IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001594-V**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 379 (AAC)**

On appeal from the Disclosure and Barring Service

Between:

LMM

Appellant

- v -

The Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Scolding KC, Tribunal Member Rachael Smith, and Tribunal Member Matthew Turner

Hearing dates: 14 June 2024 (adjourned) and 27 September 2024
Decision date: 20 November 2024

Representation:
Appellant: The Appellant was unrepresented
Respondent: Ms. Masood of counsel, instructed by DLA Piper LLP, represented the Respondent.

Anonymity order

Pursuant to an order made by the Upper Tribunal on 5 July 2023 the name of the appellant, his wives and his children are prohibited from publication or any matter likely to lead members to identify any of these individuals. Any breach of the order is a contempt of court and can lead to imprisonment under section 25 of the Tribunals, Courts and Enforcement Act 2007.

DECISION

This decision is given under section 4 of the Safeguarding Vulnerable Groups Act 2006 (**"SVGA"**)

The appeal is dismissed.

REASONS FOR DECISION

What this case is about

1. This case is an appeal about the DBS decision to place the Appellant, who I shall call LM on the Adult and Children's Barred List on 11 August 2022. The Appellant appeals against that decision. He provided written evidence and gave oral evidence at

the hearing on 27 September 2024, as did his wife, who I shall call CP. There was also written evidence from someone who had worked with LM concerning one of the incidents upon which the DBS had relied.

2. This appeal concerns issues of error of law and also the mistake of fact jurisdiction exercised by the Tribunal. There are a number of grounds of appeal. They are as follows:

Ground One: That the DBS failed to carry out a fair and appropriate information gathering and assessment exercise, in breach of the requirements of natural justice.

Ground Two: The DBS was wrong to find that LM had slapped his son in 2018.

Ground Three and Four: The DBS was wrong to find that LM had threatened to kill his partner in 2013 and had hit his partner in 2013.

Ground Five: The DBS was wrong to find that LM demonstrated sexualised behaviours to work colleagues in 2007 (three colleagues were identified).

Ground Six: The DBS was wrong to find that LM sexually assaulted a colleague in 2013.

Ground Seven: the DBS was wrong to find that LM had demonstrates sexualised behaviour towards co-workers in 2018.

3. This decision will take these grounds in turn.

4. The following evidence was before the Upper Tribunal which was not before the DBS when they made their final decision:

5. Investigation report concerning incident which took place in 2008 from the relevant care home concerning sexualised behaviours towards work colleagues in 2007.

6. Letter from care organisation to one of the complainants concerning the 2007 incidents from 2008.

7. Witness statement of LM.

8. Witness statement of LM's wife, CP.

9. Witness statement of manager of the care home involved in the 2007/2008 incidents (although she started work there after the incidents took place although whilst they were being investigated).

10. Decision of the Nursing and Midwifery Council Fitness to Practice Committee held in January 2024 and April 2024. This relates to matters of sexual misconduct in 2018.

11. Why the DBS should not bar me submissions made by LM.

12. LM had legal representation until the hearing of this matter, and so detailed grounds of appeal were filed which included relevant legal submissions and submissions about the nature and sufficiency of the evidence upon which the DBS relied. The legal representative was not present at the hearing. We allowed LM to try and have his representation reinstated (as it was removed shortly before the hearing in June 2024), but it was not to be. We sought at the hearing to adjust aid LM to present his case including:

13. Seeking to have him elaborate on his submissions and evidence by allowing him to give evidence in chief and acting in an inquisitorial manner.

14. Asking that counsel for the DBS and ourselves sought to explain the legal principles in ways that a lay person could understand.

15. Checking in and summarising complex material in bite sized chunks.

16. LM and his wife both spoke English very well and showed no difficulty in understanding the nuances of English speech.

DBS's findings and the Barring Decision

17. By a 'Final Decision Letter' dated 11 August 2022, the DBS informed the Appellant of its decision to place his name on both the Adults' and Children's Barred Lists (the **"Barring Decision"**). In that letter it said:

> "How we reached this decision
> We are satisfied that you meet the criteria for regulated activity. This is because of your stated work history within care facilities, your current nursing registration with the NMC and your qualification as a nurse which can be used to gain employment with children.
> As mentioned in our previous letter we have taken the following into account:
>
> - On 27 September 2020, you received a caution from Hampshire Constabulary for the offence of common assaults (the DBS is satisfied the circumstances are that you accepted a caution following police investigation into allegations that in June 2020 you kicked your 8-year-old son TM due to his younger brother making a mess by playing with powdered milk)
> - On 22 January 2019, you received a caution by Hampshire Constabulary for the offence of Common Assault (the DBS is now satisfied that the context of this caution is related to workplace behaviour whereby you unzipped a female colleague's top whilst simultaneously suggesting she should take her top off after she declared she was "so hot".
>
> We have considered all the information we hold and are satisfied of the following:
> Allegation 1
> You physically chastised your 8-year-old son TM by slapping him across the face on an unknown date in 2019 prior to 19 September.
> Allegation 2
> You physically chastised your son TM on unknown date in 2018 by means of slapping across the face.

Allegation 3
Prior to August 2010, Tm was left unsupervised to look after his one-year-old brother.
Allegation 4
Between February and August 2013, you threatened to kill yourself and your partner admits indications of ongoing domestic violence and hit your partner during an argument.
Allegation 5
Between May and December 2007 whilst employed as a Registered Nurse at X home , you demonstrated multiple unsolicited sexualised behaviours, including sexual assault by means of kissing and touching against will, towards female care assistants VM, EH and KW.
Allegation 6
On 9 July 2013, whilst working at Y home, you sexually assaulted a 19-year-old female care worker by means of unsolicited touching.
Allegation 7
In 2018, whilst employed as a nurse at Z placement, you conducted a range of unsolicited sexualised behaviours towards female adult co-workers, VM, LM and SN.

Having considered this, DBS is satisfied you engaged in relevant conduct in relation to children. This is because you have engaged in conduct which engendered a child or was likely to endanger a child vulnerable adult. It is also considered that you have engaged in relevant conduct in relation to vulnerable adults, specifically conduct which, if repeated against or in relation to a vulnerable adult, would endanger that vulnerable adult or would be likely to endanger him or her. This is because you have engaged in conduct which endangered a vulnerable adult or was likely to endanger a vulnerable adult.

Following receipt, evaluation, and consideration of your representations, we are satisfied a barring decision is appropriate on account that the representations did not significantly reduce the considered likelihood of future risk. It is acknowledged that you refuted allegations 5 and 6 as malicious fabrications by the manager of the respective facilities. This explanation is not accepted as plausible by the DBS for reasons including, but not limited to, the involvement and willingness of multiple different staff to potentially place themselves at risk of police / court action on behalf of the managers in response to a raised (unspecified) grievance and concerns about failure to order sufficient medication - this seems disproportionate. When added to the context of allegation 7 (which you did not address), the similarities in description of the behaviour as presented by seven different female colleagues, with no known connection in two different counties, spanning 11 years, is not considered to represent misfortune or coincidence.

