Community Care and Assisted Living Appeal Board

Citation:	*Ofra Sixto (Operating as ICARE Childcare Inc.) v. Dr. Meena Dawar, Medical Health Officer, Vancouver Coastal Health Authority*, 2023 BCCCALAB 2
Decision No.:	CCALB-CCA-21-A001(b) and 2019-CCA-004(e) [Group Appeal File: CCALB-CCA-21-G001]
Decision Date:	2023-04-12
Method of Hearing:	Conducted by way of a videoconference oral hearing concluding on August 24, 2021
Decision Type:	Final Decision
Panel:	Alison Narod, Panel Chair Tung Chan, Panel Member Donald W. Storch, Panel Member
Appealed Under:	*Community Care and Assisted Living Act*, SBC 2002, c 75

Between:

Ofra Sixto (Operating as ICARE Childcare Inc.)

Appellants

And:

Dr. Meena Dawar, Medical Health Officer, Vancouver Coastal Health Authority

Respondent

Appearing on Behalf of the Parties:

For the Appellants:	Ofra Sixto
For the Respondent:	Robert P. Hrabinsky, Counsel

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APPEALS

[1] This decision of the Community Care and Assisted Living Appeal Board (the "CCALAB" or the "Board") relates to the appeals of two reconsideration decisions made by the same Medical Health Officer ("MHO") and involving the same parties, dated October 18, 2019 and November 27, 2020, respectively. The appeals are brought under section 29 of the *Community Care and Assisted Living Act* (the "Act"), by two Appellants: ICare Childcare Inc. ("ICare") and Ofra Sixto ("OS"), the licensee and manager of ICare. The Respondent is Dr. Meena Dawar, MHO, on behalf of Vancouver Coastal Health Authority ("VCHA")[1].

[2] OS was the manager of a licensed day care owned by ICare that provided care and educational services geared to the small Jewish and Israeli community in Richmond, British Columbia. ICare was the only day care for that community in Richmond. Its students came from that community as well as from the general public. Additionally, ICare was a feeder day care for the Richmond Jewish Day School ("RJDS") in Richmond and other Jewish elementary schools in Vancouver.

[3] OS had been a successful day care operator for over two decades in Richmond. By 2018, ICare had two licenses (collectively, the "License") from VCHA for: (a) a group child care for children 30 months to school age (capacity 16); and (b) a group child care for children under 36 months (capacity 12).

[4] ICare operated out of two rooms it leased from RJDS, in part of a building situated on property where RJDS operated an independent school. ICare's rooms were located at the back of the RJDS building and were outlined in a diagram of RJDS's premises in VCHA's licensing documents. ICare also used certain outdoor areas of RJDS's property and its gym, as well as two bathrooms across from the two rooms.

[5] Although OS had been the subject of complaints in the past, none had been substantiated. OS had never been sanctioned by Licensing before the initial complaint made in these proceedings.

[6] The timing of the two reconsideration decisions under appeal may be somewhat confusing, because the first one in time (the "October 18, 2019 Reconsideration Decision") arose from facts that occurred after the facts that gave rise to the second one in time (the "November 27, 2020 Reconsideration Decision").

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[1] In an oral ruling made during the hearing on June 21, 2021, in response to an objection by the Respondent to the Board's characterization of the Respondent, the Panel provided reasons for its identification of the proper Respondent for the purposes of this appeal. The Panel will set out its reasons for this ruling below.

[7] In a nutshell, in the October 18, 2019 Reconsideration Decision, the MHO confirmed a Licensing decision of September 19, 2019 (the "September 19, 2019 Licensing Decision") to suspend and cancel ICare's License, when Licensing found that OS breached a term in a Health and Safety Plan (the "H&S Plan") and a condition Licensing previously attached to the Appellant ICare's License on June 5, 2019 (the "License Condition") prohibiting OS from attending the premises of ICare's facility during operational hours.

[8] The validity of that License Condition had already been put in issue by the Appellants' July 4, 2019 application for reconsideration, filed months before the MHO made her October 18, 2019 Reconsideration Decision finding that OS breached that disputed License Condition. It was more than a year later that the MHO issued her November 27, 2020 Reconsideration Decision, confirming Licensing's June 5, 2019 Decision (the "June 5, 2019 Licensing Decision") which originally imposed the License Condition that the MHO found that OS breached.

[9] The parties agreed that the two appeals would be heard at the same time.

[10] Briefly, the Panel has found that the Appellants have discharged the burden of proving that each of the MHO's reconsideration decisions were not justified because of accumulation in each of serious and fundamental breaches of procedural fairness and natural justice. Notwithstanding the evidence and arguments received on appeal, in the unique circumstances of this case, the breaches of procedural fairness and natural justice could not be cured by these proceedings. Accordingly, each decision should be reversed or set aside.

[11] In the alternative and in any event, after considering the merits of the appeals based on the evidence and argument received on appeal, this Panel finds that the Appellants discharged their burden of proving that each of the MHO's reconsideration decisions – one to impose the License Condition and one to suspend and cancel the License – were not justified.

[12] With respect to the MHO's November 27, 2019 Reconsideration Decision confirming Licensing's June 5, 2019 Decision to impose the License Condition, this Panel has found that the sole finding of contravention of the Act and Regulation that was justified was the finding that OS used food as a reward or punishment, contrary to section 48(7) of the Regulation. This sole contravention did not justify taking the summary action of imposing the License Condition pursuant to section 14 of the Act.

[13] With respect to the appeal of the MHO's October 18, 2019 Reconsideration Decision confirming Licensing's September 19, 2019 Decision to suspend and cancel the Appellants' License, this Panel has found that the sole breach of the License Condition was OS's attendance in ICare's prescribed program with children outside ICare on August 23, 2019, when a replacement could not be found for the scheduled employee on short notice. This was the only attendance that fell within the geographic scope of the License Condition. However, this attendance did not put the health and safety of children in care at risk, nor

did it justify the severe sanctions of suspending and cancelling the Appellants' License under sections 14 and 13 of the Act.

[14] The Panel's reasons are lengthy, in large part due to the complex procedural fairness and other issues that arose in this case, as well as complicated contradictions between the evidence in the record before the MHO and evidence adduced at the appeal hearing. We note that we considered all of the parties' arguments despite the fact that they might not be mentioned below.

PRELIMINARY ISSUE: IDENTIFICATION OF PROPER RESPONDENT

[15] In its written statement of points and oral submissions on the first day of the hearing, the Respondent raised a preliminary issue regarding the way the Board had identified the Respondent in the appeal. That objection was dealt with in an oral ruling in the course of the proceedings. For the sake of completeness, we set out the substance of that ruling here.

[16] With two exceptions, throughout the course of the appeal the Board identified the Respondent in writing as "Dr. Meena Dawar, Medical Health Officer, Vancouver Coastal Health Authority". The Board, in error, issued two separate notices of hearing on March 3, 2020 and March 26, 2021, which identified only Vancouver Coastal Health Authority as the Respondent, leaving out mention of Dr. Dawar. This error was later corrected in the Notice of Hearing issued on May 21, 2021, where again, the Board identified the Respondent as "Dr. Meena Dawar, Medical Health Officer, Vancouver Coastal Health Authority".

[17] This Board is an appellate tribunal continued by section 29 the Act. It hears appeals from, among other decisions, reconsideration decisions made by medical health officers pursuant to section 17(3)(b) of the Act.

[18] When it hears these appeals, the Board's practice is to identify as the respondent the Medical Health Officer, acting on behalf of the health authority responsible for administering the relevant licensing program. The reason for this is that the medical health officers are often reconsidering decisions by their delegates, and both the medical health officers and the delegate licensing officers are employees of the health authorities. As all those parties are health authority employees, the health authority, as the body responsible for the licensing program, may have some role to play in administering any remedies ordered by the Board.

[19] The Respondent was represented throughout the appeal by counsel (Mr. Hrabinsky), who indicated that his instructing counsel (Ms. Fedio) was in-house counsel for VCHA. The Respondent took the position that the only Respondent in the appeal was Dr. Dawar, and that the decisions made by Dr. Dawar which are subject to a right of appeal to the CCALAB were "not made by, or on behalf of a health authority". As such, the Respondent sought to have the Board remove reference to Vancouver Coastal Health Authority from its description of the Respondent.

[20] Each of the Appellants, Counsel for the Respondent, and in-house counsel for VCHA were provided with an opportunity to make oral submissions on this issue at the beginning of the hearing on June 15, 2021.

[21] Ms. Fedio was provided with an opportunity to seek instruction from VCHA on this issue and submitted that VCHA adopts the written submissions of the Respondent and further submitted that if the Board found that Dr. Dawar was not the sole respondent in this matter, that VCHA did not consider it had been properly notified of this proceeding and sought an adjournment to consider the particulars of the appeal.

[22] The Panel carefully considered the parties' written and oral submissions on this matter. Based on our review of the facts and the legislation at issue, it appears clear that there is one respondent to the appeal, and that the proper respondent is Dr. Meena Dawar, Medical Health Officer, on behalf of VCHA. Health authorities like VCHA administer health programs in the province, which includes VCHA's community care licensing program, and administer personnel issues for that program. The program is administered by medical health officers, who are appointed at the request of health authorities and are health authority employees, as well as their delegate licensing officers who are also health authority employees. It is artificial to suggest the health authority and the medical health officer are separate and distinct entities, and we find no reason for the Board to depart from its usual practice of treating the respondent as the medical health officer, acting on behalf of the health authority.

[23] VCHA, through Ms. Fedio, submitted that if the Board continued to list it as a party, it required an adjournment because it was not provided with proper notice or particulars of the proceeding.

[24] As explained above, the Panel does not consider that VCHA is a stand-alone party in its own right, separate and apart from the MHO. Consistent with the legislation, and in accordance with the Board's past practice, the proper party is "Dr. Meena Dawar, Medical Health Officer, Vancouver Coastal Health Authority". There is no issue with respect to whether the medical health officer has had proper notice of this proceeding.

[25] Even if VCHA were properly considered to be entitled to participate as a separate and distinct entity from the medical health officer, we do not consider that there has been any failure to provide VCHA with proper notice.

[26] We agree that notice is an important element of procedural fairness. Section 16(1) of the Appeal Board Rules provide that the Board will schedule hearings "by written notice to the participants". However, context is important, and a failure to give formal notice is immaterial if the person affected was, in fact, aware of what was proposed and had actual notice of the proceeding.

[27] Counsel for VCHA has been involved throughout these proceedings, and indeed has had its counsel present at a number of pre-hearing conferences in this matter. There

cannot be any suggestion that VCHA did not have actual notice of these proceedings or its particulars.

[28] For all of those reasons, we are satisfied that the proper Respondent to this proceeding is "Dr. Meena Dawar, Medical Health Officer, Vancouver Coastal Health Authority". VCHA is not a separate and distinct Respondent to this proceeding, and, in any event, had actual notice of these proceedings, so no adjournment was necessary.

ISSUES ON APPEAL

[29] The primary issue in these appeals is whether the Appellants have satisfied the burden of proving that one or both of the MHO's decisions under appeal are not justified. The Panel has reviewed the arguments raised by the Appellants and the responses provided by the Respondent and has identified the following sub-issues which require determination:

With Respect to the MHO's November 27, 2020 Reconsideration Decision:

a. Were Licensing's investigation and decision-making processes fair and adequate?

b. Was the June 5, 2019 Licensing Decision not justified?

c. Did the MHO make stand-alone errors?

d. How do any flaws in the underlying investigation and decision affect the November 27, 2020 Reconsideration Decision, and is that decision not justified?

With Respect to the MHO's October 18, 2019 Reconsideration Decision:

a. Were Licensing's investigation and decision-making processes fair and adequate?

b. Was the September 19, 2019 Licensing Decision not justified?

c. Did the MHO make stand-alone errors?

d. How do any flaws in the underlying investigation and decision affect the October 18, 2019 Reconsideration Decision, and is that decision not justified?

BRIEF CHRONOLOGY

[30] The history of these appeals is complex. What follows is a brief, chronological description of the key decisions and applications which form the factual basis of these appeals:

- **December 17, 2018:** Licensing received the first of several complaints against OS, commenced an investigation and required OS to provide a H&S Plan that included a term that OS be absent from ICare's facility during operational hours until the investigation was completed, starting December 18, 2018.
- **June 5, 2019 Decision:** Licensing found that some allegations against OS were substantiated, that there was an immediate risk to the health and safety of the children in care and that OS demonstrated that she lacked the "personality, temperament and suitability" required to continue in the role of "manager". Licensing immediately attached an interim condition on ICare's licenses, as a summary action under section 14 of the Act, prohibiting OS from attending "the premises of" ICare's facility during operational hours of the program. This interim condition was to continue, pending a final determination of whether to attach a condition to the same effect to the licenses, pursuant to section 13 of the Act, for 12 months commencing from the date of the final determination and subject to further review.
- **July 4, 2019:** The Appellants requested reconsideration of Licensing's June 5, 2019 Decision. Among other things, they argued that (a) the process that resulted in the Decision was procedurally unfair, (b) the investigation arrived at erroneous conclusions, (c) OS's absence from the premises was not necessary to protect the children's health and safety, and (d) OS would suffer significant loss while forced to be absent.
- **August 21, 2019:** Licensing received information that OS attended "on the premises" of the facility during operational hours of the program and commenced an investigation.
- **September 11, 2019:** Licensing advised the Appellant that it had implemented the "action" it proposed in its June 5, 2019 Decision which continued the prohibition in identical terms as the "summary action" imposed on June 5, 2019, with additional terms, effective immediately.
- **September 19, 2019:** After completing a second investigation, Licensing found that OS made eight attendances in breach of the H&S Plan as well as the interim condition imposed on June 5, 2019. Additionally, it found that she had been untruthful about her attendances. Again, Licensing concluded that OS lacked the "personality, temperament, and suitability" to be a manager. It found that she was ungovernable. Licensing imposed the summary action of immediately suspending ICare's licenses under section 14 of the Act. It also proposed to take the action of cancelling ICare's licenses under section 13 in the future.
- **September 24, 2019:** The Appellants requested reconsideration of Licensing's September 19, 2019 Decision. Among other things, they argued that (a) despite OS having breached the License Condition on several occasions there were no reasonable grounds to believe that there was an immediate risk to the health or

safety of a person in care; (b) there was no basis to conclude that OS breached the H&S Plan, and (c) that OS would suffer a significant loss if the September 19, 2019 Decision was not reversed. Their outstanding July 4, 2019 Reconsideration Application must be considered in its entirety in this new Application, as it was "fundamentally related" to the Licensing's September 20, 2019 Decision.

- **October 18, 2019:** The MHO confirmed Licensing's September 19, 2019 Decision to suspend and cancel the Appellants' licenses. She found that OS's lack of candour with Licensing officials about her attendances and her failure to comply with the License Condition gave rise to an immediate risk to the health and safety of the children in care, warranting the immediate suspension of the License. The action of suspension was independently warranted on the basis that (a) OS contravened the License Condition at least eight times, and (b) OS demonstrated herself to be ungovernable. The MHO sent her October 18, 2019 Reconsideration Decision to the Appellants' lawyer with a cover letter that included the following:

  > "In light of the attached Reasons and Decisions I request that you confirm to me by November 15, 2019 whether you wish to continue with your request that I reconsider the summary action and the action taken by CCFL that a condition be placed on ICare's Licences."

- **November 12, 2019:** The Appellants filed a Notice of Appeal, apparently without the assistance of counsel. Among other things, OS asked the Board to "look at all the material, the way the [Respondent] handled it all, and what they based their decision on". She submitted that "this case is the most unfairly handled and unfairly judged". She also claimed the MHO "made her decision based on licensing findings. Where is the justice there?"

- **March 31, 2020:** In a preliminary decision, the CCALAB dismissed VCHA's application for summary dismissal of the Appellants' appeal on the ground that it had no reasonable prospect of success. Among other things, the CCALAB found that the Appellant had raised appealable issues of procedural fairness and natural justice as well as significant flaws with the earlier decisions of Licensing. Additionally, the CCALAB found that the decisions relating to the placement of the condition on the License and to the suspension and cancellation of the License, were "inextricably linked" and "connected and intertwined".

- **May 7, 2020:** In another preliminary decision, the CCALAB addressed the form of the appeal hearing given the then-current coronavirus pandemic and decided that the hearing would be held in oral form.

