

PROTECT

Debbie Ann Cooper

Appellant

v

Ofsted

Respondent

[2012] 1992.EY

Before

**Mrs Meleri Tudur, Tribunal Judge
Mr David Braybrook, Specialist Member
Mrs Jenny Cross, Specialist Member**

DECISION

Heard on 17-18 December 2012 at Pocock Street, London.

Attendance

Mrs Cooper attended the hearing with her husband, Mr P Cooper.

Mr G Reed, solicitor advocate represented the Respondents. Ms H Allen and Ms S Will gave oral evidence.

APPEAL

1. The Appellant appeals against the decision issued on the 28 August 2012 to cancel her registration for childcare on non-domestic premises pursuant to section 68 of the Childcare Act 2006 on the basis that the prescribed requirements for registration had ceased to be satisfied and that the registered individual had failed to comply with a regulatory requirement.

The Law

2. Section 34 of the Childcare Act 2006 requires a person who wishes to provide early years provision on premises in England which are not domestic premises to register in the early years register.

3. Section 38 of the Childcare Act 2006 enables the Chief Inspector to impose such conditions as he thinks fit on the registration of the early years' provider. An early years' provider commits an offence if without reasonable excuse he fails to comply with any condition imposed.

4. Section 40 of the Childcare Act 2006 imposes a duty upon the early year provider to secure that the early years' provision meets the learning and development requirements and must comply with the welfare requirements.

PROTECT

5. The prescribed requirements for registration are set out in Part 1 of Schedule 2 of the Childcare (Early Years Register) Regulations 2008 and includes the requirement that the applicant is an individual who is suitable to provide early years childminding.

6. The welfare requirements are set out in the Early Years Foundation Stage (Welfare Requirements) Regulations 2007.

7. Section 68 of the Childcare Act 2006 provides that the Chief Inspector may cancel the registration of a person if it appears that the prescribed requirements for registration which apply in relation to the person's registration have ceased to be satisfied; that the person has failed to comply with a condition imposed on his registration; that he has failed to comply with a requirement imposed on him by regulations.

8. Section 73 of the Childcare Act 2006 sets out the procedure for taking steps to cancel registration.

Facts

9. The Appellant was registered as a provider of day care at Cunliffe Day Nursery, Epsom and had been so registered to provide day care since 23 May 1994. The conditions imposed on her registration were that she may care for no more than ten children under eight years, not more than ten may be in the Early Years age group and of those, none may be under two years at any one time.

10. On the 8 February 2010, following a visit by Ofsted Inspector E Juon on the 4 February 2010, the Appellant was served with a Notice to Improve which included a requirement upon the Appellant to maintain accurately the daily record of the names of the children looked after on the premises and to ensure that all records are easily accessible and available for inspection by Ofsted.

11. On the 16 April 2010, following a visit by Ofsted Inspector J Stacey on the 15 April 2010, the inspector issued a Welfare Requirements Notice requiring the Appellant to maintain an accurate daily record of the names of the children looked after on the premises and their hours of attendance.

12. On the 28 April 2010, following a visit by Ofsted Inspector C Walker on the 21 April 2010, a Welfare Requirement Notice was issued requiring the Appellant to maintain an accurate daily record of the names of the children looked after on the premises and their hours of attendance.

13. On the 2 December 2010, following a visit undertaken by Ms N Winton on the 24 November 2010, a Welfare Requirement Notice was issued again requiring the Appellant to maintain accurate records.

14. On the 21 December 2010, following a monitoring visit by Ofsted Inspector N Winton on the 15 December 2010, a Welfare Requirement Notice was served requiring the Appellant to maintain records required for the safe and efficient management of the setting, with particular reference to

PROTECT

maintaining a daily record of the names of children looked after and their hours of attendance.

15. On the 26 January 2011, following a monitoring visit by Ofsted Inspector N Winton¹⁹ January 2011, a formal warning letter was sent to the Appellant in respect of the offence committed of failing to comply with a welfare requirements notice.

16. On the 2 May 2012, the Appellant received a visit from two Ofsted inspectors and was observed to have 15 children in the nursery together with an additional, unknown number of children who had been taken off the nursery premises by her son, James Cooper. The Appellant did not deny that she was caring for more children than specified by her registration condition and received a caution for the offence of failing to comply with a condition of her registration.

