



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2022-000082-V
[2025] UKUT 041 (AAC)**

ANONYMITY ORDER

On 9 June 2022, the Upper Tribunal made the following order which remains in force:

“The disclosure of any matter likely to lead a member of the public to identify the service user referred to by the DBS in its letter to the Upper Tribunal of 12 May 2022 is prohibited.”

Any breach of the order is liable to be treated as a contempt of court which is punishable by up to two years imprisonment or an unlimited fine under s.25 of the Tribunals, Courts and Enforcement Act 2007.

AA

Appellant

- v -

DISCLOSURE AND BARRING SERVICE

Respondent

**Before: Upper Tribunal Judge L. Joanne Smith
Tribunal Member Rachael Smith
Tribunal Member John Hutchinson**

Decision date: 4 February 2025

Decided following an oral hearing which took place on 3 September 2024 at the Rolls Building, Royal Courts of Justice, London

Representation:

Appellant: Mr B. Odebo (lay representative)

Respondent: Ms K. Elliot of Counsel, instructed by DLA Piper LLP

DECISION

On appeal from the Disclosure and Barring Service (the “DBS”)

DBS Reference: 00946687833

Final Decision Letter: 20 October 2021

This decision is given under section 4 of the Safeguarding Vulnerable Groups Act 2006 (the “SVGA”).

The decision of the Upper Tribunal is to ALLOW the appeal and REMIT the matter to the DBS for a new decision.

The decision of the DBS communicated by letter dated 20 October 2021 to place the Appellant’s name on the Adults’ Barred List and the Children’s Barred List was based on a material mistake of fact.

Pursuant to sections 4(6)(b) and (7)(a) and (b) of the SVGA, the Upper Tribunal remits the matter to the DBS for a new decision and directs that the appellant’s name is removed from both lists until the DBS makes its new decision.

REASONS

Introduction

1. The Appellant (also referred to as “AA”) appeals to the Upper Tribunal against the decision of the Respondent (the Disclosure and Barring Service or “DBS”) to include her name in the Children’s Barred List (“CBL”) and the Adults’ Barred List (“ABL”) in accordance with paragraphs 3 and 9 (respectively) of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (“the Act”). This decision was communicated to the Appellant in a Final Decision Letter (“FDL”) dated 20 October 2021.
2. Permission to appeal was granted on 9 June 2022 on limited grounds. An oral hearing of the appeal took place before the Upper Tribunal in The Rolls Building, Royal Courts of Justice, London on 3 September 2024. The Appellant was present and was represented by Mr B. Odebo, a lay representative. The

Respondent was represented by Ms K. Elliot of Counsel. We, the panel of the Upper Tribunal constituted to hear this appeal (also referred to as “the tribunal” or “the panel”), are very grateful to both representatives for their written and oral submissions in this matter.

3. Throughout this decision, numbers in square brackets (“[]”) refer to pages within the Upper Tribunal bundle of documents in this appeal.

Background to DBS involvement

4. The Appellant worked as a support worker for an organisation that provides support and housing for autistic people, people with learning disabilities, and those with mental health needs (“the employer”) from 17 November 2008 (approximately 12 years). At the time of the allegations in question, the Appellant was working at one of the employer’s supported living establishments (the “workplace”). One of her duties was key worker for AO, a 60 year old service user with autism and a learning disability who had been supported by the employer since 2009. AO lived in her own flat within the workplace and was able to do many things without staff support. Amongst those things that AO was supported with, AO was assisted by staff members to manage her own finances. Members of staff, including the Appellant, would accompany AO to the cash machine to withdraw cash and to pay her expenses. When this happened, staff were expected to enter the details of the bank withdrawal into a cashbook. Once withdrawn, the cash was retained in a purse for AO, and any sum(s) of money which were removed from the purse, for example for AO’s groceries or to pay a bill, was also recorded in the cashbook and a receipt was retained. The daily movements and activities of each service user was recorded by staff in a daybook – cash withdrawals would also be recorded here as this formed part of the service user’s day. The cashbooks for all the service users, including the cashbook for AO, were retained safely in a lockable cupboard in the staff “sleep-in” room at the workplace.
5. On 25 October 2020, a Santander bank account statement was received for AO’s account and the project leader for the workplace (EA) noted some discrepancies. She found that for some cash withdrawals, the amount

withdrawn from the account was greater than the amount recorded in AO's cashbook and some withdrawals had not been recorded in the cashbook at all. EA noted that the Appellant's initials ("AA") were next to the recordings where the discrepancies were noted, and the Appellant had been working on all the days that the suspicious transactions had occurred.

6. On 29 October 2020, the employer's Director of Services (AW) asked the Appellant to attend head office on 30 October 2020 at 4pm to discuss the issue. The matter was also reported to the police, the Care Quality Commission and Lewisham Social Services. After the meeting on 30 October 2020, AW handed the Appellant a suspension letter [18] informing her that she was suspended on full pay, pending the completion of an investigation into the allegations of financial abuse.
7. EA notified AW that same day, that some of the cashbook entries for the suspicious transactions, including one on 11 April 2020, had been changed since she had initially reviewed the entries. EA was then informed, by another member of staff (FOA), that the Appellant had entered the workplace early on the morning of 31 October 2020, claiming to look for medication and a certificate, and after her visit, he found cashbooks relating to five different service users, including AO, in a bin outside the property. The cashbooks had been soaked with water and stained with food. The police were called, but the Appellant had left by the time they arrived. The police took the cashbooks as evidence. Although he did not see the Appellant take the cashbooks, FOA believed that she had done so while she was searching the cupboard, where the cashbooks were kept, for her personal items. FOA said he had worked on the cashbooks the evening before her visit and had returned them to the cupboard, all in order, before the Appellant had arrived on the morning of 31 October 2020.
8. After this information was received, the investigation was expanded to consider whether the Appellant had breached the terms of her suspension by attending the workplace on 31 October 2020 and whether she had been responsible for damaging the cashbooks which were evidence in the investigation. Statements

were taken from FOA on 2 November 2020 [19-20] and from the Appellant on 3 November 2020 [21], regarding the incident on 31 October 2020.

9. On 17 November 2020, AW conducted a disciplinary meeting with the Appellant. A written record of the discussion was prepared by the employer [22-29]. The Appellant denied taking any money, denied taking/damaging the cashbooks and denied breaching the terms of her suspension. She admitted attending the workplace on 31 October but only to locate a certificate and her medication. She also accepted that the initials "AA" were hers.

10. The investigation subsequently concluded, in a report dated 2 December 2020 [69-108], that the Appellant was the only member of staff working on each shift when one of the 16 questionable transactions had taken place. On three of the 16 transactions, AO's cashbook recorded a different (lower) amount than that shown as having been withdrawn on AO's bank statement, and the initials "AA" were next to these entries. For one particular withdrawal, on 11 April 2020, the initials "AA" were noted next to an entry in AO's daybook (the record of AO's daily activities) that AO had been supported to withdraw cash from her account that day. On the balance of probabilities, it was determined that the Appellant was responsible for the inaccurate transaction entries in AO's cashbook dated 19 October 2019, 11 April 2020 and 30 May 2020, and that she had taken AO to withdraw money on 11 April 2020. It was concluded that the Appellant had stolen the money which had been withdrawn but had not been recorded in the cashbook on these occasions. It was also determined that the Appellant had altered the 11 April 2020 daybook entry, probably on 29 October 2020, following AW's call to invite her to the office the following day, in order to disguise AO's movements to withdraw cash from her account. The Appellant did not dispute her attendance at the workplace on 31 October 2020 and AW found that to amount of a breach of her suspension. It was determined that the Appellant had damaged the cashbooks while she was at the workplace on 31 October 2020 in order to destroy evidence against her relating to the cash withdrawals.

