THE UPPER TRIBUNAL ORDERS that no one shall publish or reveal:

the name or address of (a) JT who is the Appellant in these proceedings or (b) any of the service users referred to in the decision or appeal documents;

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

The decision itself will be made public, but the cover sheet may not, as it is not part of the decision and identifies JT by name.

THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: V/0123/2021 [2022] UKUT 29 (AAC)

JT v DISCLOSURE AND BARRING SERVICE

Decided following an oral hearing on 14 January 2022

Representatives

Appellant	Not represented
Disclosure and Barring Service	Tim Wilkinson of counsel, instructed by Laura Findlay of the Disclosure and Barring Service

DECISION OF THE UPPER TRIBUNAL

On appeal from the Disclosure and Barring Service (DBS from now on)

DBS Reference: 00889327410
Decision letter: 26 October 2020

As DBS made mistakes in the findings of fact on which its decision was based, the Upper Tribunal, pursuant to section 4(6)(a) of the Safeguarding Vulnerable Groups Act 2006 (SVGA), directs DBS to remove the appellant from the adults' barred list.

REASONS FOR DECISION

A. The issues and how they arose

1. There are two issues in this case.

The first issue – legitimate expectation

2. JT was a domiciliary home care support worker, employed by Age UK. She was subject to disciplinary action and her case was referred to DBS. At the time, DBS was engaged in an exercise to help prioritise open cases. In the course of the project, JT's case was identified as one that might need to be looked at in the future. Before that was done, DBS decided not to add JT to a barred list. It wrote to her on 12 February 2019. After explaining its role and mentioning the referral from Age UK, it went on:

> Having considered the full circumstances, we have decided that it is not appropriate to include you in the Children's Barred List or the Adults' Barred List.
>
> …
>
> We will keep any relevant information in accordance with our Data Retention Policy. We may take it into account if we receive any further information in the future.

Subsequently, DBS revisited JT's case. The first issue is whether DBS was entitled to do so in view of the terms of the letter of 12 February. We have decided that it was. This involves a discussion of the law on legitimate expectation.

The second issue – inclusion in the list

3. Having revisited JT's case, DBS decided to add her to the adults' barred list. It wrote to her telling her of its decision on 26 October 2020. The letter set out the allegations that DBS had found proven on the balance of probabilities. These are the facts on which the decision to include JT in the list was based:

- failed to consistently log in and out of service user visits between 19 and 20 October 2017;
- endangered three service users between 16 October 2019 and 29 October 2017 by cutting scheduled care visits short on 26 different occasions;
- endangered three service users by failing to follow scheduled care visit timings between 16 October 2019 and 29 October 2017; and
- posed an infection risk to service users you attended on 28 + 29 October 2017 by not wearing the appropriate PPE during provision of personal care.

The second issue is whether DBS made a mistake of law or fact in coming to those conclusions. We have decided that it did and that JT must be removed from the list.

B. Section 4 SVGA

4. Before we deal with the issues, we set out this section, which contains the Upper Tribunal's jurisdiction and powers.

> **4 Appeals**
>
> (1) An individual who is included in a barred list may appeal to the Upper Tribunal against–

…

(b) a decision under paragraph 2, 3, 5, 8, 9 or 11 of Schedule 3 to include him in the list;

(c) a decision under paragraph 17, 18 or 18A of that Schedule not to remove him from the list.

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

(a) on any point of law;

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

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

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

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

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

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

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

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

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

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

…

C. Revisiting and reviewing

5. We are going to refer to the reconsideration of whether to include JT in a barred list as ‘revisiting’. The precise choice of word does not matter much. It is, though, important not to refer to it as a review, as DBS did in its decision letter, because this can lead to confusion. There is a review process in paragraphs 18 and 18A of Schedule 3 to SVGA, but it only applies when a person has been included in a list.

That was not the case here. It is better not to use the same word for two different processes.

D. R (Wood) v Secretary of State for Education [2011] EWHC 3256 (Admin)

6. DBS relied on this judicial review decision of Singh J (now Singh LJ) as authority for revisiting JT's case. We begin with the principles set out in his judgment. Then we apply them to this case.

