IN THE UPPER TRIBUNAL **Appeal No.: UA-2021-001749-V**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the Disclosure and Barring Service

Between:

AA

Appellant

- v –

Disclosure and Barring Service

Respondent

NOTE THAT, on 2 November 2021, Upper Tribunal Judge Rowley ordered that –

> **There is to be no disclosure of any matter that is likely to lead members of the public, directly or indirectly, to identify [JC] or [EB].**

That Order applies to the persons referred to in this decision as JC and EB. Any breach of the Order is liable to be treated as a contempt of court and punished as such.

Before: **Deputy Upper Tribunal Judge Rowland**
Ms Rachael Smith
Ms Josephine Heggie

Hearing date: 1 September 2022
Decision date: 12 May 2023

Representation:

Appellant: Mr Nozir Uddin of Counsel, instructed by Nathan Aaron Solicitors
Respondent: Mr Riccardo Calzavara of Counsel, instructed by DBS Legal Services

DECISION

The appeal is allowed on the ground that the Respondent made mistakes of fact and law when deciding on 19 March 2021 to include the Appellant in the adults' barred list and the children's barred list.

The Respondent is directed to remove the Appellant from both lists.

REASONS FOR DECISION

1. This an appeal, brought by the Appellant under section 4 of the Safeguarding Vulnerable Groups Act 2006 (hereinafter "the 2006 Act") with permission granted by Upper Tribunal Judge Rowley, against the decision of the Respondent, the Disclosure and Barring Service (hereinafter "DBS") dated 19 March 2021, whereby the Appellant was included in both the adults' barred list and the children's barred list that are maintained by DBS under section 2 of the 2006 Act.

2. We held a face-to-face oral hearing at which the Appellant gave oral evidence. Both parties were represented by counsel, Mr Calzavara for the Respondent and Mr Uddin for the Appellant, and, at the beginning of the hearing, it became apparent that neither of them had all the documents in the case. It is not entirely clear why, although it may have been partly a side-effect of the Upper Tribunal's case file having been computerised while the appeal was pending. Mr Uddin had a copy of the hearing bundle of 112 pages submitted by the Appellant in July 2022, but that not only did not contain all of the documents in the Upper Tribunal's own bundle of 159 pages, which Mr Calzavara had and which had also been emailed to the Appellant (partly on 16 March 2021 with the rest following on 14 April 2002), but also included at pages 17-20, 26-30 and 53-55 documents that had not previously been submitted to the Upper Tribunal and so were not in its bundle. Since those bundles were prepared, two further documents have been created but not given page numbers, a direction issued by Judge Rowland on 25 July 2022 and further written submissions on behalf of the Respondent dated 23 August 2022, which were drafted by Mr Calzavara who had recently taken over the conduct of the Respondent's case. The beginning of the hearing was delayed while the necessary documents were exchanged and read. Page references in this decision are to the Upper Tribunal's own bundle, except where otherwise stated.

The procedural history

3. The Appellant had been employed since March 2017 as a "home carer" by an agency providing domiciliary care (hereinafter "the agency"). Her job description is at pages 52 and 53 of the Upper Tribunal's bundle and it is not disputed that her work amounted to "regulated activity relating to vulnerable adults" (see sections 3 and 60(1) of, and Part 2 of Schedule 4 to, the 2006 Act). On 21 April 2020, the agency received, apparently coincidentally, complaints about the Appellant arising out of her care of two unrelated "service users", JC and EB.

4. After some investigation, including receiving a report from another care worker as to the Appellant's care for EB on 22 April 2020 and an investigation meeting with

the Appellant on 29 April 2020, the Appellant was invited to a disciplinary hearing that was to have taken place on 14 May 2020. However, she submitted a letter of resignation on that day (page 51). The agency referred the matters to DBS on a form dated 29 May 2020 (pages 39 to 45).

5. On 17 January 2021, DBS sent the Appellant a "minded to bar" letter and gave her an opportunity to make representations, which she did in a letter dated 10 March 2021 that was obviously prepared by her solicitors. Having gone through the "Barring Decision Process", DBS decided, in a decision notified on 19 March 2021, that the Appellant should be included in both the adults' barred list and the children's barred list under paragraphs 9 and 3, respectively, of Schedule 3 to the 2006 Act. The allegations that DBS found proved were –

> 1. During a care visit on 21 April 2020, [the Appellant] did not assist her colleague to reposition service user [JC}, despite [JC's] daughter ([JZ]) highlighting that her mother was struggling to breathe and asking her to do so
>
> 2. While providing care to service user [EB], [the Appellant] did not always take into account the service user's wishes and for example during calls on 22 April 2020, she:
>
> - Would not allow [EB] to have a cup of coffee and instead said that she had to have a cup of tea;
> - Told [EB] that there was none of the country food that she wanted when there was and instead prepared her a ready meal from the fridge; and
> - Put sauce on the service user's salad which the service user was not happy about.

6. It is against that barring decision that the Appellant now appeals, by a notice of appeal received by the Upper Tribunal on 3 June 2021. On 4 January 2022, Judge Rowley gave permission to appeal save on one of the grounds advanced by the Appellant. She also said that it was arguable that the decision to include the Appellant in the children's barred list "was not a proportionate one as there was insufficient evidence to show that any risk of harm was transferrable from adults to children". In his direction dated 25 July 2022, Judge Rowland said that the Upper Tribunal would also wish to hear argument on the proportionality of the decision to include the Appellant in the adults' barred list, which was in any event the issue raised in one of the Appellant's grounds of appeal.

The legislation

7. As in force since 2012, paragraphs 9 and 10 of Schedule 3 to the 2006 Act provide –

> "*Behaviour*
>
> **9**(1) This paragraph applies to a person if—
> (a) it appears to DBS that the person—
> (i) has (at any time) engaged in relevant conduct, and
> (ii) is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and
> (b) DBS proposes to include him in the adults' barred list.
> (2) DBS must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.
> (3) DBS must include the person in the adults' barred list if—
> (a) it is satisfied that the person has engaged in relevant conduct,

(aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and
(b) it is satisfied that it is appropriate to include the person in the list.

10(1) For the purposes of paragraph 9 relevant conduct is—
(a) conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult;
(b) conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him;
(c) …;
(d) …;
(e) ….
(2) A person's conduct endangers a vulnerable adult if he—
(a) harms a vulnerable adult,
(b) causes a vulnerable adult to be harmed,
(c) puts a vulnerable adult at risk of harm,
(d) attempts to harm a vulnerable adult, or
(e) incites another to harm a vulnerable adult.
(3) …"

Paragraphs 3 and 4 of Schedule 3 make equivalent provision in respect of the children's barred list. In particular, paragraph 4(1)(b) provides that, for the purposes of paragraph 3, "relevant conduct" includes "conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him".

