

Care Standards

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

Heard on 25, 26, 27, 28, 29 January 2016 and 9 and 10 February 2016 at First-tier Tribunals (Land Registry), 10 Alfred Place, London WC1E 7LR Centre

BEFORE: -

Judge Melanie Lewis
Specialist Member Ms Marilyn Adolphe
Specialist Member Ms Caroline Joffe

[2015] 2443.EY

BETWEEN:

Glory Early Years Centre Limited

Appellant

v

Ofsted

Respondent

AMENDED DECISION

Representation

The Appellant was represented by Mr Olawale Adebayo Solicitor assisted by Mr. Wil Ehimika Solicitor of David Vine Solicitor.

The Respondent was represented by Ms Deok Joo Rhee Counsel Instructed by DAC Beachcroft LLP.

Witnesses:

We heard oral evidence from the following witnesses:

Respondent Appellant

1. Grace Durojaye , Director
2. Evangeline Agbley,
3. Eleazar Jegede, Director

And read the evidence of:

1. Romana Khan, Ex Staff
2. Avis Mundle, Ex Staff
3. Joseph Idowu, Director
4. Sylmonda Williams, Ex Staff
5. Sil Aneru, Ex Staff
6. Parents of children who attended the nursery

~~Appellant~~ **Respondent**

1. Julia Crowley, Early Childhood Regulatory Inspector, Ofsted
2. Timothy Wooldridge, Hackney Learning Trust
3. Liz Corr, Hackney Learning Trust
4. Victoria Bennett, Ex Staff
5. Mariama Bayoh Ex Staff
6. Edem Nunempeku, Ex Staff
7. Janet Lamb, LADO
8. Siobhan O'Callaghan, Early Childhood Regulatory Inspector, Ofsted
9. Martin Jeffs, Senior Officer, Ofsted

And read the evidence of:

1. Gillian Joseph Regulatory Inspector, Ofsted
2. Christine Davies Regulatory Inspector, Ofsted
3. Maria Conroy Regulatory Inspector, Ofsted
5. Niddi Teresa Okpechi. Ex Staff
6. Lisa Thornburn Ex Staff.

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 Glory Early Years Centre Limited ('the Appellant'). The Appellant appeals against a decision of Ofsted dated 13 May 2015, to cancel the Appellant's registration. In that decision Ofsted set out that they had decided to cancel the registration as they did not believe the Board of Directors were suitable persons to be registered to provide care, and education for children in the early year's range due to the extensive compliance, investigation and enforcement history. The letter is extensive running to some 139 paragraphs of reasons.

The Setting:

3. The Appellant is an Early Years Setting run by a Board of Directors which was first registered on 5 September 2003. The nursery operates from Wigan Community Hall in Clapton in the London Borough of Hackney (LA). The provision is open from 7.30 am to 6 pm, 52 weeks per year. It is registered to care for a maximum of 41 children at any given time. The setting receives extensive Early Years funding from the LA, reflecting that the majority of the children placed come from low income families. The majority of the children come from homes where English is not their first language and there is a large range of home languages.

4. The Board of Directors consist of three Board members, the first is the Managing Director Ms Grace Durojaye M.Ed, PGDE, B.Sc, NVQ Level 4 who has 20 years of experience in early years provision. The second Board member is her son Eleazar Jegede and Mr Joseph Idowu.

5. The setting has not operated since September 2015 following withdrawal of Local Authority funding for placements in June 2015.

Procedural Issues:

6. This case has a long history. Further to the Order of DCP Tudur dated 7 January 2016 the Respondent was directed to provide a revised Scott Schedule ('the Schedule'), removing references to historical allegations dating before 2011 and including those in a separate document to be provided to the Tribunal together with a Chronology and Case Summary. The Schedule of Allegations has been divided between (i) those matters that are "live" – ie from October 2014 and (ii) "historic" – ie all allegations that pre-date October 2014 which were not the subject of oral examination but form part of the overall background evidence.

7. The detailed 'Scott Schedule' helpfully sets out Ofsted's allegations against the Appellant in chronological order, cross-referenced to the relevant evidence. Ofsted relied upon this together with the Appellant's cross-referenced responses. The detail of the 'live' Scott Schedule and the length of the hearing is explained by the fact that the Appellant has either baldly denied the allegations, and/or the basis for identified breaches, blame others or insist that suggestions of bad practice were malicious or in some other way biased. Up until the point of the Concession on day 7, there was no indication that the Appellant was conceding any real need for change or recognition that there was a consistent failure to meet EYFS requirements.

8. Further to questions from the Tribunal a brief 'Action Plan' was produced on the third day of evidence following an emergency meeting of the Directors on the evening of 27 January 2016, proposing the immediate removal of Ms Grace Durojaye as the manager and nominated individual and that a consultant should be approached for advice on how to bring the setting into compliance. The Respondent agreed that we should receive it as part of the

overall evidence but stated that it was all ‘too little, too late’. Whilst mindful that the Tribunal would need to consider if conditions would address the concerns, they were firm that given the history and breadth of concerns this was not an appropriate case for conditions.

9 On Friday 5 February 2016 an updated comprehensive and much more detailed Action Plan was sent to Ofsted and the Tribunal, with a large number of conditions attached. At the re commencement of the hearing on Tuesday 9 February 2016, Ofsted raised no objection to the admission of this evidence but sought clarification. It was clarified that all the Directors approved it. The detail of the plan appeared to accept the concerns of Ofsted, which until that point had been largely not accepted. At this point Ms Grace Durojaye had been giving evidence for over one day as the key witness for the Appellants and it appeared Mr Adebayo was going to recall her, for what would have been the final part of cross examination. There was a fundamental inconsistency with what she had written in all 7 of her witness statements and what she said in evidence and what was now accepted as requiring change.

