



**Neutral Citation Number: [2025] UKUT 225 (AAC)
Appeal No. UA-2023-000578-V**

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

AA

Appellant

- v -

Disclosure and Barring Service

Respondent

Pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, THE UPPER TRIBUNAL ORDERS that, without the permission of this Tribunal:

No one shall publish or reveal:

the name or address of any of:

- a. the Appellant in these proceedings, who is referred to by the cipher AA;**
- b. the resident who is the subject of allegation 1 found proven by the DBS, who is referred to by the cipher JL;**
- c. members of staff employed by AA's former employer, who are referred to by one of the following ciphers: JA, JG, LST, LB and VW,**

or any information that would be likely to lead to the identification of any of them or any member of their families in connection with these proceedings.

Any breach of this Order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanction under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

Before: Upper Tribunal Judge Butler, Tribunal Member Graham and
Tribunal Member Smith

Hearing date(s): 27 February 2025

Mode of hearing: Oral hearing at Civil Justice Centre, Manchester

Representation:

Appellant: Ms Laura Bayley (counsel)

Respondent: Mr Andrew Webster (counsel)

On appeal from:

DBS registration number: 00798155005

DBS Decision Date: 16 March 2023

SUMMARY OF DECISION

Keywords: Mistake on point of law (65.5), Finding of fact (65.9)

The DBS's Barring Decision involved mistakes of fact on which the Barring decision was based and material mistakes of law. Remitted to the DBS to make a fresh decision.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

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

The Disclosure and Barring Service's decision of 16 March 2023 was based on material mistakes of fact and involved material errors of law.

REASONS FOR DECISION

Introduction

1. This appeal deals with whether the Disclosure and Barring Service (the “**DBS**”) based its decision made on 16 March 2023 under the Safeguarding Vulnerable Groups Act 2006 (“the “**SVGA 2006**”) to place the Appellant's name on the Adults' Barred List and the Children's Barred List (the “**Barring Decision**”) on one or more mistakes of fact or errors of law.

2. We refer to the Appellant in the case reference by the initials “AA”. We make a Rule 14 Order to protect his anonymity and privacy and confirm the Rule 14 Order previously made to protect his anonymity and privacy of others involved.

A summary of the factual background

3. AA was employed by care company (called “VC”) as a support worker until his employment was terminated on 01 February 2022. AA had previously worked for several care companies whose work had been transferred, most recently to VC (which occurred in 2021). AA and other staff members were transferred across to VC under the Transfer of Undertakings (Protection of Employment) Regulations 2006. AA had been involved in care work since around 2006. His work in the company that transferred directly to VC, started on 15 March 2010. When his employment transferred to VC, and at the time of the allegations considered by DBS, AA’s role was as a Scheme Leader.
4. In late 2021, VC carried out an internal investigation in relation to matters in September 2021 regarding health concerns for a service user (“JL”) and AA’s discharge of his on-call duties on the evening of 12 December 2021. VC suspended AA from his duties on 21 December 2021 while the investigation took place. As a result of finding these matters (and another matter it had investigated at the same time) proven against AA, his employers terminated AA’s employment on 01 February 2022. AA appealed against that decision, but it was upheld by VC on 16 March 2022.
5. VC referred AA to the DBS on 06 April 2022. The DBS issued a Mind to Bar letter dated 17 November 2022 (page 130 of DBS bundle), in response to which AA’s legal representatives submitted a document called “Grounds of Resistance” which had been drafted for employment tribunal proceedings AA brought against VC, as well as character references in support of AA.

The Barring Decision

6. On 16 March 2023, the DBS decided to include AA in the Adults’ Barred List and the Childrens’ Barred List on the basis of having made the following findings of relevant conduct:
 - (a) Between 11 September 2021 and 04 October 2021, you, employed as a Scheme Leader, failed to seek medical advice for a change in the behaviour of JL, a vulnerable adult in your care. You delayed adding documentation to CMS until 29 September 2021, which delayed the diagnosis and treatment of JL’s thrush; and
 - (b) On 12 December 2021, you were on-call and advised LB, a staff member, to leave the premises even though the agency staff was refusing to stay alone and this would leave the service unstaffed.

Appeal grounds

7. On 26 January 2024, a Judge of the Upper Tribunal refused AA permission to appeal against the DBS' decision, on the basis of the written papers.
8. AA renewed his application for permission to appeal at an oral hearing in Manchester, at the Civil Justice Centre. His appeal grounds included that the DBS had made mistakes of fact in finding the allegations proved, and / or errors of law in relation to how it had investigated those allegations and carried out the decision-making process in reaching the Barring Decision. The appeal grounds also argued that the decision to include AA in the Barred Lists was disproportionate.
9. Following a hearing on 05 June 2024 at the Manchester Civil Justice Centre, Upper Tribunal Judge Butler granted AA permission to appeal reflecting the written appeal grounds and those argued at the oral hearing.
10. The directions included for the DBS to obtain complete copies of the documents VC used in its investigation. This was because the documents provided by VC referred to other documents, including notes and at least one body map for JL. The documents DBS obtained in response to the directions are set out at pages 493 to 538 of the DBS bundle. A number of them reflect what had already been provided. The notes and the body map for JL were not with them. On 24 July 2024, VC confirmed to the DBS that it had provided all available information it held about AA's disciplinary proceedings (page 539 of DBS bundle).

The Upper Tribunal substantive oral hearing

11. We held an oral hearing of the Appellant's appeal on 27 February 2025. AA was represented by Ms Laura Bayley of counsel and the DBS by Mr Andrew Webster of counsel. We were grateful to them both for their participation and for their assistance with the hearing. Counsel told us they had problems with the appeal bundles, which took up time at the outset of the day, although we had a spare paper bundle for AA to use. We were grateful to counsel for their patience.
12. We heard evidence from AA for the whole day. There were some difficulties in hearing what was being said from the witness box, due to the size of the hearing room, the location of the witness box relative to the judges' dais, and the fact that AA was softly spoken and tended to give his evidence quickly. While we were satisfied that we had heard the evidence being given, it meant the hearing lasted for longer than expected, due to double checking in the moment that we had captured what AA had said.
13. At times, it also appeared that AA would agree with a question being put to him, although we observed that he appeared to be agreeing the question had been

asked, or that it was what his former employer had said to him during the investigation. His subsequent answers confirmed he did not agree with the underlying factual assertion being put. Exploring these issues with AA also took time.

14. The outcome was that while we heard evidence on 27 February 2025, there was insufficient time for the parties to make their submissions on the day. Upper Tribunal Judge Butler therefore issued directions on 03 March 2025, for the parties to have 21 days to provide written submissions. This timescale was given at the request of counsel for the parties. Having received the written submissions, the panel reconvened and made its decision.