8. Section 4 of the 2006 Act provides –

"**4.**—(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
(a) [*repealed*]
(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—
(a) on any point of law;
(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.
(3) For the purposes of subsection (2), 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.
(4) An appeal under subsection (1) may be made only with the permission of the Upper Tribunal.
(5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS.
(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, or
(b) remit the matter to DBS for a new decision.
(7) If the Upper Tribunal remits a matter to DBS under subsection (6)(b)—
(a) the Upper Tribunal may set out any findings of fact which it has made (on which DBS must base its new decision); and
(b) the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise."

9. Here, the Appellant appeals on the ground that DBS made mistakes of both fact and law in making its decision. It is convenient to take the issues of fact first.

Mistakes of fact

10. Mr Calzavara submitted that the Upper Tribunal's jurisdiction on issues of fact was limited. We do not accept that that is so, save insofar as section 4(3) of the 2006 Act makes it plain that a finding that it is "appropriate" to include a person in a barred list is not a finding of fact for the purposes of the section (as to which, see *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575; [2022] 1 W.L.R. 1002) and also save insofar far as section 4(5) and (6) makes it plain that there is a "mistake" of fact only if the error is one that is material in the sense that it would, or might, make a difference to the decision to include the person in a barred list (see *R (Royal College of Nursing) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin); [2011] 1 WLR 1193 at [102]). Indeed, Mr Calzavara accepted in paragraphs 20 and 22 of his written submissions that, as regards its findings of fact, while DBS's primary position was that it came to decisions that were available to it on the evidence before it, "[u]ltimately this will be a matter for the Upper Tribunal to determine" having had the benefit of hearing the Appellant's oral evidence". We agree with that practical approach. In our view, we would not be bound to reach the same conclusion as DBS even if we had before us only documentary evidence that was exactly the same as that before DBS, although we would be obliged to explain why we reached a different conclusion, but, as we have additional oral evidence before us, it is less likely to be necessary for us to analyse DBS's reasoning on purely factual issues rather than simply giving our own reasons for our decision. Nonetheless, we do address DBS's reasoning in this case.

11. One consequence of there being a right of appeal on issues of fact as well as law is, as Mr Uddin accepted in argument, that it is strictly unnecessary for an appellant to argue that DBS has erred in law when making its findings of fact. Such arguments become merely arguments as to why the Upper Tribunal should make different findings.

12. There are disputes about what happened both on 21 April 2020 when the Appellant was providing care to JC and on 22 April 2020 when she was providing care to EB. It is therefore necessary for us to decide what happened in order to decide whether or not DBS made a mistake of fact. In doing so, we bear in mind that mistakes of fact may include a failure to make an additional finding of fact, and facts include states of mind such as intentions and motives (see *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC); [2021] AACR 3 at [39]).

The allegation that the Appellant did not assist her colleague to reposition JC

13. The evidence upon which DBS relies is found in the agency's investigation file. It is not in dispute that JC did not speak English, and that English was not the first language of her daughter, JZ, either. It is also not in dispute that JC usually had two carers at any one time and that the Appellant was not one of JC's usual carers but that GC, who was present on this occasion, was.

14. The first important document is the letter sent by JZ to the agency on 21 April 2020 (page 47). She said –

> "My name is [JZ], I am [JC's] daughter. Several weeks ago, the attempt to contact an [agency] coordinator, through calls, text messages and voice messages that to this day have not been answered. I understand that the current situation is very harsh.

> You have had many of your personnel sick, but remember that you have people who are in very delicate states of health, so the least you could do is return the calls that are made at the time, thus demonstrating a minimum of respect for their clients.
>
> Several weeks ago, one of your carer, he had a very personal way of acting with my mother. Her name is [the Appellant], and my mother is a person who has a degenerative disease, which means that his health condition is more critical every day, especially your breathing. The carer in question in the company of another carer whose name I do not know, that day they manipulated my mother in a way I can't say, little professional, rather uncharitable, my mother can't move to one side. The other as if it was a question of a doll, in question when these carers finished their work I approached my mother, she was crying from the pain, she had hurt an area of her stomach where she has her feeding peak, this was bleeding. I had to change her dressing, and my mother was sore all day.
>
> Today this lady has been at home again, when she was in the room with my mother, I have entered, and I had found my mother in a position that she could not breathe when I called their attention, she as if nothing happened. I take the situation as very natural, I explained how they should handle it, to which my mother told me that this lady was watching how [GC] the other carer worked, doing nothing. Until with my help, they got to sit well with my mother, and several minutes had passed without my mother breathing in conditions. After all, she was sitting in a position that forms pressure on her chest. When that happens, my mother creates a picture of anxiety and attack of panic because he can't breathe. This is very important. It is 4pm in the afternoon, and I have sedated my mother to control her anxiety. Because of a carer with a lack of empathy, who believes that clients are one more number, she enters the door believing that the important thing is to finish as soon as possible to continue with the next client.
>
> I have taken the trouble to write this letter because I know that even if I call, you will not answer. I want to let you know that this letter is addressed to you with a copy of the social services. It is worth mentioning that my mother is delighted with Shazia and [GC] for which she also wants to thank, for the services, love and empathy that they show her every day."

15. On 24 April 2020, the agency's investigator, LA (whose job title was Quality Assurance Officer (see page 64)), spoke to GC, who is recorded (page 47) as having said that:

> "… as [the Appellant] arrived client's mood swinged. Even the daughter was not happy to see her and she mentioned if not her she will not let the care worker do care for the client."

There is a reference to a statement on page 47 and in another entry, at the bottom of page 48, it appears that GC said in the statement that "JC became breathless and I put her oxygen mask on for her and she was OK" but no such statement was provided to DBS and DBS appears not to made further enquiries about it.

16. On the same day, a supervisor visited JC and her daughter. The latter is reported as mentioning that "the care worker did not act in a professional manner towards client or showed any respect" (page 47). Again, there is a reference (page 48) to an attached statement and it is not clear whether that is to JZ's original statement or to another one. The report of the supervisor's conversation with JZ (page 48) says –

> "The way they were handling was hurting but as the client cannot speak English she couldn't express herself. Also care workers were kept rolling the client but the client can only turn on one side, when they had finished, the daughter has gone into the

> room, she found Mrs JC crying and she has told her that they hurt her stomach, when the daughter looked at her peg feed it was bleeding so she had to change the dressing and give some pain killers.
>
> A week later, the same care worker attended again and when the daughter went the room to check that everything's ok, she found Mrs JC sitting in a position where she could not breathe, so the daughter has asked the care workers to move her, but the care worker AA just stood there and looked, so the daughter and other care worker had to move the client. In a few minutes time they found Mrs JC was not breathing correctly, she was getting incredibly stressed, she had panic attack."

