IN THE UPPER TRIBUNAL **Appeal No. UA-2023-000119-**
V
ADMINISTRATIVE APPEALS CHAMBER **NCN No. [2025] UKUT 038 (AAC)**

Between:

EQ

Appellant

- v –

Disclosure and Barring Service

Respondent

Before: Upper Tribunal Judge Ward, Ms R Smith and Mr R Graham

Hearing date: 9 January 2025

Representation:
Appellant: Mr C Geering, instructed by Legal Adviser, Royal College of Nursing
Respondent: Mr A Webster, instructed by DLA Piper LLP

There is an extant order under rule 14 dated 21 August 2023 precluding the disclosure of any information likely to lead to the public identification of any of the following persons, namely the appellant and members and ex-members of her family, the institutions for whom she worked, other members of staff at those institutions, staff involved at the Nursing and Midwifery Council, those who provided references for the appellant and service users involved in the matters which are the subject of these proceedings. No application has been made for the order to be varied and it is maintained. Breach of the order may constitute contempt of court and be punished by a fine or imprisonment.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The DBS's decision dated 26 October 2022 contained mistakes of law and fact. The decision is set aside and remitted to the DBS to take a fresh decision. The appellant is to remain on the barred lists meanwhile.

REASONS FOR DECISION

1. The appellant (EQ) appeals against the decision by the respondent (DBS) dated 26 October 2022 to include her name in the Children's Barred List and the Adults' Bared List. The barring decision was taken on the basis of "relevant conduct" rather than "risk of harm".

2. The DBS's decision rests on two pillars:

a. that EQ, a registered nurse, made a number of medication errors on 8.9.21 and 17.9.21 (the medication errors); and

b. that she attended work under the influence of alcohol on 10.4.22 (the alcohol issue).

3. We held an oral hearing at Field House London EC4 on 9 January 2025, an earlier hearing having been postponed. We heard oral evidence from the appellant and received submissions from counsel for both parties, to both of whom we express our thanks for their careful and skilful presentation of their respective cases.

4. By a ruling dated 10 August 2023 EQ was refused permission to appeal on her original ground 1 but given permission on grounds 2 to 6. The numbering of those grounds is maintained. The grounds as they now stand are as follows:

> Ground One: [not pursued]
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> Ground Two: the DBS failed to adequately particularise its medication error allegation;
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> Ground Three: the DBS was wrong to find the appellant had committed medication errors on the 8 September 2021 and/or 17 September 2021;
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> Ground Four: the DBS were wrong to find the appellant was culpable for any medication errors;
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> Ground Five: the DBS failed to provide adequate reasons for finding the medication allegation proved;
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> Ground Six: the DBS was wrong to find the appellant had attended work under the influence of alcohol.

5. Safeguarding Vulnerable Groups Act 2006 s.4 materially provides:

> "(2) An appeal …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.
> …
> (5) Unless the Upper Tribunal finds that DBS has made a mistake of law or fact, it must confirm the decision of DBS."

6. Grounds 2, 3 and 5 are argued as potential errors of law. Grounds 3, 4 and 6 are potential mistakes of fact.

7. We set out some initial background to both allegations, seeking to stick to matters which are not in dispute.

The medication errors

8. EQ was employed to work at the R Home, a facility housing 88 residents across 3 floors. The top floor was for residents requiring nursing provision. The middle floor was for residents with dementia and the ground floor was for those requiring residential care. She worked day shifts and another nurse worked nights. The only other person with a nursing qualification was AL, the manager, who did not do nursing work. If EQ was on leave, and on days when she was off duty, her place was filled by an agency member of staff. While there were others, such as Care Team Leaders, who were authorised to administer certain medication, only the nurse could administer controlled drugs. She therefore had to cover the other floors as well as the top floor where she was based.

The employer's procedures

9. On 21 September 2022, EQ was asked to come into the office for what was described as "a chat" with the Deputy Manager, KB. A note of that meeting is in evidence. It records:

> "[K] confirmed with [EQ] she was aware of the safeguarding which had been raised regarding medication errors she had made. [K] asked [EQ] what happened on the day in question, 8 September as there were lots of mistakes and meds not given." The Appellant discussed the difficulties she faced. It continued "[K] went on to ask about the 17 September when BD medication was not given and DM had not been given her epilepsy medication and asked her to tell her about that day."

