

Care Standards

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

Heard on: 15 May 2014, 16 & 17 June
Heard at: Pocock Street, London

BETWEEN

MINI ME'S NURSERY AND PRE-SCHOOL

Appellant

-v-

OFSTED

2014 2170.EY

Respondent

BEFORE

**Tribunal Judge Melanie Lewis
Tribunal Judge Melanie Plimmer
Ms Janice Funnell**

Representation and Witnesses

1. The Appellant was represented by Ms Cawley Wilkinson, Counsel attended by Ms Grant, Solicitor and Mr Smith, Solicitor. The witnesses were Ms Caroline Basi (nee Casey), Ms Sheneil Buddington, the manager, Ms Sandip Bassi, the owner and Director and Ms Neema Kanhum, an apprentice.
2. The Respondent was represented by Ms Birks, Solicitor. The witnesses were Ms Nazarkardeh, Early Childhood Regulatory Inspector and Ms Kathryn Bell Senior Officer Compliance, Investigation & Enforcement team.

Reporting Order

3. 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

4. This is the appeal of Mini Me's Nursery and Pre-School Ltd ('the Applicant') who is the Registered Provider and who holds registration with Ofsted. The company director of the Appellant is Ms Sandip Basi but it is the nursery registration alone which Ofsted seek to cancel.

5. On 9 April 2013 the Registration was suspended, extended on 29 May 2013 but lifted on 3 June 2013.

6. Ofsted served a Notice of Intention to Cancel Registration on 19 September 2013 on the grounds that the Appellant no longer met the prescribed requirements for registration on the basis that continued registration would place children at risk of significant harm and seriously compromise their welfare and development.

7. On 19 December 2013, an Objection Panel Hearing was convened to hear Ms Bassi and Mrs Buddington (the intended manager) and consider whether or not a decision to cancel should be made. It concluded it should.

8. On 3 January 2014 Ofsted served a Notice of Decision to cancel registration.

9. On 31 January 2014, an appeal against cancellation was submitted on behalf of the Appellant.

10. On 14 February 2014 Ms Sheneil Buddington took over the role of Nominated Person for the Applicant and is currently the manager of the setting and also a Company Director. Neither Ms Basi nor Ms Buddington hold registration with Ofsted in a personal or individual capacity

Ofsted's Concerns

11. The parties have helpfully agreed a detailed 'Scott Schedule' comprising a number of concerns, listed (a) to (z), setting out the concern, the Early Years Foundation stage reference, the page reference and the Appellant's response. We summarise those concerns that at the date of the hearing were identified as ongoing. Live concerns were:-

- c. Lack of and inadequate risk assessment.
- e. Inadequate recruitment procedures in relation to assessment and references.
- f. Lack of staff files.
- h. Poor knowledge of safeguarding issues.
- i. Lack of knowledge of the statutory framework and EYFS.
- j. Poor communication within the organisation.

- k. Inadequate funds to provide children with the food detailed on the menus.
- m. Sandip Basi's lack of contact with the nursery.
- n. An apprentice and new member of staff being left alone with children.
- o. An individual who claimed not to be a member of staff seen holding a child.
- p. Two managers having walked out without notice.
- r. Inability to deploy staff adequately despite low numbers of children.
- s. Lack of knowledge about requirements for supervision of children.
- t. A disqualified person applying to become the Registered Manager.
- u. Inadequate observations, assessments of children and planning.
- v. Poor knowledge of effective ways to plan and assess children's learning.
- w. Lack of clarity about management structure.
- x. Registers not maintained accurately.
- y. Inadequate records for children.
- z. Inadequate induction and appraisal of staff.

Legal Framework

12. Section 34(1) of the Childcare Act 2006 provides that a person may not provide early years provision on premises in England which are not domestic premises unless he is registered in the early years register in respect of the premises.

