

Care Standards

The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

Heard on 17 and 20 to 22 October 2014 at Manchester Civil Justice Centre

BEFORE

**JUDGE MELANIE PLIMMER
MS WENDY STAFFORD
MS PAT MCLOUGHLIN**

BETWEEN

[2014].2206.EY

ABC HAPPY DAYS NURSERY 2 LIMITED

Appellant

-v-

OFSTED

Respondent

DECISION

Representation

The Appellant was represented by Mr Brown
The Respondent was represented by Mr Toole (Solicitor).

Reporting order

1. There shall be a Restricted Reporting Order under Rule 14(1)(b) of the Tribunal Procedure Rules (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('the 2008 Rules') prohibiting the publication (including by electronic means) in a written publication available to the public, or the inclusion in a relevant programme for reception in England and Wales, of any matter likely to lead members of the public to identify any child or its family mentioned in the appeal.

The appeal

2. This is the appeal of ABC Happy Days Nursery 2 Limited ('the Appellant'). The Appellant appeals against a decision of Ofsted dated

10 April 2014, to cancel the Appellant's registration. In that decision Ofsted set out its reasons why the Appellant no longer meets the prescribed requirements for registration.

3. The parties have helpfully agreed a detailed 'Scott Schedule' ('the Schedule'). This sets out Ofsted's allegations against the Appellant in chronological order, cross-referenced to the relevant evidence Ofsted relies upon together with the Appellant's cross-referenced responses. In summary, Ofsted contends that the nursery operated by the Appellant has a history of wide-ranging concerns and is no longer suitable to provide early years provision. The allegations against the Appellant are numerous and broad. Some are historic and some are ongoing. The Appellant accepts some of the historic concerns but contends that these have been addressed. The Appellant disputes the ongoing concerns. A number of general themes emerge from Ofsted's case against the Appellant:

- i) the owner of the Appellant, Ms Waite, has demonstrated poor leadership and management;
- ii) although there have been improvements generally and specifically in the knowledge of the Early Years Foundation Stage ('EYFS'), these have been reactive and have not resulted in the implementation of consistent good childcare practice;
- iii) the learning and development for children has been inadequate;
- iv) the welfare of children has been adversely affected;
- v) there have been continuing concerns regarding the suitability and safety of the premises used by the Appellant to provide its services as a nursery.

4. The Appellant has directly responded within the Schedule, the documentary evidence and at the hearing to each of these overarching concerns and this is summarised below;

- i) whilst Ms Waite accepts that when the nursery was first registered she was not confident and experienced in the provision of leadership and management within the context of a nursery setting she has obtained the relevant qualifications and experience since then;
- ii) numerous policies have been put in place to address the concerns raised by inspections regarding knowledge and implementation of the EYFS and these have resulted in consistent good childcare practice;

- iii) the learning and development for children has been adequate;
- iv) the welfare of children has been paramount at all times;
- v) each of the concerns regarding the suitability and safety of the premises have been promptly addressed but in any event many of the concerns are not well-founded.

Hearing

5. The appeal was heard over the course of four full days.

Applications

6. At the beginning of the hearing Mr Toole submitted a recent document summarising an Ofsted visit undertaken by one of its inspectors, Ms Law, a few days before the hearing on 14 October. Mr Brown pointed out that this was provided very late and had caused disruption to the nursery. We considered the document to be highly relevant to the issues we had to determine. We accepted the evidence because it assisted in the efficient management of the hearing. Ms Law was going to be called as a witness and would be giving her views on the Appellant's suitability. Our task is to determine suitability as at the date of hearing. Ms Law would be basing her views at least in part on her recent visit and she was very likely to refer to this during her oral evidence. The document describing that visit assists the Appellant in having notice of what she is likely to say and would reduce the amount of oral evidence we needed to hear from Ms Law. We were however very clear that the Appellant should not be disadvantaged by the late submission of this document. It was therefore agreed that Ms Law would not give evidence until the second day of the hearing (a Monday) and this would give the Appellant the weekend to consider the document carefully and adduce any further necessary evidence.
7. Mr Brown also requested the Tribunal order the disclosure of mobile telephone records of a Ms Koser. It was said that this would demonstrate that a conversation had taken place between her and the decision maker in this case, Ms White, and this would assist the Tribunal in determining whether or not Ms White was biased. We ruled that no allegation of bias had yet been made against Ms White and that in any event it was difficult to see how the fact of a mere conversation between the two could materially support an allegation of bias. We suggested that the matter should be kept under review and if such a serious allegation is to be made the application could be renewed during the course of the hearing. Mr Brown confirmed that an allegation of bias had not been made and he was content with the course suggested by the Tribunal.