17. The Appellant was interviewed by LA on 29 April 2020 (pages 64 to 69). She denied that, on 21 April 2020, JC had struggled to breathe and said –

> No the daughters explained what can happen if she's not in a good position, I'm not the main carer. [GC] is trying to be boss, same happened when we put [JC] on the commode to transfer her."
>
> "I know what the woman wants, if she doesn't want it she won't allow it if it's not what she wants. When we transfer her we put a pad on the bed for under her bottom to sit on. I told [GC] the pad is not placed properly so we would have to roll her from side to side to position her properly. [GC] said she was positioned properly".

She denied knowing about JC crying out or her stomach bleeding or her being handled like a rag doll. Asked whether she asked service users for their preferences on things like meals, she said –

> "Yes, ask what they want and I give their normal carer chance to add. By the time we put on the pad I knew she wouldn't be able to sit properly – not placed properly. If [JC] is not happy she will call grandchild or daughter because she can't speak English to tell us, they tell us. Was not positioned properly, Daughter explained what [JC] said I told the Daughter [GC] said it was in the right position. Daughter said if she is not okay with breathing she will say, when Daughter came said we need to move or will get panic attack. We said sorry."
>
> "At Lunch we asked if she was okay, she didn't want us to touch her anymore. [GC] wrote it in the notes and left."

She then talked about transferring JC to the commode and then from the commode to the bathroom, where GC washed her while the Appellant made the bed and prepared food and drink. She told LA about that and LA then put to her that JZ had said that her mother "gets panicked when she sees you" and that her mood changed. The Appellant denied that and is recorded as having said –

> "Total lies, I'm not a mean carer I go as cover to support I'm not so forward I look to the main carer before making my own suggestions. [JC] aways says what she wants, signing or calls her daughter. [GC] understands her better she can speak and understand her [main] carer better, so I don't get involved. If covering [JC] will communicate if not using the method as normal carer, she will call her daughter and tells us then we apologise she has apologised before, because we are not the main carer we all use own method what she said she says to the main carer not me."

She again denied that JC was struggling to breathe and said –

> "She tells her daughter and she interprets, asked us to lift [JC] as she's not sat properly if she's not sat properly she can struggle to breathe. I told the daughter when I went to move the pad [GC] said that's how its meant to be done. Daughter said we need to move her or she will have a panic attack."

When it was put to the Appellant that JZ had said that she did nothing, she replied –

> "Not something can be done on your own, not when it is a double up call."

When asked what she had done when asked to position JC properly, she replied –

> "I did the sliding sheet myself, [JC] will say if she is uncomfortable. I follow the main carer as she has a breathing problem. When daughter came [JC] explained about the pad. Daughter explained to us in English, if she is not sat properly, she can have a panic attack."

Asked again whether JC had had a panic attack or breathing problems, she said –

> "No, oxygen still on, sat her up properly."

When it was put to her that JZ had said that she and GC had moved JC, she asked –

> "How is it possible that I would watch a service user's family mover her? We move her."

18. The agency identified (page 49) four matters arising out JZ's original letter and further correspondence with JZ. We are not concerned with either the first matter, which was the agency's office not having responded to JZ's earlier telephone calls and text messages, or the fourth matter, which was about missed visits. The second matter was the earlier incident where JZ complained that poor moving and handling had resulted in injury in the area of her mother's feeding peg. LA noted that the Appellant and three other care staff (who were presumably members of staff who could have been on duty with the Appellant on the relevant day or shortly afterwards) had all denied any knowledge of JC being harmed and that at the time when JZ had said she saw the peg area was bleeding, the care workers had already left. The result of the investigation of that matter was stated to be "inconclusive". The third matter was the incident on 21 April 2020 when JZ alleged that poor moving and handling had resulted in JC having breathing difficulties. That allegation was considered to have been "substantiated" but, as we have mentioned, the Appellant submitted a letter of resignation (page 51) on 14 May 2020 which was the day on which the disciplinary hearing was to have taken place.

19. The complaint file was closed on 22 May 2020. It is, however, important to note what was recorded then (page 50) –

> "It is evident that JC has complex moving and handling needs, since this concern has been raised a new careplan with more detail in moving and handling requirement has been put in place.
>
> 4 care workers have now completed on personalised on-site moving and handling training as regards to supporting JC with her breathing and safe use of rolling technique and transfers taking into account the Feeding tube.
>
> AA has gone through internal disciplinary procedures.
>
> Contact has been made with the daughter who is happy with the actions that have been taken."

20. DBS, having noted that the allegation regarding the earlier incident was not found by the agency to have been substantiated, decided that "it appears that this allegation very much boils down to one person's word against another's and that, while we have no reason to doubt [JZ's] credibility, without any evidence to corroborate her claims, we would not be able to prove it on the balance of probabilities" (pages 121 to 122). It therefore found the allegation to be "not proven". We would have expressed our findings slightly differently. We consider it probable that JZ did see bleeding in the peg area and that her mother did attribute that injury

to the way she was handled by the carers and, in particular, by the Appellant. However, we agree with DBS's conclusion, which was not in issue before us, because, despite our suspicion that the injury was caused by the way JC was handled by the carers, it is quite possible that the carers did not realise what they had done and we consider that the evidence as to how the injury occurred is insufficient to establish on the balance of probabilities that it was in fact caused by any fault on the part of the Appellant.

21. As regards the incident on 21 April 2020, DBS referred to the evidence supplied by the agency and then said in its Barring Decision Process (pages 123 to 124) –

> "As with the previous allegation, it appears that this allegation also boils down to one person's word against another's with [JZ] stating that [the Appellant] did nothing when she was asked to reposition her mother and [the Appellant] maintaining this was not true.
>
> Unlike the previous allegation however, it appears that on the balance of probabilities this allegation CAN be proven – as highlighted previously [JZ] is deemed to be a credible witness and has been consistent in her claims: [the Appellant] does not dispute that the service user was not positioned well and that [JZ] asked her to move her: and the referring organisation substantiated an allegation that poor moving and handling had resulted in [JC] sustaining breathing difficulties on 21 April 2020."

