses, including Child A, despite the arguments that the appellant had raised.

17. Regarding the alleged inconsistency as to Child A's hat, DBS stated that it was reasonable to conclude that Child A put this back on after the appellant pulled his hair and before entering the classroom. DBS explained that it found the witness statements credible, given their number and consistency and the fact that the appellant had not provided any detail as to poor relationships with staff members.

18. DBS explained that it was concerned that despite her employment experience, the appellant had displayed poor coping skills and frustration on the day in question, and that she had shown a lack of empathy through failing to recognise that the heat would make children more tired and grumpy and by pulling Child A's hair.

19. DBS acknowledged that a barring decision would prevent the appellant from working in her chosen profession and would significantly limit her employment opportunities and have financial implications, as well as causing personal stigma which could impact on her wellbeing. However, DBS stated that it was satisfied that the risk she posed to children was sufficient to make it appropriate and proportionate to include her on the children's barred list.

Legal framework

Relevant legal framework for DBS's decision

20. The appellant in this case was included on the children's barred list using DBS's powers in paragraph 3 of Schedule 3 to the SVGA 2006.

21. Under those paragraphs, subject to the right to make representations, DBS must include a person on the relevant list if (in summary and in so far as relevant to the present appeal):

    a. The person has engaged in conduct which endangers or is likely to endanger a child or vulnerable adult (Sch 3, paragraph 3 and paragraph 9);

    b. The person has been or might in future be engaged in regulated activity in relation to children; and,

    c. DBS is satisfied that it is appropriate to include them in the relevant list.

22. "Endangers" means (in summary) that the conduct harms or might harm the child: see Schedule 3, paragraphs 4(4).

23. A person included in a barred list may apply for a review of their inclusion after the prescribed minimum period of 10 years (paragraph 18), or at any time on the basis of new information, a change in circumstances or an error (paragraph 18A).

The Upper Tribunal's jurisdiction on appeal

24. An appeal to the Upper Tribunal under section 4 of the SVGA 2006 lies only on grounds that DBS has, in deciding to include a person on a list or in refusing to remove a person from a list on review, made a mistake: (a) on any point of law; or (b) in any material finding of fact (cf s 4(2)).

25. If the Upper Tribunal finds that DBS has not made a mistake of law or fact it must confirm the decision: SVGA 2006, section 4(5). If the Upper Tribunal finds that DBS has made a mistake of law or fact, it must either direct DBS to remove the person from the list or remit the matter to DBS for a new decision: section 4(6). If the Upper Tribunal remits a matter to DBS then the Upper Tribunal may set out any findings of fact which it has made on which DBS must base its new decision and the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise: section 4(7).

26. There is no right of appeal against the DBS's exercise of discretion as to whether it is appropriate to include an individual on a barred list (or to refuse to remove them), since the statute provides 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 (s 4(3)).

27. A mistake of fact is a finding of fact that is, on the balance of probabilities, wrong in the light of any evidence that was available to the DBS or is put before the Upper Tribunal; a finding of fact is not wrong merely because the Upper Tribunal would have made different findings, but neither is the Upper Tribunal restricted to considering only whether DBS's findings of fact are reasonable; the Upper Tribunal is entitled to evaluate all the evidence itself to decide whether DBS has made a mistake (see generally *PF v DBS* [2020] UKUT 256 (AAC), as subsequently approved in *DBS v JHB* [2023] EWCA Civ 982 at [71]-[89] per Laing LJ, giving the judgment of the Court and *DBS v RI* [2024] EWCA Civ 95 at [28]-[37] per Bean LJ and at [49]-[51]). A finding of fact may be made by inference (*JHB*, ibid, [88]), but facts must be distinguished from "value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness [of including the person on the barred list]": *AB v DBS* [2021] EWCA Civ 1575, [2022] 1 WLR 1002 at [55] per Lewis LJ (giving the judgment of the court).

