

# Care Standards

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

Heard on 1-4 November 2021

At the Royal Courts of Justice

NCN: [2021] UKFTT 411 (HESC)  
[2021] 4233.EY

Before

District Tribunal Judge Dow  
Miss R Smith (Specialist Member)  
Mr M Cann (Specialist Member)

Regal Brook Nursery Limited

Appellant

-v-

OFSTED

Respondent

### DECISION

#### The Appeal

1. Regal Brook Nursery Limited (the Appellant) appeals to the Tribunal against the Respondent's decision dated 18 February 2021 to cancel its registration from the Early Years Register.

#### Attendance

2. The Appellant was represented by Ms Evelyn Asamoah, the Appellant's sole director, nominated individual and registered manager.
3. Ms Wendy Gutteridge (Solicitor) represented the Respondent. The Respondent's oral witnesses were:
  - a. Wendy Ratcliff (HMI, Ofsted Principal Officer for Early Education);
  - b. Joanne Smith (Lead Early Years Advisor, London Borough of Bexley);
  - c. Justine George (Early Years Advisor, London Borough of Bexley);
  - d. Frances Oliver (Ofsted Inspector);
  - e. Jennifer Gee (Ofsted Principal Officer, Early Years Regulation);

- f. Josephine Afful (Ofsted Early Years Regulatory Inspector); and
  - g. Linda Du Preez (Ofsted Early Years Senior Officer).
4. Evelyn Asamoah was the sole witness on behalf of the Appellant.

### **Preliminary Matters**

5. At the outset of the hearing the Judge and Mr Cann did not have a copy of the Appellant's skeleton argument. Copies were made and we took time to consider it before hearing evidence.
6. The Tribunal noted that Ms Asamoah is not a legally qualified person. As the sole director of Regal Brook Nursery Limited and its nominated individual and registered manager she was, in effect, a litigant in person. The Judge explained that in such circumstances, the Tribunal's duty to ensure fairness includes ensuring that Ms Asamoah could participate effectively in the hearing. The Judge said that legal jargon would be kept to a minimum and, when necessary, any legal terms or concepts would be clearly explained. The Judge said that given the Tribunal's inquisitorial role, it would not be essential for Ms Asamoah to engage in cross examination of Ofsted's witnesses and if she would prefer, she could identify issues and questions which the Judge could then put to the witnesses in the most appropriate way. In the event, Ms Asamoah combined these two approaches in examining witnesses. In her closing submissions, Ms Asamoah said she felt she had been able to participate effectively and to put her case.
7. In the course of the hearing the Tribunal admitted two items of evidence which were not included in our hearing bundle. In both cases we applied Rule 15 and took into account the overriding objective as set out in Rule 2 of the Tribunal's Procedure Rules in determining whether the evidence should be admitted. The documents were:
- a. The Ofsted Early Years Inspection Handbook, published April 2018. This was the guidance to Ofsted inspectors for conducting inspections at the relevant times. The handbook was mentioned by Mrs Ratcliff in her evidence and given the context of complaint about the conduct of inspections in 2019 and 2020, the Tribunal considered it would be relevant and helpful to our determination of the issues to have sight of the guidance Ofsted inspectors were expected to apply. We did not consider any prejudice arose to either party by our request for this document and neither party objected;
  - b. Email correspondence between Ms Asamoah and Mrs Smith of Bexley Local Authority dated 7 and 12 August 2020 about whether and when Local Authority funding might be available to the Appellant for the forthcoming term. Ms Asamoah wanted to put the contents of the emails to Mrs Smith in cross examination. She could not explain why the emails had not been included with her evidence submitted by the final evidence deadline but there was no objection by the Respondent to admitting it and we considered the document was relevant and potentially helpful in

determining a satellite issue in the appeal.

8. We also asked Ms Gutteridge to supply copies of additional sections of the Childcare Act 2006, which were referred to during the hearing.

### **Inspection History**

9. Regal Brook Nursery Limited (the Appellant) was established by Ms Asamoah as a setting for pre-school children in 2013. It has always operated from rooms attached to the Freedom International Centre in Welling, Kent.
10. The Appellant was inspected on six occasions between 2014 and 2020. In its first inspection in May 2014 the Appellant was rated as 'Requires Improvement'. In both April 2015 and September 2015, the Appellant was rated as 'Inadequate'. Local Authority (LA) support to the setting was enhanced and an inspection in March 2016 found the setting was 'Good'. No further inspection was made by Ofsted until 30 April 2019 when the rating returned to 'Inadequate'. A further 'Inadequate' rating was given at an inspection on 13 March 2020.
11. Welfare Notice Requirements issued after the inspections in April 2015 and April 2019 were complied with.
12. Following the April 2019 inspection the Appellant complained to Ofsted about the way the inspection was conducted, including that two inspectors were present, both had appeared to be actively involved in the inspection and both had acted in such a way as to undermine the confidence and performance of the staff, including by making false statements about what they had observed or heard during the inspection. The Appellant further asserted that the inadequate outcome was wrong. The complaint was not upheld.
13. Following the March 2020 inspection, the outcome report was not published by Ofsted for reasons arising from the COVID pandemic. Circular emails were sent to providers explaining the delay and then announcing that publication was to restart in June 2020 so that inspection reports for all completed inspections would be published by the end of the summer term. The Appellant's legal representative at the time wrote to Ofsted on 12 June 2020 asserting that no draft report had ever been received for the March 2020 inspection and asked for the Appellant to have the opportunity to review and comment upon a draft of the report before it was published. Ofsted replied on 10 July 2020 saying that the report had in fact been published on 26 June 2020.
14. It is common ground that an Ofsted inspector visited the Appellant's setting on 26 November 2020 to carry out a monitoring or interim visit, during which Ms Asamoah was present but would not discuss the actions she had taken since the previous inspection.
15. The same day, Ms Asamoah wrote to Ofsted's Chief Inspector describing her ongoing dissatisfaction with Ofsted's inspection practices. A response was sent from the regional director on 14 January 2021 rejecting her criticisms and urging

her to engage fully with Ofsted inspectors. On 25 January 2021 Ms Asamoah wrote again repeating her criticisms and expressing that she would not engage 'without proper procedures being followed'. A further reply from Ofsted was sent on 1 February 2021, in essentially the same terms as its reply of 14 January 2021.