13. Schedule 2, Part 1, paragraph 1 of the Childcare (Early Years Register) Regulations 2008 requires that applicants for registration be suitable to provide early years provision, that the applicant will secure that the proposed early years provision meets the Early Years Foundation Stage (EYFS) learning and development requirements, will comply with the EYFS welfare requirements and has carried out an assessment to identify any risks to the health or safety of children for whom provision is to be provided and has appointed an individual to manage the provision which is suitable to care for young children.

14. Where the applicant for registration is an unincorporated association, the applicant must nominate an individual who is a member of the governing body of the applicant to be responsible for dealing with matters relating to the applicant's application for registration and subsequent registration and oversee the management of the early year's provision. The individual is referred to as "the nominated individual".

15. Pursuant to section 68(2)(a) Childcare Act 2006 the Respondent asserts that the requirement for the applicant to be an individual who is suitable as a provider of childcare is not met. Further in accordance with

section 68(2)(c) CA 2006 the Appellant had failed to meet the learning and development requirements and comply with the welfare requirements.

16. On an appeal the Tribunal considers matters afresh at the date of the hearing. 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.

Evidence and Witnesses

17. The parties had helpfully worked together to prepare three bundles of extensive documentary evidence. The thrust of Ofsted's case, particularly the evidence of Ms. Bell who was the ultimate decision maker, was that any improvement, whilst welcome was 'too little too late'. They acknowledged that, particularly since Ms Buddington had become involved in the latter part of 2013 but more so from May 2014, there had been improvement. However it was 'two steps forward, one step back' and there was no sustained progress. Ofsted could not sustain the high level of monitoring that had been in place and appeared to have been the motivator for change rather than the Appellant seeing what needed to be done. They stressed that these were minimum requirements and overall they had no confidence that change would be sustained to move forward to the first post-registration inspection.

18. By contrast, the Appellant's case focussed on answering allegations and concerns made. They had not appealed the Suspension, recognising shortfalls, but argued that they had now moved forward. Ms Basi had no experience of running a Nursery or of the EYFS Regulations, but said she had taken advice before setting up the Nursery with Ms Casey as the Nominated Individual. Ms Casey had a social work qualification but no experience of EYFS. Ms Basi was employed full time elsewhere so dependent on the Manager. There had been difficulties in recruiting a Manager who stayed for sufficient time, to implement change. They had been let down in the past but Ms Buddington was now in place and had a strong incentive to stay and drive change forward, as she had been made a Company Director.

19. A key concern was the instability of day to day management and leadership. Ms Bell in her final review summarised that Ms Ahmed had left in early 2013, Ms Sunocks in September 2013 and Ms Bristow was on maternity leave but acting as a deputy on visits in March, July –October 2013. Ms Roberts and Ms Shepherd were notified as new Managers in September and October 2013 but did not stay and Ms Buddington was employed at about that time as a Consultant to help the Nursery recruit staff. From January 2013, she was employed as the new Manager but was often (at least until 12 May 2014) not present leaving the day to day management to a deputy and the third in charge.

20. At the commencement of the hearing, the Tribunal indicated that it would be assisted by focussing on changes made and how they would be sustained rather than going over historic events and any factual disputes about what exactly had been said at monitoring visits.

21. Ms Conroy of Ofsted attempted to carry out an inspection on 6 March 2013. When she contacted the then manager, Ms Bristow on 20 March she was told that the setting would re-open the following week. As a result of concerns there was a suspension notice issued on 9 April 2013. That was not appealed. The concerns were wide ranging, including issues such as staff employed with no CRB checks, unqualified staff and a clear lack of structure.

22. Ms Nazarkardeh, the Early Childhood Regulatory Inspector from the Compliance Investigation Enforcement Team then became involved and has consistently monitored this case. The case summary and chronology set out the number of visits which were agreed by the parties. The case had a high level of input. Ms Nazarkardeh visited again on 29 April 2013, 13 May 2013 and on 15 May 2013 when Ofsted took the decision to impose a second period of suspension.

