



Neutral Citation Number: [2025] UKUT 321 (AAC)

Appeal No. UA-2024-000650-V

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

MOO

Appellant

- v -

DISCLOSURE & BARRING SERVICE

Respondent

Before: Upper Tribunal Judge Jones
Member Mr Roger Graham
Member Mr Christopher Akinleye

Hearing date: 6 August 2025
Mode of hearing: In person, Field house, London
Decision made: 29 September 2025

Representation:

Appellant: Mr Sente Masemola of counsel instructed by Colin Wales Solicitors
Respondent: Ms Bronia Hartley of counsel instructed by the DBS

SUMMARY OF DECISION

No mistake of fact or law in the decision of the DBS to include the Appellant on the Adults' barred list ("ABL"). Appeal against inclusion on the ABL dismissed.

SAFEGUARDING VULNERABLE GROUNDS (65) (Adults' barred list 65.2)

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 that the Appellant's appeal against the decision of the DBS dated 13 February 2024 is dismissed. There was no mistake of fact nor law in the decision to include her on the Adults' Barred List. Her inclusion on that list is confirmed.

REASONS FOR DECISION**Introduction**

1. The Appellant (or “MOO”) appeals against the DBS decision (“the barring decision” or “the Decision”) made on 13 February 2024 to include her on the Adults’ Barred List (“the ABL”) pursuant to paragraph 9 of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 (“the Act”). As part of its Decision the DBS made a finding of relevant conduct that MOO had punched on the back RR, a vulnerable adult service user in her care, on 5 February 2023.
2. Orders were made by the Upper Tribunal on 28 June and 2 December 2024 under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules (“the Rules”) directing that the Appellant’s and other witnesses’ names be anonymised and no information be published or disclosed that would identify them.
3. The Appellant was granted permission to appeal (“PTA”) by the Upper Tribunal on 2 December 2024 in respect of the Decision on the grounds set out below.
4. This Upper Tribunal (“the UT” or “the Tribunal”) held a hearing of the appeal against the Decision on 6 August 2025. The Appellant was represented by Mr Masemola of counsel and the Respondent (the Disclosure and Barring Service or “the DBS”) by Ms Hartley of counsel. The Tribunal is grateful to them both for their written and oral submissions.
5. The structure of this decision, by reference to paragraph numbers, is as follows:-

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Factual background

6. The DBS filed a bundle of evidence in relation to the Decision which incorporated the evidence on behalf of the Appellant which had been served on the Tribunal.
7. Numerical references in square brackets, [1] etc., are to page numbers of the updated bundle running to 184 pages, unless context dictates otherwise.

Undisputed Chronology

8. There is no dispute that at the relevant time MOO was conducting a regulated activity. MOO worked as a Support Worker in the Social Care Sector employed by the company anonymised as PC (or “the employer”) from 5 May 2022 to the date of her summary dismissal on 1 March 2023. The final decision by PC refusing her appeal against dismissal was communicated to her on 5 April 2023.
9. PC has more than one property used for vulnerable adults, but the relevant incident was at a house in a residential street to be identified as the “Home” for the purposes of confidentiality and in accordance with the Rule 14 orders already made.
10. Support workers at the Home had rotas, typically, for those who come on duty in the morning as day support and others that cover the night and leave early in the morning.
11. Service users have individual residential care plans pertaining to their history and support requirements at the Home.
12. A computer-based system used for data entry and reporting, was in use at the relevant time called “Nourish.”

The incident on 5 February 2023

13. On Sunday 5 February 2023 the manager, EO, got notification of the incident at the Home when she was not on site. It involved a member of staff and a service user. It was reported to EO that MOO had struck a vulnerable adult service user, RR, at the Home.
14. What occurred during that incident is the subject of the DBS finding of relevant conduct in the Decision. That finding is disputed by the Appellant. Therefore, our findings of fact regarding the incident are set out in a later section of this decision.
15. The same day, 5 February, EO contacted MOO by phone regarding a pending investigation with possible suspension from work.
16. Having left work, MOO visited L Hospital for attention to the pain she was experiencing on the chest, arm and wrist. MOO attributed the pains to the service user, RR, hitting her with an object.
17. At 12.34 p.m. MOO asked EO for more information about what she was going to be investigated for and expressed surprise there was no enquiry into her safety and well-being because MOO said she had been hit twice with a weighing scale.
18. An email was sent from EO to MOO at 2.36 pm that day confirming her suspension from work. MOO was informed that she was also withdrawn from the WhatsApp Staff Group Chat.
19. MOO sent an email to EO that evening which referred to RR declining a routine weight check and striking MOO on the body before dropping the scales and walking towards

another service user's area. In the email MOO told EO that when one of the day staff informed MOO she had hit RR, MOO denied it. The other day staff was said to be on her phone at the time of the incident.

Investigatory meeting

20. On 10 February 2023 a manager from another site arranged to see MOO. This was a disciplinary enquiry carried out by a manager alone. Brief Notes were made of questions and answers given. It is not clear if C, the manager, explained the nature and significance of the meeting to the MOO.

Disciplinary Meeting 17 February 2023

21. On 17 February 2023 a further meeting was arranged. The manager, C, was with a gentleman and MOO had her union representative with her. It was a disciplinary meeting.
22. The subsequent Outcome Letter sent to MOO does not appear to have been made available to the DBS. The DBS did not produce it for inclusion in their bundle but it was made available by the Appellant and was served in the latest bundle [176-177].
23. The outcome of the meeting was MOO's summary dismissal from 1 March 2023. MOO was told she could appeal.

The Internal Appeal – 27 March 2023

24. JH met with MOO and MA on 27 March 2023. This was termed an Appeal meeting. MA, MOO's representative, declared she and MOO had not had the Notes (Minutes) from the Disciplinary meeting the previous month, although MOO had received the Outcome letter (which contained the terms of her summary dismissal) [59].
25. MA expressed dissatisfaction with the failure to have proper investigatory interviews with the staff who were present when the incident with RR occurred. MA argued that the short statements given to the manager (EO) on 5 February 2023 were not capable of addressing the questions raised. MA indicated that one of the statements said MOO ran at the service user, RR, but the other said she did not [61].
26. MA is said to have felt unsettled by the initial lead investigation starting with one manager and now the Appeal meeting being with the Operations Manager. EO did not in her notes specify what MA had to say about the police officer who came on 7 February 2023 [73]. He was the officer that according to EO's earlier notes asked if RR had been hit by MOO. [38]. MA's concerns were expressed in the terms "at that level something had been adapted."
27. The appeal outcome was not favourable to MOO and her dismissal was confirmed. The letter with the final decision was sent in a letter dated 1 April 2023. A key part of the reasoning was reliance on the alleged testimony of three witnesses including the service user, RR, who said that MOO had carried out the described assault.

28. As far as the DBS is concerned, an acknowledgement was made (the section “Allegations or Circumstances”) [99] that the witness statements of those at the Home in the room where the incident occurred were not available. These would include the key statements of support staff BB and MJL. The DBS relied on unsigned notes of EO before the Appeal on 27 March 2023 and notes from meetings with three staff on 21 March 2023. “Corroboration” was referred to several times. MOO made statements that the initial statements of BB and MJL on 5 March 2023 were not consistent. They had raised questions about how or whether MOO ever hit RR as described. EO’s unsigned notes of what the witnesses said all start with the date 21 March 2023 and end with the date 27 March 2023. MOO relied on the fact that the DBS made no comment on this dating inconsistency nor that such interviews were coterminous with the Appeal hearing and that being more detailed interviews, they should have taken place.
29. A referral to the DBS was made.

The DBS Decision

30. The DBS investigated the incident on 5 February 2023 and sent the Appellant a minded to bar letter and invited her representations in reply which she then gave.
31. The DBS rejected the Appellant’s representations in its Final Decision Letter dated 13 February 2024. The Decision letter included the Appellant on the ABL and stated as follows:

“How we reached this decision

We are satisfied that you meet the criteria for regulated activity. This is because you worked as a Support Worker with [PC].

We have considered all the information we hold and are satisfied of the following:

- On 05/02/2023 whilst employed as a Support Worker for [PC], you struck service user [RR] on her back with your fist.

Having considered this, DBS is satisfied you engaged in relevant conduct in relation to vulnerable adults. This is because you have engaged in conduct which endangered a vulnerable adult or was likely to endanger a vulnerable adult.

We are satisfied a barring decision is appropriate. In representations you denied that you punched RR as described by the witnesses. You stated that the description of a clenched fist, which was described as a big punch which made a loud bang on the back should have left a bruise as RR tends to easily bruise easily. A body map was done on the day following the incident and there was no bruise that came up according to the team lead.

This is consistent with your version given to your employer and although it is acknowledged that there was no evidence of bruising this does not evidence that you could not have hit RR as described.

You confirmed that you reported on the day that RR had grabbed the scales from you and hit you with them on the chest. As RR went to do it again you raised your arms to protect yourself and the scales hit your arm. Your colleagues did not intervene. You remembered

raising your hands to protect your face and stomach whilst walking towards the table to grab the scales. Your sole intention was to keep the service user, as well as yourself, safe. The reason you stretched out your hands was to try and protect your stomach while you quickly rushed towards the table to grab the scales. This was to prevent any possible escalation of putting the service user or yourself at risk. In doing so, your hand could have touched RR's back, which is very possible considering the speed of the incident, but this was never your intention. Had you realised at the time that there had been any contact from you to RR, you would have apologised to RR immediately and self-reported that contact in your report on Nourish. As it was, you believe you were in shock and did not even register the comment made from one of your work colleagues who said she spoke to you and stated, "you just hit her".

You suggested that your colleagues may have been offended by your innocent remark about Filipino's which caused ill feeling and which you apologised for. After that you observed a coldness towards you but never had the discussion again. You pointed this out during your hearing, but it was never captured or looked into by your employer. You assumed the reason why they did not try to intervene in the incident between RR and you emanated from the unfriendly attitude you had received from them after that conversation.