16. On 27 January 2021 Ofsted Early Years Senior Officer Linda Du Preez decided to cancel the Appellant's registration as an Early Years provider. A notice of intention to cancel the registration was sent on 4 February 2021. Having received no objection from the Appellant, the decision was confirmed in a further letter of 18 February 2021.
17. The Appellant submitted an appeal to the First-tier Tribunal on 17 March 2021.
18. Although LA funding was withdrawn with effect from the beginning of the spring term of 2021, the Appellant re-opened the setting in March 2021 following the easing of pandemic restrictions.
19. It is relevant that after the appeal was submitted, Ofsted inspectors carried out monitoring inspections on 12 April and 11 May 2021. It is common ground that, on both dates, inspectors were admitted to the setting, but staff refused to answer questions. Following the monitoring visit on 11 May 2021, the Respondent issued an urgent suspension notice. At the time of the hearing the setting remained suspended.

## **Issues**

20. The Respondent's position can best be summarised in that the Appellant is no longer suitable to be registered as an Early Years provider because:
  - a. The Appellant has a history of failings with respect to the safeguarding and welfare requirements of the Early Years Foundation Stage (EYFS);
  - b. The Appellant has a history of weakness in implementing the learning and development requirements of the EYFS;
  - c. The Appellant has a history of weakness in its management of the setting including by failing to (i) assess the suitability of staff; (ii) implement a robust 'key person' arrangement; and (iii) train staff adequately in meeting pupils' dietary and medical requirements.

In each case, the Respondent alleges that the Appellant's refusal to fully engage with Ofsted means the Respondent has been unable to assess whether these weaknesses have been addressed.

21. As a distinct issue, the Respondent asserts that the Appellant's refusal to fully engage with Ofsted including her failure to return calls and emails and most particularly her failure to submit to Inspectors' requests to review documents or otherwise to answer questions is of itself an indication of the Appellant's unsuitability to remain registered.

22. The Appellant denies each of these allegations because either (a) the inspectors have fabricated or misrepresented evidence to support flawed conclusions; (b) procedural flaws with the inspections in April 2019 and March 2020 meant that the staff were placed under such stress that they were not able to perform their roles or explain their duties to their normal high standard; and/or (c) the withdrawal of LA funding which followed the inspection in March 2020 meant that the Appellant did not have the money or capacity to address those shortcomings it accepted. The Appellant asserts that its refusal to fully engage with Inspections in November 2020, April 2021 and May 2021 was a reasonable response to the Respondent's bad faith or procedural failings and does not reflect any lack of suitability.

### **Legal framework**

23. There was no dispute about the legal framework. The grounds for cancelling the registration of a childcare provider are set out in Section 68 of the Childcare Act 2006 (The Act).

24. In the present case, the Respondent submits that the discretion to cancel the Appellant's registration should be exercised because the Appellant has failed to comply with the prescribed requirements in the Childcare (Early Years Register) Regulations 2008 and the Childcare (General Childcare) Regulations 2008 (the 2008 Regulations) relating to suitability, learning and development and welfare.

25. It is for the Respondent to demonstrate, on the balance of probabilities, the facts upon which it relies and that the decision to cancel the registration is proportionate and necessary. The Tribunal must make its decision based on all the evidence available to it as at the date of the hearing. The Tribunal is not restricted to evidence available to the Respondent when the cancellation decision was taken.

26. Under section 74 of the Act, the Tribunal must either confirm the Respondent's decision to cancel or direct that it shall not have effect. If the Tribunal decides that cancellation should not have effect, then it may impose a condition on the Appellant's registration.

27. Noting the tenor of the Appellant's skeleton argument, we explained to Ms Asamoah that if her appeal is successful, the Tribunal's decision is limited to these outcomes. It has no power to award financial compensation or otherwise to review Ofsted's policies and procedures or the exercise of those policies and procedures.

### **Evidence**

28. We read the Bundle amounting to 860 pages before the final hearing.

29. Wendy Ratcliff adopted her written statement which described the Appellant's inspection history up to and including the 'Good' grading in April 2016. Mrs

Ratcliff had carried out the inspection in April 2015 but otherwise her evidence was based on Ofsted's records. Mrs Ratcliff added that following the September 2015 inspection, a Welfare Requirements Notice (WRN) had been issued. She explained that the purpose of a WRN was different from an Inspection Report. The latter is primarily for the benefit of parents, while the former is a basis for further enforcement action if serious shortcomings are not addressed. Mrs Ratcliff confirmed that the requirements of the WRN issued in September 2015 were met by the time of a monitoring visit on 12 October 2015.