23. On 3 June 2013 the suspension was lifted as steps had been taken to reduce the immediate risk of harm. Ms Nazarkardeh made five further visits between 20 June 2013 and 19 September 2013 and set out the detail of those concerns in her two statements, with supporting evidence recorded at the time using the Ofsted 'Toolkit'.

24. A meeting was held on 13 May 2013 with Ofsted, at the request of Ms Basi, so that improvements needed could be set out. Ms. Basi remained as the director of the registered provider but she had no involvement day to day because she was in full time employment elsewhere. Ms Casey was the nominated person and Ms Sunnucks was the new manager.

25. Ofsted considered cancelling the registration at that point but gave the setting a further opportunity to move forward, with a continued notice of suspension. Ms Nazarkardeh visited on 20 June 2013 to monitor the operation following the period of suspension.

26. On 31 July 2013, Ms Nazarkardeh made an unannounced visit. Ms Bristow said that although she had been working for 11 months, she had not received any pay. Ms Sunnucks had raised similar issues with her and then sent her an email to say she had been asked to accept pay in the form of cash in hand. It was not part of Ofsted's role to become involved in issues of pay or line management, but there was a concern about a lack of stability in the day to day structure and leadership overall.

27. At the time of Ms Nazarkardeh's unannounced visit on 9 September 2014 there was a third manager in place. There was again concern that a staff member had not been formally recruited or gone through the appropriate checks. On 11 September 2013 a decision was made by a senior officer, Mr O'Neil to cancel the registration.

28. Ms Nazarkardeh made a further visit on 19 September 2014, but decided not to issue a further suspension. A consultant had been taken on and it was decided to see if that could bring about change.

29. On 1 October 2013, Ms Nazarkardeh made a further unannounced visit and also on 14 October 2014 and 14 November. Ms Casey said Ms Bristow was the manager, but Ms Bristow did not confirm that. Ms Nazarkardeh raised issues that the learning and development requirement for older children were not met, raising an issue about a particular child who appeared to have special needs. Another example was noting a mark on a child's back but no mention of what steps were taken in consequence of this, which raised possible safeguarding issues. With so few children she would have expected the three staff to complete many more regular observations to track children's development and the next steps in learning.

30. Ms Nazarkardeh carried out a further visit on 12 December 2013 but still noted that Registers were not maintained and that the staff working with the older children and with babies lacked the knowledge to assess and plan the next stage of development.

31. Ms Nazarkardeh carried out further visits 29 January, 12 March, 27 March and 8 April 2014.

32. On 7 May 2014 there was a case review. Ms Nazarkardeh's concern was that Ms Buddington was not present in the nursery often enough to provide strong management and leadership and that the pace of improvement remained insufficient.

33. Ms Casey in her oral evidence acknowledged that in about September 2013 she recognised that she was not the correct person to be the Nominated Individual. She had supported Ms Sunnucks in recruiting staff. She denied that an apprentice had been left in the baby room on her own. She denied that community payback persons attended the setting when children were present. She blamed a lack of any CRB checks upon Ms Sunnucks. She denied that her husband had ever been left alone with the children.

34. Ms Buddington in oral evidence was very candid. She stated that when she first walked into the setting she thought 'Wow', which we clarified was her surprise that with such a large number of failings, the setting was still open. She had initially come in as a consultant which was a role she had newly moved into following, moving up through various levels of childcare responsibility to managerial positions. She had a number of childcare qualifications including a degree. Her complete CV was provided late and did not accord with Ofsted's records. Time was taken on the point, but ultimately raised no issues as she was able to satisfactorily explain her employment history.

35. Ms Buddington told us that when she first became involved, her priority was recruitment of well qualified staff, appropriate staff structures and training. She highlighted the work she had done on staff structure and training, putting

in place policies and procedures, making changes to the premises and issues relating to parent and child development. Direct observation and planning was now in place, each child had a key person and there were regular meetings with parents. She limited the registration from 220 children to 50. The Nursery provided an invaluable childcare service in the local community. She stressed at all times that she was a highly professional person who had over 8 years childcare experience. She was passionate and committed to making the necessary changes and providing a good service.

