

Care Standards

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

Heard on 10 May 2018 at the Tribunal Centre, Bradford

[2018] 3302.EY-SUS

Before
Jane McConnell (Judge)
Lorna Jacobs (Specialist Member)
Denise Rabbetts (Specialist Member)

BETWEEN

Emma Victoria Battersby

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal

1. The Appellant, Mrs Battersby, appeals to the Tribunal against the Respondent's decision dated 3 April 2018 to suspend her registration from the Early Years Register for a further period of six weeks to 15 May 2018 pursuant to section 69 of the Childcare Act 2006 ('2006 Act') and the Childcare (Early Years and General Childcare Registers) Common Provisions) Regulations 2008 ('2008 Regulations').

Attendance

2. The Appellant attended the hearing and was supported by Mr Perera, a friend.
3. Mr Reed, Solicitor, represented the Respondent, Ofsted. Ms D. Plewinska, Early Years Senior Officer was a witness for the respondent.

Restricted reporting order

4. The Tribunal makes a restricted reporting order under Rule 14(1) (a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any

documents or matter likely to lead members of the public to identify any child or their parents in this case so as to protect their private lives.

Procedural matters before the hearing

5. At a telephone case management hearing held on the 9 May 2018, before Judge McConnell only, Mrs Battersby participated and was supported by Mr Perera. Mr G. Reed, Solicitor, represented Ofsted and Ms D. Plewinska, Early Years Senior Officer participated.
6. Parties had made a number of applications which needed to be considered. Mrs Battersby confirmed that Mr Perera would be attending the hearing to support and provide some representation for her but that he would not be a witness at the hearing. Mr Perera confirmed that he was not legally qualified and had no training in representation. His role would be to support her to make her case. It was explained that he could in fact take both roles and that if he was not a witness, so had not sworn an oath or affirmation, he could not give any oral evidence on matters even where it concerned his actions. Mrs Battersby and Mr Perera both confirmed that they understood this.
7. Mr Reed raised an issue as to whether Mr Perera should represent Mrs Battersby at the hearing given evidence of the controlling and intimidatory nature of his relationship with the appellant as evidenced in the police report from the incident on the 19 February 2018 and other incidents evidenced by the police in 2016 and 2017. This was an issue that had been considered and dealt with previously by the Tribunal in an order from Judge Burrow dated 30 April 2018. Parties were reminded that it is not for the Tribunal to decide who should be appointed by the appellant to represent their case. It was Mrs Battersby's clearly stated view that she wanted the support of Mr Perera at the hearing.
8. Mr Perera had informed the Tribunal that he disputed evidence contained in the statements of a number of witnesses and that he intended to cross-examine them at the hearing. Mr Reed confirmed that given the test of reasonable belief that the Tribunal would be applying to the evidence that unless the Tribunal thought otherwise that only the two Ofsted officers involved in the suspension process would be called to give oral evidence. Mr Perera had applied for the witness statement of those witnesses that were not attending the hearing to be struck out as he would not have the opportunity to cross-examine them. It was explained that the over-riding objective of the Tribunal is to consider cases fairly and justly including in a proportionate manner. The legal test that the Tribunal would be applying in considering the case was set out in detail for the parties. It was emphasised that the role of the Tribunal in the appeal would not be one of finding facts. It was also not about the alleged actions of Mr Perera but those of Mrs Battersby in ensuring that children in her care were not exposed to a risk of harm. It was decided that all witness statements were to remain as submitted by parties as the Tribunal does not have the power to strike out evidence. No application

was made for a witness summons to require witnesses to give oral evidence.