10. Mr Adebayo was given a break at his request and confirmed that all the Board of Directors Ms Durojaye, Mr Jagede agreed to this course and Mr Idowu had confirmed his agreement by telephone. It was clarified that Mrs. Evangeline Agbley was not a Director although she had been referred to as such on the First Action Plan and on the list of Witnesses submitted by the Appellant. All were willing to concede a failure of effective leadership in place. Ms Durojaye was withdrawn as the key witness and they conceded in large part the allegations made. This point was returned to before submissions and again it was confirmed that there was no substantive challenge being made to any of the live issues set out in the ‘Scott Schedule’.

11. A concession was made that the decision was not unlawful and that the requirements set out in the Scott Schedule were not met but that as of the date of the final hearing it would not be proportionate or necessary to cancel registration.

12. Subsequent to the hearing Mr Jagede submitted an email showing that Ms Grace Durojaye had been removed as a Director. We declined to take it into account as the evidence was closed and it was not relevant to the panels decision.

Background/ Chronology:

13. The chronology sets out that over the years a number of issues arose in relation to the setting.

14. Two inspections were declared null and void: 9 November 2006 when the setting was initially judged ‘inadequate’ and 23 May 2007.

15. The routine inspection on 22 August 2008 judged the setting to be ‘Good’.

16. A number of concerns were raised in 2009, 2010 and 2011, many of the same as in the current 'live' issues.

17. However, a routine Inspection on 23 May 2011 judged the setting to be 'Good'

18. Again, a number of concerns were raised in 2013 and 2014. On 4 March 2014 Maria Conway Ofsted made an unannounced visit and made a judgment that the setting 'required improvement'.

The 'live' issues and case for Ofsted:

19. The 'live' issues date from October 2014. The ensuing compliance and enforcement action then comprised:

a. a series of monitoring visits (10, of which 3 were carried out after the Decision to Cancel Registration). (The dates of those visits are 18 November 2014, 28 November 2014, 10 December 2014, 9 January 2015, 6 February 2015, 19 March 2015, 14 April 2015, 15 May 2015, 17 June 2015, 1 September 2015). The monitoring visits (unannounced) were carried out to follow up on enforcement action taken following the earlier visits.

b. issuing welfare requirements notices ("WRNs") and notices to improve ("actions" or "NTIs") in relation to breaches identified.

c. the issuing of a warning letter on 3 December 2014 (in relation to a concern that the Appellant had failed promptly to inform Ofsted of the significant event of (I've included it because this is the legal requirement) involvement with children's services regarding a safeguarding welfare concern and/or appreciate the gravity, importance and proper process in relation to it).

d. a decision to suspend the setting because it was believed children may be at risk of harm (issued on 16 December 2014) which was lifted on 31 December 2014 following receipt of an Action Plan, which detailed how they planned to meet the requirements.

e. a full inspection carried out in February 2015 – which resulted in the judgment of "inadequate with enforcement."

20. Ofsted continued to receive numerous concerns from third parties as detailed in the Chronology on a further 10 occasions. These included a number of safeguarding concerns raised by the Local Authority Designated Officer for Safeguarding (all of which were raised prior to the decision to suspend the Appellant's registration) and HLT, as well as concerns from staff at the setting, former staff and parents. The sheer number of concerns raised by third parties, including from those involved with the Appellant in a professional context raised serious concern and were followed up by

monitoring action.

21. Ofsted says that, until children ceased to be cared for at the Appellant's setting in September 2015, the Appellant's ability and/or willingness to comply with the requirements for registration and to demonstrate an appropriate attitude to regulations had not adequately improved, although there had seemed to be an opportunity to bring about positive change in January 2015. This is despite the fact that, as time went on across the period, there were fewer and fewer children on the Appellant's roll.

22. It was part of the Appellant's case until the concession that the majority of the concerns have been motivated by malice and were unfounded, but the Judgements reached by the Ofsted Inspectors were reached against objective criteria, recorded contemporaneously in 'tool kits.' A complaint was made against Ms Crowley As a result a decision was made by Ofsted management that she was replaced by Ms O'Callaghan following the lifting of the Suspension as a 'fresh pair of eyes' to ensure transparency and elevate any difficulty for the Appellant in working towards and achieving the EYFS requirements. The outcome of Ms O'Callaghan's inspections was that she too also recorded a number of breaches and continued causes of concern.

23. The Suspension was in place for only two weeks and was lifted once the risk to children had been addressed by an Action Plan. The Appellant's argument that the suspension itself created problems with staff recruitment and retention does not hold and could not provide a reason not to address the concerns that had been clearly raised or for issues of staffing. Compliance with the requirements is mandatory.

24. Whilst there had been some at times temporary improvements, Ofsted's case was not based on the number of breaches in itself (or any such technical approach) – but on the underlying systemic and persistent failures to which the breaches point.

25. Since the Decision, Ofsted has identified further and additional breaches. In addition to new and further breaches arising after the Decision, Ofsted has also obtained further evidence of non-compliance in connection with its earlier concerns.

26. The manager had not grasped the opportunities at her disposal to make changes despite the notice given and at times had not been forthcoming and on occasions had provided incomplete or misleading information to Ofsted inspectors. It brought into question her capacity to initiate and sustain improvement, in spite of support, guidance and advice from HLT change had not happened.