11. On 10 December 2020, the Appellant attended a disciplinary hearing conducted by the Investigation Officer, AL, at the employer's head office. She had been

provided with the investigation report in advance and had been given the opportunity to submit evidence to be considered at the hearing. The hearing was recorded, and a written record was prepared by the employer [109-119]. The Appellant denied wrongdoing throughout the hearing. The employer's findings were upheld by the disciplinary panel.

12. On 7 January 2021, the Appellant was summarily dismissed by the employer for gross misconduct. She appealed the decision, but it was not changed on appeal.

The barring decision

13. On 8 February 2021, the employer (more specifically, AW) referred the Appellant to the DBS. On 20 February 2021, the DBS sent the Appellant an Early Warning Letter. This was followed by a Minded to Bar letter, dated 28 July 2021, which invited the Appellant to make any representations regarding the proposal to include her name in the barred lists, by 24 September 2021. On 24 September 2021, the Appellant submitted provisional representations [152-157] and requested additional time to supplement these. An extension was agreed until 11 October 2021. On that date, the Appellant submitted further written representations [161-164] and thereafter sent a supporting bundle of documents, dated 18 October 2021 [167-183].

14. By way of FDL dated 20 October 2021 [184], the DBS communicated its decision to include the Appellant's name on the CBL and on the ABL. The DBS was satisfied that the Appellant met the criteria for "regulated activity" on the basis of her work as a support worker, accompanied by evidence that she had applied for enhanced DBS checks in 2016 and 2017 for the post of Registered Manager in the children's workforce. It was also noted that the Appellant held a Diploma in Leadership in Health and Social Care.

15. The DBS was satisfied that the Appellant had engaged in conduct which harmed or could harm vulnerable adults and children having found, on the balance of probabilities, that the following allegations were proven:

- (i) The Appellant stole £100 after entering an incorrect amount in the cashbook in relation to AO's bank withdrawal on 11 April 2020 (this finding was amended following representations);
- (ii) The Appellant took cashbooks relating to financial transactions for service users from [the workplace] and damaged/tried to dispose of these records on 31/10/2020; and
- (iii) The Appellant breached the terms of a safeguarding suspension by ringing FOA, a staff member at the [workplace], on Friday 30 October 2020 and then attended [her] place of work on 31 October 2020.

16. The DBS made its decision based on the information provided to it by the employer namely: the employer's referral form [60]; the employer's investigation report, dated 2 December 2020, with supporting documents [68] including the notes of the disciplinary meetings dated 17 November 2020 [80] and 10 December 2020 [109], the bank statements [91] and cashbook entries [95-104], the daybook entry [105], the summary dismissal letter dated 7 January 2021 [120], and the Appellant's job description, employment contracts, and evidence of her change of name [131-149]. The DBS also took into account the Appellant's representations and supporting documents.

17. The DBS found that the allegations initially levied by the employer, asserting that the Appellant had taken money from AO's bank account on 13 separate occasions, and had failed to record these amounts, during the period 5 October 2019 to 1 September 2020, were not made out. In addition, the DBS did not find that two of the three allegations found to be proven by the employer, relating to withdrawals on 19 October 2019 and 30 May 2020, were made out. It reasoned that there was no direct evidence that the Appellant had accompanied AO to withdraw monies on these two occasions, and there was no evidence to refute her suggestion that another member of staff might have asked her simply to record the withdrawals in the cashbook. By contrast, the DBS found there was corroborating evidence in relation to the withdrawal on 11 April 2020, as the Appellant had made an additional entry, in AO's daybook, to say that AO

was accompanied that day to complete a bank withdrawal and had initialled the withdrawal transaction in the daybook. The DBS were also satisfied that the Appellant had attempted to destroy the cashbook evidence during her visit to the workplace on 31 October 2020, and that she had breached the terms of her suspension.

Grounds of Appeal

18. The Appellant lodged an application for permission to appeal dated 17 January 2022. Permission to appeal was granted by Upper Tribunal Judge Hemmingway on 9 June 2022 on four of the five grounds as stated in her application, as follows:

(a) The DBS made a fundamental mistake in the fact finding which it made and on which the decision was based;

(b) The DBS had no evidence, or not enough evidence, to support its decision;

(c) The DBS made erroneous assumptions and findings which infected the decision making;

(d) ...

(e) The DBS was aware of evidence that had been taken into account by the employer in the disciplinary process, material that was referred to by the appellant as needing to be considered by the DBS but the DBS did not obtain it and left it out of account.”

Permission to appeal was refused in respect of ground (d), which asserted that “[T]he decision gives an appearance of bias.”

19. It is fair to say that the Appellant’s arguments have varied in their terms during this appeal process. However, working with her skeleton argument (undated)

which was submitted prior to the appeal hearing, the Appellant perfected her submissions to the following:

“3. Grounds of Appeal

3.1. Material Errors in Fact-Finding

3.1.1. The DBS has made fundamental factual errors in its assessment of the Appellant’s conduct. Specifically, the finding that the Appellant accompanied a vulnerable service user, AO, to withdraw cash on 11 April 2020 is based on insufficient and flawed evidence.

3.1.2. The DBS acknowledged that there was no evidence to support similar allegations for other dates (19 October 2019 and 30 May 2020), yet inconsistently upheld the allegation for 11 April 2020 based solely on the Appellant’s signature in the daybook. This signature only records that the service user was accompanied, not that the Appellant was the one who did so. The inconsistency in how the evidence is treated renders the finding unreliable.

3.1.3. The Appellant submits that the DBS erred in concluding that there was corroborating evidence for the 11 April 2020 incident, leading to a wrongful finding of dishonesty and theft. This error alone is sufficient to overturn the decision.

3.2. Inadequate and Biased Evidence Assessment

3.2.1. The DBS failed to take into account crucial evidence that was highlighted by the Appellant, including records from the employer that would provide context for the alleged discrepancies in cash handling. The failure to obtain these documents amounts to a breach of the statutory duty to consider all relevant material before reaching a decision.

3.2.2. The DBS also relied on assumptions rather than evidence, particularly regarding the Appellant’s suspension conditions and alleged

contact with colleagues. The conclusion that the Appellant breached suspension terms is speculative and unsupported by the evidence available. The decision-maker's reliance on these assumptions gives rise to a perception of bias.

3.3. Unreasonable Findings on Future Risk

3.3.1. The DBS's assertion that the Appellant poses a future risk of harm is unsupported by cogent evidence. The finding that the Appellant would engage in future financial misconduct is based on the flawed and erroneous finding of theft, which cannot reasonably be sustained.

3.3.2. The decision fails to consider the Appellant's unblemished record over 12 years in the care industry, where no prior concerns of misconduct had been raised. The decision-maker's presumption that the Appellant should have known not to contact a colleague during suspension, despite no prior disciplinary history, demonstrates an unreasonable and prejudicial approach.

4. Procedural Unfairness and Failure to Consider Relevant Evidence

4.1. The DBS ignored relevant and significant evidence provided by the Appellant, including detailed submissions made on 27 September 2021 and 11 October 2021. The statutory framework requires that all representations and material evidence be considered. Ignoring this evidence amounts to a breach of procedural fairness.

4.2. The failure to obtain and consider documents from the employer, including cashbooks and communication records, is particularly egregious. These records are critical in evaluating the context and reliability of the allegations, yet the DBS dismissed their relevance without proper inquiry.”

Approach of the Upper Tribunal

20. The grounds advanced were somewhat overlapping, but can be summarised into the following issues which were dealt with at the appeal hearing:

- (i) Whether the DBS made mistakes of fact in the findings that:
 - a) The Appellant accompanied AO to withdraw cash on 11 April 2020 and stole the money not accounted for in the cashbook – the DBS erred by basing its finding on the wording and on the initials of the Appellant in AO’s daybook; and
 - b) The Appellant had breached the terms of her suspension by attending her place of work and contacting a colleague (FOA) – the DBS erred by basing this finding on the assumption that the Appellant should have known that she should not attend her place of work or contact a colleague while under suspension.