With regard to Caution 2, you provided no additional information. In response to the behaviour presented in Caution 1 and allegations 1, 2 and 3, you offered minimal new or additional information. It is acknowledged that you described attending a parenting course and that you voluntarily enrolled on an additional 'Teenager course'. Your description that it had changed your mindset, and the list of example behaviours / strategies are recognised as being positive steps toward avoidance of the use of physical chastisement. Your description could have been supported by documentation of course attendance / completion. The DBS is however mindful of the time elapsed since the parenting course and the time over which you demonstrated the harmful domestic behaviour.

Your response to allegation 4 appeared to describe a different period, which was not related to the timeframe presented in the allegation. You did not address DBS concern that there was a chronological connection between the work-based behaviour and that demonstrated in the domestic setting. The category and level of concern in the risk assessment fields remain unchanged following evaluation of the representations. DBS is satisfied that the evidence indicates you have an attitude that you have an entitlement to sex and that you have intermittent compromised coping skills. These are considered the causal factors in the commission of the multiple episodes of harmful behaviour in both the domestic (toward your partners and son) and workplace (female colleagues). Due to the timing of each, it is determined there is a correlation between the harmful behaviours demonstrated in the domestic and workplace settings.

The positive character references are acknowledged as is your description of being caring, a trait inherent with your profession. Unfortunately, your position of denial about the work-based behaviour is synonymous with an absence of future risk mitigating factors. Again, DBS acknowledge there have been no reported concern regarding you[sic] professional ability / capability in respect of service users / patients and there is no evidence of NMC involvement. However, it is determined that DBS is the only organisation to have had collective sight of all the allegations / behaviours. It is notable that Hampshire Children's Service documentation did not evidence its knowledge of the work-based allegations even though their 2019 / 2020 and 2021 assessments occurred simultaneously and after the 2019 police investigation. When all the information currently held by DBS is considered, it is determined that the evidence suggests you have an entitlement to sex attitude, and you are likely to act upon it in the future. The evidence suggests reoccurrence of unsolicited sexualised behaviour is linked with demonstration of other harmful behaviours, in the past it has been threats to self and others and use of physical chastisement in the domestic setting. It is not known if the workplace behaviour (or report / investigation of workplace behaviour) triggers domestic behaviour or vice versa but the dates / timings of each are very similar (as are the periods in which there are no reported domestic or work-place concerns) strongly suggesting a correlation between the two. Whilst recent training / attendance on courses may have had the effect of reducing the likelihood of the use of physical chastisement in the domestic setting, the extent of that reduction is not readily quantifiable. This is in part because the training was undertaken in the past 8 months. When compared with the chronology of harmful behaviour in the case, is not considered a significant mitigation as there were lengthy periods between the reported concerns. DBS is mindful that the evidence indicates you have a propensity to conduct harmful behaviour, in different settings and of different presentation.

DBS acknowledged that none of the sexualised behaviour was conducted or involved any vulnerable adults and that the demonstration of threats / physical chastisement was conducted in the domestic setting. However, it is considered that each of the behaviours are relevant and transferable to the workplace and to those in receipt of regulated activity. The DBS is obligated to consider not only the position held currently but all positions / settings and ages of person in regulated activity. If you were, for instance, to work in regulated activity with 16 and 17 years old, you could replicate the sexualised behaviour which would endanger those individuals to a significant level. This is a reasonable projection given the ages of the females to whom you made unsolicited and unwanted advances over the period in which you demonstrated the relevant behaviour (2008 - 2019). Furthermore, it is reasonable to conclude your approach to safeguarding children in respect of witnessed or disclosed events is likely to be impacted by your own attitude and harmful behaviour.

In consideration of the future risk toward both children and vulnerable adults, DBS consider the evidence indicates you are likely to repeat harmful behaviour either through enacting on your entitlement to sex attitude or through compromised coping skills (which has previously resulted in the use of physical chastisement toward your son and threats of harm towards partners in the domestic setting). Despite your described caring nature, DBS is mindful of public perception and confidence in a safeguarding organisation having identified the concerning behaviour / attitude. The risk assessment supports a decision that a safeguarding measure is required to protect both children and vulnerable adults from future harm. It is therefore considered appropriate to include your name on the Children's Barred List and the Adults' Barred List.

A consideration of the proportionality of a barred decision is presented as follows: The decision to include you on the Children's Barred List and Adults' Barred List has been taken in consideration of your rights to a private and family life in accordance with Article 8 of the European Convention on Human Rights. An inclusion decision will interfere with these rights and is therefore required to be legal and necessary. The DBS acknowledge the significantly negative impact of an inclusion decision for you. This will prevent you from holding or attaining employment in the health and social care sector with both children and vulnerable adults. It would effectively negate your nursing registration and prevent you from holding both qualified and non-qualified positions in regulated activity. This is pertinent given there is currently no known involvement of your professional body, the Nursing & Midwifery Council (NMC).

The inclusion decision will exclude you from not only paid regulated activity positions but also voluntary positions with both children and vulnerable adults. The financial implication of reduced employment opportunity is acknowledged and could be significant for you and your family, including four children. This could impact your standard of living. The time, emotional and financial investment in your career is not underestimated. Inclusion would in effect nullify your career and may impact further educational and qualification opportunities, for example by preventing participation in course-required placements. The DBS recognise a stigma may be associated with inclusion on a barred list. This could impact mental health, mental wellbeing, and personal relationships. The magnitude of receipt of this letter is not under-estimated. The DBS do not publicise the barred lists but will inform the police and a prospective employer / organisation should you hold or apply for a position from which you have been excluded. The negative impact of an inclusion decision on you is acknowledged however, in this case, inclusion on the Children's Barred List and Adults' Barred List is considered a safeguarding measure proportionate to the risk posed.

It is therefore both appropriate and proportionate to include you on the Children's Barred List and the Adults' Barred List, to protect children and vulnerable adults. As a result, we included your name in the Children's Barred List using our barring powers as defined in Schedule 3, paragraph 3 of the Safeguarding Vulnerable Groups Act 2006 (SVGA) on 11 August 2022. As a result, we also included your name in the Adults' Barred List using our barring powers as defined in Schedule 3, paragraph 9 of the Safeguarding Vulnerable Groups Act 2006 (SVGA) on 11 August 2022. More information about the barring powers can be found at the end of this letter."

The statutory framework

18. The DBS was established by the Protection of Freedoms Act 2012, taking on the functions of the Criminal Records Bureau and the Independent Safeguarding Authority. One of its main functions is the maintenance of the children's barred list and the adults' barred list (the **"Barred Lists,"** and each a **"Barred List"**). Its power and duty to do so arises under the SVGA.

Duty to maintain the Barred Lists

19. Section 2(1)(a) SVGA places a duty on the DBS to maintain the Barred Lists. Under Section 3(2)(a) SVGA a person is barred from "regulated activity" relating to children if they are included in the children's barred list.

Criteria for inclusion in the Barred Lists

20. Schedule 3 to the SVGA applies for the purposes of DBS determining whether an individual is included in either or both Barred Lists.

21. Under Section 3(2)(a) SVGA a person is barred from "regulated activity" relating to children if they are included in the Children's Barred List, and under Section 3(3)(a) Under Section 3(3)(a) a person is barred from "regulated activity" relating to vulnerable adults if they are included in the Adults' Barred List.

