JA v Disclosure and Barring Service
[2023] UKUT 204 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-000999-V
(formerly V339/2021)

On appeal from the Disclosure and Barring Service

Between:

JA

Appellant

- v –

DISCLOSURE AND BARRING SERVICE

Respondent

NOTE THAT, on 30 September 2021, Upper Tribunal Perez **prohibited the disclosure of the name of the person referred to in this decision as EJ and of any matter likely to lead members of the public to identify her.**

Any breach of that Order is liable to be treated as a contempt of court and punished as such.

Before: **Deputy Upper Tribunal Judge Rowland**
Mrs Josephine Heggie
Dr Elizabeth Stuart-Cole

Hearing date: 21 March 2023

Representation:
Appellant: The Appellant in person
Respondent: Ms Bronia Hartley of Counsel, instructed by Solicitor to DBS

DECISION

The appeal is allowed on the ground that the Respondent made mistakes of fact when deciding on 4 December 2020 to include the Appellant in the Adults' Barred List.

The Respondent is directed to remove the Appellant from the Adults' Barred List.

REASONS FOR DECISION

1. This is an appeal brought under section 4 of the Safeguarding Vulnerable Groups Act 2006, with permission granted by Deputy Upper Tribunal Judge Rowland, against a decision of the Disclosure and Barring Service ("DBS") dated 4 December 2020, whereby, under paragraph 9 of Schedule 3 to the 2006 Act, it included the Appellant in the Adults' Barred List, which it maintains under section 2. (DBS also included the Appellant in the Children's Barred List, but she has been removed from that List on review, in a decision dated 23 November 2022, and so that part of this appeal has lapsed).

2. Paragraphs 9 and 10 of Schedule 3 to the Act provide –

"*Behaviour*

9(1) This paragraph applies to a person if—
(a) it appears to DBS that the person—
(i) has (at any time) engaged in relevant conduct, and
(ii) is or has been, or might in future be, engaged in regulated activity relating to vulnerable adults, and
(b) DBS proposes to include him in the adults' barred list.
(2) DBS must give the person the opportunity to make representations as to why he should not be included in the adults' barred list.
(3) DBS must include the person in the adults' barred list if—
(a) it is satisfied that the person has engaged in relevant conduct,
(aa) it has reason to believe that the person is or has been, or might in future be, engaged in regulated activity relating to children, and
(b) it is satisfied that it is appropriate to include the person in the list.
(4) ….
(5) ….

10(1) For the purposes of paragraph 9 relevant conduct is—
(a) conduct which endangers a vulnerable adult or is likely to endanger a vulnerable adult;
(b) conduct which, if repeated against or in relation to a vulnerable adult, would endanger that adult or would be likely to endanger him;
(c) …;
(d) …;
(e) ....
(2) A person's conduct endangers a vulnerable adult if he—
(a) harms a vulnerable adult,
(b) causes a vulnerable adult to be harmed,
(c) puts a vulnerable adult at risk of harm,
(d) …, or
(e) ….
(3) ….
(4) ….
(5) ….
(6) …."

Section 4 provides –

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

(a) [*repealed*]

(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."

3. DBS's decision was based primarily on three findings of "relevant conduct" –

(1) On 17 September 2019, JA did not allow a service user, [EJ], to finish getting ready, raised her voice and told [EJ] to "shut up".

(2) On 15 September 2019, JA pushed a service user, [EJ], into her wheelchair and told her to shut up as she was always moaning.

(3) On 15 September 2019, JA told [EJ] that she (JA) was laughing at her when [EJ] was upset and crying.

The Appellant has denied the findings and, in her grounds of appeal, complained that she had not been interviewed by DBS before it made its decision. Judge Rowland granted permission to appeal on the grounds that the Appellant had a reasonable prospect of persuading the Upper Tribunal that DBS's decision was based both on a material mistake of fact and an inadequate consideration of its proportionality and he directed that there be an oral hearing of the appeal.

4. The Appellant attended the hearing, without representation, and gave evidence. DBS relied on the written evidence upon which the original decision was based and was represented by Ms Bronia Hartley of Counsel.

The meaning of mistake and the burden of proof

5. In her skeleton argument, Ms Hartley referred to *PF v Disclosure and Barring Service* [2020] UKUT 256 (AAC); [2021] AACR 3, where the Upper Tribunal considered the scope of an appeal brought under section 4 on the ground of mistake of fact and said –

> "37. Section 4(2)(b) refers to a 'mistake' in the findings of fact made by the DBS and on which the decision was based. There is no avoiding that condition. The issue at the mistake phase is defined by reference to the existence or otherwise of a mistake. If the Upper Tribunal cannot identify a mistake, section 4(5) provides that it must confirm the DBS's decision. That decision stands unless and until the tribunal has decided that there has been a mistake.
>
> 38. 'Mistake' is the word used and there is no reason to qualify it. The courts operate a test of whether a decision was 'wrong'. This has in the past been qualified by words like 'plainly'. Nowadays, that has to be understood in the way explained by the Supreme Court in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 W.L.R. 2600:
>
> > '62. Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone 'plainly wrong', and considered that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion.'
>
> That draws attention to the need to identify an error or, in the language of section 4, a mistake. It is not enough that the Upper Tribunal would have made different findings. …".

Ms Hartley submitted that DBS was quite entitled to make the findings it did and so, she argued before us, there being no mistake of the type considered relevant in *Henderson*, DBS was not obliged to prove any facts before the Upper Tribunal.

6. We do not accept that submission, although, given the reference to *Henderson* in *PF*, we can see why it was made. In our judgment, *Henderson* is plainly distinguishable from cases like the present because the Supreme Court was concerned with the approach to be taken by the Inner House of the Court of Session on an appeal from a Lord Ordinary – equivalent to an appeal from a High Court Judge to the Court of Appeal – where there is a proof or trial in the lower court, which hears evidence, but where evidence is hardly ever admitted before the appellate court. This point was emphasised by Lord Reed JSC in the paragraphs immediately following the one cited by the Upper Tribunal. In such circumstances, an appeal is inevitably conducted by way of a review of the lower court's decision and the appellate court will allow an appeal only if it finds a flaw in the lower court's reasoning. In the present case, the position is reversed. DBS did not receive oral evidence before making its decision, whereas we heard oral evidence from the Appellant, and DBS could have called oral evidence before us had it wished to do so.

7. Moreover, reliance on *Henderson* was not a necessary part of the Upper Tribunal's reasoning and, indeed, the general tenor of the rest of the Upper Tribunal's decision appears to be inconsistent with a *Henderson* approach. See, in particular, paragraph [51(b) and (g)], where it is said –

> "(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.
>
> …

> (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."