- **August 5, 2020:** In another preliminary decision, the CCALAB addressed VCHA's application for directions and orders regarding certain preliminary and interim matters, including whether the CCALAB lacked jurisdiction to hear matters relating to the Appellants' outstanding application for reconsideration of Licensing's June 5,

2019 Decision. The CCALAB decided that the issues raised by VCHA should be dealt with at the hearing of the appeal.

- **September 1, 2020:** In response to the Respondent's concerns that the Appellants' Notice of Appeal was not properly particularized and the grounds of appeal were unclear, the Appellants filed an amended Notice of Appeal of the MHO's October 18, 2019 Reconsideration Decision which set out the following grounds of appeal: (a) procedural unfairness throughout the investigation and processes leading to the Decision, (b) lack of credible evidence for the finding that there was an immediate risk to the health and safety of a person in care, which finding was the sole basis for the suspensions of the Appellants' licences, and (c) the MHO erred in her application of the test for ungovernability and unreasonably concluded that OS was ungovernable.
- **November 27, 2020:** The MHO concluded that Licensing's findings in its June 5, 2019 Decision were supported by the evidence and that the condition Licensing imposed was reasonable, proportionate and justified in the circumstances.
- **December 4, 2020:** In response to the Respondent's objection to certain portions of the Appellants' amended notice of appeal, the CCALAB issued another preliminary decision accepting the amended Notice of Appeal as filed.
- **January 2021:** The Appellants filed their Notice of Appeal of the MHO's November 27 2020 Reconsideration Decision. The Appellants appealed the MHO's November 27, 2020 Reconsideration Decision on the grounds of (a) procedural unfairness throughout the investigation and processes leading to the Decision, (b) lack of credible evidence for the finding that there was an immediate risk to the health and safety of a person in care, which finding was the sole basis for the suspensions of the Appellants' licences, and (c) the MHO erred in her application of the test for ungovernability and unreasonably concluded that OS is ungovernable.
- **February 22, 2021:** Based on the consent of the parties, the CCALAB ordered that the two appeals be joined.
- **May 12, 2021:** In a final preliminary decision, the CCALAB addressed VCHA's application for recusal of the writer as Panel Chair on the basis of apprehension of bias on the basis of two statements it attributed to her. The application was dismissed on the basis that the writer was not the author of one of the statements and the circumstances relating to the second statement did not meet the test for bias.

THE PARTIES' POSITIONS

The Appellants' Submissions

[31] The Appellants argue that there was procedural unfairness throughout the investigation and processes leading to the MHO's October 18, 2019 Reconsideration Decision and November 27, 2020 Reconsideration Decision, and that these decisions are inextricably connected.

[32] With respect to the Appellants' appeal of the MHO's November 27, 2020 Reconsideration Decision, they argue that the MHO erred in her reasons for confirming Licensing's June 5, 2019 Decision, which itself was flawed by procedural unfairness from the outset. These flaws included: imposing an H&S Plan that barred OS from ICare during operational hours without a proper basis in the evidence and then refusing to modify it, despite its detrimental impact on the Appellants' ability to operate the business; failing to disclose the allegations before conducting interviews of OS and failing to provide her with the opportunity to prepare and present responses to them; failing to inform OS of the procedural steps of the inquiry; presenting allegations to interviewees as facts; failing to interview parents; inappropriately re-interviewing staff; expanding the scope of the investigation; failing to address and reconcile conflicting evidence and explain why it chose the evidence of others over OS's evidence; misconstruing OS's evidence; and reaching conclusions that were contradicted by letters from parents.

[33] With respect to the MHO's October 18, 2019 Reconsideration Decision, the Appellants' argue that the MHO erred in confirming Licensing's September 19, 2019 Decision. With respect to the decision to suspend and cancel the Appellants' License, the Appellants say Licensing was biased against OS. Licensing did something it should not have done and did not do things it should have done. There was no credible evidence on which to find there was an immediate risk to the health and safety of children in care, which finding provided the sole basis for the suspension of ICare's License.

[34] Among other things, the Appellants argue that OS did not lie about her attendances, and there was no point for her to lie, given that it was widely known that RJDS had surveillance systems that would readily show her attendances. Additionally, OS told those present at a September 5, 2019 meeting about the attendances she remembered at that time and said that she would let them know if she remembered any further attendances. The Appellants point out that the primary Licensing Officer involved in the matter, GW, testified that OS said this. Moreover, the Appellants say OS followed up on this by emailing Licensing with information about two more attendances as soon as she remembered them.

[35] The Appellants also argue that the decision to suspend and cancel the License was made before OS attended the September 5, 2019 meeting. The bar to OS's attendance at ICare during operational hours in the H&S Plan and the subsequent License Condition transformed her business from being one of the only Jewish daycares in the Lower Mainland providing Jewish education to its small Jewish and Israeli community, to being a babysitting service. The Appellants say OS was unable to manage the business from afar, her staff and parents complained that staff were fighting against each other, refusing to follow instructions and mistreating the children. Meanwhile, they say Licensing refused to

address OS and the parents' complaints about the delay in resolving this matter and to accommodate OS's return. OS maintains that eventually Licensing essentially "killed" the business and destroyed her reputation.

[36] Moreover, alluding to the fact that the MHO testified that she had been assisted by a lawyer in writing her decision, the Appellants argue that the MHO did not write the decision, although she may have had input, and did not consider OS's case as seriously as she ought to have done. Her decision was a cut and paste of Licensing's Decision. They also say that the MHO erred in her application of the test for ungovernability, and unreasonably concluded that OS was ungovernable. Additionally, they argue that the sanctions were the most serious that Licensing could impose and killed a business that had already been devastated by the License Condition, which prevented OS from being able to properly manage the daycare business.

VCHA's Submissions

[37] VCHA argues that Licensing's June 5, 2019 Decision found that OS engaged in multiple, serious breaches of the Act and Regulation and that the decision to bar OS from the premises of the facility was justified and proportional to Licensing's findings. So was the MHO's November 27, 2020 Reconsideration Decision confirming Licensing's Decision. However, the two decisions should not be conflated. The earlier one had a different sanction, which was reviewable at a later date. It did not result in a decision to cancel the License.

[38] VCHA emphasizes that even if the Panel finds the License Condition was unwarranted, that does not mean that the decision to cancel the License was unwarranted.

[39] With respect to the H&S Plan, VCHA argues that it was required to ensure the health and safety of the children during Licensing's investigation. With respect to the decision to impose the License Condition, VCHA argues that the License Condition was substantially the same as the H&S Plan and that it was justified and proportional to its findings.

[40] With respect to the decision to suspend and cancel the Appellants' License, VCHA argues that OS deliberately breached the condition on her license not to attend the facility on eight occasions, and that she lacked candour when dealing with Licensing about the breaches. VCHA argues that Licensing's September 19, 2019 Decision to cancel the License was justified and proportional to Licensing's findings. When a licensee has demonstrated a willingness to breach a condition and is not candid, there is no effective mechanism to ensure the well-being of children in care.

[41] VCHA submits that the standard of review of the decisions made by Licensing, the MHO and the CCALAB differ. The legislation establishes an internal standard of review. The standard of review of the MHO reconsidering a decision of Licensing is whether the decision is not justified. The burden of proving that it is not justified is on the Appellant.

The CCALAB is not obliged to defer to the MHO's expertise, but it cannot substitute its judgement for the MHO's in all cases. Although it can say that it would have made a different decision, that does not mean the decision was not justified. If the MHO's decision falls within an appropriate range, it is justified.

[42] VCHA agrees that a standard of fairness applies to the chain of investigators and decision-makers under the Act. However, the content of the standard of fairness increases up that chain. Each of those standards has been met.

[43] VCHA says the content of the duty of fairness is contextual and depends on a number of factors. One factor is the legislative scheme. Under this Act, it is very segmented; the Licensing Officer is the front line and has delegated power to make decisions. The reconsideration process is more remote. The Act contemplates that reasons be given and the Applicant is invited to respond. Then the MHO makes a decision after a hearing that closely approximates a trial in court.

[44] It goes on to say there is no more robust standard of fairness than the one that applies in criminal proceedings. Licensing Officers are not dissimilar to police officers. Both operate on the front-line, monitor goings-on and exercise decision-making powers. In many places in BC, police officers make reports to crown counsel that initiate criminal proceedings. This decision-making power is not dissimilar to that of Licensing Officers. However, what the Appellants seek is that Licensing provide them with a written indictment. Police officers do not do that. Nor do Licensing Officers.

[45] VCHA points out that the role of the Licensing Officer is to protect and promote the welfare of children in care. Cancellation of a license is the most serious sanction. These consequences are not a punishment or penal in nature. There is no evidence that the condition "killed" OS's business. There is no evidence that it was impossible for OS to manage the business from afar.

RELEVANT STATUTORY PROVISIONS

[46] Subsections 29(11) and (12) of the Act set out the tasks of the CCALAB and the parties in an appeal hearing as follows:

> 29 (11) The board must receive evidence and argument as if a proceeding before the board were a decision of first instance but the applicant bears the burden of proving that the decision under appeal was not justified.
>
> (12) The board may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person whose decision is under appeal.

[47] An appeal hearing before the CCALAB is a hybrid process. Under subsection 29(11), the CCALAB is to conduct the appeal hearing by receiving evidence and argument from the parties as if it was making a fresh decision of first instance. However, the applicant,

who is usually the appellant, bears the burden of proving that the decision it is appealing was not justified, on a balance of probabilities.

[48] With respect to the question of whether, in this hybrid-style appeal, the CCALAB owes any deference to the underlying decision-maker, the CCALAB held in *Smiley Stars Daycare* (Decision No. 2010-CCA-006(a), June 13, 2011) (at paras 84, 90-92 and 98) that:

> We have determined that no deference is owed to the Respondent in assessing whether the Respondent's reconsideration decision is justified because the Act requires the Board to proceed as if the appeal were a decision "of first instance". The Legislature clearly intended the Board to examine the evidence and arguments anew, and if it deems appropriate, to make its own findings of fact [...]
>
> That it is meant to be a full hearing of the matter is further evidenced by the move away, as mentioned above, from a first instance hearing previously required under section 6 of the CCFA by the Medical Health Officers prior to taking enforcement action. The summary reconsideration process in the current legislative scheme is followed by an expanded right of appeal where the Board, as the appeal body, has the express power in section 31.1 of the Act to "inquire into, hear and determine all those matters of fact, law and discretion arising or required to be determined in an appeal under section 29 and to make any order permitted to be made." This particular language invites both fact-finding and the exercise of discretion on the part of the Board.
>
> At the same time, there are two significant differences in the approach of this Board from a traditional hearing "de novo". First, while not required by the Act, the Board requests that a copy of the record be produced and does look at the reconsideration decision, rather than disregard it completely as might be expected in a truly de novo proceeding. Secondly, section 29(11) places the burden of proof on the Appellant, to establish "that the decision under appeal was not justified". In other words, unless the Appellant meets the burden the prior decision stands. These differences suggest that the mandate is not a true "de novo" appeal but is instead a "mixed model appeal", or in other words, a hybrid review with de novo considerations.
>
> Accordingly, we find that an appeal to the Board under the Act fits somewhere between the two ends of the "true appeal/de novo" dichotomy, closer to the 'de novo' end. It is in the nature of a hybrid review or mixed model of appeal by way of a full hearing into the merits, where the record and the decision below are not ignored in all respects but where the Board freely hears, and in fact must receive evidence and argument as if it were a first instance decision maker; and where the appellant still bears the onus of establishing that the decision appealed from was not justified [...]
>
> [...] our view is that the legislature has made it clear that a hearing before the Board, and accordingly before this Panel, is to be conducted as a "first instance" or fresh hearing, akin to a hearing de novo, before a specialized, expert, independent tribunal with broad remedial powers. Under these circumstances the Panel is not bound to give deference to the reconsideration decision below. (emphasis added)

[49] We agree with the analysis of the panel in *Smiley Stars Daycare*. Although the CCALAB requests the record of proceedings from the underlying decision-maker, the legislative scheme makes it clear that the CCALAB is not bound to give deference to the underlying decision-maker.

[50] The Panel's task in these appeals is to undertake its own assessment of the facts and issues and determine whether the Appellants have met their burden of proving that the reconsideration decisions were not justified. If the Panel determines that they have done so, it will move on to consider the question of remedy.

[51] The CCALAB's power to grant a remedy is limited to four options. It may confirm, reverse or vary the decision under appeal, or it may return it to the person who made the decision under appeal for reconsideration, with or without giving that person directions.

WHAT IS THE APPLICABLE STANDARD OF FAIRNESS?

[52] In appeals of the sort before us, we must determine what standard of fairness Licensing and the MHO owed to the Appellants in the investigation and decision-making process that resulted in the October 18, 2019 Reconsideration Decision and in the November 27, 2020 Reconsideration Decision. An assessment of the content of the duty of fairness in a particular case requires a contextual analysis. The factors to be considered when determining the content of the duty of fairness are described in *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CanLII 699 (SCC). These factors include: (1) the nature of the decision and the decision-making process employed; (2) the nature of the statutory scheme; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body.

[53] With respect to the first factor, it has often been said that a quasi-judicial decision-maker must observe natural justice and that a high standard of justice is required when the right to continue in one's profession or employment is at stake.[2] Even an interim or disciplinary suspension can have grave and permanent consequences on a professional career. Although the standard of justice may be less where the investigator does not make a decision, it may be strong where, among other things, the investigator also makes decisions based on the investigation, the investigator makes findings of fact that are relied upon by the decision-maker, or the investigator makes a recommendation that is not challenged (for example by seeking reconsideration) or has a lasting or permanent impact. The standard will be higher where such decisions, findings of fact or recommendations will have a significant impact on an affected party's rights, even if the recommendations are not themselves the final decision.

[2] See for example *Baker* at para 25. See also a case under predecessor legislation: *Harrington v Pappachristos*, 1992 CanLII 383 (BC SC).

[54] The present appeals are not cases where investigators simply conducted investigations. Under the Act, Licensing Officers and other officers who investigate and decide these matters are delegates of the MHO in performing their investigation and decision-making processes, and, as such, are part of the exercise of the MHO's quasi-judicial decision-making function. In that regard, their decisions are also quasi-judicial. They are to gather and weigh evidence. They are to assess the credibility of interviewees. They are to exercise discretion. They are to balance competing interests, including the public interest in the safety and health of children in the care of a licensed day care facility, as well as the owner's and licensee's private interests in engaging in a profession or employment and in holding licences to operate a day care facility as a business and livelihood. Plus, as discussed below, they are to give reasons. This leans towards a high standard of fairness.

[55] With respect to the second factor, the Court in *Baker* wrote, at para. 24:

> A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface*, *supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted [...]

[56] The nature of the statutory scheme covered by the Act and Regulations is to administer and regulate the licensing and operation of community care and assisted living facilities to ensure the health and safety of vulnerable persons in care, such as children in daycare facilities and adults in assisted living facilities. The particular administrative decisions under appeal are reconsideration decisions issued by an MHO confirming complaint investigations and decision-making processes that resulted in determinations by Licensing to impose summary actions and actions on the Appellants.

[57] For the purposes of these appeals, it is noted that the Act confers on the MHO the duty to investigate complaints under section 15 and the power and obligation to make resultant determinations under sections 11, 13, 14 and 17, as well as the power to reconsider such determinations under section 17, on request. The complaint investigations, determinations and reconsiderations, when conducted by the MHO, are quasi-judicial in nature and, as noted above, attract a high standard of fairness.

[58] We note that the Act provides for a limited avenue for reconsideration by the MHO, and an avenue for a hybrid form of appeal to the CCALAB.

[59] In these appeals, the MHO delegated the function of conducting complaint investigations and making complaint determinations to Licensing. However, the MHO retained her power to make reconsideration decisions. Licensing's investigation and decision-making processes result in a decision that is final, unless and until a party is successful on an application to an MHO for reconsideration or on an appeal to the

CCALAB. As mentioned elsewhere, we disagree with VCHA that the standard of fairness increases up the chain of decision-makers starting with Licensing having a minimal standard of fairness, the MHO having a more robust one and the CCALAB having a higher one. There is nothing in the Act that suggests that Licensing's performance of the MHO's functions as they relate to complaint investigations and determinations attracts a lower standard of fairness than applies when the MHO performs these functions.