28. A mistake of law includes making an error of legal principle, failure to take into account relevant matters, taking into account irrelevant matters, material unfairness and failure to give adequate reasons for a decision. (See generally *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[11].) On ordinary administrative law principles, accordingly, "an allegation of unreasonableness has to be a *Wednesbury* rationality challenge, i.e. that the decision is perverse" (*Khakh v ISA* [2013] EWCA Civ 1341 at [18]).

29. However, a mistake of law also includes making a decision to include a person a barred list that is disproportionate or otherwise in breach of that individual's rights under Article 8 of the European Convention on Human Rights (ECHR). In this

case, DBS has drawn our attention to three recent decisions of the Upper Tribunal where at first blush it appears that divergent approaches have been taken to the issue of proportionality (*KB v DBS* [2021] UKUT 325, at [130]-[135], panel chaired by Judge Jones; *WW v DBS* [2023] UKUT 241 (AAC), at [55], panel chaired by Judge Wikeley; and *NV v DBS* [2024] UKUT 42, at [38], panel chaired by Judge Wright). A three-judge panel of the Upper Tribunal was accordingly convened earlier this month to consider the proper approach to the question of proportionality in appeals against DBS decisions in the case of *KS v DBS* (UA-2024-000839-V). It has not, however, been suggested that we should stay consideration of this case pending that decision, and we do not consider it necessary to do so.

30. Pending the decision in *KS*, it seems to us (and the parties agree) that we should in this case continue to apply the approach laid down by the Court of Appeal in *ISA v SB* [2012] EWCA Civ 977, [2013] 1 WLR 308, which was approved and followed by the Court of Appeal in *DBS v Harvey* [2013] EWCA Civ 180. This was also the approach recently taken by the Upper Tribunal chaired by Judge Brunner KC in *MFAG v DBS* [2024] UKUT 330 (AAC) at [24]-[27] (also there referring to the decision of the Court of Appeal in *Dalston Projects and ors v Secretary of State for Transport* [2024] EWCA Civ 172).

31. Those authorities make clear that the question of whether a decision is disproportionate, and thus incompatible with an individual's Convention right, is a question for the Upper Tribunal itself to decide. In addressing that question, this Tribunal must give due weight to the views of DBS given its role as the primary statutory decision-maker, a role that is reinforced by the statutory prescription in section 4(3) that the question of whether it is appropriate for someone to be included in a list is not itself a question of fact or law in this context. However, it is ultimately for the Upper Tribunal to determine whether the inclusion of a person on a barred list is or is not proportionate and compatible with their Convention rights in the light of all the evidence that is before us, at least insofar as that evidence relates to circumstances at the time that DBS made its decision.

The appellant's evidence at this hearing

32. The appellant produced a witness statement for the purpose of this hearing. She confirmed the truth of that statement on affirmation and was questioned by Mr Lewis for DBS and also by the Tribunal. We do not attempt to set out all of her evidence here, although we have taken full account of it.

33. In her witness statement, the appellant gave a detailed account of the hair incident with Child A. She stated that Child A had continued pulling her hair despite being asked to stop three times because he was hurting her, but he continued to pull her hair. She then said that: "I gently touched the back of his head to illustrate what it would feel like if someone touched his hair, without pulling or causing discomfort. At no point did I actually pull [Child A's] hair".

34. She described how Child A had then, in effect, falsely accused her. She said that during the meeting on 14 June 2023 (prior to being suspended) she had

"demonstrated my actions to show that I had not yanked, pulled, or inflicted any harm on the child".

35. She included several paragraphs in her witness statement detailing what she considered to be poor practice on the part of the pre-school and other staff at the pre-school and arguing that the pre-school's treatment of her was unfair in comparison. She argued that the statements of MN, LBD and LC were evidence of staff being upset by her having raised concerns about poor practice at the pre-school and suggested that this may be why witnesses had turned against her.

36. She also stated that she now accepted that there was no CCTV coverage of the area where the hair incident took place.

37. She also gave further evidence about her good employment record.

38. In oral evidence, she clarified that her experience in education was really four years spread over six years with gaps and that her previous work as a teaching assistant had been mostly with older children so that she had only just over a year of experience in early years in total.

