

Care Standards

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

BETWEEN:

AD and Little Diamonds Pre-School

Appellants

v

Ofsted

Respondent

[2015] 2461.EY & [2015] 2462.EY

Before
Mr Laurence Bennett (Tribunal Judge)
Mr Graham Harper
Mr Michael Flynn

Heard 19 – 23 October, 18 November 2015
29 February, 1 March 2016
Pocock Street, London

Determination 31 March 2016

DECISION

Appeal

1. AD appeals under Section 74 of the Childcare Act 2006 (the Act) against the cancellation of her registration as a child minder by Ofsted under Section 68(2) of the Act.
2. Little Diamonds Pre-School by AD appeals under Section 74 of the Act against the cancellation of its registration as a child care provider on non-domestic premises on the Early Years Register and the General Childcare Register Part A at Cyclopark, Gravesend, Kent under Section 68(2) of the Act.

Attendance

3. AD attended the hearings. She represented herself.

4. Ms Rachel Birks Solicitor with Field Fisher Solicitors represented Ofsted.
5. Witnesses for both parties appeared in person as recorded below.

Restricted reporting order

6. At the commencement of the hearing the Tribunal ordered that there shall be a restricted reporting order under Rule 14(1)(b) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 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. For that reason the Appellant and her family, users of her services and non-professional witnesses are referred to by their initials.

Preliminary

7. The Tribunal made directions to facilitate the hearing on several occasions. AD was not initially compliant.
8. Ofsted made an application to strike out AD's appeal because of non compliance. The application was refused as the Tribunal was satisfied that AD's late compliance was sufficient to enable a response. The Respondent's application for costs was postponed to the hearing but not further pursued.
9. The Respondent produced as directed a Scott Schedule. This specified 27 allegations relied upon. It set out alleged failures to meet requirements within Childcare Act 2006, The Childcare (General Childcare Register) Regulations 2008, The Childcare (Early Years Register) Regulations 2008, The Childcare (Early Years and General Childcare Registers)(Common Provisions) Regulations 2008, Statutory Framework for the Early Years Foundation Stage published 27 March 2012 and Statutory Framework for the Early Years Foundation Stage published 31 March 2014/effective September 2014.
10. The Tribunal bundle was in excess of 4 lever arch files and included copies of relevant statutes and legislation and statements and exhibits of each witness.
11. A position statement and written closing submissions were also produced by the Respondent at appropriate times in the proceedings.
12. Throughout the hearing time was given for AD to indicate her response in respect of each of the issues so that she may be assisted in developing her case and questioning witnesses.

The hearing

13. All oral evidence was taken on oath or affirmation.
14. As noted during case management and stated in directions the Respondent presented its evidence first.

YA

15. Whilst YA confirmed her statement and gave information of which she is directly aware, she presented her conclusions and an interpretation of incidents as factual evidence. She drew much of this from conversations with her son CA. She is aware of his sensitivities and considers that he requires a particular approach. She was not satisfied that such a sensitive approach and her own principles were maintained by AD. She feels AD was abrupt and had requirements of CA which she did not consider appropriate such as expecting him to clean his plate. YA gave confusing information about issues such as borrowed swimming shorts. She referred to strings of texts and Facebook exchanges which indicated a continuing relationship and did not reflect the underlying concerns that she mentioned at the hearing. We have made findings of fact on matters which were within her direct knowledge.

16. YA expressed animosity against AD including several mentions of their different cultural traditions and origins. YA altered views of events when taken to contemporaneous emails. The impression gained was of increasing dissatisfaction with what YA saw as a failure by AD to comply with the standards she would set. She did not indicate overall dissatisfaction with what was provided save in respect of the particular incidents forming the grounds of cancellation.

ET

17. ET's evidence related to her contact with AD as a swimming instructor. She gave answers to the best of her recollection. They confirmed the contents of her statement. She was definite about time estimates during which CA was left unsupervised having arrived with AD.

LS

18. LS also told us that as a concerned parent who knew CA because he was in the same class as her child, noted he was alone in the pool changing room and naked for around 25 minutes before AD appeared. She asked her son who had finished his lesson to take off his swimming trunks and give them to CA. They were returned some time later. She referred Facebook exchanges with YA whom she knew from contact between their children. She was clear that AD had not told her that she had gone to find trunks in her car but said she had other children to look after. AD said that she looked through 3 bags to find CA's trunks but they were not there.