9. Mr Perera made an application for a Ms R. Latif, acting manager of the nursery, to be called as a witness at the hearing. It was explained that the Tribunal would expect a signed witness statement to be submitted as evidence from any witness giving oral evidence in an appeal. If such a witness statement was prepared and sent to the Tribunal and Ofsted by 5pm on that day then an application would be considered at the hearing. Mr Reed objected to Ms Latif being called as a witness as there would not be adequate notice for Ofsted to respond to any evidence that she may give.
10. Mr Reed made an application that Under HESC Tribunal Procedure Rules 2008 (as amended) Rule 26 that Mr Perera be excluded from the hearing when Mrs Battersby was giving oral evidence to the Tribunal due to the controlling and intimidatory nature of his relationship with the appellant as evidenced in the police report from the incident on the 19 February 2018 and other incidents evidenced by the police in 2016 and 2017. It was agreed with the parties that this would be a matter to be decided by the Tribunal panel at the hearing having considered all the relevant evidence.
11. Written evidence obtained by Ofsted from the police had been included in the Tribunal bundle in Section H. This had been submitted after the final evidence date as it had been received from the police after that time. An application from Mr Perera for West Yorkshire Police to be compelled to disclose written evidence of phone calls made to them had been considered and refused by Judge Brayne on the 2 May 2018. When Mr Perera was referred to the written transcripts of calls between himself and the police both before and after the incident at the nursery he was unsure if he had seen all the evidence included in the tribunal bundle although Mrs Battersby confirmed that she had received it. Mr Perera was asked to ensure that he had read the evidence all the evidence in Section H by the start of the oral hearing. The application to include the evidence in Section H would be considered by the Tribunal panel at the hearing including any objections raised by Mrs Battersby to its inclusion.
12. Mr Reed brought to the attention of the Tribunal the existence of further recorded evidence of phone calls between Mrs Battersby, Mr Perera and the police on the day of the incident at the nursery. This evidence had not been available until this time and Mr Reed had not had the opportunity to listen to this evidence. Mr Perera confirmed that he had also not been able to listen to this evidence at that time. Parties agreed to listen to the evidence, discuss it with each other and decide if an application would be needed for it to be considered as late evidence at the hearing.
13. A copy of a witness statement from Ms Latif was received by the Tribunal at 6.18pm on the 9 May 2018.

Procedural matters at the hearing

14. At the hearing, before Judge McConnell and the panel, Mr Perera made an application for the witness statement of Ms Latif to be included as late evidence. Mr Reed made an application for a witness statement from Ms H. Blackburn, Ofsted Inspector, to also be included as evidence. Mr Perera confirmed that he had read Section H of the Tribunal bundle and made the point that it contained documents that were additional to those that he had requested were disclosed by the police considered in the order of Judge Brayne dated 2 May 2018. He confirmed that no opposition was being made to the evidence from the police being admitted. After considering representations from the parties on the admission of all three areas of evidence, it was decided that under Tribunal Procedure Rule 15 that all documents would further support the Tribunal to consider the appeal fairly and justly and that no party would be prejudice by the Tribunal considering them as they had both had time to read and address any issues raised by them. Both witness statements and all documents in Section H of the Tribunal bundle are accepted as evidence in the appeal.
15. At the hearing the Tribunal panel considered the application made by Ofsted that Mr Perera should not be present when Mrs Battersby was giving oral evidence. As discussed at the telephone case management hearing, this was on the grounds that there was evidence from the police specifically that of PC Holmes that Mr Perera's behaviour towards Mrs Battersby could be intimidating and controlling. When asked by the Tribunal, Mrs Battersby gave the view that it would "*make little difference*" to her if he was there or not. The Tribunal reminded ourselves of the power under Tribunal Procedure Rule 26 (5)(b) to determine who is permitted to attend a hearing or part of it where it considers that it is likely to prevent another person from giving evidence or making a submission freely. The Tribunal observed that during the hearing up until that point Mrs Battersby had not been able to easily answer questions put to her concerning procedural issues in the appeal without referring to Mr Perera. The Tribunal was persuaded there was enough evidence from the witness statements of staff and police reports concerning the nature of the relationship between the two that the oral evidence of Mrs Battersby was more likely to not be so freely given if he was present. It was explained to the parties that based on this evidence we were allowing the application and Mr Perera was asked to leave the hearing whilst Mrs Battersby gave her oral evidence.
16. At the start of her oral evidence, Mrs Battersby raised with the Tribunal the possibility of Mr Perera also giving oral evidence as a witness. It was explained that he had not given a witness statement to the Tribunal and, as she was aware, it would be expected that he should do so before such an application would be granted. When asked what evidence he would give on the issue of her ability to assess risk to children she was not able to explain. Mr Reed indicated that such an application would be opposed

by Ofsted on the grounds of if it was granted that it would not be fair, just or proportional to the issue to be decided. When asked at the end of her evidence whether she wanted to make an application for Mr Perera to be a witness Mrs Battersby confirmed that she did not, that she had given all the evidence that she wish to give and that she did not need to be cross-examined by Mr Perera when he returned to the hearing. It was also confirmed that no application was being made for Ms Latif to give oral evidence.