10. Later that day, EQ was required to attend a meeting with the Manager, AL. A letter following that meeting is in evidence. It materially reads:

> "On the basis of the evidence presented, I found the allegations substantiated. In particular I am satisfied that a safeguarding alert had been raised in relation to the medication errors made by you on 8th and 17th September 2021 and due to the seriousness of the issues and the potential harm that these issues could have caused to the residents I have no other choice but to substantiate the allegations."
>
> …
>
> I took into consideration the mitigating circumstances put forward by you, namely [they are then listed]
>
> …" [ ]

11. The appellant was advised of her right of appeal but did not exercise it.

12. Before that meeting, an anonymous referral had been made on 13 September to the Nursing and Midwifery Council (NMC) concerning the appellant. It alleged that she had administered medication to a resident at the wrong time; that she had destroyed medication; she had refused to give another resident their insulin and that a large amount of medication was said to be missing.

13. Following the meeting, the R Home referred the matter to the DBS, stating that EQ had missed medication for 8 residents on 8.9.21 and for 2 residents on 17.9.21. R indicated that EQ had accepted responsibility. The matter had been investigated and EQ dismissed.

The alcohol issue

14. After being dismissed from the R Home, the appellant obtained employment with the T home. It is at this point relevant to note two matters concerning the appellant's health. First, that she had for many years been experiencing the symptoms of vasovagal syncope. Evidence dating from 2019 from NHS Community Therapy Services indicates that "…symptoms of nausea, fascial headaches, dizziness and incident of slurred speech could be considered vascular red flags". In March 2022 the appellant saw a cardiologist whose letter confirms a diagnosis of "long history of vasovagal syncope with autonomic stimulation". Secondly, the appellant has a history of alcohol abuse. Following previous allegations in 2013 and 2017, she had been dismissed from a post in 2018 for allegedly attending under the influence of alcohol. Allegations of attending under the influence of alcohol in 2017 and 2018 and, in 2017, of making errors in administration and (in particular) recording in consequence of her alcohol dependence and mild depression had come before the NMC, who imposed a substantive suspension order, later converted to a conditions of practice order and subsequently discharged in the light of a review panel of the NMC concluding that her fitness to practice was no longer impaired.

15. In early 2022 the appellant was admitted to A and E with "a lot of chest pain with profound sweating lasting more than a day". In late March 2022 there had been an incident at work when the appellant had appeared unwell and an ambulance had been called.

16. On 10.4.22 the appellant was rostered for a shift which was due to start at 6.45 a.m. On arrival, she was observed to be sleepy, unsteady and unfocussed. The night nurse asked if she was having one of her migraines. The appellant replied that she was unable to work that day and would go to her car. There were reports of a smell of alcohol and the manager was summoned as there was a concern that she was in no state to drive. The deputy manager was subsequently sent to watch over the appellant in her car. The police were sent for, arriving at 9.15a.m. and at 9.20a.m. breathalysed the appellant, obtaining a reading of 123 micrograms per 100 millilitres of breath. (The level at which a drink-drive offence is committed is 35 per 100). The appellant's keys were in the ignition and she was subsequently prosecuted, but was acquitted on the basis that she had established on the balance of probabilities that she did not intend to drive. It was her case before the magistrates and before us that she had drunk a couple of glasses of wine when at her parents' for supper the previous evening but had only consumed further wine, resulting in the breathalyser reading above, once she had returned to her car, having concluded that she was unable to work that day and awaiting the opportunity to return home with the aid of a lift from a friend once the latter had finished work.

17. On 25.4.22 the manager of the T Home referred the matter to the DBS.

The DBS's processes

18. On 24.8.22 the DBS sent a Minded to Bar (MTB) letter to the appellant. That letter set the DBS's concerns in relation to both the medication errors and the alcohol issue. It attached a number of documents, among them the notes of the meetings held by the R Home which led to EQ's dismissal; material from previous referrals to the NMC and the current referral based on the anonymous allegations.