Mr Laurence Tricker

19. Mr Tricker is the experienced manager of Cyclopark, a multi-purpose, predominantly leisure venue. He considers the initial adjustments following agreement for Little Diamonds to take rooms were in the nature of adjustments that would happen around any new occupation. These included issues relating to fire door and entrance door. Similarly, difficult discussions relating to storage following the cessation of operation were issues he had come across before. Ultimately, whilst AD hoped that the suspension would be lifted and her business would continue, the space was required and items were removed. He recalled there may have been one or two occasions when he called in during nursery hours but AD did not respond from inside the nursery premises. He said that electronic communication between himself and AD after the suspension showed her frustration and anger and he found the tone offensive and intimidating.

Mr Ben Woodcock

20. Mr Woodcock, CA's classteacher described events on the 20 October 2014 when AD called to collect CA. He completed an incident sheet, a green report some 3 weeks later. He explained he had not made notes at the time but wanted to discuss the matter with the school's child protection officer. Neither she nor the deputy head who is the deputy child protection officer was in school and the report was delayed. He recollected the incident as set out in his statement. He described CA as immature; he will cry if he does not get his own way. On the day in question he was particularly upset because earlier he had lost his school council badge. This had been building up during the day; he did not want to go home without it. As in the past he started crying and lay on the floor and would not go. Mr Woodcock considers AD was short with CA and just wanted to take him out. She did not attempt to understand why CA was behaving as he was.

Mrs Caroline Conroy

21. Mrs Conroy, Headteacher of CA's school confirmed that Mr Woodcock expressed concerns to her and she asked him to complete a report form. Delay was caused by a combination of school holidays and training obligations and she felt unable to take further action until the forms were available to her on 3 November 2014. She confirmed that in the past CA had presented in a way it was felt he required behavioural play therapy. He was prone to tantrums particularly when he did not get his own way. She mentioned that he might have expected a replacement council badge by the end of the school day but this was not possible as she held them and was away on that day (20 October 2014).

22. Mrs Conroy said the school had received messages on morning of 21 October 2014 that CA may not be picked up by AD but this was not clear. School telephoned twice when he was not picked up, ultimately school staff spoke to AD as a result of which a telephone call was made to YA who collected him. She confirmed school has used behavioural techniques for CA including de-escalation; she also mentioned that she would have expected professionals caring for children to be trained for example as her staff in TEAM TEACH.

Ms Rosaline Cole

23. Ms Cole, Social Worker explained that as a result of contact by the LADO and Ofsted, she investigated and reported upon the incidents involving CA. She concluded that at the time he was not at risk of harm, particularly as she stated that by then the relevant child minder was no longer involved.

Ms Vicki McCarthy

24. Ms McCarthy, Senior Child Safeguarding Officer Kent County Council described the process of referrals to her. Relying on reports from the individual social workers involved with relevant children minded by AD and noting that YA had withdrawn CA from her services, she concluded children were not at risk and no further action was to be taken by the Local Authority. In response to questions at the hearing she said that her decision took into account that Ofsted had suspended AD's registration.

Ms Jinder Pal Kaur

25. Ms Kaur is the Local Authority designated officer (LADO) but was not at that time. In September 2015, the time of her unsigned statement, she reviewed the files and gave an opinion. She has not had direct involvement. She indicated that it is likely

that concerns were not taken forward in respect of other children who might have been affected by issues CA disclosed such as ear pulling as they had not themselves signified this was an issue.

JF

26. JF, a mother of a child who attended Little Diamonds was direct in her evidence but somewhat vague in detail. She was clearly disappointed that an ideal crèche opportunity for her did not prove acceptable. She gave details of what she observed on the occasions she was present at the nursery. She saw staff handling children but gave her own theories and conclusions which may or may not have necessarily been the case. She gave direct evidence about the absence of AD at the nursery when she was there and staff telling children off.