30. Mrs Ratcliff said that it was not unusual for a setting to improve from 'Inadequate' in one inspection to 'Good' in the next inspection because Ofsted provides feedback to guide providers on what must be improved. Support is also available from LAs which the Appellant had sought and benefitted from. Mrs Ratcliff said that inspection is an art rather than a science and is not a tick-box exercise. As such, it is to be expected that inspectors will focus on areas which were found to be weaker in previous inspections and otherwise to follow their professional curiosity.
31. Joanne Smith adopted her written statement which described LA support to the Appellant during the period of its registration. She was at pains to stress that the LA performs a function distinct from that of the Respondent. There was nothing to be read into the LA's finding that its requirements were met while at the same time Ofsted graded the Appellant as 'Requires Improvement' or even 'Inadequate'. Miss Smith said that the Local Authority had supported the Appellant from its registration. Support was increased through 2015 with an intensive period of support between September 2015 and the Appellant's inspection in March 2016 which resulted in a 'Good' grading.
32. Miss Smith recalled visiting the Appellant's setting soon after the Ofsted inspection in April 2019. She recalled it being an emotional time for the staff and the role of the LA was to offer advice and guidance and explain what further practical support the LA could offer to address the inspection findings. Miss Smith recalled Ms Asamoah's unhappiness with the conduct of the inspection and its findings and that she or Mrs George had explained how they could complain to Ofsted. Miss Smith did not recall discussing specific complaints. She denied that either she or Mrs George had said that Ms Asamoah's complaint was justified but they were both as sympathetic as they could be, given they had not been present for the inspection itself.
33. Miss Smith described the arrangements by which the LA funds care hours for certain pupils. She explained that providers apply online for provisional funding based on expected qualifying pupil numbers for the next term, based on which the LA makes a provisional award, which is topped up once pupil numbers are confirmed at the start of term. Access to LA funding is conditional on providers meeting expectations including that they will meet EYFS requirements and make honest and accurate claims.
34. Miss Smith said that in the Appellant's case, funding was not withdrawn until well after the second successive Inadequate inspection in March 2020 and no attempt was ever made to block the Appellant's access to the online portal. She

gave evidence that the LA encouraged Ms Asamoah to apply for funding for the autumn term 2020 and, when it was reported that she was unable to do so online, rapidly arranged for her to do so in a paper application. Miss Smith said that withdrawing funding is rare for the LA. She said the policy of withdrawing funding because of a poor inspection history is recent and that it has happened only in one other case, as a result of which that setting had closed.

35. Justine George adopted her written statement. She reviewed the record of visits and contact between the Appellant and the LA. She confirmed that LA visits were normally termly, took a 'light touch' approach and were not another form of inspection. She said that the Appellant worked cooperatively with the LA, including in the months immediately following the April 2019 inspection. Mrs George said she had been surprised that the Appellant was found to be Inadequate in the April 2019 inspection and recalled Ms Asamoah's view that the inspection had been unfair. Mrs George said she had herself mentioned the possibility of complaining but encouraged Ms Asamoah to focus on moving forward and addressing the identified issues.
36. Mrs George said that although engagement after the inspection had been good initially, it was harder to engage with Ms Asamoah after October 2019. She could not say why. Mrs George recognised that Ofsted's inspection was by then overdue and that Ms Asamoah and her staff were somewhat anxious about the prospect of a further inspection. Mrs George said she was not able to arrange another visit until immediately after the March 2020 inspection. She described Ms Asamoah as being distraught, describing herself as 'dumb' but otherwise really struggling to express herself. She did not accept that Ms Asamoah was saying that Ofsted or its inspectors were dumb.
37. Mrs George said that, as a result of her visits, she did think some things had improved between the 2019 and 2020 inspections and some of the confidence of the staff had returned but there would have been room for further improvement.
38. Mrs George said that there could be no possible benefit to the LA in withdrawing funding or otherwise bringing about the Appellant's closure. She denied any plan (whether or not in league with Ofsted) to bring about the closure of the setting. She also denied Ms Asamoah's suggestion that it had been inappropriate to raise the prospect of funding being withdrawn immediately after the March 2020 inspection. She said it had been right to explain the consequences of the inspection outcome
39. Frances Oliver adopted her written statement. She said that the inspection she carried out of the Appellant's setting in April 2019 had been personally important for her as it marked a final 'sign off' before she would be able to contract to Ofsted. The presence of Mrs Gee in a Quality Assurance (QA) role was to ensure she was a suitable person to contract as an Early Years Regulatory Inspector.
40. Mrs Oliver denied that she had conducted the inspection with excessive zeal because she was herself being assessed. She described how if she hadn't been

"signed off" at this inspection, there was opportunity for further training and for the process to continue. It was not an 'all or nothing' assessment.

41. Mrs Oliver explained how she had prepared for the inspection by considering the recommendations from the previous inspection and used these as her Key Lines of Enquiry (KLOE). During the inspection, any area of the EYFS could be observed and could become a line of enquiry if it warranted a closer look. She said she did not have any pre-existing views prior to arriving at the nursery.
42. Mrs Oliver explained that although EYFS is the focus of their inspection, any evidence may be gathered and noted, even if not directly related to EYFS, to provide a context for the findings and to support the triangulation of the evidence. She explained that there would be no breaches of the EYFS found in a 'Good' inspection but that the failure to improve and to meet the requirements had led to the breaches found during this inspection.
43. Mrs Oliver explained how as part of the Quality Assurance, she would discuss her findings with Mrs Gee throughout the day. She stated she would use the opportunity to explain her thoughts on the direction for the inspection to take and to consider the evidence gathered. She described Mrs Gee's role as passive. She reiterated that the findings made were her own.
44. She described a 'breach' of the EYFS as being where a provider had failed to do something that the EYFS states it must do. She said she would not conduct an inspection any differently now.
45. Jennifer Gee adopted her written statement. She added that Mrs Oliver had appeared to have a positive attitude at the inspection. She did not appear to have pre-judged the setting.
46. She said at no time in the inspection had she felt the need to step in and take over from Mrs Oliver. Although she initially stood by her written statement that she had not taken an active role in collecting evidence, she then said that she had been actively involved with the children at certain points, because the setting was small and she could not realistically distance herself. She said that she may have sought clarification with staff on some points raised by Mrs Oliver, such as the issue with the child with a red mark on his neck. She said this was reasonable as she had not raised any new matters and she needed to be able to take over the inspection if necessary.
47. Mrs Gee also agreed that she had involved herself in giving 'running' feedback to Ms Asamoah during the afternoon, when it was clear that there would be substantial actions arising from the inspection.
48. Mrs Gee gave evidence that, on reflection, she could now understand why Ms Asamoah and her staff might have thought she was taking an active role but said that she had tried not to place an undue burden on the staff at any point.
49. Josephine Afful adopted her written statement. She said that a fellow Ofsted Early Years Inspector, Karinna Hemmerling, would have undertaken the