19. It also attached a letter from the RCN, acting on behalf of the appellant, challenging the information which the police had included as part of the "Other relevant information disclosed at the Chief Police Officer(s) discretion" section of an Enhanced Criminal Record Certificate issued in respect of her. The text objected to read, so far as relevant, as follows:

> "On 8 September 2021, it is alleged that [EQ] failed to administer Almodipine [*sic* – Amlodipine presumably intended] (10 mgs) at 9.00 am to an 85 year old vulnerable female who lacked capacity. It was also confirmed an 86 year old female (who also lacked capacity) did not receive Metformin at 17.00 pm. Further enquiries found that [EQ] also failed to administer medication to vulnerable adults (all with capacity) aged 63, 72, 96, 78 and 89. On 17 September 2021 at 09.00am, it is reported that [EQ] failed to administer Bisoprolol (2.5mgs), Candesartan (8mgs), Candesartan (16mgs) Clopidogrel (75mgs) to an 89 year old female resident with variable capacity. [EQ] also missed a cosmocol sachet at 09.00am and 17.00pm for the same resident.".

20.The material supplied contained no records relating to the administration of medication.

21. As regards the alcohol incident, the material included the referral by the employer and statements by P (the manager), E (the deputy manager) and K and (it is believed) G, members of staff.

22. Certain documents were not included, even though DBS had them, including a printout obtained by the night nurse from interrogating the care records ("the Missed Medication Log"), which summarised calls made to the GPs of the residents said to have been the subject of the errors, asking what, if anything, should be done in the light of those errors. Also not included were certain psychiatrists' reports on the appellant obtained for the purpose of earlier NMC proceedings.

23. No submission was made to DBS in response at that time.

24. On 22.10.22 the decision under appeal was taken. The basis for it may be discerned from the decision letter and from the Barring Decision Process (BDP) document compiled by DBS.

25. The DBS was satisfied that EQ had engaged in "relevant conduct" in the two respects identified above. While acknowledging that none of the residents had experienced any harm as the result of the errors, there was a range of consequences of a medication error, which could have "dire consequences". It relied on the alcohol incident, together with the matters which had previously figured in referrals to the DBS and the NMC, as evidence of alcohol dependency intruding on the appellant's ability to care for vulnerable groups and that earlier abstinence had not been maintained.

26. In relation to the alleged medication errors, the BDP document notes:

> "It appears the investigation and disciplinary investigation were very brief, [EQ] was dismissed the same day following the allegations being made. Furthermore the information provided to the DBS is somewhat lacking, they have not provided information regarding which and what dosage of medications were missed, the impact this had, how there allegations came to light or any other contextual details. As such there is little information that can be assessed, other than the allegation as it is stated. Nevertheless there does not appear to be a valid reason for the referring organisation to [*sic* – make a] malicious allegation or provide inaccurate information, as such the evidence provided can be considered credible."

27. It further noted:

> "The evidence in this case is somewhat 'patchy', the referring organisation have provided very little detail, simply s[t]ating the allegation. Similarly the Police did not investigate the incident and the information they have included on the enhanced disclosure appears to be simply based upon what they had been told by the referring organisation and as such is secondary evidence. The evidence provided by [EQ] and her representatives paints a picture of a home with [*sic* – which] was chronically understaffed and being the only registered nurse on duty much of the work fell on her shoulders. However again there is only [EQ's] word for this and there is no discernible reason why the referring organisation would make a malicious allegation or provide inaccurate information to the Police or the NMC, as such the allegation that [EQ] made a number or medication errors proven on the balance of probabilities."

28. As regards the alcohol incident, the DBS noted the statements of witnesses that the appellant had appeared smelling of alcohol and sleepy and unsteady and that the statements were corroborative of one another and found the allegation proved. At that point it had not received any version of events from EQ, directly or indirectly.

