Neutral Citation Number: [2024] UKUT 433 (AAC) Appeal No. UA-2024-000260-V

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

CI

Appellant

- v -

DISCLOSURE AND BARRING SERVICE

Respondent

Before: Upper Tribunal Judge Stout, Tribunal Member Jacoby and Tribunal Member Smith
Hearing date(s): 4 and 5 December 2024
Mode of hearing: In person

Representation:
Appellant: In person (accompanied by her brother as McKenzie friend)
Respondent: Hafsah Masood (counsel)

On appeal from:
Decision-maker: Disclosure and Barring Service
DBS ID No: P0006Q227MT
Customer ref: 00998463430
Decision Date: 28 November 2023

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify any individual member of staff or service user referred to in the hearing bundle, at the hearing or in this judgment. In order to protect the identity of those individuals, the name of the care homes concerned must also not be disclosed or published. This order does not apply to any person exercising statutory (including judicial) functions where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

SUMMARY OF DECISION

SAFEGUARDING VULNERABLE GROUPS (65)

DBS included the appellant on the adults' and children's barred lists because of her conduct towards other staff and service users that DBS considered gave rise to a risk of harm to vulnerable adults (and would give rise to a risk of harm to children if repeated against them). The Upper Tribunal finds that there was no mistake of fact or law in DBS's decision and dismisses the appeal.

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

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

The decision of the Disclosure and Barring Service is confirmed.

REASONS FOR DECISION

Introduction

1. The appellant appeals under section 4 of the Safeguarding Vulnerable Groups Act 2006 (SVGA 2006) against the decision of the Disclosure and Barring Service (DBS) of 28 November 2023 including her in the children's and adult's barred lists pursuant to paragraphs 3 and 9 of Schedule 3 to the SVGA 2006. DBS's decision was based on her conduct in relation to other staff and service users while she was employed by BUPA at Care Home A in 2018/2019 and at Care Home B in 2021. The appellant is also subject to fitness to practise proceedings by the Nursing and Midwifery Council (NMC), with a hearing listed to take place over a number of weeks in January and February 2025.

2. The structure of this decision is as follows:-

DBS's decision

3. The appellant was employed by BUPA until she was dismissed with effect from 9 August 2022. BUPA referred her to the DBS. DBS sent the appellant a "Minded to Bar" letter in response to which the appellant (then represented by the Royal College of Nursing) made representations. DBS then issued a Final Decision letter on 28 November 2023 in which it explained that it had decided to place the appellant on both the adults' and children's barred lists.

4. DBS was satisfied that the appellant met the criteria for regulated activity because she is a registered nurse.

5. DBS was further satisfied that six core factual allegations were made out as follows:

    (1) In 2018/2019 while working as a registered nurse for Bupa at Care Home A on multiple occasions you acted in a manner that was intimidating, rude and unprofessional towards colleagues and caused them to be fearful/uncomfortable of/around you.
    (2) In 2018/2019 while working as a registered nurse for Bupa at Care Home A you used your fingers to eat food in the service users dining area, ate food from service users plates/trays, ate food while feeding a service user, and helped yourself to food from the kitchen while it was being prepared.
    (3) In 2021 while working as a registered nurse for Bupa at Care Home B on various unknown dates you belittled, mocked, intimidated, made fun of colleagues and talked about them in a discriminatory manner.
    (4) In 2021 while working as a registered nurse for Bupa at Care Home B you mimicked service users and made inappropriate/unprofessional comments about them and their families.
    (5) On an unknown date while working as a registered nurse for Bupa at Care Home B you threw water on a service user, MH.

(6)

On various unknown dates while working as a registered nurse for Bupa at Care Home B you ate food prepared for the service users before they ate and were also eating in the service users dining room while feeding them.

6. DBS was satisfied that this conduct endangered a vulnerable adult or was likely to endanger a vulnerable adult and that, if repeated against or in relation to a child, it would endanger or be likely to endanger a child. DBS went on to explain later in its letter in more detail why it was satisfied that the appellant's behaviour might be repeated if working with children and why it considered her conduct towards colleagues would present a risk of harm to children.

7. DBS further considered it appropriate to bar because, if similar behaviour was repeated in future, it would have the potential to result in significant harm.

8. DBS acknowledged that *"the level of harm to those in your care in regulated activity was relatively low"*, but considered that the following actions had the potential to cause significant harm:

    a. Throwing water over service user MH;
    b. Telling Resident F to "open her eyes and look at you, if she didn't do that today, she'd go hungry. Nobody was going to feed her".

9. DBS acknowledged that much of the appellant's harmful behaviour was displayed towards colleagues, but it was "satisfied that at times vulnerable adults were present … and were the subject of harmful comments you made, which if they had been heard would have caused significant emotional harm". The example DBS gave was the appellant commenting in relation to service user B that "I hope he doesn't come back from hospital and dies there; let him die".

10. DBS considered that the appellant's assertion that some of her behaviour was "banter" with colleagues demonstrated a lack of insight on her part, as "any situation where someone feels uncomfortable, which it is clear Staff X, Staff K, Staff N and Staff U did, is not banter and is causing harm".

11. DBS was satisfied that the appellant had treated staff differently depending on how the appellant got on with them and that this behaviour was sustained over

a significant period of time, despite the appellant having received a previous warning in Care Home A.

12. DBS considered that the appellant's "attitude towards eating service users food and eating when feeding service users was also displayed over a significant period of time and repeated despite concerns being addressed previously in Care Home A".

13. DBS noted that the appellant had made some apologies in her representations and considered that training would assist her to avoid repetition of behaviours in future, but nonetheless concluded that the appellant's general denials evidenced callousness and lack of empathy towards others, a lack of openness and honesty in her responses to DBS and an unwillingness to take responsibility for her actions.

14. DBS took into account that in 2020/2021 the appellant's son was in hospital for 11 months following a car accident, during which she regularly visited him in hospital and that this was distressing for the appellant, but DBS set against that the previous warning she received for similar conduct in 2018/2019, which was prior to her son's accident.

15. DBS queried the authenticity of two of the appellant's character references, but did acknowledge that she had provided some positive character references.

16. DBS noted that the appellant was subject to an ongoing NMC investigation, but was satisfied that there was sufficient information on which to base a barring decision without waiting for the outcome of those proceedings.

17. DBS acknowledged the impact that a barring decision would have on the appellant's ability to provide for her family and to continue in the career she had chosen but considered that this impact was outweighed by the importance of protected vulnerable groups from the risk of harm the appellant posed. DBS concluded that a barring decision was therefore proportionate in the circumstances.

