



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2022-001079-V
[2024] UKUT 269 (AAC)**

The Upper Tribunal has ordered that there is to be no disclosure or publication of any matter likely to lead members of the public to identify any of the service users, or any of the individuals that gave character references for the Appellant, as are named in the Upper Tribunal bundle for this case

Between:

TJO

Appellant

- v -

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Citron, Mr Hutchinson and Ms Heggie

Decided following an oral hearing at Field House, London EC4 on 28 May 2024

Representation:

Appellant: by herself

Respondent: by Simon Lewis 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 21 December 2021 (reference DBS6191 009472553290) to include TJO 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 21 December 2021 to include TJO in the adults' barred list.

DBS's decision

2. DBS's 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” includes, amongst other things, 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 them or
 - b. causes them to be harmed or
 - c. puts them at risk of harm.
4. The decision was based on a finding of fact (DBS’s “**core factual finding**”) that TJO neglected a vulnerable adult (the “**VA**”) in her care, by failing to complete scheduled care/welfare calls and/or inform her employer that she had not completed these calls on Saturday 16, Sunday 17 and Monday 18 January 2021.
5. DBS’s “barring decision summary” document stated that TJO admitted
 - a. that she failed to complete scheduled care/welfare calls and/or inform her employer that she had not completed these calls on 16-18 January 2021 (page 83 – this and the following page references are to the Upper Tribunal bundle)
 - b. during an investigatory meeting on 21 January 2021, that she did not see the VA during her evening call on Saturday 16 January 2021 and that she did not report this to her employer even though she was aware that she was meant to do so (page 83)
 - c. during the same investigatory meeting, that she failed to complete her morning and evening visits to the VA on Sunday 17 January 2021 (page 84)
 - d. during the same investigatory meeting, that she failed to complete a welfare call at 7.31 am on Monday 18 January 2021 and had failed to report this (page 84).
6. The letter conveying DBS’s decision (the “**decision letter**”) stated that:
 - i. DBS was satisfied that TJO had engaged in conduct which harmed or could harm vulnerable adults
 - ii. harm was caused by TJO’s neglect of the VA between 16 and 18 January 2021

- iii. it was reasonable to believe (based on what police found when they attended the VA's home at 6.30 pm on Sunday 17 January) that the VA had been on the floor when TJO's scheduled visit at 5.35 pm on that day was due
- iv. TJO's attempted welfare check at 5.35 pm on Sunday 17 January 2021 was cursory at best, given that the police reported that the VA could be seen (in the poor state he was in) by looking through the lounge window
- v. there was evidence to suggest that TJO's neglectful behaviour was pre-meditated: TJO had "logged in" to indicate that she had attend care calls, when in fact she had not
- vi. TJO took no follow up action on being unable to observe the VA or establish his wellbeing.

Jurisdiction of the Upper Tribunal

7. Section 4(2) of the Act confers a right of appeal to the Upper Tribunal against a decision by DBS under paragraphs 3 and 9 of Schedule 3 (amongst other provisions) only on grounds that DBS has made a mistake
 - a. on any point of law; or
 - b. in any finding of fact on which the decision was based.
8. 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)).

Grant of permission to appeal

9. Permission to appeal was given by the Upper Tribunal (Judge Citron) in a decision issued on 31 August 2023, on the sole ground that DBS made mistakes in its core factual finding, as follows:
 - a. per the account in her letter to DBS (in particular at pages 47 and 48), TJO did, in fact, reasonably attempt to perform her duties with regard to the VA on Saturday evening 16 January, Sunday 17 January morning and evening, and Monday morning 18 January (albeit that her attempts were unsuccessful); and, when she was unable to make contact with the VA, made reasonable attempts to inform her employer (albeit that those attempts were unsuccessful on the Saturday night and the Sunday morning and Sunday evening); DBS therefore made a mistake by finding that TJO "neglected" the VA;

- b. TJO did not “admit” some or all of the things that DBS allege that she “admitted” in the course of an investigatory meeting on 20 January 2021: it is arguably evident from the transcript that TJO’s responses to some important questions were ‘non sequiturs’ or otherwise that there was not satisfactory communication between TJO and the person asking the question; for example:

Page 36:

MM: Did you report to the office that he asked you to leave?

TO: No, but I always tell the office. NT: But on this occasion you did not report to the office?

TO: No, that's just his character.

MM: But you know that you are meant to report this to the office?

TO: Yes, I know that I am meant to.

MM: So why didn't you report this?

TO: It's because that's how he is. That's his character.

Page 37:

NT: Did you call the office?

TO: No. I tried but I couldn't get through.

NT: Do you have an email address for the office?

TO: Yes, but this is normal for him.

Page 40:

MM: So it took you 2 days, 4 consecutive visits, of not seeing the service user you are doing a welfare check for, and for the neighbour to tell you that he has been taken to hospital for you to finally contact the office.

TO: But I called on Sunday.

NT: Can you evidence that?

TO: Yes.

[Shows NT her phone log]

NT: So I can see that 2 phone calls were made on Saturday evening at 18:00 [16/01/2021]. One of these looks like it has connected, the green phone sign indicates you spoke to someone.

