



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
UPPER TRIBUNAL CASE No: UA-2023-000188-V
[2024] UKUT 43 (AAC)
FH V DISCLOSURE AND BARRING SERVICE**

THE UPPER TRIBUNAL ORDERS that:

No one shall, without the consent of the Upper Tribunal, publish or reveal the name or address of any of the following:

- (a) FH, who is the Appellant in these proceedings;**
- (b) the children identified in this decision as S and M and any other person identified by name in the documents;**

or any information that would be likely to lead to the identification of any of them or any member of their families in connection with these proceedings.

Any breach of this 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.

Decided following an oral hearing on 4 January 2024

Representatives

| | |
|--------------------------------|---|
| Appellant | Assisted by her father |
| Disclosure and Barring Service | Ashley Serr of counsel, instructed by DLA Piper LLP |

DECISION OF THE UPPER TRIBUNAL

On appeal from the Disclosure and Barring Service (DBS from now on)

DBS Reference: 00982786631
Decision letter: 7 December 2022

As DBS made a mistake in the finding of fact on which its decision was based, the Upper Tribunal, pursuant to section 4(6)(a) of the Safeguarding Vulnerable Groups Act 2006 (SVGA from now on), directs DBS to remove the appellant from both lists.

REASONS FOR DECISION

A. Introduction

1. On 7 December 2022, DBS decided to include FH in the children’s barred list and the adult’s barred list on the basis that:

On 20 January 2022, whilst working as a teaching assistant ..., you hit 5 year old pupil S on his face in response to him pulling your hair.

2. Upper Tribunal Judge Jacobs gave FH permission to appeal to the Upper Tribunal. The essence of her case was that she denied hitting S. Having heard evidence from FH, we have found that DBS was mistaken in making its finding of fact. Given that conclusion, the only outcome possible under the legislation is to direct DBS to remove FH from both barred lists.

B. Section 4 SVGA

3. This section contains the Upper Tribunal’s jurisdiction and powers. The provisions relevant to this case are:

4 Appeals

(1) An individual who is included in a barred list may appeal to the Upper Tribunal against–

...

(b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;

(c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.

(2) An appeal under subsection (1) may be made only on the grounds that DBS has made a mistake–

...

(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

...

(6) If the Upper Tribunal finds that DBS has made such a mistake it must–

(a) direct DBS to remove the person from the list, ...

C. The approach to mistakes of fact

4. The correct approach for the Upper Tribunal to take on a challenge to a finding of fact under section 4(2)(b) was considered by the Court of Appeal in *Disclosure and*

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Barring Service v JHB [2023] EWCA Civ 982. We have dealt with this case in accordance with that decision. It is not necessary to quote from it at length. It is sufficient to emphasise the following:

5. First, the Upper Tribunal is entitled to hear evidence that was not before DBS and to rely on that evidence to find that DBS made a mistake of fact. *JHB* at [95].

6. Second, there can only be a mistake if the Upper Tribunal is satisfied that DBS's finding was wrong. A finding can be wrong, even if there was some evidence to support it and it was not irrational. It is not sufficient for the Upper Tribunal to prefer a different view of the facts. It must be satisfied that the evidence requires it to take a different view. The Court relied on the decision of the Court of Appeal in *Subesh v Secretary of State for the Home Department* [2004] EWCA Civ 56 as it showed 'the extent of an appeal court's powers on a factual appeal, and ... what it means to make a mistake in a finding of fact.' *JHB* at [95]. According to *Subesh* at [46] and [53], the test for finding an error will be satisfied when 'there are objective grounds upon which the court ought to conclude that a different view is the right one' ... 'or (and we mean it to be the same thing) that reason and the law impelled them to take a different view'.

7. Third, the Upper Tribunal cannot make its own assessment of the evidence as a whole unless and until 'it identified an error of fact in the approach of the DBS to the findings of fact on which the Decision was based.' *JHB* at [90].

D. The background to the incident on 20 January 2022

8. FH had worked as a waitress and a sales assistant. In 2021, at the age of 19, she was given a four months' placement as a teaching assistant. In August 2021, she went on a week's trip with some pupils to a working farm. She enjoyed the work and must have impressed her employer, because she was taken on as a full-time teaching assistant for 4-6 year old children with special educational needs. This appointment began on 1 September 2021 with a probationary period of four months. Her role was to work one-to-one with an individual pupil. She worked under the supervision of the class teacher, as did her fellow teaching assistant AML, who had 15 years' experience.

9. On 22 January 2022, FH's class teacher had covid and was off sick. FH and AML were left in charge of the class under the supervision of a teacher from another class. During the afternoon, FH and AML decided to take the children outside. A scuffle broke out between two children, S and M. M owned an ironman toy, which S wanted to play with. M won the tussle, but was upset and came to FH, who took him onto her lap. S came over and began pulling FH's hair. That much is not in dispute.