You had not previously stated that you rushed towards the table to grab the scales whilst your hands were raised and could have made contact with RR's back. Both witnesses describe RR walking away to exit the room when you took steps towards her before hitting her with a clenched fist and which do not describe you trying to grab the scales at this point. DBS is satisfied that the witness accounts are reliable. There is also no evidence that you had previously offered the employer this motive for your colleagues to fail to intervene or collude to make false allegations against you. Given these inconsistencies and the lack of any evidence to support your claims, your account in representations is considered to be unreliable.

RR's mother maintained her view that you provided good care to RR who was safe in her care. A further supporting statement from RR's mother was provide. This described RR's challenging behaviour and your positive support. RR told them that she had hit you and they thought the allegation that you hit RR was odd. RR would be very angry if someone hit her, and they were sure she would have told them. In support of yourself, her husband also phoned the then manager and asked him to be lenient with you because of your kindness and perseverance with RR.

Whilst it is acknowledged that RR's family remain supportive of you this does not undermine the findings. Colleagues [BB] and [MJL] along with RR herself all reported that you had hit RR as alleged and following a thorough investigation the employer found the allegation proven. DBS is now satisfied that you did behave as alleged.

DBS is satisfied that the context is as follows. You were providing support to service user RR who had learning difficulties but had capacity. You had worked with RR for several months and knew her behaviours very well. RR regularly displayed challenging behaviour and was known to be physically aggressive towards staff. Two colleagues provided corroborating accounts of the incident and there is no apparent reason for them to make malicious allegations and are therefore considered to be credible. They both described how you had some weighing scales to check RR's weight however RR became agitated and angry and knocked the scales out of your hand hitting you as she did so. RR was seen to walk away and had her back to you when you took a couple of steps towards RR and hit her on the back with a clenched fist. This was described as a big punch which made a loud bang on the back. Both then describe how one colleague challenged you that you had just

hit RR. Although there was no evidence of bruising and RR did not react to the assault it is likely to have caused a degree physical and emotional harm. RR later disclosed the assault to police however she and her family did not wish to press charges.

You were dismissed from your employment but consistently denied assaulting RR during your appeal, raising a number of concerns about the disciplinary process. Although you suggested that RR had a history of accusations and that the witnesses were not consistent, given the corroborating witness accounts the reliability of this allegation is not in doubt. It is acknowledged that RR and her family did not wish to press charges and there was no body map done however this does not support your case that you did not act as alleged. You suggested that the investigation was unfair however there is no evidence to support this.

Your union representative challenged why the witnesses had not attended fact finding meetings however this was addressed where these were conducted after the appeal hearing and which formed part of the investigation report.

The investigation addressed your challenges and considered all evidence thoroughly. The witness fact finding meetings were completed however it was decided not to interview RR on what appear to be reasonable grounds. It was consistently reported by three people including the victim that you had punched RR on her back with a closed fist. This went against your version where you denied the allegation however it was concluded that you did hit RR on the back and recommended the outcome be upheld. The decision to uphold the findings was confirmed in detail in the appeal outcome letter which is considered to be a reasonable conclusion given the evidence available.

There are significant concerns that you demonstrated a belief that would endorse harmful behaviour. Despite your experience and knowledge of RR's challenging behaviours and knowledge of how to manage these behaviours, you reacted poorly to being hit by RR demonstrating a belief that RR deserved physical punishment for assaulting you.

There are significant concerns that you demonstrated a lack of empathy with a service user in your care. You appeared unwilling to empathise with RR who was particularly vulnerable due to learning difficulties when you assaulted her by hitting her on the back with your fist which is likely to have caused physical and emotional harm.

Your harmful behaviour occurred in regulated activity where you reacted poorly to RR's behaviour towards you by deliberately assaulting RR when she presented no risk to you which is likely to have caused physical and emotional harm. Repeating your behaviour is always likely to cause significant physical and emotional harm. It is acknowledged that you provided an apology and expressed regret that the incident caused distress to RR however you did not fully acknowledge your harmful behaviour. Your behaviour occurred in circumstances that are not uncommon in regulated activity and given your lack of acknowledgement and the concerns raised by your harmful beliefs and lack of empathy for those in your care, DBS are concerned that you could repeat your behaviour in future. Repeating this behaviour in regulated activity with vulnerable adults by reacting poorly to challenging behaviour by assaulting service users, would cause significant physical and emotional harm and therefore it is appropriate to include you in the Adults' List.

Your rights under Article 8 of the European Convention for Human Rights (ECHR) have been considered and afforded and a bar on the Adults' List is an appropriate and proportionate response to the risk of harm presented. It is recognised that a bar would impact on your right to a private life as you would be unable to engage in Regulated

Activity with this group which the evidence demonstrates you have done previously as a Support Worker. It is acknowledged that a bar may cause a degree of personal stigma and may adversely impact your mental health. A safeguarding decision must however take into account not only the rights of an individual but the need to protect those in Regulated Activity from harm. Given the risk of further emotional or physical harm if you were to engage in regulated activity, a bar is an appropriate, proportionate and necessary safeguarding measure and given the risk presented and that there are no other safeguarding measure given in place.”

The Appeal to the UT and grounds on which permission was granted

32. The Appellant lodged at the Upper Tribunal a notice of appeal against inclusion on the ABL dated 16 May 2024 and served her initial evidence on the Tribunal on 20 August 2024.
33. In summary, the grounds of appeal are that there were mistakes of fact in the finding of relevant conduct and mistakes of law in the DBS failing to take account relevant evidence in making the Decision.
34. On 2 December 2024, the UT granted permission to proceed with the appeal, on the grounds set out in notice of appeal.
35. The UT was satisfied that the grounds of appeal held a realistic prospect of success (that there were arguable mistakes of fact and law in the DBS Decision). The UT also granted permission to appeal on the grounds of there being a mistake of law: i) that the decision to bar the Appellant was disproportionate and / or; ii) the decision that the Appellant presented a risk of committing relevant conduct in the future was based on a mistake of fact or was irrational or unreasonable.

Legal framework

Barring decisions

36. There are, broadly speaking, three separate ways under Part 1 of Schedule 3 to the Act in which a person may be included on the Children’s Barred List (‘CBL’) or Adults Barred List (‘ABL’), which can generally be described as: (a) Autobar (for Automatic Barring Offences), (b) Autobar (for Automatic Inclusion Offences) and (c) Discretionary or non-automatic barring.
37. The third category applies in this case. The appeal concerns discretionary barring where a person does not meet the prescribed criteria (has not been convicted of specified criminal offences), but paragraph 9 of Schedule 3 to the Act applies.
38. Paragraph 9 of Schedule 3 to the Act, set out the provisions in relation to inclusion on the ABL. It provides that, following an opportunity for and consideration of representations, the DBS “must” include a person on the adults’ barred list if:
 - (a) it is satisfied that the person has engaged in relevant conduct, and
 - (aa) it has reason to believe that the person is or has been or might in future be engaged in regulated activity relating to vulnerable adults, and

(b) it is satisfied that it is appropriate to include the person in the list.

39. ‘Relevant conduct’ in relation to vulnerable adults is defined under paragraph 10 of Schedule 3 to the Act. Paragraph 10(1) sets out the meaning of “relevant conduct”. It includes: (i) “conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult”; (ii) “conduct which, if repeated against or in relation to a vulnerable adult, would endanger that vulnerable adult or would be likely to endanger him”. Paragraph 10(2) provides that conduct “endangers a vulnerable adult if” among other things it: (i) “harms” a vulnerable adult ; or (ii) puts a vulnerable adult “at risk of harm”.
40. An activity is a “regulated activity relating to vulnerable adults” for the purposes of paragraph 8(8)(b) of Schedule 3 if it falls within one of the subparagraphs in paragraph 7 of Schedule 4 to the Act; that provision broadly defines “regulated activity” and includes, in relation to vulnerable adults, the provision to an adult of healthcare, personal care or social work.

The UT’s jurisdiction on appeal

41. Section 4 of the Act provides for appeals to the UT from the DBS barring decisions:

4 Appeals

(1) An individual who is included in a barred list may appeal to the [Upper]1 Tribunal against—
[...]

(b) a decision under [paragraph 2, 3, 5, 8, 9 or 11]3 of [Schedule 3]4 to include him in the list;
(c) a decision under [paragraph 17, 18 or 18A]5 of that Schedule not to remove him from the list.

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

(a) on any point of law;

(b) in any finding of fact which it has made and on which the decision mentioned in that subsection was based.

(3) For the purposes of subsection (2), the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact.

(4) An appeal under subsection (1) may be made only with the permission of the [Upper] Tribunal.

(5) Unless the [Upper] Tribunal finds that [DBS] has made a mistake of law or fact, it must confirm the decision of [DBS].

(6) If the [Upper] Tribunal finds that [DBS] has made such a mistake it must—

(a) direct [DBS] to remove the person from the list, or

(b) remit the matter to [DBS] for a new decision.

(7) If the [Upper] Tribunal remits a matter to [DBS] under subsection (6)(b)—

(a) the [Upper] Tribunal may set out any findings of fact which it has made (on which [DBS] must base its new decision); and

(b) the person must be removed from the list until [DBS] makes its new decision, unless the [Upper] Tribunal directs otherwise.

42. As underlined above, an Appellant may appeal against the barring on the ground that the DBS has made a mistake:

a. “on any point of law” (section 4(2)(a) of the Act).

b. “in any finding of fact which it has made and on which the decision ... was based” (section 4(2)(b) of the Act).

43. However, for these purposes “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” (section 4(3))
44. The only issues in this appeal therefore are whether there were any material mistakes of law or fact relied upon by the DBS in including the Appellant on the ABL.
45. The Court of appeal has most recently summarised the applicable law in *XYZ v DBS* [2025] EWCA Civ 191 at [18]-[29] as follows:

“The safeguarding regime

18. The DBS is a body corporate (section 87 of the Protection of Freedoms Act 2012 ("POFA")). It is not a servant or agent of the Crown (POFA, Schedule 8, paragraph 15(1)(a)). Barring decisions are part of the core functions of the DBS, and the Secretary of State is precluded from giving directions to the DBS in respect of any such core function (POFA, Schedule 8, paragraphs 8 and 14).

