IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

UT ref: ***UA-2022-001326-V***
[2024] UKUT 192 (AAC)

On appeal from Disclosure and Barring Service

ORDERS

The Order of 1 November 2022 remains in place.

Any breach of that Order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

Between:

JC

Appellant

- v –

The Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Wright
Upper Tribunal Member Tynan
Upper Tribunal Member Graham

Decision date: 2 July 2024
Decided after a remote (video) oral hearing on 19 January 2024

Representation:
Appellant: The appellant represented herself assisted by her friend Ms Tanti
Respondent: Ashley Serr of counsel instructed by the DBS.

DECISION

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

REASONS FOR DECISION

Introduction

1. The responsibility for drafting this decision was Judge Wright's. He apologises to the parties for the delay there has been in his writing this decision.

2. This is an appeal by JC against the DBS's decision of 26 August 2022 to include her on the Adults' Barred List.

The DBS's decision in summary

3. The basis for the DBS's decision, in short, was that JC on an unknown date around December 2018 took £1,500 from a vulnerable adult in her care after JC had disclosed her financial difficulties to that vulnerable adult, and JC had failed to repay the money to that adult.

Grounds of appeal

4. The grounds on which permission was given for this appeal to be brought by JC to the Upper Tribunal are as follows. (The phrase "service user" is sometimes used in those grounds instead of "vulnerable adult", though it is common ground that the service user was a vulnerable adult.)

Mistaken material fact

5. First, whether the DBS's decision to include JC on the adults' barred list was based on a mistake about a material fact, namely whether JC in fact accepted a loan of £1,000 or £1,500 from the service user. That finding of fact was strongly disputed by JC and the points she raised about the adequacy of the DBS's investigation (which also arise under the second ground of appeal) may have supported this ground .

Errors of law

6. Second, whether the DBS erred in law in coming to its decision by failing to adequately investigate key relevant points before making its decision. This point may arise out of the 'duty of enquiry' legal principle identified in *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] UKHL 6; [1977] AC 1014 (at 1065B): that is, the need for the DBS to ask the right questions and to take reasonable steps to acquaint itself with the relevant information to enable the DBS to answer those questions correctly. The arguable points that may have required further investigation include (in no particular order):

(i) the terms of JC's contract of employment with Horizon Care and what within those terms compelled JC not to talk about her own life (including her own financial situation) with persons to whom she was giving care or required her not to solicit or accept loans from such persons;

(ii) the legal and evidential basis for JC's employer's decision that JC had committed a "gross breach of trust" in accepting £1,500 from a vulnerable client;

(iii) how the vulnerable adult had accessed the money said to have been lent by that person to JC and/or, if the said sum was not withdrawn from a bank or building society, the basis on which that person may have kept such a large sum of money in her home;

(iv) what information (if any) the employer may have held concerning the vulnerable adult's alleged alcohol dependence (given the same's potential relevance to that person's vulnerability and credibility); and

(v) any further information held by the Devon and Cornwall constabulary which had led it to conclude (a) that no coercion had taken place (in terms of the alleged loan being given to JC) but (b) that JC had abused her position of trust

7. Third, and in the alternative to the first two grounds of appeal, even if JC did accept a loan from the service user, whether the DBS erred in law and arrived at an irrational decision in founding its decision on a loan that was, on the face of the police evidence, freely given by the vulnerable adult to JC. This ground raised the question about what was abusive of a position of trust or amounted to conduct that endangered a vulnerable adult by JC accepting a loan of money that was given willingly to her by the service user as an autonomous adult, where, again according to the police, the service user was not vulnerable other than in terms of her mobility and where JC had not asked the service user for a loan?

8. Putting the third ground of appeal another way, or as an alternative ground, what was the legal and evidential basis for the DBS concluding, contrary to the view of the police, that "the money has only been given due to coercion that has taken place" (the coercion being by JC)?

Relevant law

9. Section 2 of the SVGA provides that the DBS must maintain the adults' barred list. Subsections (3) of section 2 provides that Part 2 of Schedule 3 applies for the purpose of determining whether an individual is included in the adults' barred list.