18. DBS's Final Decision Letter did not itself identify specifically all the evidence relied on by DBS in support of its findings. When sending the Minded to Bar Letter, however, the DBS provided the appellant with all the documentary materials it had been provided with by the employer. During the course of this

appeal, the appellant has also been provided by DBS with its Barring Decision Process document or Structured Judgment Process (SJP) (1085-1166). This sets out in much greater detail the specific allegations and evidence on which DBS relies and DBS's analysis of that evidence.

Legal framework

Relevant legal framework for DBS's decision

19. The appellant in this case was included on the children's barred list using DBS's powers in paragraph 3 of Schedule 3 to the SVGA 2006 and on the adults' barred list using its powers in paragraph 9 of Schedule 3.

20. Under those paragraphs, subject to the right to make representations, DBS must include a person on the relevant list if (in summary and in so far as relevant to the present appeal):

    a. The person has engaged in conduct which endangers or is likely to endanger a child or vulnerable adult (Sch 3, paragraph 3 and 4(1)(a) and paragraph 9 and 10(1)(a)) or has engaged in conduct which if repeated against a child or vulnerable adult would endanger or be likely to endanger them (paragraph 4(1)(b)/10(1)(b));

    b. The person has been or might in future be engaged in regulated activity in relation to (respectively) adults or children; and,

    c. DBS is satisfied that it is appropriate to include them in the relevant list.

21. "Endangers" means (in summary) that the conduct harms or might harm the child or vulnerable adult: see Schedule 3, paragraphs 4(4) and 10(4).

22. By paragraph 3(2) and 9(2) of Schedule 3 DBS must give the person an opportunity to make representations before including them on the barred list. By paragraph 16(1) a person who is given the opportunity to make representations must have the opportunity to make representations in relation to all of the information on which DBS intends to rely in taking a decision under Schedule 3.

23. By paragraphs 17(2) and (3) a person who does not make representations within the prescribed time may apply to DBS for permission to make representations out of time and if DBS grants permission it must consider those representations and remove the person from the list if it considers it appropriate.

24.

A person included in a barred list may apply for a review of their inclusion after the prescribed minimum period of 10 years (paragraph 18), or at any time on the basis of new information, a change in circumstances or an error (paragraph 18A).

The Upper Tribunal's jurisdiction on appeal

25. An appeal to the Upper Tribunal under section 4 of the SVGA 2006 lies only on grounds set out in sub-section (2), i.e. that DBS has, in deciding to include a person on a list or in refusing to remove a person from a list on review, made a mistake: (a) on any point of law; or (b) in any material finding of fact (cf s 4(2)). For the purposes of sub-section (2), the decision whether or not it is appropriate for an individual to be included on a barred list is not a question of law or fact.

26. If the Upper Tribunal finds that DBS has not made a mistake of law or fact it must confirm the decision: SVGA 2006, section 4(5). If the Upper Tribunal finds that DBS has made a mistake of law or fact, it must either direct DBS to remove the person from the list or remit the matter to DBS for a new decision: section 4(6). The Court of Appeal has held that unless the only lawful decision DBS could come to in a case, in the light of the Upper Tribunal's decision, is removal from the list, the Upper Tribunal must remit the case: *AB v DBS* [2021] EWCA Civ 1575, [2022] 1 WLR 1002 at [72]-[73] *per* Lewis LJ. If the Upper Tribunal remits a matter to DBS then the Upper Tribunal may set out any findings of fact which it has made on which DBS must base its new decision and the person must be removed from the list until DBS makes its new decision, unless the Upper Tribunal directs otherwise: section 4(7).

27. A mistake of fact is a finding of fact that is, on the balance of probabilities, wrong in the light of any evidence that was available to the DBS or is put before the Upper Tribunal; a finding of fact is not wrong merely because the Upper Tribunal would have made different findings, but neither is the Upper Tribunal restricted to considering only whether DBS's findings of fact are reasonable; the Upper Tribunal is entitled to evaluate all the evidence itself to decide whether DBS has made a mistake (see generally *PF v DBS* [2020] UKUT 256 (AAC), as subsequently approved in *DBS v JHB* [2023] EWCA Civ 982 at [71]-[89] per Laing LJ, giving the judgment of the Court, *Kihembo v Disclosure and Barring Service* [2023] EWCA Civ 1547 at [26] and *DBS v RI* [2024] EWCA Civ 95 at [28]-[37] per Bean LJ and at [49]-[51] *per* Males LJ). As the Tribunal put it in *PF* at [39], "There is no limit to the form a mistake of fact may take. It may consist of an incorrect finding, an incomplete finding, or an omission". A finding of fact

may be made by inference (*JHB*, ibid, [88]), but facts must be distinguished from "value judgments or evaluations of the relevance or weight to be given to the fact in assessing appropriateness [of including the person on the barred list]": *AB v DBS* [2021] EWCA Civ 1575, [2022] 1 WLR 1002 at [55] per Lewis LJ (giving the judgment of the court).

28. A mistake of law includes making an error of legal principle, failure to take into account relevant matters, taking into account irrelevant matters, material unfairness and failure to give adequate reasons for a decision. (See generally *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[11].) On ordinary administrative law principles, accordingly, “an allegation of unreasonableness has to be a *Wednesbury* rationality challenge, i.e. that the decision is perverse” (*Khakh v ISA* [2013] EWCA Civ 1341 at [18]).

29. However, a mistake of law also includes making a decision to include a person on a barred list that is disproportionate or otherwise in breach of that individual’s rights under Article 8 of the European Convention on Human Rights (ECHR). In *ISA v SB* [2012] EWCA Civ 977, [2013] 1 WLR 308 the Court of Appeal explained the approach to be taken by the Upper Tribunal as follows:

> *(1) The approach to proportionality*
>
> 14. Although section 4(3) of the 2006 Act inhibits the Upper Tribunal from revisiting the question “whether or not it is appropriate for an individual to be included in a barred list”, Ms Lieven concedes, correctly in my view, that the Upper Tribunal is empowered to determine proportionality and rationality. In this regard, the passage from the judgment of Wyn Williams J in *R (Royal College of Nursing) v Secretary of State for the Home Department [2011] PTSR 1193* (see para 8 above) is undoubtedly correct. Thus, the Upper Tribunal cannot carry out a full merits reconsideration. Its jurisdiction is more limited. In this respect, it is narrower than was the jurisdiction of the Care Standards Tribunal under the previous legislation.
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> 15. The ISA is an independent statutory body charged with the primary decision-making tasks as to whether an individual should be listed or not. Listing is plainly a matter which may

engage article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 provides a qualified right which will require, among other things, consideration of whether listing is "necessary in a democratic society" or, in other words, proportionate. In *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2012] 1 AC 621* , Lord Wilson JSC summarised the approach to proportionality in such a context which had been expounded by Lord Bingham of Cornhill in *Huang v Secretary of State for the Home Department [2007] 2 AC 167* , para 19. Lord Wilson JSC said, at para 45:

> "in such a context four questions generally arise, namely: (a) is the legislative object sufficiently important to justify limiting a fundamental right?; (b) are the measures which have been designed to meet it rationally connected to it?; (c) are they no more than are necessary to accomplish it?; and (d) do they strike a fair balance between the rights of the individual and the interests of the community?"