29. On 1.11.22 the RCN applied for permission to make representations late, citing what was on any view a weighty catalogue of family illness and bereavement which the appellant submitted had caused her to lose sight of the deadline for responding. The request was refused on the ground that the RCN had been instructed with regard to challenging the ECRC in May 2022 and there was no reason why they could not have provided representations on the appellant's behalf in response to the MTB letter. No criticism of that refusal has been made before us.

The evidence before us

30. In addition to the papers which had been relied upon by the DBS when taking its decision and those which, although in its possession, had not been relied upon (see para 22) we received oral evidence from EQ. She was cross-examined by Mr Webster and answered a number of questions from the panel. In view of the decision we have reached, we refer only to parts of her evidence which relate to that decision.

31. She gave evidence that the home was chronically short-staffed. As the sole nurse on duty in the building she would be called to the two other floors on top of her own duties in the nursing home. As well as drug rounds, she would have to take part in conferences about residents, deal with relatives and take the numerous phone calls

from doctors. If a patient fell, which was a common occurrence, she was required to deal with the incident, which might involve staying with the patient and making observations until the ambulance came. Some patients could be particularly time-consuming because of difficult behaviour. There were thus frequent conflicting demands on her time and, as a registered nurse, all she could do was attend to them to the best of her ability which she did, frequently involving staying late.

32. She accepted that as the sole nurse she was responsible for all medication of controlled drugs. Some residents required regular medication, others might need it PRN (as and when required).

33. She had raised concerns with management about untrained staff giving out controlled drugs and forging her signature on records. A short time before she was dismissed she had raised her professional concerns about the operation and staffing of the R home with the Royal College of Nursing. By September 2022 relations between EQ and the manager and deputy manager had become distant, with no conversations having taken place during the previous month.

34. She gave evidence that she had no recollection of events on 8 September (the panel's notes suggest she was asked about 7th, but it is clear that is the 8th that her answers concerned.). That was her first day back from holiday and she continued to work, in accordance with her normal 4 shifts a week pattern, until 17 September, without the home raising any concerns or imposing any restrictions on her.

35. 17th September had been a difficult day. The home was very short-staffed. The appellant had to take calls from doctors and there were two Zoom meetings concerning continuing care, which could take up to 1 hour. The manager was not in and the deputy manager and the administrator left at 4pm. It was a Friday and EQ had to arrange for medication to be collected for a syringe driver which would have run out over the weekend. There were frequent falls on the dementia and nursing floors, in particular involving one man who kept trying to get out of bed but was unable to do so safely. She should have left at 7pm but left at 9.20pm. As before, she continued to work without concerns raised or restriction imposed.

36. When summoned for a chat on 21 September, she had no idea of the nature of the "chat", which proved to be (in the employer's eyes) an investigative meeting. It lasted a matter of minutes and a large part of it was taken up by discussion of the abscess on a tooth which had been troubling her. She was given no notice of that or of the meeting (lasting about 5 minutes) the same day which was treated as a disciplinary meeting and she had no opportunity for representation.

37. At no point during either meeting was she shown any Medication Administration Record ("MAR chart"), any incident report, medical notes or any evidence of a medication reconciliation exercise to see whether the correct number of tablets (which were not in blister packs) remained (rather than too many as would be the case if medication had been missed).

38. She had no awareness at the time of any errors having been made on either day. She would have liked to have had the chance to check on the errors alleged, refer to the relevant MAR charts and so on but was not given the opportunity. Although the deputy manager had handed her a list of the names of the patients involved, she was given very little time to read it and her request to keep it was refused.

39. She accepted that the notes of the meeting were consistent with providing mitigation rather than denying the allegations. She has not admitted the allegations at any point and has no recollection of any errors having been made.

40. Having been dismissed, she did not appeal because she was glad to be out of the stressful environment of the R Home and content to look for work elsewhere which she found reasonably soon afterwards at the T Home.

41. Because of the nature of the case advanced on her behalf, Mr Webster put it to EQ that there was information available to her which should have enabled her to work out at least some of the individuals involved and the nature of the errors. Specifically, the notes of the investigative meeting refer to patients BD and DM and that the former had missed her epilepsy medication. On that specific point EQ said she would have remembered if BD's epilepsy medication had been missed but had no recollection that it had been. More generally, she accepted in cross-examination that the employer's referral to the DBS contained a full list of the residents being referred to, with their dates of birth and medical conditions and that, as she had been told the initials of the patients who were the subject of the 17 September allegations, the remainder must be those who were the subject of the 8 September allegations.