[60] However, in light of the comments of the Court in *Baker*, quoted above, since the Act provides for an appeal of the MHO's reconsideration decisions, we find that the second *Baker* factor tends towards a mid-level or higher standard of fairness, which falls short of the high standard applicable to a trial process.

[61] With respect to the third factor, there is no doubt that the decisions involved in the investigation and reconsideration processes were of high importance to the Appellants. OS was alleged to have engaged in serious misconduct, including, but not limited to: engaging in emotional and physical abuse; misusing government funds by using them to pay an unqualified worker to support a special needs child; breaching the H&S Plan and the License Condition, as well as lacking candour when dealing with Licensing about it; lacking the "personality, temperament and suitability" for the role of manager; and being ungovernable and conducting herself in a manner warranting immediate suspension and cancellation of the License.

[62] The implications of the decisions to impose the H&S Plan and License Condition, and later the License suspension and cancellation, were very serious. They initially included a lengthy bar to OS's ability to attend, teach and manage ICare during its operating hours, followed by immediate temporary suspension and permanent cancellation of the License. These had a significant deleterious impact on the Appellants' ability to operate a daycare and provide the distinctive services offered, including specific and unique cultural and educational services to a small ethnic and religious community. The consequences to the Appellants were economic, professional and reputational. This factor weighs in favour of a high standard of fairness.

[63] With respect to the fourth factor, GW testified that, although Licensing had practices, procedures and policies governing the investigation and decision-making process to be followed by the MHO's delegates who conducted the investigation and decided the outcomes and sanctions set out in Licensing's decisions, these were not set out in writing. Additionally, she was unable to find an explanation for Licensing's policy of not interviewing parents. Despite this, the Panel finds that at OS's first and second interviews, she acquired a legitimate expectation from Licensing that she would receive a greater degree of procedural fairness and natural justice than GW's testimony described. At OS's first interview, GW told her the following:

> So, just to let you know, what happens now… [L] and I will probably debrief today. Um and then when [M's] back we need to review all the information with her and we have a lot to go through with her so that we can look at whether we can substantiate, cause

> you can see that there is a lot of different parts to the allegation so each of them we have to look at individually and can they be substantiated from the information that's come in through all the interviews. And then, um, typically we put together a summary that we sit down and go through with you and then you get a chance to respond to that. So depending on what is substantiated, that will dictate what the next steps are. [3] (emphasis added)

[64] MA gave a similar legitimate expectation to OS in her second interview of February 7, 2019[4], when OS asked what would happen next. MA said she and GW would complete the investigation and speak with their Manager, PM, about the outcome of the investigation. Then, they would set a time to meet with OS and go over their findings and analysis of the investigation. This advice provided OS with a legitimate expectation that Licensing would facilitate a meeting in which they would disclose at least a summary of the case against her once Licensing collected and reviewed the evidence and decided whether the case against her was substantiated. Further, based on GW's comments, OS was provided with a legitimate expectation that she would have the opportunity to respond to the case against her before Licensing decided her case. This factor also weighs in favour of a higher level of fairness.

[65] With respect to the fifth factor, in the case of a reconsideration decision, the MHO is not required to give deference to its delegate's decision, including the delegate's investigatory process. The MHO is given the documentary evidence that was before the delegate who made the decision. However, the MHO does not typically engage in further investigation. Similarly, in accordance with the discussion earlier in this decision, in the case of the appeal decision, the CCALAB is not required to give deference to an MHO's reconsideration decision. In light of the foregoing, we conclude that a higher standard of fairness was applicable to both Licensing's investigation and decisions, and to the MHO's reconsideration decisions.

[66] We note that the higher standard we refer to is near to, but not equivalent to the standard applicable to a trial process. This required, at least:

a. meaningful disclosure to OS of the case against her, including the allegations, and a summary of the evidence in support, in order to allow her know that case and prepare to defend herself;
b. meaningful opportunity for OS to explain and contradict the case against her, with relevant information and documents in support;
c. a neutral and thorough investigation that pursued obvious relevant evidence, including evidence that substantiated the allegations, as well as evidence that exonerated OS;

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[3] At p 17 of the transcript, Joint Book of Documents ("JBOD"), page 136.
[4] JBOD, page 144.

d. appropriate notice of significant events during the investigation and decision-making stages that may affect or delay the outcome;
e. a fair and principled process for weighing evidence, assessing credibility and reliability, balancing the probabilities and determining sanctions; and
f. reasons for the decision.

[67] While procedural fairness requires that reasons be provided, the adequacy of the reasons provided in this case will be dealt with under our analysis of whether or not the decisions were justified.

ANALYSIS

[68] We now turn to the reconsideration decisions under appeal. The Panel's task is to determine whether those decisions were not justified. As set out above, the burden of proving that the decisions were not justified is on the Appellants.

[69] The appeal hearing proceeded as a typical administrative hearing that the Panel conducted as if it was a fresh hearing, with a difference that does not change the burden of proof. The Panel required VCHA to present its case first, in large part because relevant information was in the sole knowledge of VCHA, which was represented by counsel, the evidence was complex and the issues were expected to be legalistic. The Appellants were not represented by counsel, but by OS who had no legal training. Although OS did her best to rise to the occasion, it was clear that she was limited by her incomplete fluency in English and her unfamiliarity with relevant legal concepts and issues.

I. LICENCING'S POLICIES AND PROCEDURES AS THEY RELATE TO BOTH APPEALS

[70] Before addressing each of the reconsideration decisions separately, we review Licensing's Policies, Procedures and Guidelines and how Licensing applied them in certain contexts, including in balancing probabilities, weighing evidence, and assessing credibility. Although we are cognizant that our role is to determine whether the Appellants have proven that the MHO's decisions were not justified, as part of that determination, we also consider the procedural fairness and adequacy of the investigation and Licensing decision-making processes throughout, as these underlying processes impact the basis of the MHO's reconsideration decisions.

A. Conducting investigations

[71] GW was the sole witness on the policies, procedures and guidelines used in the conduct of Licensing's investigations and decisions. GW described how she was trained to conduct investigations, as well as how they were conducted.

[72] GW testified that a Licensing investigation is a fact-finding mission to determine whether the legislation has been contravened. She maintained that Licensing considers the facts stated by the interviewees and the evidence they give. It tries to clarify whether the person was present at the event or was told about it by someone else. Licensing does not take the word of the person who complains or the words of one staff or interviewee but looks at all the interviews first.

[73] In describing how Licensing typically proceeds and how it proceeded in this case, GW repeatedly referred to and relied on Licensing's policies, procedures and guidelines for investigations and decision-making. However, when asked for written versions, GW clarified that no written versions existed.

[74] GW described the intake process as well as the process of notifying the person named in the complaint. According to GW, each investigation is conducted a little differently depending on the allegations. Complaints come into Licensing's intake and are captured in its data system. Sometimes complaints are received by telephone and staff take notes. However, as those notes are the staff's perception of what happened, complainants are encouraged to email Licensing a summary with the details of the complaint. Not all complainants provided such emails.

[75] GW said the typical investigation steps include interviewing staff that were present at the incident, the person named in the complaint (who is interviewed last) and potentially the complainant to get more information. There may be more than one interview of an interviewee. Investigative steps also include reviewing relevant documentation, policies and internal logbooks.

[76] However, transcripts of interviews and records of complaints reveal that complainants and interviewees referred to other documents that Licensing did not collect, such as an email materially relevant to the allegation about terminating naptime, as well as a video materially relevant to allegations of emotional abuse which the interviewers and some interviewees had seen, both discussed in this Panel's review of Licensing's findings later in this decision.

[77] GW testified that once Licensing has interviewed everyone it believes were present at relevant events, and the person named in the complaint, the interviewing Licensing Officers meet with a Senior Licensing Officer to discuss their analysis and findings. Then they write the report.

[78] Despite GW's testimony, there was transcript evidence that typically Licensing undertook a somewhat different process after the interviews were conducted than GW described. At the end of OS's first interview, GW told OS that they would meet with the Senior Licensing Officer. Together they would review,

> ...<u>whether we can substantiate [the allegations]</u>, cause you can see that there is a lot of different parts to the allegation so each of them we have to look at individually and can they be substantiated from the information that's come in through all the interviews. And then, um, typically we put together a

> summary that we sit down and go through with you and then you get a chance to respond to that. So, that will dictate what the next steps are. (underlining added)[5]

[79] It appears Licensing did not have this post-investigation meeting with OS to disclose which allegations had been substantiated and provide her with an opportunity to respond.

B. Initial disclosure

[80] As mentioned in the chronology, on December 17, 2018, Licensing received a complaint by telephone from a single complainant, Complainant A, followed by her longer email received at 12:17 pm and a shorter email elaborating on the complaint. Licensing formed an investigation team and developed a plan about how it would proceed.

[81] Licensing decided to advise OS the same day that it had received a complaint against her relating to "Care, Supervision and Staffing" that it would investigate. It also decided to tell her to provide a H&S Plan by the end of the day, which would not be approved unless it contained a term that prevented her from attending the daycare during operational hours. However, it would not advise her of further particulars of the allegations, their seriousness or the length of time the investigation could take.

[82] GW telephoned OS and gave her the information, as previously decided, in the afternoon of December 17, 2018. OS asked for more information when GW alerted her to the complaint; she asked who the complainant was and how long the investigation would take. She was not given this information. OS and her lawyers' repeated attempts to obtain disclosure of the allegations before she was interviewed were unsuccessful.

[83] GW testified it was Licensing's standard procedure not to disclose further particulars of the allegations to the person named in the complaint beyond disclosing the titles of the parts of the Act that related to the alleged breaches before that person was interviewed. We address this below under the heading "Notice of allegations in advance of interviews" and will not repeat our comments here, except to say that this is inconsistent with the foundational principle of natural justice.

[84] GW testified that it was standard procedure when questioning interviewees to give them the exact wording of the allegation straight from the complaint intake. However, Licensing made findings that differed from the allegations but did not fully disclose the findings or the key evidence it was considering in advance of making those findings. This deprived OS of the opportunity to provide a meaningful response to the findings and key evidence under consideration. We address these discrepancies below, in our review of Licensing's findings, and will not repeat our comments here.

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[5] Pages 17-18 of transcript, JBOD pages 136-137.

C. Balancing probabilities

[85] When "balancing the probabilities", an administrative decision-maker is to carefully weigh the evidence that is relevant to the material issue to decide whether it is more likely than not that an alleged fact or event occurred.

[86] GW's description of how Licensing applied the balance of probabilities did not conform with the recognized approaches. For example, on one occasion she testified that when balancing probabilities, Licensing counts the number of witnesses who say that an event occurred and the number who say it did not and that where more say it happened than say it did not, Licensing finds it substantiated.

[87] On another occasion, GW described how Licensing lacked evidence to substantiate an allegation that OS had shamed a child, so it took into account "similar" evidence that OS had spoken disrespectfully to children and found that this tipped the balance supporting the conclusion that OS had both shamed and disrespected children.

[88] These examples are addressed in our review of Licensing's findings, below.

D. Weighing evidence, credibility and reliability

[89] Although an administrative decision-maker has authority to admit evidence regardless of whether it is admissible in court, the evidence that it weighs must be credible and reliable.

[90] The principles that govern the assessment of the credibility of a witness are summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, as follows (paras. 186-187):

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides [...] The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally [...] Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
>
> It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and

> with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB KB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[91] In a number of instances, described below, Licensing failed to take such matters into consideration in weighing the evidence and, in our view, erred.

[92] Serious issues arose that related to how Licensing treated hearsay and documentary evidence. Many of the documents in the record Licensing submitted to the MHO, which were also before this Panel, include hearsay and double hearsay, which are typically given less weight in judicial and administrative hearings because the person who is the source of the information is not available to give testimony and be cross-examined on that testimony, which might give greater confidence in its trustworthiness. The further the original source of evidence is from the decision-maker, the less weight it may be given, if any at all.

[93] Emails from complainants are hearsay. Complaints recorded by Licensing's note-takers are double hearsay. Transcripts of interviewees are hearsay. Evidence attributed to an unidentified source in a transcript are not only double hearsay, but such evidence will likely be considered unreliable and accorded no weight. Licensing did not appear to consider the weight to be given to the various levels of hearsay and unidentified sources of evidence.

[94] None of the complainants, except Complainant A, were interviewed by Licensing. None of the interviewees, except OS, testified in the appeal hearing. As a result, none of the dangers of the complainants' and interviewees' hearsay evidence, except OS's, could be ameliorated by cross-examination in the appeal hearing.

[95] Moreover, according to the testimony of GW, Licensing does not investigate or consider: (a) motives of complainants or interviewees; (b) whether they were telling the truth; (c) whether there was any mitigating or aggravating evidence or circumstances; and (d) whether changes in the evidence of key witnesses undermined the credibility or reliability of that evidence.

[96] Despite denying that Licensing considered whether complainants and interviewees told the truth, GW's testimony demonstrated that not only did Licensing assess their truthfulness, it did so in a manner that did not accord with a principled approach to assessing credibility.

[97] GW was asked how she determined what was and was not true. She testified that Licensing did not take the words of one staff member or one interviewee. It looked at all the interviews first. Despite this, transcript evidence shows Licensing complimented more

than one staff member on telling the truth. Additionally, it based findings on evidence that it thought more truthful than other evidence.

[98] It became clear to the Panel that, despite GW's testimony, Licensing weighed the credibility of the witnesses' evidence to determine which was more truthful and relied on its findings in that regard in deciding against OS. However, the Panel found there were very serious issues about the credibility and reliability of evidence of the key witnesses Licensing relied on in reaching its findings.

[99] A particularly egregious example flows from GW's testimony that Licensing does not determine whether witness evidence is or is not truthful, and that Licensing did not find that OS was lying. Despite this, GW testified, that Licensing decided not to rely on OS's evidence and to rely instead on the changed evidence of Staff Members J and V. Licensing concluded that the changed evidence of J and V was more truthful than earlier, contradictory evidence, because Licensing believed J and V would not have contradicted themselves if it were not true. There was no explanation to this effect in Licensing's Decision and no evidence in support.

[100] This is not a recognized basis for weighing credibility. Typically, unexplained, contradictory changes in a witness's evidence are seen to weaken credibility rather than strengthen it, unless there is some evidence or commonsense explanation for the changes. In this example and in other examples discussed below in this Panel's review of Licensing's findings, Licensing failed to undertake a principled analysis in weighing the credibility and reliability of the key witnesses' evidence.

Credibility of Key Witnesses

[101] We turn to our findings about the credibility of key witnesses.

OS

[102] OS represented the Appellants at the appeal hearing. She presented as confident and well-intentioned. She spoke English well, but it was clear she was not fluent. This was apparent from the transcripts of her interviews, as well as from the appeal hearing. She was well-prepared, and was able to marshal her evidence, give evidence, and examine and cross-examine witnesses. However, she did not have legal training, and was not familiar with legal issues, terminology and concepts, as well as the processes that led to the decisions under appeal. She had to stop from time to time to ask the meaning of English words and of legal terminology and concepts. She also tried to give testimony and make argument when cross-examining others, which demonstrated her lack of understanding of the procedures for giving evidence and argument at hearings.

[103] As mentioned, the allegations against her were not disclosed before her interviews. It was evident from the transcripts of her interviews that OS was not prepared for the questions she was asked. She did not understand that some of Licensing's questions were related to the allegations that had been made against her, the seriousness of those allegations or their potential adverse consequences.

[104] OS testified that she was ambushed and this adversely affected her ability to respond. She was stressed and felt accused. As a result, she gave answers she had not meant to give. She said her testimony at the hearing was truer than the answers she gave in the interviews.

[105] At the hearing, GW agreed that failure to disclose particulars in advance prevented OS from preparing responses. GW also agreed that, when allegations are disclosed and discussed at a first interview with the person named in a complaint, it can be very emotional for them and they might have trouble focusing on the questions being asked and providing the information they might want to give if they had advance notice.

[106] We accept that Licensing's investigation and decision-making process, and in particular its practice of interviewing named individual such as OS before making meaningful disclosure, compromised OS's ability to answer its questions at interviews. OS was put on the spot in an emotionally challenging manner where, among other things, she was unable to refresh her memory and prepare her response.

[107] In so saying, we note that OS demonstrated some memory frailties that may have pre-existed her interviews and the appeal hearing. We note that some of the allegations predated OS's interviews by years, making it difficult to respond to circumstances where there was no prior disclosure. We also acknowledge that difficulties remembering key events may worsen over time.