22. In its minded to bar letter, DBS said that it appeared to them that "you did not assist your colleague to reposition a service user despite that service user's daughter highlighting to you that her mother was struggling to breathe and asking you to do so" (page 30) and the Appellant was given an opportunity to make representations. She made the point that when the agency had made its finding that JZ's complaint was substantiated, it had done so on the basis that the Appellant *had* assisted her colleague and that what had been found to be substantiated was the complaint that JC had become breathless "after rushed moving and handling being completed by [the Appellant]" (page 86, referring to page 49). She also made the point that the agency had subsequently recognised that JC's moving and handling requirements were complex and had given four care workers special training (page 86, referring to page 50). She said – or, more accurately, clearly meant to say – that the incident had been the result of "lack of communication between JC and I in terms of language" and that she felt that she was being singled out for punishment (page 87).

23. DBS, however, focused on JZ's original letter and considered that the agency had been –

> "… referring to the fact that [the Appellant] and her colleague had moved [JC] into a position where she could not breathe – they were NOT saying that [the Appellant moved [JC] when asked to do so by her daughter. In fact, they actually say 'GC had supported in moving JC to a more comfortable position' not that AA and GC repositioned her."

On that basis, DBS found the original allegation proved.

24. DBS did not make any finding in that part of the Barring Decision Process as to the Appellant's state of mind. However, when considering "behavioural factors", it described the Appellant's failure to assist her colleague as "totally irresponsible" (page 135) and said that it, and the conduct towards EB, "has raised concerns with regards to her lack of empathy for those she was paid to care for and her general irresponsibility and recklessness" (page 142).

25. We have had the advantage of hearing oral evidence from the Appellant. She displayed a somewhat impassive demeanour, although that does not necessarily mean that she was in fact unfeeling. More importantly, she was not a particularly good witness in that she was frequently imprecise and repeatedly contradicted herself. However, we do not consider that she was necessarily deliberately trying to mislead us – her changes of evidence were too unforced for that – and we are not sure whether the difficulty was linguistic or cultural or whether there was some other cause. We have nonetheless been cautious about relying on her evidence on issues that are in dispute, but there were points upon which she gave consistent evidence in answer to questions put in different ways and upon which her evidence appeared credible. In broad terms, the Appellant's evidence was consistent with what she had said when interviewed by the agency and in her representations to DBS. However, she was able to enlarge on some issues.

26. The Appellant said that she was not the main carer for any of the agency's service users. She provided cover, with a different rota each day, sometimes working with another carer and sometimes on her own. She might have seven or eight visits to service users in a day. No particular changes had been made in the light of the Covid-19 pandemic, save that as regards personal protective equipment such as aprons, gloves and masks. She only visited JC on the occasions to which the complaints related. On 21 April 2021, she had taken her lead from GC, who was JC's main carer and was able to communicate directly with her to some extent because she had learned some words of JC's language and also understood a sort of sign language that she used.

27. The Appellant also told us, and we accept, that JC had a full body hoist that could be used by two people to transfer her to her commode, but she was bedridden and could not be transferred to an armchair and she still required manual assistance and a sliding sheet to get her into a comfortable position on her bed. She could ask for oxygen if she needed it. The Appellant confirmed that the training courses listed on the referral form (page 40) had all taken place on one day, although she told us that it was when she first started in 2017, rather than in March 2020 as suggested on the referral form (which also suggests on page 41 that her start date was only in 2020, although her terms of employment were signed in 2017 (page 53)). Sometimes 15 to 20 people would have been present. When trained in moving and handling, she would watch someone else and then they would watch her.

28. The Appellant also said that she had resigned because the questions she was asked at the investigation interview led her to believe that the agency did not accept what she said and that they wanted to get rid of her. We do not consider that we should draw any inference one way of the other from the fact that the Appellant resigned when she did.

29. In the Appellant's grounds of appeal, it was asserted that JZ's account was arguably vexatious and that "her accusation that her mother was hurt in the stomach was over-exaggerated and found to be an exaggeration" but Mr Uddin was more circumspect at the hearing, relying on the lack of corroboration of her evidence and submitting that, on the evidence taken as a whole, the Appellant had acted reasonably.

30. DBS considered JZ's account to be credible and we accept that neither she nor her mother is likely to have lied, although it is possible that their perceptions of what happened on 21 April 2020 may have been coloured by their recollections of

what had happened on the previous occasion when the Appellant had visited. However, although it is credible, it does not necessarily follow that JZ's account is entirely accurate or, more importantly, that it presents a complete picture of what happened. One area of dispute is whether JC was having difficulty breathing when JZ entered the room. We have not had oral evidence from JZ as to exactly what she meant. The Appellant denied that JC was having difficulty breathing because she did not need oxygen at that point, but she accepts that JC was in discomfort and the question whether part of that discomfort was having a difficulty breathing becomes relatively unimportant (although, on balance, we think it probably was).

31. It is clear that JZ was upset about the care that her mother was receiving and, in particular, we accept that when JZ first asked GC and the Appellant to move JC to alleviate the discomfort, the Appellant did not assist. We note that, in her original letter, JZ said that "my mother told me that this lady was watching how [GC] the other carer worked, doing nothing", implying either that she had not herself noticed the Appellant's inaction or that her mother was referring to inaction before JZ came into the room. However, whether or not it was JZ or her mother or both who noticed the inaction, we are satisfied that the Appellant did at first fail to help GC move JC and that it was JZ who assisted GC at that stage. On the other hand, that is not inconsistent with the Appellant having assisted GC to move JC at a later stage during the visit and we see no reason not to accept that she did so.

32. More importantly, JZ's account is not inconsistent with the Appellant's evidence that she had limited experience of JC's needs, that she was unable to communicate directly with JC because they did not speak the same language and that she had to rely upon GC to show her what to do, both because GC had more experience of caring for JC and because GC was better able to communicate with JC. We are satisfied that, in essence, she did not initially know what she should do and, perhaps partly because communication was slow, JZ had intervened to provide the necessary assistance before the Appellant reacted.

33. JZ was doubtless entitled to expect the agency to have supplied a more experienced or better qualified carer and it is understandable that she should have been dissatisfied with the Appellant's performance, but we are not satisfied that the evidence before us shows that the Appellant acted recklessly or that she was oblivious to JC's discomfort. DBS's finding of irresponsibility and recklessness implies that the Appellant, having recognised a danger, stood idly by even though she knew perfectly well how to help to avoid the danger. That view may have been at least partially based on its view that that the Appellant had had the appropriate training to deal with such situations" (page 142). However, we disagree.