The legal framework for Barring Decisions

15. The SVGA 2006 provides a person to be included in one or both of two Barred Lists, one for vulnerable adults and the other for children.
16. Schedule 3 to the SVGA 2006 sets out provisions relating to children (paragraphs 3 to 4) and relating to adults (paragraphs 9 to 10).
17. Schedule 3 to the SVGA 2006 Act sets out a number of ways in which the DBS may decide to include a person's name on a Barred List. In the present case the DBS relied upon the 'relevant conduct' gateway. This required the DBS to be 'satisfied' of three matters, namely:
 - (a) that AA was at the relevant time, had in the past been, or might in future be, 'engaged' in, 'regulated activity' in relation to vulnerable adults (paragraph 9(3)(aa) of Schedule 3 to the SVGA 2006);
 - (b) that the Appellant had 'engaged' in "relevant conduct" (paragraph 9(3)(a) and paragraph 10 of Schedule 3); and
 - (c) that it was 'appropriate' to include the Appellant on the Adults' Barred List (paragraph 9(3)(b) of Schedule 3 to the SBGA 2006).
18. Where the DBS was satisfied of all three matters above, paragraph 9(3) of Schedule 3 to the SVGA 2006 required it to place a person's name on the Adults' Barred List.
19. Schedule 3 also allows the DBS to rely on relevant conduct in respect of a vulnerable adult as relevant conduct in relation to a child, where the DBS is satisfied it is conduct which, if repeated against or in relation to a child, would endanger a child or be likely to endanger him.
20. To consider AA for inclusion in the Childrens' Barred List on the basis of relevant conduct in respect of an adult, the DBS would also need to be satisfied that AA

had, at the relevant time, had in the past, or might in the future be engaged in regulated activity in relation to adults.

21. AA has worked as a support worker and scheme leader for vulnerable adults. The parties do not dispute that he satisfies paragraph 17(a) above.
22. With regard to paragraph 17(b), AA's case is that he had not engaged in the conduct alleged and that the DBS's decision that he did, involved several mistakes of fact. AA's appeal grounds did not argue that if the alleged conduct were found to be proved, it would not amount to 'relevant conduct' for the purposes of the SVGA 2006. AA's representatives did, however, assert that it would be disproportionate to include him in the Barred Lists. This is dealt with below.
23. In terms of paragraph 17(c) above, "appropriateness" is not a matter for the Upper Tribunal, unless the decision-making around appropriateness is irrational.
24. Section 4 of the SVGA 2006 sets out the circumstances in which an individual may appeal against the inclusion of their name in either or both of the Barred Lists.
25. An appeal may be made only on grounds that the DBS has made a mistake on any point of law or in any finding of fact which it has made and on which the barring decision was based (see section 4(1) and (2)).
26. Section 4(3) provides that, for the purposes of section 4(2), whether or not it is 'appropriate' for an individual to be included in a barred list is "not a question of law or fact" and so, to that extent at least, is non-appealable. An appeal under section 4 may only be made with the permission of the Upper Tribunal (see section 4(4)).
27. Section 4(5) of the SVGA 2006 provides that unless the Upper Tribunal finds that the DBS has made a mistake of law or fact, it must confirm the DBS's decision. Section 4(6) of the SVGA 2006 sets out the outcomes available to the Upper Tribunal if it decides the DBS has made a mistake of law or fact. These are to either: (a) direct the DBS to remove the person from the barred list(s) or (b) to remit the matter to the DBS to make a new decision. Following **DBS v AB [2021]** EWCA Civ 1575, the usual order will be for the Upper Tribunal to remit a matter back to the DBS unless no decision other than removal is possible on the facts.
28. As explained at section 4(7) of the SVGA 2006, if the Upper Tribunal remits a matter to the DBS under section 4(6)(b), it may set out any findings of fact it has made on which the DBS must base its new decision. Furthermore, the person must be removed from the list until the DBS makes its new decision (unless the Upper Tribunal directs otherwise).

29. The relevant principles regarding the Upper Tribunal's mistake of act jurisdiction have been set out in several recent decisions of the Court of Appeal, which are binding on the Upper Tribunal (see **DBS v JHB [2023]** EWCA Civ 982; **Kihembo v DBS [2023]** EWCA Civ 1547; and **DBS v RI [2024]** EWCA Civ 95. The decision of a presidential panel of the Upper Tribunal in **PF v DBS [2020]** UKUT 256 (AAC) is also relevant to the mistake of fact jurisdiction of the Upper Tribunal.
30. Section 4(3) of the SVGA 2006 makes clear that the Upper Tribunal only has limited powers to intervene in relation to whether it is appropriate to include a person in a barred list. The scope for challenge by way of an appeal is effectively limited to a challenge on proportionality or rationality grounds.
31. At paragraph 43 of **DBS v AB**, the Court of Appeal stated:
- “...unless the decision of the DBS is legally or factually flawed, the assessment of the risk presented by the person concerned, and the appropriateness of including him in a list barring him from regulated activity... is a matter for the DBS”.
32. At paragraph 55 of **DBS v AB**, the Court of Appeal explained:
- “[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...”.
33. **R (Iran) v Secretary of State for the Home Department [2005]** EWCA Civ 982 indicates that materiality and procedural fairness are essential features of an error of law. The SVGA 2006 does not contain any provisions to provide a basis for departing from that general principle. See **CD v DBS [2020]** UKUT 219 (AAC).

AA's oral evidence

34. DBS made its Barring Decision about AA on the basis of considering documentary evidence, in the form of the referral form and related documents from VC and AA's written representations and character statements.
35. As confirmed in **DBS v RI**, the Upper Tribunal is entitled to hear evidence from an appellant and assess it against the documentary evidence on which the DBS based its decision (paragraph 29). Furthermore, the Upper Tribunal may view the oral and written evidence as a whole and make its own findings of fact (see paragraph 31 of **RI**).
36. The only witness at the hearing on 27 February 2025 was AA. The DBS did not call any witnesses. AA had provided evidence in a witness statement dated 22 May 2024 (page 413 of DBS bundle). AA gave additional oral evidence, including

in cross-examination by Mr Webster, and in answering the Upper Tribunal's questions.

37. AA's evidence was that when VC took over from his former employer, he had been managing his project for quite some time. What was described as an individual project comprised houses, in which individual service users lived together, with specific staff present to help support the service users' needs.
38. AA said that when VC took over, they agreed to put some staff in place to help the existing staff, but the new staff were never produced. AA said that when the staff were not produced and no-one came to help him, he raised his grievance (30 August 2021, pages 23 to 25 of DBS bundle). AA stated that VC had a meeting with him, but thought the situation was just between him and an operations manager ("VW") mentioned in the grievance. VC said they would bring in mediation to sort things out, but nothing really good came out of it, nothing conclusive. AA said it was never satisfactorily resolved.
39. AA explained that he had some limited experience of working with JL in around 2008. He described encountering JL again in 2016, when she was on medication for behavioural difficulties and had an open head wound. AA met with her parents and with the commissioner at the council, realising that funding for JL and another service user to attend college had stopped, meaning they were not doing anything between 9am and 4pm. He described JL having limited speech (restricted to saying one word), but she would say "tea" even when she might have had a drink five minutes before, and that if she was refused, she would bang her head on the floor. AA described developing a strategy to work with JL and having obtained funding from the council to give her activities to do. AA told us that this had helped to improve JL's challenging behaviours from 2016 onwards.
40. AA also described that JL's behaviour of not sleeping in September 2021 was not a new behaviour for her and even rubbing her private area was not really new with her. He told us JL's difficulties sleeping had not happened for a while in September 2021, so staff decided they needed to report it happening during the holiday. AA stated that when the staff went on holiday to Devon with JL on 11 September 2021, they had only taken lorazepam with them PRN to manage her sleep, because JL had been sleeping ok at the project. AA stated that JL will sometimes have difficulties sleeping and then the GP will sometimes provide medication to help her sleep.
41. AA told us he had a four-day work / three-day rest working pattern in September 2021. He told us he returned from holiday on 09 September 2021 with his last day of leave being 08 September 2021. AA said he had then received training. AA told us that on 11 September 2021, he was not formally on shift but went into work to sort out a car for two care staff ("JG" and "LST") to go on holiday with JL. AA told us that his next shift day was due to be Sunday 12 September 2021. AA told us that although he was not on shift on 11 September 2021, he did receive a

phone call about JL displaying behaviours. AA told us that he was not aware of JL having spots on her body before she went on holiday.