42. Mr Webster put it to her that by reading the letter challenging the content of the ECRC and marrying it up with the referral document and the information she had been given in the course of the second meeting on 21 September, one could work out in respect of some patients who was being referred to and at least in the case of some of them their name, the dates and in some cases the time of the alleged failing and in some cases the medication concerned. EQ accepted that such a process would yield some information to enable a response to be provided but what she would have wanted to see for such a purpose were the MAR charts. Her evidence was that both the NMC and the RCN had asked for these but were told they had been destroyed (despite, the panel notes, the guidance by the Care Quality Commission[1] that they be kept for at least 8 years).

43. EQ accepted that the evidence in the bundle of the Missed Medication Log (as noted above, not provided to her during the DBS's processes) provided details of the names, times and dates of the alleged errors and the medications concerned for all the residents said to have been involved. Her position remained that she had not seen the MAR charts and could not comment.

44. Turning to the alcohol incident, EQ explained in her witness statement that the previous evening she had gone to her parents' the previous evening as she was caring for her father who was seriously unwell and had had a fall. She had done their shopping and her own and had purchased two bottles of wine. She had had two glasses of wine but her mother had not wanted any, so she had put the remainder into a plastic bottle and put it with her own shopping in her car. She couldn't remember when she had had the second glass but it was during the evening, not in the middle of the night. She had attempted to sleep on a chair with her feet on a stool but had not slept.

45. She had left her parents' home at 5.30 a.m. and driven home to pick up her uniform before going on to the T care home, where she had arrived at about 6.35 a.m. Her shift started at 6.45 a.m. She had felt very unwell on the way to work and had considered calling in sick. She had met the night nurse who had asked if she

[1] https://www.cqc.org.uk/guidance-providers/adult-social-care/medicines-administration-records-adult-social-care

was having one of her migraines and EQ asked her to tell the manager, who was not at that point on the premises. She accepted the evidence of others that she had briefly sat at the nursing station with a pen and a handover sheet but had appeared unable to focus. According to her statement she then went to her car and tried to sleep. She denied having spoken to the manager, or to K or G who had also provided statements. It was her intention to phone a friend, L, but L would not finish work until 11 a.m. She had felt too ill to drive herself home at that point (notwithstanding that she had just driven herself to work). Remembering that she had a half bottle of wine in the car she thought that if she drank it it would help her to sleep, so she did. Having finished that, she started on the second bottle in the car. She did not drink all of it; there was still some left, but she could not say how much. At some point the deputy manager came over and sat in the car with the door open.

46. After the police had breathalysed her, she was taken into custody and, when released later that day, had phoned L to take her home.

Ground 2

47. Mr Geering refers to a number of authorities. In *R(Johnson and Maggs) v Nursing and Midwifery Council* [2008] EWHC 885 (Admin) the court considered there were two issues relevant to determining if an allegation was adequately particularised:

> "Firstly, whether the challenges in the circumstances of the case provided sufficient information to enable those charged to know, with reasonable clarity, the case they have to meet. Secondly, whether they know enough about the charges to enable them to prepare their defences." [p. 102]

48. In support of the proposition that that applies equally to DBS proceedings, he relies on *B v Independent Safeguarding Authority* [2012] UKUT 410 (the ISA was the predecessor to the DBS):

> "We also note that in *R (Johnson) v Professional Conduct Committee of the Nursing and Midwifery Council* [2008] EWHC 885 (Admin), Mr Justice Beatson considered that, in the (analogous) context of professional disciplinary proceedings, Article 6 ECHR required the allegations of misconduct to be sufficiently particularised to enable the person charged to know, with reasonable clarity, the case they had to meet and to prepare their defence. We find that ISA's approach of failing to particularise the evidence in support of each allegation in the "minded to" letter did not, in the circumstances of this case, meet the standard of clarity required by Article 6 ECHR and did not allow the Appellant to "prepare his defence" adequately. This also constitutes a mistake of law." [p. 26]

49. The degree of specificity required is a matter of fact and degree. Regard may be had to the underlying evidence in addressing if any unfairness has resulted. It comes down to whether, "in all the circumstances, including the evidence… advanced, [the appellant] had insufficient information to know what case she had to meet or that she was unable to defend herself." see *Yassin v General Medical Council* [2015] EWHC 2955 (Admin).