10. Section 3 of the SVGA deals with the consequences of a person being placed on either barred list, and provides so far as is relevant as follows:

> "**Barred persons**
>
> 3.-(1) A reference to a person being barred from regulated activity must be construed in accordance with this section.
>
> (3) A person is barred from regulated activity relating to vulnerable adults if he is—
>
> (a) included in the adults' barred list…"

11. Paragraphs 9 and 10 of Schedule 3 to the SVGA deal with what constitutes "relevant conduct" in respect of adults. Those paragraphs, insofar as relevant on this appeal, 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;

(c) conduct involving sexual material relating to children (including possession of such material);

(d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;

(e) conduct of a sexual nature involving a vulnerable adult, if it appears to DBS that the conduct is inappropriate.

(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."

12. The Upper Tribunal's appellate jurisdiction is provided for under section 4 of the SVGA, which provides (insofar as relevant) as follows:

"**Appeals**
4.-(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
(b) a decision…..to include him in 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…"

13. The following decisions set out the bounds of the jurisdiction of the Upper Tribunal in exercising its appellate jurisdiction under section 4 of the SVGA cases. First, the appropriateness of a barring decision is not a matter for the Upper Tribunal on appeal. Second, for an appeal to succeed it needs to be shown, on the balance of probabilities, that the DBS made either a material error of law or a material error of fact in its decision: *R v (RCN and others) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin) (at paragraph 104) and *PF v DBS* [2020] UKUT 256 (AAC); [2021] AACR 3. Third, 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 the body enabled by statute to decide appropriateness: *SA v SB & RCN* [2012] EWCA Civ 977; [2013] AACR 24. Fourth, what needs to be considered is not the terms of the decision letter alone but the whole basis for the decision as evidenced on the papers the DBS considered in coming to its decision: *VT –v- ISA* [2011] UKUT 427 (AAC) (at paragraph 36).

14. The primacy of the DBS's role as decision maker under the SVGA has been underscored and reaffirmed by the Court of Appeal in *DBS v AB* [2021] EWCA Civ 1575: see in particular paragraph [43] of that decision. The Court of Appeal in *AB* have also settled that there is a very limited basis on which the Upper Tribunal can direct that a person be removed from a Barred List under section 4(6) of the Act. The duty to direct removal only arises in circumstances where "that is the only decision the DBS could lawfully reach in the light of the law and facts as found by the Upper Tribunal" (*SB* at para. [73]).

15. The Court of Appeal in AB have also settled that there is a very limited basis on which the Upper Tribunal can direct that a person be removed from a Barred List under section 4(6) of the Act. The duty to direct removal only arises in circumstances where "that is the only decision the DBS could lawfully reach in the light of the law and facts as found by the Upper Tribunal" (AB at para. [73]). The decision in AB also contains a useful discussion of what constitutes a 'finding of fact', about which it may be argued that the DBS was mistaken, contrasting such a finding with value judgments and the evaluations of the relevance or weight to be given to facts when assessing appropriateness: see para. [55] of AB.

16. Finally, following the Court of Appeal's decision in *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982, and paragraph [95] of that decision in particular, as that decision is explained in *Disclosure and Barring Service v RI* [2024] EWCA Civ 95 (at paragraphs [33] and [54]), the Upper Tribunal should be slow to consider the DBS has taken a mistaken view of the facts when no new evidence has been put before the Upper Tribunal which bears on the findings of fact made by the DBS in its decision.