Ms Stefany Hodge

27. Ms Hodge, an NVQ assessor recounted her observations of Fiona a student who had achieved level 2 qualification and was undertaking level 3. This required work experience although she had the status of a direct employee of Little Diamonds. Ms Hodge was present when Fiona had used her own mobile telephone to take photographs for children's records which were subsequently downloaded on to Fiona's home computer. Ms Hodge said this was inappropriate. She was told this arose as the nursery did not have a camera. These photographs were subsequently deleted. Ms Hodge repeated conversations she had with Fiona after the nursery had ceased operation, particularly about a request by AD to agree what they might say to Ofsted.

Ms Jennifer Gee

28. Ms Gee, an Ofsted Inspector confirmed her statement and appendices which gave an extensive chronology of her investigations and the strategy she employed. She explained the conclusions she had reached and responded to questions raised by AD about the extent of her investigations and what became available to her by reference to the evidence within the bundles. She clarified where possible, imprecise transcripts of recordings.

Mrs Karen De Lastie

29. Mrs De Lastie explained her role as Ofsted's Senior Officer South East requires that she takes final decisions in connection with registrations. She said she is mindful of the impact of her decisions upon the registered person but on behalf of the general public she needs to ensure services are safe. She stated certain of the allegations against AD could not be overlooked such as assault but others in isolation might not have led to cancellation. She suggested that had AD successfully taken steps to appoint a manager, Little Diamonds might have continued although she did not see how AD's suspension as a child minder could have been lifted. Further had that number of issues arisen over say 12 months, they might have led to a review at the end of that time but as they arose within a relatively short period and could not be overlooked it became necessary to take action. She considers in all the circumstances the action taken was proportionate.

GW

30. GW's evidence was presented with clarity. She limited herself to what she could remember and stated when she could not. She recounted her history of contact with YA and CA because her own son has been taught with him since age 4. She

was present on the occasion AD collected CA from school when he was having what she described as a meltdown because of his lost badge. She said that Mr Woodcock managed to get him up and out of the classroom but CA went on to the floor again, AD asked him to get up and held out her hand. She was clear CA was not pulled up and nothing unusual took place. CA eventually went with AD.

31. On the occasion CA did not have his swimming trunks, GW arrived at the swimming pool for her own child's lesson. When she entered the changing room she found LS had given CA some trunks. She said she was not aware that AD had left a child alone either in the car or at the pool on any occasion. She has had encounters with YA and ended a friendly helping out arrangement. She said that CA has previously made unfounded allegations against her own son that were ridiculous, such as pulling his hair when it is so closely shaved that it would not be possible. She considers YA over sensitive about CA and extremely defensive and dismissive in her reactions.

AD

32. AD presented her evidence confidently. We have referred to her comments on the allegations set out in the Scott Schedule below. In cross examination she refined and provided additional information which often changed the impression previously given of events. Throughout her evidence she gave insight into her relationship with YA which seems to have developed over the period and extended beyond the child minding services she provided. Examples given include leaving her car at YA's home whilst she went on holiday with her own son.
33. AD responded to the allegations setting out what she considers happened on each occasion and expressing her willingness to develop and learn in areas which could be improved such as knowledge of procedures and management techniques such as when interviewing staff. She detailed help she had expected from Ofsted and Kent County Council although some had been received and her intention to continue on relevant training courses to develop her knowledge.

The Law

34. The Childcare (Early Years Register) Regulations 2008 Schedule 1 set out the requirements for someone to be registered on the Early Years Register – this includes the requirements that the person to be registered is suitable (paragraph 1) and that the child minder will secure that the EYFS welfare requirements are complied with (paragraph 5).
35. The EYFS welfare requirements are contained in section 3 of the EYFS Statutory Framework. This is given statutory force by section 39 of the Act, and from 1 September 2012 the Early Years Foundation Stage (Welfare Requirements) Regulations 2012 and the Early Years Foundation Stage (Welfare Requirements) Order 2007. The net result is that compliance with section 3 of the Statutory Framework document is a requirement of registration on the Early Years Register.
36. Any allegation that an early years provider has:

Failed to meet the welfare requirements or failed to have regard to the guidance in Section 3 of the EYFS Statutory Framework may be taken into account by the Chief Inspector in the exercise of his functions under Part 3 of the Act.

