CW v Disclosure and Barring Service
[2024] UKUT 19 (AAC)

IN THE UPPER TRIBUNAL **Appeal No.UA-2022-001203-V**
ADMINISTRATIVE APPEALS CHAMBER

Pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Upper Tribunal has ordered that the disclosure of any matter likely to lead members of the public to identify LAL, AN, BM or EL (full names on page 128 of the Upper Tribunal bundle), is prohibited.

The order applies to all parties to these proceedings. Failure to comply may lead to contempt of court proceedings.

Between:

CW

Appellant

- v –

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Citron, Ms Reid and Dr Stuart-Cole

Decided following an oral hearing on the CVP video hearing platform on 13 December 2023

Representation:

Appellant: Nicola Moore of counsel, instructed by NASUWT Legal Department
Respondent: Bronia Hartley of counsel, instructed by DLA Piper

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the Respondent made on 25 May 2022 (reference DBS6191 00956179999) to include CW in the children's barred list is confirmed.

REASONS FOR DECISION

This appeal

1. This is an appeal against the decision (the "**decision**") of the Respondent ("**DBS**") dated 25 May 2022 to include CW in the children's barred list. **The decision**
2. The decision was made under paragraph 3 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (the "**Act**"). This provides that DBS must include a person in the children's barred list if
    a. it is satisfied that the person has engaged in relevant conduct,
    b. it has reason to believe that the person is, or has been, or might in the future be, engaged in regulated activity relating to children, and
    c. it is satisfied that it is appropriate to include the person in the list.
3. Under paragraph 4, "relevant conduct" for the purposes of paragraph 3 includes, amongst other things, conduct which endangers a child or is likely to endanger a child; and a person's conduct "endangers" a child if he (amongst other things)
    a. harms a child or
    b. causes a child to be harmed
    c. puts a child at risk of harm or
    d. attempts to harm a child.
4. The letter conveying the decision (the "**decision letter**"):
    i. stated that DBS was satisfied that CW engaged in relevant conduct in relation to children, as it was satisfied that CW, whilst working as a supply teacher in primary schools
        a. on 11 May 2021, whilst teaching a Year 6 class,
            i. hit a pupil ("**P**") across the wrist with CW's pen
            ii. dropped a book on P's arm; and
            iii. pushed P on the top of the head causing her to be seated when she tried to sit up;
        b. on an unspecified date in 2019, grabbed a child by their jumper, scratched him and pushed him into a classroom; and

c. on an unspecified date in November 2019, refused to let a child go to the toilet and the child wet himself

(in what follows, these three incidents are referred to as, respectively, the "**May 2021 incident**", the "**2019 incident**" and the "**November 2019 incident**");

ii. gave reasons why DBS was satisfied that a barring decision was appropriate. In this section further facts were found:

a. regarding the May 2021 incident:

i. CW's behaviour caused P to cry in his classroom;

ii. P informed her mother later that day

iii. another child stated that they were scared when CW came round to look at their work as they did not want what happened to P to happen to them

iv. CW appeared to have created a fearful class and as such caused emotional harm to more than one child through his behaviour on that day

v. the Year 4 children in the school were afraid of CW and this was why CW was moved to the Year 6 class;

b. CW appeared to have caused at least three children emotional and physical harm;

iii. stated that DBS was satisfied that CW

a. was callous and lacked empathy with children

b. was irresponsible in his behaviour as he had not taken responsibility for what had been proven to him; CW had not demonstrated any understanding of the harm caused or the potential for harm in these situations

c. had poor coping skills: when shown any challenging behaviour or difficult situations, he resorted to physical "abuse", be that pushing a child back into their seat with his hand or manhandling them into a classroom having pulled at their jumper. This type of poor coping skills had the potential to lead to significant harm and DBS was satisfied that this is something that CW would repeat if given the opportunity.

Jurisdiction of the Upper Tribunal

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

    a. on any point of law;

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

6. The Act says that "the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact" (section 4(3)).

7. Permission to appeal was given by the Upper Tribunal in a decision issued on 15 September 2022. Upper Tribunal Judge Hemingway expressed his reasons for giving permission to appeal, as follows:

> "The DBS has made three clear factual findings as set out in 3 bullet points in the [decision] letter. It seems to me these can only be characterised as findings which it has made and on which the decision (to include in the relevant list) is based. I am persuaded that with respect to those matters, it is reasonably arguable that the DBS has made a mistake. That, of itself, justifies a grant of permission. The DBS has then gone on to state the appellant caused children "emotional and physical harm"; "created a fearful class"; and demonstrated "poor coping skills". If the findings set out in the bullet points were mistaken ones, then it seems to follow or may follow that these additional findings (if they are to be characterised as findings) were mistaken too. In any event, I am unclear as to whether there was evidence to support the apparent conclusion that emotional and physical harm had actually been caused. Further, even if there was no mistake in any finding of fact, it is arguable that placement on the list was disproportionate."