42. AA told us that after he was telephoned by the care staff on Saturday 11 September 2021 about JL's behaviours of not sleeping and rubbing herself, he notified his manager ("JA") about both behaviours. AA said he was in contact with JA throughout the period of JL's holiday, including on Monday 13 September 2021, at which point JA said to come home early from the holiday. AA told us that on the Wednesday (15 September 2021), he and JA were in the same office in person. At other times he was based at his project, so talked to JA by phone or email.
43. AA told us that when JL does not sleep, her behaviour can become very challenging, and therefore the main priority to inform the GP about was lack of sleep, so that they could prescribe JL some medication to manage that difficulty. AA said that he discussed this with GP at the telephone appointment on 15 September 2021. The GP prescribed JL zopiclone. AA told the GP in this appointment that the staff on the holiday said JL had been touching herself, but the GP said there was nothing they could do unless they saw her. AA said this was because at that time GPs would not allow anyone to come to the surgery due to COVID-19. AA said the GP told him that the care staff should look to see if there were any spots or anything for JL that looked suspicious and take a picture of it.
44. AA said he told the GP on 15 September 2021 that JL was rubbing herself and asked if there was anything he and his team could do. The GP asked about spots and AA said there were none. The GP said they would book an appointment on the Monday (20 September) in case it was ringworm. AA told us the GP advised AA and other staff to look for a spot or common sign, anything coin sized. AA said that over the weekend after the holiday, staff supporting JL saw tiny spots coming out, so one of the female staff took a picture of them.
45. AA said that there was not enough space on the record of the 15 September 2021 entry for him to mention about the rubbing. Mr Webster suggested in cross-examination that there was enough space on the document to add in a sentence to say she had not been sleeping and unusually was rubbing her genitalia. AA responded that it was probably on another document, a summary of work for the day. He also said that the reason the GP had booked the follow up appointment on 20 September 2021 was due to the ringworm as the GP confirmed the appointment would be to see if anything developed over the weekend.
46. In cross-examination, AA was asked about having been told during JL's holiday that she had a rash, which he disputed. He said that when he phoned the GP to get an appointment, they asked if there were any spots and when AA spoke to the staff, they could not find anything. AA said that he was not aware of any rashes, and the staff did not mention this to him. He said that there were no spots

or rash for JL until the weekend when she came back. AA was asked about saying that the ringworm was on JL's leg. He said he did not see the ringworm himself or take the photograph, because that would be inappropriate as a male carer, so a female carer took it, and forwarded the photograph to AA to upload to the GP. AA said the photograph was a close up showing the spots, and he could only see the spots, not anything else on the picture, so could not say whereabouts specifically it was.

47. AA said that on 20 September 2021, he spoke to the GP during the 1pm phone appointment and advised them that staff had seen something developing. The GP sent through a link at that stage, which AA used to upload the photograph and he spoke again to the GP that day, at which point the GP said ok, it was ringworm, and prescribed hydrocortisone cream for it. AA said he uploaded the documents on page 532 and 533 to VC's g: drive on its computer system. He said this was probably the same day or the day after. He said that JL had a dedicated file on the g: drive and he took photos of the documents on pages 532 and 433 and uploaded them there. AA said that he documented the conversations with the GP in JL's health action plan. In cross-examination, he clarified that this was different to the hospital appointments and outcomes document on page 533.
48. AA said that while staff told him that JL had started exhibiting spots in the weekend after she came back from holiday, he was not told about JL having a rash until he came back from sick leave in October. At that time his manager, JA, mentioned they had to book another appointment for JL with the GP because of rashes (and AA was not aware of any rashes). AA said that at that time, the issue had already been dealt with and he was not privy to what happened in October.
49. AA said that along with the TUPE transfer of his previous employer's work to VC, care user files were meant to be created in the new system, but this was taking time. AA said it was being done project by project and VC had not completed the project he was managing. When asked, AA said he did not know why it was taking such a long time to create the case files but one had not been completed for JL and as it wasn't there, he used JL's folder on the g: drive to upload documents. He said the g: drive was a temporary method of keeping records until JL's records had been created.
50. AA told us that in addition to uploading the GP appointment documents on page 532 and 533, he would have written notes on a case summary for JL onto the g: drive. AA said there was also a MARS sheet kept at the project for medication, which would have information on it about the medicine the GP had prescribed for JL including the cream for the ringworm.
51. AA described the CMS system involving an incident reporting system, which was different to the g: drive. He told us the ABCD form is completed when someone

displays challenging behaviour, and the staff are aware this is not behaviour they would demonstrate on a daily basis.

52. AA told us that his project did not have any scanning equipment to scan in documents, so he would take photographs of documents and scan them in that way. There was a scanner at the main office. AA told us he had a laptop at home. He explained that when he was on call over the weekend of 10 December to 12 December 2021, he had not been given the dedicated VC on call mobile phone, although this is meant to be provided to on-call staff. AA said that instead, calls were re-routed to his mobile phone. The VC dedicated on call phone contains telephone numbers for different care staff. Without it, AA only had the telephone numbers for staff from his own project.
53. AA told us that he did not upload the ABCD form. He said he did not photograph it (to upload it) before he went off on sick leave. AA said he was off on sick leave from 26 September 2021 to 11 October 2021. When asked about the MED3 certificate from his GP starting on 03 October 2021 (page 100 of DBS bundle), AA said he self-certified for the first 7 days of that period of sick leave. He said he thought the document at page 102 was evidence of this, although we confirmed with AA that this related to a later period of sick leave in December 2021.
54. AA said he would not have worked while he was off sick because it was not a good practice and would tarnish his reputation. In cross-examination, AA said that using his laptop while off sick would make it look like he was not sick if he could upload documents. He told us that if he had uploaded the ABCD document, he would have completed the (blank) boxes on the last page (page 222) because he has to follow up by writing on the form. AA told us he definitely did not complete the form himself, and therefore would not have been able to upload it onto the CMS system.
55. When asked by Ms Bayley whether it was possible for someone else to upload a document to CMS and for his name to appear, AA said it probably was because when VC had the disciplinary meeting with him, they told him that during the on-call process in December 2021, he had not recorded in the on-call log what happened on 12 December 2021. AA said he told his employers that he did record it, and asked whether it could be deleted. AA said his employer said oh yeah, anything can happen, maybe someone deleted it. When asked by a Tribunal member about passwords for the CMS system, AA said that to his knowledge, people kept their passwords private. He did not share his password with anyone. He thought it was strange that the ABCD form had been uploaded in his name, but it was possible, maybe, that someone had his log in details.
56. AA told us that he was not told in advance what the 08 November 2021 investigation meeting was about and was not allowed to be accompanied at that meeting or to have the chance to talk to his employer properly. When asked by

Ms Bayley, AA told us he did not agree with the record of what was said at the meeting. He said that he did not speak to his employers in the way recorded in the notes (with just saying yes or ok). AA told us that he told his employers he would not sign the investigatory meeting notes because what they had written was different to what he said. He said he did not have access to his emails after he was suspended in December 2021 to produce the email saying he was not willing to sign the meeting notes.