Henderson seems to be relied upon at all only in the two sentences immediately following the citation from the judgment of Lord Reed. As to those two sentences, we agree that, if an appeal is to be allowed, it is necessary that the Upper Tribunal be satisfied that there has been a "mistake" – but, in our judgment, both that requirement and the meaning of "mistake" are to be derived from the language of section 4 itself, and not from any principle that might be derived from *Henderson*. That there is only a "mistake" if an error is material to the ultimate decision, as the Upper Tribunal held in *PF* at [51(b)], is the clear implication of that word being used in both subsection (5) and subsection (6) of section 4. The Upper Tribunal appears in fact to have been following what Wyn Williams J said in *R (Royal College of Nursing) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin); [2011] 1 WLR 1193 at [102], which it had cited at paragraph at [12] of its own decision and where Wyn Williams J also said that he could see "see no reason why [section 4(2)(b)] should be interpreted restrictively". It follows from the requirement that there must be a "mistake" in that sense that, as the Upper Tribunal held, "(i)t is not enough that the Upper Tribunal would have made different findings". If the case is to be remitted to DBS for a new decision to be made, the Upper Tribunal must also be satisfied that the different findings it has made, or would make, would be material.

8. We observe that this approach to the meaning of "mistake" provides symmetry. As Ms Hartley submitted, section 4(3) of the 2006 Act has the effect that section 4(6) must be read as permitting the Upper Tribunal to direct DBS to remove the an appellant's name from a list only if removing him or her is the only decision that DBS could lawfully reach in the light of any "mistake" (*Disclosure and Barring Service v AB* [2021] EWCA Civ 1575 at [73]). Thus, the Upper Tribunal is entitled to consider "appropriateness" to the extent necessary to decide either that an error by DBS *could not* have made a difference to the outcome or that it *must* have made a difference, but not if the error only *might* have made a difference.

9. See also the further reasoning in *EB v Disclosure and Barring Service* [2023] UKUT 105 (AAC) at [29] *et seq.*, to which two members of the panel hearing the present appeal contributed.

10. We do not accept the submission that Ms Hartley made at the hearing to the effect that the fact that the appeal was what she called a "leapfrog appeal" to the Upper Tribunal, rather than an appeal to the First-tier Tribunal, supported the argument that the scope of the appeal on points of fact was intended to be narrow. That approach is inconsistent with what Wyn Williams J said in the *Royal College of Nursing* case but, in any event, the argument is misconceived. We accept that the Upper Tribunal's most common function is to determine appeals on points of law from the First-tier Tribunal (and some other tribunals in Wales, Scotland and Northern Ireland), but section 4 of the 2006 Act is not unique in providing a right of appeal from a public authority directly to the Upper Tribunal and provision is also made in Tribunal Procedure Rules for appeals brought before some Chambers of the First-tier Tribunal to be transferred to the Upper Tribunal. Moreover, when there is an appeal to the Upper Tribunal that is not limited to points of law, it is common for the Upper Tribunal

to be constituted with at least one expert member as well as either one or two judges. In relation to appeals under section 4 of the 2006 Act, see paragraph 3b of the Practice Statement on the *Composition of Tribunals in relation to Matters that fall to be decided by the Administrative Appeals Chamber of the Upper Tribunal on or after 26th March 2014* issued by the Senior President of Tribunals (and published at *https://www.judiciary.uk/guidance-and-resources/)*. Paragraphs 4, 5, 6 and 7 of that Practice Statement, which are derived from regulation 3(1)(a) and (b) and (2) to (4) of the Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations 2002 (SI 2002/816), have the effect that expert members sitting on appeals under section 4 of the 2006 Act must not only have a qualification prescribed by the Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008 (SI 2008/2692) but also have practical experience of handling safeguarding issues. Thus, not only is the Upper Tribunal appropriately constituted to consider matters of public law, it is also appropriately constituted to consider matters of fact relevant to section 4 and to make judgments as to the appropriateness of including a person in a list to the limited extent that that is within the Upper Tribunal's jurisdiction.

11. Even if we were disagreeing with the substance of *PF*, which we are not, we would not be obliged to follow that decision if satisfied that it was clearly wrong, notwithstanding that that decision was made by a panel constituted by two judges and one member, rather than one judge and two members as is more usual and as we are (*Information Commissioner v Poplar Housing and Regeneration Community Association* [2020] UKUT 182 (AAC) at [58] to [63], followed in *Commissioner of the Police of the Metropolis v Information Commissioner* [2021] UKUT 5 (AAC) at [32]). As it is, it is merely the citation of *Henderson* that we respectfully consider was inappropriate.

12. Consequently, we do not accept there is no burden of proof at all upon DBS in an appeal like the present until a flaw in DBS's reasoning is identified, which would unnecessarily complicate proceedings, although, of course, the Upper Tribunal should explain why it is differing from DBS.

13. On the other hand, such burden as there may be on DBS does not necessarily require it to call oral evidence from witnesses. DBS is quite entitled to make decisions on paper and we do not accept the Appellant's criticism of it doing so in this case. The existence of a full merits appeal on questions of fact, before a tribunal that must at least offer the parties an opportunity to ask for an oral hearing, makes the overall system fair.

14. However, when making its decision, DBS must obviously act impartially and must be satisfied that relevant facts are proved on the balance of probabilities, paying proper regard to representations made by people whom it has been minded to bar as well as to evidence provided by the person or body making the reference. It is entitled to rely on evidence provided on, or with, a referral form, but it is also entitled to ask for further documents – institutional providers of care are required to keep detailed records that might often be a source of useful information – or to obtain further statements from witnesses and it may need to do so in some cases in order to provide itself with sufficient evidence upon which properly to base its decision. This may also be necessary to rebut points made in representations. The process is necessarily inquisitorial rather than adversarial.

15. On an appeal, the Upper Tribunal may ask or direct a party to obtain further evidence, but it is not necessarily required to do so. It is generally for the parties themselves to decide what evidence to adduce in addition to the evidence upon which DBS made its decision. Notwithstanding that there are therefore some adversarial features in the procedure adopted on an appeal from a decision made by one of the parties, the burden of proof still has only a limited role in such proceedings, in which both parties are expected to play a constructive part. However, at the end of the day, there lies a burden on each party to prove, on the balance of probabilities, facts within their own knowledge or about which they are best placed to obtain the evidence and the facts upon which they must rely in the light of the relevant legislation, so that where there is no evidence, or only inadequate evidence, on a point before the Upper Tribunal, that point will be decided against the person bearing that burden.

16. If any authority is required for these basic propositions, it may be found in *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 W.L.R.1372, *per* Lord Hope of Craighead at [14] to [16] and *per* Baroness Hale of Richmond, with whom the other members of the Judicial Committee (including Lord Hope) agreed, at [62] to [69]. That case involved a claim for a social security benefit initiated by the claimant, rather than by the decision-making public body, and there was no evidence at all in relation to one significant issue, but what was said by Lord Hope and Baroness Hale about the burden of proof is equally relevant in the present case, where the barring process was initiated by the decision-making public body and, on some issues, there is a conflict of evidence rather than no evidence at all.