The DBS's decision in more detail

17. The final decision letter sent to JC reads, in material respects, as follows:

> "Having considered your representations, we acknowledge that you have denied having any financial difficulties and stated that if you had been discussing Christmas with the service user, you may have made a comment around how expensive Christmas is and that the service user may have misunderstood this.
>
> However you have then denied taking any money from the service user and questioned how the service user would have been able to go to the bank due to her mobility. It is acknowledged the service user had poor mobility but it is reasonable to state that the service user may not have went out to the bank to get this money or could have been accompanied if asked.
>
> You also alleged that the service user was an alcoholic, however no evidence has been provided around this and police considered the service user as a credible source.
>
> We accept that during your investigation and disciplinary meetings, you did not attend due to being off sick, however it remains that you do not appear to have provided a reasonable explanation around this allegation or why the service user would fabricate an allegation of this nature.
>
> We have also considered that you claimed your employer was being deceptive in trying to find means to terminate your employment, however we also have police information which has supported that these claims. Whilst we do have limited information, police deemed it sufficient to state that you were given money from a service user, and whilst they cannot prosecute when money is given willingly, the DBS can take action where we believe the money has only been given due to coercion that has taken place. You were in a position of trust, which you abused by speaking about your financial difficulties in order to persuade the service user to give you some money. It is reasonable to state that had you not mentioned your financial situation then the service user would not have made the offer, and in any event you failed to repay the money and this has resulted in financial harm to the service user.
>
> Therefore we are satisfied that this finding remains, on the balance of probabilities.
>
> Having considered this, 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.
>
> We are satisfied a barring decision is appropriate. This is because we are now satisfied that the evidence in this case appears to show that you have financially abused a vulnerable adult in your care by accepting

approximately £1,500 from a service user in your care after telling her you had no money to feed yourself or your son or for Christmas.

We are satisfied this behaviour has caused significant financial and emotional harm, particularly that you have failed to repay any of this money.

Whilst you have provided positive references within your representations, you continue to deny the behaviour and largely provide information around your mental health struggles, which we are not disputing. Therefore it remains that you have abused your position of trust by telling a vulnerable adult about your personal issues and accepting money from her, despite this vulnerable adult relying on you for care. You have not faced up to your behaviour or repaid any money, suggesting that you would be likely to repeat this behaviour again in the future.

Therefore, we are satisfied it is likely that if you were to work in regulated activity with vulnerable adults in the future, you would be likely to financially abuse them for your own personal gain, which would always be likely to cause harm.

As such, we are satisfied it is appropriate to include your name in the Adults' Barred List.

In examining the proportionality of including your name in the Adults' Barred List, your article 8 Human Rights have been considered as follows;

> it is acknowledged you would be unable to work in your chosen profession as a carer or use your skills developed over your 4 years with Horizon Care. You would also be unable to work in any regulated activity setting with vulnerable adults which may significantly limit your employment opportunities and have financial implications.

We also considered that your inclusion may impact on your wellbeing further. However, we are satisfied you pose a significant risk of financial and emotional harm to vulnerable adults if you were to engage in regulated activity.

Therefore we are satisfied it is both appropriate and proportionate to include your name in the Adults' Barred List."

Discussion and conclusion

JC's evidence

18. Before turning to address the grounds of appeal, we set out first the key aspects of the evidence JC gave at the oral hearing before us. It is that evidence which largely provides the basis for none of the grounds of appeal being made out.

19. JC told us she that had nothing to say in opening her appeal.

20. It was thus only under questioning from Mr Serr for the DBS that the appellant's oral evidence came before us.

21. JC's evidence was that her work for Horizon Care was in the setting of the cared for person's home, taking half an hour per person. Her caring duties included helping getting the person up from bed and dressed or help them to bed. However, her work did not involve her in taking people outside or to the shops. The persons she cared for were all well enough to remain living in their own homes, and were aged upwards of 45-50. JC told us that she mainly worked on her own. Two care workers were only needed when manual handling was required. She saw about the same seven clients a day, walking between where they lived, and worked on Monday and Tuesday mornings and Friday and Saturday nights from 6pm to 10.30pm. These hours of work enabled her to have time for her school age son.

22. Importantly, it was JC's evidence that she knew she could not accept a gift of over £5 from as service user. Her recollection was that she learned this more from other carers, though she later clarified that financial abuse was an aspect of her safeguarding training. The sum of £5 was to cover, for example, a box of chocolates. But JC told us she understood she could not take any larger sum of money from any person for whom she was caring, whether in the form of a gift or a loan, in any circumstance.