Witnesses

8. Mr Toole opened the case briefly and we then heard from a number of live witnesses. They were all cross-examined and the Tribunal also asked a number of questions of each witness.
9. On the first day we heard from: Ms Henry, a Senior Quality Assurance Officer at Manchester City Council ('MCC'); Ms Grocott, a Specialist Environmental Health Officer at MCC, and; Ms Taylor, an Ofsted Inspector.
10. At the beginning of the second day Mr Brown submitted a number of documents relevant to Ms Law's recent visit. He also made two applications. First, he applied for further time to adduce witness statements from employees at another nursery provision, Martinscroft. He suggested that these witnesses would be able to deal with the concern that Ms Waite did not have the capacity to manage good childcare provision. We ruled against this application on the basis that it was made very late and could have been made much earlier. Mr Brown sought to persuade us that the need for such evidence only became clear when Ofsted served its late evidence and after hearing more detail about Ofsted's case. We disagree. Ms Waite's leadership and management abilities have been a clear and dominant issue in this case for a long period of time.
11. Mr Brown also applied to witness summons Ms Henry's manager to attend the hearing on the basis that she was not a witness of truth and was unclear about the relevant criteria used by MCC to determine the Appellant's free entitlement funding. We did not consider the Appellant's free entitlement funding in the past to be an issue directly relevant to its suitability at present. In any event we considered that we had been provided with sufficient evidence from Ms Henry and would also be provided with evidence from Ms Waite, and this would be sufficient to enable us to make our own findings.
12. We then heard from two Inspectors: Ms McWilliam, an Inspector employed by Prospects Services (who are contracted to undertake some inspections on behalf of Ofsted) and Ms Law, an Ofsted Inspector.
13. On the third day we heard from Ms White, a Senior Officer with Ofsted and the decision-maker in the case. We then heard from the Appellant's witnesses. First, the Deputy Manager of the nursery Ms Ahmed. Second, Ms Waite, the owner and current manager of the nursery. Ms Waite's evidence continued into the fourth day of the hearing.

Documentary evidence

14. The parties worked well together to prepare helpful bundles of extensive documentary evidence. Page numbers were added just before the hearing and we accepted further evidence from the Appellant during the course of the hearing. We have considered this evidence in full and together with the oral evidence.

Submissions

15. At the end of the evidence we heard helpful submissions from Mr Toole and Mr Brown. Mr Toole invited us to consider all the relevant evidence and to conclude that the Appellant is unsuitable to continue to be registered. Mr Toole submitted that Ms Waite had demonstrated little recognition of past failings and sought to place blame on others. He invited the Tribunal to reject Ms Waite's allegation that so many professional witnesses had lied. He went through the evidence of each professional witness to highlight why it was reliable and significant. He asked the Tribunal to find that by contrast Ms Waite provided unreliable evidence and the correct and proportionate course was to find that the decision to cancel was a proportionate one in all the circumstances of the case.
16. Mr Brown criticised the decision-making process employed by Ofsted as well as the failure to follow relevant guidance during the course of inspections. He pointed out that Ofsted's case was based on subjective opinion and there was an absence of any objective assessment. Mr Brown criticised Ofsted's failure to follow the Evaluation Schedule for Inspections of Registered Early Years Provision ('the Evaluation Schedule') and Monitoring Visits for Early Years Provision Judged as Inadequate ('the Monitoring Visits Guidance'). Mr Brown criticised in particular the failure to monitor in accordance with the guidance and the failure to track children.
17. Mr Brown disagreed with Mr Toole's submission that Ms Waite demonstrated little or no insight into past failures. On the contrary he submitted that Ms Waite accepted that the setting was inadequate in the past and has acknowledged her failings. He argued that she made significant efforts to improve her own knowledge and experience as well as the setting itself. She did this and made sacrifices (including financial losses) out of a passion for childcare and a commitment to the African-Caribbean community in Hulme that the nursery serves. Mr Brown reminded us that Ms Waite accepted that she did not have knowledge of the regulatory framework when she first opened the nursery and she therefore studied part time and employed managers. She sought assistance from a number of external agencies including MCC, consultants and other providers and was proactive in initiating actions to improve the nursery. Although Mr Brown submitted that the decision was based on an error of fact as Ofsted wrongly believed that Ms Waite was not qualified, he conceded that Ofsted now accepts that

appellant does and did have the appropriate qualifications at the time of its decision to cancel.