MM: The phone call that is logged on your phone is when you contacted [W] to discuss concerns regarding Mrs EB which were discussed earlier. So this tells me that you had every opportunity to inform the office that there was a no reply with [the VA].

TO: But I always report. He does this all the time.

- c. DBS should have made findings of fact about the wider context of TJO's care for the VA, in particular findings about TJO's notifying her employer and social services of the squalor in which the VA lived (see TJO's account at page 45, at the bottom, and page 46) and the difficulties of gaining access to his home due to his refusal to cooperate (possibly caused by his mental health conditions) (see, for example, TJO's account at pages 46 and 47).

Documentary evidence before the Upper Tribunal

10. In addition to the decision letter and DBS's "barring decision summary" document, evidence in the bundle of 122 pages included:
- a. a police form regarding concerns about the VA and an incident on Sunday 17 January 2021 at 6.30 pm; police had been called by a concerned neighbour who had not seen or heard from the VA since the previous day; it recorded that on arrival, lights were on upstairs and downstairs and, on looking through the lounge window, the VA could clearly be seen laying on the lounge floor motionless with his trousers around his ankles; the VA appeared to be drifting in and out consciousness due to exhaustion; the VA stated that he had fallen the night before (and so could have been there for up 24 hours without food or drink); the VA was confused, and extremely cold to touch; the hospital said that it was unlikely that the VA would have survived the night if not discovered by the police; it said that the premises were in a very poor state; the kitchen was very dirty and unused; the whole premises were not clean or hygienic; it was clear that the VA was unable to look after himself; the VA was said to be extremely frail and malnourished; the house was said to be dark, cluttered, and in a dire state;
 - b. the referral by TJO's employer to DBS; this (amongst other things) said that TJO had been working as a care worker since January 2020, working with vulnerable adults; that TJO had been allocated to attend the VA twice a day for a welfare check. It said that, sadly, the VA passed away in hospital on 25 January 2021. It said that the VA had been diagnosed with dementia. It indicated that the VA was in his early 80s at the time;
 - c. a report from the employer dated 10 February 2021;
 - d. dismissal letter from the employer dated 25 January 2021;
 - e. an email from TJO to "W" (the "coordinator" at the employer for whom TJO worked) dated (Monday) 18 January 2021 at 11.29 am;
 - f. 8 page transcript of an investigatory meeting with TJO on 20 January 2021;
 - g. TJO's written representations;
 - h. TJO's training certificates;
 - i. a job description;
 - j. three character references for TJO;

The Upper Tribunal hearing

11. TJO attended the hearing, presented her case, gave evidence, and was cross examined by Mr Lewis, who also made submissions on behalf of DBS.

Review of key evidence

Transcript of the “investigatory meeting” on 20 January 2021

12. The following relevant evidence emerges from the transcript of the “investigatory meeting” on 20 January 2021:
- a. TJO attended at the VA’s home on the Saturday morning (16 January 2021); he opened the door and they spoke; the VA asked TJO to buy cigarettes for him; she refused (but said she could buy him food); he become cross with her and she then left, after about 10-15 minutes interacting with the VA. She logged her visit on the employer’s system, but did not otherwise notify the employer of anything out of the ordinary;
 - b. on the Saturday evening, TJO attended at the VA’s home, knocked on the door, but got no answer; she waited in the car for about 15 minutes but he did not return. TJO then drove to the local Tesco in case the VA was there (but he was not). TJO did not report to her employer that she had not been able to make contact with the VA;
 - c. on the Sunday morning, TJO attended at the VA’s home, knocked on the door, but got no answer. TJO said she tried to call the employer’s office but could not get through. She did not email the office, although she had an email address;
 - d. on the Sunday evening, TJO attended at the VA’s home at 5.35 pm, knocked several times, but got no answer. She logged in to the employer’s system at 5.35, and logged out at 5.42 pm. TJO did not get through to the office on the phone, and did not send an email;
 - e. on the Monday morning, TJO attended at the VA’s home, at just after 10 am, knocked on the door, but got no response. The neighbour opposite told her that the VA had had a fall outside the house and that he had called an ambulance;
 - f. during the meeting, TJO produced evidence of her having made two calls on the Saturday evening at 6 pm, only one of which “connected”. It seems that this call was with W, and they discussed a service user other than the VA;
 - g. during the meeting, TJO said that she could only see a reflection of the TV, through the VA’s front window.

TJO’s email to W of Monday 18 January at 11.29 am

13. TJO’s email to W on the Monday morning said this:

I got to [the VA] this morning to check on him, he was well and ok, he asked me to get him cigarette, I said no, he told me it's so cold to go out to get it himself, I told him, I don't buy cigarette for client, I told him I will see him later for lunch, to do his shopping and domestic.

When I arrive later to do his weekly shopping, he was not in his house, I waited outside in my car, as I was waiting for his return, his neighbours opposite his house names Dav, walk up to me that [the VA] had a fall in front of his house and he called the ambulance for him.

And he was taken to ... hospital. I put a call to the office and reported it, I spoke to [W] on the phone. She ask me to send an email and explain what has happened to him.