Documentary evidence before the Upper Tribunal

8. In addition to the decision letter, evidence in the bundle of 131 pages included:

    a. supporting documents sent with CW's application for permission to appeal, including a Teaching Regulation Agency letter of 5 July 2022 and a number of references for CW; the Teaching Regulation Agency said it had concluded that CW's case should be closed with no further action; it determined that there was insufficient evidence to suggest serious unacceptable professional misconduct/conduct that could bring the profession into disrepute for which a prohibition order should be considered

    b. the referral of CW to DBS by the supply teacher agency that engaged him at the time of the May 2021 incident, dated 23 June 2021

    c. email from CW of 7 June 2021 (about what happened on 11 May 2021)

    d. "Position of trust meeting" minutes 20 May 2021 and 14 June 2021 (these meetings were attended by the local authority designated officer ("**LADO**"), and other local authority staff, supply agencies that engaged CW, the deputy head at the primary school of the May 2021 incident, and police)

    e. email from a police officer of 27 May 2021

    f. termination letter from a supply agency dated 22 June 2021

    g. email from a LADO dated 12 April 2019 to the supply agency engaging CW at the time (about the 2019 incident); stated that "the police investigation" had

concluded in no further action; it asked the supply agency to undertake an internal investigation into the matter and report back (with the outcome) to the LADO

h. text messages about the 2019 incident

i. text messages about the November 2019 incident

j. Information provided by West Midlands police to DBS that appeared on CW's disclosure certificate on 26 January 2022; as regards the 2019 incident; states that on 19 March 2019, a referral was received from the LADO about this incident; it says that no further action was taken in relation to the police investigation as the parents did not wish to make a formal complaint; that the internal investigation by the supply agency concluded with CW being permitted to continue work for the agency whilst being placed on a "level 2 watchlist"

k. CW's response to DBS's "minded to bar" letter, dated 10 May 2022

l. DBS's "Barring decision summary" document.

Procedural issue: application to admit witness statement from CW

9. A procedural question arose on the morning of the hearing as regards admitting a witness statement from CW. We now set out the relevant background to this issue.

10. In the case management directions for the hearing, issued by the Upper Tribunal on 28 April 2023, the parties were directed to tell the Upper Tribunal within 15 working days, amongst other things

> "what evidence, apart from documents already in the Upper Tribunal bundle, they intend to rely on at the hearing. If either party wishes to provide oral evidence at the hearing (and this would include oral evidence of the Appellant himself), they must, in addition, provide a witness statement from that person, to be received by the Upper Tribunal (and copied to the other party) no later than 25 working days after the [date on which the directions were issued]" (this was direction 3c).

11. Neither party responded to this direction, so as to indicate that they intended to rely on other evidence, or provide a witness statement. On 19 May 2023, the Upper Tribunal sent an email to the parties, noting this lack of response, and stating that if either party now wished to respond to the direction (and apply for an extension of time), they should email the Upper Tribunal forthwith. Nothing further was received to this effect from either party.

12. A hearing listed for 12 September 2023 was postponed. It was relisted for 13 December 2023.

13. On 6 December 2023 the Upper Tribunal emailed the parties as follows:

> "Judge Citron is conscious that, as the hearing in September was postponed at short notice, the parties had already filed skeleton arguments and an authorities bundle. He is also conscious that, subsequent to that postponement, the judgement of the Court of Appeal in *DBS v JHB* [2023] EWCA Civ 982 was delivered. If either party wishes to amend their skeleton argument in the light of that case, they may do so, provided that any such amendments are sent by email to the Upper Tribunal no later than 1 pm on Monday 11 December 2023."

14. On 11 December 2023 at 11.21 am the Upper Tribunal received an email from CW's representative as follows: "I am writing to confirm that we will not be making any

amendments to the skeleton, however, [CW] does wish to provide evidence on the matters."