34. In our judgment, it is more probable that, while the Appellant did realise that JC needed assistance, she did not know how to help provide it. DBS's analysis does not adequately explain *why* the Appellant should have deliberately refrained from providing assistance that she knew how to provide. We note that, when GC was interviewed and apparently made a statement, no criticism was made by her of the Appellant's care on this occasion. We also take account of the agency's recognition that the whole team of people caring for JC needed further training with JC's particular needs specifically in mind and that JC's care plan needed rewriting, with the necessary implication that the generic training on moving and handling provided to the Appellant and other carers had not in fact been sufficient to equip them with the skills needed when caring for JC and also that the information in the former care plan about moving and handling JC had not been adequate either.

35. We acknowledge that JZ wrote in her original letter (page 47) that the Appellant was "a carer who lacks empathy, who believes that clients are one more number" and that "she enters the door believing that the important thing is to finish as soon as possible to continue with the next client". However, we are not persuaded that a desire to finish as soon as possible had anything to do with the Appellant's failure to assist in repositioning JC and we are also not persuaded that her inaction on this occasion is evidence of a lack of empathy. Neither the agency nor DBS asked JZ to provide any examples of the Appellant displaying a lack of empathy that were unrelated to her moving or otherwise handling JC.

36. Accordingly, while we find the allegation that, during a care visit on 21 April 2020, the Appellant did not assist her colleague to reposition JC, despite JC's daughter highlighting that her mother was struggling to breathe and asking her to do so, to be proved, we make the additional finding that that was because the Appellant did not know how to reposition JC because she had not been adequately trained. We are satisfied that, to the extent that DBS did not make such a finding, it made a "mistake … in [a] finding of fact" that, for reasons that we will give below, was clearly material.

37. In our view, it is extremely important that findings as to an Appellant's state of mind or motive should be made at the fact-finding stage of a barring process, because such findings are likely to be important when it comes to the risk assessment necessary for the determination of the appropriateness of barring the person concerned. Although the risk assessment itself and the value judgments that are part of it are not within our jurisdiction, save at the margins, findings of fact upon which a risk assessment must be based, including the state of mind of an appellant at the time that an event occurred, are. (We do not consider that what was said by Lewis LJ in *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575; [2022] 1 W.L.R. 1002 at [55], with which Macur and Moylan LJJ agreed, overrules what was said in *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC); [2021] AACR 3 at [39]).

The allegation that the Appellant did not always take into account EB's wishes

38. On 21 April 2020, the agency received an email (pages 76 to 77) from EB's mother, saying –

> "My mother [EB] has complained 3 times to me about one of the carer's named [the Appellant].
>
> Mum has been very unhappy when [the Appellant] is with her as she feels that she is not listening to her nor being respected. Mum feels that when [the Appellant] is on duty everything has to be done on a very fast pace.
>
> Mum is also distressed that [the Appellant] is not willing to help her maintain her personal hygiene assisting mum with bathing but would rather give mum a strip wash in bed.
>
> My mother has requested that she does not want her to provide her support. However, she is very happy to continue with her regular carers."

39. Two days later, a senior manager received an email (page 75) from BK, a team leader, saying –

> "I am writing this statement about a carer [who, it is not disputed, was the Appellant]. I worked with her on the 22/04/2020 at [EB] in the morning call the carer told me I had to give her personal care while she done other bits she wouldn't let [EB] have cup of coffee she said she had to have a cup of tea because she drink to much coffee when we was about to leave the carer asked me if I was writing my note and logging out manually I said no I am writing the note and logging out with the tag she wasn't happy.
>
> [EB] lunch call carer wouldn't give [EB] a choice of food she got a ready meal from fridge and put it in the microwave [EB] want her country food carer said there wasn't none but there was and [EB] as salad with her food carer put sauce on the salad and [EB] wasn't happy about it the carer rushes things in the house and again when leaving she asked if I was logging out manually I said no and she wasn't happy at all."

It appears from an entry made in the complaint file on 24 April 2020 (page 77) that, following the complaint made by EB's daughter, BK had been asked to work with the Appellant and report back. (The logging out allegation has not been pursued by DBS.)

40. The same entry on 24 April 2020 also refers to a discussion with GC, who was one of EB's main care workers and had worked with the Appellant caring for EB. GC is recorded as having said that the Appellant was always late for her visits and she alleged that the Appellant had raised her voice during the course of a disagreement between the two carers, This issue was discussed when the Appellant was interviewed by LA, although it seems to have been raised by the Appellant rather than by LA (page 66 at line 10 to page 67 at line 3). It appears that both GC and the Appellant said that the latter had expressed concern that GC was helping EB to bathe and had said that she should have a strip wash. GC said that there was an argument in front of EB, who "got panicked", whereas the Appellant said during her interview that, having expressed her view and the reasons for it, she had deferred to GC "if that's what you normally do" after GC had explained that she was doing what EB had requested. In the light of the evidence, DBS was not satisfied that the Appellant had raised her voice as alleged by GC and the issue was not pursued before us. We note that GC did not make any specific allegation that the Appellant had disregarded EB's wishes.

41. The Appellant was not asked in her interview anything about the specific allegations raised by BK. She was asked in general terms, but in the context of the complaint in respect of JC, about respecting service users' wishes. The minutes of the interview record (page 65) –

> "LA – Have you done manual handling training?
>
> AA – Yes, you let the client know what you are going to do before you do it and you are gentle.
>
> LA – Do you practise this with Service users?
>
> AA – Yes, I am a good carer.
>
> LA – This is a serious complaint, why should the Service User be making these complaints against you?
>
> AA – I don't know.
>
> LA – Do you maintain respect and dignity, how?
>
> AA – Yes, you go in and talk with them, tell them what you are doing.
>
> LA – Do you ask them for their preferences, things like meals?

> AA – Yes, ask what they want and I give their normal carer chance to add. …"

She then went back to the incident with JC.

42. Later in the interview, the Appellant was also asked whether she rushed her calls and she denied it. The minutes of the interview record (page 68) –

> "LA – Do you rush the calls you go on?
>
> AA – No.
>
> LA – We have investigated and come back that you always rush.
>
> AA – No, I'm a good carer. I do my best I don't rush. If the call is 45 minutes I do at least 40 do a proper job I do not rush it is not me."

43. The agency concluded that the overall outcome of its investigation was that the "concerns are substantiated due to the fact of poor performance and negligence AA showed on her duties towards Mrs EB". As we have said, DBS has not pursued the issue raised by GC. However, it was minded to accept BK's account and the Appellant was invited to make representations on the allegations now before us. She said (pages 87 to 88) –

> "I have been attending to [EB] on many occasions preparing the Country food that she wanted without any complaints. I know very well that she does not like refrigerated foods.
>
> On 22/04/2020, I prepared food – yam with fish stew and coffee which she requested. I cannot comprehend the allegation that I gave her tea instead of coffee as it is even easier and quicker for me to prepare coffee than tea.
>
> Regarding the issue of sauce on salad, what happened was that the yam was served on a large flat plate and the fish stew in another small dish placed on the first plate. Sauce was served on the plate near the yam and the salad served on the other side of the plate. I did not put the sauce in the salad but on the same plate and separately. [EB] has never told me that she did not want the sauce served with salad on the same flat plate. If she had told me, I would not have served the sauce and salad together on the same plate."