36. Ms Basi had very limited involvement on a day to day basis. We were told that since the adjourned hearing she had given up her job as a beautician to be available at the setting full time. The difficulty had been getting a good manager who stayed in post. We learnt that was not because she did not have financial resources available to her, as she said she had considerable assets available.

Submissions

37. At the end of the evidence we heard helpful and detailed oral submissions from the Respondent and read written submissions on behalf of the Appellant which were amplified in oral submissions. They both cross-referenced the evidence in the schedule and we reserved our decision which we now provide with reasons.

Conclusions and Reasons

38. We have concluded that all of Ofsted's concerns are justified. We were assisted by the clear and measured evidence of both Ms Nazarkardeh and Ms Bell. We are satisfied that Ms Nazarkardeh accurately recorded what she saw, read and was told. We are satisfied that both kept an open mind and reviewed the case at regular intervals, including shortly before the hearing to assess the rate of progress and whether the cancellation of registration could be withdrawn.

39. We have recorded the history of this case to show the timeline. The Appellant has had over 18 months to bring about sufficient change but have not done so. The Appellant's witnesses stated that they were not fully aware of Ofsted's concerns but the Suspension Notices and Objections Panel hearing on 19 December 2013 made clear the high level of concerns and the issues to be addressed. They were, we are satisfied offered meetings with Ofsted as requested. Ms. Nazarkardeh raised issues with the staff. Any failure of communication with them, was because of a lack of overall leadership and management on the part of the Appellant.

40. We reject the submission that Ofsted were heavy handed and disproportionate. The history does not support that at any point.

41. Turning to our findings, this is not a case we conclude, that turns on any specific findings of fact but how the evidence overall is weighed. All of the Appellant's witnesses accepted that the nursery was failing in 2013 and

that much needed to be done to get it to a satisfactory standard. They claim that those changes have now been made. The question for us is whether there been sufficient change and whether it is sustainable.

42. We conclude that all of Ofsted properly distinguished between those that are historic and those that are ongoing. We accept it is relevant to take into account historic concerns by way of background because it illustrates that the nursery has been struggling to cope with basic requirements for a long time. Historic concerns such as an apprentice and new member of staff being left alone with children and an individual who claimed not to be a member of staff seen holding a child on 9 September 2013, are historic and one-off, but show the level of failure. Other examples of this are very basic matters such as ointments being left out and it having to be pointed out over the course of three monitoring visits that plastic nappy bags were within the reach of children.

43. There can be no doubt that there were a number of very serious concerns which the Appellants accept in September 2013. This was a nursery, which was set up by individuals with little experience to prepare them for running a business, let alone a business in childcare. Both Ms Basi and her sister in law Ms Casey were very naïve and uninformed about the requirements and expectations. It is unsurprising that Ofsted identified so many serious concerns so quickly and that the registration was suspended and we find that Ofsted was entirely justified in suspending the nursery for the reasons it has provided.

44. We acknowledge the positive moves to greater compliance, although we do not attribute the weight to each improvement that Ms Cawley Wilkinson invites us to. Ms Bell agreed there had been some progress, albeit emphasising that they had come from a low starting point. It was agreed that there are now adequate risk assessments in place. There is now some evidence of recruitment procedure, with staff files. There is some evidence that staff training procedures are being set up.

45. Ms. Nazarkardeh accepted that the paper work now in place showed a greater knowledge of safeguarding issues. Ms Bell accepted there was an “indication of compliance” and acknowledged Ms Buddington had put in place adequate observations, assessment of children and planning. Such improvements however, are only to meet what are the minimum requirements and are far short of establishing a track record of good practice, understood and routinely applied by staff.