22. The Appellant has been included by the DBS on the Children's Barred List pursuant to Schedule 3, Part 1, paragraph 3 SVGA (which relates to children and is headed "Behaviour") and in the adults' barred list pursuant to Schedule 3, Part 2, paragraph 9 SVGA (the equivalent provision relating to vulnerable adults, which is also headed "Behaviour").

23. Paragraph 3 of Part 1 of Schedule 3 to the SVGA provides:

> "3 (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 children, and
> (b) DBS proposes to include him in the children's barred list.
>
> (2) DBS must give the person the opportunity to make representations as to why he should not be included in the children's barred list.
>
> (3) DBS must include the person in the children's 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 children, and
> (b) it is satisfied that it is appropriate to include the person in the list. ..."

24. By section 5(1) of the 2006 Act, a reference to regulated activity relating to children must be construed in accordance with Part 1 of Schedule 4. By section 59 SVGA "child" means a person who has not attained the age of 18. Regulated activity relating to children includes any form of care or supervision of children (paragraph

2(1)(b) of Schedule 4), and any form of advice or guidance provided wholly or mainly for children (paragraph 2(1)(c) of Schedule 4) carried out frequently by the same person (paragraph 1(1)(b) of Schedule 4).

25. "Relevant conduct" in relation to children is explained in paragraph 4 of Part 1 of Schedule 3 to the SVGA as follows:

> "4 (1) For the purses of paragraph 3 relevant conduct is—
> (a) conduct which endangers a child or is likely to endanger a child;
> (b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;
> (c) conduct involving sexual material relating to children (including possession of such material);
> (d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;
> (e) conduct of a sexual nature involving a child, if it appears to DBS that the conduct is inappropriate.
>
> (2) A person's conduct endangers a child if he—
> (a) harms a child,
> (b) causes a child to be harmed,
> (c) puts a child at risk of harm,
> (d) attempts to harm a child, or
> (e) incites another to harm a child. …"

26. Paragraph 9 of Part 2 of Schedule 3 to the SVGA provides:

> "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."

27. By section 5(2) SVGA, a reference to regulated activity relating to vulnerable adults must be construed in accordance with Part 2 of Schedule 4. By section 60 SVGA, a vulnerable adult means any adult to whom an activity which is a regulated activity relating to vulnerable adults by virtue of any paragraph of paragraph 7(1) of Schedule 4 is provided.

28. "Relevant conduct" in relation to vulnerable adults is explained in paragraph 10 of Part 2 of Schedule 3 to the SVGA as follows:

> "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) conduct involving sexual material relating to children (including possession of such material);
(d) conduct involving sexually explicit images depicting violence against human beings (including possession of such images), if it appears to DBS that the conduct is inappropriate;
(e) conduct of a sexual nature involving a vulnerable adult, if it appears to DBS that the conduct is inappropriate.

(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…"

29. The Appellant does not dispute that he has in the past been engaged in regulated activity relating to vulnerable adults or that he might seek to be engaged in regulated activity with vulnerable adults or with children in the future.

Appeals of decisions to include, or not to remove, persons in the Barred Lists

30. Section 4 SVGA sets out the Upper Tribunal's jurisdiction and powers in respect of appeals against decisions of the DBS. It provides (so far as relevant):

"**4 Appeals**
(1) An individual who is included in a barred list may appeal to the Upper Tribunal against—
…
(b) a decision under paragraph 2,3,5,8,9 or 11 of Schedule 3 to include him in the list;
(c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.

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

Ground One – has the DBS made an error of law in its approach to or gathering of evidence about LM's appeal.

31. The Appellant's submissions (set out in the "Response on behalf of LM" and the "Perfected grounds of appeal" filed by LM and submitted by Counsel on LM's behalf are, in brief that:

Allegations concerning sexual misconduct.

32. In respect of the 2007 allegation (which concerned sexualised conduct), the DBS did not ask the police for any underlying evidence or information from the care home or concerning documentation supplied by them to the police. They did not ask for any underlying statements or police reports. The Appellant was able to obtain this report (after the DBS decision was made) and so the DBS should have done so as it was made clear on the face of the information supplied by Hampshire Police that it held the internal report in its possession by reading the police log. The DBS action on this point was not therefore fair, consistent, and thorough.

33. The DBS did not seek to ask for the underlying evidence held by the police but relied upon their summaries or crime reports when such evidence could have been requested and/or disclosed by the police in respect of the 2013 and 2018 allegations.

34. The DBS should, given the paucity of information from the police, have sought further information from the relevant care homes in respect of the allegations of sexual misconduct in 2013 and 2018. The care homes could have been compelled to provide this evidence under s42 of the SGVA 2006.

Allegations concerning LM's children and relationship with his wife.

35. The DBS should have sought the underlying documents relating to these allegations rather than relying upon a s47 investigation which refers to previous contacts with children's services or matters referred to in a child and family assessment in November 2019 rather than seeking the underlying material upon which the relevant information is based.

36. The police make no reference to the allegation of domestic violence in July 2013 alleged by a support worker in the information they supplied to the DBS.

37. The DBS submits that appellate authorities (*Balajigari v SSHD* [2019] EWCA Civ 673 at 70, approving the principles set out at Mr. Justice Haddon Cave in *R(Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EHWC 1662 at 99 – 100) identify that the obligation on the decision maker is to take such steps as are reasonable to inform himself, and it is for the public body to decide the manner and intensity of the inquiry to be taken. The court should only intervene if no reasonable

authority possessed of that material could suppose that the inquiries they made were sufficient. Moreover, and somewhat contrary to the legal submissions made by the Appellant, which were predicated on the basis that making reasonable inquiries is part and parcel of procedural fairness, the Court of Appeal finds that the duty to have regard and consider matters relevant to the public body's decision-making springs from the Secretary of State to inform himself to arrive at a rational conclusion. The wider the discretion that the decision maker has, the more important it is that he has all relevant material to exercise it properly.

38. On the facts of this case, the issue is whether the information received by the DBS was sufficient to inform themselves of the nature of the allegations i.e. was it irrational to fail to ask the police or social services for further material? There is no statutory or common law duty on the DBS to pursue all reasonable lines of inquiry (*JO v Disclosure and Barring Service* [2023] UKUT 308 at [90]) but it must act rationally and in good faith when obtaining information. In J*O*, the Upper Tribunal identified that it may be useful if the DBS could confirm if it has taken reasonable steps to obtain all relevant evidence.

39. The Respondent (DBS) made the following submissions in response to those of the Appellant:

In respect of sexual misconduct

40. The 2007 allegation. The DBS had relevant information from Surrey Police, and provided two crime reports which record details of the allegations and the reasons why no further action was taken. The DBS accepted the limitations of this material but had sufficient information to make an assessment and determination.

41. The 2013 allegation. Hampshire Constabulary told the DBS that no MG5 case summary was completed by the officer, and there was no summary of the interview recorded and that as the Appellant had not been charged with any offence, they were unable to provide any witness statements and that there was no further relevant information in their possession for the purposes of the DBS.

42. The 2018 allegation. Again, Hampshire Constabulary identified that the MG5 and witness statement were not available but did provide a police summary and a record of the Appellant's interview.