19. The arrangements governing the DBS's functions of protecting children (and vulnerable adults) are contained in the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act"). Schedule 3 to the 2006 Act provides, at paragraph 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."

20. "Relevant conduct" is defined in paragraph 4 of Schedule 3 as including conduct of a sexual nature involving a child, "if it appears to DBS that the conduct is inappropriate." It also includes conduct which puts a child at risk of harm.

21. Teaching children is a regulated activity under section 5 and Part 1 of Schedule 4 to the 2006 Act. A person included in the children's barred list is prohibited from engaging in regulated activity relating to children (section 3 of the 2006 Act).

22. The requirement that, before making a barring decision, the DBS must afford the individual concerned the opportunity to make representations as to why they should not be included in

the children's barred list, is addressed in more detail in paragraph 16 of Schedule 3. This provides, relevantly, in sub-paragraph (3) that:

"The opportunity to make representations does not include the opportunity to make representations that findings of fact made by a competent body were wrongly made".

Sub-paragraph (4) states that findings of fact made by a competent body are findings of fact made in proceedings before the Secretary of State in the exercise of the Secretary of State's functions under section 141B of the 2002 Act (i.e. proceedings before the TRA) or in proceedings before certain other specified professional regulators, including, for example, the General Medical Council, the General Optical Council and the Nursing and Midwifery Council.

23. The ambit of the role and functions of the DBS was explained by the Divisional Court in *R(SXM) v DBS* [\[2020\] EWHC 624 \(Admin\)](#), [\[2020\] 1 WLR 3259](#) in these terms at [38]:

"... it is clear that the function of the DBS is a protective forward-looking function, intended to prevent the risk of harm to children by excluding persons from involvement in regulated activities. The DBS is not performing a prosecutorial or adjudicatory role and it is not engaged in considering complaints from individuals and imposing punishments. It may, as part of its task, have to form a view as to whether a person has engaged in conduct likely to endanger a child or sexually inappropriate conduct, or the case may involve conduct posing a risk of harm. It will need also to consider questions as to whether it is appropriate to include the person on the children's barred list. However it is not there to receive and adjudicate upon complaints from individuals."

That explains why information about whether a person's name is on the children's barred list is not publicly available. It is restricted to those who intend to employ or engage someone who would be involved in regulated activity with children. In *SXM* it was decided that even someone who alleged that they had been abused as a child by a person referred by a local authority to the DBS for determination as to whether they should be included in the children's barred list, had no status to seek information from the DBS as to the outcome of that referral.

24. Section 4 of the 2006 Act provides for a right of appeal against a barring decision to the UT, with the permission of the UT, on the 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. If the UT finds that the DBS made such a mistake, it must either direct the DBS to remove the appellant from the barred list or remit the matter to the DBS for a fresh decision. If it takes the latter course, the UT may set out any findings of fact which it has made on which the DBS must base its new decision.
25. In determining such an appeal, the UT is not restricted to consideration of the information which was before the DBS decision maker. It has the power to hear oral evidence, and to make its own findings of fact and draw its own inferences from all the evidence before it. It will not defer to the DBS in factual matters but will afford appropriate weight to fact-findings by the DBS in matters that engage its expertise, such as the assessment of risk to the public: see *PF v DBS* [\[2020\] UKUT 256 \(AAC\)](#) at [51], approved by this Court in *Kihembo v DBS* [\[2023\] EWCA Civ 1547](#) at [26].
26. In the present case, the UT accurately summarised the case law on the nature and extent of its "mistake of fact" jurisdiction under section 4(2)(b) of the 2006 Act at [39] to [47] of its determination. It referred, among other matters, to the decision in *DBS v JHB* [\[2023\] EWCA](#)

[Civ 982](#) in which it was confirmed by the Court of Appeal that a finding of fact may be "wrong" even if there was some evidence to support it or it was not irrational, if it is a finding about which the UT has heard evidence which was not before the DBS and the new evidence shows that the finding made by the DBS was wrong. In that case, the Court of Appeal held that the UT had erred by substituting its own evaluation of the evidence for that of the DBS decision-maker in circumstances where (i) the evidence was identical, and (ii) the UT had not held that the DBS had made findings which were not open to a reasonable decision-maker (i.e. irrational).

27. The UT also referred to the more recent case of *DBS v RI* [\[2024\] EWCA Civ 95](#), in which a different constitution of the Court of Appeal found it difficult to discern the ratio of *JHB* save possibly that "it may be authority for the proposition that if the UT has exactly the same material before it as was before the DBS, then the tribunal should not overturn the findings of the DBS unless they were irrational or there was simply no evidence to justify the decision": see the judgment of Bean LJ, with which Males LJ and Lewis LJ agreed, at [33]. Males LJ, in his concurring judgment, with which Lewis LJ also agreed, indicated that the restrictive approach adopted in *JHB* should be confined to those cases where the appellant does not give oral evidence before the appellate tribunal, or gives no evidence relevant to the question whether they committed the relevant act relied upon. The UT quoted from his judgment where he said (at [49]):

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

28. The UT directed itself in accordance with that approach. It first satisfied itself that whilst the DBS decision could have been better explained, and different findings could have been made, the findings made by the DBS were open to the decision maker on the evidence before them. It then considered further evidence, including the TRA decision, to ascertain whether any of those findings were mistaken ([88] and [89]).
29. For completeness, Paragraph 18 of Schedule 3 to the 2006 Act provides for the right of a person who is included in a barred list to apply to the DBS for a review of their inclusion (though the permission of the DBS is required to make such an application). However, sub-paragraph (3) provides that such an application can only be made after the end of the minimum barred period (which is prescribed by regulations, currently SI 2008/474) which in XYZ's case is 10 years."

Relevant general tests/principles

46. In order for the appeal to succeed under section 4 of the Act, the UT would need to reach a conclusion that DBS made a material mistake on a point of fact or law. The DBS relied on the "relevant conduct" gateway. It therefore needed to be "satisfied" of the following 3 things before barring MOO (pursuant to the following para 9 of Schedule 3 to the Act):
- (a) First, under 9(3)(aa), MOO was at the time, had been in the past, or might in the future be, "engaged" in "regulated activity" (relating to vulnerable adults).

(b) Second, under para 9(3)(a), MOO “engaged” in “relevant conduct”, as further defined under paras 4 and/or 10, (“Relevant Conduct”).

(c) Third, under para 9(3)(b), it was “appropriate” to include MOO on the barred list.

47. Indeed, if satisfied of the above three matters, the DBS was required, by the Act, to include MOO on the relevant lists.

Mistakes of fact and the UT’s fact finding jurisdiction

48. In relation to relevant principles regarding factual mistakes, the UT has the benefit of a line of authorities: *PF v DBS* [2020] UKUT 256 (AAC); *DBS v JHB* [2023] EWCA Civ 982; *Kihembo v DBS* [2023] EWCA Civ 1547; and *DBS v RI* [2024] EWCA Civ 95. The jurisdiction for the Tribunal to consider an appeal based on a mistake of fact was considered in *PF v DBS* and approved by the Court of Appeal in *DBS v RI*. A three-judge panel in *PF* stated at [51]:

- a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).
- b) In relation to factual mistakes, the tribunal may only interfere with the DBS decision if the decision was based on the mistaken finding of fact. This means that the mistake of fact must be material to the decision: it must have made a material contribution to the overall decision.
- c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.
- d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).
- e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.
- f) The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS’s factual findings in matters that engage its expertise. Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS’s expertise and will therefore in general be accorded weight.
- g) The starting point for the tribunal’s consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.

Assessment of risk

49. As set out above, the UT has a full jurisdiction to identify and correct a mistake of fact. An assessment of risk however is generally speaking for the DBS, and what is and is not

a fact should be considered with care. In *DBS v AB* [2021] EWCA Civ 1575, Lewis LJ stated at [43] and [55]:

‘43. By way of preliminary observation, the role of the Upper Tribunal on considering an appeal needs to be borne in mind. The Act is intended to ensure the protection of children and vulnerable adults. It does so by providing that the DBS may include people within a list of persons who are barred from engaging in certain activities with children or vulnerable adults. The DBS must decide whether or not the criteria for inclusion of a person within the relevant barred list are satisfied, or, as here, if it is satisfied that it is no longer appropriate to continue to include a person's name in the list. The role of the Upper Tribunal on an appeal is to consider if the DBS has made a mistake on any point of law or in any finding of fact. It cannot consider the appropriateness of listing (see section 4(3) of the Act). That is, 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 with children or vulnerable adults, is a matter for the DBS.

...

55. Section 4(7) of the Act 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)”. It is neither necessary nor feasible to set out precisely the limits on that power. The following should, however, be borne in mind. First, the Upper Tribunal may set out findings of fact. It 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, an 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.’

50. Therefore, the Court of Appeal in *AB* at [43] considered that the assessment of risk is essentially a matter for the DBS unless factually or legally flawed ie. premised upon a mistake of fact or in itself irrational or unreasonable.

Proportionality

51. In relation to whether it is “appropriate” to include a person in a barred list, the UT has no jurisdiction nor power to intervene. This is clear from s.4(3) of the Act and relevant case law as set out above.
52. The scope for challenge on appeal is effectively limited to a challenge on proportionality or rationality grounds. The starting point is that the DBS is well-equipped to make safeguarding decisions of this kind (see *AB* at paras 43-44, 55 & 66-75).