50. Mr Geering submits that not only does the person complained about need a fair opportunity to defend themselves, but the DBS, to whom alone the question of "appropriateness" is entrusted, needs sufficient detail to enable it to assess the seriousness of the alleged failings. Any shortcomings there had been might be

cases of missed medication or of a failure to record medication that had in fact been given. Different medications had different consequences if they were missed.

51. In the present case, the MTB letter did not specify the medications, the patients or the number of errors. It would have been straightforward to have done so if the MAR charts had been made available. The enclosures with the MTB letter were contradictory: the anonymous referral to the NMC mentioned insulin, that medication had been destroyed and that medication had been given at the wrong time, none of which featured in the material the DBS had received from the employer. The DBS had not attempted to piece together from various documents the case against the appellant as it had done in the present proceedings and it was unreasonable and unfair to expect a person in the position of the appellant to have done it for herself. In short, the DBS had not to a legally sufficient extent "set out its stall" in the MTB letter.

52. Such an error could not be cured by new evidence, specifically in this case the Missed Medication Log. Indeed, he objected to the DBS being permitted to rely on new evidence at all. The DBS's duty to give reasons had to be met on the evidence before it at the time. Allowing the DBS to rely on new evidence at the stage of an Upper Tribunal hearing would bypass the opportunity to address the DBS on appropriateness and the Upper Tribunal was not allowed to consider it. In any event, the Missed Medication Log did not fully spell out which matters were being alleged against the appellant (there was, for instance, a reference to a missing box of medication) nor did it address the difficulties caused by the contradictory allegations in the anonymous referral to the NMC.

53. There is little if any dispute as to the legal principles involved, so far as the need for adequate particularisation of the allegations is concerned. Mr Webster also relies on *Yassin,* submitting that at para.20 it holds that if the evidence is there, the fact that the charges lacked specificity did not make the panel's conclusions unfair. His case was that the evidence was there via the processes summarised above that had been put to the appellant in cross-examination.

54. Mr Webster further submits that it was at any rate the employer's understanding that at the meetings on 21st September what the appellant was doing was advancing mitigating circumstances and not denying the allegations She had not sought to appeal against the dismissal. At no point, even in these proceedings and with the Missed Medication Log available, had she attempted to provide any response to the allegations. As sole registered nurse on duty, there was nobody else who could have been responsible for any errors there may have been.

55. The BDP document shows that DBS fully recognised the limitations in the evidence from the employer. It is not the employer's actions which the panel has to consider, but whether DBS was entitled to rely on the material it had, less than ideal though it was in some respects.

56. In our view, Mr Geering's submissions on this issue are well-founded. While we acknowledge the protective role the DBS has, its decisions in furtherance of that role may have draconian effects on those who lose their livelihood or at least their ability to engage in their chosen field in consequence. Although none of the authorities on which Mr Geering relies are strictly binding upon us, we respectfully agree with them.

57. We do not consider that *Yassin* provides material support for Mr Webster's case. *Yassin* was an appeal from a Fitness to Practice Panel of the General Medical Council which had held a 16 day hearing and so very different from the paper-based

process of the DBS. Cranston J, holding that the lack of particularisation of certain charges did not make them unfair did so in the following terms:

> "The evidence relevant to these charges was both documentary and oral and came from a number of doctors including the appellant's junior colleagues. They were cross-examined on behalf of the appellant, in some cases making concessions in her favour. The appellant herself gave evidence in relation to the allegations, in some cases refuting them, in other cases offering an explanation. The fact that the charges did not cite specific occasions did not make the Panel's conclusions unfair."