[108] A number of OS's answers to questions Licensing put to her in her interviews conflicted with her testimony at the appeal hearing. This appeared to be due in part to the circumstances affecting her performance in the interviews and in part due to the passage of time and its impact on her memory. This was particularly evident in the evidence about the alleged termination of naptime. We have carefully weighed her evidence in light of these circumstances and have given more weight to her evidence when corroborated by other evidence. We address this further below in connection with specific allegations.

GW

[109] GW presented as a confident and well-prepared witness. However, on closer examination of her testimony against the documents, and the interview transcripts and Licensing decisions in particular, it appears that her testimony also exhibited memory frailties. This is not surprising given that the hearing of this matter occurred about three years after the investigation.

[110] GW's relationship with OS was positive prior to the events that gave rise to these proceedings, and OS relied on GW, particularly as it related to paperwork and compliance with the Act and Regulation. This relationship deteriorated considerably, particularly after the initial complaint was submitted to Licensing. In GW's view, her ability to be flexible with OS before the initial complaint could not continue once the investigation and decision-making process commenced. This was not a problem-solving process; it was a fact-finding one. However, GW acknowledged that a number of the issues that resulted in

findings against OS could have been addressed through collaborative discussion, as will be discussed below in this Panel's review of the findings of Licensing.

[111] In the course of the investigation and decision-making process, GW adopted and applied a strict and literal interpretation of the Act and Regulation.

[112] As a witness, GW was at times objective and at times argumentative. She was quick to advocate in Licensing's favour and rationalize Licensing's decisions.

[113] In giving her evidence, it was sometimes clear that GW forgot some of the evidence in the interviews she attended, or the reasoning relied upon in Licensing's decisions. She sometimes conflated evidence from different sets of questioning or gave testimony that contradicted the evidence in the transcripts and/or in the decisions.

[114] Additionally, she was evasive in answering questions about Licensing's considerations. For instance, when she was asked whether she considered various evidence, she repeatedly responded that Licensing read and considered everything, rather than providing substantive responses to many specific questions about whether certain facts were considered in making determinations. Additionally, she repeatedly asserted that Licensing was following its policies and procedures, which she admitted were not in written form and in one instance – the policy against interviewing parents - not supported with any explanation.

[115] That said, we have no reason to conclude that GW was deliberately dishonest in her evidence. We have taken the frailties described above into consideration in assessing GW's evidence and have given her evidence greater weight when corroborated by other evidence.

The MHO

[116] The MHO was a genial and straightforward witness. She acknowledged that these were her first appeals. She acknowledged that she had the assistance of counsel in drafting much of her decisions, and that parts of her decisions were "cut and pasted" from prior letters or decisions. However, she readily took responsibility for the whole of her decisions.

[117] It became clear to the Panel that the MHO was not familiar with Licensing's policies, procedures and guidelines, or with legal concepts relating to administrative investigations and decision-making. Additionally, she was candid about her lack of recollection of certain relevant matters due to the passage of time, and in particular, her intensive role dealing with the Covid-19 pandemic in the interim. We address these issues as they relate to her decisions, below.

Complainant A

[118] Complainant A was a former friend of OS and short-term employee of ICare, whose employment terminated on poor terms at or about the time she made the initial complaint. OS had criticized A's work performance and then fired A when she gave notice.

[119] A's complaint and interview, and OS's statement and testimony, revealed a clear motive that likely influenced A's complaint and her negative statements about OS. The timing of A's complaint, coming at about the same time as her termination, gives support to this. The content of A's complaint and interview are overwhelmingly critical of OS, and rife with criticism that not only related to OS's professional conduct, but also to her conduct as an employer. Her complaint bordered on the irrational; she went so far as to complain that her own child, who attended ICare and stayed at the relevant times and after A left, had contracted worms.

[120] Based on A's communications with Licensing, it is evident that A made her complaint in the context of the termination of her employment, when she was upset with OS. A also had difficulties with other staff members, which is corroborated by Staff Member J's statements in her first interview, where she said that A would tell her what to do and she did not like A.

[121] Additionally, A's credibility was undermined by evidence that her allegations were based on a significant amount of hearsay rather than on personal knowledge, that a significant part was based on conclusions rather than observations, that she exaggerated her allegations and that she exhibited memory frailties. For example, one of her allegations was strongly denied and contradicted by a parent of a child who was present at the event in which OS's treatment of the child was central to one of A's complaints.

[122] In our view, A's evidence against OS was not sufficiently credible, cogent or reliable to overcome OS's evidence. Rather, it was impressionistic and speculative, and not sufficiently corroborated. More detail about A's credibility is provided below in our review of Licensing's findings. We have given A's evidence little to no weight.

Staff Member J

[123] J's interview transcripts reveal numerous contradictions between her three interviews, as well as within her interviews. Her descriptions of OS's conduct appeared to increase in seriousness over time, as is discussed in the section on the Panel's review of Licensing's findings, below.

[124] J asked Licensing at the end of her first interview to help her get a license to fulfill her wish to open a new daycare. This suggests that a motive for changes in her evidence may have been to gain favour with Licensing and support for obtaining a license to operate her own daycare.

[125] J's answers demonstrated a willingness to exaggerate and speculate, to offer her thoughts as facts and to fill in gaps in her memory instead of readily admitting the gaps. She also demonstrated a willingness to answer questions in the affirmative and make damaging allegations without any or sufficient evidence in support. We have given her evidence little to no weight unless independently corroborated. See, for example, our comments about her evidence under the heading "Allegations of emotional abuse", below.

Staff Member V

[126] Similar concerns as those that arise in connection with J's evidence arise in connection with V's evidence. She too changed her evidence over her three interviews, creating increasingly serious contradictions about physical and emotional abuse and calling into question which of her statements were and were not truthful.

[127] V asked Licensing, at the end of her third interview to help her get a license to open a daycare. This suggests that a motive for changes in her evidence may have been to gain favour with Licensing and their assistance in obtaining a license to operate her own daycare.

[128] There were concerns about whether V had the opportunity to witness alleged misconduct with the frequency she claimed, given she had only worked closely and regularly with OS for the last two weeks before OS was banned from ICare's premises. Additionally, she claimed to witness an incident of physical abuse from 2016 that had never been reported and lacked adequate particulars, physical evidence and corroboration. Moreover, she described OS's conversation with a child, when there was credible evidence that the conversation was in Hebrew, a language V did not understand. These concerns are described in more detail in the section on the Panel's review of Licensing's findings, below.

[129] We have given V's evidence little to no weight, unless independently corroborated.

E. Conclusion regarding Licensing's policies and procedures

[130] Overall, we find that Licensing did not consistently comply with its own policies, procedures and guidelines, as described by GW, in its investigation of the allegations that led to Licensing's June 5, 2019 Decision. Rather, it departed from them without explanation.

[131] Additionally, Licensing breached the principles of procedural fairness and natural justice in the manner in which it conducted its investigation and decision-making processes, among other things, by failing to disclose material parts of the case against the Appellants and provide them with meaningful opportunities to prepare and respond to that case. More will be said about this, below.

[132] Additionally, Licensing's application of policies, procedures and guidelines in the course of balancing probabilities, weighing evidence, and assessing credibility was not consistent with the principled approaches typically taken to such matters, as described in *Bradshaw*.

II. WAS THE NOVEMBER 27, 2020 RECONSIDERATION DECISION JUSTIFIED?

A. Was Licensing's investigation and decision-making process fair and adequate?

[133] As mentioned, errors made by Licensing in its Decision, including in its investigation and decision-making process, and how the MHO dealt with them are relevant to the question of whether the MHO's Decision was not justified.

[134] The Appellants allege that there were breaches of procedural fairness, throughout, which we address below.

i. The Health and Safety Plan

[135] The Appellants say that Licensing required OS to submit a H&S Plan that would not be approved unless it contained a term that she remove herself from ICare during the investigation. OS alleged that GW dictated the H&S Plan to her.

[136] In these proceedings, OS maintained that the H&S Plan barring her attendance was devastating to her ability to run the business, that she was unable to manage ICare from afar, and that the business was killed as a result. The Respondents argued that OS was able to successfully manage from afar until the Appellants' License was cancelled some nine months later.

[137] We turn to the history of the H&S Plan. On December 17, 2018, Licensing received a complaint from Complainant A, who alleged that OS had engaged in multiple acts of misconduct. A had been employed by ICare as a Responsible Adult for about three and a half months. Her complaint included, but was not limited to, hearsay and unparticularized allegations.

[138] The only information before Licensing on December 17, 2018 was: (a) an intake summary created by the person who received A's telephone call complaining about OS, which is a form of double hearsay; (b) a subsequent email from A received at 12:17 pm providing a more expansive description of her complaint, which is a form of hearsay; and (c) a short follow-up email the same day, which is also a form of hearsay.

[139] Before contacting OS, GW and her superior, Senior Licensing Officer MA, decided to commence an investigation. At the same time, they decided to ask OS to provide a H&S Plan by the end of the day on December 17, 2018. The plan was subject to Licensing's approval, and they jointly decided that any plan OS provided would not be approved unless it included a condition prohibiting OS from attending ICare's licensed facility during the investigation. GW testified that she and MA decided on the wording that was ultimately included as the condition.

[140] GW then contacted OS in the afternoon of December 17, 2018 and told her that a complaint against her had been received relating to "Care, Supervision and Staffing", which Licensing would investigate. GW informed OS that she must provide a H&S Plan by the end of the day, but this plan would not be approved unless it included a term that OS

be removed from ICare pending completion of the investigation. GW did not explain to OS or to this Panel how or why Licensing decided at that time that the H&S Plan would only be accepted if it contained this particular term. She did, however, testify that no less serious term was considered.

[141] According to GW's notes of her telephone conversation with OS, OS asked what the investigation was about and told GW she believed that the complainant was A, an employee she had let go and who had a vengeful motive for the complaint. Additionally, OS asked GW how long the investigation would take, as she could only be away from the daycare for a month. GW told her she did not know how long the investigation would take. OS told GW to rush, as the children would be put in danger if she was not present. GW's response is notable, given the MHO's later finding that the License Condition was substantially the same as the H&S Plan; GW said that as long as OS was meeting ratio, there should be no danger with the children.

[142] At 2:31 pm on December 17, 2018, OS emailed GW a proposed H&S Plan that GW helped her draft. OS's proposed H&S Plan reflects her understanding of what she was required to say in it:

> Icare is under investigation. I, Ofra Sixto, will have to be a way for *[sic]* my center for the duration of the investigation.
>
> I will be a way from Dec. 18 2018 until the investigation is completed.
>
> (underlining added)

[143] Twelve minutes later, at 2:43 pm, GW emailed OS to advise her that Licensing had approved her H&S Plan. However, we observe that Licensing had altered it to include terms that OS had not proposed. It now stated that OS "will not be in the facility until the investigation is completed" and that the plan is in effect from 7:45 am to 5 pm until she is notified otherwise. These changes were not explained to OS.

[144] During the investigation, Licensing told interviewees that OS had voluntarily proposed the Plan. At the hearing, GW testified that OS agreed not to be in the program. In fact, OS was not given a choice. In effect, Licensing unilaterally imposed the prohibition on OS's attendance at the "facility". It was not a voluntary proposal or agreement. In so saying, we do not find that Licensing cannot impose a prohibition requiring a person's absence in an appropriate case. The question is whether the H&S Plan and its implementation in this case was flawed so as to render the MHO's Decision unjustified.

[145] After December 18, 2018, OS's then-lawyers repeatedly asked Licensing that the H&S Plan be modified to permit her to resume work at ICare in some capacity. For example, a request was made to allow OS to return to work with an additional person to shadow and supervise her and report to Licensing as required, on February 1, 2019; requests were made to allow her to return to work in a managerial capacity under any reasonable conditions or limitations on April 1 and 26, 2019; and a request was made on September 9, 2019 to allow OS to attend simply to teach children about the Jewish High

Holidays, as she was the only person who could do this. No responses were received to the requests.

[146] At her February 7, 2019 interview, OS tried to follow up on her lawyers' requests that she return to work with someone shadowing her and that she work afternoons to ensure the daycare was kept as is. Senior Licensing Officer MA refused to consider any options until the investigation was completed.

[147] In the Summer of 2019, OS hired RC, an ECE-qualified Practicum Instructor, as Acting Manager to manage iCare over the summer while the Acting Manager was away. OS had been preparing lunches for the children on a daily basis. The new Acting Manager testified that she repeatedly asked Licensing if OS could assist in providing lunch out of a kitchen in RJDS (not in ICare's classrooms) from 11 am to 1 pm each day, where she would have no contact with the children. She testified that Licensing told her "absolutely not".

[148] At the appeal hearing, GW testified that the requirement that OS remove herself was not based on evidence or hearsay. She said that it is standard procedure at the start of the investigation process to ask for a H&S Plan. Notably, GW did not give evidence that it was standard procedure to require that a term in a H&S Plan be that the person named in the complaint be removed from a daycare facility during an investigation. As mentioned, GW later acknowledged that there was no written documentation of Licensing's standard procedures.

[149] GW testified that a H&S Plan is required to ensure the children's health and safety during the course of a complaint investigation. They are developed by the Licensee for Licensing's approval. Had OS not proposed the plan in the terms Licensing required, she could have lost her license.

[150] As mentioned, GW testified that no options other than prohibiting OS from being on site during operating hours were considered. However, in cross-examination, OS put it to GW that she had proposed returning to work while being shadowed by an ECE and that GW had told her that might be possible, but then GW retracted her answer and said that it was not possible.

[151] GS agreed that OS proposed this alternative. GW said it was discussed and rejected, but OS was not told why. At the appeal hearing, GW revealed for the first time that the outcome of this discussion was "impacted" by telephone calls from staff saying that "they" had not told the truth in prior investigations because "they" were afraid for their jobs.

[152] GW's statement that the discussion about alternatives was impacted by telephone calls from staff saying that they had not told the truth in prior investigations because they were afraid for their jobs is problematic because this allegation was apparently accepted as true and relied upon to OS's detriment in the decision not to modify the H&S Plan. However, OS was never informed that Licensing had made any findings about this allegation, let alone that Licensing had relied on it as a basis for rejecting modifications to the H&S Plan. Indeed, this finding and its consequence are not mentioned in Licensing's

Decision or the record. Accordingly, Licensing possessed evidence on which it based a finding that was not disclosed to OS until the appeal hearing which it nonetheless relied on in deciding not to modify the H&S Plan.

[153] GW's statement is also problematic because it exaggerated the evidence before the Panel by maintaining that multiple staff had made this claim, when the record disclosed that only one complainant, a former employee K, called Licensing on January 31, 2019 to say she lied in a prior investigation of OS in 2016 because OS had threated to fire anyone who spoke to Licensing. K did not mention any others having lied. GW was one of the investigators of the complaint to which K referred. However, GW did not tell the Panel the nature of the complaint in that investigation, what the lie was or whether it was material to the outcome of that investigation or to this proceeding.

[154] Contrary to GW's evidence, mentioned above, that Licensing did not make findings until they had completed all of the interviews, Licensing made the undisclosed finding GW described and relied on it to OS's detriment before it had completed those interviews. OS had no way of knowing about this finding or its consequence until the appeal hearing.

[155] This conduct did not meet the higher standard of fairness owed to OS and amounted to a denial of procedural fairness and natural justice. It was a fundamental flaw in Licensing's investigative and decision-making process. As a result, the prohibition against OS's attendance at the licensed facility continued in the H&S Plan and License Condition, without change and with all its attendant damage and loss to the Appellants. Moreover, there was no record of this in Licensing's decision and the MHO was deprived of knowledge of it in her later reconsideration process.

[156] We are unable to rule out the prospect that if GW's expanded description of K's allegation had not pre-empted Licensing's consideration of a modification to the H&S Plan, that Plan may have been modified with less detrimental impact on the Appellants.

[157] When asked at the appeal hearing why Licensing did not revisit a less serious alternative than the prohibition, GW agreed that Licensing could potentially have looked at whether OS could have worked in the kitchen or elsewhere in the building where she was not involved with children. However, GW immediately ruled it out, saying there was a glass window in the classroom that looked across to the kitchen, so it would have been more challenging for OS to stay in the kitchen and not be tempted to be part of the program. GW's response was speculative and demonstrated a lack of willingness to consider how a less intrusive alternative could be accommodated. For example, GW appeared to give no thought to whether the classroom window could be covered to prevent the speculated temptation.

