IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000078-V**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 270 (AAC)**

The Upper Tribunal has made an order prohibiting any person from disclosing or publishing any matter likely to lead members of the public to identify either (a) JI or (b) PK.

Any breach of the above 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:

JI

Appellant

- v –

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Citron, Ms Heggie and Ms Jacoby

Decided following an oral hearing at Field House, Breams Buildings, London EC4 on 14 June 2024

Representation:

Appellant:	Libby Anderson of counsel, instructed by Richard Nelson LLP Solicitors
Respondent:	Scarlett Milligan 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 4 October 2021 (DBS ID P0000379JHA; reference DBS6191 00942362777) to include JI in the children's barred list is confirmed.

REASONS FOR DECISION

This appeal

1. This is an appeal against the decision ("**DBS's decision**") of the Respondent ("**DBS**") dated 4 October 2021 to include JI in the children's barred list.

DBS's 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 DBS's decision (the "**decision letter**"):
    i. stated that DBS was satisfied that
        a. on 12 October 2020, in response to a child (**PK**) screaming, JI acted inappropriately when she
            i. used a highchair for unsuitable purposes
            ii. restrained PK in a highchair and placed her outside
            iii. breached health and safety policy when she lifted PK whilst in the highchair to move her
            iv. told PK "it's a bit wet and cold outside isn't it?"
            v. used a piece of equipment to block PK in whilst in the highchair

b. on unspecified dates JI used highchairs as a restraint rather than for their intended purpose.

(we will refer to the above as DBS's "**core factual findings**");

ii. acknowledged that JI stated that she had sought help for her personal issues, and those issues had been dealt with; however, JI denied that the personal issues affected her behaviour with PK;

iii. stated that the evidence pointed to JI being under stress due to personal/work related issues and this led to JI not being able to cope appropriately with a child's relatively unchallenging behaviour; but JI was unwilling to accept that personal/work issues were having an negative impact on her behaviour; this raised concerns that if placed in similar circumstances in the future JI will allow stress to impact on how she behaved resulting in her not being able to cope effectively, which could result in physical and/or emotional harm to those involved; DBS could not be certain that JI would not repeat this behaviour in regulated activity in the future;

iv. stated that the proportionality of the decision had been considered; a significant impact on JI's future employment opportunities within regulated activity was acknowledged (and resultant detrimental impact on JI's earning potential and, possibly, standard of living); it balanced JI's rights against those of the vulnerable groups who may be at risk of harm; it found that JI had shown an unwillingness to accept that personal and work issues were impacting on her working life, resulting in JI struggling to cope with a child's relatively unchallenging behaviour which has placed the child at risk of physical and emotional harm. It concluded that it was an appropriate and proportionate safeguarding measure to include JI in the children's barred list.

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 (Judge Citron) in a decision issued on 30 October 2023 on the grounds that DBS made mistakes

    a. in findings of fact about the incident on 12 October 2020, in the sense that it failed, or omitted, to make relevant and accurate findings as to

        (i) JI's motivations and intentions in taking the actions she took in the course of that incident,

        (ii) the school's policies (formal and informal) as to putting children like PK in high chairs, and

        (iii) the precise words (and the tone and context of those words) used when JI said something to PK about the weather; and

    b. on a point of law, in the sense that the decision was disproportionate, when considered in the context of all relevant and accurate facts.

Documentary evidence before the Upper Tribunal

8. In addition to the decision letter, evidence in the bundle of 335 pages included:

    a. the DBS referral form from the school where the incident occurred; this, amongst other things, described JI's role as "kindergarten practitioner (room leader)"

    b. the 30 October 2020 suspension letter from the school

    c. the 26 November 2020 "outcome of disciplinary hearing" letter from the school; this said, amongst other things, that JI had resigned on 12 November 2020; that JI did not attend the disciplinary hearing on 19 November 2020; and that, had JI not resigned, she would have been dismissed for gross misconduct

    d. notes from the disciplinary meeting on 13 November 2020

    e. "kindergarten room leader" job description

    f. JI's application form, references and contract

    g. incident reports from HI, the deputy kindergarten manager, and from PM (the assistant to JI in the kindergarten), both dated 12 October 2020

    h. "management advice" meeting notes of 13 October 2020

    i. notes from meeting with PM on 21 October 2020

    j. notes from meetings with JI on 26 and 28 October 2020

    k. notes from telephone call with HI on 28 October 2020

    l. notes from telephone call with LY on 27 October 2020

    m. 5-page letter from JI to DBS, dated 20 September 2021, with appendices; in summary (and most relevantly for the issues in dispute in this appeal), the letter said that