17. On the 10 May 2012, the Appellant received a further visit from Ofsted inspectors who observed that she was caring for 34 children on the nursery premises. The Appellant did not deny the finding.

18. The registration of the nursery was suspended on the 10 May 2012 and the suspension remained in force continuously thereafter.

19. On the 28 May 2012, the Appellant underwent an interview under caution where she was advised by Mr Clive Rawlings of counsel. In the course of the interview, she admitted a number of factual issues put to her by the Respondent. During the course of the ensuing investigation, objections meeting and appeal, she further admitted a number of other breaches to the conditions of her registration.

20. The Respondent issued a Notice of Intention to Cancel on the 20 June 2012 against which the Appellant lodged an objection.

21. On the 3 August 2012, the Appellant pleaded guilty at the South East Surrey Magistrates' Court to six specimen counts of breach of conditions of her registration contrary to section 34(5) of the Childcare Act 2006 and was fined £2,000 on each count and ordered to pay prosecution costs.

22. The Appellant accepted that numbers in excess of the limit imposed by the registration conditions were becoming more regular and could not be reduced by changing attendance days or other arrangements.

23. The Appellant further accepted that records of children's attendances at the nursery were incomplete and/or inaccurate.

24. Whilst the Appellant claimed that she had relied on a variant to her registration condition which allowed her to care for a named child under the age of two to care for other children under that age, she admitted that she had cared for a child from 1 February 2010, when the child was aged 7 months for two days a week up until her second birthday; that she had cared for another

PROTECT

child aged 13 months continuously for 2 days a week from March 2010 and a third child aged 21 months from March 2011 for two days a week.

25. The Appellant accepted that she had kept inaccurate, inadequate or incomplete records for the purpose of misleading Ofsted as to the numbers of children attending nursery and had misled Ofsted and others as to the number of children in attendance on particular dates by moving some of the to the nearby Scout hut so that a visitor would see only those children who were on the nursery premises and it was acknowledged that the practice was used on the 2 May 2012, had been used on other occasions and would have been used for a planned activity on the 10 May 2012 had there not been two inspectors in attendance preventing the removal of children from the premises.

26. The Appellant confirmed that her arrangements to remove children from the premises involved staff in colluding with the deception and that she had requested two parents to provide false information to Ofsted regarding the ages at which their children had started at nursery.

27. For the purposes of the objections panel held on the 22 August 2012, to consider her objection to the Notice of Intention to Cancel, the Appellant produced a proposal for ensuring the future running of the nursery within the conditions imposed on the registration. The document set out how the Appellant would deal with the difficulties encountered and included a proposal that she employ an administrative assistant to deal with the daily administration tasks, thus separating the administration and care aspects of the nursery. She further proposed that the floor area of the nursery be enlarged to accommodate the children attending over numbers and a separate "porter classroom unit" be placed in the garden area for under two year olds. The Appellant further produced a list of children who were due to leave the nursery and to go into school in July 2012 with five leaving permanently between May and July 2012; 16 who would be attending school and three not attending during the school holidays.

28. The decision of the Objection Panel was issued on the 28 August 2012 and a Notice of Decision to Cancel Registration issued.

29. The Appellant appealed the decision by notice dated 20 September 2012.

30. In the course of the appeal, it has consistently been the Appellant's position that the breaches of conditions were a "recent lapse" on her part, that she had previously had an unblemished registration record and in the course of her own oral evidence confirmed her view that the breaches occurred on "odd days". She relied as part of her appeal, on the lack of understanding of the variation issued on the 7 October 2010 to enable a named child to attend at specified times whilst under the age of two years and advice given by the Ofsted helpline, as well as her perceived lack of consistency of advice from Ofsted about the need for registration of the Scout hut for use by the nursery.

PROTECT

31. At the hearing, the tribunal heard oral evidence from Ms Heather Allen, Ofsted Inspector and Ms Susan Will, the Ofsted decision maker in the case. Ms Will clarified her concerns about the Appellant's suitability for registration arising from her failure to show a clear commitment to change and adhere fully to Ofsted's regulations and requirements, her inability to take responsibility for the administration of the nursery and her attempts to try to shift the responsibility on to the parents. She described the process in place for Ofsted to offer support and instigate health checks for providers in difficulty, but underlined the fact that at no time had the Appellant sought such support or suggested any problem with her health. Ms Will concluded on the basis of the previous history and prior events that the Appellant's honesty had been compromised and that she could no longer lay her trust in her. She described how the Respondent had applied the escalating tariff and her own conclusion that her predecessor may have been overly lenient in 2010 in issuing a warning letter rather than instigating the cancellation of registration process. However, the Appellant's breach of trust was such that Ms Will could not envisage any action on her part which might restore that trust and concluded that she could not be satisfied that any future condition could be met by the Appellant.

