



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2024-000267-V
[2024] UKUT 310 (AAC)**

On appeal from the Disclosure and Barring Service

Between:

BAA

Appellant

- v -

The Disclosure and Barring Service

Respondent

Before: Judge Sarah Johnston, Josephine Heggie and Sally Derrick

Hearing date: 15 August 2024

Decision date: 2 October 2024

Representation:

Appellant: Representing herself but supported by Mr Walton, Branch Officer, Unison HAB, London

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

ANONYMITY ORDER

On 26 April 2024, the Upper Tribunal made the following order, which remains in force—

“6. Pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, and for the reasons the DBS gives in its letter of 4/4/2024, the tribunal grants the application and prohibits the disclosure or publication of:

- A. The names of the following individuals **OR**
- B. Any matter likely to lead members of the public to identify any of them:
 - [PR]*
 - [CR]
 - [JB]
 - [SP]
 - [The appellant]

* The full names were in the order.

Breach

7. In this Order the Upper Tribunal has granted anonymity to the individuals named above. Any breach of this Order is liable to be treated as a contempt of court and punished accordingly (see section 25 of the Tribunals, Courts and Enforcement Act 2007).”.

Further, given that the identification of the individuals below may lead to the identification of those granted anonymity in the order cited above, we further prohibit the disclosure or publication of—

(a) the names of the following—

- PB, Home Manager
- SH, Regional Manager;

(b) any matter likely to lead members of the public to identify either of those individuals.

DECISION

1. The decision of the Upper Tribunal is to allow the Appellant’s appeal.
2. The Respondent’s decision taken on 28 November 2023 to include the Appellant’s name on the Adults Barred List did involve a mistake of fact.
3. We direct the DBS to remove the appellant from the list.
4. This decision and the Orders that follow are given under section 4(5) and (6) of the Safeguarding Vulnerable Groups Act 2006 and rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

REASONS FOR DECISION

The outcome of this appeal to the Upper Tribunal in a sentence

1. We allow the appellant's appeal to the Upper Tribunal.

A summary of the Upper Tribunal's decision

2. We conclude that the Disclosure and Barring Service's decision does involve a mistake of fact which is material to the barring decision. Accordingly, we direct the DBS to remove the appellant from the Adults Barred List under the Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act').

The rule 14 Orders on this appeal

3. We refer to the appellant as the appellant in order to preserve her privacy and anonymity. For that same reason, we make the rule 14 Orders included at the head of this decision. We are satisfied that the appellant, and the others in the order should not be identified in this decision, whether directly by name or indirectly. We are also satisfied that any publication or disclosure that would tend to identify any person who has been involved in the circumstances giving rise to this appeal would be likely to cause serious harm to those persons. Having regard to the interests of justice, we were accordingly satisfied that it is proportionate to make the rule 14 orders.

The Barring Decision

4. This appeal concerns the barring decision of the DBS dated 28 November 2023 to include the appellant on the Vulnerable Adults List. The material facts were summarised in the letter.
5. The barring letter set out:

"We have considered all the information we hold and are satisfied of the following:

That on 13/03/2023 you hit PR, an 86 year old vulnerable adult in your care, 3 times on the leg

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."

The statutory framework

6. Section 2 of the Act requires the DBS to maintain the adults' barred list. By virtue of section 2, Schedule 3 to the act applies for the purpose of determining whether an individual is included in the list. Section 3 provides that a person is barred from regulated activity relating to vulnerable adults if the person is included in the adults' barred list. Regulated activity is determined in accordance with section 5 of, and Schedule 4 to, the 2006 Act. Both parties agree the appellant was engaged in regulated activity.
7. Schedule 3 to the Act provides for inclusion by reference to "relevant conduct" by the person included in the list. The appellant must have been engaged in relevant conduct and regulated activity in the past, present or future. Relevant

conduct is described in the Act as conduct which endangers or is likely to endanger a vulnerable adult by harming the vulnerable adult or putting the vulnerable adult at risk of harm.

8. Section 4 of the Act governs appeals. It provides that an appeal may be made to the Upper Tribunal against a DBS decision only on the grounds that the DBS has made a mistake on any point of law or in any finding of fact which the DBS has made and on which the decision was based. Subsection (3) of section 4 provides that, for the purposes of subsection 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.