18. At the end of the hearing we reserved our decision, which we now provide with reasons.

Legal Framework

19. Section 34(1) of the Childcare Act 2006 provides that a person may not provide early years provision on premises in England which are not domestic unless registered in the early years register in respect of those premises.
20. Schedule 2, Part 1 of the Childcare (Early Years Register) Regulations 2008 sets out the prescribed requirements for registration. This requires inter alia that the applicant is suitable to provide early years provision, that the provision meets and complies with the EYFS. Section 68(2) of the 2006 Act states that Ofsted may cancel a person's registration if it appears that these requirements cannot be satisfied.
21. Section 74(1) of the 2006 Act provides a right to appeal to this Tribunal. The legal burden remains vested in Ofsted, which must establish the facts upon which it relies to support cancellation. It must also demonstrate that the decision to cancel the Appellant's registration is proportionate and necessary. The standard of proof to be applied is the balance of probabilities. We must make our decision on the basis of all the evidence available to us at the date of the hearing and we are not restricted to the matters available to Ofsted when the cancellation decision was taken.
22. The powers of the Tribunal can be found in section 74(4) of the 2006 Act. Essentially the Tribunal may either confirm Ofsted's decision to cancel or direct that it shall not have effect. If the Tribunal decides that cancellation should not have effect, it may impose conditions on the appellant's registration, or vary or remove any of the current conditions.

Background facts

23. The background history to this case is lengthy and merely summarised below.
24. The Appellant was registered with Ofsted on 8 February 2012. The Appellant operates a nursery from the ground floor of a converted building (formerly a public house) in Hulme, Manchester. The nursery was approved by MCC to provide free entitlement placements. The children who attend the nursery are mostly from Black Caribbean backgrounds and this is reflective of the community served by the nursery (and formerly the public house). The quality of the provision was assessed as satisfactory in 2012 but has been assessed as unsatisfactory in three subsequent inspections. The Appellant has

been provided with a number of actions to improve as a result of the unsatisfactory inspections. A decision was taken in April 2014 to cancel the Appellant's registration.

Findings of fact

Approach to evidence generally

25. The Tribunal has been assisted by the Schedule and has taken it fully into account. Although we have not found it necessary to set out each allegation or concern in turn in this case, our findings of fact have been reached with the assistance of the Schedule. We have already set out the important themes that have emerged from the evidence available to us and from the matters set out in the Schedule. We address those themes later on in this decision.
26. Before turning to our findings we set out our broad assessment of the witnesses who appeared before us. We find that the professional witnesses called by Ofsted provided honest evidence, supported by notes written at the relevant time or soon thereafter. Where they did not know an answer or were unsure they were candid in making that clear. They were all prepared to acknowledge improvements made by the nursery and Ms Waite, and to make concessions where appropriate. We consider that they all provided balanced, reliable evidence.
27. We accept Ms Ahmed provided honest evidence. It was clear that she felt a strong allegiance to Ms Waite and her evidence was therefore limited by this.
28. We did not regard Ms Waite as a provider of reliable evidence. In our view she indicated that she could not recall matters when she considered it too difficult to acknowledge the extent of past failings. Ms Waite was very quick to place blame on others. She blamed MCC for providing the nursery with insufficient support. She blamed her managers for letting her down. She blamed environmental health officers for manufacturing concerns against her. Whilst she acknowledged some of her failings in the past she was not able or willing to properly address the root causes for the inadequate inspections from October 2013 and onwards. We are also very concerned that Ms Waite made a number of implausible allegations that the professional witnesses deliberately and independently manufactured untruths against her and the nursery. We note that these allegations emerged for the first time when she gave evidence. They were not clearly set out in any of the three detailed witness statements prepared by Ms Waite and were not the subject of any complaints. The allegations were not just directed at witnesses employed by Ofsted such as Ms Law (who is alleged to have deliberately created hazards at the nursery on two separate occasions) but extended to Ms McWilliam (an independent Inspector) and Ms

Grocott (a very experienced Environmental Health Inspector with MCC).