58. The procedures under the Safeguarding Vulnerable Groups Act are designed to be capable of operation by those who may be putting their own case and who may well lack the resources for professional representation, even if they would have wished it. While we acknowledge the care with which Mr Webster as a professional advocate has pieced together information relating to some (though not completely in relation to all) of the allegations that could be derived from the material sent with the MTB letter, we do not consider that that was a reasonable step to require of the person whose conduct was in issue. Nor is it an answer in respect of the contradictory complaints made anonymously to the NMC.

59. We note that the contemporaneous documentary evidence is certainly capable of being read as showing that the appellant's position was one of mitigation rather than denial or of seeking further information. We are not sitting in judgment on the employer's handling of the situation, but would have attached more weight to that if it had been expressed in properly conducted investigatory and disciplinary hearings rather than in hearings that were very brief and to an extent in the nature of an ambush and in a decision letter which appears to confuse the seriousness of the allegations with whether the matters alleged occurred.

60. Nor has the appellant made out any positive case in the present proceedings. In our judgment, she is entitled to make her representations in response to a properly particularised MTB letter, not least so that, as Mr Geering submits, the DBS may consider "appropriateness" in the light of them. As the allegations needed to be fairly put at the MTB stage, it is not an answer to this Ground that more information can now be derived from the Missed Medication Log. The DBS will presumably include the Log in the material on which it will now invite representations.

61. We are not prepared to say that the error was immaterial when (a) it concerns basic procedural fairness and (b) we have not heard evidence and submissions on the specific errors which it appears the DBS are now alleging.

62. We do not know at what point it is said the MAR charts were requested, obtaining the response that they had been destroyed. It is perhaps, with hindsight, regrettable that the RCN were refused the ability to make late representations at a time when it is possible the MAR charts would be more likely still to have been available.

63. As the matter is being remitted, we do not need to rule on Mr Geering's submission that the DBS should not be permitted to rely on fresh evidence. That will have to await a case in which it arises and is potentially material to the decision.

Grounds 3, 4 and 5

64. The decision we have reached on Ground 2 means that it is not necessary to rule on Grounds 3, 4 and 5.

Ground 6

65. We do need to address this ground, which concerns a distinct allegation. Whilst we can conceive that alcohol misuse might lead to a barring decision under the "risk of harm" provisions, this is not the basis on which the DBS has put it. This is a "relevant conduct" case and thus the issue is whether the DBS made a mistake in finding that EQ had attended work under the influence of alcohol. We remind ourselves of relevant recent caselaw. In *DBS v RI* [2024] EWCA Civ 95, Bean LJ, with whom Males and Lewis LJJ agreed, reaffirmed that the decision of the Presidential Panel in *PF v DBS* [2020] UKUT 256 (AAC) remained good law, as had also been held in *Kihembo v DBS* [2023] EWCA Civ 1547. In *DBS v RI* at paras 30-31, Bean LJ quoted certain parts of *PF,* italicising those which were particularly relevant to the case before the Court of Appeal, and we consider they are likewise helpful to us in defining the scope of the mistake of fact jurisdiction:

> "51. Drawing the various strands together, we conclude as follows:
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> a) In those narrow but well-established circumstances in which an error of fact may give rise to an error of law, the tribunal has jurisdiction to interfere with a decision of the DBS under section 4(2)(a).
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> 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.
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> *c) In determining whether the DBS has made a mistake of fact, the tribunal will consider all the evidence before it and is not confined to the evidence before the decision-maker. The tribunal may hear oral evidence for this purpose.*
>
> d) The tribunal has the power to consider all factual matters other than those relating only to whether or not it is appropriate for an individual to be included in a barred list, which is a matter for the DBS (section 4(3)).
>
> *e) In reaching its own factual findings, the tribunal is able to make findings based directly on the evidence and to draw inferences from the evidence before it.*
>
> f) *The tribunal will not defer to the DBS in factual matters but will give appropriate weight to the DBS's factual findings in matters that engage its expertise.* Matters of specialist judgment relating to the risk to the public which an appellant may pose are likely to engage the DBS's expertise and will therefore in general be accorded weight.
>
> g) The starting point for the tribunal's consideration of factual matters is the DBS decision in the sense that an appellant must demonstrate a mistake of law or fact. However, given that the tribunal may consider factual matters for itself, the starting point may not determine the outcome of the appeal. *The starting point is likely to make no practical difference in those cases in which the tribunal receives evidence that was not before the decision-maker."* [emphasis added]
>
> It seems to me plain that the Presidential Panel in *PF* were saying that where relevant oral evidence is adduced before the UT in an appeal under s 4(2)(b) of the 2006 Act the Tribunal may view the oral and written evidence as a whole and make its own findings of primary fact. I would add that whether or

