



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2023-000414-V
[2025] UKUT 040 (AAC)**

Between:

KH

Appellant

- v -

Disclosure and Barring Service

Respondent

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

Hearing date: 14 January 2025

Hearing venue: Manchester CJC

Representation:

Appellant: did not attend and was not represented

Respondent: by Ashley Serr of counsel, instructed by DLA Piper UK LLP

The Upper Tribunal has made orders prohibiting the disclosure or publication of certain names and matters or information relating to the proceedings – see page 126-129 of the Upper Tribunal bundle

SUMMARY OF DECISION

SAFEGUARDING VULNERABLE GROUPS (65.2)

Appellant included in adults' barred list – appellant was care worker for domiciliary home care organisation – DBS made factual findings that appellant had on certain occasions in 2022 not worn full PPE clothing, discussed themes of a sexual nature with a vulnerable adult service user, and spoken to another vulnerable adult service user in an inappropriate manner – no oral evidence before Upper Tribunal, as appellant did not attend hearing – on evidence before it, Upper Tribunal found no mistake in DBS's findings – and no mistake on a point of law – appeal dismissed

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 Upper Tribunal follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the Respondent made on 12 December 2022 (DBS reference DBS6191 00981269523) to include KH in the adults' 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 12 December 2022 to include KH in the adults' barred list.

DBS's decision

2. The decision was made under paragraph 9 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (the "**Act**"). This provides that DBS must include a person in the adults' 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 vulnerable adults, and
 - c. it is satisfied that it is appropriate to include the person in the list.
3. Under paragraph 10, "relevant conduct" for the purposes of paragraph 3 includes conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult; and a person's conduct "endangers" a vulnerable adult if he (amongst other things)
 - a. harms a vulnerable adult
 - b. causes a vulnerable adult to be harmed
 - c. puts a vulnerable adult at risk of harm or
 - d. attempts to harm a vulnerable adult.

4.

The letter (“**DBS’s decision letter**”) conveying DBS’s decision made the following factual findings, in support of its conclusion that KH had engaged in relevant conduct:

- a. on 21, 24 and 25 January 2022, and on other unspecified occasions during KH’s tenure with domiciliary home care organisation for which she worked as a carer, KH failed to wear her full PPE clothing as required by Covid 19 guidelines, and this amounted to neglect which placed service users at the risk of contracting Covid 19;
 - b. on or before 20 April 2022, whilst carrying out a care call with Ms M, a vulnerable adult, KH discussed personal matters with her which included themes of a sexual nature, and when Ms M asked KH to stop, KH did not do so and carried on;
 - c. on or before 22 March 2022, whilst on duty providing care to Ms E, a vulnerable adult, KH failed to complete her duties as required and spoke to Ms E in an inappropriate manner causing Ms E to become angry.
5. DBS’s decision letter made further findings of fact, to support its concerns and evaluation of risk:
- a. that KH’s colleague (AR) had repeatedly warned/advised KH to wear her PPE properly when attending care calls, yet KH did not;
 - b. that KH had told a manager of the organisation she was working for, in a telephone conversation on Monday 24 January 2022, that she (KH) was wearing her PPE correctly, when in fact she wasn’t; the manager reiterated the importance of wearing PPE correctly in that conversation – yet the next day (Tuesday 25 January) KH was again observed, as part of a spot check by the employer, not wearing PPE correctly when engaging with service users.

Jurisdiction of the Upper Tribunal

6. 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.

7. 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)).

KH’s reasons for appealing and the grant of permission to appeal

8. KH’s application form for permission to appeal gave these as reasons for appealing:

- a. she said that she always wore her PPE when with clients and followed the guidelines to avoid putting users at risk; the statements made that KH was not wearing her PPE when with service users were speculative as the only times KH was not wearing my PPE was when traveling between calls as the driver also did not wear their PPE. Regarding the spot check (on Tuesday 25 January 2022), KH says that her mask was on, she was not wearing an apron, and was between changing gloves following washing dishes at a safe distance from the service user;
- b. she said that she did not have any conversations with clients that she deemed as sexual in any manner, and the report is from a third party and hearsay after any proposed fact, including the third party then questioning her sexual orientation in front of a service user;
- c. she said that Ms E had a history of being verbally abusive to staff and any level of comment in response would have only been with the intention to resolve the situation, with the care of the user and KH’s own safety.