7. Mr Wood was a teacher. He accepted cautions for common assault in May 2000. In 2002, his step-son alleged that he had indecently assaulted him. At trial in 2003, proceedings were stayed when the judge ruled that a fair trial was not possible. On 15 April 2005, the Department for Education wrote to Mr Wood saying:

> … the Secretary of State has decided that she will not, on this occasion, take any further action under section 142 of the Education Act 2002, which empowers her to bar or restrict a person's employment as a teacher or worker with children and young persons on grounds of misconduct.
>
> Although the Secretary of State has decided that she will not take any further action, your details will remain on record and may be taken into account in the event of any further misconduct coming to the department's attention.

8. Subsequently, a Historical Cases Review was established and Mr Wood's case was considered as part of it. On 6 October 2009, the Secretary of State personally gave a direction that Mr Wood should be excluded from working with children. In the jargon of the time, he was put on List 99.

9. Mr Wood sought a judicial review of the decision to revisit his listing. He also appealed against the decision to add him to the list, which by that time came before the Health, Education and Social Care Chamber of the First-tier Tribunal. Only the judicial review was before Singh J, not the appeal, but he dealt with the relationship between the two procedures. The numbers in brackets are to paragraphs in the judge's judgment.

10. The judge traced the development of legitimate expectation on both substantive and procedural grounds. He identified the test as being whether there was a statement that was 'clear, unambiguous and devoid of relevant qualification' ([39]). This is judged by 'how, on a fair reading of the promise, it would have been reasonably understood by those to whom it was made' ([46]). It is for the person relying on the representation to persuade the court that that test was satisfied ([48]).

11. It is for the court to decide whether this test was satisfied ([40]). It is not limited to the grounds of rationality by the decision-maker. The judge accepted that the test was satisfied in that the letter of 15 April 2005 'created a legitimate expectation that he would not have further action taken against him unless further misconduct came to the department's attention' ([51]).

12. If the legitimate expectation is established, it is for the person who created it to justify departing from it ([48] and [52]). There are two steps in this process ([52]). The first step is that there has to be a legitimate aim in the public interest. There was no real dispute about legitimate aim, as there was a public interest in protecting children,

especially from sexual abuse and in particular by teachers, which was 'manifest and pressing' ([53] and [56]).

13. The second step is that the decision to go behind the expectation has to be proportionate. Dealing with this issue, the judge said that he had to maintain 'an important distinction between the decision to reconsider the claimant's case and the resulting decision to make a barring order against him' ([55]). He emphasised that the appeal was the better venue for exploring the merits of the decision to bar Mr Wood. The existence of an appeal was relevant to the issue of proportionality of revisiting the listing decision ([56] and [58]), as was the right to make representations to the panel that made the decision to list and its access to expertise ([57]). A court on judicial review 'should be slow to stop a case being considered on its merits' ([65]).

14. Despite the manifest and pressing public interest, proportionality was not a foregone conclusion. The judge gave an indication of the sort of circumstances in which departing from a legitimate expectation would not be proportionate. He relied ([63] and [66]) on what Judge LJ said in *R (M) v London Borough of Barnet* [2002] 2 FLR 802. The case involved an application to quash a report made by the authority. Judge LJ responded to an argument that by dismissing the application the court would deprive itself of jurisdiction to order a review of the decision to make a report. This is what he said:

> 42. With respect to this argument, in my judgment the dismissal of this application for judicial review does not and cannot mean that the Administrative Court will be depriving or has deprived itself of jurisdiction to consider and, where appropriate, order a judicial review of a decision of a local authority to make a report in circumstances like these. If, for example, Bromley's inquiry had been motivated by spite or malice or conducted in bad faith, judicial review might well be ordered. So, too, if there were simply not a scintilla of evidence whatever to sustain the case; and, if the inquiry were conducted incompetently or negligently, it would, whatever decision we reached today, nevertheless remain open to another court, reflecting on the particular and individual circumstances of the case before it, to order judicial review notwithstanding the existence of an alternative remedy. I shall deliberately avoid any attempt to produce a comprehensive list of situations where judicial review may be ordered notwithstanding our decision. I merely underline that it will continue to be an available remedy and we are not here deciding that it should not.

15. In the result, Singh J decided that the test of proportionality was satisfied.

16. The Court of Appeal has confirmed that the test to apply is whether a statement that was 'clear, unambiguous and devoid of relevant qualification' and that it applies to both substantive and procedural expectations: *R (MP) v Secretary of State for Health and Social Care* [2021] PTSR 1122 at [53(i)].