32. Mrs Cooper gave evidence that she regards herself as a competent person and that she had successfully run the nursery on her own for 17 years. If granted one final chance to show that she is a suitable person to run the nursery she would request access to a named Ofsted officer to ensure that she could clarify any issues arising and make sure that everything was going according to plan. She described her commitment to the parents of children for whom she cared and her difficulty in telling them that she could not take the children on the days that they required. She described the sequence of events on the day of the Ofsted visit on the 10 May 2012 when there had been 34 children in attendance, explaining that 10 children were due to go home after lunch, 10 were going across to the scout hall to do Yoga Bugs and five were going to school, leaving 10 in the nursery to sleep and undertake activities in the afternoon. She confirmed that due to unforeseen circumstances there were only three members of staff in attendance, one being on annual leave and the other unwell.

33. In oral evidence, the Appellant acknowledged that she had been operating over the permitted numbers on "odd days" for a period of at least two years leading up to the events of May 2012 and that she had been in breach of the condition on the same scale as was observed on the 2 and 10 May 2012 for a period of approximately one year on Thursdays. The Appellant acknowledged that the situation had become unmanageable. At the hearing, she confirmed that she had realized that she had put children at some risk. She confirmed that going over the numbers had by May 2012 become something that was happening more often than not, not just at lunchtime but also at other times throughout the day. She confirmed that since 2010 there had been two children under two in attendance on Tuesdays for some part of the day and maintained that she was not underhanded in a vicious or calculated way, but had found herself under pressure. She described how after the visit on the 2 May 2012, she and her husband had discussed the possibility of closing the nursery until July in order to try to

PROTECT

control the number of children attending, but had eventually decided against that course of action.

Tribunal's conclusions with reasons

34. Although there remained issues in the appeal which were not agreed by the parties, we have taken the view that it is unnecessary for the Tribunal to resolve those issues. There was a high level of agreement on the facts, acknowledgement by the Appellant of breaches of her conditions and the welfare regulations and the Appellant's guilty plea to six specimen charges in August 2012 which we concluded provided sufficient evidence to enable the Tribunal to reach a fair and just conclusion, without consideration of the other matters remaining in issue.

35. For clarity, we set out the breaches admitted by the Appellant in the course of the investigation and appeal, as well as those admitted in the criminal proceedings before the South East Surrey Magistrates' Court on the 3 August 2012. The appellant's admissions were as follow:

- a) Problems over a period of 18 months up to May 2012.
- b) Operating in excess of child numbers on the 2 May 2012;
- c) Operating in excess of approved child numbers on the 10 May 2012;
- d) Operating in excess of approved child numbers on "most Thursdays" during 2012;
- e) Deliberately failing to keep accurate records of children attending the nursery from 2010 – 2012;
- f) Failing to ensure that sufficient staff were on duty to meet the needs of the number of children attending the nursery;
- g) Failed to keep adequate records of staff on duty to conceal from Ofsted the fact that the nursery was operating in breach of conditions;
- h) Cared for three children under the age of two despite the condition of registration that she should not do so;
- i) Moving children out of the nursery and into the scout hut to mislead Ofsted and others about the number of children in attendance at the nursery on the 2 May, 10 May 2012 and on other occasions;
- j) Colluding with staff to deceive Ofsted and others by moving children to the scout hut;
- k) Asking two parents to give inaccurate information about their children's dates of birth to Ofsted after the suspension of registration;
- l) On the 2 May 2012 failed to collect children from school;
- m) Lack of frankness with Ofsted regarding the deception up to and including the interview under caution on 28 May 2012;
- n) Failed to demonstrate a full understanding of the seriousness of the matters investigated and the impact on children.