37. Registers enable the Chief Inspector to take action, such as cancellation of registration, when a provider has failed to meet the various regulations which govern the General Childcare requirements of those Regulations including that children being cared for are kept safe from harm.
38. Throughout Ofsted's regulatory framework, harm and significant harm are defined by reference to section 31 of the Children Act 1989 under which harm is defined as ill treatment or impairment of physical or mental health or physical, intellectual, emotional, social or behavioural development, including impairment which may be suffered from seeing or hearing another person being ill-treated.
39. Section 68 in Part 3 of the Childcare Act 2006 provides that Ofsted may cancel in a number of circumstances. Those include by section 68(2)(a) that the prescribed requirements for registration have ceased, or will cease, to be satisfied, or (c) that the person has failed to comply with a requirement imposed on him by regulations under the relevant Chapter, or (d) in the case of a person registered under Chapter 2 [in the Early Years Register], that he has failed to comply with section 40(2)(a) (which are the requirements to secure the learning and development requirements and comply with the welfare requirements).
40. Ofsted therefore has discretion to cancel registration if it appears that the requirements are not met. Ofsted does not have to establish that a child minder has harmed a child. For a provider to remain registered, Ofsted has to be assured that the child minder is not behaving in a way that may harm a child and that the child minder is meeting the requirement that children being cared for are kept safe from harm.
41. On appeal, the Tribunal's role is to confirm the cancellation or direct that it shall cease to have effect (section 74(4)).
42. The legal burden remains vested with the Respondent to prove, on a balance of probability, all those facts and matters it relies upon to justify cancellation as at the date of this appeal hearing.
43. We have to be satisfied that the decision to cancel registration is a proportionate response by the Respondent to the matters proved. The process of cancellation of the Appellant's registration as a child minder not only engages Article 6, it constitutes an interference with her Article 8 right to privacy and family life. Any interference with that right must be both in accordance with the law and necessary.
44. Hence the decision making process leading to measures of interference with the Appellant's Article 8 rights runs alongside Article 6 and must be fair. Articles 6 and 8 impose positive obligations of disclosure on the Respondent. The investigative decision making process as well as the trial process must be fair. The Respondent has a clear duty to ensure a transparently fair procedure at all stages.

45. Where, as in this case, the Appellant is unrepresented with limited if any access to legal advice, there is even greater obligation upon the Tribunal panel to ensure that an unrepresented party has a fair hearing.
46. Section 34(1) of the Childcare Act 2006 provides that a person may not provide early years provision on premises in England which are not domestic unless registered in the early years register in respect of those premises.
47. Schedule 2, Part 1 of the Childcare (Early Years Register) Regulations 2008 sets out the prescribed requirements for registration. This requires inter alia that the applicant is suitable to provide early years provision. Section 68(2) of the 2006 Act states that Ofsted may cancel a person's registration if it appears that these requirements cannot be satisfied.
48. Section 74(1) of the 2006 Act provides a right to appeal to this Tribunal. The legal burden remains vested in Ofsted, which must establish the facts upon which it relies to support cancellation on the balance of probabilities. It must also demonstrate that the decision to cancel the Appellant's registration is proportionate and necessary. 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. The powers of the Tribunal can be found in section 74(4) of the 2006 Act. Essentially the Tribunal may either confirm Ofsted's decision to cancel or direct that it shall not have effect.
49. The power to strike out is conferred by the 2008 Rules. The Tribunal has a discretion to strike out the whole or part of the proceedings "if the Tribunal considers there is no reasonable prospect of the applicant's case or part of it, succeeding" – see Rule 8(4)(c). It is for the Respondent to displace the burden that there is no reasonable prospect of the Appellant's case succeeding.

Submissions

50. Ms Birks as noted above provided a Scott Schedule at the start of proceedings setting out the events upon which Ofsted rely. The Scott Schedule is prefaced by a short submission of the relevance of the Regulations that existed at the time of the allegations (EYFS 2012) and the relevance of current Regulations (EYFS 2014).
51. Ms Birks provided written closing submissions and made some further oral submissions at the end of the hearing. The Appellant's closing submissions were made orally.