- (ii) Whether the DBS had made mistakes of law in relation to:
 - a) A failure of the DBS to obtain and consider cashbooks and other records from the employer which would have provided context for the manner of cash handling when supporting a service user
 - b) A failure of the DBS to consider evidence from the Appellant, namely her unblemished work record of 12 years, her submissions dated 27 September 2021 and her submissions dated 11 October 2021;
 - c) its finding that the Appellant poses a future risk of harm, which was unsupported by evidence

21. While the Appellant, in her skeleton argument (undated), was disputing two of the three allegations against her, when giving evidence, it was clear that she also took issue with the finding that she had attempted to destroy the cashbook evidence (allegation 2). We therefore dealt with all three matters, as the grant

of permission to appeal was not limited to consideration of allegations 1 and 3 only. The Respondent raised no issue with this approach.

The legislation

The barring provisions

22. The Appellant has been included on the CBL pursuant to paragraph 3 of Part 1 of Schedule 3 to the SVGA (headed “Behaviour”) and on the ABL pursuant to paragraph 9 of Part 2 of Schedule 3, (also headed “Behaviour”). We set out the paragraph 3 provisions below in relation to the CBL. The paragraph 9 provisions relating to vulnerable adults are essentially the same:

- “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.*
- ...”*

23. “Relevant conduct” in relation to children is defined in paragraph 4 of Part 1 of Schedule 3 to the SVGA (echoed in relation to adults within paragraph 10 of Part 2) as follows:

“4. (1) *For the purposes 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.*

...”

24. The Appellant took no issue with the contention that her work for the employer amounted to regulated activity under the legislation. It was therefore not in issue that the regulated activity test in paragraph 3(3)(aa) and 9(3)(aa) of Schedule 3 was satisfied: (“(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/vulnerable adults”). While she agreed that the allegations amounted to “relevant conduct”, she asserted that the DBS had made material mistakes of fact in finding that she had engaged in such conduct.

The appeal provisions

25. Section 4(2) of the SVGA confers a right of appeal to the Upper Tribunal against a decision by the DBS on the grounds that the DBS has made a mistake on any point of law; or a mistake in any finding of fact which it has made and on which the decision was based. For an appeal to succeed therefore, the Appellant must demonstrate, on the balance of probabilities, that the DBS either made an error of law or a material error of fact in its decision (*PF v DBS* [2020] UKUT 256 (AAC)).

26. Section 4(3) of the SVGA states that “the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.” The question of appropriateness is therefore not a matter within the Upper Tribunal’s jurisdiction.

The Upper Tribunal’s “mistake of fact” jurisdiction

27. The nature and scope of the Upper Tribunal’s “mistake of fact” jurisdiction under section 4(2)(b) of the SVGA was considered in *RI v DBS* [2024] EWCA Civ 95 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.” (per Males LJ at paragraph 49).

28. The question of 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 in *PF v DBS* [2020] UKUT 256 (AAC):

“39. 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...

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."

29. Section 4(7) of the SVGA provides that where the Upper Tribunal remits a matter to the DBS it "may set out any findings of fact which it has made on which [DBS] must base its new decision". In setting out its findings of fact, the Upper Tribunal will:

"...need to distinguish carefully 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 a 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. Secondly, an Upper Tribunal will need to consider carefully whether it is appropriate for it to set out particular facts on which the DBS must base its decision when remitting a matter to the DBS for a new decision. For example, Upper Tribunal would have to have sufficient evidence to find a

fact. Further, given that the primary responsibility for assessing the appropriateness of including a person in the children's barred list (or the adults' barred list) is for the DBS, the Upper Tribunal will have to consider whether, in context, it is appropriate for it to find facts on which the DBS must base its new decision.” (AB v DBS [2021] EWCA Civ 1575, [2002] 1 WLR 1022 per Lewis LJ at paragraph 55)

30. Notably, the Court of Appeal, in *JHB* [2023] EWCA Civ 982, at [92]) decided that the Upper Tribunal was not entitled to make different findings of fact from the DBS if it was basing such fresh findings on the same materials that were before the DBS when it made its decision. However, Males LJ, in *RI*, stated that this restrictive approach should be confined to those cases where the barred person does not give oral evidence, or gives no evidence relevant to the question of whether he/she 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 paragraph 55)

31. Bean LJ stated in *DBS v RI* at paragraph 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.”

The evidence before the Upper Tribunal

32. In advance of the appeal hearing, both the Appellant and Respondent submitted skeleton arguments which were expanded upon during the oral hearing of the appeal.
33. The DBS relied upon the written evidence from witnesses, notes and reports contained in its bundle as filed and served upon the Appellant at the outset of proceedings. This amounted to 180 pages [47-227] which was all the evidence relied upon by the DBS in making the barring decision (outlined in paragraph 16). This included reliance on the informal statement of FOA, along with documents prepared by EA and AW, neither of whom were present at the hearing to give oral evidence or to be cross-examined. The DBS' evidence was therefore untested.
34. The Appellant relied upon her written submissions sent to the DBS, as well as those submitted to the Upper Tribunal during the course of this appeal. She gave oral evidence during the hearing. She was represented by a lay representative, Mr Odebo who, while not legally qualified, did a noteworthy job of managing the evidence and of making submissions on behalf of his client. The Appellant was subjected to cross-examination by Counsel for the Respondent, Ms Elliot.
35. On the morning of the hearing, the Appellant submitted a written statement with attachments that she proposed to adduce in evidence during her appeal. The Respondent objected to the admission of the evidence on the basis that it had not been served in advance of the hearing. The Respondent was permitted time to consider the contents of the statement and the supporting evidence. The statement was essentially a formalised version of the Appellant's various submissions throughout the course of proceedings. On the basis that the Upper Tribunal is entitled to hear fresh evidence in an appeal against a decision of the DBS, particularly where a mistake of fact is in issue (*PF v DBS* [2020] UKUT 256 (AAC)), and this was the material that the Appellant sought to refer to in her oral evidence, and as there appeared to be little prejudice to the

Respondent to admit the evidence, the panel ruled that, the documents would be admitted unless it became clear that they bore no relevance to the issues in the appeal, or prejudiced the Respondent, in which case a further ruling could be made.

DISCUSSION AND ANALYSIS

36. In this decision, we deal firstly with the potential errors of fact asserted by the Appellant, taking each of the allegations in turn.