inspection in March 2020 if she had been well. Ms Afful was not aware that Ms Hemmerling had advised Ms Asamoah that she would undertake the inspection herself or that she had agreed it would not take place on a Friday. Although the contents of a phone call on 15 January 2020 had been summarised in Ms Hemmerling's records, those details were not included. Nor was she aware of Ms Asamoah's complaint after the previous inspection, or that it was based, in part, on Ofsted sending two inspectors. Ms Afful said the trainee who had accompanied her had taken no part in the inspection, she did not feel that it had impacted her inspection in any way and it would not have been appropriate in any case for her to give notice of the inspection.

50. Ms Afful said she was aware the setting was only open for three hours on a Friday. She considered that was sufficient time to observe the staff working with children. Other matters, such as the management inspection, did not require the children to be present. Ms Asamoah had not raised any objection either to the trainee inspector accompanying her or the inspection going ahead on a Friday.

51. Ms Afful said that having been aware of the inspection history and that the Appellant had previously recovered from 'Inadequate' to 'Good', she had gone into the inspection with a positive mindset, expecting to find substantial improvements since April 2019.

52. Ms Afful said that although at the end of the inspection Ms Asamoah had been very upset with the findings, she accepted them. Ms Afful said that although she had found no improvement in safeguarding since the previous inspection, she had found some small improvements elsewhere and that was reflected in the inspection report.

53. Ms Afful confirmed that although there had been serious issues and it would normally have been appropriate to issue a WRN relating to safeguarding and supervision, that was not done because the COVID pandemic meant the setting closed shortly after the inspection and Ofsted had taken a policy decision to leave settings to focus on their own pandemic arrangements.

54. Ms Afful said that she only became aware of Ms Asamoah's complaint about the 2019 inspection at the meeting with Ms Du Preez on 26 January 2021. Even then, she did not know the details but accepted it would have been helpful to the discussion. She recommended cancellation of the Appellant's registration because, based on two previous inspections, she did not believe Ms Asamoah or her staff had the capacity to improve, particularly in welfare and safeguarding, and she appeared unwilling to subject herself to further inspections, which was not sustainable. The meeting had considered all previous contacts, including the most recent monitoring visit where Ms Asamoah had not engaged fully. Although the content of Ms Asamoah's previous complaint was not discussed, Ms Afful said it would not have made much difference to her recommendation.

55. Ms Afful briefly described her monitoring visit on 22 April 2021. She maintained that although cancellation had been decided upon, she had said to Ms

Asamoah that she wanted to see whether improvements had been made which she could report back. Ms Afful said that in relation to Ms Asamoah's complaint that she had never received the final report following the March 2020 inspection, she had explained only by referring to 'technical issues' and she had not given detail about the error in recording Ms Asamoah's old personal email address as the address for the 'nominated individual'.

56. Linda Du Preez adopted her written statement. She accepted that it was a problem with Ofsted's records management system which had resulted in inspection reports being sent to Ms Asamoah's personal email address and not to the nursery email address. Ms Du Preez said she had discovered the issue at the time she was considering cancellation. She wanted to be sure there had been no malice or intent in sending the inspection reports to that old address because she could see the difficulty and confusion that would have arisen for Ms Asamoah.
57. Ms Du Preez said that the delay in re-inspection after April 2019 was largely unavoidable because of staff sickness and denied there was any prejudice to the Appellant by the delay anyway. She said that the additional time would have given extra time for the Appellant to make improvements and collect evidence that these improvements had been sustained. She said that other circumstances such as there being two inspectors again in March 2020 was unfortunate and could have been handled differently, although she did not accept that it had affected the conduct or outcome of the inspection.
58. Ms Du Preez further accepted that the correspondence with Ms Asamoah about the report of the March 2020 inspection had not been handled well. Taken together with the general emails sent to providers during the pandemic which stated that inspection reports would not be published for a period, she conceded that it might appear to Ms Asamoah that the report had been published at the end of June deliberately to forestall Ms Asamoah's potential complaint about it. She said that although she had not been involved, she was sure there had been no bad faith involved.
59. Ms Du Preez described her efforts to contact Ms Asamoah by phone, email and letter in the second half of 2020. Her intention was to try and resolve Ms Asamoah's concerns and ensure that the setting could demonstrate improvement. She wanted to make clear how important it would be that Ms Asamoah fully engaged with Ofsted in the future. She said she had considered going to the setting herself but decided against it because, as the decision maker, she needed to retain a certain distance so she could analyze the evidence more objectively.
60. Ms Du Preez confirmed she was aware of Ms Asamoah's correspondence with Ofsted's Regional Director, Michael Sheridan. She accepted that Ofsted's first response had not been timely but said that factor did not dilute the seriousness of Ms Asamoah's statements about being unwilling to 'submit to inspection'. These statements had been a key part of her decision to cancel the Appellant's registration, along with the ongoing concerns about staff supervision and safeguarding knowledge.