27. After the concession was made Ofsted's case emphasised that the Board of Directors had failed in their basic duty to supervise and ensure the suitability of the manager, and ensure the setting met the early years learning and development requirements and the welfare requirements. They failed to properly monitor, review and assess the sheer number of concerns raised by

Ofsted and take appropriate action. They demonstrated a poor attitude to compliance and did not engage and co-operate with Ofsted. They had been prepared to follow and support the view of the manager but then when the concerns became clear to them during the course of the hearing, saw the remedy as the removal of the manager without taking on responsibility for their own failures to address and action systematic failures earlier.

The revised case for the Appellant Glory Early Years Limited

28. The original skeleton argument put forward by the Appellant falls in the light of the concession but is instructive in its approach to the concerns raised by Ofsted.

29. Taking up the history from the point of the live concerns it was submitted that there was no breach of EYFS staffing, qualifications or ratio requirements on the Monitoring Visit of 18 November 2014. The inspector wrongly counted the number of children and there were 13 not 17 children and 8 not 4 adults at the setting with 2 not 4 rooms in use.

30. Other concerns raised in relation to that visit namely the lack of an embedded key person system, staffing arrangements being 'fragile and unsustainable', lack of clear systems, standards and protocols for sharing information, children not being engaged or stimulated and concerns about an inappropriate recording of a mother's complaint attached to an Accident Book, were all denied.

31. Moving forward into 2015 it was claimed that the suspension and increased presence of Ofsted Inspectors caused staff to leave or placed additional pressure on them. Concerns about the key person system continued to be denied.

32. At the point Evangeline Agbley was the co manager, whose EYFS credentials were not in doubt but she was also continuing intensive studying for her PGCE and initially had said she would do 4 days week, her teaching placements and studying were flexible. The skeleton argument drafted on 12 January 2016 records that she had in fact been able to do more than 2 days per week if required; it was known she had had a baby in July 2015 and her oral evidence was that she had decided to take her maternity leave from the setting in about March 2015.

33. At that point in opening the Appellant's position was that the setting was staffed by experienced and highly qualified personnel and the Manager had nearly 20 years of experience. The suggestion was that Ms Agbley was on maternity leave and would return. Team meetings had taken place, staff appeared supported, key policies and procedures had been reviewed and strengthened, an Ofsted seminar on 'Moving from an Inadequate Setting to Good' had been attended and they had incorporated that advice and an Action Plan was in place.

34. In closing the Appellant's case moved to focus on the current position

and the power of the Tribunal to attach conditions, which we address in our conclusions. The late Action Plan was the basis of that submission. It was submitted that the decision to cancel registration was at the date of decision neither necessary nor proportionate.

35. The Response on behalf of Ofsted was that that position was not reached as none of the Directors were suitable people to be registered and that in any event the new Action Plan was so radically different as to amount to a new registration.

Documentary evidence

36. In advance of the hearing we carefully considered 5 bundles of written evidence and read all the witness statements.

Evidence:

Respondent:

37. We summarise only such evidence as is necessary to explain our decision and in the light of the concession made. It highlights what the themes of the concerns were and the history and points of concern that the Board of Directors failed to address.

38. Ms Julia Crowley has been employed by Ofsted since 2000 and has extensive experience as an inspector. She made three visits to the setting in November and December 2014 and, following the complaint, was taken off the case.

39. On her visit on 18 November 2014, the setting was disorganised and she conceded she may have counted children twice, which is the subject of the complaint. However, her total of 14 children, including three babies, tallied with the attendance register. The themes that emerge from her evidence were that charts did not reflect what was happening in the setting. Whilst some individual staff were commended by her, she was concerned at the level of competence of the Deputy Manager as she was not comfortable in that role. Activities were not well planned. Hackney Learning Trust had funded additional toys but these were not in evidence. Outside play was not well organised and children were wandering with no aim or challenge. Whilst mixing up age groups could be acceptable, what she observed did not appear to have been the subject of planning or any structure. Ms Crowley was concerned that the accident book was not appropriately completed and had gaps for a period of 2 weeks.

40. In 13 November 2014 there was a meeting between Ms Janet Lamb, the Local Authority Designated Officer for safeguarding and Ms Durojaye regarding an individual who Ms Lamb had initially thought was a volunteer at the setting who had smacked her own child. On learning from Ms Durojaye that she was paid, she was considered to be an ex member of staff. Ms Lamb's evidence was clear that standard procedure had been followed and

she had advised Ms Durojaye she must notify Ofsted immediately. This was denied but there was an issue for the Appellant as to whether this person was a volunteer who had received some money or an employee. A Safeguarding Strategy meeting. Was held on 19 November 2014. Ofsted found out via the LADO on 20 November 2014 and issued a warning letter on 3 December 2014. Ms Lamb stressed that providers have a legal requirement to report any issues of safeguarding concerns, whether or not the person is a volunteer or an employee was irrelevant. She said both paid and unpaid staff would be subject to DBS and safeguarding policy and procedure.

41. Mr Tim Wooldridge works for Hackney Learning Trust as an EYFS Strategy Manager. He explained that HLT provides negotiated support to settings when Ofsted identifies failings, to assist them in reaching the required standards. He had arranged support to this setting over some years. We had raised whether there was any difficulty in recruiting staff within the catchment area of the setting, but none of the witnesses were aware there was. He said that the setting reflected the local demographics and many children were funded by the Local Authority. His initial concern was that although the manager was given additional support, advice and guidance she did not appear to really understand the findings and concerns raised by Ofsted and did not accept them. He found her to be more concerned about how to challenge them. In response to questions from the panel, he could not recall ever being shown a supervision or appraisal policy.