Allegation 1: The Appellant stole £100 after entering an incorrect amount in the cashbook in relation to AO's bank withdrawal on 11 April 2020 (finding amended following representations)

The written evidence

37. Utilising the evidence from the employer, the DBS considered that that there was sufficient evidence for it to find, on the balance of probabilities, that AA had stolen £100 out of AO's cash withdrawal on 11 April 2020. It took into account that AA was AO's key worker, and she was working with AO on 11 April 2020. It considered the entry in AO's cashbook recording that £200 had been withdrawn from AO's bank account [103] when the cash withdrawal of £300 was recorded on AO's bank statement for that day [93], leaving £100 unaccounted for. This cashbook entry was initialled "AA". There was no evidence, such as receipts or other cashbook entries, to show that the missing £100 had been used to pay any of AO's bills. In addition, the DBS took into account a corresponding entry in AO's daybook on 11 April 2020, which was initialled "AA", stating that AO had been accompanied to the bank to make a withdrawal on that occasion:

"[AO] was supported down to Sainsbury to buy her newspaper and withdraw some money and went to the pay point to pay her bills. [signed] AA[rest of first name]" [105]

38. In the November 2020 disciplinary meeting with AW, on behalf of her employer, the Appellant denied involvement in all the thefts. She confirmed that the initials next to the cashbook entry for AO on 11 April 2020 were hers [80]. She stated that it was typical practice for one member of staff on duty to withdraw cash with a service user and then ask a second member of staff to write up the transaction in the daybook. She stated that when she was asked to record such a transaction, her previous practice was to put the initials of the staff member who made the withdrawal next to the entry in the cashbook, but she then started to write her own initials next to the entry to show that she had written it.
39. One month later, in the December 2020 disciplinary hearing, the Appellant stated that she thought someone was setting her up but she did not say who might be responsible for this, or explain why anyone would want to set her up. She pointed out the wording in the daybook entry, which in her view stated that AO was supported to withdraw cash and pay her bills on 11 April 2020, but not that it was AA who had specifically supported her to do so. This, she asserted, indicated that she had written the entry in the daybook rather than having completed the action being recorded in the entry.
40. In her October 2021 representations to the DBS, the Appellant denied the thefts, repeating the common practice for one member of staff to support the service user to withdraw money and for another member of staff to write it in the daybook. She reiterated that the entry in AO's daybook did not identify her as the exact member of staff who supported AO to withdraw money from her account on 11 April 2020. She stated that she had not been given the actual daybook to look at and read, therefore she had not been able to inspect the entry for accuracy.
41. It was on the basis of this evidence, having considered the representations of the Appellant, that the DBS determined that on 11 April 2020, the Appellant had accompanied AO to the bank to withdraw £300 (per the note in AO's daybook), recorded only £200 as having been withdrawn (in AO's cashbook) and kept the unaccounted £100.

The oral evidence

42. In oral evidence at the appeal hearing, the Appellant stated that on 11 April 2020, she was the “sleep-in” person i.e., the staff member who undertakes the overnight shift. She said that she came on duty at 5pm on that particular shift and there was a verbal handover from the day staff as usual. One of the duties of the sleep-in person is to write up the daybook when they start their shift. This takes place in a handover, whereby the staff member finishing the daytime shift, explains what the service user did that day and it is the responsibility of the sleep-in person to write this up. She explained that the manager knows that this is the system. The sleep-in person is held accountable if the daybook is blank.
43. The Appellant stated that on 11 April 2020, she did not take AO away from her accommodation at all, thus she did not accompany AO to the bank to withdraw money from her account. She said it was someone on day shift who had supported AO to withdraw the money. Her oral evidence was that she had written the entry into the daybook about the withdrawal having taken place that day and signed it as the person making the entry, not the person who accompanied AO to the bank. She said she did not know who had taken AO to the bank. Had she known, she would have written this in her daybook entry.
44. To support her account, the Appellant provided the staff rota for 11 April 2020 to show who was working that day. This was a document admitted at the outset of the hearing (see paragraph 36). It was noted that four members of staff had worked that day, and the Appellant was noted on the rota as working a 3-10pm shift. The rota did not show that she was on a “sleep in” shift. When asked about this by the panel, the Appellant explained that the sleep-in shift is not recorded on the rota. Instead, she explained, it was common practice that the staff member doing the 3-10pm shift on one day, followed by 7am-2pm shift the following day, was automatically designated to be the sleep-in person to cover the night in between those two shifts. The hours between the end of one shift at 10pm and the start of the next shift at 7am, were the sleep-in hours. She explained that she was unable to start her shift at 3pm as arranged on 11 April

2020 as she was house hunting, so she had verbally agreed with her manager her start her shift at 5pm. This later start was not recorded on the rota as it was informally agreed with her manager close to the start of her shift, and long after the rota had been prepared. When asked in cross examination why she had not mentioned her later than scheduled start to her shift before, the Appellant stated that she did not explain this in her disciplinary meeting or in the disciplinary hearing as her employer did not ask.

45. The Appellant repeated, in oral evidence, the common practice for one member of staff to withdraw money for a service user and for another member of staff to enter the transaction in the cashbook/daybook. She reiterated that the entry in the daybook for the 11 April 2020 simply stated that AO had been supported to withdraw cash but not that it was the Appellant who supported her. She stated that the initials "AA" simply indicated who had made the entry in the daybook, not who had taken AO to the cashpoint. The Appellant submitted that this was the DBS' mistake of fact as the DBS had assumed that her initials meant that she had supported AO to withdraw the cash, and thereafter wrongly assumed that she had taken AO's money.

46. The Appellant then went on to say that the initials "AA" next to the entry in AO's cashbook relating to the cash withdrawal on 11 April 2020 were not hers, and that she did not write that entry. She asserted that someone else had written it. In evidence, she agreed that "AA" were her initials but explained that the "AA" written next to the entry for 11 April 2020 in the cashbook was not the way she wrote "AA". The Appellant explained that she writes an "M" and crosses it through in one go whereas the "AA" on 11 April 2020 cashbook entry was two separate "A"s written next to each other. She directed the panel to various entries in the cashbook and highlighted the two different ways that the initials "AA" had been written. For example three entries dated 13/1/2020 in AO's cashbook [96] show an "M" crossed right through, whereas the entry above on 11/1/2020 [96] shows two separate "A"s next to each other. The Appellant stated that the latter entry is not hers as she does not write "AA" in this manner. She did not know who would have made this entry.

47. In cross examination, it was pointed out to the Appellant that in her November 2020 disciplinary meeting with her employer, she had accepted that the cashbook entries with the initials "AA" were hers. She stated that she only realised the different styles of writing "AA" after that meeting. She went on to dispute the record of that meeting. She said that she had been asked, "Are those your initials?" referring to the initials "AA" next to the relevant entries in AO's cashbook, to which she replied, "Yes my initials are AA." However, she said the record of the meeting recorded that she had been asked, "Are your initials AA?". The Appellant found these to amount to different questions. The Appellant stated in evidence that she had requested a copy of the interview recording from her employer to check the accuracy of the written record. She said it had not been sent to her either by the employer or by the DBS and asserted that the DBS had erred in law by conducting their investigation on the assumption that the transcript of the employer's interview was accurate, when they should have listened to the actual recording instead. The Appellant stated that she had also asked the DBS to obtain the hard copy of the cashbook to show them the difference between the two different types of "AA" initials, but they had not done so. She submitted that this was a further error of law.

48. In cross-examination, the Appellant maintained her assertion that someone else had written her initials three times for the entries in the cashbook on 11 April 2020 [103]. She said she did not know who had done it and she knew of no reason why someone would do it. She just knew that it was not her. She said that there were agency staff on shift that day and one of them may have withdrawn the money, taken some of it and recorded her initials in the cashbook. When asked why she had not mentioned to the DBS the fact that agency staff were also working that day, she said it was because she only realised as time went on. In response to questions from the tribunal, the Appellant said that there was one other member of staff on shift when she started her shift at 5pm on 11 April 2020. That was the team member who was on the rota to work from 8am-3pm but she stayed late to do the handover to the Appellant who was arriving late. She had been asked to do so. In closing, the Appellant repeated

her denial of the theft, repeated her denial of making the three cashbook entries on 11 April 2020 and once again challenged the accuracy of the record of the disciplinary meeting with the employer in November 2020.