E. Applying the principles from Wood to this case

17. *Wood* was a judicial review decision. We are not exercising a judicial review jurisdiction in this case and have no jurisdiction to quash the decision to revisit the barring issue. *Wood* is, though, useful. First, it makes clear the difference between (a) the decision to revisit a previous decision in favour of a person and (b) the

decision to include the person in a list. This makes it easier for us to separate the principles that apply at different stages. Second, it shows the limitations of judicial review and the advantages of an appeal in addressing the merits of the barring issue.

18. We need to make clear how and why it is relevant on appeal to establish that DBS was entitled to revisit its initial view that JT should not be included in a barred list. If it was not entitled to do so, that would be a mistake of law for the purposes of section 4(2)(a) SVGA, as Mr Wilkinson conceded. That is the limit to its relevance. The proportionality exercise involved in revisiting the barring issue is entirely separate from the proportionality exercise undertaken by DBS as part of the appropriateness to bar assessment. In other words, the question whether DBS was entitled to revisit JT's case was a threshold one. Once the threshold was crossed, the normal rules under SVGA applied.

Did JT have a legitimate expectation that she would not be added to a list in the absence of further evidence?

19. The burden is on JT to show that on a fair reading of DBS's original letter, she would reasonably have understood it to contain a clear, unambiguous and unqualified representation that she would not be included in a list in the absence of further evidence.

20. If it had not been for *Wood*, we would have decided that, on an objective view, anyone who received the letter sent in this case should not have taken it as a promise that DBS would not revisit her case unless it received further information. The letter should be read as dealing with two separate issues. First, it reported that JT was not to be included in a list. That involved no commitment. Nowadays it is reasonable to expect decisions to be subject to some form of quality control, leaving DBS free to look at the case again. Second, the letter stated the fact that the information held would be retained and used again if further information came to light. This was a separate matter, dealing with the possibility that further information might become available, and only with that possibility. It was not limiting its use of the retained information to that possibility.

21. We need to be cautious about this. The language of the letter in *Wood* was similar to the letter sent to JT. We are not bound as a matter of law by Singh J's analysis, but it deserves respect. Allowing for the possibility that we might be wrong, we go on to consider whether DBS was entitled to revisit the barring issue.

22. It is not for this tribunal to draft letters for DBS, but it may wish to consider whether the letter it sends to persons who are not to be included in a list could make the position clearer.

Did DBS have a legitimate aim in revisiting the decision not to add JT to a list?

23. Yes. The answer to the question is surely self-evident. DBS has discharged its burden. In *Wood*, the legitimate interest was the protection of children from sexual abuse by teachers. That interest does not arise in this case. The issue that arises in this case is the protection of vulnerable adults from their carers, but with no suggestion of sexual abuse. The clients to whom JT provided care were vulnerable

and she was in a position of trust with them. Their right to protection from the persons entrusted with their care is as great as that involved in *Wood*.

Was DBS's decision to revisit the original decision proportionate?

24. Yes.

25. Here we approach the boundary between the revisiting of the original decision and the decision to include JT in a list. Singh J was influenced in drawing the line where he did by the availability of an appeal and its advantages compared with judicial review. We can find no differences between the appeal in that case and the one under section 4 SVGA that justify a different conclusion on proportionality. We have considered three factors.

26. First, Singh J was influenced by the existence of an appeal. We need to compare the appeal that was made in *Wood* and the appeal in this case. In *Wood*, the appeal lay under section 144(1) of the Education Act 2002, which provided for an appeal against a decision to give a direction. That was what might be called a full merits appeal; indeed Singh J referred to the appeal considering the case on its merits ([65]). In this case, in contrast, the grounds of appeal are limited to those in section 4(2), subject to the qualification in section 4(3). Our jurisdiction is more limited than the appeal under section 144(1).

27. Despite our more limited jurisdiction, we can see no difference in principle to distinguish the two appeals. Section 4(3) makes clear the limit to our jurisdiction inherent in section 4(2). Even within the scope of mistake of law, this tribunal is not entitled to undertake its own fresh consideration of the appropriateness of including someone on a list: *B v Independent Safeguarding Authority* [2013] 1 WLR 308 at [19]. In contrast, the tribunal that heard Mr Wood's appeal was entitled to reconsider all issues. That is a clear difference in jurisdiction, but it is important to understand how the different forms of jurisdiction work in practice. Even if this tribunal had a full merits jurisdiction, it would be expected to show appropriate respect for the DBS's judgment, for the reasons explained in a different context by the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] AC 765 at [70]. That reduces considerably the significance in practical terms of the difference in jurisdiction.