(i) the school's evidence to DBS was fabricated

(ii) JI was being victimised for questioning procedures

(iii) the reasons for JI's actions on the day in question was to gain order within the room whilst other staff members were serving food

(iv) JI put PK in the highchair to keep her safe

(v) JI's putting PK outside in the highchair was to encourage improvement in her behaviour

(vi) it was not raining at the time

(vii) JI deemed her actions that day as a safety measure

(viii) other staff put children in highchairs at lunch time, encouraging good behaviour when eating lunch

(ix) PM was 10 metres away in a room of medium noise level – JI questioned how PM could hear what JI said to PK

(x) PM was a newly qualified, newly employed staff member, aged 19

(xi) JI was suffering from anxiety and insomnia at the time; however, these personal issues had no effect on JI's behaviour that day, due to JI's professionalism

n. witness statements of JI dated 23 September 2022 and 29 January 2024, including 8 character references (there was a further witness statement from JI dated 22 June 2023, not in the bundle)

o. DBS's "barring decision summary" document: this recorded "no concerns" for "callousness/lack of empathy" and "irresponsible and reckless"; and "definite concerns" for "poor problem solving/coping skills".

JI's evidence

9. Key aspects of JI's evidence included the following:

a. there were on 8 children in the kindergarten class that day, with two staff, JI and PM, in the room; PK was one of the older children: she was aged 2;

b. JI accepted that she put PK in the highchair and picked PK up in the highchair and placed her outside. Her reasons for doing so were only to keep PK safe and to encourage good behaviour (as PK had been "screaming" in the highchair); it was not a "negative reactive" response by JI (to PK's behaviour)

c. the management of the school sanctioned use of highchairs in the kindergarten "where necessary"; JI cited the following from the school's 'timetable' document:

> "12:00 - Lunchtime: try to encourage the children to sit for as long as possible. Use a highchair for certain children if necessary"

d. JI had put PK in a high chair as she was running around the room with cutlery in her hands; JI thought putting a child like PK in a highchair in these circumstances was permitted; JI did not, at the time, think she was using the highchair for an unsuitable purpose; she had seen other members of staff adopt the same practice;

e. having placed PK outside, in the highchair, JI stepped back into the room and stood just the other side of the door to enable her to keep sight of PK;

f. JI denied telling PK, "It's wet and cold outside, isn't it?"; JI's evidence was that the weather was mild and sunny that day, including when PK was outside in the highchair; JI recalled the kindergarten children going out without jumpers and coats after lunch. When asked about it being recorded in the notes from a meeting with her on 26 October 2020 (which she signed) that "it was not cold and wasn't raining to start with, but it started spitting with rain in the time [PK] was outside", and that JI had wiped raindrops off PK (though she was "not wet"), JI maintained that there was no rain whilst PK was outside in the highchair. Similarly, when asked about it being recorded in the notes from a second interview with her on 28 October 2020 (again signed by JI) that it just started raining and JI wiped away a few raindrops on PK, JI again maintained that there had been no rain whilst PK was outside in the highchair;

g. PK calmed down completely after a "short while" outside; JI then brought her back in to eat lunch; PK was very contented. HI came in to the kindergarten room at the point that JI was carrying PK back to the table to eat lunch;

h. JI was suffering from insomnia and anxiety at the time. She saw her GP about these in September 2020, and started cognitive behavioural therapy in January 2021. JI thought that her actions in the incident in question were a "culmination" of her insomnia and anxiety. JI found the cognitive behavioural therapy very helpful;

i. JI gave evidence about why working with children is important to her; and the impact on her of being included in the children's barred list.

JI's arguments on the appeal

10. In addition to her evidence, as summarised above, JI's arguments in the appeal included that:

a. JI had raised concerns over the integrity of the school's investigation; there was an "air of fatigue" with RI on the part of her school colleagues; reduced weight should be given to evidence of other staff members

b. JI has had greater insight into her actions over time; this should not be seen as damaging her credibility

c. JI denied using anything to block PK into the highchair (though she had used blocks to "secure" highchair on other occasions)

d. In arguing that DBS's decision was disproportionate, JI made points relating to

(i) the future risk JI posed to children

(ii) barring being a method of last resort

(iii) it being four years since the incident occurred

(iv) no harm having been caused to PK

(v) the character references in the bundle

(vi) the fact that JI had insomnia and anxiety at the time

(vii) the therapy JI underwent after the incident, and the insight she now has (and the effect of these on risk of repetition)

(viii) the fact that barring prevents JI from following her career of choice.