Analysis of the evidence

49. On the whole, and in relation to this allegation more specifically, the panel did not find the Appellant's oral evidence to be credible. Her responses were short, inconsistent with previous accounts given throughout the disciplinary meetings and representations, and there were inconsistencies within her oral evidence itself. The Appellant's account in relation to this allegation had increased in detail over time thus giving the impression that as time progressed, she was creating more reasons as to why the evidence against her was wrong. For example, during the disciplinary process with her employer, the Appellant denied the theft and accepted that the initials "AA", noted against the entry in the cashbook on 11 April 2020, were hers. By the time she was giving evidence to the tribunal, the Appellant asserted that the initials "AA" next to the entry in the cashbook were written differently to how she writes them. While the Appellant had attempted to highlight to the tribunal that her method of writing "AA" was different to the way that "AA" had been written on the cashbook on 11 April 2020, it was noted that the first time the Appellant had mentioned this was in oral evidence at her appeal hearing. The Appellant explained this by saying that she had only noticed it after her disciplinary meetings. However, the tribunal did not accept this explanation, finding it strange that the Appellant would not mention such a point sooner, for example in support of her grounds of appeal, rather than leaving it until the appeal hearing before mentioning it for the first time.

50. The Appellant then went further to allege that the record of the disciplinary meeting in November 2020 was incorrect and denied that she had in fact accepted that the initials next to the 11 April 2020 entry in the cashbook were hers. The record of the disciplinary meeting states [80]:

AW "Can you please confirm that they are your initials?"

AA "They are mine"

She said that she had actually been asked, “Are your initials AA?” and that is the question which she had answered in the affirmative. Thus, the Appellant’s account was that she had simply agreed that her initials were “AA” and not that the specific “AA” initials next to the 11 April 2020 cashbook entry were written by her. Although the Appellant had requested a copy of the record of this disciplinary meeting, and while the original had never been sent to her, the tribunal considered this to be an attempt to undermine the record of her admissions in the disciplinary meeting, in order to discredit the suggestion that she had written the entry in the cashbook dated 11 April 2020.

51. The Appellant did not elaborate or explain her responses, where such elaboration and/or explanation would have given her account some credibility. It was difficult to be persuaded by her arguments in the absence of such elaboration. For example, when stating that she had been framed for these allegations, the Appellant did not give any reason for this, give any suggestion as to who may have framed her, or who, in the alternative, may have stolen the money. Similarly, the Appellant offered no alternative as to who may have written the initials “AA” next to the cashbook entry for 11 April 2020 and gave no suggestion as to who might have done this so as to “frame” her. Late in her oral evidence, the Appellant stated that there was an agency member of staff working that day and suggested that he/she may have written her initials in the cashbook. Again, there was no explanation as to why the agency staff member might do this, or who he/she was. Ultimately, the tribunal did not accept this as a credible explanation given that this was the first time the Appellant had suggested that an agency staff member had been working on that day and given that there was no note of an agency staff member on the staff rota.

52. The Appellant also told the tribunal that she could not have been the person responsible for accompanying AO to withdraw the cash on 11 April 2020 as her shift started late in the day, and she would not have been taking a service user out at that time. She stated in evidence that she started her shift on 11 April 2020 at 5pm. The tribunal also did not consider her claim to start her shift at

5pm, rather than the listed 3pm, to be credible either. The change was not recorded on the rota next to her name, it was not recorded next to the other member of staff who was to cover the extra two hours, and there was no supporting evidence as to her house hunting which left her late for shift. Her assertion that she had informally agreed that late start with her manager was not found to be credible by the panel as there was nothing other than the Appellant's word to support that account, and the panel found the Appellant's word to lack credibility overall. It was the first time she had mentioned the late start to that particular shift. Again, the panel reasoned that if she had started her shift late, such that she was less likely to have taken a service user out to get cash at that time, then it would have been raised during at least one of the two disciplinary meetings. However, her change of shift was mentioned for the first time in oral evidence at her appeal hearing.

53. In relation to the daybook entry, which the DBS found to be supporting evidence for this allegation, the Appellant asserted that it did not state who had supported AO to withdraw the cash. She said she had simply recorded the fact that someone had supported AO to withdraw cash, but she did not know who. The tribunal did not consider her explanation to be credible given that only two people could have supported AO to make the withdrawal, according to the rota. The Appellant must have known who took AO and could have advised her employer of this sooner, which would have caused the employer to investigate other members of the team. The same can be said of the Appellant's acceptance of her initials in the cashbook - had she not done so, further enquiries could have been made to widen the investigation accordingly.

54. For these reasons, the tribunal found that the Appellant's evidence did not contradict the evidence of the DBS to such an extent that we could conclude that it was mistaken to find this allegation to be proven on the balance of probabilities. By adding to her account over time, in the manner outlined above, the Appellant had essentially weakened her own credibility. Coupled with the absence of a suggestion and a reason as to who and why the Appellant was being framed, it was hard to be persuaded by this assertion. There is no error of fact in relation to the first allegation as found to be proven by the DBS.

Allegation 2: Taking cashbooks relating to financial transactions for service users from [the workplace] supported living environment and damaged/tried to dispose of these records on 31/10/2020

Written evidence

55. Again, on the evidence provided by AA's employer, the DBS considered that that there was sufficient evidence for it to find, on the balance of probabilities, that AA had attended the workplace on 31 October 2020, removed the cashbooks which recorded the questionable transactions, and tried to damage or dispose of them.

Statement of FOA [89]

56. This allegation was based upon the informal written statement of another member of staff, FOA, sent by email to the Director of Service, AW, as requested, on 2 November 2020. FOA stated that he was working the late shift on 30 October 2020, followed by the early shift on 31 October 2020 and was therefore the sleep-in person overnight between both shifts. He had been working on the service users' cashbooks during the sleep-in shift, and had finished this at around midnight on 30 October 2024. When he had finished, he returned the cashbooks to the cupboard in the sleep-in room where they were stored, along with receipts, cash, file and other documents.

57. At around 7.24pm on Friday 30th October 2020, during his shift, FOA received a call from AA to say that she was coming to the workplace to collect a certificate which was in her bag in the sleep-in room. At around 7.13am on Saturday 31 October 2020, AA arrived at the workplace and immediately went into AO's flat where she retrieved her bag. She then went to the sleep-in room, with the bag, and before she entered, she put on some gloves. She opened the bag and could not find her certificate in there. She started to search the sleep-in room and opened the cupboard where the cashbooks were stored. FOA asked her why she was searching everywhere in the sleep-in room. About three minutes later, AA said she had found the certificate and said she would take her bag home to wash her clothes, as the washing machines at the workplace were

faulty. AA then left the building to take her bag to the car and said she would be back in a few minutes. FOA sat on the bed and waited for her to return. She returned to the sleep-in room at approximately 7.40am, where she chatted to FOA for about two minutes about when she was next at work. FOA states that he then accompanied AA to the door to say goodbye.

58. When FOA returned to the sleep-in room, to tidy up and to lock the cupboard, he realised that the cashbooks had disappeared. He immediately called AA, asking her to come back as the cashbooks were gone. AA returned about four minutes later, denying that she knew anything about the missing cashbooks. She suggested that perhaps another service user, GA, had taken them outside and thrown them away. She suggested searching outside to see if the cashbooks could be found. FOA states that he started crying, begging AA not to get him in trouble and to “bring the books back” [89]. AA suggested GA was responsible once again. FOA then realised that it was unlikely to have been GA as he had gone to bed before FOA had worked on the books on the evening of 30 October 2020 and had not been in the sleep-in room after that. FOA followed AA outside to look for the cashbooks. He found the cashbooks in the outside bin, soaked in water.

59. FOA then called his manager (EA) as he believed that AA had deliberately wanted to get him in trouble. As he was calling EA, AA repeatedly asked FOA not to say that she had been at the workplace. She suggested writing in the daybook that he had found the cashbooks in the bin. FOA was advised by EA to call the “on call” person, which he did, and they informed the Senior Manager, MOK. At approximately 8.15am, FOA explained to MOK (on the phone) what had happened. He repeated it to AW on the phone shortly after and told her that AA was still at the workplace at this time. AW spoke to AA over the phone and then told FOA to ask AA to leave the workplace and to tell her if AA refused to do so. AA left the building but remained outside so FOA called AW to let her know this, as requested.