23. As for the service user at the centre of the DBS's findings, JC told us that she was one of her regular clients and she had worked for that person for the whole time she was employed by Horizon Care. She mostly saw the service user on Friday and Saturday nights. The service user's only issue was with her mobility, and she used a Zimmer frame to get around her flat. JC's evidence was to the effect that initially the service user was very alcohol dependent and this contributed to the service user, in the beginning, being very verbally aggressive and refusing JC's care. However, over time JC's relationship got better with the service user and the service user was not drinking as much, and she would accept JC caring for her. JC later stated that the service user only had physical health problems and her alcohol problems were in the past. By this we understood JC to mean that the service user had no problems with alcohol by December 2018. As time went on, both JC and the service user were pleased to see one another. The service user had no serious mental health issues and could hold a conversation with JC. JC added that she was not aware of the service user getting confused about the identity of those who were caring for her.

24. In terms of the DBS's finding that JC had taken money from the service user, JC agreed in her evidence that that would have been wrong, but she denied being given or taking any money from the service user. JC's case in her evidence was that the service user was "just making this up". JC accepted that she had had a couple of conversations with the service user about energy prices and the cost of Christmas presents, but she had not told the service user she was worried about Christmas or being able to afford it. Nor did she tell the service user she was short of money. In her written evidence (at page 61) JC described the Christmas conversation as "a conversation that Christmas was approaching and that it's always a demand for what children want and then the cost of food and I would be working Christmas Day."

25. JC told us that the service user was just mistaken about JC needing money and she was 100% sure that the service user had not lent her that money. She denied that subsequent mental health problems may have affected her memory of being given the money by the service user.

26. JC accepted that she and the service user had a good relationship at the time and she did not think that the service user had a history of making things up or complaining about JC. Moreover, JC was not aware of the service user having an axe to grind against her.

27. Mr Serr for the DBS then took JC through Horizon Care's steps in dismissing her (for gross misconduct on the basis that JC took £1,5000 from the vulnerable service user) and JC's role in those proceedings.

28. A letter from Horizon Care's director of 17 April 2019 notified JC that the employer wished to discuss "a serious matter" with JC and it asked her to attend an investigation meeting on 23 April 2019. The letter set out that the purpose of the meeting was to allow JC the "opportunity to provide an explanation for the following matter of concern". That matter the letter said was "Gross breach of trust – It is alleged you have accepted money to the sum of £1,500 from a vulnerable client".

29. JC was absent from work at the time of this letter with health-related problems. Some time was spent at the hearing before us on these health problems. We ended with no clear picture as to the effect these health problems may have had on JC's ability to respond to the 17 April 2019 letter, which JC accepted she received. JC told us she took the letter to her doctor but could not recall if she had responded to it. What we do know is that JC did not attend the investigatory meeting on 23 April 2019. Nor is there anything in the evidence showing that at the time JC told her employer that due to her health she would be unable to attend the meeting on 23 April or asking for it to be postponed.

30. An undated email on page 65 of the Upper Tribunal bundle is an internal one within Horizon Care. It records that the employer had been unable to talk directly to JC about the allegations as she was off work sick. The email continues that the employer had tried to call her and sent her letters in the post, most of which were ignored, and this resulted in the employer ending JC's employment "based on her refusal to discuss the allegations of borrowed money amounting to the value of £1500". We highlight this email because we were unconvinced by JC's response to the point made in the email that she had refused to discuss allegation(s), that she had not known the severity of the allegations. The email in our clear judgement was written after she had been dismissed and so must also have been written after the employer's letter of 19 April, and it is simply not credible that that letter – with its reference to JC having committed a gross breach of trust – was not conveying a serious allegation. JC accepts she received that letter and took it to her doctor, and we find she must have understood the serious allegation it was setting out.

31. JC's claim that she did not think about responding in writing to the 17 April 2019 letter also, in our view, lacks credibility. Given what we have said above, we consider her action in taking the letter to her doctor and the obvious seriousness of the letter's contents, shows JC knew it was raising serious matters that required an answer from her. Moreover, and just as importantly, JC's case that she did not think about responding in writing was not an argument, and therefore does not show, that she was unable to respond to the letter due to health problems. Nor can we find any basis for JC's argument before us that she expected the matter to be investigated but she was

ill at the time and so expected it to be addressed at another point. We repeat the point made above that there is no evidence from the employer, or indeed from JC, that through her GP she sought by letter to have the hearing before her employer on 23 April 2019 postponed.