29. Where there is a conflict in account we prefer the evidence of the professional witnesses.

Findings of fact

30. It is clear from the inspection on 19 July 2012 that the quality of the provision was satisfactory at that time. A number of positives are identified in that inspection although it was considered that some aspects of children's welfare were not being fully met. It is also clear that although the nursery was initially considered unsuitable to meet the relevant requirements for free entitlement funding by MCC, after a visit to the nursery on 22 August 2012 the nursery was assessed as meeting the requirements. Although it was alleged that MCC treated the Appellant unfairly in determining its application for free entitlement funding, we could see no evidence to support this proposition. We entirely accept Ms Henry's evidence that the nursery simply could not meet the relevant requirements at first. The alleged difference in treatment between the Appellant and other providers has been addressed in a letter from MCC dated 13 June 2012. This states that a number of actions needed to be complied with in order to ensure that health and safety and food hygiene requirements were met, and that MCC continued to work alongside the nursery to support them in putting these in place.
31. In response to a complaint, MCC's Quality Assurance Team made an unannounced visit to the nursery in February 2013. We accept Ms Henry's evidence that this visit generated actions for the nursery and highlighted the need for intense targeted support from the Quality Assurance Team. As a result the nursery was assigned a Quality Assurance Officer who followed up the actions and worked with the nursery. We have been provided with a number of documents from MCC setting out significant advice and support provided to the nursery. This includes childcare provider visit forms, assistance with action plans, actual training and offers of training. We accept Ms Henry's evidence that MCC provided as comprehensive support to the nursery and Ms Waite, as resources would permit. We accept Ms Henry's evidence that this nursery was provided with more support than any other setting in the central Manchester area.
32. In response to complaints, Ofsted conducted an investigation visit on 11 February 2013. Ms Smith identified a number of concerns including insufficient staff ratios, a failure to implement risk assessments and defective premises. Ms Smith detailed her visit in a typed toolkit. This includes references to conversations between Ms Waite and Ms Smith. When cross-examined Ms Waite said that she could not remember this visit at all and it is *'likely that the whole tool kit was made up as no record of this person attending the setting'*. Mr Toole took Ms Waite

through the various steps taken by the nursery to address the concerns regarding the premises but she simply said she could not remember taking any of those steps. We did not regard Ms Waite's evidence to be reliable or credible in this regard. The toolkit is a very detailed document and we accept it accurately describes the condition of the premises at this time. We note that fairly soon after this visit those concerns were addressed by the nursery and acknowledged as such within the April 2013 inspection report. In our view Ms Waite irrationally sought to dispute concerns supported by documentation, which were quickly rectified by the Appellant.

33. By 24 April 2013 serious deficits at the nursery were identified by Ofsted and this resulted in an inadequate inspection on that date. This inspection was undertaken by Ms Lee, an Inspector employed by Prospects Services. Ms Lee described a number of very basic and worrying deficits in the provision of childcare that day: children's individual needs were not well catered for, resources were limited, staff did not know children in their key group, staff did not understand the EYFS and learning and development for children seemed to be poor. Ms Lee regarded the setting as very poor generally and set a number of actions and recommendations regarding knowledge and understanding of the EYFS, children's learning and development, developing partnerships and systems for performance management. Ms Lee's report also identified a number of positive features regarding children's experiences and accepted that the breaches regarding the premises that had been identified by Ms Smith had all been addressed.
34. During cross-examination Ms Waite at first sought to disagree with the findings reached by Ms Lee. It was pointed out to her that she had previously indicated that she did not dispute Ms Lee's evidence and for this reason she did not attend the Tribunal to give evidence. Both Ms Waite and Mr Brown then agreed that Ms Lee's concerns were justified at the time but that these have since been addressed. Notwithstanding this, Ms Waite once again indicated that she did not agree with some of the concerns raised by Ms Lee. She was then taken to the toolkit in which Ms Lee provided feedback to the nursery's manager at the time. The manager is recorded as being in '*complete agreement*' with the actions that were necessary to make the requisite improvements. The manager also outlined a number of concerns of her own to the Inspector. The toolkit notes that the owner was on the premises but declined the invitation to attend feedback with her and the manager. Ms Waite stated that this was not true and that she was not invited to the feedback. We prefer the clear indication within the toolkit that Ms Waite declined to attend the feedback. We accept that this inspection report is reliable and balanced and we accept the findings reached within it.
35. We accept that Ms Waite met with Ms Henry after the inadequate inspection and she was assisted to devise a template to collate evidence to demonstrate how the nursery was addressing the actions.