[158] In the result, Licensing effectively imposed the prohibition in the H&S Plan on OS. The 12 minutes between OS's email regarding the term and Licensing's acceptance of it reflects that Licensing pre-decided that the term was mandatory and OS had no real choice but to accept it. Licensing's decision was made and implemented within about three hours.

[159] Although GW testified that the decision was not based on evidence or hearsay, it was clear from her testimony that the seriousness of the allegations influenced the decision to require the term. However, there was no indication that consideration was given to the nature of the evidence provided by A, her credibility, and her motivation, all of which were immediately raised by OS. As noted above, GW testified that no consideration was given to complainants' motivation.

[160] The evidence in Licensing's possession at the time the decision was made contained a substantial amount of hearsay and what later proved to be unreliable and exaggerated statements, a number of which were contradicted by A's later interview and the interviews of others, as discussed below.

[161] GW did not give OS particulars of the complaint or a summary of the evidence. OS was not told the seriousness of the allegations or the potential consequences should they be found to be substantiated. She was not given a realistic idea of how long the prohibition on her attendance would be in place. This prohibition lasted until June 5, 2019, when - without regard to the impact of the prohibition on the Appellants - Licensing took a summary action that replaced it with a substantially similar prohibition that was to last at least an additional year.

[162] OS argued that this was part of a course of conduct in which Licensing failed to provide her with procedural fairness. She said that Licensing made the decision to prohibit her from iCare without any evidence, other than the statement of a disgruntled employee. This was a punishment that devastated her and caused her substantial harm, operationally, reputationally and economically, and ultimately killed her business. The Respondent argued that the H&S Plan was not a punishment, and that OS managed her business successfully from afar for nine months until the License was cancelled.

[163] There may be circumstances where allegations are sufficiently serious that a prohibition against the person named in a complaint is justified for a time. However, Licensing has an obligation to revisit significant intrusions into a party's freedom to practice their profession or conduct their business to ensure they continue to be proportional in the circumstances.

[164] Despite the statutory paramountcy given in the Act to the health and welfare of children in care, when exercising their statutory powers, a decision-maker is to take into consideration relevant factors, such as the interests of the licensee and operator of a licensed daycare facility in operating their business. It is inimical to these powers that a decision-maker can require a H&S Plan or impose a License Condition, without regard to the ability of the Licensee to conduct its business while subject to those measures. Interim measures may be self-defeating or punitive when they are so harsh that they impair the sustainability of the business.

[165] In this case, the significant adverse impact of the H&S Plan, and later, the License Condition was repeatedly brought to the attention of Licensing. The chaotic and deteriorating state of the daycare was corroborated by several witnesses at the appeal

hearing, as will be discussed elsewhere in this decision. It was no longer providing the key services many parents in the Jewish and Israeli community wanted that were part of ICare's mandate to provide. OS testified that the daycare was not what it was before, and witnesses described it as a baby-sitting service.

[166] Licensing's staunch refusal to consider amendments to the H&S Plan and its duration is a significant concern, for a number of reasons. First, Licensing relied on an undisclosed conclusion to refuse to amend the H&S Plan. Second, as will be explained below, Licensing erred in its view of the scope of the prohibition in the H&S Plan, which did not prohibit OS's attendance everywhere on RJDS's property. In particular, it did not prohibit OS's attendance in RJDS's kitchen, so Licensing erred in purporting to prevent OS from working there. Third, as explained below, a significant portion of the evidence that Licensing gathered in its investigation conflicted with or undermined the credibility and reliability of allegations made by A and later, by others. However, Licensing failed to assess the allegations and the evidence in a principled way, to the Appellants' detriment.

[167] We find that Licensing engaged in serious breaches of procedural fairness and natural justice in its creation, implementation and application of the prohibition in the H&S Plan, as well as in failing to revisit it when evidence indicated that it was having significant negative impacts on the Appellants. Additionally, Licensing made errors of principle in assessing the credibility and reliability of the allegations and evidence relied on in establishing that prohibition and considering modifications to it on an on-going basis.

ii. Notice of allegations in advance of interviews

[168] There is no dispute that Licensing did not provide OS with notice of the allegations against her prior to her interviews, despite a number of requests. As mentioned above, GW testified it was Licensing's standard procedure not to disclose particulars of the allegations to the person named in the complaint beyond disclosing the titles of the parts of the Act that related to the alleged breaches before that person was interviewed. GW testified that Licensing limited disclosure in this way so that the person named in the allegation would not discuss it with staff and so Licensing could have more honest and open communications with staff during interviews.

[169] Accordingly, when Licensing notified OS of the first complaint made against her on December 17, 2019, it declined to disclose anything more than the names of the parts of the Act that it related to the alleged breaches before her interviews: "Care, Supervision, and Staffing". At the interviews, Licensing asked OS questions that, in its view, constituted disclosure. However, the transcripts of those interviews show that Licensing did not always make that clear to OS.

[170] As noted above, GW testified that it was standard procedure when questioning the party named in a complaint to give them the exact wording of the allegation straight from the complaint intake and ask them what they can tell Licensing about this. From our review of the transcripts of OS's interviews, Licensing's standard disclosure procedure appears to be quite different from much of what Licensing actually disclosed to OS.

Moreover, at the appeal hearing, it became clear that Licensing did not always disclose the existence of persuasive evidence or the lack of it.

[171] We have carefully reviewed the transcripts of OS's interviews to ascertain what Licensing actually disclosed about the allegations to OS in her interviews. We have also compared what Licensing disclosed to the allegations it ultimately found to be substantiated. It became apparent that significant aspects of the allegations Licensing ultimately found substantiated departed from the allegations it disclosed to OS in her interviews. We have included the results of our comparisons as part of our review of Licensing's findings, below.

[172] However, we point out that much of what was and was not disclosed to OS is not reflected in Licensing's June 5, 2019 Decision. Therefore, it was not apparent to the MHO from the face of that Decision. Moreover, unless the transcripts are closely reviewed and compared to Licensing's Decision, it is unlikely that an unrepresented person such as OS would be able to demonstrate to the MHO on a reconsideration application how these disclosure failures would adversely affect her ability to conduct her case. Further, it is unlikely that an MHO would have the time or inclination to do this type of review and comparison herself if it was not otherwise brought to her attention, especially considering the demands of the pandemic on the MHO starting in early 2020.

[173] In addition to Licensing's failures to disclose allegations and/or evidence that resulted in its specific findings discussed below, Licensing did not disclose the following before its June 5, 2019 Decision:

a. the allegations and a summary of the evidence in support of its decision on December 17, 2018 to require a H&S Plan from OS containing a prohibition as serious and lengthy as the term preventing her from attending the facility during iCare's operational hours, effective immediately, to continue until the investigation was complete and to remain in place until OS was notified otherwise;

b. the allegation that OS lacked the personality, suitability and temperament to continue in the role of manager; and

c. the sanction that it was considering of attaching, as a summary action, a condition to the Appellants' License that OS not be permitted on the premises of the facility during the operational hours of the program, pending a final determination of continuing to attach, as an action, that same condition for a further period of 12 months.

[174] As a result, OS was not given an opportunity to respond to these allegations and sanctions. These were fundamental breaches of procedural fairness and natural justice. Having found that OS had breached the Act and Regulation, and having decided to consider sanctions as a result, Licensing ought to have disclosed to OS that it would be considering these sanctions, including the nature of the sanctions it was considering, so

that she could have an opportunity to respond before they were implemented. There is no explanation for Licensing's lack of disclosure in this regard.

iii. No interviews of parents

[175] The Appellants argued that Licensing erred by failing to interview parents of current ICare students, who had reliable evidence about two questions at issue in the proceedings: whether the health or safety of the children at iCare were at risk and whether OS had a suitable temperament to work with children. Instead, Licensing gathered evidence only from complainants and current staff. As a result, the narrow selection of evidence was skewed against OS. It was limited to the evidence of complainants and staff, including four complainants who had been dismissed by OS.

[176] At the appeal hearing, GW testified that not interviewing parents was an unwritten policy for which she was unable to find an explanation or otherwise explain.

[177] The fact that parents had material evidence is substantiated by the letters parents supplied in support of OS's application for reconsideration, as well as the testimony of parents who were called as witnesses at the hearing, discussed in more detail, below.

[178] Accordingly, in the absence of justification for this policy, and in view of the stringency with which it was applied, we find that this policy amounted to an arbitrary and unjustified fetter on Licensing's investigatory powers and a serious restriction on its duty to gather and disclose material evidence to the Appellants. We also find that this was a fundamental breach of procedural fairness and natural justice. It failed to meet the standard of fairness owed to the Appellants by Licensing. Moreover, this amounted to a failure to pursue crucial evidence and to conduct a thorough investigation.

iv. Staff were inappropriately reinterviewed

[179] The Appellants argued that Licensing inappropriately reinterviewed certain key interviewees on the same subject matter until they changed the answers they had previously given to Licensing that were favourable to OS to answers that were more damaging to OS. Licensing is entitled to reinterview people on the same subject matter. However, where interviewees change their evidence, Licensing must carefully consider why, including whether the reinterviewing conveyed the message that Licensing was not satisfied with their answers and whether those people had a motive to change their answers until Licensing appeared to be satisfied with them by ceasing to ask the questions or otherwise.

[180] Skewing of evidence towards interviewees with possible adverse motives is a legitimate concern in Licensing's investigation. As GW testified, Licensing did not take into account the motives of complainants and employees. However, this is contrary to the principled approach to credibility issues, where factors such as whether a witness changes their answers and whether they have a motive to lie are to be taken into account when assessing their credibility.

[181] In their interviews, two of the key witnesses who changed their answers on reinterviews to answers Licensing relied on – staff members J and V – also expressed their wishes for assistance from Licensing in obtaining licenses for their own daycares. These wishes amounted to motives that may have influenced them to change their original answers to Licensing's questions so they were damaging to OS and more satisfactory to Licensing. Under a principled approach to weighing their credibility, Licensing ought to have considered whether they were motivated to change their answers to curry Licensing's favour and failed to do so.

[182] Moreover, there was a disparity in Licensing's treatment of OS compared to other interviewees. For example, despite the testimony of GW that Licensing did not make determinations before conducting and reviewing all interviews, there was evidence that Licensing's interviewers complimented key interviewees, J and V, on their truthfulness and validated their experiences. This was capable of being construed as determining that their evidence was truthful and valid.

[183] However, Licensing's interviewers went on to encourage these same interviewees to change their evidence, and then relied on that changed evidence on the basis that the changed evidence was more believable than the original evidence, because changing it was so hard to do, as set out below in the Panel's review of Licensing's findings. Licensing failed to explain in its June 5, 2019 Decision how it reconciled J and V's contradictory statements with the statements Licensing had complimented as being honest and why it preferred their changed statements it relied on over their earlier statements, or over or other contradictory evidence.

[184] Notably, Licensing was much more officious and less accommodating when dealing with OS's evidence. For example, it assumed, without asking her, that OS was acting out the harsh tone she used in talking to a child and concluded that she yelled at him, even though that was not part of the allegation. Moreover, it assumed that OS decided to stop napping all children in the 3-5 program without obtaining the email that set out OS's decision that specifically said that nappers would continue napping. These examples are addressed below.

[185] Licensing's conduct compromised the neutrality of its investigation and undermined the fairness and integrity of its decision-making process. Moreover, Licensing's failure to explain why it preferred the changed evidence of key witnesses over their other evidence, or over OS's evidence, amounted to a material gap in Licensing's reasons and a breach of procedural fairness and natural justice.

v. Changed scope of the investigation and decision-making process

[186] The Appellants submitted that after the initial complaint in December 2018, a flurry of additional complaints about other matters were spontaneously made from January 31 to February 11, 2019. These included complaints relating to previously closed investigations. This changed the scope of the investigation and decision-making process.

[187] The Appellants argued that this could not have been a coincidence. The complaint process was to be confidential. There was no explanation for how the new complainants could have learned of the investigation unless someone, such as Complainant A, contacted them to make their complaints. The Appellants argued that Licensing should have properly assessed the credibility of these complainants by taking into consideration their motives. If it did not do this, Licensing committed a serious flaw in its investigation.

[188] It is correct that Licensing received the new complaints and that they broadened the scope of the investigation and decision-making process. The Appellants' submission, however, relates to the confidentiality of the process and, in particular, the motives of the new complainants. It is not always possible to enforce the confidentiality of complaints and other allegations often arise in the course of conducting an investigation. If those allegations do not fall within the scope of the allegations already made, it may not be appropriate to include them as part of the matters being investigation. However, the Appellants' concerns appear to be focused on the credibility of the new complainants, saying that they had motives to harm OS.

[189] As mentioned, GW testified that Licensing did not take complainants' and employees' motives into consideration when assessing credibility. GW also testified that Licensing did not ask the additional complainants what prompted their complaints. As noted above, there exists a principled approach to the assessment of credibility, and one factor to take into account is motive. In this case, Licensing failed to take into account the new complainants' motives. Failure to address issues that go to the credibility of evidence is a failure of procedural fairness and natural justice. Moreover, the failure to assess issues relating to credibility may undermine the weight to be given to that evidence. In the instant case, we have given the additional complainants' statements less weight, where it is clear that their statements were taken into consideration.

[190] However, as noted below, GW admitted that there were occasions where Licensing found it could not prove allegations on a balance of probabilities on the basis of interviewees with personal knowledge of the complained of events and relied on similar allegations made by others to tip the balance against OS. She gave the example of Licensing's finding that OS shamed and disrespected children. However, in such instances Licensing did not include that it had done so in its reasons for its Decision. The failure to disclose this in its reasoning is a fundamental breach of procedural fairness and natural justice that impaired the integrity of Licensing's decision-making process.

vi. Allegations put to interviewees as facts

[191] The Appellants argued that Licensing deprived them of procedural fairness and natural justice because allegations were presented to interviewees as if they were facts, rather than as unproven allegations. We address this below in connection with the MHO's November 27, 2019 Reconsideration Decision.

Conclusion Regarding Fairness

[192] In our view, Licensing failed to afford procedural fairness and natural justice to the Appellants in the investigation and decision-making process leading to its June 5, 2019 Decision. Had Licensing's June 5, 2019 Decision been the end of these proceedings, these failures would have rendered the Decision invalid or unjustified. However, the Act provides for reconsideration and appeal processes, which the Appellants pursued. The matter now at issue is the Appellants' appeal of the MHO's November 27, 2020 Reconsideration Decision, which confirmed Licensing's June 5, 2019 Decision. Accordingly, this Panel has taken Licensing's failures of procedural fairness and natural justice into consideration in deciding the Appellants' appeal of that Reconsideration Decision, as discussed below.

B. Was Licensing's June 5, 2019 Decision justified?

[193] Having looked at a general overview of the errors made by Licensing in its June 5, 2019 Decision, we now turn to the specific findings reached by Licensing in that Decision, in the order in which they were set out. These findings are discussed in detail because they informed the November 27, 2020 Reconsideration Decision of the MHO.

1. Shaming and disrespecting children

[194] Licensing found that the allegation that OS shamed and spoke disrespectfully to children was substantiated, as follows:

> Throughout the investigation a clear thread of [OS] shaming children and speaking disrespectfully to them was substantiated by Licensing. [OS]'s responses during the interviews demonstrate a lack of understanding of how her actions may be perceived as shaming or speaking disrespectfully to children. When asked about the allegation of yelling at a child [Child D] accused of breaking a toy train [OS] stated that she said to the children *"And so I went on the whole thing that "this is expensive toys. I buy them. I wish nobody to my toys. I don't go to your homes and break your toys. I wish you don't come to my home and break my toys."* [...] When the child walked in, [OS] said good morning and proceeded to say, *"I don't like it when you break my toys. "And that was the end of it.* So *the mother [Parent R], the mother was a little bit upset about it and I thought ok but instead of doing it I could have done it differently*" (underlining added)

[195] There are a number of problems with this finding, including non-disclosure issues, expansion of the allegations and failure to conduct a neutral and thorough investigation. First, Licensing failed to disclose to OS that there was an allegation that OS both shamed and spoke disrespectfully to multiple children and that she lacked understanding of how her actions may be perceived as shaming or speaking disrespectfully to them.