61. Ms Du Preez did not see any reason to delay the cancellation decision until that correspondence had run its course. Action was needed because of the ongoing unwillingness to engage with inspection which in turn meant Ofsted could not be satisfied whether its serious concerns about safeguarding knowledge, management and staff supervision had been addressed.
62. She said that although she was aware of Ms Asamoah's complaint about the April 2019 inspection, she did not see its response until after the current appeal had been made.
63. Ms Du Preez concluded her evidence by saying that at every stage, she had believed there was a way back from cancellation. She said monitoring visits were a necessary part of Ofsted's duty while the setting was still open during the appeals process. She denied that the visits were in any way designed to harass the Appellant or bring about the end of the business. She said that although the visits had reinforced her view that cancellation was necessary because of Ms Asamoah's unwillingness to engage with inspection, Ofsted would have been obliged to consider any evidence from the monitoring visits which indicated that the Appellant had made and sustained improvements since the previous inspections.
64. Ms Du Preez said that although lack of engagement was a serious concern, ongoing failures in relation to safeguarding knowledge stood alone. The failure to make and sustain improvement in that area alone would have justified cancellation. Ms Du Preez said Ofsted do not routinely consider imposing conditions and in the present case, there were no conditions which could have been appropriate.
65. Ms Du Preez said she had no part in the decision to suspend the Appellant's registration on 14 May 2021.
66. She concluded her evidence by confirming that if the Appellant's registration were cancelled, that would mean that Ms Asamoah would be disqualified from registering again as a provider's nominated individual (unless a waiver were agreed) but neither she nor any member of her staff would be disqualified from working in a childcare setting.
67. Evelyn Asamoah adopted her written statement. She clarified that some passages in her statement were taken from the written accounts made by the nursery staff immediately following the Ofsted inspection in April 2019.
68. Ms Asamoah described her history as a childminder and then setting up Regal Brook Nursery. She said she had done so out of a passion for children's welfare. She described the setting's early challenges and accepted Ofsted's assessments in 2014 and 2015 had been broadly accurate. She accepted that the LA's support had helped the staff meet the concerns and improve to the extent that the inspection in April 2016 had been deservedly 'Good'. However, Ms Asamoah said that the improvements would have been achieved even without LA support.

69. Ms Asamoah said that although the April 2019 inspection was unfair in how it was conducted and the outcome was wrong, she had decided to put it behind her. She was disappointed in the complaint response. She said that just because her complaint was not upheld, that did not mean the things she complained about did not happen. She had not taken the complaint further because she did not have the resources and it was causing her so much stress that she wasn't sleeping.
70. Ms Asamoah said she did accept there is always room for improvement and that the staff had worked hard to ensure the nursery would do well in its next inspection. Ms Asamoah denied that engagement with the LA had dwindled – it was just because there were other things going on. She said that following Ms Hemmerling's telephone call in January 2020 she believed that the setting had met the requirements and all that was needed was for the staff to be of a sound mind for the inspection they knew was coming soon.
71. Ms Asamoah believed that if the inspection had been conducted in normal circumstances with an open-minded inspector, then the setting would have earned at least a 'Good' outcome. However, the feeling of unfairness remained and together with the increased anxiety that came with the delay to the inspection, the failure by Ms Hemmerling to conduct the inspection in January as she had indicated and then the arrival of Ms Afful with a second inspector on a Friday in March 2020 had all combined so that the staff were unable to perform to the required standard at the critical time. Ms Asamoah said that she felt strongly these circumstances were deliberate. It had left staff members extremely anxious during the inspection such that one had complained of being unable to breathe. Ms Asamoah said she had never been in a similar situation where she was so afraid.
72. Ms Asamoah said did not complain after the 2020 inspection because no-one would listen. She was left numb by the inspection feedback. Ofsted had decided on cancellation and Justine George had already told her the LA would remove funding so there was nothing more to do.
73. Ms Asamoah said that after the March 2020 inspection she did not trust Ofsted any longer. For example, emails about what Ofsted would do during the COVID pandemic were contradictory. Ofsted's response to her solicitor's letter about the March 2020 inspection report and their decision to publish the report without ever sending her a draft to comment upon had been made in bad faith. Ms Asamoah said that the tendency of inspectors such as Ms Du Preez to telephone or email her showed that they did not want to put on record what they wanted to say. Asked about the letter sent to her by Ms Du Preez on 6 November, Ms Asamoah said she only received it electronically. She had not replied at the time because she was busy with the children. Anyway, she was still waiting to receive the report of the March 2020 inspection. After the monitoring visit on 26 November 2020 she had decided to correspond with Alison Speilman, the Chief Inspector by letter because there would be a permanent record.

74. Ms Asamoah said that she had intended to object to the notice of cancellation. She was preparing to reply to the regional director Michael Sheridan's letter of 4 February 2021 setting out her next steps when the confirmation of cancellation arrived.
75. Ms Asamoah accepted that she had not complied fully with monitoring visits in November 2020, April 2021 and May 2021. She said that now she understood the 'Rules of Engagement' better and that she was required by law to comply with the inspection, she would have acted differently. However, she also said that if inspectors continued to do things which were not in line with expectations, it was not reasonable to expect her to comply. She said that was still her position because she cannot work with inspectors if they work to different rules.
76. Ms Asamoah said that although Local Authority funding had been withdrawn at the end of 2020 she had still managed to make and sustain improvements in the setting. She accepted that demonstrating these improvements to inspectors would have been the easiest thing but there was a matter of principle at stake. Ofsted's actions had offended fundamental British values including fairness. Ms Asamoah said it was down to her to challenge things which are not right.
77. Ms Asamoah said that if the appeal is successful, the nursery could be ready to open again in January 2022. All the equipment and resources remain in place and key staff would be able to return. Asked about her future relationship with Ofsted, Ms Asamoah said she hoped and expected that things would be done differently now that Ms Du Preez and others had learned more about her experience as a result of the Tribunal proceedings. She said she felt her story had now been heard. Asked whether she would comply with inspections and visits in future, Ms Asamoah said that if proper procedures were not followed, she could not engage, but having better knowledge herself of those procedures meant that she would comply, but follow complaints procedures through if she felt Ofsted had not complied with its duties. She denied that she would only engage with Ofsted on her own terms.