Events leading to the issue of the notice of statutory suspension

17. Mrs Battersby is the sole owner of Flutterbies Nursery, Rotherham, South Yorkshire. On the 19 February 2018, an incident occurred at the nursery just before 1pm which resulted in a member of staff calling the police for emergency support in dealing with a Mr Perera, who was on the premises. The police attended the nursery and as a consequence made a Child Protection Referral to the Local Authority that same afternoon. At 4.45pm the Local Authority Designated Officer (LADO) for safeguarding notified Ofsted that there had been an incident at the nursery that day involving Mr Perera who they believed was the partner of Mrs Battersby. The case was risk assessed as part of Ofsted's procedures and it was considered necessary for action to be taken. The case was considered by a case worker at Ofsted on 20 February 2018, contact was made with PC Holmes one of the attending police officers and also with a member of the local authority early years team. A case review was held where the compliance and enforcement history of the nursery setting and its inspection history was considered. A recommendation of suspension was made as there were already a number of historical concerns linked to domestic abuse incidents between Mrs Battersby and Mr Perera both at the nursery and in public places. It was agreed that there was a belief that Mrs Battersby had failed to not sufficiently safeguard children from a domestic abuse incident and that the threshold for suspension was met. A first suspension was put in place on 21 February 2018 to remain in force until 3 April 2018.

18. During this first period of suspension, Ofsted undertook further investigations. Mrs Battersby was invited to attend a meeting with Ofsted on the 22 March 2018 which she failed to attend as she had not received notification of it. She also did not respond to telephone or e-mail correspondence. At a further case review held on 29 March 2018 it was agreed that the period of suspension should be extended as Ofsted were not yet satisfied that the risk of harm to children had been eliminated and it was considered that the appellant had not given any other information or reassurances that she could and would ensure children would be safe from the risk of harm. Additional concerns from parents about some care practices of the children also needed to be explored with the appellant.

19. On 4 April 2018 Mrs Battersby was given notice of a second period of suspension that would continue until 15 May 2018. The reasons for the suspension outlined by Ofsted included Mr Perera's accessing the

nursery setting and acting in an intimidating, threatening and aggressive manner towards Mrs Battersby and staff resulting in the police being called. Mrs Battersby leaving the premises without checking the welfare and well-being of the children and staff. Allowing Mr Perera access to the nursery premise the next day despite him allegedly being confrontational and intimidating to the police officers that attended the incident. Additional concerns were also raised by staff and parents during enquiries relating to two previous domestic incidents at the nursery involving Mr Perera.

20. The suspension was reviewed by Ofsted following a letter dated 10th April 2018 from the then solicitor representing Mrs Battersby. This outlined steps Mrs Battersby had put in place to address concerns raised, included an interview with her on the 13 April 2018 and CCTV footage from 19 February 2018. In a letter dated 19 April 2018 Ofsted set out its decision refusing to lift the statutory suspension as enquiries are still ongoing.
21. It is against the second suspension decision that Mrs Battersby has registered an appeal.
22. Ofsted served notice of their intention to cancel the registration of the nursery on Mrs Battersby in a letter dated 3 May 2018.

Legal framework

23. The statutory framework for the registration of a person as an early years provider is set out under the 2006 Act. Section 69(1) of the Act provides for regulations to be made dealing with the suspension of a registered person's registration. The section also provides that the regulations must include a right of appeal to the Tribunal.
24. When deciding whether to suspend an early years provider, the test is set out in regulation 9 of the 2008 Regulations as follows:

“that the Chief Inspector reasonably believes that the continued provision of childcare by the registered person to any child may expose such a child to a risk of harm.”

25. “Harm” is defined in regulation 13 as having the same definition as in section 31(9) of the Children Act 1989:

“ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill treatment of another”.

Guidance on the application of this provision is set out in the case of Ofsted v GM & WM [2009] UKUT89.

26. The second suspension is for a period of six weeks. Suspension may be lifted at any time if the circumstances described in regulation 9 cease to exist. This imposes an ongoing obligation upon the Respondent to monitor whether suspension is necessary.
27. The powers of the Tribunal are that it stands in the shoes of the Chief Inspector and so in relation to regulation 9 the question for the Tribunal is whether at the date of its decision it reasonably believes that the continued provision of child care by the registered person to any child may expose such a child to a risk of harm.
28. The burden of proof is on the Respondent. The standard of proof '*reasonable cause to believe*' falls somewhere between the balance of probability test and '*reasonable cause to suspect*'. The belief is to be judged by whether a reasonable person, assumed to know the law and possessed of the information, would believe that a child might be at risk. In reaching its decision the Tribunal does not need to make any findings of fact. The Tribunal will still need to consider whether suspension is proportionate.

Evidence

29. We considered all the evidence that was presented in the evidence bundle and that given orally at the hearing. We have summarised some of the relevant evidence.