44. DBS concluded (page 126) –

> "[The Appellant] does not address the more general point in relation to her occasionally failing to take into account service user's wishes when providing care and overall, having considered her representations we can now be satisfied that this allegation is proven on the balance of probabilities.
>
> This is on the basis that (as highlighted at the minded to bar stage) we have "no reason to doubt the credibility of [BK]; the behaviour that [BK] witnessed during her care calls on 22 April 2020 supports the service user's original claims that she was not being listened to or respected; and [the Appellant's] behaviour in failure to act on a service user's wishes is consistent with the general poor standard of care [the Appellant] is alleged to have provided on other occasions."

45. In her oral evidence, the Appellant was adamant that she had given EB coffee as she had requested. As regards the food, the Appellant told us that EB did eat country food and that her family cooked it and put it in the fridge. She was not allowed to cook meals from scratch; merely to reheat them. She gave EB what she found in the fridge and put the ready-made salad on the side. She did not put sauce on the salad.

46. Essentially, the principal question for us, as it was for DBS, is whether BK's evidence proves, on the balance of probabilities, the allegations relied upon by DBS, notwithstanding the contrary evidence of the Appellant. We accept that BK is unlikely to have lied, but, as in the case of JC, it does not necessarily follow that her evidence is entirely accurate – people make innocent mistakes and BK's perception may have been coloured by what she had been told about EB's complaint – or that it conveys a full picture of what happened. Indeed, it is clear that it cannot be a full account. Apart from its brevity, it leaves unanswered a number of questions that might have been asked had BK been called to give evidence or, indeed, if DBS had spoken to her with a view to obtaining a fuller statement

47. For instance, as regards the cup of coffee, the entire evidence against the Appellant is BK's statement that "she wouldn't let [EB] have cup of coffee she said she had to have a cup of tea because she drink to [sic] much coffee". There is no clear indication as to who said what to whom and it is not even certain that this was witnessed by BK rather than being, at least partly, what EB told her. There is also no explicit statement that EB expressly asked for coffee on this occasion and there is no evidence that she never drinks tea. Nor is it stated whether the Appellant's alleged statement that EB drank too much coffee was made to EB in BK's hearing or was made to BK herself or whether it was something that EB told BK had been said to her in the past. Nor is there any indication whether, if the Appellant did make such a statement, either EB or BK said anything to the Appellant in consequence and, indeed, BK's evidence is not inconsistent with the possibility that, after an exchange about the desirability of drinking coffee, the Appellant did give EB coffee, having accepted that that is what she really wanted.

48. On the other hand, for reasons we have given above, we are cautious about accepting the Appellant's evidence where there is a clear dispute. The Appellant's argument that she had no reason to give EB coffee because it was at least as easy to make as tea is not a complete answer to DBS's case because BK's evidence suggests that the reason that the Appellant did not give EB coffee was for EB's own good because she thought EB drank too much of it. On the other hand, we accept that it is unlikely that the Appellant deliberately gave EB tea, knowing that she wanted coffee, simply because the Appellant was in a hurry. However, the Appellant denies giving EB tea at all. She accepts that EB wanted coffee and she has not said that she initially suggested tea but subsequently complied with EB's wishes.

49. On balance, we accept that the Appellant did give EB tea rather than coffee, and we reject the Appellant's denial. It is common ground that EB wanted coffee and it seems unlikely that BK was mistaken about her having been given tea and that she either fabricated or was mistaken about the very specific point that the Appellant did so because EB drank too much coffee, whether BK heard that directly from the Appellant or whether it was something that EB told her that the Appellant had previously said.

50. However, we remain uncertain as to why the Appellant gave EB tea. The evidence is too vague to enable any motive to be inferred with any confidence. There is no evidence that the Appellant gave EB tea deliberately in order to upset her or annoy her and it has not been suggested that she did. It seems unlikely that the Appellant's true motive was a desire to protect EB from the adverse effects of drinking too much coffee, given that she has not admitted that that was so, but, even if it was, the Appellant was still overriding EB's wishes without an adequate reason. It was no part of her duties to regulate EB's intake of coffee. As we have said, it also

seems unlikely that she deliberately gave the Appellant tea rather than coffee simply because she was in a hurry, since instant coffee would have been at least as quick to prepare as tea. It seems more likely that being in a hurry caused the Appellant either to fail to ask EB what she wanted at all – which would imply that BK meant that the appellant "didn't" let EB have a cup of coffee, rather than "wouldn't" – or to forget what EB had said, and that she perhaps mentioned the adverse effects of coffee as an *ex post facto* justification. In the end, we do not think it matters precisely what the Appellant's state of mind was; we need go no further than repeating that there is no evidence that the Appellant gave EB tea in order deliberately to upset her or annoy her.

51. As regards the "country food", the allegation in BK's evidence is "[EB] lunch call carer wouldn't give [EB] a choice of food she got a ready meal from fridge and put it in the microwave [EB] want her country food carer said there wasn't none but there was". At first sight, the implication is that the EB wanted "country food" that was not a "ready meal" but was instead deliberately provided with food that was not "country food" and was a "ready meal". No context is provided that might suggest a motive for such an action. Moreover, we accept the Appellant's evidence that she was not required to cook food from scratch using raw ingredients but was required merely to heat a prepared meal, because that seems more probable.

52. In those circumstances, we have some difficulty understanding BK's reference to a "ready meal" as something that was to be contrasted with "country food". The Appellant says that what she gave the Appellant was yam and fish stew and that she regarded that as "country food". Moreover, both BK and the Appellant in her witness statement (page 19 of the Appellant's bundle) say that there was more than one meal available. On the limited evidence available to us, we are not satisfied that the Appellant gave EB a meal that had not been prepared for her by her family. However, that leaves the question whether the Appellant gave EB a choice as to which of the prepared meals she wanted to have. On one hand, BK says that the Appellant "wouldn't" give EB a choice from the available meals and, on the other hand, the Appellant says she did. It is possible, again, that BK meant "didn't", rather than "wouldn't" and that the Appellant simply took a meal from the fridge without giving EB a choice, but that is not what BK wrote and it is denied by the Appellant. It is also possible that the Appellant did give EB a choice, as she claims. BK does not say whether she actually witnessed EB not being given a choice or whether EB told her afterwards or whether she merely inferred from EB subsequently saying that she was unhappy with the food that she had not been given a choice.