57. In relation to the incident on 12 December 2021, AA said he was the on-call person for the weekend of 10 December 2021, starting at around 5 pm or 6pm on Friday 10 December, when the office closed. AA was on call until the Monday morning. AA described having the work laptop at home but not the specific mobile phone for on call (which would have the personal numbers of the staff from all the other projects around the local area).
58. AA said he had access to a rota system, but only for his particular project, and he could not access another particular project on his phone. AA said that when his on-call duty started, he was not told that a taxi had been booked for the Sunday night for the other project. He said that the first he knew about it was on the Sunday night, when the taxi did not arrive. AA said he was also not told by the agency that the agency staff member for a project (at a place called FR) had cancelled.
59. AA confirmed that on the weekend of 10 December 2021, the operations manager, VW, was the next person in command for him to call (he described this as her being the cover for that weekend as well). AA said that when the staff member phoned him to say the taxi had not arrived, he telephoned his direct manager, JA, first but she did not answer, so he left a message, and phoned again two or three times, so he went directly to deal with the issue by himself. AA said this was because he knew he could still sort it out as quickly as possible. AA said that JA was also back up for him during the on-call weekend. He said he did not telephone VW about the taxi issue because he knew he could sort it out, and he called VW when he could not sort out the issue of staffing at FR.
60. AA said that when he was on call, he had to record his actions on the on-call log, and that he did so that weekend. AA told us that on 12 December 2021, he had been on a shift from 07.30am, due to end at 5.30pm (but which did not finish until 8pm). AA said that as soon as he finished, he received a call that one of the staff working at another project (at a place called WC) was supposed to finish early and then be taken home so that their partner could leave to go to another project. A taxi should have been booked for this but did not turn up and AA was not informed about it when he started his on-call duties.
61. AA decided to go to the staff member's home, as it was 10 minutes away from where he lived, and collect the partner, but when he got to their home, they had a baby at home, and AA did not have a car seat to transport them. AA therefore

had to drive back to the WC project, taking half an hour, collect the first staff member and take them home (another 30-minute drive). AA said it took two hours overall for him to drive back and forth, after a long shift that had ended late at 8pm.

62. When asked why this was something he needed to sort out, AA said that a taxi should have been booked, and staff had told him one had been booked but had not turned up. He said he had to go out of his way to make sure that the staff were in the right place. AA told us he did not have authorisation to book a taxi to take the staff member home from the WC project. AA said that there was a double problem if he could not sort things out because the staff member needed to go home, and their partner needed to go to a shift.
63. AA said he was in the middle of sorting out the problems with the missing taxi, when he was telephoned about the agency staff not arriving at FR. AA told us he had to pull over in his car to take the calls because he did not have a hands-free system. He agreed that the staff member at FR (called "LB") had called him at 9.05pm. AA confirmed he then telephoned a team supervisor at VC to ask about the agency staff and that the supervisor called him back at 9.48pm to explain the agency staff member was not going to attend.
64. AA told us that he then rang LB shortly afterwards to tell her that no agency staff was going to come. He said that LB told him one agency staff member was there, and explained that residents were watching a film, they had capacity and could not go to bed straight away because it was their choice. AA told us he then spoke to VW at around 9.56pm. He said VW initially told him to go to the project at FR himself, but AA said he could not do this because it was a long day, and he was driving people around, he had an early shift the next morning and didn't think it was safe for him to work. AA said he could not really remember what advice VW had given him, but he thought she had told him to tell LB that VW was 5 minutes away and would go to the project if needed. AA told us it was common practice at that project because VW would tell the staff she was 5 minutes away and could get there as soon as possible if anything happened, and agency staff would always stay.
65. AA told us that he tried to find someone from his project's staff to provide cover and ringing around took time, but no one was available. AA told us that he then spoke again to LB, when she phoned him and told him that she and the agency staff member were putting people to bed. This call took place after AA had spoken to VW. He told us he relayed VW's advice to LB. AA told us LB did not tell him the agency staff member was refusing to stay, and he did not tell LB to leave the project in circumstances where the agency staff was refusing to stay. AA also said he did not advise LB not to sign any documentation. AA said he would never tell staff to leave the project.

66. When asked why LB had written in her statement that AA had rung her again at 11.41pm, AA said that LB had wanted to get a taxi home, but AA did not have the budget or the power to authorise it, so he advised LB to telephone VW about sorting out a taxi. Asked how he had LB's telephone number, AA said that he must have had it because she had rung him on the on-call system.
67. AA told us that he rang the project at WC at around 11.56pm, but no one answered the phone. He rang again at midnight, and again, no one answered. Both times AA rang the house number. Asked if he telephoned LB at that time, AA said no, and that he was expecting her to finish her shift, leave the project and to leave the agency staff member alone with the users in bed, and VW available for back up if needed. AA said that LB did not call him back after their last phone call to say otherwise, so he assumed everything was ok.
68. AA told us that he rang the project at WC at 6.30am the next day and was told by the agency staff that everything was fine. No one mentioned any problems to him.
69. Asked about the entries in the on-call log on page 531 of the DBS bundle, AA explained that the staff member on call would complete these. He had completed the entries for 11 December 2021. However, the entry for 12 December 2021 was missing. AA said that he did not know why it was not there. He said that on the Monday (13 December 2021) he sent an email to JA about everything that had happened, which included the problem with the taxi not turning up. AA said JA had replied apologising for this, but that after he was suspended, he did not have access to any of his emails so could not retrieve it.
70. AA said he told his employers that some of his entries were missing from the on-call log, and they said it would be investigated, but nothing came out of it.
71. AA told us that he signed the notes for the disciplinary hearing minutes on 28 January 2022 because he was under a lot of pressure, including the way his employers were talking to him. AA said he disagreed with some of what his employer had recorded in those notes, because they were not what he actually said.

Assessing the Appellant's oral evidence

72. During the hearing, we observed that AA often responded to a question with “Yes” or “Ok” but that he did not actually agree with the underlying statement suggested by the question. His next, or subsequent answer, would then confirm that AA did not agree with the underlying statement or assertion being put to him. We assessed these initial responses by AA as agreeing that a question had been put (or that it was what his employer had put to him) rather than indicating AA agreed that the factual assertion behind it was correct.
73. We assessed AA was doing his best to answer the questions asked. However, we considered that AA did not always understand when he was being asked whether he considered something was correct or accurate. We assessed that in order to understand what AA's position was, it was necessary to ask follow up questions, which produced the contrary answer (“No”) when AA was asked if he agreed with the factual assertion, compared with earlier questions where he had previously said “Yes” or “Ok”.
74. Examples included an exchange with Mr Webster about whether AA had been told that JL had a rash. Mr Webster highlighted that AA appeared to have contradicted his oral evidence that he had not been told about a rash. This occurred when Mr Webster took AA to an entry from the disciplinary hearing dated 28 January 2022 (on page 163 of the DBS bundle). The entry stated: “*Staff height lighted [sic] a rash in the groin area, did staff reported [sic] this to you?*”. AA's reply to Mr Webster was: “yes, oh, ok, yes”. Mr Webster probed further by stating “*You said to the tribunal today, clearly, a second time, nobody told me about any rash, that was your evidence today but according to this you told your employer staff did report a rash to you?*”. AA replied: “*Not a mention of a rash at all, it was the spots*”.
75. Upper Tribunal Judge Butler then followed up to clarify AA's evidence in the following way:
- TJ: “*You say mention of spots. Mr Webster has said that you told your former employer in the disciplinary hearing that you were aware of spots before the holiday. And your answer to that is?*”
- AA: “*I wasn't aware of any spots before the holiday.*”
- TJ: “*Ok, during the holiday, what was the position?*”
- AA: “*Not any spots or rash until the weekend she come back, she come back on Wednesday, weekend when spots, we can see the spots.*”
76. Another example was a series of questions about whether AA's position was that JL had ringworm on her leg, and what that meant. There were recorded