53. The proper approach to proportionality in barring appeals was conveniently summarised in the recent case of *KS v Disclosure and Barring Service* [2025] UKUT 045 (AAC):

a) Whether a decision is disproportionate is an issue of law: *R (Royal College of Nursing) v Secretary of State for the Home Department* [2011] PTSR 1193 at [104] and *B v Independent Safeguarding Authority (Royal College of Nursing intervening)* [2013] 1 WLR 308 at [14] (para 46).

b) In *Wilson v First County Trust (No 2)* [2004] 1 AC 816 at [61], the House of Lords decided that the test has to be applied ‘by reference to the circumstances prevailing when the issue has to be decided.’ In DBS cases, that means the date of the decision under appeal: *SD v Disclosure v Barring Service* [2024] UKUT 249 (AAC) (para 43).

c) Proportionality is distinct from appropriateness. This means that proportionality sets the limit to what may be appropriate. It is never appropriate for DBS to make a decision that is disproportionate. It does not, though, occupy the whole space covered by appropriateness. In other words, DBS need not find it appropriate to bar just because it would be proportionate to do so (para 47).

d) As Lord Neuberger explained in *In re B (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 at [84], it is well established that a court entertaining a challenge to an administrative decision, i.e., a decision of the executive rather than a decision of a judge, must decide the issue of proportionality for itself – see the statements of principle in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, paras [29-30] and [63], and in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, paras [12-14], [24-27], [31], [42-46] and [89-91] (para 48).

e) As safeguarding appeals under the Act are a first judicial consideration, the UT may consider proportionality for itself (para 48).

f) In carrying out its assessment of proportionality: the Upper Tribunal is not undertaking a rationality or Wednesbury assessment. It is not concerned with the process followed by DBS (para 50).

g) The Upper Tribunal must have regard to DBS’s statutory role as the primary decision-maker. This is consistent with the Upper Tribunal having to decide proportionality for itself. It makes the decision but takes account of DBS’s analysis when doing so (para 53).

h) The Upper Tribunal must make its own analysis of proportionality, but in practice it will have the benefit of argument from the parties, at least if the appellant is represented (para 54).

i) In determining proportionality, Lord Reed’s four stage test from *Bank Mellat v Her Majesty’s Treasury (No 2)* [2014] AC applies:

(1) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right (DBS’s objective, in the most general terms, is to protect children and vulnerable adults from harm by those entrusted with their care in regulated

activity. That objective is sufficiently important to justify interfering with the barred individual's exercise of their Article 8 Convention right (para 58);

(2) Whether the measure is rationally connected to the objective (DBS's decision under the barring scheme prohibits the barred individual from engaging in regulated activity, which is rationally connected to the objective of the scheme (para 59);

(3) Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective (DBS has no power to limit the extent to which the bar applies. It cannot apply a temporary bar while it investigates the case or limit the scope of the bar to specified types of regulated activity. Nor can it permit a person to engage in regulated activity but subject to conditions. The trigger for acting is governed by SVGA. It may not include a person in a list unless and until the statutory conditions are satisfied, but once they are satisfied, DBS is under a duty to include the person in either or both lists (para 61);

(4) Whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (This involves a balancing exercise between the severity of the effects on the barred individual's exercise of their Article 8 Convention right and the importance of the objective of barring them from regulated activity. This is a matter of judgement (para 71).

54. It was said in the *Belfast City Council* case that '[i]f [a] local authority exercises [a] power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights' (per Lord Hoffman at [16]).

Mistakes of Law

55. When considering appeals of this nature, the UT "must focus on the substance, not the form, and the appeal is against the decision as a whole and not the decision letter, let alone one paragraph...taken in isolation": *XY v ISA* [2011] UKUT 289 (AAC), [2012] AACR 13 (para 40). When considering the Decision, the UT may need to consider both the Final Letter and Rationale Document ("Barring Decision Summary"). The two together, in effect, set out the overall substantive decision/reasons (see *AB v DBS* [2016] UKUT 386 (AAC) (para 35); *Khakh v ISA* [2013] EWCA Civ 1341 (paras 6, 20, 22)).
56. Classic statements of law such as that in *R(Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 make clear that materiality (or procedural fairness) is an essential feature of an error of law and there is nothing in the Act which provides a basis for departing from that general principle (*CD v DBS* [2020] UKUT 219 (AAC)).
57. The DBS is not a court of law. Reasons need only be adequate. DBS does not need to engage with every potential issue raised. There are reasonable limits, too, in practice, as to how far DBS needs to go in terms of any duty to "investigate" matters or to gather further information, etc, itself.

The UT's powers to grant remedies on allowing appeals

58. If the UT finds that the DBS made a material mistake of fact or law under section 4(2) of the Act, it is required under section 4(6) to either (i) direct that the DBS removes the person from the relevant list(s) or (ii) remit the matter to DBS for a new decision. Where the UT does the latter, the UT may, under section 4(7), set out any findings of fact, which it has made, on which DBS must then base any new decision. Following *AB*, the usual order will be remission back to DBS unless no decision other than removal is possible on the facts.

The grounds of appeal and the Appellant's submissionsSubmissions on behalf of the Appellant

59. The Appellant was granted permission to appeal on the grounds of appeal set out in her notice of appeal and those additional points of law identified by the UT as set out above.
60. In submissions for the hearing drafted by counsel dated 31 July 2025, the Appellant relied on the following summary of grounds:
- i. Critical in this case is whether as a matter of fact, the Appellant struck a service user while carrying out their work in support of a vulnerable adult service user. A secondary question, if an assault did occur, is the level of risk of relevant conduct occurring again.
 - ii. PC made errors of fact and law some of which DBS failed to address in the period from which it first got a Referral to the time of its final decision.
 - iii. The DBS itself made at least one material mistake of fact.
 - iv. The DBS made at least one error of law in coming to its final decision and the barring outcome.
 - v. The barring outcome concerning work with vulnerable adults and partly based on the DBS perception of current or future risk was unfair to MOO and disproportionate in all the circumstances.

Barring Decision Process – unreasonableness and disproportionality

61. Mr Masemola submitted that the barring decision process was unreasonable and disproportionate such that there was a mistake of law. He submitted that the threshold of *Wednesbury* unreasonableness is satisfied by careful examination of the DBS documents and following headings therein: Establishment of Relevant Conduct and the Structured Judgement Process - Cognitive factors – Harm, Supportive thinking; attitude and beliefs.
62. On both counts he submitted the DBS made an erroneous assessment which led it to consider MOO harmful and a risk to other service users. This was made on an irrational, unfounded and perverse basis.

Mistake of law – procedural fairness

63. He also submitted that there had been a mistake of law in relation to procedural unfairness. The DBS needed to oversee fairness in establishing facts in the investigation and disciplinary process; there should be no lapses in fair process and there should be adequate and proper provision of information to a person who is under investigation or is in a disciplinary environment. He made the following points:
- i. MOO as an employee of PC at the relevant time, had been with the employer for a period under 2 years and so would not have the s.94 statutory right - not to be dismissed unfairly (s.108 Employment Rights Act 1996). By acting before the end of the qualifying period an employer can divest themselves without comeback or retribution, of new staff no longer required or considered problematic.
 - ii. Even if MOO had not worked two years, an employer is duty bound to follow principle of fairness and reasonableness in the workplace under the non-statutory ACAS Grievance and Disciplinary Guidelines.
 - iii. Determination of whether RR was hit by MOO is crucial in this case because so much hangs on that question. Yet the employer refused to interview RR when she had capacity. For that reason, the investigation could not be described as thorough.
 - iv. In addition, the employer needed to avoid the same people featuring more than once in the disciplinary process. When the email about the incident was sent by either BB or MJL to EO on 5 February 2025, JH was copied in. Both JH and EO featured and conducted fact finding interviews of three staff excluding RR in March 2023. JH asked EO for any comments even though she was simply meant to take notes, not ask staff questions. JH also conducted an appeal meeting and made the final appeal decision. EO attended the police interview with RR. It was noted EO “filled in the gaps” when RR was interviewed by the police. There is therefore the possibility of bias due to EO and JH featuring multiple times in the adjudicatory process.
 - v. The DBS did not comment on the obvious anomaly that the incident occurred on 5 February 2023. MOO had had investigatory interviews; suspension, and summary dismissal by 1 March 2023. Only when she appealed were fact-finding interviews of three staff conducted. It is not clear when those interviews took place as the date on the front of the unsigned headed papers was 21 March 2023 but the date adjacent to EO’s name in each case was 27 March 2023, coincidentally the date of the internal appeal against dismissal.
64. Mr Masemola submitted that there had been flaws in the fact-finding investigations and disciplinary process. There are reasons to doubt whether the Appellant deliberately struck the Service User or struck her at all. MOO was trained in safety procedures and would be averse to any physical struggle with RR knowing her behavioural patterns.

Mistake of fact

65. Mr Masemola contended that the finding that the Appellant lacked empathy flies in the face of material evidence and as was the finding of callousness and harmful behaviour – these were all based on a mistake of fact.
66. He argued that the history of MOO's dealings with RR is remarkable – in a period up to 8 months – she claimed no-one among the staff had suffered more from beatings, biting, or being chased by RR, a young adult. Nonetheless, MOO had developed a rapport with RR including acting as a hairdresser for RR to increase her self-esteem. MOO applied the Restraint training (RRN) that she was given, so she knew when RR was 'kicking off' and needed to be approached with care. On her mother's admission MOO stayed loyal in supporting RR throughout her time at the Home.
67. With regard to the alleged assault, RR did not say anything to her parents about MOO hitting her when she got into the car after incident and when RR immediately stated she had hit the Appellant and had apologised to MOO for it. The parents were incredulous when they later heard from another source about MOO allegedly hurting their daughter knowing that RR would have told her parents if it happened. On the index date, MOO after being hit by RR patiently accepted her apology, ending the fracas over getting weighed. Then, in a forgiving way, MOO let RR input the weight into the weighing App on her mobile phone. Surely that act alone arose from empathy.
68. Mr Masemola submitted that it was equally incomprehensible that MOO having fallen pregnant after trying for a baby for 5 years and being a dedicated member of staff, would endanger RR, the daughter of people she got on well with, in an unprofessional retaliatory strike against a service user, which could have provoked more violence and endangered the baby she was carrying.
69. In support of his argument that the finding of relevant conduct was based upon a mistake of fact, he relied on the following reasons undermining the credibility of the alleged assault by MOO on RR at the Home on 5 February 2023:
- i. MOO from the very outset narrated she was the victim of an aggressive assault from RR, but she did not retaliate. When either BB or MJL told MOO she had hit RR, she immediately replied to that member of staff that she had not hit RR. MOO's training would require MOO to retreat but she could not do so quickly as the kitchen door adjacent to her was closed.
 - ii. As stated in her email on 5 February 2023 to EO, MOO declared she did not hit RR.
 - iii. She had been RR's personal support worker for many months and was familiar with RR's aggressive and unpredictable behaviour. There had been many incidents with RR including; MOO being the recipient of biting, hitting and racist abuse in the past, and in such incidents MOO sometimes had to run into the garden to escape from her.