9. KH also made the following supplementary arguments:

- a. If she was a Covid risk, then how was it that she did not contract the disease herself?
- b. KA, the branch manager, had not worn PPE
- c. She had been taken off calling on Ms E in April 2021 due to an allegation against her; she was put on this call again in April 2022 but felt uncomfortable and possible resentment by Ms E due to the original complaint.

10.

KH also made a number of criticisms of the domiciliary home care organisation that she was working for at the time, saying she would not recommend it to anyone looking for work in care. She also provided emails from five people who had known KH for some years, commenting positively on her traits and personality.

11. Permission to appeal was given by the Upper Tribunal (Judge Citron) in a decision issued on 16 November 2023. The permission decision stated that
 - a. DBS's decision was based on the three factual findings set out at paragraph 4 a, b and c above;
 - b. KH challenges those factual findings:
 - i. as regards the first (failing to wear full PPE on particular dates, and this amounting to neglect), KH asserts that significant context is missing from the facts as found – for example, that the only times she did not wear full PPE, was when she was in between visits; and that she had removed her face mask temporarily, at the time of the “spot-check” on 25 January 2022 – and that these contextual facts are materially relevant to DBS's factual finding of “neglect”;
 - ii. as regards the second (discussing personal/sexual matters with a client, when client asked her to stop), KH asserts that she did not do this;
 - iii. as regards the third (failing to complete duties with client; speaking to the client inappropriately), KH again asserts that significant context is missing from the facts as found: namely, that the client had a history of being verbally abusive to staff; and that KH's response was intended to resolve the situation with the care of the client and KH's own safety;
 - c. in its barring decision document, DBS regarded these allegations as not challenged by KH;
 - d. it was realistically arguable that oral evidence from KH (in a hearing before the Upper Tribunal) could show that, on the balance of probabilities, that DBS made material mistakes in its findings of fact, as KH alleges; and

e.

if KH were to be able to establish mistakes by DBS in its factual findings as set out above, it would then be realistically arguable that DBS made a mistake on a point of law by making a decision that was disproportionate.

Documentary evidence in the Upper Tribunal bundle

12. In addition to DBS's decision letter, evidence in the bundle of 135 pages included:

About wearing PPE

- a. a written text of about half a page by AR, made on Tuesday 25 January 2022: this said that on numerous occasions whilst working with KH, KH had not been wearing a mask or visor; that AR had asked KH to do so multiple times, to protect the service users; that AR had made multiple reports in the last few months; that AR asked KH multiple times to wear a mask, and had given her one, but KH repeatedly took it off and pulled it down, leaving it on her chin throughout calls at premises of service users; that on Friday (21 January 2022, it would appear) AR had told KH three times but she still was not listening; that AR then texted the 'oncall' to make an anonymous report; that S (this would appear to be SB, the area manager of KH's employer) then phoned KH to ask about the situation and KH replied "I am wearing a mask", when she was not; that on Monday 24 January KH was again not wearing a mask when working with service users; AR gave her a mask but KH pulled it off within five minutes; AR again reported this to 'oncall';
- b. a three paragraph written statement signed by SB (area manager of KH's employer) on 25 January 2022, stating that the writer had received a text message from AR on Friday 21 January stating that KH was not wearing PPE (specifically, a mask) whilst on calls with service users; the writer said they phoned KH from the on call phone and asked if she was wearing full PPE and KH confirmed that she was;
- c. a four paragraph written statement signed by KA (branch manager of KH's employer) saying that on Monday 24 January she received a text message from AR stating that KH was not wearing PPE (specifically, a mask); KA reached KH by phone and KH confirmed that she was wearing PPE;