There, as here, the main focus is on questions (c) and (d). In *R (SB) v Governors of Denbigh High School [2007] 1 AC 100*, para 30 Lord Bingham of Cornhill explained the difference between such a proportionality exercise and traditional judicial review in the following passage:

> "There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test … The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time … Proportionality must be judged objectively by the court."

16. All that is now well established. The next question—and the one upon which Ms Lieven focuses—is how the court, or in this

case the Upper Tribunal, should approach the decision of the primary decision-maker, in this case the ISA. Whilst it is apparent from authorities such as *Huang's* case and *Aguilar Quila's case* that it is wrong to approach the decision in question with "deference", the requisite approach requires (per Lord Bingham in *Huang's case* [2007] 2 AC 167 , para 16, and see, to like effect, Lord Wilson JSC in *Aguilar Quila's case* [2012] 1 AC 621 , para 46):

> "the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice."

There is, in my judgment, no tension between those passages and the approach seen in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 which was concerned with a challenge to the decision of the city council to refuse a licensing application for a sex shop on the grounds that the decision was a disproportionate interference with the claimant's Convention rights. Lord Hoffmann said, at para 16:

> "If the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights."

Baroness Hale of Richmond added, at para 37:

> "Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck."

These passages are illustrative of the need to give appropriate weight to the decision of a body charged by statute with a task of expert evaluation.

17. Ms Lieven's first complaint is that the Upper Tribunal failed to accord appropriate weight to the decision of the ISA. The 16-page decision of the Upper Tribunal was undoubtedly the product of a careful and conscientious consideration. However, it seems to me that the Upper Tribunal did not accord any particular weight to the decision of the ISA but proceeded to a de novo consideration of its own....

20. The assessment of the ISA caseworker was itself a careful compilation produced on a template headed "Structured judgment process" which tabulated "indications" and "counter indications" in adjacent columns. Moreover, examination of that assessment and the decision which it informed suggests to me that the conclusion of the Upper Tribunal that the ISA had failed to take account of "the wealth of evidence" that SB imposes a low risk of reoffending and "gave no weight or at least very little weight, to the issue of [him] as a person" was simply erroneous. The "wealth of evidence" seems to relate to the numerous positive references but it is apparent that these were taken into account in the caseworker's assessment and in the decision of the ISA. The assessment was a fair representation of the many indications and counter indications and specific mention was made of the numerous references and the fact that SB had voluntarily sought counselling.

21. This brings me to two particular points. First, there is the fact that, unlike the ISA, the Upper Tribunal saw and heard SB giving evidence. However, it cannot be suggested that it was unlawful for the ISA not to do so. It had had at its disposal a wealth of material, not least the material upon which the criminal conviction had been founded and which had informed the sentencing process. The objective facts were not in dispute.

> Secondly, Mr Ian Wise QC, on behalf of the RCN, emphasises the fact that the Upper Tribunal is not a non-specialist court reviewing the decision of a specialist decision-maker, which would necessitate the according of considerable weight to the original decision. It is itself a specialist tribunal. Whilst there is truth in this submission, it has its limitations for the following reasons: (1) unlike its predecessor, the Care Standards Tribunal, it is statutorily disabled from revisiting the appropriateness of an individual being included in a barred list, simpliciter; and (2) whereas the Upper Tribunal judge is flanked by non-legal members who themselves come from a variety of relevant professions, they are or may be less specialised than the ISA decision-makers who, by paragraph 1(2)(b) of schedule 1 to the 2006 Act, "must appear to the Secretary of State to have knowledge or experience of any aspect of child protection or the protection of vulnerable adults". I intend no disrespect to the judicial or non-legal members of the Upper Tribunal in the present or any other case when I say that, by necessary statutory qualification, the ISA is particularly equipped to make safeguarding decisions of this kind, whereas the Upper Tribunal is designed not to consider the appropriateness of listing but more to adjudicate upon "mistakes" on points of law or findings of fact: see section 4(3) of the 2006 Act.
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> 22. For all these reasons I consider that the complaint that the Upper Tribunal did not accord "appropriate weight" to the decision of the ISA is justified.

30. The Court of Appeal's approach in *SB* was approved and followed by the Court of Appeal in *DBS v Harvey* [2013] EWCA Civ 180. In this case, DBS has drawn our attention to three later decisions of the Upper Tribunal where at first blush it appears that divergent approaches have been taken to the issue of proportionality (*KB v DBS* [2021] UKUT 325, at [130]-[135], panel chaired by Judge Jones; *WW v DBS* [2023] UKUT 241 (AAC), at [55], panel chaired by

Judge Wikeley; and *NV v DBS* [2024] UKUT 42, at [38], panel chaired by Judge Wright). A three-judge panel of the Upper Tribunal is accordingly being listed for early in 2025 to consider the proper approach to the question of proportionality in appeals against DBS decisions in the case of *KS v DBS* (UA-2024-000839-V). It has not, however, been suggested that we should stay consideration of this case pending that decision, and we do not consider it necessary to do so. Pending the decision in *KS*, it seems to us that we should in this case continue to apply the approach laid down by the Court of Appeal in *SB* and *Harvey*, the ratio of those decisions being in any event binding on us. We note that this was also the approach recently taken by the Upper Tribunal chaired by Judge Brunner KC in *MFAG v DBS* [2024] UKUT 330 (AAC) at [24]-[27]. The Upper Tribunal in that case also referred to the decision of the Court of Appeal in *Dalston Projects and ors v Secretary of State for Transport* [2024] EWCA Civ 172 which affirms the "well-established" principle that the question of whether an act is incompatible with a Convention right is a question of substance for the court itself to decide.

Background

31. The appellant qualified as a nurse in 2010. She is 55 years' old. She is a single mother of three adult children. Her youngest child is severely disabled following a road traffic accident in 2020 and she has been his primary carer since he left hospital 11 months after the accident.

32. The appellant worked for BUPA from November 2011 to 9 August 2022.

33. In 2018/19 the appellant was working at Care Home A. A grievance was raised against her by colleagues that was investigated by her employer. There is a letter in the bundle (p 926) that indicates that this colleague who raised a grievance resigned on 19 January 2019 citing the appellant's "bullying" and the employer's failure to progress the grievance in a timely manner.