Tribunal's findings

52. Numbering of allegations within this section follows the Scott Schedule.

Witnesses

53. We found the standard of evidence as might reasonably be expected for a Regulatory Authority. They had conducted a detailed and comprehensive investigation into the issues and were able to point to documents illustrating each of the points they made and in response to queries raised in AD's evidence and submissions. They did not in our opinion embellish the evidence but illustrated the facts and conclusions.

54. Overall we found Ofsted's witnesses to be credible although there were some difficulties in recall. It was clear that YA, the originating complainant had a direct interest in the issues. We have taken into account evidence of fact upon which she was in a position to provide, other points she made could not have been by direct experience. She was articulate and clear in what she said but this reflected a strong personal opinion about the Appellant.
55. The evidence provided by Mr Woodcock and ET was less certain. In broad terms it supported the evidence given by other parties, however, we formed the impression that they did not fully observe the events at the time and were less confident and authoritative.
56. Ms Cole became involved because of her professional duty. We accepted the veracity of her investigation and findings.
57. We found the evidence of the remaining Ofsted witnesses credible and reliable.
58. AD called GW. Evidence she gave was general in nature as she was not directly concerned in the events within the Schedule. It is clear she has a particularly strong opinion of YA and her priorities.
59. AD's evidence was given with conviction. She did not call witnesses save for GW despite most of these events taking place in public and the ample opportunities during the long appeal process to provide further evidence. We noted from her that she was restricted by time outside the UK, family and work requirements and resources. She was fervent in her belief in her vocation. She gave evidence of her involvement in voluntary work with children in her community.

Tribunal's conclusions

YA and CA

60. The relationship between AD, YA and CA initially was a professional relationship. AD was engaged as a child minder for CA, her duties involved taking him and collecting him from school, some activities after school including swimming and minding him at her home. This developed into a personal relationship with YA on the basis of which AD undertook what she called favours for her in connection with CA and YA allowed AD to park her car in her path. We accept from AD that the relationship soured after her requests for outstanding payments for her services. For that reason AD terminated the contract. The unchallenged evidence was that YA had work or other commitments and often returned home late. We find that YA previously engaged several child minders who did not continue. The evidence is persuasive that CA has some characteristics which can lead to difficulty in his management. He is not always compliant and may be stubborn. Mrs Conroy and Mr Woodcock's evidence indicated they had developed approaches based on continuing experience with him. They consider that with appropriate skills CA could be managed.
 1. Swimming pool changing rooms
61. We accept that this incident occurred. AD's evidence confirmed that she left CA alone when she went to find his swimming trunks. She considers that this did not give rise to risk in that the premises were relatively secure at times reserved for children's swimming. Because CA was crying and did not have his trunks she

decided that it was better that she tried to find them in her car. LS's evidence was clear and relevant, we are satisfied she had full recall of the incident. It was memorable because she felt appropriate to offer her own child's trunks to calm CA and allow him to swim. LS found him naked and crying. Noting the evidence of ET we accept there no alternative arrangement for supervision during AD's absence. We consider this was a significant event.

2. Pulling ears

62. Pulling ears and hair have been mentioned and evidence given in relation to both. There is a significant chance of confusion. Comments were made that this a cultural practice. This incident resulted in the investigation by Medway Children's Services. Ms Cole spoke to CA and reached the conclusion that the incident occurred. AD denied it. CA did not give evidence at the hearing nor was a statement taken from him. We have reservations about the arrangements in which Ms Cole took information from him and note the purpose would be in respect of child protection. We are not able to reach a reliable conclusion about the underlying event. No further action was taken against AD nor did Social Services conclude CA was at risk.

3. Unattended children

63. The evidence that other children were left by themselves in AD's car comprises evidence of what these witnesses were told. AD denies she had other children in the car and the witnesses upon which Ofsted rely could not have known who was in the vehicle. On balance of probabilities bearing in mind AD went specifically to find swimming trunks and she would otherwise have been expected to be at the poolside for some time, we accept that there were no other children left unattended in the car.
64. In contrast we are satisfied that from the evidence at 1. above, AD left CA unattended in the changing room. ET's evidence was general in nature, she did not mention which child had allegedly fallen off a table nor the nature of injury. We do not find that this arose in respect of a child for whom AD was responsible.