36. On 29 August 2013 Ms Grocott attended the nursery to carry out a routine food safety inspection. She rated the food hygiene as a level 1 'major improvement necessary' and summarised the key points as using out of date potatoes (considered unfit for use because they were green and sprouting in places), cleaning issues with the kitchen, mouse droppings in several locations, lack of sanitizer in the kitchen and a foul drainage smell from the kitchen sink. It appears that the majority of these concerns were addressed quickly and by 16 September 2013 the food hygiene score was increased to level 3 'generally satisfactory'. During her oral evidence Ms Waite rejected Ms Grocott's first report as completely unfounded. She was unable to explain how or why the concerns identified were rectified. We are troubled that in the face of clear evidence that food hygiene concerns were identified and then addressed that Ms Waite continued to dispute that there were any food hygiene issues at all. We entirely accept Ms Grocott's clear evidence regarding the food hygiene issues she observed in August / September 2013.
37. Ms Johnson, an Inspector working for Ofsted visited the nursery on 2 September 2013 in order to investigate the nursery's compliance with the EYFS. She found that the vetting procedures at the nursery were not sufficiently robust and some staff did not have CRB/DBS checks in place and unvetted staff were having unsupervised contact with children. To the appellant's credit improvements were made reasonably quickly and noted as such when Ms Johnson revisited on 9 September 2013.
38. Ms McWilliam inspected the nursery on 23 October 2013 and concluded that it was inadequate. Ms Waite did not accept the majority of her conclusions. It was pointed out to her that Ms McWilliam's toolkit clearly indicates that she agreed with Ms McWilliam's judgment and that she and the manager '*were going to work hard to make things better*'. Ms Waite rejected this as untrue. Ms Waite refused to accept that the manager said that which is set out in the typed toolkit. She claimed that she was ignored and not permitted to talk beyond saying she believed the inspection should have a good outcome. In our view, Ms McWilliam's inspection report is a balanced document containing some positive aspects. The report however contains a number of areas of concern, which are significant in themselves but are particularly significant because they have previously been identified as concerns in the past. We accept Ms McWilliam's evidence that children's well being was compromised because daily checks of the premises were not effective. We accept that daily checks were made but issues that ought be noticed and rectified were not properly addressed. We accept that children's behaviour was not properly managed. Ms McWilliam's notes provide a number of detailed examples of this. A high chair was used as a means of controlling a toddler. A child was not given any explanation why it was wrong to hit another child over the head with a toy. We also accept that staff

engaged in activities without planning them properly such as taking children and babies outside when it was pouring with rain. We accept that Ms McWilliam observed staff to be de-motivated and not interacting well with one another. There was also some confusion as to who the manager was on that day. Ms Waite did not accept that the discussions between the inspector and the manager described in detail within the toolkit over two pages (D192-3) ever took place. She indicated that she was present at the feedback and no such discussion ever took place. We do not accept Ms Waite's evidence about this. She has offered no explanation whatsoever for why Ms McWilliam would manufacture evidence regarding this, and we accept her description of the nursery on that day.

39. In a letter dated 21 November 2013 MCC confirmed that it would not be funding any new free early entitlement places at the nursery from January 2014 and unless there was significant evidence of improvement by this time the quality premium would also be withdrawn.
40. Ms Law visited the nursery on 3 December 2013 and highlighted a number of concerns. Ms Waite did not accept the majority of these. She maintained that at the time she was the 'stand-in' manager yet during the course of her evidence she referred to another member of staff on more than one occasion as '*my manager*'. It became clear upon questioning that this member of staff was undertaking important managerial responsibilities. Ms Waite made allegations that Ms Law deliberately damaged wire meshing at the premises in order to demonstrate by way of a photograph that the premises were unsafe. We entirely reject this allegation and find that such an unjustified allegation reflects adversely on Ms Waite's credibility. We accept that as Mr Brown submitted that it was disproportionate for Ms Law to describe the key person system as '*worthless*'. We however accept that it was not working properly and for the benefit of the children. This was largely down to ineffective leadership and management, poor relationships among staff and a high turnover of staff. We accept Ms Law's assessment that the majority of staff had not had the time to build relationships with the children to identify their individual needs.
41. Ms Law drew attention to ratios not being met in two rooms in her toolkit. This was denied by Ms Waite but she was unable to explain why Ms Law would contemporaneously record with precision that in two rooms ratios were not met. Ms Waite pointed out that two additional members of staff should have been there but Mr Toole was able to demonstrate that those individuals were not even at the nursery at the time.
42. It was after this visit that Ofsted gave notice of its intention to cancel registration.
43. Ms Law visited the nursery together with Ms White on 4 February 2014. We accept Ms Law's evidence about this visit, which is supported by