### **The Tribunal's Findings and Reasons**

78. We took into account all the evidence that was presented in the bundle as well as the late evidence presented to us at the hearing and the oral evidence of the witnesses. We have summarised some of the evidence before us and we wish to make it clear that the summary above and the evidence we refer to in our findings below is not intended to be a transcript of everything that was said at the hearing.
79. The Appellant's Ofsted inspection history up to and including the assessment of 'Good' in April 2016 was not disputed. Our starting point therefore, was that in April 2016 the Appellant was meeting the EYFS requirements (and by extension the 2008 Regulations) at that time and the reasons given in the inspection report why the setting was not outstanding amounted to relatively minor criticisms, albeit these remain relevant because they are repeated in subsequent inspection reports.

80. However, just as a setting could improve from 'Inadequate' to 'Good' within a short space of time (as the Appellant's setting had done) we had no difficulty accepting that over three years, it was quite possible that the same setting might slip back to 'Inadequate'. We did not accept the proposition put tentatively by Ms Asamoah that since she and her staff had continued to run the setting in exactly the same way ever since April 2016, it must have continued to be at least 'Good' and any inspection which followed must be presumed to be faulty. Some things clearly did change: for example, at least one staff member left and others joined. The skills of those staff members will have changed over time too. Just as they might have garnered experience, so too their skills may have faded, particularly if regular and good quality training was not provided as part of a robust management plan. It was consistent with the inspection findings in April 2019 and March 2020 to conclude that no such plan was in place. The profile of the children will inevitably have changed too as each joined with their own needs, developed in their own way and eventually left the setting. We also bear in mind that settings are under a duty to strive for improvement. In that way, it is reasonable that a failure between inspections to act on previous shortcomings, even if they are relatively minor, may assume more importance on the next occasion. In the Appellant's case, a failure to implement a robust system for measuring and tracking the attainment and progress of children between inspections in 2016 and 2019 could rightly be viewed as a more serious failing on the latter occasion.
81. In our finding, there were procedural failings in the April 2019 inspection. We find it was entirely appropriate that Mrs Gee accompanied Mrs Oliver for quality assurance purposes. However, based on her admissions in oral evidence, we also find that Mrs Gee did take an active role in the inspection. That extended to interacting with children, which was to some extent inevitable in a relatively small space, but also to interaction with staff. Mrs Gee's admitted '*asking for clarification at certain points*' seeks to minimise what we find was likely to have been quite extensive active involvement in the inspection. Although Mrs Gee told us that Mrs Oliver was leading, we can well understand how Ms Asamoah and her staff will have identified Mrs Gee as the more senior inspector and as such the one with real authority.
82. Nor can we discount the possibility that the inspection was carried out with a thoroughness, zeal even, which was not typical for an inspection of its type. The inspection lasted almost nine hours from arrival to completion of the debrief. Although the Ofsted witnesses consistently said that inspection times could vary depending on what was found, we find that must have amounted to a very gruelling day for Ms Asamoah and her staff. This was particularly so since, on Mrs Oliver's admission, by lunchtime it must have been reasonably clear to the staff that the inspection was not going well.
83. However, we were not at all persuaded that the inspection was carried out in bad faith, as Ms Asamoah submitted. We accepted both Mrs Oliver and Mrs Gee's evidence that the inspection was carried out with an open mind and that Mrs Smith in particular had taken a balanced view about the setting's previous inspection history. As such, despite our qualified criticisms of that inspection as set out above, we had a high degree of confidence in the accuracy of the

findings. Where there were irreconcilable differences in the accounts of Mrs Oliver and Mrs Gee on the one hand, and Ms Asamoah and her staff on the other, we did not find it necessary to reach detailed findings because the differences in recollection did not go to the heart of the inspection findings, but were instead more focussed on different interpretations of what was observed and what exactly was said, by whom and when. What was important for us was to decide whether the inspection findings were reliable enough that it was safe for Ms Afful to refer herself to that inspection report in preparation her own inspection in March 2020. In our finding, the faults with the April 2019 inspection, such as they were, do not significantly undermine the assessments made in that inspection, We find any faults with the 2019 inspection did not impact at all on the reliability of the findings or outcome os the subsequent inspection in March 2020.