42. In early January 2015, together with witnesses for Ofsted he felt more positive in the light of the Action Plan submitted following Ofsted's Suspension of Registration. Once the decision had been made to proceed to cancellation, the HLT decided they could no longer put bespoke resources into the setting, but staff could still access their training. He clarified that there were many providers who would have, for a fee, provided additional advice to the setting to enable it to improve.

43. Even though the setting was under scrutiny there were in this period 13 instances of non-attendance to safeguarding and other training which had been offered free. When cross-examined, he agreed that staff not turning up for training had been a problem not unique to this setting which was now addressed by charging a fee but the failure here was striking. He said that one outcome of this case was that they had recognised there needed to be closer liaison between Ofsted and HLT. He thought it would be helpful to have a framework for discussions.

44. Ms Liz Corr of Hackney Learning Trust worked with Mr Woolridge in supporting the setting and providing some of the bespoke training. She was also of the view that the Manager did not really understand the reason for Ofsted's inspection findings and her focus was on how to appeal against them. In her oral evidence she said they were concerned at the high turnover of staff which meant there was not a consistent staff group, and the training they gave could not therefore be embedded. A number of staff had told her of their concerns about the setting and these had been passed on to Ofsted.

45. Ms. Victoria Bennett qualified in 1994 with an NNEB. In contrast to some of the other witnesses, she then took a period working outside childcare and appeared confident and had significant experience as an NNEB professional and in other disciplines. On 12 December she contacted Ofsted to say that she had been asked by the manager to sign a statement to the effect she had not seen a staff member sit a child down roughly. She refused to sign this because she had not seen it.

46. When cross-examined, she said the setting appeared chaotic and crazy and that is how it felt to her. Those are the words she had used contemporaneously to the Ofsted inspector. She said it did not feel a safe and secure place for a child; at times ratios were not met and that was not safe for children or staff. There was no structure, and it did not seem organised. There was very little adult interaction with the children and there were not enough resources. She had after a few days formed a view that this was not a setting that she wished to work at or be associated with. Her concerns tallied with the ongoing concerns of Ofsted.

47. Ms. Edem Nunempeku was volunteering at the setting from February 2011. It was convenient to her home location and her twin sons attended the nursery. She then undertook her NVQ Level 2 qualification and acknowledged that Ms Durojaye had given her a start on her career so she had a loyalty and respect for her but felt compelled to speak out for the children. She had observed good practice and support in her current work place which further highlighted the deficiencies at Glory Years.

48. Ms. Nunempeku returned to the setting in June 2013 and described a calm scene as Ms Durojaye was largely absent, with Theresa Okpeni as the acting manager. After Theresa Okpeni left, she had a great deal of responsibility placed on her. When the concerns started to be raised by Ofsted in 2014, the staff were not fully briefed, about the inspection outcomes and required actions. Staff did not receive any supervision. There was no structure for allocation of the key person scheme it was fragmented, staff did not have time to access the children's file which should provide information on the child's care, welfare, learning and development needs. There were insufficient activities and play equipment for the children to be fully stimulated for their learning and development. While Ms Durojaye had bought equipment, it was kept in the cupboard.

49. A key part of her evidence was that they often did not have enough staff to meet the required ratios of staff to children, and staff were constantly being moved from room to room. Staff did not like it, and it meant the key person system couldn't work as they were not with their children. New staff would come and leave after a few days; Ms Durojaye had a poor management style. The manager did not employ agency staff to cover daily staff absences before Ofsted came in November 2014. She gave other examples of Ms Durojaye putting on a show when the Ofsted inspectors came. She decided to leave because she could not see that changes were being made. She did see some changes in January 2015 but they did not last

and by May 2015 made clear her intention to resign. At that stage, she was concerned that she was allowing herself to be associated with a failing setting where basic standards were not maintained. She was offered a number of inducements to stay but refused them.

50. Ms. O'Callaghan's involvement dated from 9 January ~~2005~~ 2015 when she visited the setting once the Suspension of Registration was lifted following the submission of a detailed action plan. She felt optimistic that change could happen with Evangeline Agbley as co manager and two new deputies. Ms O'Callaghan pressed Ms Agbley, who is also the Appellant's daughter, to explain how she would be able to manage the setting at a time of change when she had study commitments. It later transpired that she was pregnant at the time. She said she could manage. Ms O'Callaghan recorded how she quickly saw things starting to slide back. It is also a point of note that on 20 January 2015 a complaint to Ofsted by the Appellant in relation to the notification of an event shared by the LADO with the Appellant was upheld as a notification had technically been made in time under the EYFS. Other complaints were dismissed but this success was later relied on by Mr Jagede to explain why the Board of Directors relied on the Manager and did not challenge her in her refutation of Ofsted's concerns.

51. In the light of the concession it is made out that the concerns that quickly emerged were justified. Staffing issues were coming to the fore again. By February 2015, the new deputy had left, a newly recruited member of staff had already left, and another new member of staff. A staff member shared that she and Edem Nunempeku had been left alone with 26 children in the garden as early as 6 February. Two staff did not attend the safeguarding training in January 2015, as it would lead to insufficient staff to maintain ratios.

52. Ms. O'Callaghan was concerned that the commitment from Evangeline Agbley was not as great as she had been led to expect it would be in order to bring about change. She was not told at the time that the intended relationship of co-manager had not worked and that Ms Agbley knew that by March. Again her concerns were all made out in the light of the concession but at the time she had to wait, observe, monitor, record and report her findings.