17. In a case like the present where DBS is defending its decision to include the Appellant in the Adults' Barred List, it is clearly for DBS to prove that the Appellant engaged in relevant conduct that is capable of justifying her inclusion in the list. No doubt practical and proportionality considerations will be taken into account by DBS when deciding whether to call oral evidence but, if it does not, it may run a greater risk of not making good its case. The Upper Tribunal is entitled to receive written evidence and may, if there is conflicting oral evidence, prefer the written evidence to the oral evidence. On the other hand, it may not. One obvious reason why written evidence will not necessarily carry the same weight as oral evidence is that it may be less precise. When oral evidence is given, supplementary questions may be asked so that the evidence becomes more detailed. That is clearly not generally practical when the evidence presented is written.

Findings as to states of mind

18. In *PF*, the Upper Tribunal said –

> "39. There is no limit to the form that a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission. It may relate to anything that may properly be the subject of a finding of fact. This includes matters such as who did what, when, where and how. It includes inactions as well as actions. It also includes states of mind like intentions, motives and beliefs."

We respectfully agree that findings of fact include findings as to a person's state of mind and we consider that such findings are important as factors to be taken into account when risk is being assessed. Accordingly, a failure to make such findings may be a mistake of law and may be remedied on an appeal either by the Upper Tribunal remitting a case for DBS to make such findings or by the Upper Tribunal

rectifying the error by making its own findings, in which case it may conclude that a material error, and therefore a mistake, of fact has been made.

19. At one point during the course of argument, Ms Harley submitted that DBS could not make findings as to a person's state of mind. We do not agree. Decision-makers, tribunals and courts frequently have to make findings as to whether a person acted maliciously, recklessly, carelessly, dishonestly, knowingly, intentionally or in some other state of mind, and they do so having regard both to what the actor says about his or her knowledge and motives at the time of the act and also to such inferences as they consider appropriate to draw from the evidence of the person's behaviour and the surrounding circumstances. We accept that DBS may not be helped by the lack of depth of many employers' investigations and the brevity of their reasons for dismissing employees or the fact that such investigations have a different focus from DBS's. Nonetheless, DBS cannot avoid the issue and it needs to be addressed at a fact-finding stage of its decision-making, rather than only when assessing appropriateness.

20. Potentially material findings of fact include all findings of fact upon which an assessment of appropriateness is made, including findings that are not in themselves findings of relevant conduct. That there is a clear distinction between, on one hand, such findings of fact and, on the other hand, "value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness" was made clear in *Disclosure and Barring Service v AB* [2021] EWCA Civ 1575 at [55].

The evidence and DBS' reasoning

21. The Appellant has worked in the care sector for many years. She told us she had first worked in a care home as a member of domestic staff but was encouraged to become a care assistant and had worked as such ever since. She obtained an NVQ 3 in health and social care in 2007 and attended other training courses over the years (page 38). There are positive references from former employers in the documents before us, one of which (page 80, which, we observe, was not on headed paper but the genuineness of which has not been disputed) states that she had been "promoted to Senior Care because of her leadership skills & professional knowledge she displayed as a carer" and she had also worked as a senior carer from 2013 to 2018, followed by a period as a care assistant from October 2018 until 14 July 2019 (page 39).

22. On 15 July 2019, she started work as a care assistant in a different care home, working with vulnerable adults. On 18 September 2019, while she was still in her probationary period, she was suspended from her employment after her employers had been made aware of four allegations of her abusing residents (page 50). She was summarily dismissed on 25 September 2019 on the ground of gross misconduct in abusing a vulnerable adult on 17 September 2019 (page 53).

23. That dismissal resulted in a referral being made to DBS, who considered all four of the allegations that had been made to the employers. It found that one ("allegation (4)"), which had been made by a member of staff in a statement dated 11 September 2019 but which related to an alleged incident on 22 August 2019, was not made out because the Appellant had denied it and there was no explanation for the apparent delay in the allegation being made and also no indication that the allegation had ever been investigated by the employer (page 94). It therefore told the Appellant in its

"minded to bar" letter that the allegation had been disregarded and that it was not necessary for her to address it in her representations, and we need say no more about it either.

24. The other three allegations all concerned a resident, EJ, who, the Appellant told us – the employers having failed to provide relevant information in box R of the referral form (page 43) and DBS not having asked them to remedy the defect – apparently had a diagnosis of dementia. It is recorded in the minutes of a strategy meeting on 18 September 2019 between the local Safeguarding Adults Board and KI, the Care Director of the care home, that KI said that EJ had fluctuating capacity but nonetheless "had capacity" on 17 September 2019 (page 60).

25. The second and third allegations (upon which DBS's findings (2) and (3) were based) were both made by a member of staff, TD, whose statement, dated 15 September 2019 (page 46), was countersigned by another member of staff, DW. As Ms Hartley was inclined to accept, it seems probable that the incident that is described in the second half of that statement occurred before TD and DW spoke to EJ about the earlier incident described in the first half of the statement. The entire statement reads –

> "Myself and [DW] asked [EJ] what went on this morning.
>
> [EJ] was getting upset and crying saying she didn't want to tell tails [sic].
>
> She ([JA]) came into her room and pushed her hard in her wheelchair and [EJ] said please stop your [sic] hurting me and she ([JA]) said shut up and stop moaning your [sic] always moaning. [EJ] said she will complain and she [JA] said you can do what you want. [EJ] said she's 88 yr old and she dont [sic] need this. She [JA] said I don't care and then brought her down.
>
> When [JA] came into the dining room with [EJ], [EJ] was upset and in a panic saying that [JA] has been horrible to me and shoving me and slapped my back. [JA] came to the kitchen hatch. [EJ] said don't laugh at me. Me [TD] said I'm not laughing [EJ] I'm listening. [JA] said your [sic] not laughing but I am and said she don't have time for her and [RX] today."

26. The Appellant told us that TD was a member of the catering staff, whereas DW was a member of the care staff. It is apparent from the minutes of the strategy meeting between the local Safeguarding Adults Board and KI (who, in the light of those minutes and the way some of the other documentation was completed, appears not to have been wholly confident in her disciplinary role) that DW telephoned KI on 15 September 2019. The minutes record (at page 59) –

> "… [KI] received a phone call from [DW] saying [EJ] had come downstairs after [the Appellant] had cared for her and she was upset. [EJ] said [the Appellant] had not been nice to her. [KI] requested [the Appellant] go home. [DW] did not feel it was necessary for [the Appellant] to go home after speaking to [EJ]. [KI] stated [the Appellant] must be job shadowed as there were no other issues. (See [TD] statement uploaded to Mosaic)."

The Appellant told us that nothing was said to her about those matters before the incident on 17 September 2019. That appears to be borne out by the other documentation in the case.