E. What happened on 20 January 2022

10. What happened next is the subject of DBS's finding of fact. FH denies hitting S. AML says that she did. The school's site manager or maintenance man, EP, was also present at the time and says that FH hit S.

11. FH gave evidence at the hearing in response to questions by the panel and by Mr Serr on behalf of DBS. She gave a clear account, supplying information that was not previously before DBS and demonstrating the movements and gestures that she made. Our impression of her as a witness is that she was frank and sincere, which of course does not necessarily mean that her evidence is reliable. This is what she told us.

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12. In part, FH's evidence was given by reference to the photographs at pages 45, 46 and 71 of the Upper Tribunal's bundle. AML and FH brought the children out to a covered area. The photographs show that it is rectangular in shape with fencing along one of the long sides and panels along the other. The entrance to the school building is at one short end. At the other, the area opens out onto the playground for the special needs classes, beyond which is the playground for the mainstream pupils.

13. We were able to judge the dimensions of the covered area from FH's evidence of the width of the panels down one side. She said they were a metre wide, judging by comparison with the bookcases in the court room. We accept her estimate, which is consistent with the size of the chairs in the photos, best seen in image F on page 46. That puts the length of the area at a little over 12 metres.

14. FH was almost at the furthest end from the building, adjacent to the playground. That is what she told us and it is consistent with images B and D on page 45, which show someone sitting at the end by the playground. AML and EP were towards the other end of the area, approximately 8 metres away from FH. That is what she told us and it is consistent with the photographs.

15. Image B shows someone sitting close to the panels turned towards AML and EP. Image D shows someone sitting sideways on to AML and EP, with their back almost against the panels. FH told us that she was half turned towards the playground, so that AML and EP were viewing her from behind her left shoulder. She also told us that she was sitting in the middle of the area on the white line in images A and B on page 45 and in the photograph on page 71. We accept FH's evidence, which is consistent with her location next to the playground. AML was too far away to supervise the children who were outside, so it makes sense that FH would have positioned herself with the best view of what the children were doing.

16. FH had two children, S and M, with her. AML had a third child with her. The other children were in the playground. Inevitably, there would be noise from those children as they ran around, excited to be out of their classroom early and eager to go home. FH told us of one child in particular who wore a crash helmet for protection as he had a habit of hitting his head on walls. We accept this evidence of background noise. It would be surprising if the playground was quiet. The playground noise was in addition to the noise caused by S and M during the tussle over the toy and later.

17. We consider that FH's position relative to AML and EP is important new evidence that was not previously before DBS, as is the background noise from the children in the playground. Her position restricted what AML and EP could see and the background noise hampered their ability to hear what was being said.

18. FH was sitting on the chair with M on her lap and her left arm around him. There is no dispute about that. Having won the fight for his ironman toy, M was playing with it. S was annoyed and trying to take the toy for himself. He is non-verbal, but vocal. FH's hair was in a bun low on the back of her head. S stood by her shoulder, took hold of her hair and pulled it. There is no dispute about that.

19. FH's left arm was around M, and she said that S was standing on her left side. S would stroke her hair if it was loose and pull her hair if it was in a bun. Usually, he would let go, but this time he did not, pulling her head back. She reached round with her right arm to free her hair. S was, she said, in melt down. She took hold of his hand to free his grip and pull him round. She told him he could not have the toy and

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demonstrated her gestures that she used as part of her communication with him. This involved raising and moving her hand to emphasise that he must stop his behaviour. From a distance, this could be mistaken for raising her hand to hit him. She brought S round to move him away from her hair. At first, she thought she might have caught his face by accident. Later, she was not sure whether she did or not.

F. After the incident

20. On 21 January 2022, both AML and EP sent emails reporting what they saw. They were sent within minutes of each other, shortly after 6 am. AML gave the fuller account. She said that FH ‘slapped S around the face with her full palm and hand.’ EP said that FH ‘slapped the kid on his face so hard the kid starts crying’.

21. Both AML and EP gave statements to the police and at the disciplinary hearing. The former are formal, signed witness statements; the latter were not recorded verbatim.

22. In his police statement, EP said that he was two metres away from FH. He said that S was on FH’s right and she ‘pulled the child round in front of her so they were basically face to face, there was no hesitation in her actions and she slapped him almost straight away. ... I believe FH used her right hand to slap the left side of the child’s face. If I was to describe the force of the slap on a scale of 1-10, 10 being the hardest I would say FH slapped the child using a 10.’ FH did not say anything when her hair was pulled, but ‘I could tell by her face that she was upset.’ S was ‘non-verbal and didn’t say anything.’ At the disciplinary hearing, EP described FH bringing S round to her side. His language suggests that FH pulled S round to her right side before slapping him with an open hand, which means S started on FH’s left. He repeated that the power of the slap was 10 out of 10. EP said that S ‘started screaming like any child who gets beaten up.’