53. The third part of the allegation is that the Appellant "put sauce on the salad and [EB] wasn't happy about it". Again, no context is provided to suggest motive. It is, again, possible that the Appellant was rushing and failed to ask EB whether, and if so where, she wanted the sauce, but, again, that is not quite how the allegation is framed and the Appellant denies putting the sauce on the salad at all because she knew that EB did not like it. She admits putting fish stew on the same plate, but says it was in a separate dish. BK's evidence does not exclude the possibility that what upset EB was merely that some of the fish stew got onto the salad by mistake.

54. We are not satisfied that either of these two allegations, arising out of the Appellant's lunchtime visit to EB, is made out. We are prepared to accept that BK understood EB to have complained about the food she had been given and about sauce being on her salad, but we are not satisfied that the evidence proves that the Appellant had actually done anything wrong. It is even less substantial than the

evidence about the morning drink. In any event, for reasons that will appear below, our different findings are not crucial to the outcome of this appeal.

55. DBS said in its Barring Decision Process (page 126) that the Appellant did not "address the more general point in relation to her occasionally failing to take into account service user's wishes when providing care", but she has said that she is "a good carer" and did not rush her visits and, unless DBS can prove at least one or two specific examples of poor practice, it cannot prove the more general point. It is noteworthy that neither the agency nor DBS carried out any investigation of the point originally made by EB that the Appellant did not assist her with her personal hygiene in the way she wished, which was arguably supported to some extent by GC and by the Appellant's own evidence, with the consequence that that issue has not been argued before us.

56. Thus, while EB's daughter, BK and GC all raised concerns that the Appellant failed adequately to respect EB's wishes on various occasions, the only instance that we are satisfied is proved is the one on the morning of 22 April 2020 when the Appellant gave EB tea rather than coffee, saying that she was drinking too much coffee. Even then, exactly what happened cannot be established. Nevertheless, we are satisfied that DBS made errors in its findings of fact, the materiality of which we will consider below.

Relevant conduct

57. We are satisfied that, for the purposes of paragraphs 3 and 9 of Schedule 3 to the 2006 Act, the Appellant engaged in relevant conduct both when she did not assist her colleague to reposition JC and when she gave EB tea rather than coffee. The definitions of "relevant conduct" in paragraphs 4 and 10 appear designed to catch as much conduct as possible, implying that a strict and inclusive approach is to be taken to the question whether conduct is relevant conduct, on the basis that the flexibility required to ensure that people are barred only when it is fair and proportionate to do so is to be found in the assessment of the appropriateness of barring them.

58. There can be conduct by omission, and, although we consider that a lack of specific training was an important factor, the Appellant failed to take action that would have prevented JC from experiencing avoidable discomfort. Her conduct endangered JC by causing her harm or, at least, put her at risk of harm and, if repeated against a child, would similarly endanger that child. It is for this reason that we reject Mr Uddin's submission that, if the Appellant acted reasonably in the situation in which she found herself, she could not be said to have endangered JC within the meaning of paragraph 10(1)(a) of Schedule 3 to the 2006 Act, so as to have engaged in relevant conduct within paragraph 9(3)(a).

59. DBS did not expressly explain why it considered that the Appellant's not always taking into account EB's wishes amounted to "relevant conduct" within the scope of paragraph 10, but it did state in its Barring Decision Process (page 142) and its final decision letter (page 95) that it considered there to be a risk of the Appellant "causing emotional harm to a service user by restricting their choice and not acting on their wishes". We accept that restricting a person's choice may cause emotional harm. Accordingly, we accept that the Appellant giving EB tea rather than coffee put her at risk of harm and that, if such conduct were repeated against a child, it would similarly endanger that child.

Appropriateness

60. We are entitled to direct that DBS remove the Appellant from the adults' barred list and the children's barred list only if we are satisfied that that is the only decision that could lawfully be made in the light of our findings. In this case, we are so satisfied.

61. We have found there to have been two instances of relevant conduct, but our findings differ from DBS's findings.

62. Although we have found that the Appellant failed to take action that would have prevented JC from experiencing avoidable discomfort, we have found that that failure was due to her not initially knowing what to do. Moreover, we have found that she was not oblivious to JC's discomfort and that her lack of knowledge about what to do was substantially due to her not having had adequate training. Accordingly, we have disagreed with DBS's finding that she lacked empathy and acted in an irresponsible and reckless manner on that occasion.

63. In these circumstances, this finding of relevant conduct no longer provides any evidential basis for a finding that the Appellant generally lacks empathy and is irresponsible and reckless, which was the reason that DBS considered it appropriate to include the Appellant in the barred lists in relation to this particular relevant conduct.

64. Nor does this finding of relevant conduct provide any evidential basis for a finding that the Appellant is generally incompetent. Even though many people might have been proactive and more helpful without having had specific training, the Appellant should not have been put in the position she was without such training. It has to be presumed that any future employers that she might have would provide adequate training and support and so the Appellant ought not again to be put in a position where she endangers a vulnerable adult or a child because she does not know what to do to assist him or her.

65. It follows, not only that what we have found to be errors of fact by DBS are material mistakes, but also that including the Appellant in either the adults' barred list or the children's barred list on the basis of this relevant conduct cannot reasonably be considered to be appropriate.

66. In relation to our finding that, on 22 April 2020, the Appellant gave EB tea rather than coffee, we have accepted that restricting a person's choice and not acting on his or her wishes is capable of causing emotional harm. We also accept that it demonstrates a lack of empathy, whether it was done deliberately or merely carelessly because the Appellant was in a rush. In its structured judgment process, DBS did not suggest that any other predispositional factor or behavioural factor relevant to barring was illustrated by its findings that the Appellant had restricted EB's choice or not always acted on her wishes; its concerns that the Appellant was irresponsible and reckless arose solely out of its finding about the care of JC. We accept also that a predispositional factor such as a lack of empathy gives rise to a legitimate concern that the relevant conduct might be repeated.

67. However, Mr Uddin argued that the decision to include the Appellant in the adults' barred list and the children's barred list was disproportionate. The Appellant's grounds of appeal described it as "akin to breaking an egg with a hammer" (page 11).

68. Under the heading "Appropriateness and Proportionality Assessment" in the Barring Decision Process, DBS considered the seriousness of the impact on the Appellant of barring her and then said (at pages 142 to 143) –

> "However, any interference with [the Appellant's] human rights must be balanced against the rights of vulnerable groups and, as we are satisfied that she poses an ongoing risk of causing physical and/or emotional harm to vulnerable adults and children, we are satisfied that her inclusion in the barred lists is both a necessary and proportionate safeguarding measure."