15. At 4.41 pm on the same day, the Upper Tribunal emailed CW's representative, as follows:

> "Your email of 11 December has been put before Judge Citron, who notes that the appellant wishes to give evidence at the hearing on 13 December. Judge Citron notes that the appellant appears not to have complied with direction 3c of the directions issued on 28 April 2023 (page 130 of the Upper Tribunal bundle). Judge Citron would like an explanation of the position from the appellant, preferably by email as soon as possible (and otherwise at the start of the hearing). If the parties can reach agreement that direction 3c should now be varied or waived, the appellant should inform the Upper Tribunal of that. Emails from the appellant to the Upper Tribunal on this should be copied to the respondent."

16. At 8.33 am on 13 December 2023 (the day of the hearing), the Upper Tribunal received an email from CW's counsel attaching a witness statement of CW dated 13 December 2023 and submissions including the following

    a. that due to full time trial court commitments it had not possible to discuss the effect of *JHB* on CW's case until 12 December 2023 at 5pm; following a conference a witness statement was drafted; any delay in providing the information "falls at the feet of counsel and not CW himself"

    b. that CW sought leave to rely on the witness statement. It went to the very heart of his appeal in relation to the DBS errors of fact. It cited [95] of *JHB*:

> "… Second, a finding may also be 'wrong' for the purposes of section 4(2)(b) if it is a finding about which the UT has heard evidence which was not before the DBS, and that new evidence shows that a finding by the DBS was wrong …"

    c. that balancing fairness and in the interests of justice the Upper Tribunal should allow the late reliance upon this evidence.

17. At the hearing, DBS's counsel was "neutral" as to whether CW should be permitted to provide the witness statement; but she submitted that, if permission were to be given, the hearing had to be adjourned to a later date, to give DBS time to consider its contents and properly prepare for a hearing (at which CW could give oral evidence and be cross examined). CW's counsel agreed with DBS that, if the witness statement were to be admitted, the hearing should be adjourned to a later date to give DBS time to consider its contents.

18. We refused CW's application. Our reasons are set below in the "Discussion" section.

CW's arguments on the appeal

19. CW's arguments in the appeal included that:

    a. there was a paucity of evidence in relation to the three incidents; and therefore, by inference, a mistake in DBS's factual finding that there had been harm suffered by the three children involved

    b. no reasonable decision making body would have concluded as DBS did; there was no critical examination of the conflicting material

    c. the mere fact that child is observed to be apprehensive, or has been crying, is not evidence of harm; harm to a child is the detrimental effect of a significant

nature on a child's physical, psychological or emotional wellbeing. Transient expressions of not liking a teacher's manner or strictness is not behaviour which harms a child

d. there was evidence of there being no safeguarding concerns concerning CW:

    1. a 17 July 2020 letter from school trust employing CW in 2013-2018: this said there had been no safeguarding or child protection concerns during this period of employment;
    2. a 21 July 2020 email from a supply agency CW worked with in May 2019 - March 2020 – this said there had been no safeguarding concerns;
    3. a 21 August 2020 email from a supply agency CW worked for, 15 November 2018 to 19 March 2020: this said there had been no safeguarding concerns (and yet this agency provided evidence to "position of trust meetings" about the 2019 incident)

e. the 2019 incident was on "unspecified date"; the LADO involved appeared to investigate the matter and find it not proved; the 2019 incident was (presumably) not proved, as (i) there was no follow up after an internal investigation by the supply agency and (ii) that supply agency said there had been no safeguarding issues

f. CW disputed what was said in DBS's "Barring decision summary" that four children witnessed the May 2021 incident; only one saw the "pen" part; another saw P being "bumped"

g. CW made arguments based on the police conclusion (in the May 2021 incident) that further police action was not appropriate or required. CW submitted that the police were uniquely placed to decide if there had been harm to children

h. there was no evidence of harm or risk of harm – hence no "relevant conduct"

i. DBS's "Barring decision summary" document states in the "Evidence evaluation outcome" section (after setting out the three allegations found proven):

    > "This appears to constitute relevant conduct for children as CW has caused children emotional and physical harm.
    >
    > A decision has been made to go straight minded to bar as CW has physically assaulted a child and there is limited information from him that would provide an efficient SJP";

    yet the "Structed judgement process" part of the document is completed as regards "Callousness/lack of empathy" (definite concerns), "Behavioural factors – self management and lifestyle" (some concerns), and "Poor problem solving/coping skills" (definite concerns).