27. On 17 September 2019, KI was notified by telephone (see pages 59 and 64) of an allegation made by CM, the catering manager. CM subsequently wrote a statement (pages 47-48) which says –

> "Today 17/9/19, I decided to listen in on [the Appellant] when she was getting [EJ] up out of bed in her room. I did this because several times people have told myself about the way [JA] is talking to [EJ] and other residents is rude and unacceptable. It was around 9.45 am and I went into room 4 and stood behind the door. At first I couldn't hear much as room 5 wasn't directly next door it is in the corner. Then [the Appellant] came out of the room and was on the phone to what sounded like the doctors as she said 'he is dehydrated and constipated'. She was on the phone for a few minutes. She then went back into room 5 where [EJ] was getting ready and she said are you ready now [EJ] or not? [EJ] responded saying I am just brushing my hair to which [the Appellant] responded 'for goodness' sake come on'. I decided to record this as I didn't like [the Appellant's] tone with [EJ]. I then heard [EJ] say to [the Appellant] can you pass my glasses to [sic] then I hear a clink as if the glasses fell on the floor or had been thrown on the floor. [EJ] then said are you going to pick them up for me and [EJ] responded saying 'no, I'm not'. [EJ] then said you're a nasty piece of work, aren't you?' [The Appellant] then said 'yes I am'. I then heard the door open fully and then a bang and straight away [EJ] shouted 'Ahhhh' as if she had hurt herself, then shouted 'stop'. I then stopped recording as I was going to intervene. As I was going to open the door, [EJ] shouted 'ouch that's my foot'. [The Appellant] then shouted to her 'well put your feet on the plates then' and [EJ] said 'I can't because they aren't round the front' Jean said 'oh shut up [EJ]" then I heard another door open which was the lift door. I then came out of room 4 and came downstairs. I was very angry and went straight to [a senior carer] and asked if I could have a word. I also asked [the Appellant] if I could have a word with her and we went into the back room where the back stairs are. I questioned [the Appellant] on what she had just done with [EJ] and asked if she threw [EJ's] glasses on the floor. [The Appellant] responded saying 'no I didn't and I spoke to her like that because we all know [EJ] is difficult'. I said 'the way you have just spoken to [EJ] is disgusting and I heard every word and I have recorded you'. [The Appellant] said nothing. I told her I was ringing [KI] right away and would be showing her the recording. I did say I thought she was vile and that she shouldn't be in this job and a lot of other people have complained about her. I then walked out and went back into the kitchen and other staff members told me to go outside and calm down, so I did. I feel [the Appellant's] attitude to certain residents is terrible and I've already verbally reported a couple of incidents in the last few weeks."

28. KI directed that the Appellant be sent home. Pages 64 to 67 are brief, undated, records made by KI of conversations she or SP, the deputy manager, had with CM, TD, EJ's husband and EJ herself. Reading them together, we consider that they all probably relate to the incident on 17 September 2019, rather than those on 15 September 2019, although that is not absolutely clear. Page 64 clearly does. On page 65 it is recorded that TD told KI that EJ "was upset all day and was not her usual self" and that she had one-to-one support from staff and reference is made to a conversation between EJ and her husband that was not witnessed by anyone else. On page 66, it is recorded that SP spoke to EJ's husband in the presence of CM and that he "was upset as [EJ] had told him but he didn't believe it", upon which CM "informed him that it was true and she was present". On page 67, it is recorded that KI spoke to EJ, but when she asked EJ what had happened, EJ appears merely to have said that "it was yesterday" and that "the girls have reassured me that they would sort it out" and she trusted them to do so. She did not want the police involved.

29. On 18 September 2019, the Appellant attended an investigatory meeting with KI, the minutes of which are at page 68. The Appellant was given the formal suspension letter (pages 50-51) and was then asked about the incident on 17 September 2019. The minutes record –

> " [The Appellant] said she went in in the morning and [EJ] wasn't ready to get up. She said [EJ] usually chooses her own clothes, but she didn't, she informed [KI] of what she usually does but she didn't this day. She said [EJ] dropped the glasses on the floor and asked [the Appellant] to pick it up but [the Appellant] said no your [sic] pick them up, but she said this as she was bending down, she was picking them up. She said she understands the situation she is now in and the situation we are in. [The Appellant] said she had banter with [EJ]. [The Appellant] also said it doesn't look good.
>
> [the Appellant] said if she was going to abuse EJ then she would of shut the door, [KI] informed her that this is not the case.
>
> [The Appellant] said [EJ] wanted to put her foot up on the footplate, but she said that the footplate is broke. (Policy is do not use a broken wheelchair).
>
> [KI] informed her that she doesn't feel this is banter.
>
> [KI] informed [the Appellant] that she will be suspended and that she will need to safeguard this. She informed her that [EJ] does not want police involved but this is her choice.
>
> [KI informed [the Appellant] that a full investigation will be completed, and she will be sent a letter to come back into work.
>
> [KI] informed her of other allegations that have been made.
>
> [The Appellant denied the allegation that is not before this Tribunal, concerning a male resident.] She said that his daughter has offered her a job in the home care that she does.
>
> [The Appellant] refused to read the statements provided.
>
> [The Appellant] said she doesn't want to waste any time so she said she would rather it happen now. [KI] reassured her that she needs to investigate the allegations. [The Appellant] said she was fully aware she is in the probationary period. [KI] reassured [the Appellant] that today isn't about sacking her its about completing the investigation but if [the Appellant] wanted to resign then [KI] informed her she had no power over that that had to be [the Appellant's] choice.
>
> [KI] escorted the Appellant of the premises."

30. Page 69 is a note of "what was found", which is presumably a record of KI's conclusion at the end of her investigation.

> "Neglect – refusing to pass [EJ] her glasses when she asked.
>
> Emotional abuse – saying she is laughing at her when [EJ] was crying/upset. [EJ] called [the Appellant] a nasty piece of work and [the Appellant] responded with yes I am.
>
> [EJ] was brushing her hair. [The Appellant] was telling her to hurry up. [EJ] at this point started to shout stop, stop I am not ready. [CM] could hear her bringing her out of her room and [the Appellant] saying I am not moving you.
>
> [CM] spoke with [EJ] after this and [EJ] said she had banged her foot into the door (this was checked and no bruising) and also that she had chucked her glasses at her.
>
> [EJ] also told [TD] that [the Appellant] had pushed her into her wheelchair and told her to stop whingeing – all she ever does is moan."

31. The Appellant did not resign following the investigatory meeting, but she did not attend the disciplinary hearing on 25 September 2019 before the Deputy Manager (who had actually been present at the investigatory meeting, although nothing turns

on that) at which she was dismissed for gross misconduct. We note that the notice of the hearing stated (in a sentence that is otherwise not altogether clear) that, as the Appellant only had "short service", the company "does not have to follow the disciplinary warnings procedure" (page 56), although we accept that gross misconduct would normally justify summary dismissal anyway. The dismissal letter (pages 53-54) identifies the gross misconduct that led to the dismissal as "abuse to a vulnerable adult on Tuesday, 17 September 2019". No mention is made of the other allegations. The Appellant did not appeal. Instead, she got another job as a carer.