39. Mr Lewis put to the appellant that although the statements were anonymous it was actually clear to her who each person was. She agreed that she was able to identify the witnesses and agreed with counsel as to the names of the authors of each of the eight anonymous witness statements.

40. When specific parts of the witness statements were put to her, she broadly agreed with what each witness had said, even where that conflicted with the representations she had made to DBS or what she had put in her witness statement. Thus, she accepted that she had said to MN that she was frustrated with the children's behaviour and that her conversation with MN had gone broadly as MN described, although in her representations to DBS the appellant had said that she did not recall this conversation.

41. The appellant accepted LBD's statement as being broadly accurate although in her representations she had described this as "heavily embellished". She did not accept that she had said to LBD anything about there being no consequences for the children or that the children were 'feral'.

42. She said that the meeting with LBD and LC was more a discussion about policy, that LC was fine with the way she had handled everything and at the end of the meeting "everything was fine and all sorted", although in her representations to DBS she had said that it was her intention to raise the setting's behaviour policy for discussion later as a staff team, suggesting that at the time she had not thought "everything was fine and all sorted" but, rather, that there was a problem with the school's behaviour policy that needed addressing.

43. The appellant accepted that the setting's policy was that physical intervention was not to be used unless necessary to prevent injury to self or others.

44. The appellant agreed that Child A was very shy, but that he became more outgoing with her.

45. She accepted that when Child A was tugging her hair that it hurt, that she tried to persuade him to stop and that this was the type of thing she had been frustrated about earlier in the day, i.e. children not stopping and there being no consequences. She insisted that she merely touched his hair and insisted that she would never intentionally harm a child. She denied losing her patience or taking the child's hat off. She denied having poor problem-solving, coping and empathy skills.

46. She could not comment on what MN and AL had or had not been able to see or hear or what Child A had said to them afterwards. She agreed that the blue form obtained by MN was an injury form.

47. She accepted, as she had in her witness statement, but as she had denied in her representations, that in the conversation with EB she had demonstrated what she had done with Child A's hair, albeit that she disagreed with the way that EB and LC described this in their statements, emphasising again that all she did was to gently touch Child A's hair.

48. Although in her representations she had denied speaking to KN, in oral evidence the appellant accepted that she had and that she had said she had "fucked up big time". She explained her reaction to us saying: "there was a lot going on then, I was thinking of my home situation, my financial situation, there was a lot of emotions going on in that kitchen". She denied saying that she had pulled Child A's hair, reiterating that she had just touched his hair.

49. It was suggested to the appellant that her email of 14 June was more consistent with her having pulled Child A's hair than just touched it. She did not accept this. She said that she was not denying that the incident happened, but there was no harm done to the child.

50. She said she did not attend the disciplinary meeting because she was advised not to.

51. She said that she now works as a receptionist in a medical practice and has been in that job for about three months. This was the first job she had had since her dismissal by the pre-school. There had been a period she could not work because of a back operation.

52. When asked by Mr Lewis, the appellant said that she did not think she had done anything wrong. She had just touched Child A's hair and she had apologised for it immediately. She said that maybe "use of profanity was not the best way to express it" and that she "should have taken adequate time to calm down" but she "did not harm an individual and … never would, so the process of how things was handled was not fair or just".

Submissions

53. The parties' counsel had both submitted written skeleton arguments and both made oral closing submissions. We are grateful to them for their assistance and intend no disservice in not setting out their arguments here. We deal with the main points of their submissions as part of our consideration of the grounds of appeal below.

Our decision on the appeal

Mistake of fact?

54. We have considered first whether there was any material mistake of fact in the decision of DBS.

55. So far as the hair incident itself is concerned, we are satisfied that there was no error. The witness statements obtained by the employer provided sufficient evidence that the incident occurred as the employer and DBS concluded it had. The evidence of other staff was not "hearsay". Each member of staff provided direct evidence of what they had individually witnessed, albeit that evidence was for the most part circumstantial evidence rather than direct evidence of the incident. However, MN personally witnessed the hair-pulling by the appellant. The appellant was not in a position to gainsay what MN was able to see or hear from where she was standing. Strong support for the incident having occurred as described by MN is then provided by AL having witnessed Child A's immediate reaction to it and his accusation against the appellant. The evidence of EB and LC as to the appellant's recounting of the incident immediately afterwards and their description of the appellant's demonstration of what she had done as involving 'tugging' Child A's hair also provides strong support for MN's account of what happened.