20. During the hearing CW's counsel withdrew any arguments based on the decision being disproportionate.

DBS's arguments

21. DBS emphasised the following evidence about the May 2021 incident, in the "position of trust meeting" minutes:

    a. P was "extremely upset"

    b. P and her mother met with the head teacher at 8.45 am on 12 May 2021; the account given to the head teacher of the incident was fairly detailed

    c. the head teacher considered P a "very honest" child

    d. on 9.30 am that day (12 May 2021), the head teacher spoke to the children in the class; the minutes say that "other children within the class had witnessed the allegation against CW – hit [P] across the wrist with his pen, put his hand on [P's] head and pushed down into the chair".

    e. The following passage from the minutes:

> "[The head teacher] referred to the children that had witnessed the incident with [P] and stated that one girl said that CW 'whacked' her with his pen for talking and [P] started crying in the R.E lesson after lunch and [P] was moved and she and [another pupil] were told not to talk to her. The girl said that [P] continued to cry and CW bumped her as he moved her onto a chair and she said "ouch". She stated that another child said that they thought that CW was unkind to girls, but got on with the boys. He said that he did not want to be mean to the teacher, but he felt that it was unfair on some of the girls and thought that [P] had done lots of work, but CW was horrid to her. The pupil said that CW's tone when he spoke to [P] was really angry and then he hit her with his pen. He said that CW looked at his work and he did not want the same to happen to him that had happened to [P], e.g., being moved for pushed in the chair.
>
> [The head teacher] said that another pupil said that CW was nice to the boys and liked acting a bit silly, but did not like the girls and he was worried too and referred to CW tapping [P] on her head. Another pupil said that CW told [P] to sit down, CW pushed her and she sat down and started crying."

22. DBS emphasised that the evidence of the 2019 incident says that the child concerned gave information about the incident to the assistant head of the school; that the assistant head investigated what happened; and did so by speaking to "reliable trustworthy children".

23. As regards the November 2019 incident, DBS pointed to CW's statement in his 10 May 2022 representations that

> "When teaching I always try to encourage children to go to the toilet at break and lunchtimes to avoid disruptions to learning. However, I always ask if a child is desperate and let them go if they are. If they tell me they can wait I always remind them to ask again if they become desperate. I certainly would never refuse a child access to the toilet if they say they can't wait until the next break or lunchtime".

Discussion

Our decision not to admit CW's witness statement or allow CW to give oral evidence

24. We viewed the questions of allowing CW to provide his witness statement, and allowing him to give oral evidence at the hearing, as closely related. This is principally because, in order for us to put any meaningful weight on things stated by CW in his witness statement, we would have wanted him to give oral evidence and, in particular, to have made himself available to answer questions on his witness statement from DBS and, potentially, from the Upper Tribunal panel. This, in our view, was a matter of fairness to both parties.

25. Consonant with this, the parties at the hearing were in agreement that, if CW's witness statement were to be admitted, the hearing would have to be adjourned to a later date. This was again a matter of fairness: CW had produced a witness statement very late in the day, and it would not be fair to admit it without giving DBS the opportunity to consider it, prepare any questions for cross examination, and make submissions arising from any new relevant evidence.

26. We therefore considered whether it was fair and just, in all the circumstances, to adjourn the hearing, to allow CW's witness statement to be admitted in a way that was fair to both parties:

    a. a factor tending against adjourning was that the Upper Tribunal, in its case management directions of 28 April 2023, and again its communication with the parties on 19 May 2023, required the parties to say what additional evidence they wished to adduce, within a reasonable deadline, and there had been no response from CW. CW submitted that *JHB* affected his position on this matter; but we noted that judgement in *JHB* was released on 17 August 2023, nearly four months before the morning of the hearing, when CW first provided a witness statement; and even when the Upper Tribunal, on its own initiative, gave the parties the opportunity to amend their skeleton arguments in the light of *JHB*, on 6 December 2023, CW did not apply for permission to provide a witness statement until a week later, on the morning of the hearing;

    b. other factors pointing against adjourning included the delay to these proceedings and the knock-on effect on other proceedings before the Upper Tribunal;

    c. a factor pointing in favour of admitting, and adjourning, was enabling fuller participation by CW in the proceedings;

    d. another such factor was the possible prejudice to CW (in terms of his being able to establish that the decision involved a mistake in a finding of fact) of not admitting his witness statement; to the extent it contained fresh evidence that had not been before DBS, it might assist in showing that a factual finding, on which the decision was based, was "wrong" (as the extract from *JHB* at [95] quoted by CW's counsel, indicated);

    e. however, given the importance of complying with directions of the courts and tribunals, and the fact that the documentary evidence contained two documents with CW's views of matters (closer to the times when they occurred), we decided that the balance of fairness and justice lay with proceeding with the hearing (and therefore not admitting CW's late witness statement, as to do so (and place any evidential weight on it) would be unfair).