53. The key person system still was not embedded. Neither was the policy on managing children's behaviour. Staff still did not have a clear understanding of their roles and responsibilities. There was still a failure to have effective systems in place to support children who speak English as an additional language. This was a nursery caring for children with a very wide diversity of home languages.

54. She went back on 23 February 2015 to undertake an unannounced inspection with Miss Gillian Joseph. The same range of concerns were identified. The judgement remained 'Inadequate with enforcement' for improvement'. Following this visit 7 Welfare Notices were served requiring action to be taken in connection with breaches of the EYFS learning and development requirements in addition to remedying breaches of requirements

relating to the General Childcare register. Two WRNs around ratios and complaints were met but no Notices to Improve were deemed to be met at this time.

55. On 11 March 2015 an Intention to proceed to Cancellation of Registration Notice was served. Following an Objection Hearing, a Notice of Decision to Cancel Registration was issued on 13 May 2015.

56. Matters did not improve. On 15 May 2015 Ms O'Callaghan made an unannounced monitoring visit and multiple breaches were identified. Following this visit 4 WRN and 6 NTIs were issued.

57. The Scott Schedule records that as a result of other unannounced visits on 10 June 2015, 17 June 2015, 16 July 2015 multiple breaches were identified.

58. Mr Martin Jeffs is an Early Childhood Senior Officer. He became involved in the case on 15 December 2014. His colleague, Sue Will, made the decision to suspend the registration and when the Notice of Appeal came in he became active on the case, as she was on leave. He made the decision to lift the suspension as a result of the Action Plan as he considered that the application of the action specified, if appropriately made, would significantly reduce the risk of harm to children. He had made it clear to Ms Durojaye that she could expect unannounced inspections. His preference would have been not to lift the suspension until there have been a closer scrutiny but that is not what the applicant wanted.

59. When cross –examined he confirmed that he had made the decision to take Ms Crowley off the case as there had been personal allegations against her and he felt it would be helpful to bring a fresh pair of eyes to the case and a second opinion. He confirmed that Ms Durojaye had made a number of complaints to Ofsted in the past following adverse inspection findings. At this time he had telephone contact with Mr. Jagede who wanted to register a new and separate company Genesis Day Nursery but was advised that would need to be considered once the appeal was over. Mr Jeffs described an aggressive tone which was strenuously denied. He described a conversation which was, in his view, not a constructive discussion around what needed to be done but a strong disagreement with the way that Ofsted had acted.

Appellant:

60. The essential case for the Appellant was set out in the witness statements of Ms. Grace Durojaye. The first witness statement dated 18 October 2005, the second witness statement in response to the statement of Siobhan O'Callaghan dated 2 March 2015, third witness statement in response to a statement of Theresa Okpechi dated 2 October 2015 , fourth response to the statement of Martin Jeff dated 19 September 2015 , in response to Tim Woolridge dated 19 September 2015 and in response to Ms Nunempeku dated 19 September 2015 and Liz Corr 19 September 2015 and

a final witness statement of the same date in response to the decision. We clarified that the statements had been drafted by her.

61. She gave evidence for over one day so before the concession was made so we had a full opportunity to hear her view. The only issue on which she felt she might have done better was in relation to building a steady staff group, by offering more stable hours and better employment terms. She had been off for a period in 2013/14 due to ill health but maintained regular phone contact with the setting and came in from time to time. This was with the full knowledge of the Board of Directors.

62. The suitability and qualifications of Ms Evangeline Agbley to manage the setting was not doubted. She is the daughter of Ms Durojaye and at points it was clear that she found it painful to speak against the family business but recognised the vulnerability of her position as she hopes to work as a teacher in the future. In January 2015 she saw what needed to be done in the setting and started to make changes but an issue arose very quickly as to who was in charge. By March 2015 she was of the view the Action Plan was not going to work. The situation was very stressful and she decided her focus had to be on her health and that of her unborn baby and went on maternity leave in May 2015. She was pressed by us to say why she had not told Ofsted, but said that she wanted to avoid confrontation and thought her mother would tell Ofsted. Ms Agbley gave evidence that she left an improvement plan in place when she went on maternity leave. She clarified she is currently on maternity leave, but intends to resign as co-manager.

63. She confirmed that she was a twenty per cent share holder in the business but had not been and was not a director. She was clear that she just wanted to walk away from the setting and have no further involvement unless she was able to have complete management control of the setting in order to bring it in line with EYFS requirements.

64. We heard Mr Jagede over more than one day in his role as a Director of Glory Years and in the light of the late revised Action Plan. He said the Directors including Ms Durojaye would resign but he would remain. He told us that he had put the plan together by working long hours. He is a professional working in the financial sector. He is now 28 years of age, but has been a Director since the inception of the company in 2002 when he was just 15. In the past he had worked in Glory Years in a voluntary capacity.

65. Given the detail of the Action Plan that he had now put together, he was asked in a number of ways and at different points both in cross examination and by us why he had not acted earlier when the concerns were laid out in the various notices. His replies essentially came down to the fact that he relied on Mrs Durojaye who was an experienced manager who had previously been successful in challenging Ofsted and that she was passionate in her view that a robust challenge had to be made to Ofsted. He started from that position.

66. He agreed his sister had been in regular email contact with him to

update him on what she saw as the problems in the setting and that she had not been able to exert authority as she wished. He was also asked why no action appeared to have been taken when the staff had not stayed but he said he had been trying to recruit a manager and referred to advertisements he had placed. He agreed that this had not been notified to Ofsted

67. On reflection he agreed that the Directors could and should have done a lot more to satisfy themselves that the setting was compliant. However, he said that the decision to Cancel Registration was not necessary and proportionate at the time it was made or now.