60. The police arrived at the workplace at approximately 9am, and AW arrived shortly after that. FOA gave a statement to police, who saw the destroyed

cashbooks and took pictures of them. The police instructed FOA that no one should touch the cashbooks until the police returned. AW told FOA that AA had been suspended day before, on 30 October 2020. AW also wrote this in the communication book along with an instruction to call 999 if AA was found at the workplace.

61. FOA stated in subsequent email correspondence with AW, on 1 December 2020, that AA called him at 7.13am on 31 October 2020. He clarified that AO did not leave her flat that morning and another named service user did not come upstairs near the sleep-in room, nor had they entered the sleep-in room that morning.

Statement of AA [88]

62. AA emailed her statement regarding the incident on 31 October 2020, to AW, on 3 November 2020. In it she stated that she called FOA to say that she had left her certificate at work, and he said to come in and look for it (date and time of this call was not stated). When she arrived at the workplace at 7.50am on 31 October 2020, FOA was in the sleep-in room, so she met him there. She explained that she needed to get her bag from AO's room because her medication was in it. She said that she got the bag and set it on a chair which was beside the sleep-in room door. She then started to look for her certificate in the sleep-in room. FOA was there too. He had helped her to pull the bed out to look for it. AA stated that FOA suggested to check the cupboard (where the cashbooks were stored) and AA found the certificate in there. As she was making her way downstairs to leave, FOA emerged from the sleep-in room and asked if AA had seen the cashbooks. AA said she hadn't seen them and asked FOA if he wanted to check her bag before she left. He said "no" and asked AA to help him look for them. AA pointed out to FOA that he knew she hadn't left the building. AA stated that FOA was shouting and was scared. She tried to calm him down. They looked outside and found the cashbooks in the bin. FOA said AA could leave, so she did. As she was leaving, FOA was shouting that the cashbooks were wet and stained. AA stated that FOA then called EA. Thereafter AW called and spoke to AA. She asked AA what she was doing at

the workplace. AW told AA to leave the workplace. AA sat in her car, crying, as she wasn't feeling herself after the incident, and couldn't drive until she felt better.

Investigation meeting – 17 November 2020

63. At her investigation meeting in November 2020, the Appellant stated that she was on a three-month course of antibiotics which she took once per week, on a Saturday. Her weekly tablet was in her bag which she had left in the workplace. She was expecting to be working the Saturday after her suspension and therefore had left her bag with her medication there so she would not forget to take it. She had also left her certificate for manual handling at the workplace, and she needed it to scan it to her university. She did not mention the fact that her things were at the workplace after she was suspended because she forgot. She stated that she remembered they were there on the evening of Friday 30 October and that is when she called FOA. She went to the workplace on the morning of Saturday 31 October 2020 to collect her things.

64. She stated that she arrived at the workplace, at 7.30am, and not 7.50am as previously stated. She went to where she left her bag (did not say where that was) and put it on the chair in the sleep-in room where FOA was, and they chatted. She told FOA about her certificate and they looked for it together. It was in the cupboard where the cashbooks were stored. She said that she left and as she was about to open the front door to leave the building, FOA called her to say that the cashbooks were missing. She stated that she had not left the building. She asked FOA if he wanted to check her bag and he said, "No". She told him to calm down and said they should look for it. As they looked together, they went to the opposite block of flats and on the way back, FOA opened the black bin outside, where he found the cashbook. The cashbook was wet and FOA was shivering and shouting. He called EA on the phone, who told him to call the "on call" person. AA said that she went to the car where she felt unsettled.

65. AA stated that FOA was with her at all times when she searched the cupboard in the sleep-in room. She denied putting on gloves before searching for her

certificate but accepted that she had put them on when looking for the cashbooks. She denied taking a phone call from FOA about the cashbooks going missing – she said he had told her face-to-face as she was about to leave the building. It was pointed out to her that the call log of FOA's phone indicated that he had called her at 7.42am on 31 October 2020 which must have been that call he described when she was outside the building. She admitted telling FOA not to tell anyone she had been there because she was not on shift and shouldn't have been there when she wasn't working. She denied leaving the property twice, as alleged by FOA. She was unable to explain how the cashbooks had gone missing or been damaged. She stated that she got on well with everyone. She said that one of the service users, "I", was awake and came upstairs. AO was also awake and came out of her flat. AA did not see GA (the service user who had a history of taking things and throwing them away).

Disciplinary hearing on 10 December 2020

66. At the disciplinary hearing on 10 December 2020, AA denied taking the cashbooks, denied damaging them and she denied throwing them in the bin. She stated that she went to the workplace on Saturday 31 October 2020, arriving at around 7.30am, although she couldn't be specific. She went there to get her certificate and her medication. She takes her medication every Saturday and was supposed to work that Saturday but had been suspended. The medication was in her bag which was at the workplace - she leaves it in a cupboard in AO's flat. She denied putting gloves on when she arrived at the workplace but accepted that she put gloves on when she was looking for the cashbooks as she didn't know what she would be touching. She explained that she didn't tell FOA that she was looking for her medication as that was a confidential matter.

67. AA stated that when she got to the workplace, she went upstairs and chatted to FOA, telling him that she was there to get her certificate and her bag. She looked for the certificate and found it. She then said she was going to get her bag from AO's room, which she did, and put it on the chair beside the door of

the sleep-in room. She said that she was chatting to FOA and as she said she was leaving, he said he was looking for the cashbook. AA asked if he wanted to check her bag but he said, "No". They looked for the book, found it in the black bin outside, and AA "went out". FOA then asked AA to come back and he showed her the wet and torn cashbook. AA pointed out that he hadn't seen her with water or with food. She told FOA to calm down. He called EA on the phone and then called the "on call" person.

68. AA stated that she was not happy with EA, her line manager, who she stated was on a "witch hunt" against her, checking everything that AA does. AA gave an example: EA was questioning the fact that AA told AO that her family was taking over her finances. AA felt, that as AO's key worker, she should be the person to tell AO. AO was upset at this news. AA recoded the conversation in AO's daybook [106]. AA stated that EA, despite undertaking checks for about a year from 5 October 2019 to 1 September 2020, had never noticed a discrepancy in AO's accounts before. AA then accepted that this was the first of EA's checks and discrepancies had been noted. She pointed out that FOA was with her the whole time she was at the workplace and would have seen her lift five cashbooks. She questioned why FOA was working on the cashbooks until midnight on 30 October 2020. She said that while she was not pointing fingers at him, it was not usual to work on the cashbooks so late.

Representations to the DBS

69. In her provisional representations to the DBS dated 23 September 2021, AA stated that she had asked for a copy of the cashbooks concerned, asserting that when they were seen, everyone would know that she did not take the books or attempt to destroy them. In her subsequent representations of 11 October 2021, the Appellant reiterated that she did not take or attempt to destroy the cashbooks and provided no further information, other than to say that the allegation was based on anecdotal evidence of other members of staff.

Oral evidence

70. In oral evidence at her appeal, the Appellant denied the allegation once again. The Appellant said that she called FOA on the evening of 30 October 2020.

She agreed that she had been at the workplace early in the morning of 31 October 2020 and confirmed that FOA had been with her throughout the visit. She said, in evidence, that she was there to get her medication and her certificate. Her medication was in her bag which was in a cupboard in AO's flat. The cupboard, which AO does not use, was at the back of her flat, so AA had considered it safe to leave her bag (and medication) there. She explained that there was nowhere to leave things in the sleep-in room, as it just contained a bed and the cupboard for the cashbooks. AA stated that if items are left in the sleep-in room, one of the service users (GA) comes in, takes things and throws them away. For this reason, the cupboard remains locked, and staff leave nothing in the sleep-in room, which is also usually locked.