Permission to Appeal

9. Permission was granted by Judge Perez on the papers on 6 April 2024. Her decision was made on the basis that there is a real prospect of success of that the DBS made a mistake of fact in finding-
10. "That on 13/03/2023 you hit PR, an 86 year old vulnerable adult in your care, 3 times on the leg".
11. She noted there was only 1 witness SP who according to the appellant had a reason to lie. She also noted that the appellant had no other witness but the DBS does have a witness whose account has not been tested and whose oral evidence would help the Tribunal.
12. The DBS did not call any witnesses at the hearing today.

The evidence

13. The appellant was put on the Adults Barred List by the DBS on 28 November 2023. She had worked in the care sector at this home for 6 years before the alleged assault. There have been no allegations of violence before this allegation. There was an allegation of inappropriate language in 2018 in the referral, but the DBS did not rely on this and no details were available. We are therefore considering whether there was a mistake of fact in the DBS decision with reference to the alleged assault as set out in their final decision letter.
14. By way of background the resident PR moved to the care home after the appellant had started but he had been there for some time before the alleged assault took place. We are told he is suffering from dementia. It seems common ground that he can be difficult behaviourally in that he lashes out and is verbally abusive. The appellant was aware of this and explained to us that this happens often and she does not take any notice of it. She has looked after him for some time. She worked in the care home two night shifts a week and at Tesco's on other days.
15. The appellant has consistently denied the allegations that she struck PR on the evening of 13 March 2023. She says that PR was being encouraged by another resident JB to get up from his chair to go out. She went over to PR and told him she needed to help him. He had mobility problems, was suffering from dementia and was incontinent. The staff member SP who made the allegation was on duty on the same floor but on one to one with another resident.
16. When the appellant approached PR he was getting upset as he was trying to stand up to go out with JB who was encouraging him. Standing up without

assistance was dangerous for him and it was late. The appellant went over to him and told him he cannot go out now but could tomorrow and asked him to sit back on the chair for his own safety. He was getting upset, lashing out and racially abusing the appellant when she attempted to help him. SP offered to help get PR into the wheelchair. She was reluctant and said that they should wait until he calms down. She wanted to get the senior member of staff who was downstairs. SP said that they should carry on. Given her concern for his safety she agreed. At some point PR ends up on the floor and a hoist is used to get him to a wheelchair. He was taken to his room to prepare for bed and needed to be “changed” as he had soiled himself. She cleaned him and then put him to bed with SP assisting. The team leader came into the bedroom where PR was. The appellant said this was not until after PR was in bed. The team leader said she took over from the appellant and put PR to bed with SP.

17. SP alleges that the appellant hit PR twice in the lounge and once in the bedroom.
18. Later that night about 2am the appellant tells us she found SP sleeping and warned him that he was not allowed to do this. She told the team leader this but did not write it down. She did not want to get SP into trouble and she believed she had addressed the incident correctly.
19. It is clear that the appellant and SP did not have an easy relationship. He has referred to her as “bossy” and she believed he did not listen to advice. SP had only been at the home for 4 months when he made the allegation of assault.
20. The appellant gave evidence that she did not assault PR, that she does not hit her children and PR is the same age as her parents. She told the Tribunal she would never assault a resident. She told us that whilst he did kick her and racially abuse her this was common, and she did not take this to heart. She adamantly denied that she hit PR as she has denied any assault took place from the time the allegation was made.
21. The notes she wrote on the Kradle system explained that PR was chatting to JB and they both wanted to go out. JB gave him a frame to stand up. The appellant asked PR to sit down so he did not fall but he refused. She told him she was helping him to the bedroom and he was aggressive “screaming, shouting punching and kicking” – “we calm him down but still continue fighting took us ages before we can hoist him to his wheelchair wheeled to his bedroom he continue to punch screaming transfer him to bed sensor mat put in place PR still continue screaming will continue to observe him through the night.” This entry was made a 11.05 pm on 13 March 2023. In the morning of 14 March 2023 at 7.26 am the appellant wrote PR had a settled night, was given medication in the morning, his incontinence pad was changed and he was dressed and left in the lounge.
22. SP made the allegation on 14 March 2023. His first statement is at page 38 of the bundle and handwritten. In summary it says that the appellant “didn’t talk to PR in a good manner”, PR got “little aggressive” and the appellant punched him three times, two times in the lounge and one time in his room. He goes on to describe the appellant; “she was ordering me to do such things as I am one to one to room 17.” In this statement he did not mention where she had allegedly hit PR.