68. When cross examined he was asked who was calling the shots, his mother or the Board? He said it was previously the Manager, whom he referred to as the 'ex manager' objecting to the use of mother. It was pointed out that the Manager was still a member of the Board and as their Articles of Association stated a quorum was one, she could effectively continue to make all the decisions. Subsequent to the hearing he attempted to submit a change registered at Company House showing that she was no longer a Director.

69. It was put to him that there had been no separation between the Board and his mother. He said that he had reflected on the position on day three and left on day five of the hearing to work on the Action Plan. He was asked why it had taken until day three to reach that view, and if he had read all the papers. He said that he had not read her witness statements or the considerable volume of papers in the appeal in close detail.

70. Mr Jagede explained that Mr Idowu was a family friend who received no formal remuneration. He said he did go into the setting and there were meetings but no formal minutes or reports were kept. He said he was not a 'yes man' but spoke of the Manager making a passionate plea so they had stood behind her to fight the case.

71. When pressed he agreed that Ofsted should have been informed by the Board of Directors that the Manager was not in the setting due to ill health in 2012-14 and with hindsight he agreed a new manager should have been appointed. He agreed that Theresa Okpechi who covered that period was not valued, monitored or supported as much as she should have been and that her level of remuneration did not accord with her level of responsibility. He had not seen the agreement with Hackney Learning Trust as to the support they would provide.

72. Mr Jagede said that he had been involved in drawing up the Action Plan in January 2015 but this appeared to be a support for his sister taking on the role of co -manager. He was not able to say why he thought that arrangement would work and agreed she let him know where the tensions lay.

73. On the second day of cross examination he accepted that the breaches took place in large part and a key problem was not maintaining staff ratios and the high staff turn over, and staff deployment was a primary responsibility of a manager. After some prevarication he accepted that the Key person system

was only effective if there was a consistent and stable trained and supported staff group in place. He now saw Ms Durojaye was not suitable as a manager. He considered a key problem was the setting allowing children to be admitted and leave at any time so the number of staff required varied all the time and it was difficult to get the right level of staff and conceded that leadership of the manager was a problem.

74. Mr Jagede was less clear about who held the lease and what would happen if the appeal failed. He agreed that that he had submitted a new application in respect of the same premises in January 2015.

75. In response to questions to the panel he agreed that safeguarding was not just an issue of qualifications but staff having the confidence, support and understanding of how to implement safeguarding procedures and how in practice to promote the welfare of children. He agreed that his view had changed on day three when he had heard questions from the panel and the way that the case was being put.

The Law

76. Pursuant to s 68(2) CA 2006, Ofsted may cancel the registration of a person registered under Chapter 2 (early years register), 3 and 4 (general childcare registers) if it appears to it that (so far as relevant for present purposes):

“(a) the prescribed requirements for registration which apply in relation to the person’s registration under that Chapter have ceased, or will cease to be satisfied,

[...]

(c) that he has failed to comply with a requirement imposed on him by regulations under that Chapter,

(d) in the case of a person registered under Chapter 2 in the early years register, that he has failed to comply with s 40(2)(a), or

[...].”

77. 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.

78. 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.

Conclusion and Reasons

Approach to evidence generally

79. 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 Durojaye, and to make concessions where appropriate. They gave time for change to take place. We consider that they all provided balanced, reliable evidence.

80. We note that Ms Crowley was taken off the case following complaints by Ms Durojaye but Ms O'Callaghan reached the same conclusions. We accept she did look with fresh eyes at the current situation but for the reasons now conceded concerns remained.

81. We were assisted by the evidence of the three women who had worked in the setting. Ms Bennett had the most experience both in child care and the work place and she was not prepared to stay in what she saw as an inadequate setting, independent of being asked to sign a paper about an event she had not seen. Ms Nunempeku was a quieter person but her evidence was clear and candid. She had worked at the setting for a number of years so was able to give a good overview. She had shown considerable loyalty to Mrs Durojaye and had clearly worked beyond her hours to provide consistent care for the children and the quality of her work was recognised by the Ofsted inspectors. We accept she came to see that the setting was not working to the required standards and that children's needs were not being met so she needed to speak out about her concerns, as did Ms Bayoh. It was striking that both have since moved to other settings and looking back have become even more aware of the failings at Glory Years in contrast with what they have now experienced as good practice.

82. Ms Evangeline Agbley was in a difficult position as Ms Durojaye is her mother but she clearly recognised her own precarious position. We accept that when she went to the setting in January 2015 she was committed and motivated to make changes, but quickly saw that she would not be allowed to do so, so she withdrew. Her qualifications and leadership as a co manager were spoken of in positive terms by all the witnesses. She could have done more to make her withdrawal clear to Ofsted but we accept that her mother and brother must bear some of the responsibility for this.

83. Mr Jagede is an educated man with professional experience in the financial sector. He has an understanding of what makes an effective team. We did not find his evidence on this occasion either straightforward or persuasive on a number of points. He and his fellow directors failed to engage with Ofsted's high level of concern and the appeal in a meaningful way. They systematically failed on every level of their duty to monitor, review and ensure the setting was meeting the relevant requirements. When he

appreciated the weight of the evidence and that they had missed a chance to try to put things right instead of taking a fiercely adversarial stance, he tried to take a different position. He initially took a very defensive stance but after some hours of being questioned he had to accept what was self evident that the failings in the setting came down to leadership and management and that steps could have been taken by Directors to remedy this. By the end, he accepted he could and should have done more to challenge the manager, talk to staff about their concerns and why they were leaving and look at issues like terms and conditions to try to build a stronger staff team. In particular his sister Ms Agleby had told him why she wanted to withdraw from the setting. In his oral evidence he put blame on the manager but he did nothing to address the issue of her power before day three of the hearing.