- iv. After trying to get a child for five years and knowing she was four weeks pregnant she did not wish to risk the pregnancy by any further altercation with RR after she was hit on the chest with the scales on the chest and arm.
- vi. The fact-finding episode with the two support workers contains instances of leading by JH and contradictions with earliest written statements. For example, on 5 February 2023, MOO is said to have “*ran after RR*” before hitting her on the back; but in March six weeks later, it was recollected that MOO walked “*one or two steps* towards RR.”
- vii. The Care Plan which MOO was familiar with contained information about RR intermittently making false accusations against staff. It was not referred to.
- viii. RR’s mother referred in her statement to MOO’s commitment to RR. As parents she and her husband experienced episodes especially during the Covid period when their daughter was so difficult or violent that police were called.
- ix. It was said that there was a loud bang, when RR was struck. Neither the employer nor the DBS questioned what the true nature of the sound was or its source. Nor does it appear there was any reasonable enquiry into how a blow on the shoulder would make a “loud bang” as opposed to a thud. The question was could the bang have had another source?
- x. There was a voice message from Team Leader Z to MOO exonerating her from any wrong-doing, and a WhatsApp message indicated that after MOO’s suspension and dismissal a member of staff in the Home contacted MOO to say they too had been attacked by RR and falsely accused leading to their suspension, but management had conducted an interview with RR, (in a process not followed in MOO’s case over the incident with RR).
- xi. As already submitted, the original statements of the two staff witnesses, BB and MJL have inconsistencies and so do the fact-finding interview statements on 21 or 27 March 2023. The default position that three witnesses agreed the service user was hit, is not so clear-cut. It leaves sufficient room for doubt to the degree the testimony cannot be regarded as reliable even on a balance of probabilities, that MOO struck RR in a defenceless stance as she walked away.
- xii. The parents of RR had a good rapport with MOO. There was frequent communication and gratitude expressed for MOO persevering and supporting their adult child despite her particularly challenging behaviours. They were told by RR she hit or hurt MOO and she apologised to her for it on 5 February 2023. There was also a rapport between MOO and RR to the extent that MOO allowed RR to enter her weight on the Nourish App on her phone after she came and apologised for hitting MOO that Sunday. It is counterintuitive to suggest a person who must have forgiven her many times would hit RR on her back while she was walking away that morning, soon to be picked up by her parents.

- xiii. The Appellant did not have any blemishes on her work record until the index event and having worked in the sector before, it is not apparent, she had any previous record of misconduct as a care worker.

Facts Found

Evidence received and approach to evidence

70. The DBS relied on written evidence from witnesses and notes of the incident or reports of meetings contained in the bundle of evidence it filed and served which contained 184 pages. The bundle included all the material relied upon by the DBS in making the Decision and in defending the appeal as well as all of the material provided by the Appellant.
71. The evidence relied on by the DBS included: that from the Appellant's former colleagues BB and MJL; internal disciplinary, fact-finding and dismissal meetings; investigation reports and appeal proceedings conducted by managers on behalf of PC; emails and Whatsapp messages of what witnesses and MOO had said; correspondence; and a witness statement from a police officer.
72. As we note below, none of the eye witnesses relied on by the DBS made formal witness statements containing statements of truth, nor gave oral evidence nor were cross examined. Their evidence was made up of written reports from internal investigations and meeting, notes or correspondence and therefore contained untested hearsay. This is a matter to take into account when considering its reliability and the weight it is to be given.
73. The Appellant relied upon: her witness statement; contemporaneous accounts given in correspondence and disciplinary proceedings; the witness statement of witness LR; representations sent to the DBS; and oral evidence given to the Tribunal by the Appellant and LR. In contrast to the DBS witnesses, the Appellant gave oral evidence and was cross examined, as was witness LR. When considering its weight, we take into account that the Appellant's evidence was tested.
74. We have examined all the evidence in the case with care, both that which was before the DBS and that provided by the Appellant as part of her appeal (most of which was not available to the DBS at the time it made its Decision). We have not found it necessary to refer to every document. It goes without saying that all subsequent written and oral evidence of the Appellant was not available to the DBS when making its Decision.
75. We make findings of fact on the balance of probabilities as set out below. In light of these, we consider whether the DBS made mistakes of fact in accordance with the approach set out in *PF v DBS* and *DBS v RI*. The burden of proof remained on the DBS when establishing the facts and making its findings of relevant conduct in its barring decision. Thereafter on the appeal to the UT, the burden was on the Appellant to establish a mistake of fact (see *PF* at [51]):

‘The starting point for the tribunal’s consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker.’

76. Furthermore, the UT stated in *PF*:

‘In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.... In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it...The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS’s factual findings in matters that engage its expertise.’

77. However, it is not within our jurisdiction, when considering whether there have been mistakes of fact, to make our own evaluative judgments as to risk (for example, whether there would be a risk of repetition or future harm). The proper evaluative judgements which should be made based upon the primary facts found are a matter for the DBS as the expert risk assessor. We would not interfere with risk assessments made by the DBS unless such judgments are based upon mistakes of primary fact or are irrational (contain a mistake of law).

78. We make findings of fact – both of primary facts and secondary facts (inferences from primary fact). We make the following findings on the balance of probabilities.

Appellant’s evidence

79. MOO was one of the two witnesses from whom we heard oral evidence. We found her to be witness whose evidence was reliable on peripheral matters but not as far as her evidence on the core allegation of punching RR.

80. We do not accept MOO’s written or evidence that she did not punch RR. We reject her key denial as being unreliable on the balance of probabilities. This is for the reasons set out below.

81. We begin by setting out the email that MOO sent to her manager EO on the evening of the incident as it her most contemporaneous account:

“Date: 5 Feb 2023 7:54 pm
Subject: Re: **S House Incident - 05/02/23.
To: EO
Cc:

Hello Emma,

Thank you for your concern and sorry for the late response. The pain reliever I was given had a drowsy effect and I had to take a break from my phone.

Find below my account of the incident and Night Shift with RR

The Night Shift started 19:30pm, RR slept at about 23:00pm and woke up at 6am. She was in her room talking to herself, I went in to meet her, we greeted and chatted a bit as she spoke of all her obsessions before I prompted her to observe her personal care. At about 07:30am, I offered RR a breakfast of coco pops and with the assistance of the morning staff as they arrived at about that time (BB and MJL).

After that, I went upstairs at about 07:35am to get the scale, when I got back, I came in through the kitchen door into the lounge. I was removing the scale from the pack when I prompted RR to come check her weight. She screamed and shouted saying I am not checking my weight, she charged towards me and quickly grabbed the scale of my hand, I was standing at the kitchen door which was shut and there was no room for escape at the moment. She got hold of the scale and hit me the first time on my chest, upon raising the scale the second time to hit me, I barricaded my body with my palms out and both arms crossed side by side. She hit me a second time this time on my arm/ palm.

All the while, the two day staff were sitting down on the dining area and did not intervene or try to de-escalate the situation. RR dropped the scale on the table and angrily walked out of the lounge door into the hallway and went into the second lounge to meet TB's staff complaining to them that I said she should check her weight when she has a doctor's appointment on the 15th of February, 2023. I could hear the conversation from the lounge while I was packing up the scale, one of the day staff (MJL) said to me that I hit RR, I said that I didn't and I was in pains from the impact of being hit with metal end of the scale. MJL did not further comment. The second day staff (BB) did not make any comment at all as she was on her phone.

TB's staff encouraged her that the weight check is one of the task to be done. She returned to the lounge and I asked her gently again if she will want to check her weight again. She accepted and climbed the scale, we checked the weight together and she assisted with recording it on Nourish. I and RR had a brief chat before the end of my shift and she apologized for hitting me asking me not to write an incident report all these conversation were made in the presence of the day staff and to their hearing. I also did a handover to the day staff and ended by shift at 8am.

If you need any more information, kindly let me know.

Warm regards"

82. The contents of MOO's witness statement dated 17 June 2025 stated as follows:

"2. I am a dedicated care professional and have worked with vulnerable service users, including adults and children with special needs for three years.

3. At the time of the incident, I was employed by PC and was supporting a service user referred to as RR, a young adult with complex needs.

4. I am a mother and was pregnant during the incident. I have a personal understanding of the vulnerability of children and those with additional needs. I take my professional duties seriously and have always acted in the best interests of the individuals I support.

5. The referral to the DBS arose from an allegation that I had assaulted RR during a shift. I categorically deny this allegation.
6. RR is known to be verbal, expressive, and capable of giving a detailed account of her experiences. However, in this instance, the manager, EO, assisted in formulating RR's statement. The police report clearly notes that EO filled in the gaps for RR.
7. RR's Care Plan, which I had stated during the internal investigation, records that she has a history of making false allegations against staff. This information was not appropriately considered by either my employer or the DBS in reaching their conclusions.
8. On the day of the alleged incident, RR voluntarily told her parents, without pressure, that she had hurt me and was sorry. This was said before police were involved and in the absence of staff, which means that her statement was spontaneous and truthful.
9. Her parents are a stable support system, and their account of RR's first reaction should have carried significant weight. RR's mother is also preparing a witness statement for this appeal which corroborates this account.
10. I also possess an audio voice message from the Team Leader, sent to me after the incident, in which she absolves me of assaulting RR. I seek to include this audio message in the appeal bundle. It evidences that internal management at the time did not believe I committed any misconduct.
11. There was a witness, a staff member who interacted with RR immediately after the incident. Despite my repeated requests, the staff member's account was only taken very late and finally disregarded. The screenshots of the staff conversations which further support my innocence are in the index bundle.
12. Prior to the incident, I had raised concerns about EO's professional conduct, including the sharing of sensitive service user information via WhatsApp and improper communication of medical details. I raised this issue during a supervision session with the Team Leader.
13. Emma expressed dissatisfaction after I raised these concerns. Since then, I experienced several forms of victimisation from her, including the exclusion of favourable evidence and the manipulation of investigation procedures.
14. A current staff member recently contacted me to share a disturbing incident involving RR. According to the staff member, RR had accused her of hitting her. In response to this allegation, EO conducted an interview with RR and determined that RR had the capacity to be interrogated in relation to the matter. This is in contrast to how EO assessed RR's capacity in my case, where she concluded that RR lacked such capacity. The contrary assessments show a clear inconsistency and bias in how capacity was determined, apparently influenced by who the accused was. Unlike the other staff member, I was not afforded the same level of procedural fairness.
15. A copy of the WhatsApp chat between myself and the staff member has been included in the case bundle.
16. Also, RR's mother personally informed me that EO had made her aware of the incident and that the matter had been reported to the police. She also described how RR appeared distressed during the conversation, and expressed fear that she might be in trouble, which made her to apologise to me directly. This shows the level of emotional response from RR and the

seriousness with which the allegation against the other staff member was addressed in contrast to the lack of fairness and consistency that I was given during the handling of my case.