[196] Moreover, Licensing failed to disclose to OS an allegation that she yelled at Child D, the child accused of breaking a toy train (the "Broken Toy" incident). In fact, Complainant A made the complaint about OS's treatment of Child D but did not allege that OS yelled at him. Rather, she alleged that OS yelled at the children about the broken toy before he arrived at ICare that morning and that when he arrived, OS immediately launched into a tirade about the broken toy.

[197] According to the transcripts of OS's interviews, the allegation that was disclosed to OS was only that "When [Child D] arrived with his mother you immediately launched into a tirade about the toy train being broken and this was done in front of other children."[6] OS, whose mother tongue is not English, asked what the word "tirade" meant. The interviewee told her "that is when you're really upset about something and you just plow in and say your piece, without, usually it's without any sort of, it's not a two-way conversation." In short, OS was alleged to have been upset and to have "said her piece", but not to have yelled at Child D, despite the findings in Licensing's Decision.

[198] OS said she noticed that Child D's mother, R, was "a little bit upset", and realized she could have done things differently. So, she sent R a text apologizing that it happened this way and acknowledging that it could have been done differently. R was satisfied with this.

[199] Accordingly, OS did not have a meaningful opportunity to respond to the undisclosed allegations that Licensing found were substantiated: shaming and speaking disrespectfully to children, including by yelling at Child D. This amounts to a breach of natural justice and procedural fairness.

[200] Second, although in its June 5, 2019 Decision Licensing stated it considered all the evidence, it did not pursue critical and determinative evidence. It did not interview Child D's mother, who was present throughout the incident and had personal knowledge of it. There was nothing in the Decision that explained or justified this. This was a failure to conduct a thorough investigation. Nor did Licensing explain how it reconciled OS's evidence that conflicted with Complainant A's about what occurred and why it preferred A's evidence over OS's.

[201] GW's testimony at the appeal hearing revealed that (a) GW believed there was an allegation that OS yelled at Child D and (b) Licensing's policy or practice was not to interview parents, which, as discussed below had a determinative effect on the outcome of this allegation.

[202] GW testified that Licensing took the complaint into account along with OS's harsh voice tone in describing in the interview what she said to the children. GW assumed that OS was acting out how she yelled at Child D using that harsh tone. GW admitted that she did not ask OS whether her assumption was correct.

[203] GW testified that Licensing did not interview R, Child D's mother, because Licensing had a policy that parents were not to be interviewed. GW said she tried to obtain an explanation for this policy but was unable to find one.

[6] JBOD, page 120.

[204] Additionally, GW's testimony at the appeal hearing revealed that Licensing took an unusual route in determining credibility, weighing the evidence and balancing the probabilities to find against OS. None of this was mentioned in the Decision.

[205] In particular, the Panel asked GW how she assessed credibility in the Broken Toy incident, where there were three witnesses – OS, A and Parent R. GW was also asked, based on all the evidence she heard, how she arrived at who she believed based on the balance of probabilities. GW responded that when Licensing receives a complaint, it looks at whether it can be substantiated. But sometimes, especially when there are several complainants making a multitude of allegations, as in this case, Licensing groups them into similar types of issues and looks at whether there is a pattern of behaviour.

[206] According to GW, Licensing was not necessarily able to say on a balance of probabilities whether the alleged conduct in the Broken Toy incident, taken in isolation, did happen. Licensing only had two people giving statements about that incident – OS and A - since Licensing's mandate does not include interviewing a parent. One said it happened and one said it did not. However, GW agreed that Child D's mother did not feel he had been shamed.

[207] So, Licensing looked beyond the evidence relating to that individual incident and asked whether other complaints it received that showed a link to this one. That is, even if everybody said that on that occasion the child was not shamed or did not appear to be shamed, and the parent did not appear to be upset with the treatment the child had received, was there something in that interaction that connected it to other complaints? Licensing found a link to the complaints about OS disrespecting children and decided that if those were included under the issue of shaming, it was probably more likely than not that it happened.

[208] According to GW, the judgment that A's statements about the incident were more credible than OS's was "affected" by Licensing taking into account statements made by other people – who she did not name - who shared situations that Licensing considered similar, but where the allegation was that OS disrespected children. That is, the decision that, on the balance of probabilities, the allegation was substantiated was "affected" by Licensing taking into account an issue it considered similar to shaming: the issue of disrespecting children. As a result, Licensing concluded that OS's treatment of Child D – yelling at and shaming him - was substantiated under the expanded allegation of shaming and disrespecting children. As noted, it was not alleged that OS yelled at Child D, and it was not substantiated that she shamed him.

[209] As mentioned above, the Panel has significant concerns about the credibility of the key witnesses Licensing relied on in reaching its conclusions, including Complainant A. In the absence of Licensing's explanation of how it reconciled and why it preferred the evidence of A and the undisclosed evidence of multiple unknown others over OS's conflicting evidence, the Panel cannot conclude that Licensing applied the proper approach to assessing credibility, weighing evidence and balancing the probabilities in

finding that the expanded allegations against OS were substantiated on the evidence. The Panel is unable to determine whether the undisclosed evidence is credible, reliable or sufficiently similar to warrant Licensing's conclusions.

[210] However, we now have the additional evidence of the child's mother, R, which we address after commenting on OS's testimony.

[211] OS testified that during the interview, she was scared and shocked. It is apparent that Licensing failed to understand the cultural context in which OS answered their questions, including that she was not a native English speaker. OS admitted making the statement attributed to her in the above-noted quote. But she denied she was acting out her response and denied yelling at or shaming Child D. The tone she used in the interview was not how she had spoken to the children.

[212] OS explained that she had taken a course that recommended addressing issues about hurting oneself, others and equipment as they happen. This is what she did. There were many occasions where she revisited taking care of equipment. She had a conversation with the children at snack time in which she took an educational approach. She said she did not go to their houses and break their toys to teach empathy. When Child D and his mother came, she said good morning. OS told Child D that the children said he had broken the toy and asked if that was so. He shrugged his shoulders, got a snack and sat down. It did not seem to affect him at all. There was nothing in what she said that should have affected him.

[213] Parent R was called as a witness at the appeal hearing. She corroborated OS's version of events. R recalled entering the classroom with Child D while OS was having a conversation with the children about a broken toy train. As they entered, OS told Child D they were just talking about him and asked if he was the one who broke the toy. OS then continued with her talk about breaking toys. There was no tirade, and OS was not loud. It was done in a mundane, conversational, peaceful, calm and nice way and with a smile. R testified that OS did not yell at Child D. He was not upset. He was calm and oblivious to what was going on.

[214] Complainant A's allegations were put to R in cross-examination. R said that they were not accurate. R never spoke to A about how she and Child D felt about the incident, and R did not agree with A's description of what happened. OS did not speak negatively or in a manner that said that Child D was bad.

[215] R testified that when she found out that this incident was part of A's complaint, she was very upset because it was not true. She did not want A to use her and her son in this manner and did not want to be part of A's complaint. Once R learned of Licensing's decision, she repeatedly tried, unsuccessfully, by telephone and emails to contact Licensing to tell them that this was a minor incident that had been mitigated the same day when OS called her, apologized and acknowledged it could have been handled differently. R's emails were part of the record that was produced to the MHO but were not referred to in the MHO's November 27, 2020 Reconsideration Decision.

[216] In the Panel's view, the child's mother was in the best position to describe what happened and how her child responded. Moreover, her evidence contradicted the evidence of Complainant A and established that key aspects of A's allegations were based on unidentified hearsay. She confirmed that OS did not yell at Child D. She did not shame him and he was not shamed.

[217] Licensing made efforts to substantiate an unfounded allegation by adding broader, undisclosed grounds and evidence, without explanation. The outcome appears to be that Licensing decided there was a pattern of shaming and disrespecting children, because it could not substantiate the allegation of yelling at or shaming Child D on the evidence it gathered about the Broken Toy incident. As a result, this was not a neutral investigation and quasi-judicial determination. It was a search for substantiation. Nor was it a thorough investigation. No effort was made to pursue crucial evidence from a witness with personal knowledge of the event - the child's mother - because Licensing fettered itself with an unwritten, unjustified policy or practice that it would not interview parents. In so doing, it unduly compromised the interests of the named party in a fair hearing of this complaint.

[218] Importantly, for the purposes of the Appellants' reconsideration application, because of Licensing's inadequate reasons, many of the failures described above were not apparent in the record before the MHO. As a result, the MHO was deprived of an adequate record of the June 5, 2019 Decision on which to conduct her reconsideration.

[219] In view of the foregoing, the Panel concludes that Licensing's finding in the paragraph quoted above that OS had a pattern of shaming and disrespecting children was not justified.

2. Handling children roughly

[220] Licensing found that an allegation that OS handled children roughly was substantiated, as follows:

> With regard to handling children roughly, [Staff Member V] said *"Uh, yeah. She's, like that. She's, like she doesn't know how to control her anger. And she ... grabs them from the arm"* (indicating the upper arm). [Staff Member V] further stated that in 2016 she witnessed [OS] grabbing a child *"She grabbed her, and I think she was not listening to her, she grabbed her. And she put her on the carpet where we have group time with the little ones and then we saw her arm was like, bruised. And I don't know, if her parents complained or anything but she was crying hard. She goes oh my arm hurt, my arm hurt. ...*When asked by Licensing how often [OS] would grab children the staff responded *"At least once a month".* She further stated that in 2016 it used to happen a lot with one particular child *"He was a little, uh, um autistic boy? Or he was little, different. Like he needed to move a lot and, and he was that kind of boy. And yeah, she used to grab him too.* (underlining added)

[221] The only allegation in the above quoted passage that was disclosed to OS was that she grabbed and bruised a child in 2016 (the "Bruising" incident). Licensing did not disclose to OS the rest of the allegations it found to be substantiated above or a summary of the evidence, and she was not given an opportunity to respond to them. For example,

OS was not told about the allegation that she was unable to control her anger, that she grabbed children at least once a month or that she frequently grabbed the "different" boy in 2016. This is a failure of natural justice and procedural fairness.

[222] Staff Member V made all of the comments quoted in the passage reproduced above in her third interview. V is one of the key staff members who Licensing relied on and who changed their evidence over the course of three interviews. For instance, V's statement in her third interview that OS grabbed children at least once a month contradicted her statement in her first interview, that OS was "pretty good" and "very good" with the children.[7] In that interview, V also said she did not see OS frustrated, yelling or handling the children roughly. Licensing did not explain how it reconciled the contradictions or why it preferred them over OS's evidence.

[223] In her third interview, V told Licensing that she was "pretty sure" that at the time of the Bruising incident, she discussed the bruise with G, a complainant and former co-worker who had recently left ICare.[8] Although G was readily available since she was a complainant, G was not interviewed about this.

[224] V also said that she did not see anything like what happened to the bruised child with any other children; she never saw marks on other children, a child crying or a child upset as a result of being grabbed. This suggests that if the incident occurred as alleged, the behaviour may have been a one-off circumstance that was not repeated. This was not mentioned in the June 5, 2019 Licensing Decision.

[225] When interviewed, OS denied the Bruising incident in 2016 and said it never happened. She had a policy against grabbing children and had fired staff for it. OS said one of her reasons for firing A had been that she had grabbed children. She told staff to just offer a child your finger and they always take it.[9]

[226] Other staff members corroborated OS about roughly handling children. Staff Member J corroborated the existence of the policy and that OS strictly enforced it. Staff Member S said OS never touches the children. S said she never saw OS grabbing children by the hand or arm roughly, bruising or yelling at them. Staff Member K said she had not seen OS grab a child roughly. Staff Member M said she had not seen OS engage in any grabbing. Staff member L said she did not see OS grab or bruise children.

[227] At the appeal hearing, GW relied on V's statements in her third interview, quoted above. Under the Panel's questioning, GW acknowledged that V was the only witness interviewed about the allegation that OS grabbed and bruised the arm of a child in 2016. GW acknowledged there was no evidence that corroborated that allegation, such as a record, a picture of the bruise or a description of the size of the bruise.

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[7] JBOD, page 067-074.
[8] JBOD, page 148.
[9] JBOD, page 122.

[228] When asked whether it was fair to put this allegation about an event in 2016 to OS in January 2019, GW acknowledged that it is challenging to ask someone to go back three years to recall an incident. GW agreed that before the January 2019 meeting, all OS knew about the complaint was that it had to do with "Care, Supervision or Staffing". She agreed that OS had no idea an allegation of bruising a child in 2016 was going to come up. She agreed that OS could not possibly prepare for it.

[229] When asked how this allegation was substantiated, GW said that it was substantiated by other people saying OS had handled children roughly. She did not say who these other people were, what, where or when they saw this, or whether they saw the same or different examples. This was unattributed hearsay with all the attendant hearsay dangers unresolved.

[230] At the hearing, OS denied grabbing children or holding them on the body. She said her philosophy was not to hold children's bodies. She repeated that she had a written policy that staff were not to do this. She instructed her staff to hold out their finger. OS testified that V's evidence in her third interview was completely different from what she said in her first one.

[231] OS testified that V had a motive to harm her and expected a benefit for giving Licensing the answers it wanted. At the end of the transcript of V's third interview, there is an exchange between her and Licensing's interviewer where V asked about "my license" and the interviewer responded that she would send V the information that day. OS testified that V wanted to open her own day care and that the discussion about V's license must have been about obtaining a license to do so.

[232] OS cross-examined GW and argued about Licensing's treatment of the key staff it interviewed repeatedly, V and J. She pointed out that they changed their evidence and inquired about potential benefits Licensing could give them after they changed their evidence and that Licensing relied on the changed evidence in making its findings against her. OS said that Licensing interviewed V three times and asked her the same questions each time, signaling that it was not satisfied with her answers. Licensing Officers were authority figures to the staff. Finally, V gave them what she thought they wanted and changed her evidence.

[233] In the Panel's view, the evidence Licensing relied on had a number of credibility and reliability frailties of the kind discussed in *Bradshaw*. V's allegations that OS grabbed and bruised a child's arm in 2016 and that she frequently grabbed the "different" child in that period were based solely on V recollections of events that occurred three years earlier. GW acknowledged the difficulty and unfairness of OS answering an allegation that old. It would be especially difficult in this case where there is no independent objective evidence corroborating the accuracy or reliability of V's memory. V did not report the Bruising incident in 2016 to OS or Licensing. There is no objective evidence that established that the child's arm was free of bruises before the incident and no contemporaneous description or picture of the bruise in the materials, such as its size or colour that might

indicate whether it was recent or old, minor or severe. V's allegation that OS frequently grabbed the "different" child in that period lacked cogent detail or corroboration.

[234] Moreover, Licensing failed to consider V's opportunity to witness OS's alleged rough treatment of children, and whether it occurred once a month, as she alleged, given the intermittency of her assignments in the 3-5 Room and the brevity of her time working exclusively with OS in that room, i.e., the last two weeks that OS attended ICare before December 18, 2018. This undermines V's evidence of frequency and taints it with exaggeration.

[235] Nor did Licensing pursue corroborating evidence from G, a recently departed former employee with whom V said she spoke contemporaneously about the Bruising incident. G was readily available as a recent complainant and likely had crucial evidence about V's allegations about OS's conduct in 2016, including V's opportunities to observe it. This indicated Licensing's investigation on the 2016 events was not thorough.

[236] V's statement about the 2016 incidents directly conflicted with OS's denial. Moreover, V's allegations about OS's allegedly abusive conduct over time were inconsistent. V's statements about OS became increasingly serious over her three interviews, from denying that OS engaged in angry or rough treatment of children in her first interview, saying that OS got mad and yelled at some children when they were not listening in her second interview, and then changing her statements dramatically in her third interview by making the serious allegations quoted above. These included unparticularized allegations of OS's lack of anger control and of her frequent rough treatment of children.

[237] OS said she did not handle children roughly and that she had a policy against grabbing that she strictly enforced. The evidence of other staff corroborated that OS strictly enforced that policy. Licensing failed to explain in its Decision how it reconciled the conflicting evidence and why it preferred V's third and most serious version of OS's alleged angry and rough handling of children over OS's staunch denials supported by staff statements that OS strictly enforced her policy against such misconduct.

[238] There are questions about V's credibility and motives for her changing evidence. As noted, according to GW, Licensing assumed that V's statements in her third interview were true, because it believed V would not have contradicted herself if it were not true. However, V changed her evidence about OS's angry and rough treatment of children more than once. On GW's theory, V twice gave false answers before telling the truth.