the evidence of Ms White, her toolkit and photographs. It is particularly concerning that despite a documented safety check of the baby room that morning a screw and rawl plug were found on the floor of the baby room. We accept that this demonstrates a lack of attention to safety notwithstanding a system for checks being in place. Ms Waite accepted that this was a mistake on her part but blamed workmen for allowing this to happen. Ms Law observed very poor workmanship including sharp edges and we agree with her summary of concerns in this regard. We also accept that staff were confused about who was the room leader for a room. Ms Waite sought to explain that this was just an error in communication. Even if Ms Waite's evidence is taken at its highest, it is clear that two members of staff spent at least an hour and a half working at the nursery that day without knowing the other's role and this was not clarified by Ms Waite.

44. After an objection panel hearing on 21 March 2014 Ofsted made the decision to cancel registration on 9 April 2014.
45. We were told by Ms White, and we accept, that Ms Taylor attended the Appellant's premises during the course of 2014 in order to determine whether any immediate action needed to be taken such as suspension. Ms Taylor raised some safeguarding issues but these were not considered sufficiently serious to justify suspension. We do not consider that the photographs taken by Ms Taylor support her concerns about the cleanliness of the kitchen area. Mr Brown described this as misleading evidence. Whilst we disagree with Ms Taylor's characterisation of the cleanliness of the kitchen, we accept her views were honestly held.
46. We are concerned that Ms Waite may have acted inappropriately and insufficiently quickly in relation to a safeguarding issue that arose on 26 June 2014 regarding a child displaying sexualised behaviour, who was crying because he said his mother had hurt him. This incident is recorded in some detail in Ms Taylor's notes of her visit on 27 June 2014. Ms Waite's reaction was to take the child's top off to check for marks. She did not seem to appreciate that there might be a link between sexualised behaviour and the child reporting that he was hurt or that it would be more appropriate for the matter to be immediately considered by the Local Authority Designated Officer, and the child checked by a medical officer. Importantly, Ms Waite did not report this to the local authority until she was told to do so by Ms Taylor. In her evidence before us Ms Waite explained that she acted '*straight away*' and was about to report the matter but was interrupted by Ms Taylor's arrival at the premises on 27 June 2014. We do not accept this explanation as the incident took place the day before Ms Taylor's visit (see toolkit at D53) and not on the morning of the visit.
47. On 18 September 2014 Ms McWilliam carried out her second full inspection. She described this as a very challenging inspection. Ms Waite considered that majority of the concerns were unjustified. We

accept that this inspection properly raises a number of serious issues of concern that have already been raised in the past: staff ratios not met; children's behaviour not appropriately managed; evidence that children's learning and development not appropriately promoted. Ms Waite completely denied that there had been a failure to report three minor accidents that Ms McWilliam witnessed involving the same child. Ms Waite told us that she was '*confident 100% to say that she [Ms McWilliam] made it up*'. We have considered the notes for this inspection and we accept that the nursery breached accident recording and reporting requirements, as recorded by Ms McWilliam.

48. Ms Grocott attended the nursery again on 24 September 2014. We accept Ms Grocott's evidence that Ms Waite was not cooperative at this visit. Ms Grocott identified a leaking waste pipe in the cellar below the nursery. Although the pipe was fixed by the time of the revisit on 3 October 2014, Ms Waite dismissed the issues raised by Ms Grocott out of hand as being untrue and made up. Ms Waite said in relation to Ms Grocott's identification of issues at the nursery: '*everything is all made up*'. We unhesitatingly reject that allegation having considered all the evidence available to us. Ms Grocott's evidence was clear, straightforward, unexaggerated and supported by documentation. Ms Waite's evidence was implausible and inconsistent.