11. JI noted that DBS's "barring decision process" document stated that the evidence suggested that JI's actions were an attempt to punish PK for her challenging behaviour; and that JI spoke to PK in a callous manner.

DBS's decision re: "poor problem solving/coping skills"

12. In its "barring decision process" document under "poor problem solving/coping skills", DBS stated: "It appears that poor coping skills is the key factor to the relevant conduct. JI has been unable to cope appropriately with a child crying. This has resulted in JI placing the child outside alone as a form of punishment. … It is acknowledged that JI following the incident has appeared to have sought help in regards to her personal issues … However … JI is still unwilling to acknowledge that the stress resulting from these issues had impacted on her behaviour on the day of the incident. This failure to acknowledge the impact it was having has resulted in her ability to cope effectively with PK's relatively unchallenging behaviour. JI's lack of awareness reinforces the concerns in this field and therefore definite concerns remain"

Discussion of the permitted grounds of appeal

The first permitted ground

13. The first part of the first permitted ground of appeal concerns JI's motivations and intentions in taking the actions she did in the course of the incident. It seems to us, on the evidence, that JI's motivations and intentions were quite straightforward: she was trying to deal with a two-year-old running around in a disruptive manner (holding cutlery, by JI's account, which we are prepared to accept) – and did so by placing the child in a highchair. We note that placing PK in a highchair was not, primarily, to assist in her having lunch; it was, primarily, a means of stopping the two-year-old running around disruptively. When the child continued to behave disruptively – now, by "screaming" (although not in a distressed way), JI dealt with this disruptiveness by picking up the highchair with PK in it, and putting her outside the room, exposed to the elements, in the hope that this would stop her behaving this way. We accept that JI's primary motivation was not to "punish" PK; her primary motivation was to try to get PK to stop being disruptive.

14. Having made the findings immediately above, we do not find that they indicate any material mistake in DBS's findings of fact: specifically, they are consistent with DBS's core factual findings that JI acted inappropriately when:

    a. using a highchair for unsuitable purposes – the highchair was being used primarily to stop PK being disruptive, not to assist with her eating; it was not a mistake for DBS to find JI's use of the highchair to be for an unsuitable purpose;

    b. restraining PK in a highchair – it seems to us this was indeed what was being done; it was not a mistake for DBS to find that JI acted inappropriately in so doing, as the appropriate use of a high chair is to assist with a child eating;

    c. breaching health and safety policy by lifting PK whilst in the highchair – this finding makes intuitive sense and JI did not challenge it as mistaken in her evidence or in submissions made on her behalf.

15. We acknowledge the passage in DBS's "barring decision process" document in which DBS stated that the evidence suggested that JI was attempting to punish PK for her challenging behaviour; we do consider this mistaken, insofar as it described JI's primary motivations; however, given that (1) this finding did not make its way into DBS's core factual findings, and (2) the finding is not repeated in the section immediately following, which records DBS's evaluation of the evidence *post representations*, we find that this was not a factual finding that was *material* to DBS's decision.

16. The second part of the first permitted ground of appeal concerns the school's policies (formal and informal) as to putting kindergarten children in highchairs. The key point here is whether the school sanctioned, formally or informally, using highchairs as a way of stopping children in the kindergarten being disruptive (such as running around with cutlery in their hands). We find that it did not. It is clear enough from the 'timetable' document that the highchairs were to be used at lunchtime as an aid to children eating, if necessary. It was not a sanction for generally using highchairs as a method of stopping disruptive two-year-olds running around. We are inclined to believe JI when she says there were occasions when she saw other members of staff putting children in highchairs; but this seems to us consistent with what is said in the 'timetable' document about using highchairs, at lunchtime, to aid children eating, if necessary. In our view, JI was doing something different from this: she was using the highchair primarily to stop the child running around and being disruptive.

17. Having made the findings immediately above, we do not find that they indicate any material mistake in DBS's findings of fact: specifically, they are consistent with those of DBS's core factual findings cited in paragraph 14 above.