46. We found Ms Buddington to be a reliable and honest witness. She was both candid and accurate about the real shortcomings she found in the nursery when she became involved from in September 2013 and had been surprised that it was still running. She was prepared to acknowledge her own lack of experience and reflected on whether she really had sufficient experience in her new role as a consultant, to turn around a setting that was so clearly failing. Her professionalism and her commitment to succeed in her chosen career impressed us. She has considerable experience in childcare

and holds a number of impressive qualifications, which were obtained whilst working. She is clearly resourceful.

47. We acknowledge that there has been a more stable staff since January 2014 but even after that date, there is still evidence of staff not understanding the management structure. Prior to May 2014, we accept that Ms Buddington was only ever present on an irregular basis. The reasons seemed to us, a mixture of her own personal and family issues and financial issues. Like other managers she was also concerned that being involved with a failing nursery might adversely reflect on her professional record.

48. It was quite clear that she needed to be in the setting managing, checking and modelling good practice, not just improving the written procedures. We accept that the deputy and third in charge told Ms Nazarkardeh in this period that they felt that they were having to take on more responsibility than they felt ready for. There was remained little clarity about the management structure and who was in overall charge. Ms Khanum is a young apprentice, who said that things had now turned around and that she now had a clarity, as to her pay and who was her manager, but we conclude that this is very recent.

49. We accept that change will only be sustained if there is a robust and stable management structure in place. We have no doubt the Respondent has demonstrated that it is more likely than not that the management structure will be found wanting and it has on many occasions. Ms Basi has not developed sufficient insight into the nature and extent of past failings and her own role in them, and the challenges that lie ahead. Ms Buddington's position at the nursery seems to us to remain unresolved and precarious. She has not been paid, save for her bus pass although Ms Basi told us that she had considerable funds available to use at the nursery. This echoes earlier issues raised by other staff. No contract had been finalised to secure Ms. Buddington's role as a Director in the business and we heard changing evidence on what her percentage return on the profits would be. Ms Buddington acknowledged that she would need a consultant to work with her and monitor her practice but there was no firm evidence of an identified individual, with contracts and funding in place. She told us that she also hopes to undertake a Masters Degree from September 2014, which would be a further draw on her time even if attendance was in the evening.

50. Neither Ms Casey nor Ms Basi accepted responsibility for the management issues, even those directly within their control such as pay and conditions. Neither have undergone EYFS training, although they had said they would. We saw only very recent evidence of payslips and it seems that prior to that staff were self-employed, using Agency staff where needed, with no consideration for the effect on children on a changing staff group.

51. Although we accept that some concerns were addressed when Ms Buddington came into post, the management structure was insufficiently robust to address adequately Ofsted's concerns in a manner that would be realistic or sustainable and it is unsurprising that notwithstanding Ms

Buddington's efforts as a consultant, there continue to be serious and justified concerns.

52. Staff have only recently been booked onto Safeguarding training and whilst there are now templates in place, that alone is not evidence that they are used or how they are used to inform practice. Only in recent weeks has Ms Buddington liaised with the Local Authority over what support and training they could assist with. Similarly the Learning and Development requirement was not met as recently as April 2014, when recording started but again no clear evidence that this was informing practice. Induction training has only just begun, despite a long history of staff we are satisfied, not being adequately trained and supported. Staff recruitment procedures are beginning but need to be further worked on. The interview template we read for Ms Buddington was in a standard form and it was conceded wrongly dated 2013, but was produced very late despite Ofsted making three requests to see her staff file. We got no sense that Ms Basi had examined her history in any critical way to make sure there was an explanation for any gaps. That task was left to the Tribunal.

53. In weighing all these matters we have weighed such changes as we can in the Appellant's favour. We were told and accept that nursery places are needed in the local area. At the date of the hearing a competent manager is in place with aspirations to do better, but this is very recent against a long history of very serious concerns which were not addressed adequately, despite many opportunities. Cancellation of Registration is an appropriate and proportionate sanction in all the circumstances of the case.

APPEAL DISMISSED

**Melanie Lewis
Tribunal Judge
27 June 2014**