In respect of allegations concerning his children and his wife

43. In respect of the allegations concerning TM (his child) being slapped by LM, the DBS had a chronology from Hampshire Children's Services, CAF assessments dated November 2019 and August 2020 and a s47 assessment of risk in respect of LM. In summary, the DBS had sufficient information to reach the decision that it did because the CAF assessments indicated that TM had reported being slapped both in 2019 and three times in 2018 and other documents supplied by Hampshire Children's Services showed consistency.

44. In respect of the allegation concerning TM being left to look after his brother on his own, the Appellant admitted that this could have happened, and this allegation was not contested in his response.

45. In respect of the allegation of domestic abuse, that whilst they did not have the underlying referral made to Hampshire Children's Services for LM and his wife, that an initial assessment was conducted, and information was provided that an outreach support worker had indicated that the Appellant had hit his partner. This information was not provided by Hampshire Constabulary, but the DBS recognised this in making its decision.

46. It is our conclusion that whilst it is always possible for someone to point to further information or evidence which could be gathered, the question is whether the information so gathered was sufficient for the purposes for which the DBS required it. The DBS is not an investigative body: it is therefore reliant upon information which is provided to it by other (public) bodies. Its role is not to determine the truth or otherwise of matters, but to manage risk based on the information presented to it (*R (SXM) v DBS* [2020] EHWC 624 [2020] 1 WLR 3359 at 38).

47. We do not consider that the DBS fell outside the range of a reasonable decision maker in not seeking to see if there was further information beyond that supplied to them by the relevant public bodies. In respect of the sexual misconduct, the Police identified why they did not have further information or why they would not provide it and there was sufficient information about the relevant misconduct and its facts for the DBS to be able to make a risk assessment. As to the issue in respect of the internal report of 2007, the police summary flagged the outcome of the internal investigation which was that there was "insufficient evidence". In those circumstances, it was not irrational for them not to seek further information about this by way of the internal report.

48. In respect of the allegations concerning LM and his children, the information from social services was sufficient for an assessment of risk to be made, and included a chronology, CAF assessments and a s47 assessment and relevant family plans. This was, it is submitted, adequate and relevant information required for the DBS to carry out its statutory functions.

49. In respect of the allegations concerning domestic abuse, the DBS recognised that the information was limited, but it was set out in the chronology supplied by Hampshire and that an initial assessment was carried out at that time by Hampshire in respect of LM's son and that work was undertaken with the family leading to the allegations that the parents had an argument that father had hit mother. It should be noted that the chronology says:

> "Both parents have spoken to the police about the incident."

50. If one were pedantic, one would indicate that this does not mean that the police have a record of such, and that no formal complaint was made. Whilst this evidence is not of the highest quality, the question is whether it is sufficient to identify that a risk is present because of domestic abuse. We consider that the evidence is sufficient to reach that conclusion, albeit brief in nature.

51. We do not consider that the fact that the Appellant could have obtained further information from the police or social services as part of the process of making representations excuses the DBS from making reasonable inquiries. However, we

agree with the DBS that if there was contradictory material that would have given the LM an opportunity to present such. The fact that he was not legally represented at that time does not mean that he would not have been able to have written to the police or Hampshire and asked for information directly pertaining to him.

52. Even if we are wrong about the evidence concerning domestic abuse in 2013, we consider that this is only one part of a complex picture of risky and/or maladaptive behaviours demonstrated by LM, and furthermore, as LM was asking us to make different findings of fact on the basis of further information, this ground of appeal was academic.

53. We therefore dismiss Ground One.

Grounds 2 – 7

54. Grounds 2 – 7 all concern allegations of mistake of fact. There have been a number of appellate authorities about the nature and extent of this jurisdiction over the past five years. I rely upon the summary provided by Upper Tribunal Judge Church in *NK v DBS* [UA-2023-001292-V] at paragraphs 20 – 28 which eloquently analyses the case law in respect of mistakes of fact in this jurisdiction. He says:

> "The nature and extent of the Upper Tribunal's "mistake of fact" jurisdiction has been the subject of several recent decisions of the Upper Tribunal and the Court of Appeal. What constitutes a mistake in the findings of fact made by the DBS on which the decision was based (for the purposes of section 4(2)(b)) was considered recently by the Upper Tribunal in *PF v DBS* [2020] UKUT 256 (AAC). At paragraph [39] the panel stated:
>
> > "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."
>
> In *AB v DBS*, in the context of discussing the Upper Tribunal's power to make findings of fact under section 4(7) of the 2006 Act, Lewis LJ noted (at [55]) in relation to the Upper Tribunal's jurisdiction to make findings of fact that it would:
>
> > "Need to carefully distinguish a finding of fact from value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness. The Upper Tribunal may do the former but not the latter. By way of example only, the fact that a person is married and the marriage subsists may be a finding of fact. A reference to marriage being a "strong" marriage or a "mutually supportive one" may be more of a value judgment rather than a finding of fact. A reference to a marriage being likely to reduce the risk of a person engaging in inappropriate conduct is an evaluation of the risk. The third "finding" would certainly not involve a finding of fact."
>
> It was noted in *PF v DBS* that:
>
> > "41. The mistake may be in a primary fact or in an inference... A primary fact is one found from direct evidence. An inference is a fact found by a

> process of rational reasoning from the primary facts likely to accompany those facts.
>
> 42. One way, but not the only way, to show a mistake is to call further evidence to show that a different finding should have been made. The mistake does not have to have been one on the evidence before the DBS. It is sufficient if the mistake only appears in the light of further evidence or consideration."

In *DBS v JHB* [2023] EWCA Civ 982 the Court of Appeal returned to the issue of the extent of the Upper Tribunal's jurisdiction under the SVGA on issues of mistake of fact. Laing LJ said that a finding may be "wrong" even if there was some evidence to support it, or it was not irrational, and it may also be "wrong" if it is a finding about which the Upper Tribunal has heard evidence which was not before the DBS, and that new evidence shows that a finding by the DBS was wrong (see paragraph [95]).

However, the Court of Appeal decided that, while the Upper Tribunal had identified what it said were mistakes of fact, it did not explain why the relevant DBS findings were "wrong" or outside "the generous ambit within which reasonable disagreement is possible." Rather, it had looked at very substantially the same materials as the DBS and made its own findings on those materials, which differed from those of the DBS. This, the Court of Appeal said, was impermissible, because it was only entitled to carry out its own evaluation of the evidence that was before the DBS if it had first identified that the DBS had made a finding which was not available to it on the evidence on the balance of probabilities.