Our decision on the substantive appeal

27. We organise our analysis of this appeal against the decision, as follows:

    a. was there a mistake in any of DBS's three "main" factual findings (about the May 2021, 2019, and November 2019 incidents)?

    b. was there a mistake in any of DBS's other factual findings, on which it based its decision?

    c. was there a mistake on a point of law, in that "relevant conduct" had not been made out?

    d. was there any other mistake on a point of law?

28. As regards [27a] above, we are satisfied that none of the three "primary" factual findings was plainly "wrong"; all were supported by evidence; there was of course evidence pointing in the opposite direction – that the incidents did not take place – primarily, that of CW; plus, inferences that could be drawn (to the same effect) from the facts that

    a. there was no further reporting back from the supply agency about the 2019 incident, as was requested in the email from the LADO to the supply agency of 12 April 2019; or that

    b. that supply agency did not flag "safeguarding concerns" when it gave a reference from CW; or that

    c. as regards the May 2021 incident, the police decided not to take further action; or that not all the children in the class described every aspect of the incident;

    however, these points do not come close to persuading us that DBS's findings were wrong or unsustainable or outside the generous ambit within which reasonable disagreement is possible (to pick up the terminology of the relevant case law as cited in *JHB* at [72]): to infer from any, or all, of the facts above, that the facts as found by DBS were "wrong" may be *possible*, but it certainly is not *required*.

29. As regards [27b] above, similarly, we find no mistake in DBS's other "primary" factual findings (as opposed to "secondary" or "inferential" factual findings), such as that that CW caused P to cry and that he created a fearful class. As for DBS's "secondary" factual findings "by inference" from primary facts – chiefly, that CW caused emotional and physical harm – this is best considered together with [27c] above, as the key issue in establishing "relevant conduct" here is whether CW "harmed" a child. In our view, DBS's inference, from the primary facts of the three main incidents, that, in each, one or more child was harmed, emotionally and/or physically, was not wrong or unsustainable or outside the generous ambit within which reasonable disagreement is possible, given that:

    a. each incident involved, on the primary facts, confrontational physical interaction with a child (i.e. hitting, pushing, grabbing, scratching, or pushing the child) (in the case of the November 2019 incident, it was done "passively", by not allowing the child to go to the toilet); and

    b. the evidence indicates that P was very upset, and the same (about the children involved there) can reasonably be inferred from the facts of the two 2019 incidents.

In this analysis, we find it unnecessary to search out substitute words for, or "gloss", the word "harm" (as used in the statute (paragraph 4 of Schedule 3 to the Act)); it is an ordinary English word and its meaning is self-evident. We do, however, note that the statute does not require any particular level, or degree, of harm; "harm" (itself) is all that is required.

30. On this point, we, as a panel, may have some sympathy for drawing a different inference from the primary facts (namely, that one or more of these incidents was not serious enough to cause harm) – but, as before, that is some way from being able to say that the inference as drawn by DBS was plainly wrong. It follows that there was no error of law on DBS's part in concluding that "relevant conduct" had been made out.

31. As regards [27d] above, it does not seem to us that the decision was irrational or one which no reasonable decision-making body could arrive at, given that (as we have just concluded) there was no mistake in the factual findings on which the decision was based. As a panel, we may tend to view the incidents concerned as being towards the less serious end of the "safeguarding" spectrum; however, that is far from saying that it was irrational or otherwise wrong in law for DBS to take a conservative, risk-averse approach; and in any case, the "appropriateness" of including CW in a barred list is not a matter for us. The fact that other bodies (the Teaching Regulation Agency, or the police, or a supply agency) made other decisions (about prohibiting CW from teaching, or pursuing a police investigation, or ceasing to engage CW) at other points in time does not persuade us that there has been a mistake on a point of law by DBS, given that the decision was taken at a different time and/or for a different purpose.

Conclusion

32. The decision involved no mistake either in a factual finding on which it was based, or on a point of law. The decision is therefore confirmed.

Zachary Citron
Judge of the Upper Tribunal

Heather Reid
Dr Elizabeth Stuart-Cole
Members of the Upper Tribunal

Approved for release on 16 January 2024