17.1 believe the swift decision to implicate me was partially driven by bias and retaliation due to my earlier whistleblowing, and not an objective assessment of the incident.

18. My union representative and I pleaded with management to allow RR to be interviewed, as she has the mental capacity to give a clear account of what occurred. This request was repeatedly refused.

19. At no stage was I offered formal post Incident support by my employer, despite being pregnant and reporting physical pain. I had to attend A&E myself following the incident.

20. The DBS decision appears to have relied exclusively on the EO's account and those of two staff members, without assessing my version or RR's family's initial reports. This indicates a presumption of guilt and disregard for the burden of proof,

21. The decision further stated that my apology was not sufficient and lacked empathy. I would respectfully state that it is difficult to apologise for something I did not do, as it would amount to an admission of guilt. However, I deeply empathise with RR and all vulnerable service users that I have supported.

22.1 am a compassionate and caring professional who has always placed the safety and dignity of service users above all. I have worked diligently and faithfully in my role and have never before faced disciplinary action or safeguarding concerns.

23. The trauma of this accusation, combined with the lack of support and the loss of my career, has had a significant emotional and financial impact on me and my family.

24.1 respectfully request that the Tribunal reconsider this matter in light of this witness statement and also the following:

- i. The audio message from my Team Leader exonerating me.
- ii. The witness statement from RR's mother confirming RR's admission and apology.
- iii. Screenshot of RR's statement to parents
- iv. Screenshots of internal staff conversations
- v. RR's history of false allegations.
- vi. The procedural unfairness of the investigation and lack of direct testimony from RR."

83. MOO gave extensive supplementary evidence in chief. The most relevant oral evidence related to her account of the incident. In summary, her evidence was as follows.

84. On the morning in question, around 7.30am on 5 February 2023, MOO was ending a night shift with the two other staff, BB and MJL, coming to take over. RR, a vulnerable service user, was under MOO's care. RR had a GP check-up scheduled for 10 days later so MOO wished to check RR's weight. MOO, RR and the two other staff were in the combined dining room and lounge, all close to each other. MOO was unpacking the weighing scales by removing them from the box when RR rushed towards MOO and grabbed the scales from MOO and hit MOO on the chest and MOO raised her arms and hands to protect her face and stomach. RR then hit MOO's hands with the scales when MOO's hands and forearms were crossed in front of her face. RR then threw the scales down on the table and it made a noise as they were bathroom scales made of metal. After throwing down

the scales, RR ran out of the room and went to the other lounge and went to another member of staff. MOO took the scales that RR had dropped to prevent any further harm.

85. The two other members of staff, BB and MJL, were behind MOO during the incident and leaning on the radiator as it was cold. No one was between them and MOO. They were about ten feet away from MOO. BB and MJL stood there and did not move from their position or help her. One of them was on her phone and MOO did not know what the other was doing. They would not have been able to see RR's back as MOO was between them. One of them did not say anything but the other, MOO thinks MJL, said MOO hit RR. It may be that MJL had thought MOO raised her hand so that is why she thought that MOO had hit RR. However, MOO did not register precisely what MJL was saying as MOO was in pain and was just rubbing her hands and forearms. MOO did not say anything in reply to MJL. When MOO was struck on the hands and arms, RR left. MOO was just rubbing her hands and forearms in pain and panting as her hands were hurt. RR was about five foot five inches tall, taller than MOO, and of a large build.
86. After the incident RR had gone on to the other lounge and to another member of staff who told RR she should not have hit MOO and that member of staff came to see MOO. MOO did write the incident down in a report although afterwards RR came to her apologising and begging MOO not to write it up. RR was telling MOO not to use her phone to enter the incident into the Nourish system. MOO wrote the report on the app called Nourish. It took her around 10-15 minutes as RR was following MOO around the building arguing with MOO not to write a report.
87. MOO finished her shift at 8am and then went home. She did not wait to speak to the team leader who would arrive at around 9am. When MOO got home and tried to lie down she was in pain and still panting, she called 111 to tell the operator she was hurt and also pregnant and scared about her baby. The operator told MOO to come into the hospital see the doctor. She visited L Hospital and they noted there was pain in her hands and MOO was recommended to take pain medication.
88. RR had a history of making false allegations against staff. RR was friendly with MOO when in a good mood but when she was angry RR could fight and hit and punch MOO and do bad things. Whenever RR was calm again she would apologise. They mostly got on with each other and RR allowed MOO to dress her hair and get closer than any other staff that worked with her. There had also been previous incidents when RR had hit and dragged and punched MOO. MOO had received training to deal with restraint and how to break away from RR and deescalate incidents by keeping a distance from RR. In this incident however MOO could not walk away as she was trapped between the door, dining table and chair. MOO noted that her employers and manager only interviewed the two staff and did not take a statement from RR about the incident. She noted that the manager EO assisted in formulating RR's statement to the police and filled in the gaps for RR. RR bruises easily so the fact that there were no bruises on the body map supported MOO's account that she did not hit RR.
89. MOO was cross examined by Ms Hartley for the DBS. She gave relevant evidence summarised as follows.

90. She thinks that BB was lying about what happened – BB originally said that MOO took a couple of steps and then hit RR on the back with a closed fist on the little finger ('pinky') side. BB had originally said MOO ran and then said that MOO took a couple of steps. The two staff, BB and MJL, are Filipino and MOO believed they were motivated to make up an allegation against her because she had previously said that Filipinos were of average height. They were angry with MOO and she apologised to them at the time but noticed a cold response from them and so they did not talk to her anymore. MOO never said anything offensive about them or Filipinos.
91. MOO accepts she did say in her minded to bar representations to the DBS that she might have unintentionally made contact with RR's back. She did say she probably touched RR's back but she did not know if she had. When MOO spoke to her union representative, and in response to their enquiries, MOO stated she raised her hands but maybe when she turned and followed RR, she may have unintentionally touched RR when she got the scales back from her. It may be that the witnesses who said MOO's hand touched RR's back were right but MOO never hit or intended to hit RR. She raised her hands across her hands and face to defend herself. She definitely did not punch RR's back. MJL was lying like BB. The pair used the opportunity on the day to make up a lie about her – they spontaneously decided it was an opportunity to get revenge on her. It was malicious. EO also filled in the gaps during RR's police report. MOO had complained to a team leader about EO posting personal information about service users on the team Whatsapp groups and creating a lot of Whatsapp groups and not following the employer's instructions not to do so. EO wanted to get rid of her and what EO was wrote was different from the RR's police statement. MOO never hit RR out of frustration or in return for the fact that RR had hit her with the scales.

LR's evidence

92. LR is RR's mother. She provided a witness statement and gave oral evidence in support of MOO. Her witness statement includes the following:
- "2. I have offered to support MOO by providing this written statement based on what my husband and I witnessed and were told in relation to the incident on Sunday 5th February 2023.
3. On that day, as part of our weekly routine, my husband and I went to the Home to collect our daughter, RR.
4. When RR got into the car, she said spontaneously, I hit MOO. She then added something like, I said I was sorry. or She has forgiven me.
5. Later that day, possibly after attending a church service, although I do not remember exactly, the house manager, Ms EO, phoned my husband to inform him that there had been an incident.
6. RR became distressed during that call and expressed worry that she was in trouble. Ms EO wanted us to reassure RR, that she was not in trouble.
7. Ms EO went on to state that it was MOO who had allegedly hit RR and that the matter had been reported to the police.

8. My husband, who holds Power of Attorney for RR jointly with me, attended a meeting a few days later where he informed the police officer involved in the case that we would not be pressing charges. We know the police officer personally, as he was our next-door neighbour as a child, and had attended primary school with RR. We believe he is familiar with RR's learning disabilities and autistic needs since childhood.
9. My husband and I were both confused by the entire situation. Based on RR's personality, she is usually very quick to report if someone has upset or hit her. It was surprising to us that RR did not show such concern in this incident.
10. We also wish to express that MOO had been an extremely dedicated and patient member of staff since she started working with RR, around February 2022. During the difficult period following the national lockdown, RR's behaviours had increased significantly, many of them physical. Despite this, MOO showed continued care, perseverance, and kindness.
11. In fact, MOO's support helped RR build a sense of trust and security, and we as parents were deeply appreciative of this.
12. We were later informed by another member of staff that the incident may have occurred during a disagreement about RR needing to be weighed, which she refused. This is not uncommon given RR's needs, and again we believe MOO handled such challenges with patience.
13. MOO also made special efforts to build a bond with her hair, something which RR really enjoyed.
14. I personally provide this statement to explain MOO's role in this matter, and the nature of her relationship with our daughter, which we have always seen as positive."
93. LR gave extensive supplementary oral evidence in chief expanding upon this statement. It was all consistent with the statement and included reference to the Whatsapp messages she sent to MOO checking if MOO was ok and assuring MOO of her gratitude.
94. LR was not cross examined by Ms Hartley. This was on the basis that LR had not been present during the incident and could not give any direct evidence.
95. We are satisfied that LR was an honest and reliable witness. We were impressed by her and are very grateful that she attended the hearing and gave oral evidence, particularly how sensitive and stressful it would have been to give evidence about her own daughter and RR's behaviour to others and its impact. Nonetheless, we were not able to place weight on LR's beliefs that RR would have reported to her if she had been hit by MOO or that MOO would have been patient and not have hit RR in return. This is because LR was not present to witness the incident and did not have the benefit of being a direct witness. We accept all the other evidence she gave.