> not A stole money from B cannot be considered a matter of "specialist judgment relating to the risk to the public" engaging the DBS's expertise."

66. We have heard EQ's evidence and both Mr Webster and we ourselves have had the opportunity to put questions to her. The issue here – whether EQ had drunk excessive alcohol before or after arriving at work – is, like the issue in *RI*, not one which engages the expertise of DBS. We consider EQ's evidence to be truthful to the best of her recollection, but, given the state she was in on the morning in question (however that was caused), we prefer the evidence of the manager and the deputy manager where it conflicts with hers. We do, however, accept her evidence, given so far as we are aware for the first time, that having drunk what remained of the decanted bottle of wine from the previous evening, she embarked upon the second bottle she had purchased and drank that, though "some" remained when the bottle was taken away by the police. The panel are not experts in alcohol toxicity but it appears more probable than not that the reading obtained by the police could be reached by a person drinking the greater part of 1 ½ bottles of wine in the relatively short period of time between around 7a.m. when the appellant would have arrived back at her car and around 8.30a.m. when the deputy manager arrived to sit with her. We know that the appellant had to drive home from her parents' to pick up her uniform and there is no indication that she stopped for breakfast. The fact that the second bottle of wine – part of her shopping the previous day – had not been unloaded while at home suggests that she was rushing. The new evidence of the second bottle in our view lends credence to her account that the wine was only consumed after she had left work. Whilst to those who do not turn to excessive consumption of alcohol in the face of difficulties, it may seem startling to turn to wine so early in the day and in such quantity, particularly when on her case she was unwell, it does not appear to the panel to be surprising given the appellant's lengthy – if intermittent – history of alcohol misuse and when on her own admission the abstinence displayed by the evidence to the NMC's panel had not been maintained. We further accept her evidence that the fact that her car was parked near the bushes was caused by its length and should not be taken as indicating by any perceived eccentricity of parking that the appellant had already been under the influence of alcohol on arrival.

67. We note the evidence that her medical condition can produce symptoms such as nausea, dizziness, headaches and slurred speech, although so, of course, can alcohol. We also note the incident when she had been taken to A and E by ambulance from work because of her health. There is no suggestion that her state on that occasion was attributed to alcohol. We further note that neither the manager, P, nor K, both of whom on their evidence saw the appellant, have given evidence that she smelt of alcohol; the only evidence of a smell of alcohol on the premises is multiple hearsay and has not been tested and we place minimal weight on it.

68. While the evidence is that EQ apologised to P, it is insufficiently clear what she was apologising for, for that to assist us.

69. We therefore conclude that the DBS's finding that EQ had attended work under the influence of alcohol was vitiated by a mistake of fact: the DBS were unaware at the time of decision (EQ not having responded to the MTB letter) that EQ had been drinking while seated in her car. We remit the matter to the DBS for a fresh decision on this ground also.

70. Under section 4(7)(a) the Upper Tribunal may, if it sems fit, direct the DBS to proceed on the basis of particular findings of fact. We do not do so: as we have said, we are not experts in alcohol toxicity. If either party sees fit to obtain such evidence before the fresh decision is taken, that is a matter for them.

71. Under section 4(7)(b) we direct that the appellant should remain on the barred lists pending the fresh decision: no application to the contrary was made to us and the allegations, if established, are serious by reason of their potential consequences.

C.G. Ward
Judge of the Upper Tribunal

Ms R. Smith
Member of the Upper Tribunal

Mr R Graham
Member of the Upper Tribunal

Authorised for issue on 3 February 2025