Findings on 'Live Issues' recorded in Scott Schedule:

84. The concession made on behalf of the Appellant is all-encompassing. The Scott Schedule is lengthy. Even just taking the 'live allegations' from October 2014 there were numerous failings relating to:-

- a) staffing: including a failure to ensure the suitability of personnel, a lack of training, a lack of meaningful induction for staff, lack of effective staff supervision, failure to meet staff qualification/ratio requirements, failure to embed a key person system
- b) safeguarding: failure to ensure all staff have a clear understanding of safeguarding policy and procedures and to implement the policy. There were failures in the implementation of safe practice regarding health, hygiene food and drink, safety and risk assessment, managing behaviour and the keeping of records and sharing of information.
- c) learning and development: all the above ongoing breaches in the welfare requirements, together with additional breaches in these requirements meant that the learning and development requirements were not met consistently or adequately.

85. The burden of proof is on Ofsted. They have compiled a painstaking case based on a large number of observations and recordings. Their concerns have been amply made out.

Approach of Appellant on the need to change and the appeal

86. The Skeleton Argument for the Appellant makes no concession. It is instructive of the Appellant's approach to the appeal which was to concede nothing. It asserted that the 3 reasons for the suspension in December 2014, were all unfounded reasons. It was asserted that the Respondent made inaccurate and false reports about the induction processes. Parents who were aware of the background made supportive statements. Statements as were made to Ofsted were by disgruntled employees, but in the event the evidence of Victoria Bennett, Mariama Bayoh and Edem Nunempeku were not substantially challenged.

87. It was asserted that there was ‘a lack of diligent and prudent assessment, flawed reporting, breaches of procedure by the Respondent’. In the light of the concession this was not pursued but again it is indicative of the approach to the appeal. We specifically find that Ofsted carried out its duties in a fair and reasoned way in accordance with its procedures and policies.

88. We took into account the witness statements from the parents of children who attended the nursery into account and respected the positive views of some parents that the nursery provided a good service. However this is strongly outweighed by the evidence of Ofsted and other professionals involved made with full knowledge of the relevant regulations and the persistent failure to meet the required standards.

89. Overall, our view of this case is that Ofsted took a stepped and systematic approach to the issues and concerns. We find that the driving force in the setting and the way that this case has been run is Ms Durojaye and there has been no separate or meaningful influence until day seven by the other directors. Overall, we find that Ofsted did take a stepped approach and tried to help the setting to improve but there was a notable lack of co-operation. Any prospect of change was infected by an adversarial mindset.

90. We were wholly unconvinced by Mr Jagede’s late stance of independence from what he insisted on calling the “old manager”. We have set out sufficient of the evidence and history to show that this cancellation notice was preceded by a period of at least nine months when the setting had notice of the need to change. At the point when the setting needed to engage on change and on our analysis January 2015 was a catalyst point, the decision was made by the Directors to follow the manager and pursue the appeal aggressively. We regard that as an abdication of responsibility.

91. We find that there was considerable support, guidance and advice offered to the setting by Hackney Learning Trust using public funds. The evidence does not support the view that the Board of Directors stepped back and took an arms length review of its own performance. We heard reference of a consultant’s report but the contents were not put in evidence and we find no concerted attempt by the setting to seek an outside objective view as to whether any of Ofsted’s concerns were valid, which might be .

Early Years minimum requirements:

92. We have reminded ourselves at all times we are dealing with the EYFS which are a minimum requirement. The setting took in a number of vulnerable children where there was social work involvement, and children, supported by local government funding. Reliance was placed by the Appellant on supportive statements from parents, but we conclude that many of the parents may not have fully appreciated what the minimum requirements were. Ofsted acknowledged that certain individuals working at the setting tried to give a good standard of care and this was no doubt appreciated by parents.

93. This is the reason why this childcare is highly regulated. We heard evidence of a number of worrying concerns about children who appeared under-stimulated and lack of appropriate interaction with staff. Even a few months is a long time in the life of a young child. This is not a case about physical harm but the potential harm caused by a fundamental failure to consistently meet children's welfare, learning and development needs. There was little thought into planning activities to meet the needs of individual children and enable them to grow, and until Ofsted raised it, no real thought about how children's language could be developed. There is evidence of babies in a playpen with little stimulation, children of varying ages being grouped together which could be a learning opportunity but with little thought how to develop this, and children wandering around at outside play sessions. Without an effectively embedded key person system, children would struggle to form dependable and secure attachments to staff.

94. Staffing was one of the key themes. We are satisfied that it was possible to recruit staff but the issue was one of retention and if retained development, support and most crucial to staff retention regular supervision in order to assess staff competencies regarding their specific roles and responsibilities. The Board of directors was either unable or unwilling to change the way that the nursery had been running. It followed a model from 2002 that children would arrive and leave when it suited their parents but this did not lead to stable hours for the staff who were then asked to leave if numbers were over ratio.