32. DBS wrote on 6 December 2019 to inform the Appellant that it was considering her case and, on 2 September 2020 (pages 27-32), wrote to say that it was minded to include her in both the Adults' Barred List and the Children's Barred List and provided her with the evidence upon which its decision was based and its provisional reasoning. The Appellant duly made representations (pages 75-79). As to the incident of 17 September 2019, she provided some background and then said –

> "[EJ] also liked to brush the back of her own hair but she was unable to do the back of her head again because of [EJ's] being in pain from arthritis so I offered to help [EJ]. I already had [EJ's} glasses in my hand because I had cleaned them. I did pass the glasses over to [EJ]and they dropped to the side of her wheel chair. (They was [sic] not on the floor.) I picked them up from the wheelchair, checked them over again for finger prints. I quickly wiped them over again and gave them to [EJ]. [EJ] did say words to the affect [sic] of me not being nice but I was giving EJ back her glasses. I have known from training never to argue with people who are being supported. I thought it was best to agree with [EJ]."

She then explained about the defect in the wheelchair. She denied that she has ever said to CM that she "spoke to [EJ] that way because we all know [EJ] is difficult". She said that she had "no idea" what TD's witness statement was all about and that she was not offered any statements to read and had not seen before the letter from [KI] mentioning four allegations (presumably the suspension letter (page 50) mentioned in the minutes of the investigatory meeting (page 68)). She wrote a bit about her previous career and more recently working during the Covid-19 pandemic and added (page 78) –

> "There is not a day goes by that I don't think about what happened in [EJ's] bedroom and that [EJ] was already upset and sat in her wheelchair. I have never hurt anybody meaningfully or otherwise. If my actions/humour caused [EJ] any upset then I will have to live with knowing this but I assure you that was not my intentions [sic]."

DBS maintained its view on the ground that the Appellant's denials were not accompanied by any supporting evidence, and so made the decision against which the Appellant has appealed.

33. Its full reasoning is set out in the Barring Decision Process document (pages 88-109). Essentially, DBS accepted the accounts given in the statements of TD and CM because it considered that TD's statement had been corroborated by DW, that CM's was supported in part by her audio-recording and the fact that EJ had mentioned the incident to her husband and that the statements supported each other and were also supported by other (unspecified) allegations that had been made by EJ against the Appellant. DBS considered that, in a number of respects, the evidence showed that the Appellant displayed callousness or lacked empathy when caring for people she deemed "difficult" and that, notwithstanding that her long career demonstrated that she could be and had been empathetic and kind, that was outweighed by her recent actions. It considered that there was little evidence of

insight or remorse and that the lack of empathy and compassion, accompanied by malicious actions, had the potential to cause further emotional and physical harm in the future and DBS could not be certain that it would not. On that basis, it considered it proportionate to include the Appellant in the lists.

34. The findings that DBS considered showed that the Appellant was callous and lacked empathy included not only the findings of relevant conduct as set out in the particulars of the three allegations found proved but also two further parts of her alleged conduct – that, when on 17 September 2019 "[EJ] asked [the Appellant to pick up her glasses, she said 'no, you pick them up'" and, on 15 September 2019, saying to EJ that she had no time for her or RX – and three things she allegedly said when subsequently questioned about her actions – saying to CM "well you know what EJ is like; she can be difficult" and, in the investigatory meeting, "[l]abelling her interactions with [EJ] as 'banter' even after knowing the upset it caused [EJ]" and not being "interested in hearing about other complaints made against her".

35. In her letter of appeal, the Appellant again referred to her experience and qualifications and the references from past employers and she sought an oral hearing so that she could explain herself. She did not make many specific points about the facts, although she did say that she had not worked with CM and (presumably referring to the incident on 15 September) she had not laughed at EJ. She also reiterated that, if the manner in which she spoke to EJ caused her upset, she was "truly sorry" and it was never her intention to do that.

36. The only oral evidence we heard at the hearing came from the Appellant. Her evidence was broadly consistent with what she had said before, but she did add some further points. She told us that EJ had been a resident at another care home who had felt that they were no longer able to meet her needs. Because she had not been long at her new care home, a care plan was still being built for her. She could not remember having particular information about her.

37. As to the incidents on 15 September 2019, she denied having pushed EJ into her wheelchair – indeed, she said that EJ was already in her wheelchair before she went into the room – or that she had slapped her back or told her to shut up and stop moaning. She also denied having said in the dining room that she was laughing at EJ and that she did not have time for her or RX (who she described as a "proper gentleman" for whom she very rarely cared, although she did go to his room to take clothes to the laundry). She said that she would not have said anything like that, but she was unable to recall what had been said.

38. As to the incident on 17 September 2019, she accepted that CM had no axe to grind and that, although CM had once made a complaint about her, it was a trivial thing. She told us that she had not had any telephone conversation and certainly not the one described by CM. When questioned about what she had said to EJ, she was clearly unable to remember exactly what was said, but she was adamant that she did not mean to upset EJ and she did not think that she had spoken to her exactly as CM described.

39. As to the investigatory meeting, she denied mentioning "banter" as such. She said that she had not pursued her case because, when she was told that EJ was upset, she knew that she "had done wrong".

40. In October 2022, DBS provided the Upper Tribunal with a temporary link to the recording made by CM on 17 September 2019. Although made as a video-recording

on her mobile phone, the video obviously showed nothing relevant as CM was hiding in a different room and only the sound was important. When giving permission to appeal, Judge Rowland commented that "the copy of the audio-recording to which I have listened is so unclear that it seems doubtful that much, if any, assistance can be gained from it" (page 132). However no new link or other copy of the recording was provided to enable it to be played at the hearing, presumably because DBS accepts that the "recording isn't completely clear" (page 90). In the event, there was not much dispute as to what was actually said during the period covered by the recording and we accept DBS's summary of it on page 90, so the lack of a copy of the recording at the hearing is unlikely to have been important.

General observations on the evidence

41. DBS's findings of fact are derived principally from the statements made by TD and CM for the purposes of the care home's disciplinary procedures. We agree with DBS that there is no reason to doubt the motives of TD and CM in providing their statements and, indeed, the Appellant has not suggested otherwise. However, it does not necessarily follow that the statements are wholly reliable or that they prove as much as DBS suggests.