34. A large number of witnesses (we estimate over 20) were interviewed as part of the employer's investigation. The Investigation Summary (478) sets out that the allegations made against her at that time were:

    a. Allegation of bullying, intimidating, threatening and physical sexual harassment;
    b. Failure to administer medication;

c.
Breach of infection control and basic food hygiene procedure;

d. Breach of uniform policy and health and safety;
e. Unauthorised use of company property;
f. Breach of confidentiality and potential reputational damage.

35. The investigation concluded that there was a 'case to answer' on all the allegations, which were referred on for consideration at a disciplinary hearing.

36. The outcome of the disciplinary hearing was communicated to the appellant in a letter dated 5 June 2019. The appellant was issued with a final written warning for "serious misconduct" on the basis of the following conclusions:

a. Allegations of bullying/intimidating/threatening behaviour were largely dismissed on the basis that there were inconsistencies in the witness evidence, some of the allegations related to days the appellant was not on duty and there was some evidence of collusion by witnesses based on friendship groups. However, the hearing manager concluded "some of your behaviours may have been deemed as unprofessional and that you may also need to reflect on your communication style" (514);

b. Allegations of physical sexual harassment were upheld on the basis that the appellant had "over-stepped the boundaries of what [she] perceived as 'work place banter'". The allegations related to pinching people's bums and breasts and harassing Witness X to the extent that he felt uncomfortable and tried to avoid the appellant, but on one occasion when they met on the stairs, she 'pinned him to a wall';

c. Allegations of breach of infection control policy were upheld on the basis of evidence of witnesses that the appellant used her hands to eat at work and ate food from residents' plates, including sharing cutlery;

d. Allegations of breach of uniform policy were upheld;

e. Allegations of breach of confidentiality and potential reputational damage were not upheld.

37. The appellant was required to re-read and sign to confirm understanding of the BUPA Code, to adhere to the NMC Code, to revisit the infection control policy and attend a training update and was re-issued with a copy of the up-to-date

uniform policy. The warning was placed permanently on her personnel file, but marked to be disregarded for disciplinary purposes after 18 months provided there was no further misconduct during that time.

38. The appellant was also transferred to a different BUPA care home *"due to the breakdown in relationships between you and a number of colleagues"*. As a result of this, the appellant transferred to Care Home B.

39. In November 2021 a grievance was raised against the appellant by a colleague EG. The grievance appears initially to have been set out in an email which is not before us. EG was a colleague who had at times got on well with the appellant. The appellant had helped EG and her family out when they were struggling and cooked for them. However, the relationship evidently soured. On 23 November 2021 the appellant was suspended from work while allegations of *"bullying and harassment and resident abuse"* were investigated. The suspension came soon after the appellant's 10th anniversary of working for BUPA when she was celebrated with a staff party, of which she has provided photographs.

40. The grievance investigation took over six months. A very large number of staff and residents were interviewed, some of them on several occasions and there were three meetings in March 2022 where staff were interviewed in groups about allegations against the appellant. In total, there are 58 interview records in our bundle in relation to this investigation.

41. An Investigation Summary was prepared dated 18 May 2022 and the appellant was invited to a disciplinary hearing which took place on 15 June 2022. The outcome was communicated to the appellant by letter of 9 August 2022. The decision was that the appellant was dismissed summarily for gross misconduct.

42. The dismissal letter acknowledges that there were shortcomings in the investigation process, in particular that there was a lack of probing in some of the initial interviews and that it was inappropriate for colleagues to have been interviewed in groups. However, it is apparent from the dismissal letter, and the notes of the disciplinary hearing, that at the disciplinary hearing the disciplinary manager went very carefully through the evidence with the appellant, discussing each witness interview and putting to the appellant the specific allegations. The letter concluded that the following allegations were proven, in summary for the following reasons:

a. Breach of the Diversity and Inclusion Policy including the Anti-Harassment and Bullying Appendix, Bupa Code and Values, Protecting our People Policy and the Working Guide in that you have mocked and made fun of your colleagues on various unknown dates. The employer concluded that, "based on the number of comments combined with the similarity of themes within those comments made by your colleagues … on the balance of probability, you have acted and behaved in the manner as described by your colleagues. You were unable to provide me with any mitigation but did state that you believed you had good relationships with your colleagues. There is neither evidence that your colleagues have [collaborated] nor is there evidence of any revenge".

b. Intimidation of staff on various unknown dates – the employer concluded that the appellant's colleagues had found her rude, belittling, verbally abusive and intimidating, and that there was a pattern of her treating some staff differently. The employer rejected the appellant's denials and assertion that staff could not be telling the truth as they had not complained previously. The employer considered that staff had not come forward prior to the investigation as they were genuinely intimidated by the appellant.

c. Talked about people in a discriminatory and unkind way – the employer was satisfied (despite the appellant's denials) that two colleagues had heard the appellant use the term "white bastard", that the appellant had referred to other black carers as "you have my blood" and to wanting "the blacks working together and the whites working together" and that the appellant had said she did not want to work with another carer "because he is Indian and couldn't understand English".

d. The appellant was recorded at a handover meeting on 11 August 2021 saying that she 'will take Resident E home, sign for his millions, marry him and then dump him in Africa'. The appellant had denied this twice when asked in interview (182, 188), but at the disciplinary hearing, having heard the recording, the appellant accepted that this was her voice on the recording and that it was 'unprofessional'. (The recording was not provided to DBS or to us.) The appellant also at the disciplinary hearing accepted that on the recording she had told her colleagues that the last time she fed Resident F she said to Resident F "open her eyes

and look at you, if she didn't do that today, she'd go hungry. Nobody was going to feed her". The disciplinary manager was satisfied that this was not said as guidance to staff but as a report of what the appellant actually said to the Resident. The manager concluded that these comments were "wholly inappropriate, derogatory and offensive".

e. The appellant threw water a Resident MH. The manager rejected the appellant's denial of the incident because Resident MH had given her account which there was no reason to doubt and other witnesses had said that the appellant herself had told them about this incident.

f. Allegations that the appellant had eaten food meant for residents were not upheld because the disciplinary manager was "mindful that Bupa's guidance on staff meals is a little ambiguous" and there were "several inconsistencies" in the witness evidence.

g. An allegation that the appellant was rough with Resident MH when administering insulin was upheld.

h. Eight colleagues had heard the appellant make inappropriate comments about Resident B: "I hope he doesn't come back from hospital and dies there; let him die", so this was upheld despite the appellant's denial.

43. Other allegations, not relevant to those with which we are concerned, were not upheld.

44. The appellant did not appeal her dismissal.

The appellant's evidence at this hearing

45. The appellant had been ordered to provide a witness statement if she wished to give evidence at this hearing. Despite the order clearly explaining that this meant her personally and not just anyone else she might want to call as a witness, the appellant had not produced a witness statement. As a result, counsel for DBS was not prepared at the start of the hearing to cross-examine her. We agreed with the parties that part of the appellant's grounds of appeal (16-19) and her representations to DBS (1070-1073) could appropriately stand as her witness statement. The appellant wanted time to re-read those

documents and Ms Masood wanted time to prepare her cross-examination. We allowed the parties the remainder of the first morning for this and resumed the hearing after lunch, when both parties confirmed they were ready to start. With some minor corrections, the appellant then swore to the truth of the documents and was questioned by Ms Masood for DBS. The Tribunal also asked her some questions.