56. We do not find the appellant's denial of the incident credible. She has not been consistent in her account. Her grounds of appeal to the Upper Tribunal were broadly in line with her representations to DBS. Notably, it was not until her witness statement in these proceedings that she provided her account of having touched Child A's hair. The impression gained from her representations to DBS and her grounds of appeal to this Tribunal was that she denied the whole incident, although on reflection we can see that her denial was specific to the allegation of 'pulling' Child A's hair. There were also multiple other inconsistencies between her evidence to this Tribunal and the account she gave to DBS in her representations, as we have indicated above when recording her evidence to us, during the course of which these inconsistencies were put to her by counsel. It will be noted that we have not recorded above her responses to these inconsistencies being put to her, but that is because she did not make any specific response that in any way explained the inconsistency.

57. We acknowledge that memory is fallible and that the inconsistencies may not have arisen as a result of any deliberate untruthfulness on the part of the appellant, but we do find that the inconsistencies render her evidence unreliable.

58. In contrast, we can find no reason not to accept the evidence of the pre-school's witnesses. The appellant's suggestion that these witnesses were acting in retribution for her having criticised policy at the pre-school has no merit in our judgment. The fact that the appellant has added further criticisms of the pre-school in her witness statement than she included in her representations to DBS underscores for us that this is after-the-event reconstruction on the appellant's part.

59. In any event, the documentary evidence as a whole is consistent and plausible in a way that points firmly away from corruption or conspiracy. The 'anonymous' witness statements are evidently written by different people in different 'voices' (and we have in the bundle some of the witness statements in their original handwritten format). They attest to events in terms that are broadly consistent, but with minor differences of detail in the accounts of the sort that tends to indicate authenticity rather than conspiracy. This is most clear in the accounts of MN and AL of the hair incident and its aftermath where MN does not recount having asked AL to help with the blue form or by checking with Child A is all right, whereas AL's account is fuller. Likewise, EB and LC's accounts of the meeting in the office after the incident are similar but different in ways that indicate authenticity.

60. Further, the appellant's own email of 14 June 2023 is much more what would be expected if the appellant had pulled Child A's hair and knew she had been seen doing it, than if all she had done was to lightly touch his hair. If the latter was really what happened, we would have expected to see something of that account in the email.

61. We therefore find that DBS did not make any mistake of fact about the hair incident. Like DBS, we find that the appellant pulled Child A's hair hard enough to hurt him. Moreover, that was, we find, what she intended to do as she was trying to demonstrate to him how it hurts someone else if you pull their hair.

62. We then consider whether DBS was also right to find as facts that the appellant lacks coping skills and lacks empathy. We find that DBS was not mistaken in these respects either. In making those findings, DBS relied on the background and circumstantial evidence from the pre-school as to the appellant's frustration earlier in the day, her concerns that the children lacked consequences, and her refusal to accept the effect that the heat had on the children. In relation to all these matters, we find that it was open to DBS to rely on the pre-school's statements. We, too, accept that evidence, much of which was accepted by the appellant in cross-examination anyway. To the extent that it was not, we prefer the written statements of the pre-school staff to the appellant's evidence for the much the same reasons that we rejected her evidence in relation to the core allegation of hair-pulling. We have not found the appellant to be a reliable witness, while the 'anonymous' witness statements all seem to us to be plausible, credible and corroborative of each other.

63. We agree with DBS that the hair incident itself demonstrates that the appellant lacks coping skills and empathy. The evidence of the appellant's expressed frustrations earlier in the day and lack of empathy with the children in relation to the heat contribute to this picture. The appellant's explanation to us in oral evidence that her concern on the day when speaking to KN after the incident was not the hurt that had been caused to Child A but her own personal and financial circumstances underscored for us her lack of empathy.