23. In her police statement, AML said FH was ‘screaming out in discomfort asking S to let go.’ She described her ‘turning her body to slap S but remained seated. I believe FH was holding the child on her lap with her left hand and moved her right hand across her body to get S off of her hair.’ She hit S when he was on her right side. AML described FH’s slap as ‘both forceful and aggressive’, adding that her ‘face was scrunched up like she was angry that he had hurt her.’ At the disciplinary hearing, AML said that FH did not bring S round in front of her but turned her whole body to see him. She described the power of the slap as ‘on the verge of 8’.

24. S’s parents did not support the police investigation and said they had noticed nothing different or unusual in their son’s behaviour when he was collected from school.

G. Our assessment

25. FH gave evidence that was not previously before DBS. We refer in particular to: (a) FH’s position relative to and distance from the witnesses; (b) the background noise; and (c) the gestures she used to reinforce her instructions to S. We have accepted FH’s evidence on those matters, for the reasons we have explained. The absence of any findings on those matters was, with the benefit of hindsight and to quote *JHB* at [90], ‘an error of fact in the approach of the DBS to the findings of fact on which the Decision was based.’ They are findings on matters that are capable of affecting the reliability of DBS’s findings.

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26. That allows us to consider the effect of those findings on DBS's conclusions.

27. There are obvious differences within and between the statements made by AML and EP. We have taken into account that memory is not perfect, that the immediate recollection is not necessarily the most reliable, and that the brain can supplement memory with what a witness expects to see or hear. We have also taken into account that an error on one feature, such as the power of a slap, does not necessarily mean that the evidence as a whole is unreliable. That makes it impossible to find some simple test for grading the reliability of evidence. The solution is to take account of the evidence as a whole.

28. In applying that approach, we accept FH's evidence of where she was sitting. This is important, because with child M on her lap the use of her right hand and arm was restricted, which was all she had to try to control S. It also limited the view that AML and EP had from some metres away. Image B cannot be right if S pulled FH's hair from her left, because S could not have got into position to do so. FH says he came from the left, so does AML. EP told the police that S came from FH's right, but his evidence at the disciplinary hearing is more consistent with S being on her left. We prefer FH's account to Image D, because her position would allow her to keep an eye on the children in the playground.

29. We do not accept that FH struck S with a force of 8 out of 10, let alone 10 out of 10. She is a strong young woman. A blow with that kind of power would have sent a child of 5 spinning away, possibly onto the ground or even injured.

30. We do not accept EP's statement that he was two metres away from FH. That is not the position he demonstrated in image C. Judging from image C, he was at least 8 metres away; and judging by images A and C, AML was about 6 metres away.

31. We do not accept that either AML or EP could see FH's facial expression. They were not able to do so given their relative positions and their distance away. There is also the light levels to consider. We did not hear evidence on the orientation of the area where the incident took place. The sun would have been low on 20 January and some of the photographs show deep shadows at FH's end of the covered area. Whatever the direction of the sun, the light level would have been low in mid-afternoon, further limiting the ability of AML or EP to see the details they describe from the distance they were away from FH.

32. There was a lot of noise from excited children and, at least in the case of S and M, upset children. It is unlikely that either AML or EP would have been able to distinguish which child was making what noise in the general hubbub of noise for the second or so that the incident lasted. S and M had been shouting and screaming as they fought for the toy. M calmed when he had settled on FH's lap. But S remained in meltdown. If S had been struck – and struck with the force described – we would have expected a moment of shocked silence before resuming the screaming with increased force and volume. That is not what AML and EP described.

33. We accept FH's description of what happened. With her left arm holding M and S standing over her left shoulder, it would have been awkward but necessary for her to twist and reach across her chest to take hold of S's hand. It is possible that she may have caught his head in the course of the struggle with an angry child, but we have no evidence that this was intentional. If there was any contact, it was merely an accident. Whatever happened, happened in a matter of seconds, so she may not fully recall

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precisely what occurred. Executing any slap while holding S at her left side would have been difficult, given the presence of M. FH told S that he could not have the toy. She used gestures with her right hand to emphasise her point. It is possible that these could have been mistaken by AML and EP as a blow.

34. We attach significance to the view of S's parents. S is non-verbal, so they will be even more attuned than parents of a verbal child to his mood and behaviour. They did not notice anything out of the ordinary, which we would have expected if S had been hit and left screaming and crying. They saw nothing in his behaviour to suggest that he had been ill-treated in school that day. Nor did they see any physical evidence that he had been struck at all, let alone with the force described by AML and EP.

35. For those reasons, we find that DBS made a mistake in its finding and the only correct analysis of the evidence compels us to make the findings that we have made. Given those findings, there is no longer any basis on which FH can remain on the lists, which is why we have directed DBS to remove her name.

**Authorised for issue
on 03 February 2024**

Edward Jacobs
Upper Tribunal Judge
Brian Cairns
Suzanna Jacoby
Members