

Disclosure and Barring Service ('DBS') v. RI [2024] EWCA Civ 95 reaffirms the 'mistake of fact' jurisdiction in appeals against decisions of the DBS

By [Sunyana Sharma](#)
3PB Barristers

[Disclosure and Barring Service \('DBS'\) v. RI \[2024\] EWCA Civ 95](#)

Routinely registrants not only face disciplinary proceedings before their professional bodies when misdemeanours are alleged but may have to experience an internal investigation by their employers alongside possible proceedings before other Courts or tribunals.

The case of *DBS v. RI* is a recent Court of Appeal decision against a decision by the Upper Tribunal to remove RI's name from the Adults' Barred List. In its judgment, the Court of Appeal reaffirmed the approach to be taken by Appellate Tribunals when hearing an appeal against the decision of the DBS.

RI was a support worker for vulnerable adults with learning difficulties. In 2018 it was alleged that RI had stolen money from a service user who had learning disabilities and health needs. An internal investigation concluded that between January and September 2018, RI had stolen £2,800 from the service user. She was dismissed by her employers Metropolitan Thames Valley Housing ('MTVH') in April 2019 following disciplinary proceedings and was reported to the police. A referral was made to the DBS. The Police closed the investigation due to insufficient evidence and MTVH settled unfair dismissal proceedings against them brought by RI for £15,000. On written representations alone and despite RI's denial of the alleged offence, DBS notified RI of its decision that it would include her in the Adult's Barred list under the Safeguarding of Vulnerable Groups Act 2006 ('SVGA').

RI appealed to the Upper Tribunal where permission was granted and an oral hearing took place in which RI gave evidence and was cross examined. Her appeal was allowed as the Upper Tribunal ('UT') made a finding of fact that "the appellant did not steal any money from RV at any time during the course of her employment and her duties as a key worker and/or

support worker". The DBS was therefore directed that RI's name be removed from the Barred List on the basis that it had made a mistake of fact.

Under s.4 of SVGA, an appeal to the UT may be made on the grounds of either a mistake of law (s.4(2)(a)) or a mistake in any finding of fact (s.4(2)(b)) on which the decision was based, but s.4(3) lays down that the UT may not decide whether it is appropriate for the appellant to be included in a barred list. If the UT finds that the DBS has made a mistake under s.4(2), it must either direct the DBS to remove the person from the barred list (s.4(6)(a)) or remit the matter to the DBS for a new decision (s.4(6)(b)).

In summary, the DBS appealed the decision of the UT to the Court of Appeal on the following bases that:

1. The UT had made an error of law in its approach to the mistake of fact jurisdiction, which was contrary to case law;
2. The UT erred in law in its conclusion that others may have stolen money as there was no evidence of this;
3. The Tribunal failed to take into account material considerations which disproved the conclusions reached.

A number of legal principles were confirmed in the case including the reasoning in *PF v. DBS* [2020] UK UT 256 (AAC) that the UT were permitted to hear oral evidence that may not be available to the DBS and may assess it against the documentary evidence upon which the DBS relied to make its decision. In *PF*, Farbey J said at paragraphs 37 to 39 that:

'Section 4(2)(b) refers to a 'mistake' in the findings of fact made by the DBS and on which the decision was based... 'Mistake' is the word used and there is no reason to qualify it. The courts operate a test of whether a decision was 'wrong'... There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact. This includes matters such as who did what, when, where and how. It includes inactions as well as actions. It also includes states of mind like intentions, motives and beliefs.'

Further in her judgment, Farbey J confirmed that one way to show a mistake was to call further evidence to show that a different finding should have been made and that the mistake could appear in light of such further evidence or consideration.

The DBS sought to persuade the Court of Appeal that the decision in *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982 took a contrary approach at Elisabeth Laing LJ had stated that paragraph 93: ‘...On the authorities, a disagreement about the evaluation of the evidence is not ‘an error of fact’. However the Court of Appeal felt able to distinguish the case of *JHB* on the basis that its reasoning was confined to cases ‘where the Upper Tribunal either hears no oral evidence at all, or no evidence which is relevant to the question whether the barred person committed the relevant act – in other words, where the evidence before the Upper Tribunal is the same as the evidence before the DBS’ (Lord Justice Males, paragraph 54).

The Court endorsing the legal submissions made on behalf of RI concluded that the mistake of fact jurisdiction could be described as the UT being ‘entitled to make a finding that an appellant’s denial of wrongdoing is credible, such that it is a mistake of fact to find that she did the impugned act. In so doing, the Upper Tribunal is entitled to hear oral evidence from an appellant and to assess it against the documentary evidence on which the DBS based its decision.’ (paragraphs 28 – 29).

The DBS’ appeal was dismissed in full.

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the authors. If you seek further information, please contact the [3PB clerking team](#) or [Russell Porter](#).

8 May 2024



Sunyana Sharma

Barrister
3PB

0330 332 2633
sunyana.sharma@3pb.co.uk
3pb.co.uk