The scope of the mistake of fact jurisdiction was further considered by the Court of Appeal in the recent cases of *Kihembo v DBS* [2023] EWCA Civ 1547 and in *DBS v RI* [2024] EWCA Civ 95. The decision in *Kihembo* confirmed that *PF v DBS* remains good law. In *RI v DBS* Males LJ explained that the restrictive approach adopted by the Court of Appeal in JHB should be confined to those cases where the barred person does not give oral evidence at all, or gives no evidence relevant to the question of whether the barred person committed the relevant act relied upon. Where the barred person does give oral evidence before the Upper Tribunal:

> "The evidence before the Upper Tribunal is necessarily different from that which was before the DBS for a paper-based decision. Even if the appellant can do no more than repeat the account which they have already given in written representations, the fact that they submit to cross-examination, which may go well or badly, necessarily means that the Upper Tribunal has to assess the quality of that evidence in a way which did not arise before the DBS" (per Males LJ at [55])

Males LJ interpreted the scope of the Upper Tribunal's jurisdiction under section 4(2)(b) of the 2006 Act as follows:

> "In conferring a right of appeal in the terms of section 4(2)(b), Parliament must therefore have intended that it would be open to a person included on a barred list to contend before the Upper Tribunal that the DBS was mistaken to find that they committed the relevant act – or in other words, to contend that they did not commit the relevant act and that the decision of the DBS that they did was therefore mistaken. On its plain words, the section does not require any more granular mistake to be identified than that" (*RI v DBS*, per Males LJ at [49]).

> Bean LJ rejected the DBS's argument that the Upper Tribunal was in effect bound to ignore an appellant's oral evidence unless it contains something entirely new. He said in *RI v DBS* at [37] that:
>
> > "Where Parliament has created a tribunal with the power to hear oral evidence it entrusts the tribunal with the task of deciding, by reference to all the oral and written evidence in the case, whether a witness is telling the truth."

55. We have considered the various allegations in the light of the guidance given by these cases and in carefully examining the written evidence supplied by LM and his wife, the submissions made by his legal representative in writing and his oral evidence, which was subject to cross examination by the DBS.

Ground Two: The DBS was wrong to find that LM had slapped his son in 2018.

56. We heard evidence from LM about this allegation. LM admits and has received a police caution for slapping his son in 2019. He explained to us that his son had been the subject of reprimands at school, having behavioural problems which caused the head teacher to have to attend to deal with his son and for TM's mother to have to go to school to discuss TM's behaviour. He said that as an "African parent" (his words), he was firm in his belief that you should respect your teachers and that not listening to the teacher was serious. He also explained that he did not understand in 2018/19 that his problems at school may be related to the fact that he did not like transitions, was too intelligent and so was bored. He identified that he had undertaken a parenting course after receiving the caution and his involvement with Hampshire Social Services. He describes himself as being negative and angry at having to attend the course, but the 10-week course taught him empathy and it transformed his attitude towards parenting. Following on from this he has done a further course in talking to teenagers. This is consistent with the information from Hampshire Social Services who identified that parents worked well the child protection plan put in place for TM and his brother in 2020 and made changes to their working lives to meet their children's needs.

57. He also explained that TM was the first child he raised in England. On several occasions during his evidence, he identified that he was an "African parent" at that time so that he was influenced by those mores and values. During the November 2019 CAF assessment (set out below), the social worker records that LM identified he was from Africa and experienced significant chastisement as a child, however, he demonstrated an understanding that this was not normalised in England. We note that the children's services risk assessment of 2020 records information gathered from TM's school. TM disclosed to the school that when his father slaps him, the calls it "real discipline" and says that this is how he got disciplined when he grew up in South Africa.

58. The CAF assessment in November 2019 said that LM and his wife had identified that physical chastisement was not normalised within the family and were open however about the troubles they were having in managing TM's behaviour at home.

59. He also stated that he has had no problems with the children since 2020, despite being their primary carer since 2022, showing how he has grown and that he shows no evidence of disposition to harm children now.

60. The suggestion made was that his son, TM, had suggested that he may have been "dreaming" when suggesting that his father had slapped him prior to 2019. He gave evidence that his son was very intelligent but was also very good at talking and exaggerating things. LM said he could not remember the incidents from 2018. The information within the Child Assessment Framework (CAF) identifies that TM disclosed to his school in June 2020 that he had been kicked by his father and that:

> "This was not the first time dad had hit him: dad has slapped him twice in 2019 and three times in 2018".

61. This assessment also identified that TM worried about being hit by his dad, and that his father made constant threats to him that he will be in trouble. The same assessment also described LM saying that the kick to TM in June 2020 was a "soft kick" because he had shown defiance when LM had spoken to him about the mess that the younger child had made.

62. In November 2019, during another CAF assessment, the Appellant has stated that he had "*admitted slapping [TM] and put it down to not being in the right frame of mind to deal with the situation as he had just returned from a night shift*".

63. The s47 investigation and risk assessment of June – July 2020 has a section which describes the social workers views and analysis, which includes commenting upon the validity of the concern. This describes TM's account as "consistent," and that TM did not feel safe at home. She states:

> "I do believe the account that the child gave is accurate regarding the current incident….I do, however, have some questions and uncertainty regarding previous allegations] the child] made . He just seemed a troubled child and related that some of the incidents he did not remember if they had been real or a dream, but he thought they were real."

64. We considered that the social worker did raise this concern about TM's consistency, but consider, on the balance of probabilities, that TM's allegation was plausible and credible and given the strains in the household outlined in 2018 and 2019, coupled with LM's admitted concerns about TM's behaviour, that such did happen. Furthermore, we note that LM had denied slapping his son when the police were first involved in 2020 but subsequently recollected that it did happen.

65. The DBS therefore did not make a mistake in concluding that this was behaviour which was relevant to their determination about risk of harm.

Ground 3 and Ground 4: The DBS was wrong to find that LM had threatened to kill his partner in 2013 and that LM had hit his partner in 2013.

66. LM gave oral evidence on these issues, as did his wife. LM' s evidence was that he did not hit his partner. He recognised that he and his partner were arguing at the time, largely because their accommodation was unsatisfactory (they were living in a studio flat with a small baby with very bad mould) and this meant they had no space which made them stressed. He said, however, that the police were not involved and there was no record of domestic violence recorded by the police. He also said that he did visit the police to indicate his unhappiness with his life, accepting that he went to

the authorities that he wanted to take his own life, and they just gave him a pamphlet. When cross examined, he accepted that he did want to take his own life to the police (despite denying saying this earlier in his cross examination). He also accepted in cross examination that he had a poor memory and that “a lot of things have happened here". He did deny, however, in cross examination that he did have an argument and hit his wife and threatened to kill her.

67. He also gave further evidence about the stressful relationship between himself and his wife in 2013. He identified that his wife was not working, as she was a student, LM was having to support a family in South Africa alongside sending money by way of remittance to the Philippines for his wife’s family, and that they were struggling financially. LM told us that he suspected that his wife had post-natal depression after the birth of their son, TM, and that part of their problems were caused by a cultural clash. He told us that he was “*African and from a strong traditional background*” and so was keener on saving money than his wife who wanted possessions.

68. He described their lives living in the flat as very difficult and that was why he applied in February 2013 to have TM taken into short term foster care so that he could earn sufficient money to return to South Africa. He described being stressed and depressed with his financial and housing difficulties, and that he felt like sleeping most of the time during that period.