42. One point that is particularly important in the present case is that records of spoken language have to be treated with care. It is easier to remember the gist of a conversation than the actual words used, although some words or phrases may stand out. Even when recording a conversation contemporaneously in writing, a person may capture the gist, but do so using his or her own words. Moreover, there are occasions when people say something that makes no literal sense or which literally means something different from what was intended, but those listening nonetheless know from the context what was meant. On the other hand, there is also scope for misunderstanding, with what is said not being understood in the way it was intended, even when it makes literal sense. This is particularly so when spoken words are written down and then read, because the effect of words may depend not only on the context in which they are spoken but also on the manner – for instance, whether with a smile – and tone in which they are spoken. Those factors are also likely to be important when it comes to inferring the probable intention of the speaker in saying those words.

43. The difference between the intended meaning of words and the meaning that is understood by the listener is one of the problems with what is often called "banter". Making comments that would normally be rude or offensive but are not intended to be taken seriously may be acceptable in some contexts if it is clear that the comments will, indeed, not be taken seriously. But there is very often a risk that they will be taken seriously or, at least, as being serious in part, and the risk is likely to be greater when children and vulnerable adults are concerned, particularly if they have some loss of cognitive function. Moreover, in a caring context, such comments may well be inappropriate, even when they do not amount to relevant conduct, because they may not afford the person being provided with care the respect and dignity to which they are entitled from people with whom they have a professional, rather than entirely personal, relationship.

44. Another point that has caused us concern in this case is that we have not been provided by DBS with any detailed evidence about EJ's vulnerabilities and the way that they affected her, largely because it did not seek such information from the

Appellant's employers before making its own decision. EJ's care plan, even one produced after the relevant events, would have been helpful and the care home should have had other records of the carers' observations of her that might have given a picture of her as a person. It is the Appellant who told us that she understood EJ to have dementia. In the absence of any better evidence, we accept that was so, although she also appears to have had severe arthritis and limited mobility. Dementia may be characterised by a degree of confusion and sometimes unwarranted argumentativeness or aggression, even towards family and friends, that may be expressed verbally or (although not in EJ's case as far as we know) physically. However, not everyone with dementia displays the same behaviour and the condition is progressive, so one cannot generalise about its effects. Clearly the Appellant was able to converse with her, although she sometimes did not know what EJ was talking about.

45. Some loss of cognitive function is not inconsistent with having mental capacity, but it may have an impact on the reliability of what a person says. (The way that information is elicited may be important, although we understand why EJ was not questioned closely in this case.) It is, in our view, significant that EJ's husband did not believe whatever EJ had said to him about the incident on 17 September 2019 and we note that DW, who was present when TD spoke to EJ on 15 September 2019, told KI shat she did not feel it necessary to send the Appellant home in the light of what she had heard then, with which KI agreed, which may again suggest that reliance was not always placed on what EJ said. Moreover, we have no reliable evidence as to how easily EJ became distressed and what was likely to cause her distress.

46. We also observe that CM took it upon herself covertly to listen to the Appellant in the light of what she had previously heard herself and had been told – it is not unreasonable to assume that she had spoken with TD, who also worked in the kitchen, about the incident on 15 September – and may have been predisposed to put the worst possible construction on what she heard. We note that she suggested, without any evidence, that the Appellant might have thrown EJ's glasses to the floor and she states that she herself became so angry that she had to be told to calm down. As CM had made previous verbal complaints about the Appellant, one of which seems to have reached the Appellant, this may have worked both ways and, two days earlier, TD may equally have been looking for evidence. However, as we have said, we do not doubt the genuineness of their concerns and, although there is a risk that their perceptions may have been influenced by talking to each other, we accept that they were honest witnesses and, as far as their evidence goes, reasonably accurate in what they recorded in their statements.

Our findings about the incident on 15 September 2019

47. Although one particular of DBS's allegation (2), which it found proved, was that the Appellant "pushed" EJ into her wheelchair, we note that, when it came to considering whether she had displayed callousness or lack of empathy, it did not rely directly on that finding but instead on a finding that she "told [EJ] to shut up after [EJ] *said* she hurt her when putting her into her wheelchair" (page 101, but with our emphasis), although it did rely on her having "moved [EJ] into her wheelchair in an uncaring manner" when assessing the appropriateness of including her in the Adults' Barred List (page 108). We are not satisfied that there is sufficient reliable evidence

to show that the Appellant actually did anything untoward that might have amounted to treating EJ roughly. There is no evidence as to what happened other than what TD reported EJ as having said, which contains no details. Even DBS's finding that the pushing occurred when the Appellant was moving EJ into the wheelchair has no clear foundation in the evidence as it appears from what the Appellant told us that EJ did not always need help in transferring herself to her wheelchair. Moreover, as we have already observed, we consider it significant that EJ's husband appears not to have regarded what she said as always being reliable and DW appears not to have done so on this occasion. TD may possibly have disagreed, but EJ's husband and the care staff may have been better judges. Indeed, we note that DBS have rightly not relied upon the report that EJ complained that the Appellant had slapped her back. There is no evidence of the Appellant treating anyone roughly or causing physical harm to anyone on any other occasion, save to EJ's foot on 17 September 2019 in an incident that appears to have been accepted as being an accident that was not, or did not arise from, relevant conduct. For reasons that will become apparent, we do not agree with DBS (page 92) that the evidence as to how the Appellant subsequently spoke to EJ somehow supports the allegation that she "pushed" EJ in an inappropriate way.

48. On the other hand, we do accept that it is probable that the interaction between the Appellant and EJ that occurred in the dining room was a continuation of what had gone on before in EJ's room and that, whatever exactly was said, the Appellant probably did effectively tell her to shut up and stop moaning before taking her down to the dining room. That would be consistent with what she said two days later.

49. We are not sure what exactly TD meant when she said that EJ was "upset and in a panic" when she came into the dining room and to what extent that statement was based on hindsight, but we accept that EJ was complaining of the Appellant's earlier treatment of her and we also accept that she was concerned about being laughed at, which tends to suggest that she had been upset by what the Appellant had already said to her. We also accept TD's account of what the Appellant said to EJ in the dining room. Both the allegation that the Appellant said, "you're not laughing but I am" and the allegation that she said that she did not have time for EJ and RX that day, have the ring of genuine recollections of expressions used. That the Appellant says now that she would not have said such things may suggest that she now recognises that it was inappropriate to say them, but we are not satisfied that she regarded them as inappropriate then.

50. DBS's allegation (3) is that, when they were in the dining room, the Appellant told EJ that she was laughing at her when EJ was "upset and crying". Although we are prepared to accept that EJ was in fact upset by what the Appellant had said earlier, TD's statement makes no reference to her "crying" at the time that EJ was in the dining room. She says that EJ was crying when she and DW went to speak to her in her room but, as we have said, we understand that to have been after the conversation in the dining room. We are not satisfied on the evidence before us that, at the time that the Appellant spoke to her, EJ was as obviously in distress as she would have been had she been crying. Indeed, we are not convinced that she was showing any signs of being upset other than that she was complaining about EJ.