references in AA's disciplinary hearing minutes to him saying that JL had ringworm around her leg. AA agreed with Mr Webster when it was put to him that the ringworm was on JL's leg. However, when this was probed with AA during the hearing, he explained that he did not himself see the ringworm. AA explained that he saw a photograph or photographs of spots on JL's skin, which were too close up to identify where precisely, but he was told were on her leg. He was unable to say which part of the leg they indicated.

77. We do not criticise AA for the initial answers he gave during the oral hearing. Our assessment was that AA did not really understand his initial answers were being taken to agree to the factual statement within the question he was being asked. We considered this relevant to our assessment of the evidence overall, because it indicated the need to pin down AA's initial answers and to explore them in order to fully understand them.
78. In particular, we considered it relevant when assessing what was recorded in the investigation meeting minutes on 08 November 2021 and the disciplinary hearing minutes dated 28 January 2022. Those minutes were recorded as not being verbatim. AA told us that he disagreed with what was recorded in them. We observe that a number of the answers the minutes recorded for AA are ones saying "Yes" or "ok". In our assessment, it was not effective for AA's former employer to rely on answers from AA without checking that he had understood their question and that they had understood his answer. z
79. In paragraph 55 of **DBS v RI**, Males LJ observed that where an appellant gives 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."
80. Our assessment is that there was a stronger and more credible quality to AA's oral evidence than in the written minutes of the investigation meetings, the disciplinary hearing and the appeal meeting. The reason for this was that we have an accurate record of what was said at the hearing (from the audio record of proceedings) and counsel, and the Tribunal members, were able to probe what AA meant with his response. This highlighted and clarified a substantial number of answers that AA had given.
81. We therefore decided greater weight could, and should, be applied to AA's oral evidence at the hearing on 27 February 2025 than what his employer had recorded as his position in the various minutes. The minutes were not verbatim,

and the structure of the questions and answers indicates that when answers were recorded as given, they were not probed further. We therefore preferred AA's oral evidence to what his former employer had recorded as AA's position.

Mistake of fact argument: Allegation 1

82. We discussed with the parties at the hearing the fact that allegation 1 contains two components: (i) whether AA failed to seek medical assistance for a change in the behaviour of JL and (ii) whether AA delayed in uploading documentation to CMS until 29 September 2021 (which delayed the diagnosis and treatment of JL's thrush).

Did AA fail to seek medical assistance for a change in the behaviour of JL between 11 September 2021 and 04 October 2021?

83. There is documentary evidence in the form of the care manager outcomes document dated 15 September 2021 that AA sought medical assistance for a change in JL's behaviours in terms of her not sleeping while on holiday and having to return early. See page 532 of DBS bundle. This document records that a follow-up appointment was booked for 20 September 2021. The document has AA's signature on it. He told us, and we accept, that he uploaded it to the folder for JL on the g: drive, which was being used while files were being transferred over to a new system, as part of the overall transfer from AA's former company to VC. AA's former employer had this document, although it appears VC did not provide it to the DBS as part of the referral (see index at Annex A to the Minded to Bar letter, page 137 of the DBS bundle).
84. There is also documentary evidence in the form of the Hospital Appointments and outcomes form dated 20 September 2021 that AA sought medical assistance for AA in terms of ringworm. See page 533 of DBS bundle. The outcome recorded is consistent with the evidence AA gave at the hearing on 27 February 2025, that staff were to take a picture of the (ringworm) spots and upload it through the link sent by the GP. This document is signed by AA. Again, he told us, and we accept, that he uploaded it to JL's folder on the g: drive. VC had this document and did provide it to the DBS as part of the referral (see index at page 137 of the DBS bundle).
85. AA's oral evidence was that while JL was on holiday, there were discussions about her going to a walk-in clinic in Devon, but that on 13 September 2021, JA made the decision that JL should return from holiday early and she returned on 15 September 2021. AA managed to arrange a telephone appointment with a GP on the same date. AA's evidence was that he told the GP about two behaviours by JL – that she was not sleeping and that she was rubbing herself. His evidence was that the GP asked if there were spots, and AA said there were none, so the GP advised the follow up appointment on 20 September 2021, and for the staff to monitor JL to see if any spots emerged over the weekend after 15 September 2021. AA's evidence was that the GP advised they were to look for a coin-sized mark.

86. We accepted AA's evidence on this issue as credible and consistent with the documents dated 15 September 2021 and 20 September 2021. The follow up appointment dated 20 September 2021 does not contain any information about JL's problems with lack of sleep and whether the zopiclone was working. If it had been a follow up appointment for lack of sleep, we would have expected it to have focused on that issue.
87. We also take into account that in the investigatory meeting minutes dated 08 November 2021, question 14 asked AA whether he had reviewed any documentation before 29 September 2021 to ensure any concerns or deteriorations in presentation were discussed with the GP. VC recorded AA's answer as: "*Yes and I sent a picture to them and then they prescribed cream*". (see page 32 of DBS bundle). This answer was consistent with the hospital appointments and outcomes form dated 20 September 2021. It is not consistent with AA describing consulting the GP about JL's sleeping difficulties. This is because there would be no reason to photograph her to evidence sleeping difficulties, and it is unlikely cream would be prescribed to help with sleep difficulties (and, in fact, zopiclone tablets were prescribed instead).
88. We also accepted as credible and reliable, AA's oral evidence that he was not aware of JL having spots or a rash before she went on holiday, or during the holiday.
89. One of the carers who took JL on holiday, LST, was recorded, in an undated and unofficial document headed "*investigation meeting*" as having seen JL had a rash slowly spreading (and mostly in her pad area) when delivering personal care and pad changes during the holiday. The document records that LST reported it to AA and completed a body map and he advised to keep an eye on the ringworm as it was spreading (see pages 88 to 89 of DBS bundle). The document recorded LST's surname incorrectly as "TS" not "ST" (see the ABCD form on page 217 in which LST records as her surname as "ST"). We directed the DBS to obtain a copy of the body map from VC. Given that VC confirmed to the DBS that it had provided everything it had, which means there was no body map available, and we take that into account.
90. The other carer who took JL on holiday, JG, was recorded, in investigatory meeting minutes dated 02 November 2021, as inspecting where JL was rubbing and not seeing anything (see page 29 of the DBS bundle). We take into account that of the two carers who took JL on holiday, and each delivered personal care to her, one of them did not see any spots or rash during the holiday.
91. AA was not present on the holiday to see whether she had spots. AA told us, and we accept, that as a male carer, he would not be expected to deliver personal care to JL and inspect JL's intimate body areas to see if she had a rash or spots. AA told us that over the weekend, spots developed on JL, and he reported these to the GP on the 20 September 2021. AA told us he was sent a link to upload a

picture of them (which he did) and then had a follow up conversation with the GP by telephone, who confirmed JL had ringworm and prescribed her topical cream to treat it.