84. That said, what transpired between the April 2019 and March 2020 inspections can have done nothing to restore Ms Asamoah's shaken confidence in Ofsted. In our view, the catalogue of errors which followed was unfortunate to say the least and, to some extent, avoidable. First, we accept it was no fault of Ms Asamoah's that she did not receive the report of either inspection. As Ms Du Preez frankly conceded and explained in her evidence, it was an IT issue which was to blame for Ofsted continuing to send reports meant for the Nursery to an email address Ms Asamoah had previously used when registered as a childminder and which was no longer actively in use or monitored by her. She explained why those reports will have been sent to one address while other official correspondence was sent to another.
85. Secondly, given our finding above about the extent of Mrs Gee's involvement in the inspection, the flat rejection of Ms Asamoah's complaint was, in our view, unwarranted: even if Ofsted could justifiably have relied on the appropriateness of there being two inspectors present and stood by the findings and the outcome, the investigation should have uncovered and acknowledged Mrs Gee's active involvement in the inspection and dealt more sensitively with Ms Asamoah's concerns about it.
86. Thirdly, there was a very substantial delay in re-inspection, a total of 11 months when the Appellant could reasonably expect to be visited after 6 months. Although we accepted the premise raised by the Ofsted witnesses that additional time ought to benefit a provider by affording them with additional time to make improvements and build an evidence base that these were being sustained, we also accept that in the Appellant's case, there was a disbenefit because the circumstances of and the outcome of the previous inspection had left them with more than usual trepidation about what might happen when they were re-inspected. The stakes were high and, whether justified or not, Ms Asamoah and her staff were not confident that the inspection would be fairly conducted.
87. Fourthly, and following Ms Hemmerling's assessment that the Appellant had discharged the WRN issued after the April 2019 inspection, we accept on balance that she did tell Ms Asamoah on 15 January 2020 that she would be carrying out a further inspection in the near future and that she did assure Ms

Asamoah that it would not take place on a Friday.

88. In relation to the March 2020 inspection, the Appellant did not challenge the findings as such. Ms Asamoah accepted generally that the inspection had been conducted fairly, although at points in her oral evidence Ms Asamoah took the view that Ms Afful had not shown an open mind. Despite that equivocation, we understood the Appellant's case was that in light of the perceived unfairness of the previous inspection, compounded by the rejection of its complaint about that inspection, the delay in carrying out the re-inspection and the circumstances where contrary to expectation, that inspection was eventually carried out by a different inspector, again with a second person accompanying them, and on a Friday, caused such anxiety that neither she nor her staff were capable of performing at anything like the expected standard.
89. Having identified that this submission was really the central plank of the Appellant's case, we considered it particularly carefully. We accepted that this combination of circumstances will have had some negative impact on Ms Asamoah's performance and that of her staff. Ms Afful's evidence, as well as that of Mrs George who saw Ms Asamoah a few days afterward, tends to support that view. However, we were not persuaded that these factors are enough for us to reject Ms Afful's findings or the conclusions she reached. We accept Ms Afful's evidence that she took the staff's nerves into account, sought to reassure them so far as was consistent with her role, and afforded them every opportunity to present to her the evidence she required in order to record an improvement in performance. Where that evidence was available, in the staff's answers or in documents and records, we are satisfied that was reflected in Ms Afful's assessment. Improvement was recorded in three of the four key inspection criteria (albeit that was only from 'Inadequate' to 'Requires Improvement'). Where the assessment for leadership and management remained as 'Inadequate', we are satisfied that was because the Appellant could show no evidence of improvement, either in the staff answers about safeguarding or their roles and responsibilities for promoting child development, or in keeping records about staff training and supervision.
90. In sum, we had full confidence in Ms Afful's findings. As a result, we were also satisfied that as of 13 March 2020, the Appellant had failed to make and sustain improvements in the key inspection criteria. Given that the setting had been rated as 'Inadequate' or 'Requires Improvement' for its Leadership and Management in five of six inspections since 2014, and that assessment was based in serious failings in the key duty of safeguarding pupils, we concluded that on that date, the threshold for cancellation had been met.
91. Although there was another series of unfortunate events in Ofsted's handling of the publication of the report of the March 2020 inspection, which can only have reinforced the Appellant's perception of deliberate unfairness, we were satisfied those events could be explained by the ongoing and still hidden issue with Ofsted holding the wrong email address for the Appellant, together with the confusion and rapidly changing circumstances which accompanied the early phases of the COVID pandemic. Nor did we find any fault with the process by which Ms Afful or Ms Du Preez approached the decision whether to cancel the



Appellant's registration. We found both to be honest and sincere witnesses. We were particularly impressed by Ms Du Preez' candid acceptance of Ofsted's administrative shortcomings, which lent credibility to her assertions that she had been balanced in her assessment and never closed to the possibility that the Appellant might still prove suitable to remain registered. We discounted the Appellant's suggestion that there was some procedural flaw in reaching the decision to cancel while Ms Asamoah's correspondence with Michael Sheridan was (in her view) still ongoing. In our finding, if Mr Sheridan's responses were not enough to persuade Ms Asamoah that she needed to engage with Ms Du Preez and her inspection team urgently, then the stark terms of the notice of intended cancellation sent on 4 February were, in our finding, sufficient to warn Ms Asamoah that a failure to raise objections would automatically result in confirmation of that decision. Even at the end of the oral evidence we cannot say with confidence why the Appellant did not object to the cancellation notice.

92. However, notwithstanding our conclusion that cancellation was likely to have been appropriate based on the findings and outcome of the 13 March 2020 inspection, we did not lose sight of our responsibility to assess the Appellant's suitability as of the date of the hearing. Since it was common ground that since March 2020 Ms Asamoah had refused to answer questions about the measures she might have taken to address the identified shortcomings in the three monitoring visits in November 2020, April 2021 and March 2021, there was nothing positive that we could take from the evidence of those inspections. If anything, the observations recorded by Natalia Moroz, which directly led to the urgent suspension of the Appellant's registration and was not directly challenged, supported the conclusion that Ofsted's concerns about leadership, management and safeguarding were well founded.