28. Second, the judge was influenced by the right to make representations. JT had that right when her case was revisited by the DBS. Before the Upper Tribunal, she had the right to present grounds of appeal before giving evidence and making representations at the hearing. That is equivalent to the position in *Wood*.

29. Finally, the judge was influenced by the access to expertise. DBS has its specialist decision-making. The Upper Tribunal has its specialist members, whose qualifications for the role were set out in *CM v Disclosure and Barring Service* [2015] UKUT 707 (AAC) at [59] to [64]. Again, we find no significant difference between this case and *Wood*.

30. Proportionality is not, though, a foregone conclusion. It would be wrong to approach it in that way and we have not done so. We have considered the factors identified by Judge LJ and adopted by Singh J; none are present. There is no

question of spite, malice, or bad faith on the part of DBS. And as our analysis of DBS's reasoning will show, there was evidence to support its decision to include JT in a list. Those factors are not exhaustive. We are not going to attempt to provide a comprehensive list of factors that are potentially relevant to this question. None were suggested to us. Possibilities are: (a) the passage of time may mean that evidence or witnesses are no longer available; (b) the person concerned may have relied on the expectation to such an extent or for so long that it would be wrong to allow the DBS to revisit the case; or (c) the procedure followed by DBS in deciding to revisit may be so flawed or unfair or prejudicial that the decision to revisit would be quashed on judicial review. None of those factors was present.

F. A time line

31. On 13 December 2016, JT was monitored during a care visit. The supervisor recorded that she had not used protective equipment (pages 128-131) and a strike notice was written to her on the same day (page 132). JT told us that she had not received that notice; there is no record that it had been sent. She also told us that the supervisor had arrived at the end of the care visit by which time JT had removed her protective equipment. She had accepted the criticism because she had effectively been given no choice.

32. On 26 April 2017, the Home Support Services Manager wrote to JT regarding the standard of care she was providing, specifically about complying with the schedule for attending and the duration of attendance with the clients (page 135). A meeting was held with JT on 2 May 2017 (pages 136-137). The discussion refers to meeting with all the support workers on the particular run.

33. On 28 and 29 October 2017, JT and a colleague were accompanied by a new worker. She reported concerns to Age UK, which were recorded on 30 October 2017 (page 113). A suspension meeting was held with JT on 30 October 2917 (pages 114-115). A letter confirming her suspension was signed on 6 November 2017 (page 117). By this time, JT had resigned with effect from 16 November 2017 (page 116).

34. On 7 November 2017, JT was informed of the allegations against her (pages 118-122). A disciplinary meeting was held on 15 November 2017 (pages 123-124). An appeal hearing took place on 30 November 2017, which JT attended (pages 144-147). The appeal was allowed in part on 5 December 2017 (pages 148-149). We put to one side the panel's findings relating to JT's disclosure of her suspension and her reaction to that suspension. Neither has any relevance to whether she should be included in a list. That left the following allegations as substantiated:

> 'Not consistently logging in and out of service users visits. [The records are at pages 125-127.]
>
> 'Putting service users at risk by cutting calls dangerously short and in doing so have fraudulently claimed for time not worked.
>
> 'Posing an infection risk by not wearing the appropriate PPE despite being provided with specialist gloves at your request.'

Those allegations form the basis of DBS's findings, with the exception of the reference to fraudulent claims for time not worked.

35. On 16 November 2017, Age UK referred JT to DBS (page 57 onwards).

G. Failed to consistently log in and out of service user visits between 19 and 20 October 2017

36. Although there is no record of JT logging in and out of most calls, there are suspicions about the reliability of those records and there are significant problems with drawing inferences about safeguarding concerns from this evidence. The limitations of this evidence do not allow it to be used as the basis for any matter relevant to the appropriateness of including JT on a list.

What this is about

37. JT explained the login procedure to us. For each visit, she was supposed to ring into the system and enter her code so that there was a record of her arrival. She had to use the client's landline to show that she was on their premises. At the end of her visit, she was supposed to ring in again to record her departure. We have the computer records for the relevant period, which show no entries for any of the scheduled visits except for three clients, who happen to be the subject of the findings we consider in the next section.

38. JT told us of problems with the system. Some clients did not have a landline; others had their line blocked to prevent them using the phone for outgoing calls. If the client lived with their family, the phone might be in use by someone else. There could also be confusion when two support workers were in attendance, with one logging out at the start of visit by mistake. There would also be occasions when a client needed help immediately on arrival, so logging in was overlooked. Finally, JT admitted that she sometimes forgot.