Voice note of team leader Z

96. We listened to the voice note recording from team leader Z who had called MOO. Z said that RR hurt MOO and the employer should question the girls (BB and MJL). Z said that RR says that she (RR) was the one that hit MOO and that the employer needed to ask questions about that part.

97. Again, we were not able to place any weight on this recording as it was simply a hearsay account, albeit from a team leader, purely based on what Z had heard from another about the incident. Z was not present as a direct observer nor witness to the incident.

Findings of fact

98. Based upon all the evidence considered above we make a finding of fact that the finding relied upon by the DBS, and as set out in the Decision, is established on the balance of probabilities:

- On 05/02/2023 whilst employed as a Support Worker for [PC], MOO struck service user RR on her back with her fist.

99. The Appellant has not established any mistake of fact in relation to the DBS's finding. There is no dispute that it amounts to a finding of relevant conduct as a matter of law (causing harm to RR). In coming to this conclusion we have had regard to the following evidence, facts and reasons:

a) There are two largely consistent direct eyewitnesses to the incident, BB and MJL, each of whom gave internally consistent and contemporaneous accounts that MOO punched RR on the back. Even though they have not been cross examined, we consider that they are reliable. BB and MJL each gave written accounts by email no more than five hours after the incident on the same day, 5 February 2023 and before MOO gave her account. Their emails were as follows:

“11.26am

On 5th of February 2023, we arrived in front of S House around 7.25am. We heard RR inside her lounge area with a loud and agitated voice. When we walked inside, RR went to us and greeted ‘Good Morning’ with unhappy and low tone voice. And she goes back to the daily topic about her obsession while walking to her lounge.

...I went to the lounge and MOO asked me to get a laundry pod and weighing scale upstairs. But in only brought the laundry pod because I did not find the scales. So that time MOO look for it and brought in the lounge area. When RR saw it, she get mad and shout that she doesn't want to do it. She runs toward to MOO and grab the scale with a force.

I knew MOO get hurt because I heard the ‘Aww/ouch’. Then RR walked back with the scale and then MOO hits her on the back.”

“12.13pm

Good day to you EO,

I am writing this email to you due to the me incident What we witnessed this morning that involves service user and the night shift staff. My apologies but I can't remember that exact time it happened all I know was that it was around 7:30am to 8am.

When it was time for her weight to be checked, MOO went upstairs to get the weighing scales to weigh her, RR was very angry, screaming and shouting telling why she needs to check her weight

today then RR suddenly ran towards her and tried to grab the scaled was there on the radiator side and I was not able to see the whole scene if RR really hits MOO on her arm , things happened so fast.

When RR turned around MOO ran after her and hit her on her back (left side upper part). RR went to TB's lounge to complain to TB staff then the TB staff eventually was able to encourage her to do it and RR finally agreed but insisted that she has to record it her self so, MOO gave her cellphone so RR can record it....”

b) BB and MJL went on to give further, more detailed accounts, over time to the employer which were equally consistent such as those given on 21 March 2023 [51]-[54].

c) In the transcript of BB’s fact finding interview dated 21 March 2023 at [51-52] BB stated: ‘So MOO asked RR to do the weighing and RR was very angry. So MOO went and got the weighing scales from upstairs and brought them downstairs. Eventually things all happened so fast. RR was starting to grab the scales from MOO and then I was on the radiator side...MOO is by the door (the door to the kitchen) and MOO is to the side of me and RR is on her sofa. She came straight towards us, she garbed (sic) the weighing scales but, I cannot remember whether she hit MOO’s hand/fingers or anywhere else. All I heard was an “ouch”....RR went to get the weighing scales, she went towards the door exit. At this time they had swapped places during the altercation. RR went to exit through the other door. RR had her back to MOO and this is when I saw MOO hit RR on the back. It was about two or three steps...(BB demonstrates a closed fist, and explains that it was on the pinkie side and explains that she saw MOO hit RR). It was a big punch to the back....My colleague challenge (sic) MOO and said that she had seen her hit her’ (Flag 10 – [51-52]).

c) In the transcript of MJL’s fact finding interview dated 21 March 2023 at [53-54]: ‘...Scale went with some force like this one (MJL described a hand and indicates the area between the thumb and the first finger to where the corner of the scales, caught MOO) But she didn’t hit MOO with the scale...I was in front of them at this point and I was looking at them...[MOO] stepped in and (maybe one step/two) and then hit her with her fist on her back, like this (MJL demonstrates with a clenched fist, on the pinkie side referring to the little finger, hitting RR on the upper back)...we heard a loud bang on the back...I just told to MOO “you just hit her”. When RR was in the lounge, I told MOO that you hit her...’ (Flag 11 – [53-54]).

d) EO’s notes of home visit by police dated 7 February 2023 [38] reveal that RR did make a direct and relatively contemporaneous complaint that MOO assaulted her: ‘The Police Officer asked [RR]if she was able to talk to him about what happened? [RR] explained that (“a staff member/name disclosed to the Police by [RR]”) had hit her on the back and that she did not like what happened to her (sic)’ (Flag 3 – [38]). It is unlikely that EO made a false note of the meeting between RR and the police or ‘filled in the gaps’. The motive for EO to lie (because MOO says she complained about EO’s use of Whatsapp groups) is not a likely explanation. It is not likely EO would associate herself with a conspiracy by two other members of staff, BB and MJL, to pursue a false allegation against MOO.

e) Furthermore, there is the handwritten signature of RR [37] in the police officer's notebook beside RR's statement that 'I do not wish to take further action. I don't want that person to get into trouble. I don't want to blame her for it.' This is beside the signature of RR's father underneath the statement 'I do not wish to support police action. We are aware that RR does have challenging behaviour at times. This has been less over recent months. We don't wish to take further action.' This evidence plausibly supports a reason why RR did not wish to pursue a complaint.

e) The suggestion by MOO that BB and MJL might have been motivated to lie because of a remark she made about women of Filipino heritage being 'of average height' (MOO representations – [77] and oral evidence) is highly unlikely and implausible. It is hard to see what is even offensive about suggesting that women of Filipino heritage are of average height, let alone sufficiently so to prompt them to conspire with a colleague to falsely accuse someone of hitting a service user. It is also unlikely that they would both spontaneously seize on the incident to fabricate a false allegation immediately at the time.

f) In so far as MOO also appears to suggest that BB and MJL might have been motivated to lie because they did not intervene to assist MOO during the incident in question, the observation is made that in their fact finding interviews BB and MJL were both perfectly open about not having intervened. MOO accepts that BB and MJL were present in the room when the incident with RR occurred (MOO representations – [76] and in all of her evidence).

g) MOO does not appear to dispute that MJL accused her then and there of hitting RR, saying only that this did not register at the time: 'I did not even register the comment made from one of my work colleagues who said she spoke to me and stated "you just hit her"' (MOO's oral evidence and response to *Minded to Bar* letter – [76]). This was a contemporaneous exclamation by MJL that she saw MOO hit RR and it supports the truthfulness and accuracy of MJL's later formal report of this.

h) MOO accepts that it is 'probable' or 'possible' that she 'made contact with RR's back', but insists that such contact was 'unintentional' (her oral evidence and MOO response to *Minded to Bar* letter – [77]). MOO has described in writing her hand movements as follows: 'I remember raising my hands to protect my face and stomach whilst walking towards the table to grab the scales...The reason I stretched out my hands was to try to protect my stomach whilst I quickly rushed towards the table to grab the scales' (MOO response to *Minded to Bar* letter – [76]). It is hard to see how MOO raising her hands to protect her face/stomach whilst moving towards RR to take the scales from her could result in her making contact with RR's back. This aspect of MOO's response to the DBS's finding, and oral evidence, suggests she may have hedged her bets in relation to BB and MJL's clear and consistent evidence of seeing her hit RR's back. However, it is also inconsistent with her initial account that she made no contact with RR's back and is also inconsistent with her primary account that BB and MJL are lying rather than mistaken as to what they may have seen. A reasonable inference is that MOO is prevaricating and that MOO is not prepared to 'nail her colours to the mast' (BB and MJL 'maliciously instigated allegations against [her]' as opposed to BB and MJL have mistaken MOO making inadvertent contact with RR's back for a deliberate punch).

j) The absence of visible bruising on RR's back does not assist as to whether MOO struck RR's back or not, given the many variables in play when it comes to the development of visible bruising.

k) RR's parents were not present when the events occurred and as such the position they have adopted in relation to MOO is of no real utility when it comes to resolving the evidential dispute in question. This is particularly so since RR striking MOO with the scales and MOO striking her back are not mutually exclusive occurrences. The same applies to the voicemail from the team leader Z.

l) It is not a surprise that RR did not initially volunteer or report to her parents that morning that MOO hit her but instead volunteered and admitted to her parents that she had hit MOO. As we have found, it is likely RR had hit MOO with the scales first and RR admitted as such to her parents. RR accepts in her written statement that she did not want to get MOO in trouble, and RR was probably more worried about being in trouble herself. This is unsurprising in the circumstances.

100. The most plausible and more likely explanation, as we find, is that contained in BB and MJL's detailed accounts of seeing MOO hit RR on her back with a clenched fist as RR had her back turned (and in MJL's case also hearing the sound of MOO's fist striking RR's back). It is likely that MOO lashed out in frustration after RR caused the weighing scales to hit MOO's hand and forearms (prompting MOO to say "ouch") and that BB and MJL saw it. MOO did not suggest she was acting in self-defence, rather she denies any deliberate punch to RR's back, and we find that she was not doing so when she hit RR. Instead, she did so in retaliation – out of frustration and anger at RR. This was made all the more acute because MOO was pregnant and concerned about the impact of being hit with the scales on her pregnancy.

101. We reject MOO's account, as set out in her correspondence and submissions to the employer and DBS and in her written and oral evidence to the Tribunal, as unreliable. We accept the DBS's case on the balance of probabilities in light of the evidence, facts and matters detailed above.