64. We add that we do not consider there is anything in the appellant's allegations of misconduct or poor practice and the pre-school generally, or her complaints of unfair treatment, that has any bearing on the matters we have to decide. We have not found her to be a reliable witness so we would not be minded in any event to accept her allegations against other staff without corroborating evidence, but even if she were right that there was misconduct and poor practice by others at the pre-school, in this context two wrongs do not make a right. If she really has concerns, she should report them to the appropriate authorities, but what she says can have no bearing on our factual findings about what happened in her case. The question of whether she was dealt with fairly by her employer is also not directly relevant to the issue we have to decide. We are not an Employment Tribunal deciding whether she was unfairly dismissed. Our task is to decide whether DBS has or has not erred in law or fact in including her on the barred list. As a matter of fact, we do not consider that the appellant was dealt with unfairly by her employer: the only real potential source of unfairness was that witness statements were anonymised, but as it is apparent that the appellant could actually tell who each witness was, in practice she was not disadvantaged. There was certainly no unfairness that had a material affect on the quality or reliability of the evidence on which DBS based its decision, and on which we base ours.

Mistake of law? - Proportionality

65. Finally, we consider whether DBS's decision was proportionate. We are satisfied that it was and that the decision to include her on the children's barred list is not an unlawful interference with her rights under Article 8 of the ECHR.

66. We start by recognising that a barring decision is a draconian sanction. It prevents the appellant from undertaking a wide variety of work, for which she has training and experience, and prevents her undertaking it potentially for life (although she may apply for a review in 10 years). It carries with it a significant stigma, lessened only marginally by the fact that the list itself is not accessible to the general public only to employers on a 'need to know' basis. However, it is right also to note that in the appellant's case the effect of the barring decision has not been as harsh as it is for some. She is relatively young, she had done other types of work before and she has been able to find alternative work since.

67. Against the effect on the appellant, we consider the legitimate public interest in protecting children from those who may work with them. In this respect, we note that the appellant's conduct in pulling Child A's hair is at the lower end of seriousness in terms of its potential for harm. However, it is by no means

inconsequential. This was deliberate infliction of physical pain in order to teach a child a lesson and Child A complained of pain immediately. There is evidence that, as one would expect, it caused emotional harm to Child A, the effects of which lasted at least into the following day.

68. If the appellant had demonstrated insight and remorse and undertaking training or counselling to address her response to the situation, we might have been persuaded that a barring decision was disproportionate. However, the appellant has maintained her denial of the incident. She has shown no insight at all. She still thinks she did nothing wrong. The circumstantial evidence as to events of 14 June 2023 indicated a lack of empathy and coping skills as already noted and her evidence to us has reinforced those findings. In short, we are satisfied that the appellant does pose a risk of harm to children that is significant enough in principle to warrant barring her in order to protect them.

69. We also take into account also that DBS's view, which was not based on any mistake of fact, was that it was appropriate and proportionate to bar the appellant. We give due weight to that view. We share it. In our judgment, the decision to bar the appellant is justified. There is no other means by which the legitimate aim of protecting children may reasonably be achieved in this case. Dismissal by her employer is not sufficient as she may find alternative work with children despite that. There is also no other regulator to whom the appellant is answerable that can prevent her from working with children. Given the appellant's range of work experience, it is reasonable to assume that she might, if not barred, seek to work with children in other contexts. The interference with the appellant's Article 8 rights is therefore justified and proportionate given the legitimate aim pursued.

Conclusion

70. As there is no mistake of law or fact in the decision of DBS, we confirm the decision of DBS. The appellant must remain included on the children's barred list. The appeal is dismissed.

Upper Tribunal Judge Stout
Tribunal Member Stuart-Cole
Tribunal Member Hutchinson

Authorised by the Judge for issue on 22 January 2025

Annex: Anonymity: Rule 14 Order

1. A Rule 14 Order had previously been made by an Upper Tribunal Registrar covering the names of every person identified in the bundle in these proceedings, including the appellant, other staff and children. At the start of the hearing, we asked the parties if they wished these orders to remain in place and also to apply to our judgment. They confirmed that they did. They further confirmed that they considered the name of the pre-school should also be anonymised so as to prevent 'jigsaw identification'.