69. His wife, who I shall call CP, supported her husband’s evidence. She recognised that they had relationship difficulties in 2013 involving poor housing, a small baby, LM having to work very hard, and cultural differences between them as they had just moved in together and were “learning each other’s culture”. His wife described LM as more conservative and more mature than her at that time. She accepts that they were having verbal arguments at the time in question, and that an outreach support worker from Hampshire Children’s Services was involved at that time. She denied that LM had ever hit her. She also told us that she had never spoken to the police in her life. She identifies that the outreach worker was engaged by the local authority after the health visitor contacted children’s services because of the poor accommodation where they were living with a baby. She was adamant that LM had never hit her and that he was a very kind gentleman. She denied minimizing abusive behaviours because she was a healthcare professional, and she was concerned that accepting such may impact upon her and her husband’s employment (as was stated by Hampshire Children’s Services in their assessments in 2020).

70. The material upon which the DBS based their conclusions was that from Children’s Services. The CAF assessments in 2019 and 2020 record in summary form what was said about the incidents in 2013 (there is no direct evidence/assessments provided by Hampshire from that time). The 2019 CAF assessment said that an initial assessment was undertaken in respect of TM in 2013 because of “father’s indications of ongoing domestic violence and his partner and himself”. It also says that he raised concerns about his relationship with his partner which had deteriorated to the point “where he wanted to kill her himself and everyone.” In July 2013, an outreach support worker contacted Children’s Services and said that LM and CP had an argument, and that LM had hit his partner, and that both had spoken to the police about the incident. The DBS in their letter recognised that there was no information from Hampshire Constabulary about this and took this into account in their overall assessment.

71. We consider that there was no mistake of fact in the DBS reaching this conclusion. The Appellant and his wife recognised that at the time in question they were under significant stress and strain – such strain that LM requested that his son is taken into short term foster care. We do not consider that LM was intentionally seeking to mislead us about the event, but it was plainly a very stressful time in LM's and CP's life. The fact that there is no information supplied by Hampshire Constabulary is not conclusive. The evidence was that they were "spoken to by the police" which may not have involved any formal engagement or complaint to have led to a record. We also take account of the fact that during periods of stress – as can be seen in LM's behaviour towards his son, TM – he can lash out. On that basis, we consider that on the balance of probabilities this event did occur. We do not consider that the threat to kill his partner was serious but was simply a mechanism to display his despair and unhappiness to social services.

Grounds 5 – 7: initial considerations on issues of propensity

72. These grounds all concern sexual misconduct towards female work colleagues at three different times in three different care homes. The DBS's decision letter states that they considered the fact that seven adult women raised concerns about LM, the majority reported multiple instances of varying degrees of sexualised behaviours. The DBS considered as an aggravating factor the fact the police investigation did not deter LM from carrying out similar behaviour subsequently. The DBS concluded that the pattern of behaviour was repetitive and reflective of a harm endorsing attitude. The DBS considered that the failure to inform social services of LM's investigation for sexualised behaviours in 2019/2020 was a purposeful act of concealment designed to minimise the potential impact of the assessment process and that the sexual entitlement appears ingrained.

73. LM's grounds of appeal seek to identify that, in the case of a number of similar allegations being made, the DBS and thus the Upper Tribunal can have regard to them but must consider the cogency of the evidence when looking at this. In particular, bad character should not bolster a weak case (relying upon *R v Hanson* [2005] EWCA Crim 824). LM's grounds of appeal make various submissions about the weakness of the evidence and material in the 2007, 2013 and 2018 allegations of sexualised behaviour and set out that the paucity of the evidence and the absence of underlying materials, alongside the lack of charge of the Appellant in respect of the 2007 and 2013 charges showed that these were weak cases which should not be relied upon. LM further provides explanations as to why the incidents in 2007 and 2013 were malicious in nature.

74. The DBS submits that the Appellant had admitted inappropriate behaviour in the workplace in 2018 including unzipping a colleague's top (for which he received a caution), hugging colleagues and engaging in conversations of an explicit nature. It submits that having three different allegations made by several different women at three difference care homes over a period of 10 years is both relevant and significant. The DBS relied upon the case of *R v Mitchell* [2016] UKSHC 55 [2017] AC 571, where Lord Kerr identified – albeit in a criminal context when determining how propensity should be put to a jury in a case where it is relevant – is to look not at each and every incident and decide if it has been proven, but to look at the issue of propensity in the round (at paragraph 39 – 43 of Lord Kerr's speech*). R v Mitchell* was a case where a Defendant, who was charged with a murder by stabbing, had used knives on a number

of occasions, none of which had led to a conviction but showed, in the minds of the prosecutor, a propensity to use a knife.

75. As set out in *O Brien v Chief Constable of Police* [2005] UKHL 26 [2005] 2 AC 534, the court considered the issue of similar fact evidence stating that evidence must be relevant to be admissible in any proceedings. To be relevant it is (citing *DPP v Kilbourne* [1973] AC 729 at 756):

> "Relevant if it is logically probative or disapprobative or some evidence which requires proof ….relevant (i.e. logically probative or disapprobative) evidence is evidence which makes the matter which requires proof more or less probable."

76. In *O Brien*, Lord Bingham (paragraph 4 of his speech in O Brien) says this about evidence of what happens on a previous occasion:

> "That evidence of what happened on an earlier occasion may make the occurrence of what happened on the occasion in question more or less probably can scarcely be denied…..to regard such evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair minded person might, on the facts , follow….it is undesirable that judicial decision making on issues of fact should diverge more than it need from the process followed by rational, objective and fair minded people called upon to decide question of fact in other context where reaching the right answer matters. Thus, in a civil case such as this the question of admissibility turns, and tuns only, on whether the evidence which it is sought to adduce, assuming it is (provisionally) to be true, is in Lord Simon's sense [see above] probative . If so, the evidence is legally admissible. That is the first stage of the inquiry."

77. The second stage (paragraphs 5 and 6 of Lord Bingham's speech) identifies the factors which a judge will consider in deciding whether to admit the evidence even if probative. This would include the wider public interest in exposing wrongdoing, the public righting of wrongs, but also whether or not the evidence will distort a trial, focus only on collateral issues to be decided, the case for causing unfair prejudice if the evidence is admitted and the burden in time and resources of dealing with the admitted evidence and the passage of time in some cases.

78. Lord Kerr's reasoning in *R v Mitchell* (above) at paragraph 43 where he says that a jury can consider issues of propensity in the round. Lord Kerr says that:

> "43……There are two interrelated reasons for this. First, the improbabilities of a number of similar incidents alleged against a defendant being false is a consideration which should naturally inform a jury's deliberations on whether propensity had been proved. Secondly, obvious similar in various incidents may constitute mutual corroboration of those incidents. Each incident informs another."
>
> 44. …. The jury should be directed that, if they are to take propensity into account, they should be sure that it has been proved. This does not require that each individual item of evidence said to show propensity must be proved beyond reasonable doubt. It means that all the material touching on the issue should be considered with a view to reaching a conclusion as to whether they are sure that the existence of a propensity has been established."