[239] We note that Licensing briefly questioned V in her third interview about whether there was a reason why she did not tell "the truth" at the beginning of her interviews. V's response was vague and unhelpful. She said "Not really", it just takes time to get ready, and "maybe" she had not done an interview like that before. Licensing immediately supplied an answer to V that better conformed with its theory, and V promptly agreed with it:

> L. Right. And its very, yeah, It's difficult.
>
> [V]. Yeah
>
> L. There's no doubt about it.
>
> [V]. Yeah. Yeah.[10]

[240] Leading questions are not forbidden in investigations but can affect the weight to be given to answers. This leading question, where a decision-maker offered an interviewee an answer that fit with the decision-maker's theory of credibility, suggests a lack of neutrality, or at least a flaw in her credibility assessment. In any event, GW's theory that it is difficult for a witness to change her evidence and therefore her changed evidence is more truthful than her original evidence did not justify V's changed and contradictory statements. In the result, V's adoption of GW's suggested answer bears no weight.

[241] In addition to the question of the evidence Licensing did not consider, Licensing's reasons were opaque about the evidence it did consider in weighing the evidence and balancing the probabilities. In particular, GW testified that Licensing again relied on allegedly similar evidence from other, unnamed people saying OS had handled children roughly, to substantiate its finding that OS treated children roughly. However, it did not disclose that it had done so in its reasons, or the evidence it relied on in doing so. This lack of disclosure undermined the justification for its findings, leaving Licensing's reasons on the record as the only ones available to the Appellants and any subsequent decision-maker on reconsideration or appeal. This was a breach of procedural fairness and natural justice.

[242] This Panel concludes that Licensing's finding about the allegation that OS roughly handled children and bruised a child in 2016 was marred by disclosure failures, credibility errors, procedural fairness and natural justice failures, and investigative, decision-making and decision-writing errors. In light of the foregoing, the Panel concludes that Licensing's finding that the allegation that OS handled children roughly was not justified.

3. Refusing to accept a child's apology

[243] It was alleged that Child L was shamed in front of other children when OS refused to accept an apology he made to her. Licensing wrote:

> When asked about the allegation that she [OS] refused to accept [Child L's] child's apology and the child was shamed in front of the other children, [OS] recalled that during this incident she was doing a circle time that included the children looking for hidden toys. The child found the toy, but [OS] took the toy away and gave it to another child. The first child started crying and [OS] asked a staff to take him to the Infant/Toddler program to relax. [OS]admitted that there have been a number of times when this child did something and wanted to apologize, [OS] stated *"And then he will*

[10] JBOD, page 148.

> *come and say sorry and I will say "ok" or "you know what, your behaviour is not very nice, I'm still thinking about it, ok?"* [...] When interviewed staff [J], [V], and [M] were aware of the incident, and [Staff Member V] stated *"And he* (the child) *said uh, something in Hebrew, it means 'sorry* '. *But she goes, she said, um* "i *don't accept it. You make me mad. "And I was like, oh my God. Right? It was like ok. Poor guy, right? I literally had a tears in my eyes"* [...]**.** [Staff Member J] stated that [OS] gets mad if this child is not listening or is making noise, and recalled her saying *"I cannot take it - please take him away"* [...] in front of this child. [Staff M] admitted during the interview [...]*"And I went to her ([OS]) and I was, I talk to her about it, I told her, Ofra, everything I will accept everything, and I understand that you were trying to uh teach something and and --- was interrupt you or I can understand everything, I don't understand one thing. I don't understand one thing, why you didn't accept his apologize. He's only four years old. He's a child, you're a grown up, right? So she told me that she wanted to teach him like, cause he is keeping doing it every time. He always say sorry, but he continue doing it ... So this time she wanted to teach him, you can't say sorry every time and acting like nothing happen and do it again and again and again".*

[244] The allegation that was disclosed to OS was only a portion of the finding ultimately made against her. That allegation was made by Complainant A. It was disclosed to OS in her first interview on January 3, 2019, as follows:

> ...a child from the 3-5 room was brought to the gym after an incident with you. The child apologised to you and you looked at him and yelled and said, "I do not accept your apology." The child was left in the gym with the infant-toddler group, and then at lunch you continued, the words were, "to shame the child in front of the other children."[11]

[245] This partial disclosure was a breach of procedural fairness and natural justice. The allegation that Licensing ultimately found substantiated went substantially beyond what it disclosed to OS.

[246] Witness descriptions of the incident with Child L were complicated by the fact that he was a very recent immigrant from Israel. As Staff Member V said, Child L spoke Hebrew, and his English language skills were poor. The only other staff that spoke Hebrew were his mother, Staff Member M, and Complainant A.

[247] Notably, OS is the primary person who promotes knowledge of Hebrew at ICare. As part of this, she conducts part of ICare's program in Hebrew. Staff Member V confirmed this, saying that when OS does circle time, "she does it more in Hebrew so they [the children] can learn the language".[12] Additionally, OS speaks to new Israeli students in their own language, where their knowledge of English is limited. There was evidence to this

[11] JBOD, page 121.
[12] JBOD, page 072.

effect both in connection with this allegation and the allegation that OS permitted an Israeli child under 30 months to be in the 3-5 class, discussed below.

[248] Despite this evidence, Licensing did not take this multicultural aspect of ICare's operations into account in relation to this allegation. GW admitted at the appeal hearing that she believed that the conversations between L and OS were in English. This fact sheds a very different light on the evidence Licensing relied on in reaching the conclusion that the allegation, as ultimately found, was substantiated.

[249] The transcript evidence showed that A's allegation arose from one of a series of interactions in a single day involving OS and Child L. A, V and J observed only parts of Child L's day and so were not in fact "aware" of what happened in its full context. J was present during the first part in the classroom, V and A were present in the second part in the gym, V and OS were present during the third part in the classroom, and OS and M were present for the final part in the classroom. Additionally, there was some overlap. However, OS was the only one who participated in all of the key events.

[250] On November 28, 2018, while OS was leading circle time with the 3-5 class, Child L had a tantrum. His mother, M, was not present during the circle time incident, but later saw a video of this. She said that during circle time, OS was trying to teach the children about the Jewish holiday Hanukkah with a game involving a hidden doll. L kept trying to interrupt OS to show her he had found the doll. There was some misunderstanding between them and OS took the doll and gave it to another child. This prompted the tantrum: L became very upset, sat down and started shouting and crying. M said this so disrupted circle time that it was brought to an end. OS told J to take Child L to the gym, where the IT class was at the time.

[251] J recalled that she had been videotaping circle time that day. At OS's direction, she stopped videotaping and took Child L to calm down in the gym where the IT class was. J did not witness the rest of the incident that day. We address our serious concerns about J's credibility about the subject-matter of the quote attributed to her above, as well as her changed statements about this incident, under the heading "Allegations of Emotional Abuse", below.

[252] Both A and V (in her second interview[13]) said they were assigned to IT class at the time and were in the gym with the small children. They saw Child L in the gym lying on the floor and crying. Neither knew why he was crying. V took Child L to the 3-5 classroom to calm him down. She tried to find out what happened, but he was unable to tell her because of his limited English. V assumed from something A told her in the gym that OS was mad at the child. So, V encouraged him to apologize to OS. He agreed and V brought him to OS for that purpose.

[13] JBOD, page 095.

[253] There is a conflict in the evidence about who was present at the apology, where it was and what was said at the time. Each of A, V and OS said they were present for the child's apology. A said that OS was at the door to the gym at the time of the apology. The evidence of V and OS was that no one else was present with them and Child L at the time of the apology. Although V did not say where the apology took place, OS said it took place in the 3-5 classroom's kitchen. We will return to OS's version of events, below.

[254] V said that Child L was happy when she took him to apologize to OS. V said Child L told OS he was sorry in Hebrew. Each of A, V and OS gave somewhat different versions of what OS said in response. A and V both said that OS refused the apology. In V's version, OS also said "I am mad at you". V was unable to say what explanation OS gave for this. We find that V did not understand what OS said to Child L, because OS spoke to him in Hebrew, a language V did not speak. Therefore, V's statement about what OS told Child L is not credible. A, who speaks Hebrew, admitted she did not remember the exact words OS used after she refused the apology, but said OS yelled at Child L and said something like "I am sick of your behaviour and I am sick of you crying". No one corroborated A's recollection of the yelling or this wording.

[255] When OS was first interviewed about this incident without prior notice of the allegation, she did not remember this particular apology but said that Child L often made apologies for misbehaviour and then would then do it again. She denied refusing his apologies, saying "who would do that?" When Child L apologized, she would have said either "ok" or that "you know what, your behaviour is not very nice, I'm still thinking about it, ok?"[14]

[256] M said she was not present during the apology. When she arrived at work that day, she learned about the apology from A and V. They told her that V was the one who took her son, Child L, to OS to apologize. Afterward, M went to talk to OS. She found Child L hugging OS and heard them talking.

[257] M's account of what OS told her corroborated that OS had not absolutely refused to accept L's apology. M said OS told her about her child's tantrum during circle time. OS said Child L was crying and she could not handle it because it was too much. So, she had someone take L to the gym. About 20 minutes later, Child L came to OS to say sorry. OS said, "…[N]ot now, I'm not accepting your sorry or apologize right now."

[258] M said that OS explained that Child L was always apologizing for his misbehaviour and then repeating the behaviour. OS wanted to teach him that he cannot do something very bad and say sorry and then act like nothing happened and do it again and again. She wanted him to understand that his apology was not acceptable at the time. She thought he needed to wait and have time to think about what he had done. OS later called Child L over to her and they talked about it. OS told him, "I love you [Child L], um you know why I

[14] JBOD, page 122.

was behaving like that? You know why I didn't accept your apologize and he told [OS] yes, I know I understand…. And it's ended with hugs and kisses".

[259] In her interview, M agreed that Child L did have the pattern OS described. M also said that he told her that he loves OS and did not believe she would hurt the children. She said their relationship was "like … a grandma and grandchild." M said that A's complaint made what happened sound much worse than it was, because she knew OS loved the children and she knew how the kids loved OS.[15]

[260] At the appeal hearing, OS testified that the apology occurred in the presence of V. A was not present. OS's exchange with Child L was in Hebrew. Child L recently came from Israel and started at ICare. He knew very little English. V did not speak Hebrew. OS testified that Child L did not understand what an apology was. He would often become overstimulated and have temper tantrums when he did not get instant gratification. He would apologize for his behaviour, but then he would misbehave again as if nothing had happened before. OS had tried a number of strategies that had not been successful.

[261] On this occasion, Child L had a temper tantrum when playing a game during group time that involved finding a hidden toy. OS asked J to take him to relax. Later, V brought Child L to OS in the kitchen in the 3-5 room while the rest of the 3-5 children were outside. OS wanted to teach Child L to wait and think about what he did and learn that there are consequences to his actions. She attributed her theory of talking about consequences to the theories of a psychologist, Skinner. When L told her he was sorry, in Hebrew, she responded in Hebrew. She thanked him but said she did not accept it just now. She said she was thinking about it and they would talk about it later.

[262] Very shortly afterward, OS called Child L to her and asked if he understood that each of the children had found the toy. He said yes. She then asked if he thought it was fair for him to have the toy twice and the other child not at all. He said no. She told him that she then accepted his apology and hugged him. His mother, M arrived while they were hugging. OS testified that she spoke with M about what had happened. M understood her teaching method and later said she does it at home as well.

[263] GW testified that she understood from the staff interviews that OS's response was in English, not Hebrew. We note that the contrary can be inferred from Staff Member V's transcript. Accordingly, GW's understanding appears to be based on an assumption.

[264] GW testified that A said she was present at the time of the apology. GW testified that V said that she was present at the time of the apology and denied that any other person or child was there. This is a direct contradiction that Licensing failed to resolve in addressing the credibility of the evidence about the apology.

[265] In describing what OS had done wrong, GW testified that the child was crying and trying to apologize to OS and his apology was not accepted in front of other people. GW

[15] JBOD, pages 114 and 117.

then said that an absolute refusal to accept the apology of a child who is crying was not appropriate behavioural guidance. However, there was no allegation or personal knowledge evidence that Child L was crying at that time. We attribute GW's testimony about the child crying while apologizing to memory issues.

[266] In reviewing the evidence, we note there were a number of errors relating to Licensing's conclusion that the allegation as ultimately described was substantiated. These include disclosure failures, evidentiary issues relating to credibility and reliability issues, assumptions made without evidence and failures to apply principled analyses when assessing and weighing evidence and balancing the probabilities.

[267] OS was not given sufficient particulars of the allegations that Licensing found were substantiated and a summary of key evidence. Nor was she given an opportunity to respond to them. This was a breach of natural justice and procedural fairness.

[268] More importantly, Licensing failed to ascertain what language OS used in responding to Child L's apology and failed to resolve the contradiction about who was and was not present at the time. These issues were critical to the question of whether the witnesses Licensing relied on – J, A and V - had the opportunity to hear what was said during the apology. There was ample evidence that OS, a native Hebrew speaker, was sensitive to the communication needs of newly arrived children from Israel and spoke to them in Hebrew, including Child L. V confirmed Child L's difficulty with English. A child with Child L's poor facility with English would not have understood OS's rejection of his apology that A and V stated had it been said in English.

[269] We find that neither J nor A were present during the apology. We prefer OS's testimony that she spoke with Child L and responded to his apology in Hebrew. We find that V did not understand what OS and L said to each other in Hebrew. Because of the language barrier, V did not have the opportunity as a witness to understand the exchange. This fact damaged V's credibility.

[270] While OS did not recall the specific apology and exchange when she was first interviewed about it, without prior notice of the allegation, she described her general recollection of Child L's difficulty in understanding the meaning of apologies and the strategy she used to teach him about their significance.

[271] OS's general recollection was corroborated in more detail by M's specific recollection of what happened in the particular incident. Although M was not present for the apology and response, OS told her about it very soon afterward with Child L present. Additionally, M had personal knowledge of the steps OS took to follow-up on what OS had previously told Child L, i.e., that OS was "not accepting [L's apology] right now" and would think about whether to accept his apology. There would have been no need for OS to follow-up with Child L if OS had rejected his apology absolutely. The fact that OS did so strengthens the credibility of her evidence.

[272] Complainant A demonstrated memory frailties when she described the events of the day and OS's response to the apology. Additionally, other witnesses – OS and V - contradicted significant aspects of A's statements, such as whether she was present at the apology. There was no evidence to corroborate A's allegation that OS yelled at Child L when responding to his apology. Nor is there any evidence that OS shamed Child L in front of other children at that time, as none were present at the apology.

[273] Further, A, who spoke Hebrew, described OS's response to Child L's apology on three occasions, which changed somewhat on each telling, understandably, as she twice admitted she did not remember the exact words OS used when refusing the apology. However, this diminished the weight to be put on A's description.

[274] The Panel prefers M and OS's version of the apology and its delayed acceptance over V's and A's version that OS refused it absolutely when he first apologized. Moreover, we give the greatest weight to M's evidence as she is Child L's mother and, as such, would have a better reason to remember what OS and her child told her. That is, OS responded to Child L's apology in a manner that required a further step. The fact she took that step, witnessed by M, corroborates that OS did not refuse to accept the apology absolutely, but instead delayed it for a teaching purpose. Moreover, M's and OS's descriptions are a better fit with the overall context and sequence of events of the day.

[275] In the result, we find that Licensing's finding that this allegation was substantiated was not justified.