93. Although at the start of the hearing we reminded Ms Asamoah of the value to us of evidence that would show us how she or her staff had addressed Ofsted's identified concerns since March 2020, or even after the suspension was enforced after 14 May 2021, and that we would look favourably on any application to adduce late evidence to that effect, nothing of substance was forthcoming. There was nothing in the Appellant's documents which evidenced any action plan, training or review of policies and practices between March 2020 and the hearing date. The children's development tracking records Ms Asamoah showed to us during her oral evidence were all dated from 2019. Ms Asamoah's own oral evidence was that she had locked up the setting on the day of the suspension and very little had happened since. When asked, she was able to speak in general terms about needing to clean the setting and prepare resources for re-opening. However, we found that she was able to demonstrate almost no insight into the serious and urgent measures she would need to take in order to bring about the improvement in leadership and management that would allay ours and Ofsted's concerns. We could not escape the conclusion that lack of insight was because, at heart, Ms Asamoah does not believe there is anything to address.

94. Although we would confirm cancellation based on our concerns about the Appellant's ability to sustain improvements in welfare and safeguarding alone, we note that Ofsted's case was that the inspection outcomes also showed that

the Appellant was failing to meet the Learning and Development requirements of the 2008 Regulations such that cancellation was justified on that ground. Although we accepted the inspection findings did show an ongoing weakness in that area, we also took into account Ms Afful's findings, which she confirmed in her oral evidence, that there had been some evidence of improvement in that area between 2019 and 2020, even if it was not yet 'Good'. We were somewhat sceptical whether the Appellant could have continued that improvement so far as a 'Good' outcome, particularly without the intensive LA support which had no doubt underpinned previous improvements. However, given there was at least some improvement in that area, we would not cancel the Appellant's registration based solely on the criterion of a failure to meet the EYFS requirements in Learning and Development.

95. Finally, there was nothing in our findings which in our view could have justified the refusal to cooperate fully with Ofsted's regulatory regime. We noted that section 77 of the Childcare Act 2006 affords powers on Ofsted's inspectors to enter and inspect the premises of any provider and to interview the provider and that it is an offence for any person to intentionally obstruct a person exercising those powers. It is not within our remit to make any findings about whether Ms Asamoah or anyone else committed any offence in refusing to cooperate fully with the monitoring visits in November 2020, April 2021 or May 2021. However, in light of those powers, and the good reasons for them which go to the heart of Ofsted's role in assuring the safety and welfare of young children while away from their parents' care, we find Ms Asamoah's own conduct in refusing to engage fully with those monitoring visits fell very far below that expected of any responsible provider.

96. Although we gave Ms Asamoah every opportunity in her oral evidence to reflect on those decisions and to assure us that she would never again refuse to comply with an inspection, she could only do so in a highly caveated way, conditional in her view on Ofsted accepting its previous bad faith, and modifying its corporate conduct towards her in line with her expectations. Since we have concluded there was no bad faith on Ofsted's part, only a series of procedural failings which did not undermine inspection findings nor justify in any way a failure to comply with regulatory inspection requirements, we can have no confidence that Ms Asamoah, and by extension the Appellant, will comply with regulatory inspection requirements in the future, particularly if she perceives some further unfairness in the future. As a result, we would also cancel the Appellant's registration for suitability based on her refusal to engage with Ofsted as the Regulating Authority.

### *Conditions*

97. We carefully considered whether there were any conditions we could impose which would meet our concerns while enabling the Appellant to continue to act as a provider. We rejected the possibility that the Appellant could be required, as a condition of remaining registered, to comply with Ofsted's inspection requirements because, having reviewed the requirements of Section 77 of the Childcare Act 2006, we were satisfied that requirement is always present. Making it a condition would serve no useful purpose.

### *Proportionality.*

98. We considered the impact of our decision on Ms Asamoah, her staff and the children and parents who have relied on Regal Brook Nursery. Ms Asamoah confirmed in her evidence that some of her staff have found other employment. Another is on maternity leave and does not necessarily expect to return, although she was likely to do so if given the opportunity. We also take into account Ms Du Preez' evidence that cancellation of the Appellant's registration would not disqualify staff from working in any other childcare setting. Finally, we take notice that nationally there is a shortage of experienced staff in early years settings. Albeit there may be some impact from their involvement with the Appellant and the manner of its cancellation, we do not consider any competent member of staff will have difficulty gaining employment elsewhere in the sector. We consider the impact on them to be substantial, but manageable.
99. So far as children and their parents are concerned, we are sure that there will be some families who have always been content with the service provided by the Appellant, who may even have selected it in preference to other providers for either its location or its values and approach, and who were inconvenienced by having to turn to alternative providers when the Appellant's registration as a provider was suspended in May 2021. That impact has already been felt. We accepted the LA's evidence that there are nearly 100 early years settings within Bexley LA and that the LA have had little difficulty in helping parents find other nurseries. We consider the impact of cancellation on them to be quite low.
100. No doubt the impact of cancellation will land most heavily on Ms Asamoah herself. We take into account that Regal Brook Nursery is her business and that cancellation effectively brings her business to an end, at least as a registered Early Years provider, with all the implications that entails, most particularly for her income. However, we can place relatively little weight on that factor. Ms Asamoah told us in evidence that the principles she believes are at stake are more important to her than making money from her business. That much was evident from her refusal to submit to inspection. Although she may not have appreciated that her actions might have constituted an offence leaving her open to prosecution, we are quite sure she understood at all times that her refusal to engage with regulatory requirements including inspection could result in the cancellation of her registration and the loss of her business.

### **Conclusion**

101. Since we are satisfied that the Appellant has not met the requirements of the 2008 Regulations and is no longer suitable to be registered as an Early Years provider, and since we find that no conditions can reasonably be applied that would overcome the unsuitability, cancellation is both necessary and proportionate. We therefore confirm the Chief Inspector's decision to cancel the Appellant's registration.

### **Decision**

102. The appeal is dismissed.

103. The Chief Inspector's decision to cancel the registration is confirmed.

**Judge C Dow**

**First-tier Tribunal (Health, Education and Social Care)**

**22 November 2021**