Discussion and Analysis

102. We begin by addressing the grounds of appeal on which the Appellant was granted permission to appeal before addressing the submissions as grounds of appeal pursued at the hearing.

Mistake of Fact

103. We do not find there to be any mistake of fact in the DBS's finding of relevant conduct for the reasons set out above.

Mistakes of Law*Inadequacy of the employer's or DBS's investigation*

104. We do not accept there was any material error of law in the DBS's barring decision based upon the complaints of procedural unfairness regarding the employer's investigatory and disciplinary processes. Any flaws in employment and dismissal process would be a matter for the employment tribunal in any challenge. The Appellant had an opportunity to give an account to the employer regarding the incident in response to the complaint and to appeal panel before the final disciplinary decision to dismiss her. The fact that RR was not interviewed by the employer and did not wish to pursue a criminal complaint is not material when she did give an account to the police which we have had an opportunity to consider together with all the evidence.
105. The same applies to the DBS's investigation and process. It reasonably considered all the evidence provided to it and was not under a further duty in the circumstances of this to conduct further investigations into the evidence. RR was interviewed by the police even if not by the employer and a record was made of her account but a wish not to pursue the matter. The DBS approached all the evidence reasonably in its Barring Decision Process document. In any event, any flaws in the process by employer or DBS would not be material. The Appellant had the opportunity to present all relevant evidence on her behalf to the Tribunal during the appeal proceedings. We have had the opportunity to assess all the evidence on this appeal, including the Appellant's oral evidence, and have taken into account the absence of oral evidence or cross examination of RR, BB and MJL. Nonetheless, we assess their contemporaneous accounts are reliable.

Failure to take account of relevant evidence

106. We do not accept that this ground gives rise to any mistake of law. The DBS did not fail to take account of relevant evidence considered MOO's representations regarding:
- a) The absence of visible bruising on RR (and its consistency with her denial of the conduct alleged).
 - b) MOO being struck with the scales.
 - c) Her colleagues not intervening.
 - d) The possibility that MOO inadvertently made contact with RR's back having raised her hands to protect her face/stomach.
 - e) The possibility that MOO caused offence to colleagues by making a remark about Filipinos.
 - f) RR's mother maintaining the view that MOO provided good care to RR (as evidenced by the supporting statement she supplied) and her belief that the allegations were 'odd'.
 - g) RR's admission to her parents that she hit MOO.
 - h) The unfairness of the investigation.
 - i) Inconsistency between the witnesses.
 - j) RR's reliability.

These matters are considered in the Final Decision Letter – [91-92] and Barring Decision Summary – [101-102].

107. The DBS was reasonably entitled to find the allegation proven on the balance of probabilities notwithstanding these representations given the evidence, facts and matters set out above. It made no error of law

Other errors of law

108. We do not accept that there is any mistake of law based upon the barring decision being disproportionate or irrational. We find that the Decision was proportionate and rational.

Irrationality

109. When reaching its decision, the DBS relied on a risk assessment that MOO may repeat her behaviour if she were allowed to work with vulnerable adults again in the future in circumstances where she had not fully acknowledged her harmful behaviour (FDL – [93]). In this regard the DBS noted that the circumstances in which MOO’s behaviour occurred are not uncommon in regulated activity.
110. Irrationality was described by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935 at [410] as follows:
- “By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness”. ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”
111. We are satisfied that the DBS risk assessment was not irrational – particularly in circumstances where MOO has continued to deny her conduct. Thus, she has demonstrated no insight or attempt to remediate the risk she poses. Since MOO continues to deny/minimise her actions, it follows that she cannot have fully reflected on or sought to address what drove that behaviour. The DBS was entitled to conclude that such a person may pose an ongoing risk to vulnerable adults in regulated activity. This cannot be described as being irrational or in defiance of logic, let alone to such a degree that no sensible person who had applied their mind to the question could have arrived at the same conclusion.
112. Even leaving aside the fact that unless a decision of the DBS is legally or factually flawed, the assessment of (and, by extension, solicitude about) the risk presented by a person is a matter for the DBS (per Lewis LJ at [43] of *AB*), the above analysis is unimpeachable in light of MOO’s continued denial of what amounted to an assault upon a vulnerable adult. We have found her denial to be unreliable and have rejected her explanation as set out above. This means that the DBS made no mistake in finding she lacked insight and empathy and this increases the risk of a repeat of the conduct.
113. Whilst the DBS’s requirement to bar was engaged under paragraph 9 of Schedule 3 of the 2006 Act irrespective of whether MOO was regarded as posing an ongoing risk, the DBS was entitled to conclude that someone who responded to the challenging behaviour of a

vulnerable adult by striking them with a clenched fist may pose an ongoing risk, particularly once regard is had to MOO's continuing denial/minimisation of her actions.

114. MOO's behaviour amounts to relevant conduct for the purposes of the 2006 Act and the DBS having regard to relevant conduct per se cannot be irrational.

Proportionality

115. In carrying out its assessment of proportionality the Upper Tribunal is not undertaking a rationality assessment of the DBS's decision proportionality but making our own assessment. We are not concerned with the process followed by the DBS in assessing proportionality but makes the assessment afresh for itself (*KS* at para. 50).
116. It is accepted that barring represents an interference with a person's private life for the purpose of Article 8 of the European Convention on Human Rights (ECHR) but the question is whether it is proportionate. We consider that there was no mistake of law in the barring decision based upon the findings made at the time, and as now made following the hearing, on the grounds of proportionality.
117. In summary, the proportionality of DBS's decisions to include individuals on the barred lists should be examined applying the tests laid down by Lord Wilson in *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45:
- ...But was it "necessary in a democratic society"? It is within this question that an assessment of the amendment's proportionality must be undertaken. In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, Lord Bingham suggested, at para 19, that in such a context four questions generally arise, namely:
- a) is the legislative objective sufficiently important to justify limiting a fundamental right?
 - b) are the measures which have been designed to meet it rationally connected to it?
 - c) are they no more than are necessary to accomplish it?
 - d) do they strike a fair balance between the rights of the individual and the interests of the community?
118. These four questions were later developed by Lord Sumption in *Bank Mellat* [2013] UKSC 39 at 20:
- ... the question [of proportionality] depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.
119. In assessing proportionality, the Upper Tribunal has '...to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation' (see *Independent Safeguarding Authority v SB* [2012] EWCA Civ 977 at [17] as set out above). However,

we must conduct our own assessment of proportionality afresh rather than simply review the DBS's assessment.

120. We are satisfied that each of questions a)-d) should be answered in favour of inclusion on the ABL being proportionate based on the finding that the DBS made at the time (and that finding is confirmed because we have found the finding contained no mistakes of fact).
121. On the basis of the finding that the DBS made and we have upheld, we are satisfied that it was proportionate and reasonably necessary to bar MOO from regulated activity with vulnerable adults in order to achieve the public interest in the (important and) legitimate safeguarding aim.
122. There is no real question that the public interest and legislative objective of safeguarding vulnerable groups is sufficiently important to justify the interference with private life that barring constitutes and that barring is rationally connected to protecting those groups.
123. We are satisfied that no other measures were available sufficient to adequately safeguard the risk of future harm that the DBS rationally decided that MOO posed. We are satisfied that the DBS was entitled to consider that the Appellant presented a risk of harm to vulnerable adults at the time of the decision based upon the findings as originally made and upheld by us. The decision that the Appellant posed a risk of repeating similar acts at the time of the Decisions was also rational. We find that the DBS's evaluation of the future risk continues to be rational as at the time of the hearing.
124. In so far as striking a fair balance is concerned, the question is whether, balancing the severity of the effects of barring on the rights of the Appellant against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. In circumstances where the objective of the barring decision is the protection of vulnerable adults, there are other sectors in which MOO can work and no other effects of barring (beyond the loss of her ability to work in regulated activity) are raised, the effect of barring on the rights of the Appellant does not outweigh the objective of the barring decision in this case.
125. We consider the barring Decision to include MOO on the ABL to be proportionate because it strikes a fair balance bearing in mind the following aggravating and mitigating factors:

Mitigating

- a) MOO previously had an unblemished record in the care sector which she had worked in for 3 years.
- b) RR was volatile, sometimes violent, and difficult to handle.
- c) Despite this, MOO had previously good relationship with RR and, as is clear from RR's mother's evidence which was supportive of MOO, RR's parents appreciated what MOO had done for RR.
- d) Before MOO hit RR, she had been hit by RR with the scales which hurt MOO. This was understandably provocative, even though MOO's response was retaliatory or out of frustration and not self-defence.

- e) MOO was newly pregnant and concerned about the impact of being hit with the scales on her unborn child.

Aggravating

- a) MOO hit and therefore assaulted a vulnerable service user to whom she had a duty of care.
- b) She was trained to control herself and de-escalate or use restraint. MOO was under a duty not to react or respond in kind to provocative behaviour.
- c) It was an impulsive assault committed against a particularly vulnerable adult, RR who suffered from a number of conditions.
- d) MOO did not give a reliable account either to her employer, the DBS or the Tribunal regarding the incident.
- e) The DBS was rationally entitled to make the risk assessment as to future harm that MOO posed – this was a rational evaluation based on the lack of insight, reflection or subsequent remediation or training.

126. We are therefore satisfied that barring was necessary and struck a fair balance between MOO's right to a private life and the public interest in safeguarding. The DBS expressly carried out the "balancing act" exercise required. Based on the findings we are satisfied for ourselves that barring strikes a fair balance, notwithstanding the impact that it has had and will have upon the Appellant.

127. We also take into account all the mitigating factors set out above. We recognise and understand the pressures placed upon MOO throughout her employment, the stressful nature of the barring proceedings and appeal and the impact upon her of barring. We know that this decision will come as a disappointment to her

Conclusion

128. The decision of the Upper Tribunal is that the Appellant's appeal against the barring Decision of the DBS dated 13 February 2024 is dismissed. There was no mistake of fact or law in the decision to include her on the Adults' Barred List. The decision to include her on that list is confirmed.

**Judge Rupert Jones
Judge of the Upper Tribunal**

Authorised by the Judge for issue on 29 September 2025