32. The employer's evidence before the DBS shows that on 25 April 2019 it wrote to JC dismissing her with immediate effect. The letter says that JC had not attended the hearing. The employer had taken account of JC's "responses" but had concluded that the gross breach of trust stated in the 17 April 2019 letter had occurred and that JC's conduct had "resulted in a fundamental breach of [JC's] contractual terms, which irrevocably destroys the trust and confidence necessary to continue the employment relationship". The reference to 'responses' JC told us was about a phone call from her doctor, though we do not know what was said in that call. JC accepted before us that she had not appealed this dismissal decision.

33. We accept that the evidence shows that JC was suffering from mental stress in and around December 2018 to April 2019 and that on 3 April 2019 she had threatened to kill herself. Quite whether these serious health concerns arose because of the allegation that JC had wrongly accepted £1500 from a vulnerable client, or had another cause, was not clear from the evidence before us. It appears that at least a cause of JC's mental health difficulties at the time was to do with her diabetes and the effect this had on her sight. We do not wish to downplay the very significant difficulties JC's mental health problems provided her with in or around April 2019. However, the exact nature of those difficulties remains unclear. We note, for example, that social services was not involved at the time in terms of JC's ability to care for her son, and on her own evidence it seems JC remained capable of cooking, cleaning and doing other household tasks despite her mental health problems. And we repeat the point we have made above that we consider the evidence shows that JC did understand the importance and serious nature of Horizon Care's letter to her of 17 April 2019 and was sufficiently able to react to it by taking it to her GP.

34. Given the mental health problems from which JC was suffering in and around April 2019, we are not in a position to conclude that her failure to respond substantively to the employer's letter of 17 April 2019 is positive evidence showing that JC had 'nothing to say' and therefore agreed she had accepted the £1500. However, the lack of any response by JC to that letter also does not provide any positive evidence in favour of her not having accepted that money.

35. One last aspect of Mr Serr's questioning of JC concerned an argument she had made in writing that Horizon Care had had an ulterior motive for getting rid of her. As stated in writing, that ulterior motive was said by JC to be because she would not take on any additional work shifts (i.e. overtime). That argument was in our view wholly undermined by JC telling us she would have taken on overtime from Horizon Care. This left the 'ulterior motive' argument to be based on an unspecified claim from JC that she always thought Horizon Cared had another reason for getting rid of her and she was not liked by them. This thinking by JC on her own evidence only occurred to her after she had been dismissed, and therefore is not evidence of JC feeling she was disliked by Horizon Care while she worked for them. It provides no proper evidential basis to undermine the DBS's key findings of fact, not least because those findings are based on evidence separate from the employer's evidence (e.g. the police).

36. Before leaving JC's evidence, we are compelled to comment on another aspect it. This is that in the course of her evidence JC admitted that she had not disclosed she

had been dismissed by Horizon Care for gross misconduct to future prospective employers. This evidence arose in the context of JC being asked why she had not involved herself in Horizon Care's disciplinary investigation of her conduct in relation to the allegation of having accepted the £1500 or appealed the dismissal decision. It was put to JC that a reason for doing so would be to try and ensure she did not get a negative reference from Horizon Care. It was in this context that JC told us that in job applications she made after she had been dismissed for gross misconduct by Horizon Care she said she had left Horizon Care because of her health. This at best was wholly misleading and we were concerned that JC did not seem to recognise that there was anything wrong in her doing this. Although it may have been part of the factual matrix that JC had in fact stopped working for Horizon Care because of her health, the obvious and substantial cause of her no longer working for Horizon Care was because she had been dismissed for gross misconduct. Any employer would wish to know this information, particularly an employer in the field of caring for children or vulnerable adults. JC's failure to be completely transparent with future potential employers about why her employment with Horizon Care had ceased in our judgement itself gives rise to a significant safeguarding concern. Moreover, it undermines her credibility in terms of being an honest and accurate witness about the facts.