95. We were struck by the lack of support for the staff. We highlight some examples. Information was not conveyed or cascaded to staff, by the manager, policies and procedures were in place in theory but in practice they were not put into action. It was striking that was that Ms Nunempeku was only offered inducements to remain when she made clear her intention to leave in May 2015, although the evidence all supports that she had been a very loyal member of staff whose engagement with the children had been positively commented on by the inspectors. The manager who had been in place during the period when Ms Durojaye was not visiting the setting regularly, instead of being offered a package to recognise that level of responsibility was offered an additional 50p per hour. We were struck by the evidence of Ms Bennett, who appeared to be a rather more confident robust personality and made plain within three days that she was not going to remain in the setting, not just because she was being asked to sign statements about things she had not observed, but because she was not prepared to be associated with what she saw as the prevailing poor practice.

96. It is clear why staff did not feel valued. There were problems of morale long before Ofsted became involved in November 2014. They did not have regular hours so no regular salary they could rely on. Undue reliance was placed on apprentices and volunteers. Good practice was not consistently modelled to them. Staffing ratios were often inadequate which would have left them and the children vulnerable, and staff, were frequently moved out of their allocated room and away from the age group they were used to working with and their key children. Staff Induction was not viewed as a vital aspect of risk

assessment in their new role and responsibilities, as the Appellant was not willing to pay them to be inducted as part of their employment contract. Appraisals and staff development were not taken seriously. Staff were not spoken to by a director when they left to see if there were improvements that could be made. This was a clear role for a director other than Ms Durojaye, especially when staff like Ms Nunempeku left who had worked there a long time left.

97. We find no evidence that this was a setting determined to make improvements, rather that there was a certain amount of “acting up” for Ofsted but the evidence does not support that sustained changes were being made. The website did not refer to the fact that the setting had been graded as requiring improvement and misleadingly referred to a 2011 inspection where it was deemed ‘good’. Safeguarding concerns raised by the LADO on 13 November 2014 were not shared promptly with Ofsted. Even if there had been some misunderstanding about that, this hardly shows an open and transparent relationship with the Regulator. Children were still present at the date of suspension. Training events were not attended. Hygiene points were not cascaded to staff. Staff were not told of Ofsted’s concerns and what was going to be done to bring the setting into compliance.

98. Our overview from the chronology is that January 2015 was a turning point. The setting decided to re-open immediately after the suspension was lifted once the immediate risk of likely harm was removed but we found it telling that the Board of Directors somehow saw this as a win for them rather than an understanding of the legal test that had been applied. We accept that Mr Jeffs suggested it would be sensible to give time to embed the changes before reopening as did HLT, a view shared by Mr Jagede when he came to give evidence. We accept that they were made aware there would be monitoring visits.

99. We find it telling that no-one on the Board of Directors informed Ofsted that Ms Agleby would no longer be playing the vital role of co-manager. This was not a case where something unexpected happened. It was known that she was pregnant and studying and it was known that the other manager employed lived out of London. None of this suggests sustainable change. If other managers were being actively pursued this was not shared with Ofsted, as might be expected if the provider was actively working with the Regulator. This really was the final chance for the Board of Directors to take action, and accept that change was needed and address the key issue of who was in control.

100. We record at this point that this case was actively case managed. The Appellant’s case has always been to accept nothing and fight the appeal on essentially every ground put forward.

Suitability of Directors to be registered

101 We find that none of the directors are suitable to be registered. They failed to adequately supervise, monitor and ensure the setting met the EYFS

welfare and learning and development requirements. They demonstrated a poor attitude to compliance and a lack of willingness to accept responsibility. The Action Plan submitted on 30 December 2014 and accepted by Ofsted which had been drafted by Ms Durojaye, appeared promising. For the reasons set out above it was not robust and sustainable. When it became clear it would not work no appropriate steps were taken as also set out above.

102. We find that Mr Jagede was aware of the difficulties but neither he nor the other directors did anything to address the fundamental management issues. Regrettably it took him to come to the appeal to realise that which he should have realised earlier had he applied himself properly as a director.

103. The Appellant decided not to call Mr Idowu but we make similar findings in respect of him. He appears to have played little part in the setting but that cannot excuse his lack of action.

104. The position of the Appellant is that section 74(4) CA 2006 would allow us to accept what is, in effect, a “fruit and branch reform” as set out in the Action Plan drafted by Mr Jagede. We express a certain frustration about that Action Plan because it does demonstrate that Mr Jagede who has management experience, could have brought about change at an earlier point had he applied himself to longstanding concerns. However, we are mindful that the Appellants have produced Action Plans in the past which appeared promising, but which they have not succeeded in implementing effectively. None of the directors have established during the long history of this case that they were suitable. The manager failed to comprehend the significance of what was required and was not prepared to accept that change was needed. She acted in a reactive way and was supported by the other directors who made no arms length assessment of their own nor did they engage with the detailed concerns raised by Ofsted in any meaningful way.

Proportionality

105. 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 ongoing over time. The failings are persistent and systemic, and go to the ability of the Appellants to provide a consistently safe and secure setting for children, which facilitates their learning and development. We have also taken into account the assistance provided by HLT to support, advise and provide training to the nursery. Whilst the Appellant has sought to address some 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 and help to comply with actions in order to evidence sustainable good childcare practice, and they have demonstrated their unsuitability. When all these matters are considered cumulatively we conclude that the sanction imposed was and is appropriate and proportionate.

Decision

The appeal is dismissed.

The decision of Ofsted dated 13 May 2015 to cancel the Appellant's registration is confirmed.

Judge Melanie Lewis
Primary Health Lists/Care Standards
First-tier Tribunal (Health Education and Social Care)

Dated: 03 March 2016
Amended Under Rule 44: 04 March 2016