51. EJ was showing more signs of distress when TD and DW went to speak to her afterwards, but nonetheless DW did not consider it necessary for the Appellant to be sent home. It would have been interesting to know her thinking, but, among other possibilities, it may have been that EJ's distress was not long-lasting and did not

appear particularly serious or that DW was not convinced that all of EJ's distress had been caused by the Appellant or that she did not consider it likely that the Appellant had actually done anything wrong that required, if anything, more than a quiet word to be had with her. In any event, KI accepted what DW had said, and one result appears to have been that no-one spoke to the Appellant about what had happened until after 17 September 2019. Nonetheless, we accept that the way that the Appellant had spoken to her caused EJ some distress.

52. We will address the question of the Appellant's state of mind below.

Our findings about the incident on 17 September 2019

53. We do not accept DBS' allegation that the Appellant did not allow EJ to finish getting ready. That finding of DBS is not supported by CM's statement, which merely records that, when the Appellant asked EJ, "are you ready now [EJ] or not?", EJ replied, saying "I am just brushing my hair" and the Appellant then said: 'for goodness' sake come on'. The Appellant told us that when she had first checked on EJ, she was not ready. EJ liked to get ready herself as much as she could and could mobilise a little with the help of a frame. EJ left her for a while and, when she went back, EJ was in her wheelchair. There is no evidence to contradict the Appellant's evidence that she then actually helped EJ brush the back of her hair or to suggest that EJ's hair was not in fact done before the glasses were dropped. KI, in her conclusions said that "[EJ] at this point [i.e., when the Appellant was telling her to hurry up] started to shout stop, stop I am not ready". However, CM had said that EJ shouted "stop" at the time when she was being brought out of her room, and therefore presumably when the wheelchair hit the doorframe, and did not mention her doing so before then. Moreover, DBS's summary of the recording says that after EJ had called the Appellant "a nasty piece of work" (and, we add, presumably, after the Appellant had replied "yes, I am"), "you can then hear [EJ] ask her to wait a minute, [and the Appellant] replies that she wasn't going anywhere", which suggests to us that the Appellant did wait until EJ was completely ready. KI said that the Appellant said "I am not moving you", but the effect is the same.

54. On the other hand, we do accept CM's evidence that the Appellant had earlier appeared to express exasperation at EJ's slowness by saying, "are you ready now [EJ] or not?" and then, "for goodness' sake, come on", or something similar. That is consistent with the Appellant's account of having already given EJ time to get ready. We accept that CM thought that the Appellant's tone was not appropriate and that was why she started her recording, but it is not evident how clearly she could hear what was being said.

55. We also accept CM's account that, when EJ's glasses were dropped, EJ said "are you going to pick them up for me?" and the Appellant responded saying, "no, I'm not", to which EJ then said, "you're a nasty piece of work, aren't you?" and the Appellant replied, "yes I am". However, we accept the Appellant's evidence that the glasses merely fell into the side of the chair, which would be more consistent with a "clink", but no more, being heard than them falling onto the floor – not that it really matters where they fell – and that she said that she was not going to pick them up while she was actually picking them up. There is no evidence that the Appellant did not in fact return them to EJ promptly and we are satisfied that it is probable that she did so. KI concluded that the Appellant had refused to give the glasses back to EJ and that that amounted to neglect. However, we do not consider that EJ's question,

"are you going to pick them up for me?", can be read as a simple open question. In its context, it appears accusatory, and the Appellant's reply appears to be an ironic (in the proper sense of that word) response to the implied accusation. Whether or not the attempted irony worked, we are not satisfied that the Appellant intended any harm to EJ by what she said and, as the Appellant was actually returning her glasses to EJ at the time, we are not satisfied that it either caused her, or risked causing her, any harm. We observe that it has not been suggested by DBS that EJ was seriously admitting in her next response that she was a nasty piece of work or that, by saying that, she caused, or risked causing, EJ any harm.

56. We do accept that the Appellant raised her voice when EJ did not put her foot on the plates after one footplate had hit the doorframe – although her voice may have appeared louder to CM partly because the Appellant was nearer the door that may then have been open more fully than before – and that she said "shut up" or something to that effect when EJ said that she could not put her foot on the footplate. Again, these appear to be expressions of exasperation that CM clearly regarded as inappropriate. Again, there is no evidence that the Appellant did not actually help EJ so that her foot was adequately supported when the Appellant wheeled her to the lift. We therefore do not accept DBS's imputation that the Appellant actually refused to help her.

57. Whatever the Appellant's motive, which we address below, we accept that both what the Appellant said to EJ when apparently trying to hurry her up and when EJ could not put her foot on the footplate gave rise to a risk of emotional harm and was therefore relevant conduct. Further, we accept that EJ was in fact upset in consequence, although how much she was upset specifically as a result of what the Appellant had said to her is impossible to determine on the limited evidence available.

The Appellant's intention in engaging in relevant conduct

58. The only relevant conduct that we have accepted is the way in which the Appellant spoke to EJ. The Appellant has, throughout, denied that she meant to cause EJ any harm and we are not persuaded that it is probable that she did intend to cause her harm or that she realised that she was causing her harm.

59. The exchange between EJ and the Appellant after the glasses were dropped is particularly illuminating, because it shows EJ speaking quite sharply to the Appellant. If that was generally her manner – and we have no evidence to the contrary – and she often appeared to be complaining unnecessarily, it is plausible that the Appellant may have felt that it would lighten the atmosphere and move the conversation on to respond in the same manner but ironically; in other words not intending EJ to take what she said seriously but intending her to view it as part of a game, or "banter" between the two of them. That, we find, was what ran through much of the Appellant's interaction with EJ. The Appellant did not take to heart what EJ said to her and she did not expect EJ to take to heart what she said in reply.

60. In particular, it seems to us to be the most probable reason for the Appellant saying what she did in the dining room on 15 September 2019, in front of TD. We do not consider that the Appellant intended to upset, or further upset, EJ by what she said, or that she realised that she might do so. Nor do we consider that the Appellant really did not care about – "have time for" – EJ and RX. However, we understand

TD's reaction to what she said and it seems to us that the Appellant ought to have realised that EJ might take her seriously and be upset, although we are not satisfied that any distress was obvious at the time.

61. Similarly, in relation to her expressions of apparent exasperation on 17 September 2019, we consider it probable that the Appellant did not mean EJ to think that she did not intend to help her with her hair or to help put her foot on the footplate. We are not satisfied that she either meant to upset EJ or that she did not care whether she did or not. As we have said, there is no evidence that she did not provide the help and it is quite possible that both EJ and CM, who was hiding in another room and could not see what was actually going on, failed to understand that the Appellant was not being serious or, at least, not being entirely serious, when apparently exasperated. And, if that was so on 17 September 2019, it seems to us to be unlikely that what the Appellant said to EJ before she brought her down from her room on 15 September 2017 was meant any more seriously. The evidence upon which DBS relies is not, in our judgment, sufficient to show that the Appellant's initial explanation for her behaviour, when confronted with it in the investigatory meeting, was not true and that her interactions with EJ did not involve "banter", That is not to say that her employers were not entitled to regard it as unacceptable, but for DBS's purposes and ours, the Appellant's intention is important.