4. Making fun and threats

65. This issue has arisen from Medway Social Services' investigation and its discussions with YA and CA. We have been able to observe AD and hear her approach to management of children. We accept she is committed to them but has a sense of how they should behave and high expectations. We find this can result in robust demands and a firm attitude towards them. The use of threats, sanctions and disparaging remarks to children is in our view consistent with her approach. On balance of probabilities we accept that AD's approach included the offending issues.

5. 22 July 2014

66. It is not disputed that whilst taking children to school AD's car failed. Whether it ran out of petrol or there was an electrical fault is not material. Equally there is no dispute that a parent stopped whilst driving her own child to school, CA was recognised and in turn recognised his school mate, got into the car and was taken to school. During these events AD said that she telephoned YA on several occasions to tell her what had happened. CA arrived at school. AD said that she recognised the parent from previous contact at school although she did not know her nor did she have contact details. She could not get into the car herself because

there was insufficient room. Taking into account the lack of dispute, we accept these events occurred and AD allowed CA to be taken to school by an unauthorised person contrary to Regulatory requirements.

6. Halloween

67. The underlying events are not disputed. CA was taken by AD to a shop which had a Halloween display. For reasons similar to 4. above we accept that AD's approach was insensitive and inappropriate. It demonstrated she had neither the flexibility nor expertise to cope with the demands of a child such as CA.

7.

68. In the light of Ofsted's submission we do not find it not necessary to reach a conclusion on this issue.

8.

69. In the light of Ofsted's submission we do not find it not necessary to reach a conclusion on this issue.

9. Unvetted individuals

70. We find from the evidence AD did not rigorously comply with requirements in relation to references and checking of individuals. Further, there is confusion about the qualifications of a particular individual Fiona Clements as is clear both from statements taken by Ms Gee and the visiting NVQ Assessor. Taking into account the allegation that AD was not always at the premises, which we find substantiated despite her denial that this was only after children had left, we conclude that the nursery did not meet this requirement when she was not there.

10. Inappropriate handling of Child C on collection from school

71. It is common ground that CA was disturbed by the loss of his badge. Evidence given by Mr Woodcock and by AD confirms that he was having difficulty. AD confirmed that he did not leave the class spontaneously or voluntarily. The dispute in the evidence is the degree of coercion used. There is evidence of surrounding circumstances, not least AD's need to move on and collect other children. We find the weight of the evidence is that AD inappropriately handled CA by dragging or pulling him at least initially. We are satisfied that CA's behaviour was not managed in a suitable manner.

11. Failure to report allegations of harm

72. Ofsted was not advised of the allegation of ear pulling. AD stated she had no reason to do so as the underlying incident did not occur but the requirement relates to failure to report an allegation. The allegation was repeated during the investigation and proceedings. It is consistent with other comments made by YA and we find that it was raised by her as detailed in the statement of Ms Gee and mentioned in voice recordings. AD does not deny that she failed to report the allegation. We conclude she has not fulfilled this requirement.

12. Failure to report concerns

73. AD's evidence shows she does not consider CA's comments reliable. She does not consider she should take significant notice of things he said. She exercised her own judgement. However, bearing in mind the nature of what he told as she acknowledged in her evidence, we conclude these are issues which should have been reported. It is of interest that Medway's investigation did not disclose a child

at risk. Nevertheless, it is required that such matters are referred and AD failed in that regard.

13. Intent to undermine credibility of the Inspectors

74. This is a general allegation. There are contrary indications in that AD attempted to work with Ofsted although at the point action was taken against her, she became disputatious. Whilst she does not agree with Ofsted, we do not find “continual intent to undermine the credibility of the Inspector....”

14. Understanding of CR requirements.

75. In the light of our findings above, we accept that AD was unable to demonstrate an adequate understanding of CR requirements.

15. Manner in which children were spoken to

76. JF’s evidence was persuasive. Her comments were in our opinion objective and credible. Ms Hodge’s evidence is incidental to this particular point but indicates staff were asked to go beyond what was acceptable, particularly in relation to third parties.

77. For the reasons set out above we are satisfied AD’s attitude could be described as harsh. This may extend to children’s handling and their management. The reason for unexplained injury is just that; unexplained. Neither Ofsted witnesses nor AD could provide an explanation. We are unable to find a failing by behalf the nursery. JF explained that she did not take the matter further.