79. In *R v P (Children: Similar Fact Evidence*) [2020] EWCA Civ 1088, the court had to consider whether evidence from private law family proceedings of coercively controlling behaviour from a new relationship that a father had formed subsequent to the end of his relationship with a mother, who made allegations of coercive control against him in private law proceedings relating to children should be admitted. The court considered various factors relating to the admission of such evidence, one of which was that domestic abuse does not usually consist of a serious of isolated incidents, but of harmful patterns of behaviour over time, and where issues of coercive control and stalking cannot necessarily be labelled and identified as separate incidents (paragraph 22 of *R v P*) and bearing in thin that a pattern of harassment and other forms of domestic abuse is only discernible by conducting a broader examination of these allegations (as identified by Lord Justice Baker in *re LG (Re-opening of Fact Finding)* [2017] EWHC 2626 (Fam) at [27]). Lord Justice Peter Jackson ((at 26)) identified that *R v Mitchell* was applicable to family cases which show that the prevent facts must form a sufficient basis to sustain a finding of propensity, but each individual item of evidence does not have to be proved.

80. We have borne these points in mind when considering propensity in this case, examining the view of the DBS that such propensity could be established against the allegations raised and critically looking at the evidential material upon which the DBS reached their conclusions.

81. We deal with Grounds 7 – 5 in reverse order in this judgment as there is the most information and evidence garnered from Ground 7 which is relevant to the factual position in respect of Grounds 6 and 5. Our conclusion having examined these issues is that the material in respect of all these allegations is relevant and shows a pattern of behaviour which gives rise to a risk of harm, even given the absence of underlying evidence in respect of the 2013 and 2007 incidents. We set out our reasons for this in more detail below.

Ground Seven: "The DBS was wrong to find LM had demonstrated sexualised behaviours with colleagues in 2018"

82. The Appellant accepted a police caution (which is an admission that an offence had taken place) for common assault in relation to his behaviours whilst working at a placement in November 2018. LM had unzipped a female colleague's top whilst simultaneously suggesting she should take her top off after she declared that she was very hot. Other allegations made at the time which were not the subject of any police action were inappropriate touching of hands, arms, shoulders, hips, and waist of VM and two other colleagues, and that he pushed his body up against one of them and made inappropriate comments to them. All three females were 21-22 years of age at the time.

83. The Nursing and Midwifery Council held a professional conduct hearing as outlined at the beginning of this judgment. They heard oral evidence from 3 care workers at the home along with LM and had relevant written material. LM was legally represented at the hearing. Paragraph 16 of Schedule 3 of the SGVA 2006 provides that a person cannot make representations that findings of fact made by a competent body were wrongly made, so that the findings of the NMC are binding upon LM – but not the DBS (see paragraph 64 of *XYZ v DBS* [2024] UKUT 85). There were seventeen

"charges" brought against LM. Those allegations which were found proven or where an admission had been made were:

84. That on around 15 November 2018 in respect of Colleague A that he put his arms around her, and said words to the effect of "do you want to go into the next bedroom or upstairs, don't tell me you have changed your mind".

85. That on or about 15 November 2018, he put his arm around Colleague A

86. That on or about 16 November 2018 he approached Colleague A and unzipped her jumper, pulled it down over her left shoulder and touched her shoulder.

87. That on about 16 November 2018, he approached Colleague A and put his arm around her waist, kissed her neck and said words to the effect of "I want to take you to South Africa."

88. That on or around 16 November 2028, said words to the effect that "you can tell Daddy" to Colleague A and

89. Said words to the effect of "two service users are on sodium valproate because it gives them a large erection" and

90. Said words to the effect of "in South Africa they stand pulling their penis as it's a muscle it makes it grow longer."

91. In respect of Colleague B, put her hand around her waist and kissed her neck and kissed her cheek.

92. On an unknown date took a photograph of Colleague B and sent it to her (this was not found to be misconduct).

93. That on more than one occasion in the presence of Colleague D you brushed up against a female colleague and touched a female colleague's bottom.

94. That these allegations above (except for the photograph) breached professional boundaries and were sexually motivated to seek sexual gratification and/or to pursue a future sexual relationship.

95. That in relation to those allegations proven in respect of Colleague A, that this was unwanted conduct amounting to harassment by creating an intimidating, hostile, degrading, or offensive environment.

96. That in respect of Colleague B, this was unwanted conduct amounting to harassment and had the effect of violating B's dignity and/or creating and intimidating, hostile, degrading, humiliating or offensive environment for Colleague B.

97. As a result of the above, the NMC imposed a six-month suspension order. It should be noted that the Panel were informed (page 57 of 60 of the GMC decision) that this was an "isolated period in a long career and there is no evidence of repetition". The panel had regard to the sexual misconduct, you had undertaken appropriate courses and demonstrated a good level of insight into your behaviour, and the panel

was satisfied that the misconduct in this case in this case was not fundamentally incompatible with him remaining on the register (page 58 of 60).

98. In respect of this ground, LM was cross examined by the DBS. In his oral evidence identifying that he behaved unprofessionally and crossed a boundary, but he intended it to be banter or teasing. He was also cross examined on the basis that his witness statement of 2022 did not accept that he had pulled her top from his shoulder whereas in the account given by Colleague A was not that the unzipping took place in the context of "banter" but was when she was putting in some bed blocks and you approached her from behind. He did not seem to accept in his cross examination by counsel for the DBS that he was seeking to minimize his behaviour in the way that he described the assault against A in his witness statement.

99. LM also accepted that he held inappropriate conversations with staff members, some of whom he had only known for a few weeks, and that it was inappropriate for him to say in a workplace that "*he slept better after sex.*" He intimated that the complaints made against him may, in part, be caused because the young women concerned were white and when he worked with women from different ethnicities he had no problems.

100. When trying to explain his sexual conversations with staff members and in particular his discussion about sodium valproate, he sought to contextualise the discussion by saying that 2 female care staff were laughing amongst themselves about sex and then spoke about sodium valproate which was how the discussion arose about abnormally large penises amongst service users. In fact, the words used at the hearing were that "*service users had massive manhood's.*" Leaving aside whether or not it is clinically accurate, we found that this showed no insight into how to speak appropriately about the users of the service where he worked, who had learning disabilities. As he was in a senior position of responsibility, he would set the tone for the nature of discussion. He then went on to discuss further discussion about whether women have "vaginas like a bucket" between himself and his colleagues if they take the drugs, identifying that he had not observed this. He described this as an "ill-advised conversation." We recognise that conversations about sex or sexual behaviours do take place between staff, and that a degree of bawdy humour may provide some levity in difficult or stressful situations. LM sought to persuade us that this conversation was speaking about the effects of medication (likening it to the discovery of Viagra as a side effect of medication designed for other purposes). We do not consider that analogy was apt and shows to us a marked lack of insight into what is or is not appropriate behaviour in the workplace.

101. We consider that the evidence demonstrates on the balance of probabilities that he did demonstrate sexualised behaviour with colleagues in 2018 and that no mistake of fact was made. We also note that in his witness evidence from 2022 he denied all allegations bar those in respect of 15 November 2018, and even then he sought to minimize the "unzipping" by seeking to place it as a joke which went too far, which is directly contradictory to the account given by Colleague A (whom the NMC believed).

Ground 5: the DBS was wrong to find that he had demonstrated sexualised behaviour in 2007 by VM, EH, KW.