46. The appellant in the documents that stood as statements describes how she has undertaking training since she was dismissed. She explained, and we accept as it is consistent with the NMC's usual practice, that this training was undertaken in response to requirements by NMC for her to maintain her professional development during her interim suspension from practice pending her fitness to practise hearing, which she told us is due to take place between 21 January and 18 February 2025. The appellant told us that she hopes as a result of the training there will be fewer misunderstandings and that she will know the limit to which she can go in jokes with colleagues. She said she would also know not to let herself be recorded without her knowledge again. She explained she did not appeal her dismissal because of what was going on in her personal life at the time with her son's accident.

47. In answer to questions, the appellant made clear that (despite her recent training) she did not consider she had conducted herself in any way that was inappropriate and that she had never crossed professional boundaries. Regarding the member of staff who raised the initial grievance in 2018 and who appeared to have resigned in large part as a result of the appellant's conduct (926), the appellant said in fact that that member of staff left because she was training to be a nurse and wanted to work in a hospital. Regarding EG, who raised the 2021 grievance, the appellant said that she had been close to EG. She considered that EG wanted to leave BUPA because she had two disabled children and could not cope and that she wished to achieve a 'pay out' from BUPA by putting in a grievance and that, when she did not receive a 'pay out', she left anyway.

48. The only incident the appellant accepted to us had occurred was the comment about marrying Resident E for his millions, which had been recorded. She said this was 'just banter' with colleagues. She alleged that the recording had been 'doctored' as they had taken other voices off the recording and left only hers on it.

49.

She was taken by counsel through the evidence in relation to each of the principal allegations on which DBS relies in its Final Decision letter, as detailed further in the SJP document. The appellant in response to being shown the relevant part of each witness interview said that the other allegations were all made up, including the other allegations based on the same recording. She felt that there was a conspiracy because otherwise there would not have been a recording made of the handover on 11 August 2021, that this was clearly malicious. She said that in November 2021, just before she was suspended, her colleagues gave her a surprise party for her 10-year BUPA anniversary so they could not be telling the truth when they said nasty things about her. She said if they were telling the truth they would all have reported their concerns earlier as required to do by the employer's whistleblowing policy.

50. She repeated several times that, in relation to the investigation at Care Home A, two of the main allegations had been rejected as the allegations had been made in relation to days when she was not at work. She also said that staff had lied about her telling them that they should lie to the Care Quality Commission (CQC) when they visited as she was not even in the country at that time (January 2020).

51. Regarding the allegations about eating residents' food, she denied doing this other than in accordance with the employer's policy which permitted staff to eat after residents. She denied ever using her fingers to eat in a public area. She confirmed that when allegations of this sort were upheld in 2018/19 she had afterwards re-read and signed the infection control policy as indicated in that disciplinary outcome letter.

52. The appellant and her brother (who accompanied her to the hearing) emphasised that the appellant loved her profession and had encouraged him to become a nurse too. She is a 'mother' to her five younger siblings at home as well as to her own children.

Discussion and analysis of the grounds of appeal

53. The appellant argues that DBS made mistakes of fact in relation to each of the six allegations on which the decision was principally based. She denies any inappropriate conduct.

54. We have therefore considered carefully whether DBS made a mistake of fact in relation to any of the six allegations. However, we have decided that it did not

and, despite the volume of evidence that we have received, our reasons for that can be shortly stated as follows.

Finding (1): 2018/19 - conduct towards staff

55. DBS's first finding was that "In 2018/2019 while working as a registered nurse for Bupa at Care Home A on multiple occasions you acted in a manner that was intimidating, rude and unprofessional towards colleagues and caused them to be fearful/uncomfortable of/around you". When this allegation was investigated by the appellant's employer it was not wholly upheld. This concerned us as we consider that it is likely only to be in rare cases where it will be reasonable for DBS, dealing with a case on the papers, to reach different conclusions on the credibility of witness evidence to the employer who has heard all the witnesses 'live' and who is familiar with the workplace in question. In a case like this where there has been an extensive internal disciplinary investigation, we would normally expect DBS, if it is going to depart significantly from an employer's conclusion, to acknowledge this in its Minded to Bar and Final Decision letters and to explain its reasons for doing so.

56. However, in this case, we are satisfied that DBS's failure to acknowledge its departure from the employer's conclusions is not a material error of law (or fact). This is because:

    a. Even the employer had found that some of the appellant's behaviours in 2018/19 were "unprofessional";

    b. The employer had upheld the separate allegations of physical sexual harassment of other staff which in and of themselves could properly be categorised by DBS as amounting to "intimidating, rude and unprofessional" conduct that caused staff to "be fearful/uncomfortable of/around you" (indeed, we would add that the appellant's conduct in touching other people's bums, breasts and pinning one witness against a wall was in our judgment seriously inappropriate, harassing behaviour); and,

    c. The employer's reasons for not accepting all the allegations that DBS relied on in support of this first finding were vague. The employer said "there were inconsistencies in the witness evidence, some of the allegations related to days the appellant was not on duty and there was some evidence of collusion by witnesses based on friendship groups".

> The employer did not provide any more specific reasons. We observe that the 'collusion' reference might be to Witnesses C and D who had been the subject of a complaint by the appellant about smoking breaks, while Witness E was C's daughter, but otherwise the employer's reasons for not upholding these allegations seem to us to be insufficient given the wealth of allegations considered by the employer under this heading. Most of those allegations could not reasonably be dismissed as inconsistencies or the product of collusion. In contrast, the detailed analysis in DBS's SJP provides strong evidence in support of its conclusions.

57. We are also not persuaded by the appellant's evidence to us that none of these allegations were true. The fact that the first two dates given in the grievance were wrong is really neither here nor there. It is easy to get a date wrong and it would have been perfectly reasonable for both the employer and DBS to uphold the allegations in relation to those first two dates as being things that happened even if not on those particular dates. In fact, in the appellant's favour, neither the employer or DBS relied on the allegations relating to the dates when the appellant was on annual leave. But it certainly does not follow from the fact that the person who raised the grievance got the dates wrong that all the witnesses were making the allegations up. We mentioned at the hearing the well-known direction in *R v Lucas* [1981] QB 720: "the fact that the witness has lied about some matters does not mean that he or she has lied about everything". That aphorism is all the more true when we are dealing with over 20 witnesses, not just one.