Events concerning the suspension

30. The Appellant's case was that whilst she accepted that an incident had taken place at the nursery on the 19 February 2018 she believed that it did not occur in the manner described by Ofsted in the suspension letter. Mrs Battersby denied that Mr Perera had acted in a manner which was intimidating, threatening and aggressive towards either herself or towards staff. She relies upon the fact that police took no further action in relation to the incident as proof that this was the case and refers to them confirming in correspondence that Mr Perera was not intimidating to police officers. The appellant also refers to the fact that no child was directly affected by Mr Perera's alleged behaviour as proof that they were not at risk of harm. Mrs Battersby also denies leaving the nursery after the incident with Mr Perera without checking the welfare and well-being of the children or staff.
31. In a letter dated 10 April 2018, from a solicitor appointed by Mrs Battersby, she again denied that Mr Perera acted in a manner which was intimidating, threatening and aggressive towards her or staff members during the incident of 19 February 2018. Mr Perera is described as holding a non-childcare related position of administrative business partner at Flutterbies nursery. His duties are confirmed as being carried out from the office where no childcare is provided. Although Mr Perera does not work from the areas in the building where childcare is provided

and is not in contact with children, his suitability to work in childcare settings has been checked as prescribed by the statutory framework for early years foundation stage (March 2017) and other relevant guidelines. The letter confirms Mrs Battersby has put additional measures in place further to the incident in a commitment towards continuous improvement. These include all non-childcare related matters being scheduled for discussion after 6:15pm. It sets out Mrs Battersby's view that the incident was misinterpreted by Ofsted and the allegations that any child may be exposed to a risk of harm are ill founded and based on incorrect information. It asks for the suspension to be lifted.

32. The Respondent's position is set out in the detailed witness statement of Ms D. Plewinska, Early Years Senior Officer, dated 2 May 2018. The history and progress of Ofsted's decision making process since notification of the incident on the 18 February 2018 is set-out in detail. In her oral evidence, Ms Plewinska emphasised the fact that concerns had been raised consistently by Ofsted since 2016 as to Mr Perera's involvement in the nursery and Mrs Battersby duty to assess risk to ensure the safety of children. The incident on the 19 February 2018 was further evidence that Mrs Battersby had not prevented Mr Perera from accessing the nursery and as a result he subjected her and staff to aggressive and intimidating behaviours. This may be a risk to children. It was still not clear to Ofsted what role Mr Perera took in the nursery and Mrs Battersby had not been able to provide an answer as to why he had told both staff and police that he was the owner having a 51% share of the business. Ms Plewinska concluded that it remains Ofsted's view that suspension of registration is the only appropriate course of action open to them at this time as it is their view that the evidence is that Mrs Battersby has not taken sufficient action to ensure children are safeguarded either in the past or currently. To confine Mr Perera's access to the nursery to hours when children are not in attendance is a measure that has been taken previously but which Mrs Battersby had then reviewed and revoked. She did not consider his presence to be a potential risk. The result was that the incident of the 19 February 2018 had occurred. A commitment made in the past few days by the Appellant to install more CCTV including in the nursery including in the office would not in the view Ofsted prevent a repeat of Mr Perera's behaviour. CCTV had already been present during the last incident. Of vital importance was that Ofsted did not believe that Mrs Battersby yet understands that an incident of domestic abuse can potentially be a safeguarding risk to children in her care and specifically does not understand that in relation to Mr Perera.

33. Included in written evidence was a copy of the Child Protection Referral Form completed by PC K. Holmes dated 19 February 2018 written following her attendance at the nursery in response to the emergency call from staff. In it she records that Mr Perera describes himself as the owner of the nursery with a 51% share. She describes him as being evasive with officers, refusing to give his personal details and *"would not allow (Mrs) Battersby to speak and told her not to give her details to*

officers". He was verbally intimidating to the member of staff, Ms S. Peel, who had called the police stating that she would be disciplined for calling them and for asking him to leave the premises. When police arrived at the nursery Ms Peel was observed to be very distressed. Whilst police were speaking to staff at the nursery Mr Perera returned and continued to intimate staff, stating that he was the owner of the nursery and had control of their contracts. This caused Ms Peel further upset. It was the police officer's view that Mr Perera attempted to cause arguments with the staff who were advised to leave the room to avoid any confrontation. Mr Perera told staff that there were covert recording devices in the office and staff dining areas but the report notes that despite such recordings potentially being able to confirm his account of events he refused officers the opportunity to listen to any such devices. Staff told police that this was not the first incident that Mr Perera had attended the nursery and had been verbally abusive and aggressive to Mrs Battersby. When Mr Perera was advised by police officers not to return to the nursery he refused and stated that it was his intention to do so. He then became argumentative, attempting to intimidate police officers with threats of complaints.