23. On 14 March 2023 an investigation meeting was held and SP interviewed. This is at pp 45 of the bundle. He said she was shouting at PR and pulled him from the chair. PR kicked her and she punched him. He says he told her not to punch residents. She denies he said this as she denied punching PR at all. He described the appellant's temperament; "She was angry with me. She is always ordering me what to do, she never ask to do things, she is bossy. Many staff has the same problem with her, she is interfering with our job, controlling us what we are doing". He says when they were in PR's room that he had calmed PR down but that PR was upset by the appellant. When hoisting him to the bed PR kicked the appellant and she punched him back on his leg. SP alleges that she punched him three times on the leg.
24. The Team leader said she heard PR shouting and went to his room. She said she took over from the appellant and put PR to bed. The appellant said the team leader came to the room but not until after PR was in bed. The Team Leader said once she was in her office SP told her that the appellant punched PR a few times when they tried to put him to bed. She advised him to report to management.
25. On 17 March 2023 the appellant attended an investigation meeting. She said the allegation was false "I will never punch my resident". She said that PR was being aggressive and she wanted to wait for the Team Leader but SP said to transfer him. They continued and got him to bed. After that the Team Leader came into the room. PR slept the rest of the night. She maintained she told SP they should wait but SP said they should carry on. In evidence today she told us she agreed to avoid injury to PR. She said she did not know why SP made the allegation but it could have been because she caught him sleeping.
26. There were no bruises on PR on the morning of 14 March 2023 but they were seen at 19.41 on 14 March 2023. There is a significant bruise in one place on PR's thigh.
27. On 18 March 2023 the Deputy Manager finds there is evidence that supports the allegation against the appellant. This was that SP had stated precisely where the appellant had struck PR, that at 19.41 the bruising appeared in that place. He also said the appellant's statement did not tally with the statements of the team leader and SP.
28. A disciplinary meeting was held on 24 March 2023 with the Manger PB. The appellant was accompanied by her union representative. Again, she denied the allegation and her evidence was consistent with her note in the Kradle entry. The manager who was conducting in answer to questions from the union representative said that the bruises developed in the exact location on PR where it was alleged the appellant hit him and there was no other contact documented. He repeated this in the decision letter dismissing the appellant. The manager said that PR was hoisted from a soft chair and "doctors" had said "the bruises of that size are from impact. The District Nurse also asked if he had been hit". The union representative pointed out that the bruises could have been caused by hitting the arm of the chair, the wheelchair, bed or any hard surface. The manager said there was no evidence "to suggest this and no recorded incident taking place".
29. We have not been given any medical notes confirming any medical opinion. In the meeting PB said that "Doctors have said bruises of that size are from

impact. The District Nurse asked if he had been hit.” In the letter dated 06 April 2023 informing the appellant of this it is said “... consultation notes from further exploration from the GP state that “the extent of bruising being from the possibility of trauma is high”. We note that this is a different account of the medical advice from the appeal of dismissal letter from SH the Regional Manager below.

30. The appellant appealed the dismissal This was conducted by the Regional Manager and the hearing was on 10 May 2023. The appellant again denies the allegations and gave consistent evidence that she did not hit PR. She asked if anyone had spoken to PR. They had not. The Regional Manager then conducted her own enquiries. The decision letter confirming the dismissal says that the appellant approached PR when he was sleeping. That was not the evidence until this letter, and it is not clear where that came from. It is not in the statement of SP nor the appellant. The Regional Manager did speak to PR and JB and neither recalled the incident. They were not asked until May when the alleged assault happened in March. The Regional Manager goes onto say that there are “no entries have been documented to support any injury to PR at all.”
31. This is the second time this has been repeated in a decision letter. However, the notes do describe PR as screaming, shouting, punching and kicking and that it took some effort to get him into the wheelchair. Whilst no specific injury was noted common sense would lead one to believe that PR could have been bruised during that series of events described by the appellant, SP and in the notes. The decision letter goes on to say, “The GP visited PR and reported that the injury is conducive with this type of punching injury. It does therefore correlate with the punching allegation”. There is no note about whether the GP was asked whether the bruising could have been caused another way by PR lashing out, from the wheelchair, from the chair, from falling on the floor or from the hoist. This was the first time it was mentioned that the GP mentioned punching.
32. The letter from SH also addresses the ulterior motive of SP in that the appellant found him sleeping. It says; “I have enquired of all night staff as to whether they have ever witnessed any sleeping on duty and have had no positive responses. I also note that you did not report this.” This is despite the appellant having said that SP was asleep and she reported this verbally. She was consistent with this piece of evidence and repeated it today.