18. The third part of the first permitted ground of appeal concerns the precise words (and the tone and context of those words) used when JI said something to PK about the weather. The source for DBS's core factual finding that JI told PK "it's a bit wet and cold outside isn't it?", is the notes from a meeting with PM – the assistant in the kindergarten and the only witness who was not a child in the kindergarten – on 21 October 2020, the day after the incident. We

find it probable that these words were said as reported by PM; and, based on the signed notes of interviews with JI on 26 and 28 October 2020, the context was that it started to rain lightly just before JI brought PK back inside. We do not, however, find that the words were said with malice or cruelty; and so, in our view, they are not materially different from *JI's own account* (according to notes of the 28 October 2020 interview) of what was said (roughly, as she could not remember the exact wording), being "something along the lines of, oh, dear, it's raining." Whilst the tone was not vindictive or cruel, it was clearly a purpose of the words (as, indeed, it was a purpose of putting PK outside in the first place) to encourage and incentivise PK to stop being disruptive, so as to avoid the ensuing negative consequences (like being put outside in a highchair).

19. Having made the findings immediately above, we do not find that they indicate any material mistake in DBS's findings of fact: specifically, they are consistent with DBS's core factual finding that JI acted inappropriately in telling PK "it's a bit wet and cold outside isn't it". The reason we find no mistake in DBS finding that JI *acted inappropriately* in saying this is not that JI's intentions were cruel, as such, but rather that the words were part and parcel of the whole exercise of placing a two year old out of doors, strapped in a highchair, as a response to her behaving in a disruptive manner: DBS made no mistake in finding this exercise to be *inappropriate*, and it follows, in our view, that it was no mistake to find that these words, which underlined to the child the (unwelcome) consequences of that exercise (and so, of her being disruptive), were also inappropriate.

The second permitted ground

20. The second permitted ground concerned whether DBS's decision, to bar JI, was disproportionate when considered in the context of all relevant and accurate facts. In terms of what those facts were, as at the time of DBS's decision (which we consider the correct time at which to adjudge whether DBS's decision was proportionate or not) we would include

    a. DBS's core factual findings (as we have found no material mistake in them);

    b. the findings we have just made in the paragraphs 13, 16 and 18 above; and, in addition,

    c. JI's evidence as summarised at paragraph 9 g and h above (PK's reactions to the episode; and JI's mental health difficulties at the time of the incident and the therapy she pursued in response to them, up to the date of DBS's decision).

21. The parameters of the law here are relatively settled: a disproportionate decision is a mistake on a point of law; but DBS's decision as to the appropriateness of including someone in a barred list is not a question of law. The main authority put before us on the subject, *B v ISA (RNC intervening)* 2013 1 WLR 308, [2012] EWCA Civ 977, focused on the third and fourth of the classic questions arising in assessing proportionality: (a) the measure being no more than is necessary to accomplish the legislative object (here, safeguarding children and vulnerable adults) and (b) does the measure strike a fair balance

between the rights of the individual and the interests of the community?; the case described (at [16]) the "requisite approach" as requiring "the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgement of a person with responsibility for a given subject matter and access to special sources of knowledge and advice". The judgement there noted "the need to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation". It also said, at [24], that public confidence (in safeguarding children and vulnerable adults) "must be placed in the scales" and "will always be a material consideration".

22. Bearing in mind that inclusion in the children's barred list is *the* tool at DBS's disposal to deal with safeguarding risks to children, the essential exercise is to weigh up the adverse consequences to JI of her being included in the children's barred list, against the safeguarding risks of her working with children. DBS's opinion was that the safeguarding risks were material, principally because of what DBS perceived as JI's poor problem solving and coping skills; DBS was also concerned, when making its decision, about JI's not seeing a connection between her mental health difficulties and her actions on the day in question (JI took this position in the detailed letter she wrote to DBS on 20 September 2021, shortly before DBS's decision). Given that assessing risk to safeguarding children is DBS's core expertise, we are inclined to give DBS's views on this significant weight in the balancing exercise; and, together with the public interest in safeguarding children, in our view that risk fairly outweighed, at the time of DBS's decision, the personal detriment to JI, in not being able to pursue her desired career in working with children. We conclude that DBS did not make a mistake on a point of law, by making a disproportionate decision.

Conclusion

23. The permitted grounds of appeal have not been made out; DBS's decision involved no mistake either in a factual finding on which it was based, or on a point of law. DBS's decision is accordingly confirmed.

Zachary Citron
Judge of the Upper Tribunal

Josephine Heggie
Suzanna Jacoby
Members of the Upper Tribunal

Approved for release on 3 September 2024