- d.
- a “care worker monitoring form” of the organisation KH was working for, recording an audit by MD, a field supervisor, on 25 January 2022; this said: no PPE worn on entering; no gloves, no aprons; no mask on entering house; no mask on when I arrived; was on her chin, said she just pulled it down. This document was countersigned by KH; there was also an email from MD of the same date on the same subject, which she referred to as a ‘spot check’; it said that KH entered the service user’s house without any PPE on; that when MD herself entered the house a short time later, KH standing near the service user’s bed and still had no PPE on – her mask was around her chin and she was not wearing gloves or an apron; KH said that she had taken the mask off as she was making the service user a cup of tea;
- e. a one page account of an investigation meeting on Thursday 27 January 2022 – on the matter of what was observed at the “spot check” on Tuesday 25 January, KH is recorded as explaining that she was wearing a mask but it was pulled down before she went in as she had recently been to Costa and was drinking the coffee while walking to the service user’s premises; KH stated that she went straight to the bathroom and so she had no contact with the service user upon entry; she said she then went to the kitchen to clean up and do the dishes. KH stated that she always had her mask but it sometimes slipped down; that she always wore her gloves; but that she did not always wear an apron;
- f. a 1½ page account of a disciplinary meeting on 1 February 2022 with KH and a support manager; this referred to the 25 January ‘spot check’ and its findings; KH is recorded as responding that she always wore gloves but had just finished doing the dishes; and that her mask was pulled down because she was in the kitchen and had not gone in to the service user yet;

About conversation with Ms M

- g. a signed manuscript note of one page dated 20 April 2022 stating that Ms M and another person were laughing about KH's relationship with X and it was always on and off; it recorded that KH then said to Ms M that she would get X to come and sort her out if she wanted and also said to Ms M it would hurt; the topic was X giving Ms M sex; the note says that Ms M asked KH to stop on numerous occasions but KH's response was to laugh; Ms M then told KH she had overstepped the mark on various occasions;
- h. a four paragraph email dated 21 April 2002, referring to an incident on Monday 18 April; it said that these conversations had not just happened on Monday but had been building up for a while; that Ms M had laughed along before but on Monday Ms M told KH to stop but KH carried on; it said that KH goes on about X, her ex partner; KH also brought up Y, someone Ms M knows; KH makes out to Ms M that Ms M is having a sexual relationship with Y; Ms M feels very uncomfortable when KH mentions Y;
- i. a short email dated 5 April 2022 in which the writer said they were on shift with KH and after the first shift she already knew about her ex leaving her in debt, her bowel movement, her sex life, her health; it said KH talked about these situations in front of her work partners and her clients;
- j. a short email dated 4 June 2022 in which the writer states that on arriving at a client's home and starting a conversation the service user raised concerns about KH; they informed the writer that KH had been informing her on a lot of personal problems that should not be shared with clients including menstrual cycles and problems like sore nipples that come with it, loose stools and other illnesses that should not be discussed

About incident with Ms E

- k. a one-page "complaint record form" received on 22 March 2022; complainant was BW, an occupational therapist; the service user concerned was Ms E; the form states that BW called to say that she was not very happy with the conduct of KH and how she approached Ms E; BW said that KH was making inappropriate comments towards

Ms E during the call on her, and making Ms E furious and upset to the point that Ms E kept telling BW that she did not like KH; BW said that KH had been expressing, in the way she was speaking to Ms E, that she did not like her, and it was uncomfortable to watch;

Other

- l. the referral form (to DBS) from the domiciliary home care organisation KH had been working for; this indicated, amongst other things, that KH worked for them between July 2020 and April 2022; that KH was in her early 30s at the time; that in April 2022, according to the form, KH made inappropriate sexual comments to Ms M; and that Ms M had cerebral palsy and was in her early 40s at the time;
- m. a one-page letter of 22 October 2022 from KH raising 11 points KH felt needed to be looked at in her investigation, including why she had not been interviewed, and asking rhetorically why she was always refreshing her stock of PPE from the office, if she was not using PPE with clients; it generally questioned a number of the circumstances in relation to KH's employment which KH portrayed as unfair or as showing that she was a good care worker;
- n. DBS's barring decision process document: this found "definite concerns" as regards "any other attitude endorsing harmful behaviour" and "irresponsible and reckless", and "some concerns" as regards "callousness/lack of empathy".

The Upper Tribunal hearing

13. The Upper Tribunal sent KH notice of the hearing on 14 January 2025, on 29 October 2024. KH did not respond and the Upper Tribunal followed up by email and attempted to speak with her on the telephone (but did not get through). When KH did not attend on the morning of the hearing, the hearing clerk also tried to contact her by telephone, without success. The contact details used for KH were those on her completed appeal application form.
14. We decided that it was in the interests of justice to proceed in KH's absence: there was nothing to indicate that KH would attend if the hearing was adjourned.