34. During this time PC Holmes records that Mrs Battersby remained in her car outside of the nursery, did not speak to police officers or attempt to return to the nursery to assist staff or check on the welfare of the children. It was her view that Mrs Battersby did not display any concern for her staff or the children. When police officers were able to speak to Mrs Battersby she was evasive and would not answer a simple question about her partnership and relationship with Mr Perera. She stated to police that he is *"always right"* and it was *"best not to go against him"*. PC Holmes concluded that Mrs Battersby did not appear to appreciate the impact that Mr Perera's behaviour had on staff, the children, their parents and her business. She appeared to be heavily controlled and coerced by Mr Perera. As a result of concerns a Child Protection Referral was made immediately to the Local Authority. A witness statement from PC Holmes dated 3 May 2018 confirmed that the Child Protection Referral Form accurately records the incident of the 19 February 2018 at Flutterbies Nursery.
35. The Tribunal panel were able to listen to a recording and read a transcript of the call made by Ms S. Peel to police from Flutterbies nursery on the 19 February 2018. In it Ms Peel can be heard describing Mr Perera as being *"really aggressive and he's refusing to leave the premises"* later she tells police that *"he's just stormed in, start shouting, screaming, effing and blinding at her"* [Mrs Battersby. She states that *"this is not the first time that he has come in, shouting and swearing"*. When Mrs Battersby is handed the phone she does not give any further details of the incident. Mr Perera speaks to the police call handler and tells her that *"she [Ms Peel] cannot ask me to leave as although she does not know that, I am the owner of the nursery"*.

36. In a statement written on the 19 February 2018 for the appellant and in a witness statement dated 26 March 2018, Ms Peel gives additional evidence to that recorded in the call to the police. She describes in more detail the incident, how Mr Perera had slammed the door to the nappy changing room at least twice whilst shouting and swearing at Mrs Battersby. When Ms Peel asked Mr Perera to calm down or leave, he then shouted at her and told her that she could not tell him to leave because he owned the business. He said that she wanted her sacked. Ms Peel warned him that she would call the police. When he did not stop she made the call to emergency services. Throughout this conversation Mrs Battersby sat there and never spoke or intervened. Ms Peel records that Mr Perera and Mrs Battersby eventually left the nursery building whilst she was on the phone to the police. At the end of the day Mrs Battersby was due to come back at 4.50pm to take Ms Peel off her shift but did not arrive. On arriving at the nursery the next day Ms Peel saw Mr Perera in the office at the nursery. Since the incident she and other staff have had limited interaction with Mrs Battersby.
37. A witness statement from a Ms L. Smith dated 17 April 2018 describes Mr Perera shouting and swearing at Mrs Battersby in the office at the nursery on the 19 February 2018 and that he left the room and entered the nappy changing area at least twice banging the door with force. She saw Ms Peel enter the office and ask Mr Perera to calm down or leave the building as there were children in the setting. She heard Mr Perera tell Ms Peel "*if you have a problem then phone the police*" then she heard him tell Mrs Battersby that "*she is sacked, she is sacked, get me her contract*". Ms Smith describes herself as being shaken up by the events. Ms Smith also sets out details of a previous incident where Mr Perera had been shouting and swearing in the office. A statement prepared by Ms Smith for the appellant dated 22 February 2018 supported her evidence as set out in the witness statement.
38. During an interview with Mrs Battersby, conducted by Ofsted on the 13 April 2018, she was asked about the incident with Mr Perera on the 19 February 2018. She described it as a "disagreement" between the two of them and did not give any further comment or explanation of the evidence that he was shouting, banging doors, being aggressive and intimidating towards staff and herself. She confirmed that after the incident she left the nursery and explained that she did so, even when some staff were upset and crying, as "*it was probably better that I, we, stepped outside and went into the car*". When asked if she thought it was appropriate that Mr Perera, in his role as administrator, was present on occasions when confidential issues were being discussed about a child Mrs Battersby replied "*I think ... I don't really know what to say*". She confirmed that Mr Perera had come back on site in the nursery the next day, 20 February 2018, despite the fact staff had been upset the previous day to the extent that the police had been called, because "*there was something I needed doing in the office*". Mrs Battersby confirms that she is the only director of Flutterbies Childcare Solutions but that she was not aware when informed by Ofsted that a strike out of the company has

been applied for and is recorded on the Companies House website. When asked as to why Mr Perera told the police that he was the owner of the nursery and owned a 51% share as can be heard on the audio recording of the emergency call to the police on the 19 February 2018 she replied that *"I don't know what you are talking about ... I own the nursery"*. She gave no further explanation as to why Mr Perera had made that statement. When asked about whether safeguarding training that she had attended particularly focussed on domestic abuse, Mrs Battersby was unable to recall that it did. She confirmed that she considered that she had safeguarded children from the arguments between herself and Mr Perera.