58. Before us, the appellant has denied all the 2018/2019 allegations, as she did before her employer and to DBS. We did not find her denials credible. It is not plausible that all these people would have made up all this material. What witnesses said in the 2018/2019 investigation interviews has none of the hallmarks of conspiracy. Many witnesses made very similar allegations, or had noticed similar conduct by the appellant, but all of them recount these matters in their own words and with variations in their accounts that make the accounts plausible and also point away from conspiracy, where one would expect everyone to say the same thing. See, for example, the SJP at pp 1094-1095 with the record the evidence from Staff A, B, C, D, E and W. There are multiple such examples in the SJP.

59.

The allegations made and upheld in relation to 2021 also add weight to the 2018/2019 allegations. There are common themes between the two Care Homes in terms of what staff say about the appellant's conduct in terms of having 'favourites' and being intimidating, rude and unprofessional, as well as in relation to her eating service users' food.

60. We are therefore satisfied that DBS did not make any mistake of fact in relation to its first finding.

61. For the avoidance of doubt, we are also satisfied that the DBS did not err in regarding the appellant's conduct towards staff in this way as posing a risk of harm to service users so as to constitute 'relevant conduct' for the purposes of the SVGA 2006. It is well established that children and vulnerable adults may suffer emotional harm if exposed to abusive conduct by their carers towards others. The evidence demonstrates that the appellant's conduct towards other staff might occur anywhere. It was not confined to times when she was in private with colleagues. There is also the secondary risk that carers who are unhappy with their work relationships may as a result provide a reduced quality of care to residents.

Finding (2): 2018/2019 - eating service users' food

62. In the 2019 final written warning letter allegations of breach of infection control policy were upheld on the basis of evidence from witnesses as follows:

    a. Witness A: appellant used her fingers to eat food within the residents areas, eat peas off a resident's plate and use the same spoon to 'feed' the resident and herself;
    b. Witness F: appellant had picked up a piece of cheese from the kitchen;
    c. Witness N: appellant eats with her hands and eats from a resident's plate;
    d. Witness U: appellant eats with hands while 'feeding' a resident;
    e. Witness Z: appellant helping resident to eat while eating from another plate at the table

63. The employer found these allegations proven and so did DBS. The appellant still denies all of this conduct, but again we do not find her denials credible. The weight of evidence against her is too great. For the reasons given in relation to Finding (1), there was no reason for DBS to find that other witnesses were making up the allegations. There was no error of fact in DBS's conclusion.

64. Again, we are also satisfied that DBS did not err in regarding this as 'relevant conduct'. Failure to adhere to infection control policies poses a risk of harm to residents from infection.

Finding (3): 2021 - conduct towards staff

65. DBS's third finding was that "In 2021 while working as a registered nurse for Bupa at Care Home B on various unknown dates you belittled, mocked, intimidated, made fun of colleagues and talked about them in a discriminatory manner". The specific allegations relied on by DBS in this regard are at pp 1107-1115 of the SJP. Encompassed within these allegations are some of the most serious allegations against the appellant including her using the term "white bastard", referring to other black carers as "you have my blood" and saying she wanted "the blacks working together and the whites working together". There are also many other allegations of the appellant using similar discriminatory language.

66. Again, we find that DBS made no error in finding these allegations to be established on the facts. The appellant's general denial of all allegations is not plausible, particularly given that in relation to the 'millions' comment – finding (4) below – she initially denied that twice before being played a recording of it which meant she could not deny it.

67. In relation to these 2021 allegations, the appellant advanced further reasons why witnesses might be making allegations up, including that EG was looking to get a 'pay out' in order to leave. However, that does not explain why all the other witnesses would make things up, despite (for the most part, and until the end of the investigation) being asked about the allegations in private interviews where there is no suggestion anyone was being pressured to say anything in particular. The same points we have made previously about the witnesses all saying similar but different things apply in relation to the 2021 investigation: the evidence has all the hallmarks of being genuine and not conspiracy. The fact that a colleague made a recording of a handover meeting in August 2021 also does not point towards conspiracy or malice. If there was conspiracy or malice there would have been more recordings, and whoever made the recording would not have waited until after a grievance investigation started in November 2021 to come forward with it. Likewise, the fact that colleagues celebrated the appellant's 10 years in post says nothing about how colleagues were feeling about the appellant. Such formal markings of work milestones tend to happen

regardless of actual feelings. Finally, like her employer we are not persuaded that witnesses' failure to bring forward their concerns at the first opportunity as whistleblowing means they were lying. The view of the disciplinary manager that witnesses were genuinely fearful is one that deserves respect and we accept it.

68. For the avoidance of doubt, we are satisfied for the reasons given in relation to Finding (1) that this conduct towards staff constituted 'relevant conduct'. Indeed, the evidence is stronger in relation to the 2021 conduct because of the discriminatory (racist) elements of the appellant's conduct. It is reasonable to suppose that there is a real risk that someone who makes discriminatory remarks like the appellant does may also express similar views in front of or to service users. Such an attitude and comments bring an obvious risk of emotional harm to vulnerable adults and children.

Finding (4): 2021 - inappropriate comments about service users

69. The evidence relied on by DBS in relation to this finding is in the SJP at pp 1115-1120. This finding relates to what the appellant was found to have said on the recording of the 11 August 2021 handover. Although some of these comments were inappropriate comments *about* service users, said in their absence, the appellant's comment about having told a service user to look into her eyes when she was being fed or she would go hungry was a comment that the appellant on the recording was reporting she had actually said to a service user.

70. The appellant alleges that this recording has been 'doctored'. We have not been provided with the recording itself, and it was not provided to DBS, but it is apparent from the records of it being played to witnesses that they all regarded it as a genuine recording and that it included multiple voices, not just the appellant's as she suggests. See, eg, pp 62, 66, 93, 116 and 906. There is no reason to think that it had been 'doctored'.

71. As mentioned already, the only allegation that the appellant accepts is that about her getting Resident E to marry her and sign for his millions. She did not at this hearing even accept the other comments that witnesses said they had heard her making on the recording. Again, we find the appellant's blanket denials are not credible. The weight of evidence is against her. DBS made no error in fact.

72.

Further, it was open to DBS to conclude that this was 'relevant conduct'. Although some of what is alleged could be regarded as reasonable banter (of the 'coping mechanism' variety) if said strictly between staff in private, it was open to DBS to conclude that this was conduct of a type that might be repeated by the appellant in front of residents, as indeed her comment about the service user going hungry if she did not open her eyes was. All this could reasonably be viewed by DBS as amounting to emotional abuse.

Finding (5): 2021 - throwing water at service user MH

73. There was no error of fact in DBS's conclusion. It was open to DBS, as it was to the employer, to find MH's own evidence of what happened persuasive and to reject the appellant's denials, particularly given the number of other witnesses who gave some indirect evidence about this incident. It is also obvious that DBS rightly regarded this as 'relevant conduct' as throwing water at a service user might harm a service user, even if MH in this particular instance does not seem to have been bothered by it.