Analysis

33. There is one allegation in this case. It is expressed concisely in the DBS Final Decision letter. The evidence to support the allegation is the witness statement of SP and bruising that appeared the next evening.

Mistake of fact

34. We have decided that the DBS made a mistake of fact in finding that the appellant punched PR 3 times.
35. We heard evidence from the appellant. She has been consistent throughout in her evidence. She was interviewed twice by her employers and gave consistent

evidence. She gave the same evidence today. She did not change her evidence even under the able questioning of Mr Serr, Counsel for the DBS. Her evidence was tested by him and by us and was consistent.

36. The only evidence of punching was from SP. In granting permission Judge Perez said this at para. 6 of that decision;
“She, like the DBS, is free to call witnesses in support. It seems there are no witnesses apart from SP to the alleged act, so it may be that the appellant has no-one to call. The DBS does however have an alleged witness whose account has not been tested and whose oral evidence would help the tribunal.”
37. The DBS has not called SP and his evidence has not been tested by us or the appellant. We have had the evidence of the appellant tested and she was entirely consistent. We therefore place more weight on her evidence.
38. The photos of the bruise were taken at 19.41 on Tuesday 14 March 2023 and at 01:02 on 15 March 2023 the evening after the alleged assault and early in the morning of the next day. We note the bruising is in one place. Throughout the bundle it is noted that the punches were to the left thigh and this has been found significant by the care home as it correlates with the location on PR’s body described by SP. SP says that the appellant punched PR three times and in two different locations; twice in the lounge and once in the bedroom. We find that it implausible that if the appellant did punch PR three times in two different locations whilst he was kicking and punching that these punches would have been to the exact same place on his body.
39. We also find that it is entirely credible that the bruising could have been caused by contact with the chair in which he was sitting, the wheelchair to which he was moved, the hoist or the bed given he was kicking and punching throughout the process of transfer. We have heard the GP said the bruises were because of “impact.” That impact could have been from PR kicking and punching whilst he was transferred to the wheelchair and then his bed. We are also told the GP said; “the injury is conducive with this type of punching injury”. We assume that conducive means consistent but we have not seen this note and repeat our findings that it is entirely credible that the bruising could have been caused by contact with the chair in which he was sitting, the wheelchair to which he was moved, the hoist or the bed given he was kicking and punching throughout the process of transfer.
40. Much has been made of the appellant not noting injuries in the Kradle notes. The notes made by the appellant describe PR’s behaviour. There was no bruise until the next evening and so the appellant would not have written that PR was injured in the notes. She was working with him in the way she was to avoid injury.
41. We accept that the relationship between the appellant and SP was difficult. He describes in his first statement that she was bossy and ordered him to do things. She said she was giving him advice and he would not follow it. She also said she found him sleeping and reported it to the Team Leader. We have no reason to doubt her account. We have not been able to hear from SP despite the DBS being free to call him. We find that her allegation that she found him sleeping does cast doubt on the statement he made.

42. To conclude, we find the DBS did make a mistake of fact. We find there is insufficient evidence to make the finding they did on the balance of probabilities for the reasons given above.

Disposal

43. Having decided that the DBS decision made a mistake of fact, we direct the appellant is removed from the Vulnerable Adults Barred List.

Conclusion

44. It follows from our reasons as set out above that the appellant's appeal to the Upper Tribunal is allowed.

**Sarah Johnston
Sitting as Judge of the Upper
Tribunal**

**Ms Josephine Heggie
Specialist Member of the Upper Tribunal**

**Ms Sally Derrick
Specialist Member of the Upper Tribunal**

Approved for issue on 2 October 2024