Our findings arising from the Appellant's conversation with CM and the investigatory meeting

62. We accept that, on 17 September 2019, the Appellant said something to CM along the lines of "I spoke to her like that because we all know [EJ] is difficult", although we are not satisfied those were necessarily her exact words. However, it seems to us to be implausible that she meant that EJ being "difficult" justified her causing her to be upset. It seems much more plausible that she meant that she considered her comments an appropriate way of responding to CM's way of speaking to her. We do not agree with her, but the distinction we draw is important.

63. DBS relies on two matters arising from the investigatory meeting: "[l]abelling her interactions with [EJ] as 'banter' even after knowing the upset it caused [EJ]" and not being "interested in hearing about other complaints made against her".

64. As to the first of those, it does not matter whether "banter" was the Appellant's word or the minute-taker's. One could substitute "joked" for "has banter" and the Appellant herself has referred to her "humour". The gravamen of DBS's allegation is that the Appellant considered it appropriate to say what she did, knowing that EJ was already upset and that her comments would further upset her. However, we are not satisfied that, when the Appellant spoke to EJ on 15 and 17 September 2019, she realised that the way she was speaking to her did upset her. She did by the time of the investigatory interview, or at least by the time it ended, but the impression that we get from the minutes (page 68), which are obviously not a verbatim record, is that the Appellant was trying to explain how she saw what she had said to EJ on 17 September 2019 at the time she said it, rather than to argue that what she said was acceptable in the light of the upset that she subsequently discovered she had actually caused. In other words, she was trying to explain her actions and make a plea in mitigation, rather than justify them. At that stage in the meeting, she did not know of allegations (2) and (3), relating to 15 September 2019.

65. This is linked to DBS's second point: that the Appellant was not interested in hearing about allegations (2), (3) and (4), which she did not know had been made until the investigatory meeting. DBS argues that this "supports the suggestion that she isn't interested in the feelings of other people or how her actions may have upset other people and is not interested in rectifying them" (page 106). However, we do not accept that that was the reason that the Appellant did not read the statements given to her during the meeting (if they were given to her then).

66. The minutes show that allegations (2), (3) and (4) were mentioned only after the Appellant was told that she was being suspended. She was then informed verbally of allegation (4), which was also about the way she had spoken to a resident, and denied it. There is no mention of allegations (2) and (3) being put to her verbally. The minutes say that she was then given the statements, presumably those of CM, TD and the person who had made allegation (4), but that the Appellant refused to read them. The Appellant denies having been given the statements, but we think she probably was given them at the meeting, although the letter dated 20 September 2019 (pages 55-56) says that the statements of TD and CM were sent then. Moreover, it seems quite possible that enough had been said to make the Appellant aware that allegations (2) and (3) were also primarily concerned with the way she had spoken to EJ. In any event, the impression we gain from the minutes is that, if the statements were provided to her then, the reason that the Appellant did not read them was that she realised that her employers had enough evidence to sack her anyway, particularly as she was still within her probationary period, and therefore she "said that she doesn't want to waste any time so she said she would rather it happen now".

67. That is consistent with the Appellant telling us that, when she heard how upset EJ had been, she realised she had been wrong to speak to her as she had. Her not resigning is consistent with her not having thought at the time of her actions that she was upsetting EJ, but it seems obvious that she had really given up expecting to be reinstated by the end of the meeting.

Conclusion on the facts

68. We have not accepted all of DBS's findings, but we do accept that, on a number of occasions, the Appellant spoke to EJ in ways that caused her distress. These amount to relevant conduct. We are not satisfied that the Appellant intended to upset her or that she realised at the time that what she said would have that effect, but we consider that she ought to have realised that there was at least a risk that it would have that effect.

Appropriateness and Proportionality

69. It is unnecessary for us to consider whether, on its findings of fact, DBS's decision was proportionate. We are satisfied that DBS's decision was based on mistakes of fact insofar as its findings were different from ours

70. Its decision to include the Appellant in the Adults' Barred List is very closely argued but it was, of course, based on its findings of fact and we have differed to a considerable extent. We have not accepted that the Appellant moved EJ into a wheelchair in an uncaring manner. Nor have we found that the Appellant realised

that she was upsetting EJ; in particular, we have not accepted that EJ was obviously upset to the point of crying when the Appellant said she was laughing at her and did not "have time for" her. We have also not accepted that the Appellant in fact displayed what DBS called in its appropriateness and proportionality assessment "uncaring behaviours", even though what she said to EJ, if taken literally by a bystander, might have suggested that she was.

71. Nonetheless, even on our more limited findings, the Appellant's conduct was plainly wrong, as she herself accepts, because whatever her intentions, the way she spoke to EJ did upset her and that was foreseeable. The question for us is whether it would be proportionate to bar her.

72. DBS inferred from its findings of fact –

> "that if [JA] finds the service user's behaviour challenging … she is unable to put her frustrations aside and provide caring, professional care and instead she allows her personal feelings to interfere and cannot empathise with the service user, therefore she becomes uninterested in the needs and emotions of that service user, this is indicated in the witness statement that [JA] was heard verbalising her dislike for two of the service users, one of which was involved in the allegations. The uncaring behaviours recently displayed by [JA], alongside the absence of any real insight, remorse or ownership for her actions gives the DBS reason to believe that [JA] is at risk of repeating her behaviour in the future if she were to work with service users that she disliked." (page 108)

73. We do not consider that such inferences could reasonably be drawn from our findings. In particular, while we can understand DBS's concerns, we do not consider that it can reasonably be inferred from our findings that the relevant conduct in this case was the result of more than a serious misjudgement on the part of the Appellant made in relation to one particular resident in the care home. The evidence is simply insufficient to permit any broader adverse conclusions as to the Appellant's character to be drawn. There is, of course, a risk that a misjudgement will be repeated, but, in the absence of any basis for finding that the Appellant has a propensity for misjudgement, that must be regarded as low in the light of the Appellant's history and the warning that this case will have provided. The Appellant has spent a large part of her working life caring for vulnerable adults, has on more than one occasion been given responsibility as a senior carer and, on page 80, specific reference is made to "her gentle ways with Dementia residents& patience she displays with them is valuable to their well being". Furthermore, in the absence of any evidence that she would deliberately or recklessly cause harm, the risk of causing anyone significant harm by a misplaced joke must also be regarded as slender.

74. In these circumstances, we are satisfied that it would not be proportionate to include the Appellant in the Adults' Barred List.

Disposal

75. Accordingly, we allow this appeal and direct DBS to remove the Appellant from the Adults' Barred List.

Mark Rowland

Deputy Judge of the Upper Tribunal

Signed on the original and authorised for issue on 15 August 2023