92. Again, we accept that as a male carer, AA would not be expected to personally photograph the spots on JL. We accept his evidence that a female carer did so and sent him the photograph, which the carer told him was of JL's leg, but the image captured the spots so close up that AA could not tell where on the leg it was.
93. We take into account that while the hospital appointments and outcomes document dated 20 September 2021 referred to another follow up appointment in one week, by 27 September 2021, AA was not present at work, due to sickness. AA has a MED3 fit note from his GP covering sickness for stress from 03 October 2021. We accept his oral evidence that he self-certified for the first 7 days of that sickness, which would cover his absence from 26 September 2021 onwards.
94. Mr Webster suggested at the hearing that the rules allowing a person to self-certify their absence from work had changed from 3 days to 7 days after 2021. However, we take judicial notice of the fact that in 2021 and up until December 2021, an employee could self-certify sickness absence for a period of up to 7 days. The change in December 2021, in response to the COVID-19 pandemic, allowed employees to self-certify their sickness absence for a period of up to 28 days. This covered the period from 10 December 2021 to 26 January 2022.
95. We take into account that the CMS entry JA made dated 04 October 2021 states: *"GP has also prescribed a different cream to treat ringworm as there appears to be no improvement in her symptoms"*. This is documentary evidence confirming JL attended an emergency appointment with her GP on 01 October 2021, had been treated by the GP with cream for ringworm, and that her ringworm was still present at that time October 2021. The entry dated 04 October 2021 then refers to the ringworm looking like it was improving, but there is a CMS entry dated 08 October 2021 stating that the ringworm appeared to be spreading (page 537 of DBS bundle). None of the entries indicate where specifically the ringworm was on JL's body.
96. We also note that the CMS entries dated 04 and 08 October 2021 do not confirm that JL had thrush, although the entry dated 04 October 2021 states that on 01 October 2021, a tablet and cream had been prescribed on 01 October 2021 to treat thrush, but that a possible UTI (urinary tract infection) was also being investigated and a sample was collected that day. The UTI was later ruled out as the results were negative.
97. We are not medically qualified, but take into account, as a matter of common knowledge, that any of the three conditions identified above of ringworm, thrush and a UTI, would potentially cause itching, soreness and for JL to display

behaviours of rubbing herself in response. We take into account that having been consulted by AA, JL's medical practitioner, decided to treat her in September 2021 for ringworm, and that it was still confirmed as present in October 2021. AA was not medically qualified and would not be in a position to know whether JL's rubbing was caused by the ringworm her GP diagnosed on 20 September 2021 or by some other medical cause.

98. We also take into account, as a matter of common knowledge, that even in late 2021, it was difficult to obtain medical appointments in person with GPs. This was caused by ongoing difficulties in consequence of the COVID-19 pandemic.
99. When granting permission to appeal, the Upper Tribunal directed the DBS to obtain notes and documents produced by VC including documents created or uploaded by JA on or after 29 September 2021 including the outcome of the GP appointment on 04 October 2021 (see page 484 of DBS bundle). We acknowledge that the DBS requested those documents from VC and all that has been provided in relation to that specific direction, are the CMS entries on pages 537 of the DBS bundle. However, we are left without any documentary confirmation that JL was medically diagnosed with thrush, and if so, when it was, or was likely to have been, contracted.
100. Taking account of all the matters set out at paragraphs 72 to 81 and 83 to 99 above, we are satisfied that AA's oral evidence, supported by the documentary evidence we have described, confirms the DBS made a mistake of fact in deciding that AA failed to seek medical assistance for a change in JL's behaviours. It was a mistake of fact because we are satisfied AA sought medical assistance on 15 September 2021 and on 20 September 2021 for the changes in JL's behaviours, which included her not sleeping and rubbing herself.

Did AA fail to upload documentation onto CMS before 29 September 2021, delaying the diagnosis and treatment of JL's thrush?

101. Within its finding that allegation 1 was proved, the DBS made a finding of fact that AA delayed the diagnosis and treatment of thrush for JL by not sharing her unusual and new behaviour of rubbing her genitals with other staff and the GP (see Barring Decision Summary on page 296 of the DBS bundle). It follows from the matters set out at paragraphs 83 to 100 above that we are satisfied this contains a mistake of fact, because it relies on AA not sharing JL's behaviour of rubbing with her GP, and with other staff in circumstances where the evidence indicates he told the GP, and other staff, including the staff who observed, and then photographed, JL's spots after she returned from holiday.
102. Given the matters set out at paragraphs 83 to 100, we have decided the DBS made a mistake of fact in deciding that there was a delay in the diagnosis and treatment of JL's thrush prior to 29 September 2021. Implicit within this finding by DBS is a finding that JL had thrush and that she had it on 11 September 2021.

As explained above, the DBS has not produced evidence to confirm that JL was diagnosed with thrush or that she contracted it on or around 11 September 2021. What has been made available to the Upper Tribunal are the CMS entries for early October 2021 that refer to JL being prescribed a tablet and cream for thrush, while at the same time being investigated for a UTI, and at the same time being prescribed a different cream for ringworm that was not improving and on 08 October 2021 appeared to be worsening.

103. We note that Mr Webster's written submissions state that AA was told JL had a rash in the groin area, and that the ringworm was around JL's leg and AA was unable to say where it was on the leg because he saw the photograph of it from very close range. Mr Webster relies on this to separate the location of the ringworm from what was causing JL to rub her genital area. However, it is the DBS's assertion, present in the findings made within allegation 1, that JL had a diagnosis of thrush and that it was present from 11 September 2021. The burden of proving that assertion must rest on the DBS, rather than the burden of disproving it resting on AA.
104. The DBS has not produced evidence to demonstrate where the ringworm was on JL, beyond relying on what AA was recorded saying in the investigation process (that it was on her leg), while at the same time acknowledging that AA did not see the ringworm spots himself. Mr Webster's written submissions do not address the notes recorded from LST that she noticed JL had a rash around her genital area near her thighs and that this was described as ringworm slowly spreading and mostly in JL's pad and where she sweats (pages 88 to 89 of the DBS bundle). While this evidence is inconsistent with AA's position that JL did not have any signs of spots or rash during her holiday, it is also inconsistent with the DBS's position that JL's ringworm was somewhere other than at, or close to, her genital area.
105. We do not accept Mr Webster's written submissions that the only symptoms referred to in terms of the thrush are the rash in the groin area and itching that AA accepted staff had reported to him, and thus on balance JL must have already had thrush. Putting on one side the fact that AA disputes that staff reported a rash and itching from 11 September 2021 onwards (as opposed to rubbing behaviour), the DBS has not established that JL had symptoms of rubbing that are more likely than not to demonstrate she had thrush on that date. Such an argument would have to discount ringworm as a cause of itching in, or close to, JL's groin area. The DBS has not provided sufficient evidence to demonstrate this on the balance of probabilities, for the reasons set out above.
106. We have also decided there was a mistake of fact within this part of allegation 1 because the DBS's reasoning in support of its conclusion that AA's actions delayed JL's diagnosis of thrush, are that JA was not aware of JL's behaviours rubbing herself. In the Barring Decision Summary, at page 296 of the DBS bundle, the DBS relied on JA's statement that she was not aware of JL's rubbing

behaviour before 29 September 2021. The DBS analysed that AA disputed this but stated it appeared to be one word against another.