49. We have already referred to a monitoring visit undertaken by Ms Law on 14 October 2014. Ms Waite again alleged that on a second occasion Ms Law deliberately created a hazard for children by using her finger to pry a piece of ply board from the surface beneath. Mr Toole clarified with Ms Waite that a photograph showed the wood prior to it being touched by Ms Law. She confirmed that was correct. He then asked her whether she saw a small gap between the ply board and the surface beneath (SW292). She said repeatedly that there was no gap on the photograph. In our view the photograph clearly shows a gap at the relevant place. We are satisfied that a child could clearly trap a finger in that gap. It is a hazard and Ms Law was correct to point it out as such. We entirely accept Ms Law's assessment of the premises and of the setting in practice that day. We accept that Ms Law demonstrated comprehensive knowledge of what was done and when in relation to a tracked child, and that this demonstrates a failure to promote the child's welfare and development.

Particular concerns

50. Having reached these findings in relation to the chronology we now go on to address the themes we have earlier identified as having emerged in this case. Before we do so we wish to emphasise that we accept that Ms Waite has demonstrated a degree of willingness and ability to improve and to evidence improvement, and that she has shown some persistence in her efforts. We accept that the photographs we have been shown demonstrate at present a far more organised and well-resourced nursery than was hitherto the position. Indeed, both Ms

McWilliam and Ms Law specifically credited the nursery with improving its resources. We accept that Ms Waite accessed support from other agencies and has taken on board some of the concerns identified and sought to address them. Unfortunately, we agree with Ms Henry that notwithstanding these efforts quite often any improvements could be described as '*one step forward and two steps back*'. Ms Henry observed that this nursery was the only one in the area to have three consecutive inadequate inspections. Although improvements were made, good practice was not sustained.

Poor management and leadership

51. Having considered all the detailed evidence in the round we find that during the course of 2013 and continuing in 2014 that the management and leadership of the Appellant lacked: overall direction; clarity of roles and responsibilities; effective monitoring of operations or dealing with issues before they became problems; a proactive approach to safety and suitability of the premises. Policies were formulated and documentation on children's activities was provided but this was not reflected by progress in practice.
52. Undoubtedly there was a high turnover of managers and staff. Ms Waite indicated that this could all be explained. Mr Brown submitted that no proper enquiry was made into reasons for the departure of the managers. Had that been taken into account a different decision would have been reached. We disagree. We have come to the firm conclusion that Ms Waite is not an effective recruiter, manager or leader within a childcare setting. First, we have found her to be too quick to pass the blame on to others and unable or unwilling to take responsibility for her own actions or the actions of others that she manages. Second, Ms Waite has provided inconsistent and unreliable evidence to explain the reasons for the departure of managers. In her oral evidence she tried to indicate that managers mainly left because they were underperforming. This is inconsistent with the evidence she has provided in her statements suggesting that the majority of managers left for reasons personal to them. There is considerable evidence within the toolkits that managers were dissatisfied with the approach adopted by Ms Waite as a leader. When we consider all the relevant evidence cumulatively we are satisfied that much of the high staff turnover is attributable to Ms Waite's poor leadership qualities within a childcare setting. Third, poor leadership and management have been consistently evidenced from the first inadequate inspection and have continued to the third inadequate inspection. This includes unacceptable staff ratios / qualifications, poor communication with staff regarding their roles, failing to conduct CRB/DBS checks, insufficiently explained high staff turnover. These inspections have been undertaken by two different Inspectors working independently from Ofsted. Their judgments are consistent with those reached by two different departments within MCC and Ofsted Inspectors when undertaking monitoring visits. Ms Waite has had responsibility for

leadership during that time and her leadership has been consistently described as poor.

53. We accept that Ms Waite has gained experience and qualifications during that time. We note (and Ms White accepted) that in recent months the staff at the setting has become more stable. We also accept that Ms Waite's knowledge of the EYFS has increased. We remain concerned about her depth of understanding of the EYFS and how it translates into practice. In our view Ms Waite has understated the importance of very basic aspects of running a compliant nursery such as good quality care, rigorous risk assessments and taking a proactive rather than reactive approach to the identification of hazards within a nursery setting. We consider that she has been provided with extensive support and has been given an extended period to apply her knowledge and experience in order to make sustainable improvements. We however accept the conclusions of the various professionals that she simply does not have the leadership and management skills to secure compliance with the relevant Regulations and this has been evidenced for an extended period of time.