2. In the light of the parties' positions, we have considered whether it is appropriate to continue the Rule 14 orders made by the Registrar and to extend them as requested by the parties. We bear in mind that we should not order a restriction on publication simply because both parties seek it: see *X v Z Ltd* [1998] ICR 43, CA.

3. In this case, we were satisfied that the private interests of the appellant, and also other individuals (staff and children) named in the papers, were such that it was appropriate to protect those interests by anonymising them at the hearing and in this judgment pursuant to a Rule 14 Order. Our reasons for so concluding are as follows.

4. Open justice means that justice must not only be done, it must be seen to be done. In *Cape Intermediate Holdings Limited v Dring* [2019] UKSC 38, [2020] AC 629 the Supreme Court explained the purpose of the principle as follows:

> "42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the ways in which courts decide cases – to hold the judges to account the decisions they make and to enable the public to have confidence that they are doing their job properly. …
>
> 43. …the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases".

5. Article 6(1) of the European Convention on Human Rights (ECHR) provides that: "Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of…" and then a series of reasons are listed, including: "the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice".

6. Numerous cases have emphasised the link between open justice and the right under Article 10 of the European Convention of Human Rights to freedom of expression and have provided guidance on the nature of that right, including stressing the importance of names to the exercise of that freedom (see, in particular, *Khuja v Times Newspapers Limited and ors* [2017] UKSC 49, [2019] AC 161 at [14]-[30]). Section 12(4) of the Human Rights Act 1998 (HRA 1998) requires the Court to have "particular regard to the importance of the Convention right to freedom of expression" when considering whether to make any order that

might affect the exercise of that right. This is not a case in respect of which there has been any press interest, nor does any seem likely; that does not affect the principles we have to apply, but it does mean there is no one who can realistically be notified as a 'respondent' to this application for the purposes of section 12(2) of the HRA 1998.

7. An order anonymising someone who would otherwise be named in court proceedings is an interference with the principle of open justice. As Lord Reed JSC described in *A v BBC* [2015] AC 588 at [23]: "It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy…In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny".

8. Ordinarily, it is said that it is not unreasonable to regard a person who brings proceedings as having accepted the normal incidences of their public nature, including the potential embarrassment and reputational damage inherent in being involved in litigation: see *TYU v ILA SPA Ltd* [2022] ICR 287 at [44] *per* Heather Williams QC (sitting as she then was as a Deputy High Court Judge). However, the same is evidently not true of other people named in the proceedings but who have otherwise had no involvement in the proceedings. As Williams J notes later in that paragraph, that is a factor that has been accepted in the authorities as being relevant to the question of whether they should be anonymised.

9. In this particular jurisdiction, the considerations are somewhat different to those in the authorities we have mentioned, because this is an appeal in relation to the appellant's inclusion on the barred lists, the statutory scheme for which provides for the identity of those on the lists to be kept confidential and only revealed by DBS to those with a legitimate interest in knowing. Generally, that just means prospective employers, as the Divisional Court (Flaux LJ and Lewis J) explained in *R (SXM) v DBS* [2020] EWHC 624 (Admin), [2020] 1 WLR 3259. However, that case was a judicial review brought by someone who claimed to be the victim of sexual abuse who wanted to be informed by DBS whether the alleged perpetrator had been included on the barred list. The Divisional Court held that DBS had acted lawfully in refusing to disclose that information. It is, of course, not possible to tell from the judgment in *SXM* whether the alleged perpetrator had appealed to the Upper Tribunal or not, since that fact would itself have conveyed to the claimant in that case that the alleged perpetrator had been included on the barred list. It is, though, relevant for us to take into account that not anonymising an appellant in an appeal to the Upper Tribunal goes 'against the grain' of the legislative scheme as it was recognised to be by the Divisional Court in *SXM*.