71. AA stated that her certificate was in the locked cupboard, in the sleep-in room, where the cashbooks were kept. FOA opened the cupboard for her with the key and then locked it back up again when she found her certificate. FOA had the key to the cupboard as he had been working on the cashbooks the previous day. AA stated that before she left the building, FOA called her on the phone and told her that he couldn't find the cashbooks. She said that they searched for the cashbooks together. After looking upstairs, FOA suggested looking downstairs. As they knew GA throws a lot of things away, they thought he may have done it. His room is on the same floor as the sleep-in room. As he had previously thrown things behind the outside fence, AA said that FOA suggested looking outside.

72. FOA found the cashbooks in the black bin outside. They were wet and stained with food. The Appellant stated that FOA accused her of taking and destroying the cashbooks, but AA told him that she had nothing to do with it, and reminded him that he was with her at all times during the visit. AA stated that five, A4 size cashbooks were taken from the cupboard, and it would be impossible for FOA not to have seen her taking them. FOA then called AW and told the Appellant to leave. She then said that FOA had not accused her of taking the cashbooks.

73. In cross examination, the Appellant said that she looked in AO's room for the certificate. She claimed that FOA, who was with her at all times, was lying when

he said that she had left the building before she returned to look for the cashbooks. AA reiterated that she had not left the entrance door of the workplace before FOA had called her back so she would not have been able to take the books to the bin outside. She reiterated that FOA thought that GA might have taken the books and not her. AA stated that no service users were awake or up when she was at the workplace that morning. She later said that another service user, "I", was at the door of the sleep-in room when she was in there. The Appellant agreed that she had no issues with any other members of staff and therefore there was no reason for anyone to get her into trouble. She denied asking FOA not to tell anyone that she had been at the workplace that morning.

Analysis

74. The evidence against the Appellant in relation to this allegation was the written statement of FOA, which the DBS preferred, on balance, to that of the Appellant. The Appellant had consistently denied that she was responsible for taking the cashbooks, damaging them and throwing them in the bin outside the workplace. She consistently accepted that she had attended the workplace early in the morning of 31 October 2020, the day after her suspension, and that she had been inside the building, inside the sleep-in room and inside the locked cupboard within which the cashbooks were stored. The question therefore was whether she had removed the cashbooks from the cupboard when she was in there, damaged and/or disposed of them.

75. FOA did not categorically state that he had seen AA take the cashbooks, put them in her bag and remove them from the sleep-in room. Nor did he state that he saw AA damage them with food and/or water and dispose of them in the bin. The DBS relied on circumstantial evidence to find, on the balance of probabilities, that the Appellant had done this. As highlighted by the employer, in the disciplinary meeting (17 November 2020), the Appellant had a reason to destroy/damage the cashbooks as they were evidence against her in connection with the investigation into the financial abuse allegations. They had been damaged the day after the Appellant's suspension pending the outcome of this investigation.

76. Amongst other circumstances, FOA stated that AA had put gloves on when she arrived at the workplace and while she was looking for her things. This action, if accepted, suggested that AA did not want her fingerprints to be found on anything she touched in the workplace so as to negate any suggestion she had been there or had touched the cashbooks. AA denied putting gloves on when looking for her bag and certificate but accepted putting them on before searching for the cashbooks with FOA. She stated that she did so as she was not sure where she would have to look and what her hands would be touching while she did so. The panel found it peculiar for AA to put gloves on at all. Even taking AA's admission, it was illogical for her to think that she would not be touching dirty things when she was looking for her bag and certificate, but she might be touching dirty things when looking for the cashbooks. None of these items were any more or less likely to be outside. It suggested that she knew she would be looking in the bins, which in turn suggested she knew they were there, and she put the gloves on to avoid her fingerprints being found on the cashbooks. Regardless of when she put the gloves on, the use of gloves at all suggested to the panel, that the Appellant did not want to be discovered as having been at the workplace that morning.

77. On the account of FOA, when AA arrived at the workplace, she went to AO's room to obtain her bag, then went to the sleep-in room, with her bag, putting gloves on before she entered. She thereafter went to the cupboard where the cashbooks were stored, before leaving. By this account, AA had her bag inside the sleep-in room, and it was therefore available to contain the cashbooks she was taking from there. AA's emailed statement said that when she arrived at the workplace, she got her bag from AO's flat and then went to the sleep-in room to look for her certificate, leaving her bag on the chair outside. By this account, the bag would not have been inside the sleep-in room and therefore not able to hold the cashbooks. The cashbooks would have been more difficult to conceal without a bag to store them in. During the disciplinary meeting on 17 November 2020, the Appellant stated that she got her bag and left it on the chair in the sleeping room. In her disciplinary hearing (December 2020), AA stated that on arrival she went to the sleep-in room to get her certificate before

going to AO's flat to get her bag, which she left on the chair outside the sleep-in room before going back inside it to chat to FOA. Throughout these accounts, AA changed the order of events and changed the position of the chair on which she placed her bag. While the order of how things happened at the workplace that morning was not discussed in oral evidence, this inconsistency in the details called the credibility of her account into question.

78. FOA also stated in his written statement that AA left the building with her bag before returning to the building a short time later, for a brief chat with him and then leaving. It was at this point that FOA called her to say that the cashbooks were missing, and she returned. On FOA's account, AA had her bag, potentially containing the cashbooks, outside the building which implies that she was capable of having discretely taken them and thrown them in the bin. AA's emailed statement said that she had not made it out of the building before FOA called her to say that the cashbooks were missing. By her account, she did not make it outside and therefore could not have destroyed the books and/or put them in the bin.

79. While the Appellant consistently stated thereafter that she had not left the building with her bag, there were other inconsistencies in her account. In her statement, she said that when FOA told her that the cashbooks were missing, she responded by asking if he wanted to check her bag. She also pointed out to him that she hadn't left the building, she still had her bag with her and they had been in the sleep-in room together the whole time. These actions and comments, in the opinion of the panel, were defensive in nature and amounted to a strange reaction to the situation, particularly as FOA had not accused her of taking them – he had simply approached her in a panic, telling her that something important was missing. AA said in oral evidence that FOA had accused her of taking the cashbooks and later, in evidence, said that he had not done so. FOA stated that AA suggested that another service user, GA, who was known for throwing things away, might have done it. AA did not mention this in her statement, although she relied upon this in oral evidence. Overall, the inconsistencies in AA's accounts, both throughout the process and within her oral evidence, caused the panel to consider that her account in relation to

this allegation lacked credibility. This, in turn, caused the panel to prefer the evidence of FOA and could find nothing to suggest that the DBS were wrong to have done the same. We found that the DBS had not made an error of fact in relation to allegation 2.

Allegation 3: Breach of the terms of a safeguarding suspension by ringing FOA, a staff member, at [the workplace] on Friday 30/10/20 and then attending the place of work on 31/10/20

Written evidence

80. It is an agreed fact that on 30 October 2020, the Appellant was suspended from duties on full pay in order for her employer to conduct an investigation into the alleged thefts. This was communicated in a letter (dated 30 October 2020) [79] which was handed to the Appellant, in person, by AW (Director of Services) on that same date. The final paragraph of the letter stated:

“During the course of your suspension, you are instructed not to contact or to attempt to contact, or influence, anyone connected with the investigation in any way, or to discuss this matter with any other employee or client of [the employer].”

The DBS went on to find, that on the basis of the Appellant’s call to FOA on 30 October 2020 and then her attendance at the workplace on 31 October 2020, she had breached the terms of her suspension.