16. Deputy

78. This is not disputed. AD related the steps she had taken to find a deputy. They were not successful.

17. Leaving nursery with no qualified member of staff

79. AD was the only qualified member of staff. Mr Tricker said she was not there when he called at the nursery although AD disputes he did so during hours when children were there. Mr Tricker did not give exact detail when he called; bearing in mind the importance of the issue we would have expected specific times. We found him credible but this does not resolve the issue. Ms Hodge indicated that AD was not present when she was there. On balance of probabilities we are satisfied that at least on one occasion AD was not present and left the nursery without a qualified member of staff when children were there.

18. Robust systems

80. The evidence indicates that procedures and systems were in the course of development as AD gained experience. We are satisfied she was committed to doing so but at the time of operation had not yet achieved that goal. We accept Ofsted evidence in that regard.

19. Mobile phone pictures of children

81. The underlying facts are not in dispute. AD accepts that pictures were taken by a member of staff on her personal phone because a nursery camera was not available. Explanation was given how the photos were downloaded, emailed and then deleted. The events occurred; they involved a staff member using her own mobile phone whatever the intent, AD was instrumental in this. This is

inappropriate and should not have taken place. We find this a breach of requirements.

20. Communications to Mr Tricker

82. The Tribunal has seen copies of the text messages sent to Mr Tricker. Mr Tricker stated in evidence his impression and feelings when he received them; he felt intimidated. AD was apologetic at the hearing but obviously sent them at a time when she was stressed by events, particularly the loss of her nursery. The communications are by any objective view inappropriate and unacceptable and would indicate a lack of judgement.

21. Fire exits

83. Ofsted has indicated this is not relied upon. In our view a satisfactory explanation was given in evidence.

22. Racist attitudes

84. Apart from the texts to Mr Tricker we have not found evidence that AD held a racist attitude. Her employees were not exclusively of one race and evidence of Ofsted witnesses does not contain other allegations or indications that events were influenced by racist attitudes. It is clear from Mr Tricker's evidence that this had not been an issue during his relationship with AD's organisation. We conclude that AD was not in breach of her Equality requirements.

23. No nursery premises anymore

85. This is plainly a fact. The occupancy arrangements have been terminated. Mr Tricker was firm that they will not be re-offered. For this reason alone, the registration must lapse.

24/25/26. Understanding of issues, insight and knowledge.

86. The evidence leads us to find that that whilst AD expressed a willingness to follow Regulatory requirements, she had little insight into the underlying reasons for close regulation or the details to be put into practice, for example, the breaches we have found. We have particular concerns about AD's knowledge and lack of understanding of child protection, safeguarding, issues and procedures. Whilst she might personally judge the importance of matters, Regulations require her to report and allow others to reach a conclusion. From her evidence it is clear that the nursery was a work in progress; it was yet to acquire experience, qualified staff and acceptable practices and procedures. In response to direct questions during the hearing AD was unable to state correctly to whom a child protection issue should be reported.

Summary

87. For the reasons above we find that substantive allegations have been proved and that AD was in breach of relevant Regulations both in her capacity as child minder and separately as Registered Proprietor of Little Diamonds Nursery. The breaches have been numerous and have occurred over a period of time that indicates that neither she nor Little Diamonds is suitable for registration to continue. We conclude that Ofsted's decision to cancel the registrations was correct.
88. AD will be disappointed by our decision. We accept she has endeavoured to establish needed facilities for the benefit of children in her community. She has failed in regulatory requirements, most of which will have been new to her at the

time she commenced her business. Regulation exists to ensure public confidence in arrangements for children. Whilst she may consider that a purist attitude was taken, it is inappropriate for the risk demonstrated by the breaches we have found to continue. We conclude it is not in the interests of the public for the registrations to remain nor would the imposition of conditions satisfactorily meet the difficulties found.

Order:

89. AD's and Little Diamonds' appeals fail.
90. The cancellation decisions in respect of registration as a child minder and as child care provider on non-domestic premises are upheld.

Tribunal Judge Laurence Bennett
Care Standards
First-tier Tribunal Health Education and Social Care Chamber

Date issued: 4 April 2016