There is no further assessment either of necessity or of proportionality.

69. We accept that, if it is necessary and proportionate to include a person in a barred list in order to protect vulnerable adults and children, barring will be justified notwithstanding the interference with that person's rights under the European Convention on Human Rights. Moreover, there are many cases where the relevant conduct is so serious that it is obvious that, if repeated, there would be a serious risk to a vulnerable adult or child, in which cases no detailed analysis of necessity or proportionality is required. However, this is not such a case.

70. Assessing proportionality requires the balancing of the seriousness of the impact on the Appellant's rights if she were to be included in the barred lists against the possible seriousness of the consequences to vulnerable adults and children were she not to be included in the lists. Here only one side of that balancing exercise was carried out. No assessment was made by DBS of the likely seriousness of the consequences to vulnerable adults and children of not including the Appellant in the barred lists, which required an assessment of both the likelihood of further incidents arising and of the likely seriousness of such incidents.

71. As to the likelihood of further incidents occurring, we have accepted that a predispositional factor such as a lack of empathy gives rise to a legitimate concern that the relevant conduct might be repeated. That is perhaps heightened in the present case, where allegations of other instances of either overriding (or being willing to override) EB's wishes or rushing her care have been made by EB's daughter, BK, and GC and, of rushing the care of JC, by JZ, even if the evidence has been insufficient to enable us to find specific allegations proved. On the other hand, as DBS acknowledged (page 134), previous employers had not raised concerns about the Appellant's interaction with service users and, we would add, there is no evidence of concerns having been raised in the first three years of the Appellant's employment by the agency. In the light of the evidence, what DBS found proved was that the Appellant had "occasionally" failed to take account of EB's wishes (page 126). That was a view it was entitled to take and we do not consider that it really makes any difference that we have not found the "country food" and "sauce" allegations satisfied because, at the appropriateness stage, one is looking at the risk of conduct being repeated in the future and it may not matter whether it has already been repeated. Even if we had found those particular allegations (which are no more serious that the coffee/tea allegation) proved, the evidence would still not be capable, in our judgment, of showing that the Appellant was likely to be disposed to repeat the relevant conduct in the future more than occasionally. On the other hand, the fact that the Appellant has failed to take account of a service user's wishes on just one

occasion can be sufficient to show that there is a risk of the conduct being repeated occasionally in the future and it seems obvious that that would be DBS's view in the present case. Thus, it is arguable that the errors of fact that we have found DBS to have made in relation to the Appellant's care of EB are not, by themselves, material to the assessment of risk and therefore to the decision whether or not the Appellant should be included in the barred lists.

72. As to the seriousness of the consequences were the Appellant to repeat the relevant conduct in the future, we have said that we accept that a failure to respect a vulnerable adult's wishes may cause emotional harm. However, the extent to which it is likely to do so depends on the context. Deliberately refusing to comply with a person's wishes over a period of time is capable of causing serious harm, particularly if it is done with the obvious intention of causing distress. However, occasionally making a person tea instead of coffee due to carelessness, or as a result of failing to ask which they want, is unlikely to cause significant harm, unless that person has a particular psychological vulnerability, and it may well not cause any harm at all. That does not mean that such carelessness or behaviour is acceptable; merely that significant harmful consequences are unlikely, save in particular circumstances for which a carer ought to have appropriate training. Moreover, we note that, although both JC's daughter and EB's daughter made allegations that the Appellant had rushed their mothers' care and, in the latter case, had not listened to or respected her mother, neither identified a specific incident, which suggests that no incident caused by rushing through a visit or not giving a service user due respect resulted in any significant harm. In our judgment, the evidence is not capable of supporting an inference that the Appellant lacks empathy to the extent there is a real risk that the Appellant would fail to comply with a service user's wishes or would fail to ascertain what his or her wishes were in circumstances likely to cause any significant emotional harm.

73. The question of necessity is related to the question of proportionality. We do not suggest that the relevant conduct did not require some action to be taken to avoid repetition. Clearly it did. However, assessing necessity requires consideration of other, less drastic, action that might reasonably be expected to be taken, not necessarily by DBS, to eliminate or reduce a risk. We note that when the Appellant was interviewed by the agency, the agency concentrated on the failure to provide assistance with repositioning JC and appears to have taken little interest in the allegations in respect of EB, which we suspect was because LA regarded the former as a possible sacking offence, but not the latter. The Appellant's evidence shows that she knows what is expected of her in terms of giving service users choices and respecting their wishes. There was no history of concerns about the Appellant rushing her work or not respecting service users' wishes before the complaints were made on 21 April 2022.

74. An employer who had made the same findings that we have made could, in our judgment, reasonably have given an employee in the position of the Appellant a written warning, requiring her to improve her standards or face dismissal. Including the Appellant in the barred lists, which has more serious consequences than the termination of a single employment contract, cannot be regarded as necessary if immediate dismissal, or at least the immediate removal of the Appellant from any regulated activity with vulnerable adults or children, would not be the only action reasonably open to an employer. It is relevant that employers are not required to refer to DBS instances of relevant conduct that do not result in them withdrawing

permission for the employee to engage in regulated activity, unless they would or might have done so if the employee had not otherwise ceased to engage in the activity (see section 35(2) of the 2006 Act). No-one is perfect and not every lapse by a care worker that represents a breach of the standards that are expected from them can justify barring them from the type of work that they wish to do.

75. For these reasons, we are satisfied that it is not necessary and proportionate to include the Appellant in the adults' barred list or the children's barred list, notwithstanding that we have found that she has engaged in relevant conduct when caring for EB. Our finding that the Appellant engaged in relevant conduct in relation to EB may act as a warning to her, as might have a similar finding by DBS.

76. As we are satisfied that it would not be proportionate to include the Appellant in the adults' barred list and the children's barred list in the light of the relevant conduct in relation to EB that we have found proven, it follows that it cannot lawfully be considered appropriate to include her in the lists due to that conduct. DBS's errors of fact in relation to the Appellant's care of EB may not be material mistakes, but its error of law in filing properly to assess proportionality is material.

77. We have, of course, found the Appellant to have engaged in relevant conduct on two occasions. However, the two instances that we have found proven are of different types with different causes, and the fact that there are two of them does not make the case for barring the Appellant any stronger.

78. Accordingly, we direct DBS to remove the Appellant from both the adults' barred list and the children's barred list.

Mark Rowland
Deputy Judge of the Upper Tribunal

Signed on the original on behalf of the Tribunal on 12 May 2023