107. The DBS then wrote that the interviews with both support workers indicate JA was contacted about PRN medication, but this does not state that she knew about the new behaviour. However, while this is broadly consistent with what is recorded in the undated note with LST, it is contradicted by question 4 asked of JG during the investigation meeting dated 02 November 2021. That question was worded: *“When was the incident of JL initially reported during or after the holiday? Am aware from the notes that you contacted [JA] during the holiday to ask if you could give further PRN due to displayed behaviours that appeared JL was rubbing herself?”* JG replied: *“Yes, during the holiday but [LST] dealt with all the calls whilst I was attending to the needs of JL. I know that phone calls and text were going on.”*.
108. Mr Webster argues in his written submissions that JG said in the investigation meeting that JG said LST dealt with all the calls while she was attending to the needs of JL. He argues that LST confirms calls were made but does not personally attest to what JA was told or even whether JA was spoken to. We did not accept the second part of this submission, because question 5 of the undated investigation notes for LST states: *“Am aware from the notes that you contacted JA during the holiday to ask if you could give PRN medication, is this correct?”*. LST was recorded as saying *“Yes. As JL’s sleep deteriorated on the Monday where she had no sleep at all”*.
109. We therefore do not consider it realistically sustainable to argue that LST did not personally attest to whether JA was spoken to during the holiday. Question 5 was a specific question, based on notes VC already held. If JA had not been spoken to about the rubbing, one might reasonably expect LST to say so in her response. We conclude that the nature of question 4 to JG and question 5 to LST indicate VC had evidence in the form of notes that JA was made aware of JL’s behaviours while she was on holiday and that she was told that JL appeared to be rubbing herself.
110. The DBS’s finding that the interviews with both support workers do not state JA knew about the new behaviour (i.e., rubbing) therefore contains a mistake of fact, because it conflicts with what JG was asked by her employer, drawing on notes that indicated JA was told about the rubbing. This is a key part of the DBS’s finding that AA delayed a diagnosis and treatment of JL’s medical difficulties before 29 September 2021, because it relies on JA being unaware, prior to that date, that JL was rubbing herself.
111. In light of the matters above, we have decided it is not necessary to decide whether the DBS made a mistake of fact by deciding that AA uploaded the ABCD form to the CMS system on the 29 September 2021. Our assessment of the evidence here was that it was equivocal, rather than it definitely indicated a

mistake of fact by the DBS. We are mindful that the Upper Tribunal should not identify a mistake of fact by the DBS simply because it would, or might, have reached a different factual conclusion based on the evidence.

112. Having said that, we observe the ABCD report was dated as completed by JG and LST on 11 September 2021 (and signed by them with that date), when this could not be correct. That was the date when JL's holiday started. The ABCD form was completed to include: "*Whenever JL sat down from the journey to 2 days after she repeated to do this*" (page 221 of DBS bundle). This indicates the form talked about later events on 12 or 13 September 2021 and therefore could not have been completed until at least 2 nights after the holiday started. We also observe that the final section of the form, which needed completion when uploading to CMS, was also incomplete. It included space for a CMS reference number, which would be generated once the form was uploaded. None of the boxes have been ticked and the reference number has not been included.
113. The DBS acknowledged that AA was not working between 26 September 2021 and 11 October 2021 (see page 294 of DBS bundle). The DBS acknowledged AA's representations that he was off sick on 29 September 2021 (page 296 of the DBS bundle) but has not addressed those representations. We consider this issue is more appropriately addressed as a potential error of law, by failing to address and evaluate the representations being made and to explain how the DBS concluded that AA uploaded the ABCD document to the CMS system while he was said to be off work on sick leave.

Mistake of fact argument: allegation 2

114. Having heard his evidence overall, including about the lengths he went to, in order to resolve the taxi issue that had arisen with the staff member at the WC project (and her partner at home), we found AA's explanation of what happened on 12 December 2021 to be plausible. AA gave consistent oral evidence that he was not told the agency staff member was threatening to leave FR, that AA did not tell LB to leave that project and that he did not advise her not to sign any documentation.
115. The DBS concluded that AA's submission was lacking in the detail provided by LB and VW and while the timings matched, the arrangements for cover and resolving the issue did not. However, we had the benefit of the email dated 18 December 2021 (page 513 of the DBS bundle) confirming AA spoke to VC about obtaining agency cover and that the VC staff member rang him back at 9.45pm to confirm there would be no agency cover. We also had the benefit of hearing AA's evidence about the timings. His account was consistent with speaking to LB at 9.05pm, speaking again with her later on, and then speaking with LB at around 11.41pm, when he telephoned her.

116. We found credible AA's explanation of not being given the on call mobile phone and the difficulties it caused him. His evidence, and the statement from LB explained how AA had LB's telephone number because calls were patched through to his personal mobile phone and LB had rung him at 9.05pm. We found credible AA's explanation that he had a conversation with LB at 11.41pm because she wanted to have a taxi arranged, and AA could not authorise that or pay it from his budget (just as he could not authorise a taxi at the project at WC). This was consistent with AA advising LB to contact VW to authorise a taxi. LB's statement confirms she telephoned VW after that, although she did not suggest it was for that specific reason.
117. We found credible AA's explanation that he rang the project before and after midnight, but not LB, because as far as he was concerned, she would have ended her shift with the agency staff remaining present and VW on standby five minutes away. If the FR situation had been left without any resolution, and AA was not able to speak to the project when he rang just before midnight, it would have followed for AA to ring LB (as he had her phone number) to check, but he did not do so. AA's evidence was also that when he rang the project the next morning at 6.30am, the agency staff was present and did not suggest there had been any difficulties. Both of these are inconsistent with the types of difficulty suggested in LB and VW's statements.
118. Mr Webster invited us to conclude that while there might be reasons for ill-feeling between VW and AA (connected with AA naming her in his grievance), there was no reason for LB to have a grievance against AA and therefore no reason not be truthful about what happened. However, LB was not made available by the DBS for us to ask her questions and to test her evidence about whether there was some misunderstanding between LB and AA about what she should do. We mention this, because of our evaluation that AA's explanations of matters needed probing to understand fully and that his first explanation of something was not always clear. VW has not been made available as a witness either, and both her statement and that of LB are hearsay statements, which affects the weight that can be attached to them.
119. We accept and take into account AA's evidence that there were endemic difficulties with having sufficient staff at VC to cover shifts, in particular, that agency staff would cancel without cover. This is consistent with the entries for 11 December 2021 in the on-call log on page 531 of the DBS bundle. There are other entries on the on-call log sheet, later in December 2021 that also appear to be consistent with these difficulties.
120. We accepted as credible, AA's evidence that there was a general pattern at the FR project of staff not turning up, and VW providing cover, if required, by being 5 minutes away. Mr Webster submitted that given AA said there was a routine pattern of problems at FR with being short of agency staff, there must have been another reason for LB to remain present for several hours and the most likely

explanation is the one she gave (that the agency staff was refusing to stay). However, no explanation is given for why the agency staff, whom AA said was generally sent to work at FR, should refuse to stay on this particular occasion. The records in the on-call logs on page 531 tends to suggest some staff staying past the end of their shift. This was AA's evidence of his shift ending 3 hours late on 12 December 2021 as well.