Finding (6): 2021 - eating service users' food

74. The evidence relied on by DBS is at pp 1128 to 1131 of the SJP. In relation to this finding, DBS departed from the view of the employer. Our comments above in relation to Finding (1) as to the careful approach that DBS should take when departing from the view of the employer who has seen the witnesses in this sort of case apply equally here. However, again, we are satisfied that there was no material error in DBS not explicitly acknowledging that it was departing from the employer's findings in the Final Decision letter. This is because we are satisfied that the evidence relied on by DBS does support its conclusion that the appellant ate food prepared for the service users before they ate, that she ate food with her fingers and was also eating in the service users' dining room while feeding them. We do not consider that the employer's reason for not upholding this allegation (that there was a lack of clarity about BUPA's policy) explains why the employer did not uphold the allegation, given that it is apparent from the employer's dismissal letter itself that the appellant was not in any doubt what the policy was.

75. The reasonableness of DBS upholding these allegations is underscored by the fact that this conduct was essentially a repeat of part of what the appellant was disciplined for in 2018/19. Despite having confirmed that she had re-read and signed the infection control policy, she returned to behaviour that breached that

policy. Again, we do not accept the appellant's denials of this conduct; the weight of evidence is against her.

76. We are therefore satisfied that DBS made no error of fact in relation to this finding and did not err in finding that it constituted 'relevant conduct' as it did in 2018/19 (Finding (2)).

Lack of insight

77. The appellant also challenges DBS's conclusion that she lacked insight. However, we are satisfied that DBS was entitled to infer that she lacks insight. Indeed, were there any doubt on that front, it was dispelled by the appellant's evidence at this hearing. The first step on the road to insight for the appellant would be to recognise that so many witnesses cannot be mistaken in every respect save the one that happened to be caught on record in August 2021. As matters stand, the appellant has not demonstrated any insight at all into her behaviours or their potential impact on vulnerable adults, or (if that conduct were repeated against children), on children.

The NMC hearing

78. There was some suggestion in the grounds of appeal that DBS should have waited for the outcome of the NMC's fitness to practise hearing. This argument was not pursued by the appellant at this hearing, although we did raise it with the parties to ascertain their respective positions. Counsel for DBS readily acknowledged that in the event that the facts found by the NMC at the forthcoming hearing depart significantly from the facts as found by DBS, that would potentially provide the basis for an application to DBS for a review of the appellant's inclusion on the barred lists. As matters stand, however, DBS submits, and we agree, that this is a case where it was reasonable for DBS to proceed on the basis of the evidence it had, and there was no need for it to delay making a decision until after the NMC hearing. We note that this was an approach accepted by the Upper Tribunal in *XYZ v DBS* [2024] UKUT 85 (AAC) to be lawful. Although that case is now the subject of an appeal to the Court of Appeal, we have received no argument or evidence that would cause us to doubt that the Upper Tribunal's decision in that case was correct, or to hold that DBS made any error in this particular case in proceeding to a decision in advance of the NMC hearing.

Proportionality

79. Finally, the appellant invites us to consider whether DBS's decision to include her on the barred lists was proportionate. As set out above under the Legal Framework, this is a matter for us to decide, giving due weight to DBS's view.

80. DBS in its Final Decision letter acknowledged that, despite the wealth of evidence against the appellant of inappropriate conduct, much of it was conduct towards staff and the level of risk that the appellant posed to service users was low. However, DBS considered that it was still proportionate to include the appellant on the barred list given that her conduct had been sustained over a number of years and repeated despite the appellant having been issued with a Final Written Warning in 2019. DBS considered that the appellant's conduct and general denials evidenced callousness and lack of empathy towards others, a lack of openness and honesty and an unwillingness to take responsibility for her actions.

81. In this case, we agree with DBS. Despite the very significant impact that the barring decision has had on the appellant and her family, we are satisfied that it is proportionate in this case due to the nature of the risk that she poses to vulnerable adults and children. We do not consider that her dismissal by her employer provides sufficient protection because the appellant has already demonstrated an inability to learn from previous disciplinary action. We also do not consider that the NMC procedures provide sufficient safeguards. Those relate only to the appellant's suitability to remain as a registered nurse. However, the nature of the appellant's conduct is such that it would be likely to manifest in any caring role; it is not specific to her practice as a nurse. As such, the only way to protect children and vulnerable adults from the risk posed by the appellant is for her to remain on the barred lists.

Conclusion

82. For all these reasons, we dismiss the appeal and under section 4(5) of the SVGA 2006 we confirm the decision of DBS.

Holly Stout
Judge of the Upper Tribunal

Suzanna Jacoby
Upper Tribunal Member

Rachael Smith
Upper Tribunal Member

Authorised by the Judge for issue on 18 December 2024

Annex: Anonymity: Rule 14 Order

83. A Rule 14 Order had previously been made by an Upper Tribunal Registrar, but this only covered certain redactions to documents in the bundle. At the start of the hearing, we asked DBS if it also sought other Rule 14 orders anonymising any individual in this hearing and in this judgment. DBS confirmed that Rule 14 orders were sought in relation to all individuals named in the documents, both staff and service users. DBS also had no objection to one being made in respect of the appellant and, indeed, considered anonymisation of the appellant to be necessary to protect the identities of the other persons named in the documents. DBS also considered it would be necessary to anonymise the care homes in which the appellant worked, although given the size of the organisation for which the appellant worked (BUPA), there was no need to anonymise that organisation.

84. When asked by the Tribunal, the appellant stated that she did not object to any of the orders sought by DBS, but that she did not seek an anonymity order for herself. She indicated she was content for her name to be made public in connection with these proceedings.

85. In the light of the parties' positions, we considered whether it was appropriate to make any orders under Rule 14 in this case going beyond the orders already made by the Registrar. We bear in mind that we should not order a restriction on publication simply because the parties seek it: see *X v Z Ltd* [1998] ICR 43, CA.

86. We decided that it was appropriate and necessary to protect the identities of individual members of staff and vulnerable adult residents named in these proceedings, and that in order to protect their interests it was necessary also to anonymise the care homes in which the appellant worked. However, we decided that this did not also require the anonymisation of the appellant and as

she did not seek anonymity we do not anonymise her. Our reasons for so concluding are as follows.

87. Open justice means that justice must not only be done, it must be seen to be done. In *Cape Intermediate Holdings Limited v Dring* [2019] UKSC 38, [2020] AC 629 the Supreme Court explained the purpose of the principle as follows:

> "42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the ways in which courts decide cases – to hold the judges to account the decisions they make and to enable the public to have confidence that they are doing their job properly. …
>
> 43. …the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases".