37. Having set out, and to some extent commented on, JC's evidence, we turn to the grounds of appeal. We can take them quite shortly given the contents of JC's evidence.

38. We will take the first ground of appeal – whether the DBS made a mistake of fact about JC having accepted the £1500 loan from the vulnerable adult – last as in its own terms the other grounds of appeal are relevant to it.

39. The second ground of appeal concerns whether, following the decision in *Tameside* whether the DBS erred in law in failing to take reasonable steps needed to answer properly the relevant questions arising in JC's case. An important starting point is that the *Tameside* duty is no more than an aspect of the requirement for a public law decision maker to act rationally and, thus, to take such steps as are reasonable in the circumstances: see paragraph [70] of *Balagigari and others v SSHD* [2019] EWCA Civ 673; [2019] 1 WLR 4646. In JC's case that duty most obviously arose in relation to whether JC had engaged in 'relevant conduct': that is, whether she had accepted the loan of £1,500 from the vulnerable adult. Given the DBS had evidence from both the police and Horizon Care that the vulnerable adult had given the £1500 to JC and that this was a gross breach of trust by JC and had resulted in a fundamental breach of JC's contractual terms, we do not consider it was unreasonable for the DBS not to have taken further steps to ascertain the terms of JC's contract of employment, what the gross breach of trust was, how the vulnerable adult had come by the money she gave to JC, whether the vulnerable adult was affected by alcohol or seek any further information from the relevant police force about the lack of coercion or how JC had abused her position of trust.

40. In our view the DBS was entitled to accept the combined evidence of the employer and the police without taking any further steps. Importantly, that evidence showed that JC had abused her position of trust, by accepting the £1500 loan, and that the acceptance of the money had resulted in a fundamental breach of the terms of JC's employment. Given the seriousness of the sanction of immediate dismissal and the reference to JC breaching the terms of her employment contract with Horizon Care, in our judgement it was reasonable for the DBS to infer that the acceptance of the money by JC was contrary to a term of her contract of employment. It was therefore not

unreasonable of the DBS not to have sought sight of JC's actual contract of employment.

41. The gross breach of trust simply follows from the finding that acceptance of the money was contrary to JC's contract of employment. The gross breach of trust by JC was not a separate failing by her in addition to breaching her contract of employment. However, it is worth emphasising in any event that the DBS's decision did not depend on any separate finding of gross breach of trust.

42. We may add that even if the DBS ought as a matter of law to have sought out JC's contract of employment, which we do not accept, given JC's clear evidence to us that she knew that in her employment with Horizon Care she ought not to have taken anything more than £5 from any client, any such error of law by the DBS in not seeking out JC's contract of employment would not have been material to the DBS's decision. This is because even on JC's own case her contract told her not to accept money over £5.

43. As for the problems with alcohol JC alleged the vulnerable adult may have had and the consequent effect this may have had on her ability to recall accurately lending JC the £1500, it was not in our judgement unreasonable for DBS not to have sought further information about this before it made its barring decision. The DBS was entitled in law to accept the evidence from the police that the vulnerable adult was not vulnerable in any way other than because of her mobility issues. In any event, JC's evidence to us as that the vulnerable adult no longer had any problems with alcohol by December 2018, had no mental health problems and had no difficulty in knowing who JC was, would make any possible error of law here immaterial. This is because on JC's own case any clouding effects of alcohol was not an issue for the vulnerable adult by December 2018.

44. We consider the above points sufficiently answer whether the DBS reasonably needed to seek further information from the police. As we have said above, the breach of trust is tied inextricably to accepting money from a client contrary to the terms of JC's contract of employment. And the police's view of lack of coercion was simply, in our judgement, the necessary product of the police's view that the vulnerable adult was not vulnerable mentally.