TJO's evidence

14. TJO's evidence was not confined to the events of 16-18 January; it contained background information: that she had been assigned to the VA earlier in 2020, had been very concerned about his poor living conditions and state of health, and had gone "above and beyond" her duties to help him (for example, she had bought him food with her own money). Her evidence was that she had raised concerns with the employer about the state of the VA's home and his health, but nothing had been done. She said she had suggested putting a key in a lock box outside the VA's home, but this suggestion had not been acted upon. She said that she had been taken off duties with the VA for a period at the end of 2020 and then, in around December 2020, had been re-assigned to work with him. She made clear how much she cared for the VA.
15. As regards the events of 16-18 January, TJO's evidence was that
 - a. she had tried to phone the office on the Saturday night (about her inability to make contact with the VA that evening), but no one picked up
 - b. on both Sunday morning and Sunday evening, when the VA did not answer the door, TJO assumed that he had gone out, as he quite commonly did
 - c. she tried to phone W on Sunday evening, but she did not pick up
 - d. she did not look in through the front window when the VA did not respond to her knocking at his door.
16. In cross examination, TJO said that it was common for the office not to pick up calls on the weekend (and so TJO would phone contacts like W "directly"); and that a further impediment to her seeing through the front window of the VA's home was the long grass outside the window (which, she said, pressed into her skin).
17. TJO's evidence was that it was not possible to make longer notes in the employer's electronic "log in" system.
18. TJO's twice-daily welfare checks to the VA were usually at around 7 am and 5.30 pm; on Mondays, she made an extra visit, at around 11 am, for shopping
19. In TJO's view, it was the employer and social services that had "neglected" the VA, by not doing anything to improve his circumstances, despite TJO raising concerns.

Discussion: did DBS make mistakes in its core factual finding?

20. The question in this appeal is whether DBS made mistakes of fact in its core factual finding that TJO neglected the VA by failing to complete the welfare checks she was employed to carry out and/or failing to inform her employer that she had not completed these.
21. We find (and this was not disputed) that the “welfare checks” for which TJO was responsible involved her visiting the VA twice a day, morning and evening, to check that he was okay; and that it was part and parcel of these checks that TJO inform the employer if, having made the visit, she had found the VA not to be “okay” – or that she had been unable to make contact with him.
22. We also find that TJO made the twice-daily visits, as she was supposed to, on the Saturday, the Sunday, and the Monday morning in question. She made contact with the VA, and found him to be “okay” (in the sense of not seriously unwell or otherwise in a dangerous situation) on the Saturday morning. However, on the Saturday evening, on Sunday, and on Monday morning, TJO was unable to make contact with him: he did not respond to her knocking at the door; and TJO did not attempt to look in through the front window. It is common ground that TJO did not convey to her employer, by phone, email, text or other means (such as making a note in the employer’s electronic logging in system), the fact that she had been unable to make contact with the VA, on the Saturday night, the Sunday morning, or the Sunday night. (We do not accept TJO’s evidence that it was not possible for her to make a note of such things on the employer’s electronic system – it is clear from the 20 January 2021 meeting transcript (albeit in a section concerning a service user other than the VA), that this was possible (see page 42, at the top)).
23. There is reason to be wary of TJO’s uncorroborated evidence, given that her email to W on the Monday morning was, on its face, untrue (TJO’s explains this by saying that she was describing there what had happened two days earlier, on the Saturday morning). But even if we accept her relevant evidence at face value – that she tried to phone the office, or W, each time she failed to make contact with the VA over that weekend, and that it was not uncommon for the VA to be “out”, or to not answer, when she paid her visits – we nonetheless do not think that DBS made a mistake in its core factual finding. For TJO to have failed to make contact with the VA, and failed to follow up with an email or a text or a note on the internal system, once, on the Saturday night, would be one thing; but for her to do the same when the VA could not be contacted the next morning, and then do the same *again* when the VA still could not be contacted on the Sunday evening, does, viewed in the round, amount to her neglecting her core duty – to check the VA was okay and, if he was not, or if he could not be contacted, to tell her employer. By the third successive instance of her not making contact and being unable to reach W or the office by phone, TJO ought to have been sending “urgent” emails or texts, or putting such messages on the internal electronic system, and/or considering other ways of checking on the VA, such as looking in through the front window, as the police had done (even if this meant dealing with the long grass, and reflections, which TJO says were impediments to looking through that window).

24. Whilst we have no particular reason to doubt TJO's evidence about the wider context – in particular, her efforts in the past to alert her employer to the terrible conditions the VA was living in, and her kindness in buying him food with her own money – we do not consider these points relevant to the question of whether DBS made a mistake in its core factual finding, being a discrete point about TJO's conduct on the Saturday, Sunday and Monday in question.

Conclusion

25. The ground on which permission to appeal was given has not been made out; DBS did not make a mistake in its core factual finding. DBS's decision is therefore confirmed.

**Zachary Citron
Judge of the Upper Tribunal**

**John Hutchinson
Josephine Heggie
Members of the Upper Tribunal**

Approved for release on 3 September 2024