121. We take into account that AA's account was broadly consistent with the investigation meeting minutes (recorded as not verbatim) for 10 January 2022. It confirms AA's account that he did not advise LB not to sign paperwork and he did not advise her to go home and to leave the service unsupervised. See page 204 of the DBS bundle, which records AA as saying that he confirmed as advised from VW that one person is able to stay there when people were in bed. See also page 202 of the DBS bundle, which records AA stating that he was aware that staff were staying overnight at FR alone once the residents were in bed and VW would be able to come out if there was an emergency as long as they are in bed.
122. We have taken into account AA's evidence that he spent two hours driving around, trying to resolve the problems at the project at WC, to enable one staff member to get home, and another to go to their shift. In those circumstances, we do not find it plausible that while taking substantial steps to resolve the problems at WC, AA should tell LB to go home and to leave FR unsupervised.
123. Mr Webster invited us to conclude that AA's evidence about his entries in the on-call log having disappeared, were not credible and were, again, evidence that his account overall was not credible. However, AA did refer in the investigation meeting dated 10 January 2022 to knowing he wrote the on-call log entries somewhere (page 201). In the disciplinary meeting notes dated 28 January 2022, AA is recorded as stating that he wrote something down in the on-call log but did not complete it, he needed to claim back his mileage for the other staff issue at the project at WC, and it was strange (see page 48 of the DBS bundle). In the appeal meeting dated 16 March 2022, AA was recorded as saying that VC had shown him that he had not recorded the incident on 12 December 2021 and why would he not write it down because he needed evidence to claim for the taxi back. This account is not fully consistent with what AA told us at the hearing, but we do not consider it undermines his credibility in the extensive way Mr Webster invited us to conclude.
124. As a result of the matters set out above, we therefore have concluded that the DBS made a mistake of fact in deciding that AA advised LB to leave the project at FR when the agency staff was refusing to stay alone, and this would leave the service unstaffed.

Were mistakes of fact made by the DBS ones on which the Barring Decision was based?

125. We have decided that the mistakes of fact identified for both allegations 1 and 2 were ones on which the Barring Decision was based within the meaning of section 4(2)(a) of the SVGA 2006. They satisfy the test of being material to the Barring Decision (see paragraph 51(b) of **PF v DBS [2020]**).

The error of law arguments

126. In her closing submissions, Ms Bayley has grouped the error of law grounds of appeal into the following:

- (a) The DBS unreasonably adopted VC's findings and conclusions;
- (b) The DBS had insufficient evidence before it to make its findings of fact;
- (c) The DBS failed to obtain and consider relevant information when making its findings; and
- (d) The Barring Decision was disproportionate.

127. We have decided the DBS made the following errors of law in its Barring Decision, and that they were material to its Barring Decision.

128. The DBS decided JL had contracted thrush on or around 11 September 2021 and that her symptoms of rubbing were to do with thrush symptoms. However, for the reasons set out above the DBS had insufficient evidence before it to properly be able to conclude that JL had a diagnosis of thrush, and that the only cause of her rubbing behaviours was thrush. We do not consider that the CMS documentation provided by VC has resolved either of those issues. This does not confirm JL had a diagnosis of thrush or when it was contracted. Furthermore, the DBS did not obtain evidence about where JL's diagnosed ringworm was located, in order to rule it out as a potential cause of JL's rubbing behaviours. The DBS therefore had insufficient evidence before it on which to reach the essential conclusions that it reached as part of allegation 1.

129. The DBS recorded that AA's position was that he was absent from work on sick leave from 26 September 2021 to 10 October 2021, but did not evaluate this evidence adequately before concluding that AA uploaded the ABCD document on 29 September 2021. Mr Webster argues in his submissions that the DBS concluded that it was, in effect, a moot point and refers to page 296 of the DBS bundle). However, the DBS has not provided any reasoning at page 296 (or elsewhere in the Barring Decision Summary) to explain that it considered this point moot, or why it did so. Instead, the DBS recorded, without providing any further analysis about it: "*However, [AA's] solicitors have noted that [AA] was off*

sick on that date and that the documentation was the responsibility of the support workers and not [AA]”.

130. Mr Webster argues that the DBS does not have to engage with every issue raised by the Appellant, and that ***Khakh v Independent Safeguarding Authority [2013]*** EWCA Civ 1341 confirms that it is enough that intelligible reasons are stated sufficient to enable an appellant to know why his representations were to no avail. However, in our assessment, ***Khakh*** does not rescue the failure by the DBS to provide any reasoning about its position on AA’s argument that he was on sick leave when the ABCD form was uploaded and therefore did not upload it.
131. The DBS’s conclusion that AA did not mention sharing JL’s rubbing behaviour with her GP in his previous meetings with VC, fails to address what AA said in the meeting 08 November 2021. It represents an error of law, because it confirms the DBS failed to evaluate the documentary evidence correctly. The DBS has relied on that conclusion to support its assessment that AA’s account was lacking in credibility because the DBS concluded he had not mentioned it earlier. That assessment is undermined by the failure to evaluate the evidence correctly.
132. The DBS’s rejection of AA’s account of events on 12 December 2021 on the basis that LB and VW’s accounts were consistent with, and corroborated each other, and therefore were more credible than AA’s account. The DBS did not address the inconsistencies between LB’s and VW’s accounts, in particular, about who telephoned whom, before concluding they were corroborative of each other. This is contrasted with a more critical eye that the DBS cast over AA’s account, where the DBS’s assessment was that AA’s account was said to lack the detail provided by LB and VW, although the timings matched, the arrangements for cover and resolving the issue, did not. The DBS’s failure to resolve the conflict in evidence between the evidence of LB and VW affected its evaluation of the evidence overall, and we assessed it formed part of the DBS’s rejection of AA’s evidence. It amounted to an error of law.
133. Given the above identified mistakes of fact and errors of law, we do not consider it necessary to consider the remainder of the errors of law asserted on behalf of the Appellant.

Conclusion

134. Having considered evidence that was not before the DBS, which we found to be credible, we have found that the DBS made mistakes of fact on which the Barring Decision was based, We have also found that the DBS made errors of law that were material.
135. Where the Upper Tribunal finds that the DBS has made mistakes of fact on which the Barring Decision was based and / or material mistakes of law, the Upper

Tribunal must either direct the DBS to remove the person from the list or remit the matter back to the DBS for a new decision.

136. In the circumstances, we have decided, in accordance with section 4(6) and (7) of the SVGA 2006, to remit this matter to the DBS to decide afresh whether to make a Barring Decision. Applying the principles in **DBS v AB**, we are not satisfied that no other decision than removal is possible on the facts. However, applying section 4(7)(b) of the SVGA 2006, AA must be removed from the Adults Barred List and the Childrens Barred List until DBS makes its new decision.
137. In the circumstances, we have decided it is not appropriate to address the proportionality argument raised by AA. This is because we have concluded this matter should be remitted to the DBS to consider afresh whether any of the allegations are made out. The proportionality of any Barring Decision will have to be considered in light of what the DBS decides to do, including any factual findings it makes about the allegations previously addressed. We therefore do not consider it necessary to invite the parties to make representations to the Upper Tribunal about proportionality.

Judith Butler
Judge of the Upper Tribunal

Roger Graham
Specialist Member of the Upper Tribunal

Rachael Smith
Specialist Member of the Upper Tribunal

Authorised by the Judge for issue on 03 July 2025