Did DBS make a mistake in a finding of fact on which its decision was based?

15.

It is clear from KH's appeal application that she believed there were mistakes in the findings of fact on which DBS's decision was based:

- a. KH asserted that she did, generally, wear a mask and gloves (she acknowledged that she did not always wear an apron), when attending on service users; this assertion is consistent with what the documentary evidence records KH as saying very close to the time of the incidents (see paragraph 12 e and f above);
 - b. KH denied discussing themes of a sexual nature with Ms M;
 - c. KH indicated that anything she may have said to Ms E that was inappropriate would have been in response to verbal abuse by Ms E, and with the intention to resolve the situation.
16. DBS made its decision on the basis that KH did not challenge its findings of fact; it follows that the evidence before us (which includes the factual assertions made by KH in her appeal application) is not identical to that which was before DBS. We note, however, that none of the evidence was tested in cross examination before the Upper Tribunal, as no witnesses attended the hearing.
17. We see our task, therefore, as being to weigh the (entirely documentary) evidence that was before us, and come to a conclusion as to whether DBS made a mistake in the factual findings on which its decision was based.
18. On the findings concerning KH wearing PPE, we find the evidence that KH was regularly not wearing full PPE when attending on service users, and that that was also the case on 21 and 24 January 2022 (see paragraph 12a above, corroborated in part by the 12b and c evidence), combined with the evidence of the 'spot check' on 25 January 2022 (see paragraph 12d and e above), which includes observation of KH standing near the service user's bed, without PPE, more persuasive than KH's denials and assertions that, during the 'spot check', she was only observed when not in close contact with the service user. It seems to us that the employer's 'spot check', in particular – carried out by an organisation with no likely motive of trying to "trip up" KH – tilts the balance of probability in favour of DBS's findings. We accordingly find no mistake in DBS's 'primary' factual findings in this regard (those at paragraph 5 above, as well as those at paragraph 4a), or in its 'secondary' factual finding (see paragraph 4a above) that this conduct amounted to neglect which placed service users at risk.

19.

- On the finding concerning KH's conversation with Ms M including themes of a sexual nature, we prefer the contemporaneous documentary evidence (see paragraph 12g and h above), corroborated in part by evidence of KH more generally talking about inappropriate person matters in front of service users (see paragraph 12i and j above), more persuasive than KH's denial in her appeal application. We accordingly find no mistake in this finding.
20. On the finding about KH speaking to Ms E inappropriately, causing her to become angry, we observe that KH, in her appeal application, appears to say that, if she did this, it was "defensive" (our word, not hers), because Ms E had been verbally abusive to her. We prefer the contemporaneous documentary evidence (see paragraph 12 k above), which comes from another care professional who, it would appear, had no likely reason to try to "trip up" KH or omit relevant context (such as Ms E being verbally abusive to KH in such a manner as to make it reasonable for KH to respond to Ms E, a vulnerable adult, as she did). We accordingly find no mistake in this finding.
21. It follows that in our view DBS made no mistakes in the findings of fact on which its decision was based.

Mistake on point of law?

22. In our view, and in light of our conclusion that DBS made no mistake in the findings of fact on which its decision was based, it cannot be said that DBS's decision to include KH in the adults' barred list was wrong in law by being irrational, perverse, or a decision no reasonable barring body could have made on the evidence before it. As to whether DBS's decision was disproportionate (and so mistaken in law), proportionality is at heart a balancing exercise, with, on the one side, the risk KH posed to the safeguarding of vulnerable adults, and, on the other side, the detriment to KH of her being barred (being that he would be unable to work with vulnerable adults). It is well established that in striking this balance, appropriate weight must be given to DBS's views on safeguarding risk, as this is its specialist field; as well as to public confidence in the safeguarding of vulnerable persons. In our view, and given that DBS's decision was a rational one, the balance is struck in favour of avoiding the safeguarding risk posed by KH. DBS's decision was not, therefore, mistaken in law by reason of being disproportionate.

Conclusion

23. 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
Rachael Smith
Members of the Upper Tribunal

Authorised by the Judge for issue on 4 February 2025