Welfare / Learning and development of children

54. We accept Mr Brown's submission that it would have been better for Ofsted to have more comprehensively and clearly evidenced concerns regarding children's progress in learning and development by tracking more children. He was entirely correct to draw our attention to the relevant guidance. We accept that it is often helpful to track particular children in order to ensure any concerns or any lack of progress is evidenced. We accept as the Evaluation Schedule states, that direct observation should be supplemented by a range of other evidence to enable progress in learning and development to be measured. However, in this particular case we accept Ms White's evidence that Ofsted prioritised more basic welfare needs as the setting was struggling to demonstrate even these. In any event we have carefully considered the inspections and their associated toolkits. Each details clear concerns regarding children's welfare and learning / development. The three inspections paint a very worrying picture of children's experiences on the day of the inspection. Although Ms Law did not track specific children prior to her recent monitoring visit, she identified very basic deficits at the setting such as staff ratios and qualifications, as well as safety hazards. Ms Law also observed staff interaction with babies at the visit in December 2013 and found that the interaction with a baby was poor and the key worker system was not working appropriately with that baby.
55. We entirely accept that that Ofsted has provided extensive, credible and cogent evidence that children's individual needs have not been prioritised and their welfare has been adversely affected. Numerous examples are set out in the toolkits that correspond to each inspection and monitoring visit. We are satisfied that these examples must be

viewed together and that when they are, they are reliable. They have been provided by different Inspectors over time.

Premises

56. Mr Brown submitted that all actions have been completed regarding the premises and that the particular premises form an important part of the community. Whilst that may be so, we are concerned that the premises are such that they are likely to require constant vigilance in order to address likely hazards and dilapidations. The recent history of the premises demonstrates this. We are satisfied that Ofsted has displaced the onus of demonstrating that Ms Waite has not been proactive in addressing issues arising at the premises and has been entirely reactive. Significantly, Ms Waite has underplayed the significance of serious issues raised regarding the premises. Her implementation of risk assessment has been found to be defective.

57. We therefore find that the premises are such they require particularly proactive and effective leadership and attention to maintain them at a satisfactory standard. We do not accept that Ms Waite as manager or owner is equipped to provide such leadership in order to ensure the suitability and safety of the premises in the future.

Presence or absence of support to the nursery

58. Ms Waite alleged that the nursery did not get sufficient support from external agencies. There was a suggestion that MCC may have treated the nursery and / or the Appellant differently to other providers. We are satisfied that MCC has provided comprehensive and consistent support to the nursery and to Ms Waite. On the evidence available to us we are entirely satisfied that although there may have been some mistakes made by the relevant agencies (such as the erroneous publication of the cancellation decision regarding the nursery, when there was an extant appeal) any mistakes were genuine mistakes and the relevant professionals have acted in accordance with their respective professional standards.

Conclusion

59. We have no doubt that the Appellant was unsuitable to provide early years provision when a decision was made on 10 April 2014 for reasons relating to a combination of management / leadership concerns, unmet welfare needs, unsatisfactory learning and development for children and concerns relating to premises. We accept that attempts have been made to address these concerns but we find that these attempts have not resulted in sufficient and sustainable good practice for children and the nursery remains unsuitable. We conclude that the Appellant is unsuitable to provide early years provision on the basis of all the evidence before us at the date of the hearing.

Proportionality

60. In considering whether the sanction imposed by Ofsted was proportionate we have had regard to the duration and breadth of the concerns and the fact that many have been repeated over time. We have also taken into account the assistance provided by MCC to assist the nursery. Whilst the Appellant has sought to address weaknesses and make improvements, the approach has been reactive and not proactive. The improvements have not translated into sustainable good practice. We do not consider that conditions are appropriate or practicable when the Appellant has already been provided with numerous opportunities to comply with actions in order to evidence sustainable good childcare practice. When all these matters are considered cumulatively we conclude that the sanction imposed was and is appropriate and proportionate.

Decision

61. We dismiss the appeal and there shall be no order as to costs.

Ms M Plimmer
Lead Judge Primary Health Lists/Care Standards
First-tier Tribunal (Health Education and Social Care)

29 October 2014