Analysis

39. The finding relates only to the use of the logging system. Of itself, that is irrelevant to whether JT should be included in a list. What matters is the significance of the lack of any records for all but three of the clients. That makes it important to understand the reliability and purpose of the system.

40. We deal with reliability first. The problems that JT told us about are plausible and we accept that they could happen. They cannot, though, account for the total absence of any records for all but three clients. We wonder if something had gone wrong with the system. It is surprising to find such sparse records. There is some support for our suspicions in the statement of the new worker who accompanied JT on 28 and 29 October. Despite making numerous criticisms, she did not comment on a failure to log in or out (page 113). We find that a surprising omission if JT was not using the system. We also know from that statement that JT was accompanied by another worker on those dates. In her evidence to us, she referred to another worker being with her, saying both were supposed to log in and out. We do not know if the records we have relate only to JT. If so, JT's personal records tell us only about her use of the system and do not provide a safe basis for inferences about her actual attendance. There will be records relating to her fellow carer that would be needed for a more reliable picture of attendance.

41. We deal now with the purpose of the system. The explanation in DBS's decision letter does not draw a clear distinction between this finding on the logging procedure and the following findings about endangering three specific users. That is understandable, because DBS has to look at the evidence as a whole. It is important, though, to understand the logging procedure in order to identify the extent to which it can be relied on in relation to safeguarding issues.

42. The records could have been used as a check on authorising payment to the support workers. Age UK relied on them for that purpose when it found that JT was fraudulently claiming for time not worked. DBS has not made that finding. We therefore take no account of fraud as a factor.

43. The records could not be used as a check to ensure that support workers remained with clients for the whole of a scheduled slot. We so find for the simple reason that in most cases there was no allowance for travel between the clients' homes. There are gaps between some of the slots, some short and some longer. The short gaps would allow a short journey, but JT told us that her clients were spread over a wide area. The longer gaps probably allowed for the support workers to have a break. It is unrealistic to expect support workers to be present with every client exactly as scheduled. That was impossible.

44. JT gave evidence that Age UK told her to fit in other visits. We accept this as plausible, indeed realistic. JT did not quantify the occasions when that happened. It would be too much to expect this after more than four years. But it is another factor that has to be taken into account when drawing inferences about attendance from the absence of records.

45. There is evidence that the computer records were needed to show social services, who paid for each call, that Age UK was delivering the service it was being paid for (page 145). That is, though, not directly relevant to safeguarding issues. A failure to log in and out is not necessarily an indication that the support worker did not attend or was not giving the care required. There would be other records that were more directly related to the delivery of care. JT told us of these in her evidence and the new worker mentions them in her statement at page 113. Again this limits the scope for drawing inferences from the records we have.

46. DBS said in its decision letter:

> The failure to consistently use the timing system is considered to represent an intentional attempt to conceal the true extent of your concerning practices.

The evidence does not justify or allow that conclusion. The records show that JT used the logging system consistently for three of her clients. They are the three clients who are the subject of the next findings. Their records show considerable variation in the duration of visits and in the times of arrivals and departures. That is a strange way to conceal what was happening.

47. The logging procedure is not primarily concerned with the support worker's delivery of care. DBS has used this evidence as a proxy for safeguarding concerns. It can only do so by inferences. In part, those inferences are contrary to the evidence available. In part, they take an unrealistic, unsustainable approach to what the scheduled slots for visits required. And in part, they overlook the existence of the

more direct and reliable evidence of the care delivered. DBS must rely on the evidence it has and it cannot make findings without evidence. But it must take account of the existence of other evidence that it should know exists that may affect the inferences that can properly be drawn. A purist might say that JT should have obtained those records and put them before us. Given the circumstances in which she left Age UK, the time that has passed, and the inevitable data protection concerns, her request would probably have been refused.

H. Endangered three service users between 16 October 2019 and 29 October 2017 by cutting scheduled care visits short on 26 different occasions and endangered three service users by failing to follow scheduled care visit timings between 16 October 2019 and 29 October 2017

48. It is convenient to take these two findings together. These findings are limited to three clients and we can identify them, because they are the only ones with times of attendance in the logs. We accept the evidence of those logs. We also accept JT's detailed account of each of those clients. Mr Wilkinson did not challenge her evidence on cross examination and we can see no basis on which he could properly have done so. In view of JT's evidence, we find that the failure to attend for the times and during the slots scheduled on her rota is not indicative of any matter relevant to the appropriateness of including her in a list.