39. In oral evidence to the Tribunal Mrs Battersby confirmed that she had entered into a voluntary arrangement following discussions with Ofsted inspectors in 2017 not to allow Mr Perera into the nursery. This was in direct response to the concerns raised by them regarding him having access to the setting without it being clear what his role was or evidence of the relevant safe-guarding checks being completed. When asked, Mrs Battersby accepted that one of Mr Perera's previous criminal offences had been disclosed as part of the DBS check that she had completed for him. She could not remember which one it was, when the DBS check had been completed or explain why she had not informed Ofsted of this when questioned by them during interviews in 2016 and 2017. Whilst she accepted that she had previously changed the pin code allowing access to the nursery so that Mr Perera could not freely enter the nursery premises, she could not explain when or how he had subsequently obtained the code again. Mrs Battersby emphasised to the Tribunal that she was still confused as to the nature of the safeguarding issues that Ofsted were raising concerning Mr Perera at that time. She had decided to let him access the nursery again in the summer of 2017 but was not clear when. She did this as she had not had any response to emails and letters sent by her then solicitor asking for confirmation of Ofsted's concerns.

40. When asked by the Tribunal whether she now clearly understood that it was her duty as the responsible person at the nursery to identify potential safeguarding risks, and not the role of Ofsted, Mrs Battersby replied that she thought that she did understand. She explained that it was not however until the hearing that she had started to understand the gravity of the situation she was facing concerning the closure of the nursery, the loss of her business and professional reputation despite the previous interviews with Ofsted inspectors in 2016 and 2017. It was put to her that evidence from the previous two documented incidents in 2016 which had involved the police being called should have been indication that Mr Perera could present a possible risk to a child in a nursery setting. Mrs Battersby was of the view that these were personal matters and that as they had not happened on nursery premises they were not relevant.

41. Concerning the events at the nursery on the 19 February 2018, Mrs Battersby now accepted that if she was not connected to the nursery that

Mr Perera's behaviour would be considered "*not acceptable*" and "*not appropriate*". She described him as being "*quite loud*" but that as no child had been disturbed by the incident that she did not consider that he had been a risk to them or that he may have been a risk. When asked whether she considered herself to be at risk from Mr Perera that day she said that she had not considered that question before, that she could not remember in detail the incident but that she had only wanted to resolve the argument with him. When asked whether she considered his treatment of staff, specifically Ms Peel, to have been a risk to them Mrs Battersby said that she did not consider that it had been. When asked why as part of her safeguarding role she had not considered this, she could not explain. When asked what actions she had taken to reassure staff that she remained the owner of the nurseery and that Mr Perera was not the owner or part owner Mrs Battersby said that she had taken no steps. Mrs Battersby accepted that on the day of the incident whilst Ms Peel was on the phone to the police she had left the premises with Mr Perera immediately after the altercation without speaking to staff or checking on the welfare of children. It was her evidence that the observation of PC Holmes that she had not subsequently checked on the welfare of staff and children when she returned to the nurseery later to visit the toilet was incorrect. She stated that she had spoken to staff, although she could not remember who, to make sure all was ok before leaving again with Mr Perera.

42. In a statement written for the appellant by Mr S. Perera dated the 25 February 2018 he describes the incident at the nurseery on the 19 February 2018. He explains that he ran out of the office at the nurseery in order to reach the toilet in the nappy changing room quickly as he felt ill and was about to be sick. In doing so he closed the door forcefully. He described himself as being annoyed at Ms Peel's attitude towards him in asking him to leave the office and that he told her that she had no authority to make him leave and that he would put her on a disciplinary investigation for the way she was behaving towards him.
43. An email from South Yorkshire Police dated 21 February 2018 to Mr Perera states that attending officers had confirmed that no offences had been committed during the incident at the nurseery on the 19 February 2018 and no further action was required.
44. Clips of CCTV footage from two separate cameras at the nurseery dated 19 February 2018 were watched by the Tribunal panel. No sound recording was available. Footage of the hall way downstairs only showed people from the waist down arriving/ leaving the nurseery as cameras were angled to view an internal door. Mr Perera referred the Tribunal to a photocopy of a till receipt for further CCTV equipment which he said would be installed in the nurseery as an additional measure to safeguard children.