102. The Appellant's submission is that in this case the paucity of evidence means that the DBS cannot fairly have rely upon it to demonstrate propensity for the other allegations. This was because the DBS had not seen the witness statements or interviews provided to the police. Furthermore, the DBS had not seen the internal investigation report of the care home when reaching its decision. He states that the police explained that they had dropped the case because of the lack of independent witnesses, CCTV, no forensic evidence, and delay in reporting the offences to management or colleagues or friends, and VM had continued to work alongside the Appellant.

103. Furthermore, a witness said that he had never witnessed LM kiss EH, and KW did not even present herself to give a statement despite being approached by the police to do so.

104. We received the following additional information not before the DBS. We summarise these here:

Internal investigation which took place in 2008 about events in 2007

105. An investigation report carried out by the care home in respect of sexual harassment by LM to VM between June – December 2007. VM was concerned about events which had taken place during night shifts and phoned the Head Office of the care home to set out her concerns during this time in February 2008. LM was suspended from duty pending an investigation. A statement was produced (which is not attached to the investigation report that we saw). LM's interview was however before us. This identifies that VM alleged:

106. LM followed VM and asked if he was married or had a boyfriend. He then asked whether she had ever "had a black man" and similar things.

107. He tried to touch and kiss her and would touch her breasts.

108. This happened most nights for the next few months.

109. She said she did not report it because she was embarrassed and did not know how to.

110. Other members of staff were questioned, and LM was interviewed. The investigation report identifies that there was no evidence to support the claims in relation to LM, with no dates at to when the alleged events took place, conflicting details about the allegations and no report to any college or others within the care home at the time in question. The investigation identified that no-one else was present at the time, and the investigation officer said that the matter was to be taken forward to enable full and proper investigation into the alleged assaults. LM said that VM had confided in him about her personal relationship during the time when the harassment was taking place. This report identifies that LM recognised that he had crossed acceptable professional boundaries as he hugged VM (with her consent). Correspondence from

2008 also showed that VM continued to choose to work with LM after this allegation was investigated despite her employer advising her that would not be sensible.

111. LM's account is to deny the behaviours (which included grinding his groin into someone's lower waist, approaching a colleague from behind and groping her breast, holding someone against their will and kissing them, and asking her about her marital status before identifying that he had "never tasted a white woman before" and asking if "she would be the first". There was also an allegation that LM straddled this individual whilst she was lying on a reclining chair. He denied this. Her account (from the police report, which the DBS accepts is not as optimal a piece of evidence as, for example, a witness statement from the individual) was that he would try to touch her bottom and breasts as he went past her. He accepts that he did hug her.

112. Another allegation made at this time was asking to kiss another individual and holding her hands on this individual's cheeks and turning her head). The third allegation was that LM advanced on her and touched her including her genital region.

113. LM's explanation for this was that these allegations were malicious and provoked by a manager at the care home. He had offered and was paid £5 by this manager to pick up other staff and bring them to work – to avoid having to pay larger sums for a taxi. He says that when he asked for an increase in the monies to be paid to him (from £5 to £10) that these allegations emerged. LM also relies upon the fact that the police took no further action in respect of these charges and the internal investigation did not find them proven as demonstrating that he was cleared of all wrongdoing.

114. Unlike the DBS we had the benefit of hearing live evidence from LM. His evidence amounted to no more than a bare denial, and his explanation of why three different women would make such allegations seems to us to be implausible. The DBS submission was that the care home only investigated the incidents relating to one colleague and not two others, about whom not investigation took place. Moreover, the colleague who went to the police did so after the internal investigation. The DBS identified that it was unusual for someone who has falsely made an allegation in an internal investigation to then go to the police (which is what happened in this case) because she was unhappy with the internal outcome. The individual who complained to the police does indicate, as was set out in the police log that she was disappointed that no action was taken.

115. LM provided evidence from a manager who came to the home after the sexual assault has been reported. She was responsible for reintegrating LM after the investigation had finished. We did not give much weight to this information which postdated the actual incidents.

116. We consider that in the round, the DBS did not make a mistake of fact in reaching the conclusions that they did. They gave adequate weight to the lack of police investigation, and we consider that the outcome of the care home investigation is not determinative of the conclusions reached by the DBS that there was an attitude that LM has an entitlement to sex. We consider that the pattern shown in 2007 was similar to the pattern shown in 2018, and that similar things were said, in similar settings, towards similar colleagues.

Ground 6: Sexual assault at a care home in 2013.

117. In respect of allegation 6, the allegation was that whilst working at a care home, he touched a 19-year-old female care worker which amounted to indecent assault. LM gave oral evidence about this and was cross examined. LM's written account was that no charge was brought against him by the police, so that the DBS should not use this allegation as a basis upon which to decide. There are no witness statements or other information from the police save a short narrative account. The allegation was that LM had approached a female from behind, placed his hands on her hips and kissing her on the cheek, he had made inappropriate comments to her about coming to her house when her mum was asleep and had lifted her up from a sitting position, brushing his hands on her breasts while doing so. LM was interviewed by the police but there is no record of that interview, and no further action was taken against LM.

118. LM's oral evidence was that nothing happened between him and the care worker. He said that the allegation was malicious. He told us that he had been working in the home for around 3 months. He said that nurses were not ordering medication as they should. He put a patch on a client which lasted for 72 hours, which was the last one, and said that a colleague agreed to order further patches. When he returned five days later, the medication had not been ordered, and the management asked him about why the medication had been missed. 48 hours later, the agency (for which he worked at the time) called him to say that he should not attend the placement as allegations had been made – the words he used was "girls are crying". He then said that he had to wait for 6 or 7 weeks before the police came to his house to discuss matters with him. He accepts that the police interviewed him. He says that the allegation came from one particular individual. He also says that there were different accounts given by different women saying different things and said that he was not in the physical place where the young woman said that he was at the time of the alleged assault and that the investigation did not get further.

119. In cross examination, the DBS identified that this allegation took place in 2013, at the same time that LM was having problems at home (as identified above) and that this may have impacted upon the way that he behaved at work – as he had accepted that in 2018, he accepted that this actions at work were influenced by the pressures he was under at home.

120. The DBS accepted that the information from Hampshire Constabulary was limited.

121. We consider that LM's view that the allegation was fabricated and made maliciously orchestrated by the manager of the care home is not convincing. Furthermore, the nature of the allegations is similar to those made in 2018, using a similar modus operandi (i.e. way of operating). The fact that there was no police prosecution does not mean that it is not relevant information which builds up a picture of entitlement to sex, as described in the DBS minded to bar letter. We take note of the fact that this incident took place in a separate care home, involving separate individuals, and took place whilst LM accepted, he was under significant strain.

122. In all the circumstances, we consider that the DBS have not made a material error of fact.

Disposal

123. As set out above, having carefully listened to all the evidence and material, we consider that the DBS did not make a mistake of fact in considering the various allegations when reaching their conclusion that LM's pattern of behaviour were such so as to create a risk to children and vulnerable adults. We recognise the impact that this will have upon LM's career as a nurse but as there has been no mistake of fact, and no error of law, we uphold the DBS decision and dismissed this appeal.

Fiona Scolding KC
Judge of the Upper Tribunal
Matthew Turner, Member of the Upper Tribunal
Rachael Smith, Member of the Upper Tribunal

Authorised for issue on
20 November 2024