45. As for the third ground of appeal, again we consider we may well have answered this under our discussion of the second ground of appeal above. In our judgement the answer to the third ground is not located in the autonomy or mental competence of the vulnerable adult. In that sense, the money may well have been freely lent to JC by the vulnerable adult, albeit in the context of a conversation around the cost of Christmas. What, however, was abusive of trust in this circumstance, and endangered a vulnerable adult, was JC accepting money from the vulnerable adult for whom she was caring in circumstances where doing so was a clear (and understood) breach of JC's terms of employment.

46. Insofar as there is a fourth ground of appeal which concerns the DBS's decision relying on the money having been given due to coercion, we do not consider this separate error of law ground is made out. The basis for the DBS's belief that "the money has only been given due to coercion that has taken place" was sufficiently explained by the DBS in its decision letter. That explanation was that JC had abused her position of trust by speaking about her financial difficulties in order to persuade the vulnerable adult to give JC some money. JC accepted in her evidence that she had had a conversation with the vulnerable adult about the cost of Christmas It is apparent

that it was in this sense that the DBS reasoned a form of coercion had taken place, namely that if JC had not mentioned her financial situation then the service user would not have had the context in which to offer the money. As a matter of law, we consider the DBS was entitled to make this judgement that a form of coercion had been involved on the evidence before it. Furthermore, we consider that there was no necessary contradiction between the DBS so concluding and the view of the police that no coercion had taken place. The DBS's decision letter itself contrasts the view of the police that the money had been given willingly with the DBS's view that a form of coercion had been involved, and the decision letter goes on (sufficiently in our judgement) to explain what the DBS meant by coercion and why the DBS was using coercion in a different sense for the police.

47. Even if it may be said that the DBS erred in law in not having a sufficient evidential basis for finding coercion had been involved, this is but one aspect of its decision. Given the DBS had been entitled to conclude that JC had accepted the money in a gross breach of her contractual terms and had then not paid the money back (which last step evidenced actual financial harm to the vulnerable adult: see relatedly paragraph [19] of *SA v ISA* [2013] UKUT 93 (AAC); [2013] AACR 21 (that case concerned theft, which is not in issue here, but not paying money given in the form of a loan can also constitute financial), we do not consider a lack of sufficient evidence of coercion would make any material difference to the decision. Putting this another way, the taking of the money and not paying it back was a clear basis on its own for the barring decision.

48. Once grounds two to four have been dismissed, the first ground of appeal has little independent existence or merit. In our clear judgement, the DBS made no error of fact in finding as fact that JC accepted approximately £1,500 from a vulnerable service user in December 2018 and failed to pay that money back. JC really has no more than assertion that she did not do this. We have set out above why we have doubts about her credibility as a witness, particularly because of her not being transparent with future potential employers about the reason why she stopped working for Horizon Care. Moreover, on her own evidence, none of JC's arguments challenging the case against her are made out. The vulnerable adult had no mental health issues, alcohol had ceased to be a problem, and she got on well with JC and, on JC's own case, had no axe to grind against JC. We therefore can find no good reason why the vulnerable adult would have made the allegation up or otherwise have been mistaken about it. Nor is there any proper evidential basis for considering Horizon Care had any ulterior role in dismissing JC. (In any event, it is difficult to see what the relevance of this motive would be to the DBS's primary finding of fact given those findings are, in part, based on what the vulnerable adult independently told the police about the money.) And in the column in favour, so to speak, of the DBS's core findings of fact is the independent evidence of the police and of what the vulnerable adult told the police, and the actions of Horizon Care in dismissing JC for gross misconduct for having accepted the money from the vulnerable adult. We stress again there is no proper evidential (or other) basis for not finding the vulnerable adult's, the police's or the employer's evidence credible. When we consider all that evidence in the round, on the balance of probabilities, we are not persuaded the DBS was mistaken that in December 2018 JC had accepted a loan of approximately £1,500 from a vulnerable adult and failed to pay it back.

Conclusion

49. For all of these reasons, this appeal is dismissed.

Approved for issue by

Stewart Wright
Judge of the Upper Tribunal

Michele Tynan
Member of the Upper Tribunal

Roger Graham
Member of the Upper Tribunal

On 2nd July 2024