10. We also consider that, in the context of appeals against DBS decisions, the emphasis that courts and tribunals in other contexts place on it being reasonable to assume that someone who litigates accepts the incidence of publicity that comes with that should perhaps be given less weight. That is because the legislative scheme gives those who are subject to it an expectation that they will not be publicly named and because the right of appeal to the Upper Tribunal is

an essential element of that same legislative scheme. The hearing before the Upper Tribunal in DBS cases is the "fair and public hearing … by an independent and impartial tribunal" with "full jurisdiction" which secures that the barring scheme under the SVGA 2006 is compliant with Article 6 of the European Convention on Human Rights. A decision to place someone on a barred list (or not to remove them) is a determination of an individual's civil right to practise their profession and to work with children/vulnerable adults: see *R (G) v Governors of X School* [2011] UKSC 30, [2012] 1 AC 167 at [33]. Although in that case the Supreme Court rejected the argument that Article 6 applied at the earlier stage of the employer's internal disciplinary proceedings, the Court proceeded on the assumption that Article 6 did apply to the decision-making of DBS's predecessor, the Independent Safeguarding Authority (ISA), and that, as such, the availability of an appeal to the Upper Tribunal as a court of "full jurisdiction" ensured the scheme as a whole was compliant with Article 6: see [84] *per* Lord Dyson, [94] *per* Lord Hope and [101] *per* Lord Brown. It is therefore important that an appellant should not be deterred from exercising their appeal rights by the fact that an appeal to the Upper Tribunal might bring with it publicity from which they are otherwise protected under the statutory scheme.

11. In this particular case, we are satisfied that the appellant's right to privacy under Article 8 of the European Convention on Human Rights is engaged as the issues in the case are capable of significantly affecting her personal life and reputation, although the appellant has in fact been able to obtain alternative employment as a dental receptionist notwithstanding being placed on the barred list, so the impact on her of publicity would not be so great as in some cases. We also place limited weight on the appellant's Article 8 rights because she has not provided any evidence of the impact on her of publicity, beyond bare assertions that she wishes for privacy. However, revealing the appellant's name would represent a significant departure from the statutory scheme that was evidently intended by Parliament to strike the appropriate balance between public interest and private rights in this context as explained in *SXM*. As we have noted, although it is often said that a claimant implicitly accepts publicity by commencing legal proceedings, it is hard to see why someone who exercises their statutory right to appeal DBS's decision should be deprived of the privacy they would otherwise have enjoyed if they had not appealed but accepted the barring. There is also no particular public interest in anyone knowing the appellant's name in this case beyond the important general principle of open justice. In this case, the principle of open justice is very nearly as well served by the public hearing and the publishing of this judgment without names as it would be with names.

12. We are therefore satisfied that the appropriate balance in this case between the principle of open justice, Article 10 and the appellant's Article 8 rights, is for the hearing and judgment to be public, but for the appellant to be anonymised.

13. For anonymity to be achieved in practice in this case, it seems to us that this means the name of the pre-school in which the appellant worked must also not be made public as this was a relatively provision and we consider there is a high risk of the appellant being identified if the pre-school is identified. It also means in our judgment that the names of other individuals in the case should be

anonymised as publishing the names of multiple individuals who all worked at the same time in the same place would in our judgment bring a risk of 'jigsaw identification'.

14. However, we are also satisfied that the other individuals in the case require anonymisation in their own right. Their Article 8 rights are also engaged. It may be said that the state (this Tribunal included) has a responsibility to protect the privacy of the children involved. As to other staff members, their personal reputations are not engaged to the same degree as the appellant's, but some of them have been the subject of argument and allegations as to their professionalism or credibility. The proceedings relate to matters that occurred at their work some time ago which those involved would have had no reason to think would become public. These other staff members have not been involved in these proceedings, are probably unaware of the proceedings and have had no opportunity to answer any allegations made against them in these proceedings. These are all relevant factors as the *TYU* case makes clear. There is a real risk of unfairness to these staff members if their names are made public, and revealing their names would do little in this case to further the principle of open justice as their identities are not important to the facts of the case.

15. All these factors mean that, even absent the considerations about the appellant, we would have made Rule 14 orders requiring the staff members and service users referred to in these proceedings to be anonymised.