36. We did not accept the Appellant's interpretation of her conduct as a "recent lapse". The use of the term "lapse" suggests a consistent standard from which there has been a temporary falling. The evidence presented, even from the Appellant's own admissions, supported the conclusion that there had been regular and long term deviation from the conditions imposed upon her registration in terms of the numbers cared for at the nursery. The evidence presented was that there were frequently between 15 and 34 children in attendance, with sufficient staff on duty to support the registered number of 10

PROTECT

children. Even on her own evidence, the nursery in 2012 remained grossly over numbers and the number of staff in attendance at any given time cannot be ascertained, nor could even Mrs Cooper work out the staff:child ratio over a sustained period from 2010 to 2012.

37. We note from the chronology and from the evidence supporting it that Ofsted has applied the escalating tariff very fairly in this case, offering the Appellant every opportunity over a long period of improving her work practices and putting her house in order. She failed to respond to the notices and warnings issued to her over an extended period from February 2010 to May 2012 and did not appear to appreciate the seriousness of the situation in which she had placed herself. Her explanation for failing to limit the numbers of children because of an inability to refuse parents' demands reflects a lack of understanding of professional boundaries. We concluded on the basis of Mrs Cooper's own evidence of her dealings with Ofsted that she did not understand the role of the regulator, and did not shoulder her own responsibilities in the administration of the nursery. Her description of a "recent lapse" in her administration is far removed from the reality of a planned and gross contravention of the relevant regulations and registration conditions over a significant period of time.

38. A significant aspect for the tribunal was the collusion with staff and the fact that the Appellant asked parents to collude in deceiving the regulator further even after she had been found out by asking two families to provide inaccurate dates of birth for their children to conceal the further breach of condition regarding caring for children under the age of 2. It is necessary for any provider to show a spirit of co-operation with the regulator and an ability to work with the regulator in the interests of the children for whom they care. We have concluded on the basis of the Appellant's admissions that she showed herself to be unable to do that.

39. The application of the escalating tariff over a period of two years showed that the Appellant did not appreciate or understand the significance of her own actions. She was given every opportunity to change through the five notices, warning letter and caution that she received. Despite the admitted leniency of Ofsted in the action taken, she pursued the appeal with a request that she be given one final chance to put things right and had prepared for the objections hearing a document setting out her proposals for change.

40. We carefully considered the document prepared by the Appellant for the objections meeting and referred to in the appeal as her proposal to ensure future compliance with the registration conditions. We noted that the intention was to extend the nursery building, employ additional staff to deal with administrative tasks and to add another classroom unit in the garden area to provide space for under 2s. We regard the document as a business plan for the expansion of the nursery to accommodate the numbers and ages of children already admitted by the Appellant and does not demonstrate a clear intention to comply with the existing registration requirements. For instance, the appointment of an administrative officer would not address the core issue as Mrs Cooper would still hold overall responsibility for the provision, including the management of the administrative officer. We concluded that the

PROTECT

Appellant had still not demonstrated any understanding of the importance of complying with the conditions imposed and the requirements of the regulations and that we could not have any faith that she would comply with any similar conditions imposed upon her in the future.

41. From the evidence, we conclude that the Appellant does not understand her own responsibility or the role of Ofsted and cannot be trusted as a provider in the future.

42. The Respondent set out in its case summary the reasons for its decision to cancel the Appellant's registration and confirmed that it did not take steps to cancel a registration lightly. The present case is not one where there is a minor or isolated breach of conditions: we accept the Respondent's submission that it was in fact planned, gross had occurred over a very long period time and involved a planned deception of the regulator, parents and others. The Respondent had stripped the reasons for opposing the appeal to the fundamentals and underlined that its opposition was based on lack of trust in the Appellant as a provider and the conclusion that she was unsuitable to be a provider. We agree and we do so because we found that the evidence supported the conclusion that there had been planned deceptions of the regulators, through the inaccurate record keeping of attendance registers and the removal of children from the nursery to the Scout hut; there had been an attempt to persuade two parents to lie about the ages of their children when they started in the nursery and lies to a parent about the existence of a variation to enable the Appellant to care for children under two. The Appellant lied at the PACE interview about the involvement of her son and the removal of children to the Scout hut on the 2 May 2012. We are satisfied on that evidence that the Appellant is not to be trusted in her dealings with the regulator and is not therefore a suitable person to be registered as a provider.

Order:

Appeal dismissed

Dated 31 December 2012

Meleri Tudur, Tribunal Judge
David Braybrook, Specialist Member
Jenny Cross, Specialist Member