88. Article 6(1) of the European Convention on Human Rights (ECHR) provides that: "Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of…" and then a series of reasons are listed, including: "the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice".

89. Numerous cases have emphasised the link between open justice and the right under Article 10 of the European Convention of Human Rights to freedom of expression and have provided guidance on the nature of that right, including stressing the importance of names to the exercise of that freedom (see, in particular, *Khuja v Times Newspapers Limited and ors* [2017] UKSC 49, [2019] AC 161 at [14]-[30]). Section 12(4) of the Human Rights Act 1998 (HRA 1998) requires the Court to have "particular regard to the importance of the Convention right to freedom of expression" when considering whether to make any order that might affect the exercise of that right. This is not a case in respect of which there has been any press interest, nor does any seem likely; that does not affect the principles we have to apply, but it does mean there is no one who can realistically be notified as a 'respondent' to this application for the purposes of section 12(2) of the HRA 1998.

90. An order anonymising someone who would otherwise be named in court proceedings is an interference with the principle of open justice. As Lord Reed JSC described in *A v BBC* [2015] AC 588 at [23]: "It is a general principle of our constitutional law that justice is administered by the courts in public, and is

therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy…In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny".

91. Ordinarily, it is said that it is not unreasonable to regard a person who brings proceedings as having accepted the normal incidences of their public nature, including the potential embarrassment and reputational damage inherent in being involved in litigation: see *TYU v ILA SPA Ltd* [2022] ICR 287 at [44] *per* Heather Williams QC (sitting as she then was as a Deputy High Court Judge). However, the same is evidently not true of other people named in the proceedings but who have otherwise had no involvement in the proceedings. As Williams J notes later in that paragraph, that is a factor that has been accepted in the authorities as being relevant to the question of whether they should be anonymised.

92. In this particular jurisdiction, the considerations are somewhat different to those in the authorities we have mentioned, because this is an appeal in relation to the appellant's inclusion on the barred lists, the statutory scheme for which provides for the identity of those on the lists to be kept confidential and only revealed by DBS to those with a legitimate interest in knowing. Generally, that just means prospective employers, as the Divisional Court (Flaux LJ and Lewis J) explained in *R (SXM) v DBS* [2020] EWHC 624 (Admin), [2020] 1 WLR 3259. However, that case was a judicial review brought by someone who claimed to be the victim of sexual abuse who wanted to be informed by DBS whether the alleged perpetrator had been included on the barred list. The Divisional Court held that DBS had acted lawfully in refusing to disclose that information. It is, of course, not possible to tell from the judgment in *SXM* whether the alleged perpetrator had appealed to the Upper Tribunal or not, since that fact would itself have conveyed to the claimant in that case that the alleged perpetrator had been included on the barred list. It is, though, relevant for us to take into account that not anonymising an appellant in an appeal to the Upper Tribunal goes 'against the grain' of the legislative scheme as it was recognised to be by the Divisional Court in *SXM*.

93. We also consider that, in the context of appeals against DBS decisions, the emphasis that courts and tribunals in other contexts place on it being reasonable to assume that someone who litigates accepts the incidence of publicity that comes with that should perhaps be given less weight. That is because the legislative scheme gives those who are subject to it an expectation

that they will not be publicly named and because the right of appeal to the Upper Tribunal is an essential element of that same legislative scheme. The hearing before the Upper Tribunal in DBS cases is the "fair and public hearing … by an independent and impartial tribunal" with "full jurisdiction" which secures that the barring scheme under the SVGA 2006 is compliant with Article 6 of the European Convention on Human Rights. A decision to place someone on a barred list (or not to remove them) is a determination of an individual's civil right to practise their profession and to work with children/vulnerable adults: see *R (G) v Governors of X School* [2011] UKSC 30, [2012] 1 AC 167 at [33]. Although in that case the Supreme Court rejected the argument that Article 6 applied at the earlier stage of the employer's internal disciplinary proceedings, the Court proceeded on the assumption that Article 6 did apply to the decision-making of DBS's predecessor, the Independent Safeguarding Authority (ISA), and that, as such, the availability of an appeal to the Upper Tribunal as a court of "full jurisdiction" ensured the scheme as a whole was compliant with Article 6: see [84] *per* Lord Dyson, [94] *per* Lord Hope and [101] *per* Lord Brown. It is therefore important that an appellant should not be deterred from exercising their appeal rights by the fact that an appeal to the Upper Tribunal might bring with it publicity from which they are otherwise protected under the statutory scheme.

94. On the other hand if, as in this case, the appellant is not so deterred, then these considerations fall away. In this case, the appellant's name is already in the public domain as being subject to an Interim Suspension Order by the Nursing and Midwifery Council (NMC). In the ordinary course of events, if the NMC follows its usual practice of publishing its decision following the appellant's upcoming fitness to practise hearing, the appellant's name will be in the public domain in connection with much of the detail of the underlying factual allegations against her. If the NMC follows its usual practice, however, the names of witnesses in those proceedings, and staff colleagues and service users will remain anonymous.

95. For these reasons, despite the norms of this legislative scheme, it is not appropriate to anonymise the appellant.

96. However, we are satisfied that the other individuals in the case require anonymisation in their own right.

97. So far as service users are concerned, we for the most part do not know their identities anyway as they are not revealed in the documents, but to the extent that they are, we consider that they should be anonymised. They are vulnerable

adults being provided with intimate care in what is effectively their own home. They have not had any involvement in these proceedings and it would not have been appropriate even to notify them of the proceedings.

98. As to other staff members, their Article 8 rights are also engaged. Their personal reputations are not engaged to the same degree as the appellant's, but some of them have been the subject of argument and allegations as to their professionalism or credibility. The proceedings relate to matters that occurred at their work some years ago which those involved would have had no reason to think would become public. These other individuals have not been involved in these proceedings, are probably unaware of the proceedings and have had no opportunity to answer any allegations made against them in these proceedings. There is a real risk of unfairness to them if their names are made public, and revealing their names would do little in this case to further the principle of open justice as their identities are not important to the facts of the case.

99. All these factors mean that we consider that the appropriate balance in this case is for Rule 14 Orders to be made maintaining the anonymity of all other individual members of staff and service users identified in the documents or evidence in these proceedings or in this judgment.

100. We have considered carefully whether this also requires the appellant to be anonymised in order to protect the identities of others. However, we consider that, provided the names of the homes concerned are anonymised, there is very little risk of individuals being identified just from the appellant's name. Adopting this course also aligns our approach with the approach that the NMC is likely to take in relation to its proceedings. We add, for the avoidance of doubt, that, provided the names of the homes are not revealed, we do not consider there is any difficulty in naming BUPA as the employer given the size of that organisation.