Previous events concerning the appellant

45. Copies of police records included in written evidence included confirmation that a two year restraining order had been issued against Mr Perera in 2014 and he had received a caution for harassment in 2011.
46. A witness statement made by a Police Constable from South Yorkshire Police dated 23 June 2016 records an incident involving Mrs Battersby and Mr Perera to which he had been called after a phone call to emergency services by a third party. He describes Mrs Battersby as being visibly distressed, crying and shaking when he arrived at the vehicle in which she and Mr Perera were sitting. Mrs Battersby told him that Mr Perera had been grabbing her and had put her into a head lock. When she had attempted to call the police Mr Perera had taken her mobile phone off of her and pulled the car door shut so that she could not leave. Mrs Battersby had sounded her car horn to attract the attention of a passer-by and asked them to call the police. The PC noted that he could see that her left forearm was red and swelling. Also she showed him a bruise on her right leg which he was told was from an incident the previous week. Mr Perera was arrested and cautioned for false imprisonment and coercive controlling behaviour.
47. The Tribunal heard a recording and read a transcript of a call made to the emergency ambulance service by Mr Perera on the 16 August 2016. In it Mrs Battersby describes Mr Perera as *“getting more and more threatening to the point I’ve had enough of all of it. He’s just ruining my life, quite frankly”*.
48. In evidence contained in a Childcare Investigation Toolkit dated 22 August 2016 it is recorded that Ofsted inspectors raised concerns with Mrs Battersby about the involvement of Mr Perera who she describes as her boyfriend. She tells them that he had an argument with her in the office at the nursery and that she did not think it was appropriate. As a consequence she has changed the pin code and he could not access the premise at all. When asked how she can be reassured he is suitable to be involved in the nursery, Mrs Battersby tells them that he has a DBS but that she didn’t take up references as she was only employing him for IT support.
49. A further Childcare Investigation Toolkit dated 7 March 2017 notes that concerns were raised with Mrs Battersby about access to the nursery premises by people whose suitability has not been checked. When asked she confirmed that she had obtained a DBS for Mr Perera but that she did not have a record of it at the nursery to show inspectors. When asked if Mrs Battersby could recall if there was anything recorded on the DBS or in the soft information she stated that nothing was recorded. A Welfare Requirement Notice was issued by Ofsted dated 22 March 2017 due to Mrs Battersby not being able to provide evidence that she had carried out a criminal records check of Mr Perera and could not demonstrate that he was suitable to be in contact with children at the nursery.

50. In a series of emails and letters between Mrs Battersby, her solicitor and Ofsted dated from the 17 March 2017 to 9 June 2017 she asks them to set out their concerns and “unspecified warnings” to her about Mr Perera’s involvement with the nursery.
51. In an interview under caution with Ofsted inspectors on the 22 June 2017 Mrs Battersby tells them that she does not know whether Mr Perera now had the pin code for the nursery. She is then asked about six alleged domestic abuse incidents that occurred between June 2016 and March 2017 between herself and Mr Perera, four on nursery premises, none of which have been notified to Ofsted. Mrs Battersby says that she does not recall any of them. She says that a previous agreement that she made with Ofsted that Mr Perera cannot be on the premises was not voluntary and that *“you didn’t give me a choice”*. When asked whether she had told Mr Perera it was her decision that he could not go into the nursery, Mrs Battersby replied *“no I never said it was my decision. I told him what you said and he stayed away”*.
52. In a third Childcare Investigation Toolkit dated 5 October 2017 it records that Ofsted officers questioned Mrs Battersby as to her understanding of coercive control. She tells them that she does not understand the concept and it was not covered on her recent training. Ofsted officers discuss domestic abuse with Mrs Battersby and previous specific incidents involving Mr Perera including the one in August 2016 where the ambulance was called. As a result, Mrs Battersby was cautioned for failing to notify Ofsted of a significant event under Regulation 8 of the Childcare Act 2006. Ofsted officers reiterated that Mrs Battersby must look after her own emotional and physical well-being as any impact of her failing to do this will negatively impact on the setting and bring into question her leadership and management of the nursery. Mrs Battersby confirmed to Ofsted that she understood.