49. We rely in part on matters we have already mentioned in the previous section. In particular, we refer to: the impossibility of complying precisely with the schedule; and the need to fit in additional visits.

50. Before coming to JT's account, we accept her evidence that she had reported what was happening to the office. This was what she had been told to do. When the calls to the office became frequent, she was told not to bother reporting these matters any longer. That may not have been what Age UK authorised, but it is a plausible account of the reality of a busy office that did not want to field repeated reports of the same problems. We accept this evidence.

51. We now come to the clients. One client was abusive to her support workers. They had been told that they did not have to tolerate abuse and should leave if it became intolerable. The second client lived with his wife and daughter. They would often tell JT to leave rather than stay for the entire slot as they would be able to manage alone. The third client spent her day sitting in a chair. By tea time, she could tolerate this no longer and asked to be put to bed where she would be more comfortable rather than at the scheduled bed time. She was rather old fashioned and did not want the support workers around talking with her while she was eating.

52. So JT did not comply with the schedule duration and slot times for a variety of reasons. No one can criticise her for not tolerating a litany of abuse. For the other clients, she was acting according to their wishes or their families'. They were all mentally competent. Those changes should have been formally agreed with Age UK and probably social services, but those are not relevant to safeguarding. Finally, although we have no direct evidence for this, it is our general experience that this kind of arrangement is not uncommon.

I. Posed an infection risk to service users you attended on 28 + 29 October 2017 by not wearing the appropriate PPE during provision of personal care

53. The evidence is not sufficient to allow this finding.

54. The only evidence relevant to JT's use of personal protective equipment on 28 and 29 October is the statement of the new worker who accompanied JT and a colleague on their rounds on those dates. This is how her statement was recorded (page 113):

> Gloves and aprons were not routinely used and [JT] did not wear an apron on any of the calls, particularly when assisting with continence care.

We are told that the worker was 'not new to care'. We assume that the sentence we have quoted is an accurate record of what she said. We cannot, though, be sure that it records her exact words. It says that gloves and aprons were not routinely worn and that JT did not wear an apron even for continence care. Presumably, that means that she did sometimes wear gloves, although we do not know how often she did or did not wear them or in what circumstances. Nor do we know what was involved in 'continence care'. Nor do we know the respective roles JT and her fellow support worker took on those two dates. In short, this is a general comment with no context in which to assess its reliability or its significance.

55. There is also evidence from the supervisor at a monitoring visit on 13 December 2016 (pages 128-132). As we have said, JT told us that she had been wearing protective clothing but had removed it by the time the supervisor arrived. The record of the visit could be consistent with what JT told us and is certainly unclear. This is the relevant part of the monitoring form:

> **If personal care was delivered was the worker:**
>
> Wearing protective equipment? Yes No
>
> If not, why not?

The supervisor ticked No in answer to the first question and below the second question she wrote: 'none given'. That could mean that no care was given during the visit or during the observation. Or it could mean that no protective equipment had been given to JT. JT denied receiving the strike letter after this visit and there is no record that it was ever sent. We accept that she did not receive it, so she was not aware that the matter was being taken further.

56. To borrow the language of the first DBS caseworker, this evidence does not allow robust findings of fact. In deciding whether to find an issue proven on the balance of probabilities, it is necessary to take account of the seriousness of the allegation and the likelihood that it occurred. The new worker's report contains a litany of errors, some of omission, others of commission. It is surprising that two experienced support workers would have committed so many failings when there was a stranger present to observe them. On its own, the evidence of the new worker is not sufficient to allow this finding. The monitoring report does not override about our concerns about the statement or provide independent support for the finding. JT

has given a plausible explanation for what the supervisor saw and the record itself is difficult to interpret.

J. Disposal

57. We have directed that DBS remove JT from the barred list because ‘that is the only decision that DBS could lawfully reach in the light of the law and the facts as found by the Upper Tribunal.’ That is the test we have to apply under *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575 at [73]. In at least one other case, DBS has argued that the Upper Tribunal should first disclose its findings and then invite submissions on the appropriate disposal; counsel for the appellant in that case agreed. That is not necessary in this case in view of our conclusions, which remove the factual foundation for JT being in the list.

Authorised for issue
on 04 February 2022

Edward Jacobs
Upper Tribunal Judge

Josephine Heggie
Sallie Prewett
Members