81. At the investigation meeting on 17 November 2020, the Appellant admitted calling FOA on the evening of Friday 30 October to explain that she had left personal items at the workplace. She admitted attending the workplace on 31 October 2020 to look for and collect these items. She said she remembered about these items being at the workplace on Friday evening, hence the call to FOA and the arrangement to collect them the following day.

82. She again admitted, in the disciplinary hearing on 10 December 2020, that she had attended the workplace on 31 October 2020 to collect her medication and a certificate of manual handling. She stated that she did not know this was a

breach of her suspension and offered her apologies for this action. In her letter of appeal against the summary dismissal (dated 9 January 2021), she stated that on 31 October 2020, she did not contact or attempt to contact or influence anyone connected with the investigation. She pointed out that the letter did not say she could not collect her personal property. She did not discuss the investigation with FOA, who was unaware of both the suspension and the investigation. She repeated the same in her representations to the DBS, asserting that she did not believe she had broken the terms of her suspension.

83. Both the employer and the DBS found it proven, on the balance of probabilities, that the Appellant had breached the terms of her suspension letter, on the basis of the statement of FOA relating to the Appellant's attendance at the workplace on 31 October 2020, as set out in the paragraphs above.

Oral evidence

84. In oral evidence at her appeal hearing, the Appellant agreed again that she had been handed the suspension letter by AW on 30 October 2020. She read it and understood it to mean that she should not contact anyone involved in the investigation. She did not think FOA was part of the investigation. She attended the workplace to collect her personal items and only spoke to FOA about conversational matters. She mentioned nothing about the investigation or the suspension. She stated that she did not know who was involved in the investigation other than the names mentioned during the investigation meeting.

85. In cross examination, AA admitted calling FOA on the evening of 30 October 2020, at around 7.24pm, shortly after receiving the suspension letter a few hours earlier, at 4pm. She again accepted that she had attended the workplace on 31 October 2020. It was put to her that as she didn't know who was involved in the investigation, she should not have spoken to anyone from her workplace. The Appellant stated that she had never been given a list of names of people involved in the investigation. It was put to her that attending the place of work was a breach of her suspension and the Appellant stated that she did not see this as a breach, and she still didn't. It was suggested that she should have

known not to go to her place of work while suspended. The Appellant stated that as she had never been suspended in 12 years of working there, she did not know this. She stated that has been given awards and money bonuses for managing the workplace for three months.

86. In closing, Ms Elliot for the DBS submitted, echoing the written submissions made by the DBS on 5 August 2022 [230] and on 27 August 2024, that the DBS was entitled to find that the Appellant had breached the terms of her suspension as she had contacted FOA without knowing whether he was involved in the investigation, by attending the workplace where AO lived and by entering AO's living space. It was submitted that the Appellant knew she was wrong to attend the workplace as she had asked FOA not to tell anyone that she had been to the workplace on 31 October 2020. It was submitted that the DBS was entitled to find that a person of the Appellant's experience (12 years in the care sector) should have known not to have returned to her workplace without express permission and should have known that doing so would amount to a breach. In response, in closing, the Appellant stated that she had never been suspended before and did not know that attending her place of work was a breach of suspension. She stated that she clearly misunderstood the terms of the suspension letter.

Analysis

87. The allegation against the Appellant is that she breached the terms of a safeguarding suspension by ringing FOA, a staff member at the workplace, on Friday 30 October 2020 and then attending her place of work on 31 October 2020. As a matter of fact, the Appellant has always accepted that she did these two things. However, the question then arises as to whether these actions were a breach of her "terms of a safeguarding suspension".

88. The terms of AA's suspension were set out in the suspension letter dated 30 October 2020 and handed to the Appellant on the same date. It was clear from the suspension letter that the Appellant was prohibited from doing the following things:

- Not to contact; and/or
- Not to attempt to contact; and/or
- Not to influence...
- “anyone connected with the investigation”

Additionally, she was:

- Not to discuss “this matter” (presumably the investigation into the financial abuse allegations and the suspension) with
- Any other employee or client of the employer.

89. The Appellant accepts having contacted FOA by telephone on 30 October 2020. Was he “anyone connected with the investigation”? As a matter of fact, he was not. All the evidence suggests that he only became involved in the investigation after the cashbooks went missing on 31 October 2020. He had not been interviewed or spoken to by the employer in respect of the investigation into the financial abuse of AO. He had not made a statement in relation to the financial abuse investigation. It was accepted by Ms Elliot, on behalf of the DBS, that FOA was not involved in the investigation.

90. In the view of the tribunal, it does not matter that the Appellant accepts contacting him without knowing if he was involved in the investigation as it is a matter of fact that he was not involved in the investigation. The suspension letter did not state that the Appellant was not to contact “any member of staff”. It did not state that she was “not to attend your place of work”. Had FOA been connected with the investigation into the financial abuse of AO, then AA would certainly have been in breach of her suspension, but as a matter of fact he was not. It can not therefore be said that the Appellant, by contacting FOA by telephone on 30 October, a person who was not connected with the investigation, is a breach of the terms of the suspension as set out in the letter. We find that the DBS made an error of fact in this regard.

91. The Appellant also accepts that she was with FOA on 31 October 2020 when she attended the workplace. We agree that this amounts to “contact”. There

is no evidence to suggest that when AA and FOA were together, she “influenced” FOA in any way regarding the investigation. There was no indication from the evidence that there was any discussion about the investigation at all. From the statement of FOA himself, the only thing that was said by the Appellant was to encourage him not to say that she had been to the workplace. Given that we have upheld the DBS’ finding that the Appellant had taken and attempted to destroy the cashbooks, we find that any suggestion of her saying this to FOA was not in relation to a fear of being found to have breached her suspension, but rather due to a fear of being found to have tampered with the cashbook evidence. There is no evidence to suggest that the Appellant discussed “this matter” with FOA, who we agree is “an employee”.

We find that the DBS also erred in this finding of fact, upon which the decision to bar the Appellant was based.

92. We find, as a matter of fact, that the Appellant did not breach the terms of her suspension, as set out in the suspension letter dated 30 October 2020, which she received on the same date. Following a precise interpretation of the terms of the suspension in that letter, the Appellant did not breach any of the instructions given to her. We reject the Respondent’s suggestion that because she contacted FOA when she did not know whether he was involved in the investigation, she had breached her suspension. We also reject the submission that she breached the terms of her suspension as she should have known that attending her place of work would have done so. This is not what the terms of her suspension set out. Quite simply, the Appellant has not breached the terms of the suspension letter as set out by the employer. We find that the DBS has materially erred in fact in relation to Allegation 3.

Disposal

93. In conclusion, and for the reasons set out above, we find that the DBS were entitled to find allegations 1 and 2 proven on the balance of probabilities. However, we find that the DBS erred in its finding of fact in respect of allegation 3, a fact upon which the decision to bar the Appellant was based. In light of our conclusions, we must decide how to dispose of the appeal. We have two

options. One is to dismiss the appeal on the ground that the mistake of fact was not material to the decision to include the Appellant on the barred lists. The other option is to remit the case to the DBS for a new decision. Given the approach of the Court of Appeal in *Kihembo v Disclosure and Barring Service* [2023] EWCA Civ 1547 (citing *DBS v AB* [2021] EWCA Civ 1575) we take the view that the second option is more appropriate. As we are remitting this matter to the DBS on an error of fact, we do not consider it necessary to consider the errors of law asserted by the Appellant as any potential errors of law will be subsumed by the re-making of the decision. In accordance with s.4(7)(b) of the SVGA, the Appellant must be removed from the lists pending the fresh decision of the DBS.

Ms L. Joanne Smith
Judge of the Upper Tribunal

Ms Rachael Smith
Specialist Member of the Upper Tribunal

Tribunal Member John Hutchinson
Specialist Member of the Upper Tribunal

(Authorised for issue on)
4 February 2025