The Tribunal’s conclusions with reasons

53. The standard required to justify a suspension is not a high one. During the short period of the suspension, it is for the Respondent to investigate matters to determine if there is a case for longer-term enforcement action, or whether the outcome of the investigation is that there is no longer reasonable cause to believe children may be harmed. We reminded ourselves that we are not required to find facts in considering the evidence in appeal.
54. The information provided to the Respondent by the Police, leads us to conclude that we are satisfied that there may be a risk of harm to a child placed at the Nursery whilst Mr Perera has access to premises. The evidence of PC Holmes is independent of anyone connected to the Nursery and it records an observation of both Mr Perera and Mrs Battersby’s behaviour which we find disturbing. We accept the evidence from the police, supported by the witness statements of staff that Mr

Perera was likely to have been acting in an aggressive manner at the nursery on the day of the incident. The evidence of Ms Peel and Ms Smith is that they were intimidated by him. The evidence from the police of previous incidents between Mrs Battersby and Mr Perera should have led Mrs Battersby to be aware of potential safeguarding issues concerning aggressive behaviour. The email confirmation from the police subsequently received by Mr Perera, in response to his enquiry that no further action would be taken by them is not proof that this was not a disturbing and distressing incident which may have put children at risk.

55. We are not at all persuaded by the oral evidence of Mrs Battersby that she understands what domestic abuse is or the concept of coercive control. In giving oral evidence she was not able to recall significant events, such as that recorded in the call to emergency services in 2016. This led her evidence to be evasive. She was unable to explain to the Tribunal why she would not consider that these were domestic abuse incidents. Most concerning is that she does not associate the behaviour of Mr Perera, either previously, as recorded in police evidence or during the incident, with there being a potential risk that a child may be exposed to harm. The fact that children did not see or hear the incident on the 19 February 2018 is not pivotal. The issue is that they could easily have done so and that by allowing Mr Perera onto the premises, given Mrs Battersby's previous experience the evidence of his behaviour, is evidence that they were placed at risk of harm. It is a fundamental requirement of registration with Ofsted and her over-riding duty is to the children in her care. In addition she has a duty to protect her staff from a risk of harm. Mrs Battersby still failed to recognise the scope of this duty in her oral evidence at the hearing.
56. We do not accept Mrs Battersby's view that Ofsted had failed to bring to her attention the issues that they were raising concerning Mr Perera. The written evidence, in particular the record of conversation contained in the Childcare Investigation Toolkits clearly sets out the concerns being raised on each occasion. It was then for Mrs Battersby to take action to address those concerns. As recorded in the Toolkit dated 22 June 2017, Mrs Battersby did not directly address the issues raised concerning Mr Perera. Instead she told him what Ofsted had said and left it to him to take the decision to stay away. This is not the action of a person who is actively assessing and making clear, reasoned decisions concerning risk.
57. Allowing Mr Perera to access the nursery on 20th February 2018, the day after the incident, we decided is further evidence of her not being capable of assessing risk, particularly where he is concerned. That he returned to the nursery was not disputed by Mrs Battersby at any point in written or oral evidence. In allowing Mr Perera back onto the premises after an incident that resulted in the police being called, when she had not completed an investigation herself and where staff had been visibly upset only the day before is further evidence that she failed to safeguard children in her care.

58. We considered the measures proposed by Mrs Battersby to minimise or eliminate the risk of harm to children. We agreed with the view expressed by Ms Plewinska on behalf of Ofsted that there was no evidence to suggest that Mrs Battersby or Mr Perera would comply with any agreement for him only to be on the nursery premises when children were not present. This was the same as an agreement made in the past. It is clear from the evidence of the interview carried out by Ofsted on the 22 June 2017 that Mrs Battersby had not understood why she had entered into the agreement at the time. As a consequence she allowed it to be broken by Mr Perera. We were not persuaded that Mrs Battersby even now understood why such a measure should be put in place.

59. We did not conclude that additional CCTV being installed would provide effective protection against Mr Perera accessing the nursery or acting in an aggressive manner. Whilst it might have the ability to capture in its recording if such incidents occurred, that would be after the event. As a deterrent it would be limited.

60. For the reasons outlined we conclude therefore the continued provision of child care by the Appellant to any child may expose such a child to a risk of harm and that the steps proposed by the Appellant failed to address that risk adequately.

Decision

61. The Appeal is dismissed and the suspension is confirmed.

Judge Jane McConnell
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date of Order: 15 May 2018
Date Issued: 16 May 2018