4. Yelling at and embarrassing a child brought in a diaper

[276] Licensing found an allegation substantiated that OS yelled at and embarrassed a toilet-trained child who was brought to ICare one morning in diapers (the "Diaper" incident). It wrote:

> When asked about the allegation that she yelled at [Child Z] who came to the daycare wearing a diaper that their grandmother had put on them [OS] said *"So the child is already toilet-trained. It was really hard to toilet train her. And her grandmother is ... for the lack of better words, old you know? So. I don't know how she handled things, right? So she brought her in, in a diaper. And I noticed a few hours later that she has a diaper and I said why do you have a diaper? "Grandma put it on me." But you don't need a diaper. You're toilet-trained why you need the diaper? And I said take it off She took it off That was the end of it."* When asked if the child was embarrassed and crying, [OS] stated *"I never embarrass my kids. I never embarrass them. I never disrespect them. I love them"* When asked if she thought that it would embarrass a child to have that conversation in front of their friends, [OS] said *"Why? To tell her she doesn't need a diaper? She doesn't need a diaper why would she wear one? Would you be embarrassed? Why? if you wearing a diaper and I tell you why you wearing a diaper, you don't need one. You big girl one. You don't need one".*

[277] The allegation disclosed by Licensing to OS was as follows:

> A child who is three came to the daycare wearing a diaper that her grandmother put on her. During circle time you yelled at her and told her that she doesn't need a diaper, and that if her parents or grandparents want to put one on her she should tell them she's not going to wear it and the child began to cry.[16]

[278] Complainant A made the complaint. Her descriptions of the incident yielded relevant inconsistencies. She wrote in her December 17, 2018 email that the child became embarrassed before circle time, not at circle time:

> There is a little girl named [Child Z], who came to the daycare with a diaper that her grandmother had put on her. Ofra was furious that [Child Z] had it on and [Child Z] was very embarrassed about wearing it. [Child Z] is 3. During circle time, Ofra yelled at [Child Z] and told her that she doesn't need to wear a diaper and that if her parents or grandparents want to put one on her, that she should tell them that she is not going to wear it. [Child Z] was crying. This happened with just me and Ofra in the room. I was mortified for this child.[17]

[279] Complainant A's description of the incident changed during her December 19, 2018 interview, where she said the child became embarrassed during circle time, not before, as follows:

> She came in wearing a pull-up [W]hen [Child Z] came in the morning, the grandma was taking it off in the room and um and Ofra came over and said "why is she wearing a diaper she doesn't need a diaper" um and then the grandma left and in circle time [Child Z] was standing next to her and she was like "[Child Z], you don't need a diaper and if anybody tries to put a diaper on you you tell them that you don't need a diaper" and... she's three. [Child Z] is three. And [Child Z] was crying because she was really embarrassed because she was wearing a diaper and ...she went on and on in front of all the kids."[18] (underlining added)

[280] The differences between the descriptions are material to the question of whether OS yelled at Child Z, whether OS caused her to be embarrassed and cry, when her diaper removed, and what she was embarrassed about. We address this further below.

[281] In response to the allegation as disclosed to her, OS made the comments quoted above from Licensing's Decision. At the hearing, OS testified that she was not angry when she talked to the child. Her tone was conversational; she invited a conversation with the child, for whom toilet training had been difficult. She was intelligent and almost four years old. This was a big milestone for her. When OS saw the child wearing a diaper, she asked her why and whether she needed a diaper. If she did not need it, she could take it off. The child took off the diaper and together they put it in the garbage. The child did not cry. Rather, she was grateful to take the diaper off and hugged OS.

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[16] JBOD, page 124.
[17] JBOD, page 040.
[18] JBOD, page 083.

[282] OS denied that she talked to the grandmother about it because she was not the person she dealt with about the child. Instead, OS later talked to the child's father about the grandmother bringing the child in the diaper. She told the father that putting a diaper on the child would confuse her and might interfere with her toilet training. He agreed to discuss it with the grandmother.

[283] There are a number of concerns about the credibility and reliability of Complainant A's statements.

[284] First, Complainant A changed her statements about this incident. In her December 17, 2018 email, she said OS was furious when Child Z arrived in a diaper, yelled at the child during circle time and the child cried. In Complainant A's interview two days later, she did not mention OS being furious or yelling at the child at all. Rather, she described OS's manner using much more subdued language. She used the words "Ofra …said" and "Ofra was like". One would expect Complainant A to have mentioned that OS was furious and yelled in the interview, because it was such a significant part of the original complaint. This omission suggests that OS's fury and yelling did not occur.

[285] Second, Complainant A's two versions are inconsistent about when Child Z became embarrassed. In the email, Complainant A said Child Z was embarrassed when she arrived, before circle time. In the interview, she said the child was "really embarrassed" during circle time. There is no explanation for these different claims in the space of two days about when the child became embarrassed. This weakens the credibility of A's statements.

[286] Third, Complainant A said in the email that Child Z was embarrassed because she was wearing a diaper, before circle time. She said at her interview the child that Child Z was "really embarrassed" during circle time because she was wearing a diaper. Complainant A could not have known what was in the child's mind, what she was feeling and why she felt that way. Complainant A's allegations were conclusory and not based on objective evidence.

[287] Fourth, Complainant A's evidence does not establish a cogent, causal link between OS's alleged misconduct and Child Z's crying or embarrassment. The cause of these reactions, if they occurred, are open to other interpretations. For example, if, as Complainant A said in her interview, the grandmother had already removed the diaper before circle time, it is not possible to conclude that during circle time OS caused the child to be embarrassed because she was wearing the diaper, since she was not wearing one. If the child cried during circle time while still wearing the diaper, there are other plausible reasons for this, such as those OS described. For example, OS's actions in confirming to her in front of her friends that she was indeed potty-trained and did not need a diaper may have relieved her embarrassment. If the child cried, it may have been because she felt grateful and validated by OS's actions. This view is supported by OS's statement that the child threw away the diaper and hugged her.

[288] GW testified that Licensing did not ask Complainant A to substantiate her complaints in any way. She said that Licensing does not rely on the words of one staff member or one interview; it looks at all of the interviews first. Despite this, there were only two witnesses to the Diaper incident: Complainant A and OS. Licensing's findings relied on Complainant A's statements that OS had yelled at and embarrassed the child and rejected OS's denials. In the result, Licensing found the complaint was substantiated by Complainant A. There is nothing in the Decision to show it was substantiated by any other evidence. Notably, Licensing failed to explain how it reconciled Complainant A's and OS's conflicting versions and why it preferred Complainant A's version over OS's. This was a breach of procedural fairness and a fundamental flaw in its reasoning that this allegation was substantiated.

[289] It appears from OS's description of her exchange with Child Z that OS employed a method of asking questions to elicit answers that supported Child Z's confidence in treating her as a "big girl" who did not need diapers anymore. Child Z responded positively to this by throwing away her diaper and hugging OS. This is similar to the method OS said she successfully used with children who were misbehaving, rather than behaving age-appropriately, as described below.

[290] In this Panel's view, OS's consistent and more detailed version of events, which includes her explanation of her method and her discussion with Child Z's father, is more trustworthy than Complainant A's inconsistent versions. We note that the child's father likely had crucial evidence about the events of the day that may well have corroborated or disproved OS's evidence, but Licensing did not pursue it. A's changing and conflicting evidence against OS is not sufficiently credible, cogent or reliable to overcome OS's evidence, which is more harmonious with the probabilities. We find that Licensing's finding about this allegation was not justified.

5. Threatening to send older children to the Baby Room

[291] Licensing found the allegation substantiated that OS threatened to send children from the 3-5 room to the IT room if they did not behave:

> When asked if children were threatened with being sent to the baby room if they didn't behave, [OS]stated that she has told the children, *"It's not a threat, it is like this. Here, here 3-5. This is a big kids' room. In the big kids' room I expect big kids behaviour. If you are going to do this or that, you belong in the other room? No. Do you want to babies' room? No? Then you behave like a big kid"* [...] [OS] did not see this as "threatening" the children. In the December 18th interview [...] [Staff Member J] stated, *"And she, <u>once</u> she got so frustrated so she told me just take him there. And I have to because I am working there, right? I could not do much".* (underlining added)

[292] Complainant A made the allegation that that OS "will also threaten the children with sending them to the baby room if they don't behave". GW testified that OS admitted that she made the statement, but denied it was a threat. GW said that OS's admission confirmed that it was a threat.

[293] It is significant that Licensing did not include what OS said in the transcript after the sentence "Then you behave like a big kid", which was: "So of course big kids' behaviour you know it's a kid right?"[19]

[294] When the quoted statement is read with the missing comment, it is apparent that OS put a number of questions to children who had been misbehaving which offered them a choice about whether they wanted to be in the big kids' room where behaviour appropriate to their age is expected or whether they wanted to be in the babies' room where that behaviour is not expected. This conclusion is supported by OS's testimony that the children always chose the big kids' room where they would have to act their age. Notably, there was no evidence that OS actually sent children to the IT room after making such a statement to them.

[295] It is curious that Licensing included the comments attributed to Staff Member J in the last sentence of the paragraph quoted above, since they do not support the allegation of threatening and are not relevant to it. In her first interview, J said that once OS was so frustrated she told J to take Child L to the IT room. However, J did not say that OS threatened Child L beforehand. Indeed, J did not describe anything that OS said to Child L before telling her to take him to the IT room.[20] Nor would J have understood what OS said to Child L, as his English was poor and they spoke to each other in Hebrew, as explained in the discussion of the Broken Toy incident, above.

[296] In our view, the statement that OS admitted making, explained by the missing words and her testimony, did not amount to a threat. OS did not tell misbehaving children that she intended to send them to the baby room if they did not behave. The statements OS admitted to are more properly characterized as offering a choice. She asked a series of questions designed to encourage a child who was not engaging in age-appropriate behaviour to choose whether to stay in the "big kids" room where age-appropriate, "big kids"' behaviour was expected or whether the child wanted to go to the babies' room where that kind of behaviour was not expected. The children always chose to behave like a big kid and stay in the 3-5 room. As a choice, the statement was not a threat.

[297] In the circumstances, Licensing's finding that OS threatened to send children to the Baby Room if they did not behave was not justified.

6. Allegations of a variety of misconduct and emotional abuse

[298] Licensing found the allegations substantiated that OS engaged in emotional abuse of the children, as follows:

> Licensing reviewed the interview comments regarding the allegations that [OS] yells at children and *"is a loose cannon. Many of the children are afraid of her"* and concluded that there was enough evidence to substantiate the complaint. In one of the interviews on

[19] JBOD, page 123.
[20] JBOD, pages 055-056.

> December 21st [...] [Staff Member J] said *"I mean she really gets mad. Maybe if the child is not listening or making noise you know. Such an environment. So she cannot take it, so she tells me just take the child away from me."* When asked by Licensing to clarify what [OS] does when she gets mad, the [Staff Member J] said *"Like the way I showed you, "Stop! Stop! Just take the child away from here! I cannot take it anymore! This is too much! This is very stressful for me!"* [...] Licensing asked if this took place in front of the group, and [Staff Member J] confirmed *"Yes."* She further stated *"we are scared of her the way she is loud"* and described [OS]'s behaviour as "*It is emotional abuse for the kids and maybe they are afraid of her.*" In interview on February 13th [Staff Member V] stated that children have said to her *"Don't tell her. I'm afraid of Ofra".* [...] She said that sometimes she has seen [OS] yelling at some children, especially if they are not listening. She further stated *"Yes, she's like that. She doesn't know how to control her anger, and she just yells at them and grab them from the arm ... sometimes she just comes and drops them by the door and shuts the door. Hard. So hard, like everybody can hear. And then we used to pick up the kids, like kid, nicely, oh what happened to you? And then sometimes she used to come back and then she used to tell us, you don't need to do that! Leave them alone!"* [...]. In the interview from December 18 [Staff Member L] said, *"It's happening... So, if for example, somebody is not listening in the circle time, or they talking with each other or they doing something, or I don't really, like, she is getting like frustrated. Yeah sometimes she is raising her voice."*

[299] This passage covers a number of allegations made by Complainant A and Staff Members J, V and L, some of which Licensing relied on to substantiate these allegations but did not disclose to OS, including that:

- She is a loose cannon;
- She does not know how to control her anger;
- She gets frustrated, for example when a child is not listening or is talking to someone in circle time;
- She gets mad if children are not listening or make noise;
- She grabs and pulls children "once a month" and yells at them "daily";
- "Many" children are afraid of her;
- Staff are afraid of "the way she is loud";
- Sometimes she drops children by the door of the IT room and shuts the door so hard everybody can hear;
- Sometimes she returns to the IT room to find teachers comforting the children she dropped off and tells the teachers they did not have to do that and to leave the children alone;
- She emotionally abuses the children by making statements in front of them, such as: "Take the child away from here.", "I cannot take it anymore.", "This is too much", and "This is very stressful for me."

[300] Licensing's failure to disclose the specific allegations, important particulars (such as those in quotes above) and key evidence was a significant breach of procedural fairness and natural justice that was particularly problematic because: (a) they were among the

most serious allegations made against OS, (b) the key witnesses on which Licensing relied were not credible or there were inconsistencies in their evidence over their multiple interviews, and (c) there was conflicting evidence about these allegations that Licensing did not resolve with reasons explaining why its findings were preferred over the versions of OS and others whose statements supported her version.

[301] Below, we review the allegations and evidence in sequence, according to the person who made the comments quoted in the passage above. The Panel has reviewed them in more detail because of the multiplicity of allegations and complexity of the issues they raise, especially about credibility, weighing evidence and balancing probabilities.

Complainant A:

[302] According to Licensing, A stated that OS yells at children and "is a loose cannon. Many of the children are afraid of her." However, A's specific allegations that OS yelled at children were denied by OS and Parent R and were otherwise not credible or reliable. A's allegation that OS "is a loose cannon" is opinion evidence, which has no weight. A's statement that "Many of the children are afraid of her" was not supported by her particulars. A mentioned only one unidentified child saying this. As unidentified double hearsay, we give this evidence little to no weight.

Staff Member J:

[303] The comments quoted above that are attributed to Staff Member J were made in the second of her three interviews.

[304] Licensing repeatedly questioned J about certain allegations over her three interviews. Her answers were inconsistent as between those interviews and even within the second interview. However, Licensing chose to rely on J's comments in her second interview to substantiate the allegations, without reconciling these comments with J's contrary or inconsistent comments in that and two other interviews. Licensing also cobbled together parts of two answers to two different questions that were not relevant into a single sentence, without providing an explanation for doing so.

[305] In J's first interview, she recalled the incident on November 28, 2018, where OS told her to take Child L to the IT room. J said that OS was frustrated with Child L, based on J's view that OS looked unhappy. Notably, J did not say OS yelled at the child or grabbed him. When asked whether OS's voice gets louder, J said "Not that much. No."[21] J also said that OS was good with the children, was nice with them and did not insult them.

[306] At J's second interview, Licensing questioned her about this incident again. J's responses were significantly different from her first interview. She recalled that she was videotaping the incident she described in her first interview. She said that OS told her to stop the video because Child L was very disruptive and OS told her to take him to the

[21] JBOD, pages 055-056.

other room. Licensing then asked her why OS told her to stop the video and J provided contradictory answers. J said, "I think" the video was to be sent to parents and it would not look good if OS sent them a video of Child L misbehaving and running around everywhere.

[307] Licensing caught an error in J's answer. They had seen the video and said that was not what Child L was actually doing in the video. They said they saw that OS "was not happy" when she told J to stop the video. J then pivoted and suggested there was a pattern, saying: "Oh. It was not the first time she. I think that was the second video she told me to stop. Yeah."[22]

[308] Significantly, there was no evidence of a pattern. No one corroborated there was an earlier incident of that nature. Nor was there evidence of any later such incident.

[309] Licensing repeated its question why OS told her to stop the video. This time, J admitted her statement that Child L was disruptive, misbehaving and running around was false and disavowed all knowledge of why OS told her to stop saying: "I swear I don't remember at all because it is not the first time." (underlining added)

[310] Licensing appears to have ignored the impact of this admission on J's credibility and proceeded with J's "pattern theory" by asking: "When it's not the first time, what does she do then when she stops a video? What happens?" J answered: "She doesn't do anything she just tells me take the child away from there. I cannot take it. I cannot take it, please take him away. Like that. So then I do what she tells me."

[311] When asked what OS could not take, J made the more damaging comments attributed to her in the passage above. That is, J made a conclusory statement that OS gets "really mad", speculated that "maybe" it is because the child is not listening or making noise and repeated her description of what OS said to her when she got mad. J went on to say that "[OS] gets mad. But she doesn't harm the children".

[312] The problem with these statements is that J did not establish that OS had a pattern of misconduct or that it involved the speculated emotions. J only mentioned two occasions when OS told her to stop videotaping, only one of which related to Child L. J did not provide any particulars of the first occasion. Notably, J did not state that OS got mad at Child L on the second occasion.

[313] Moreover, J's statements about OS getting mad contradicted her statements in her first interview, where J said OS got frustrated, but also said that OS was good with the children.

[314] As noted in the quote, J described the words OS used when she got mad. However, those words were capable of interpretations other than anger, such as expressions of stress, frustration or exasperation. Licensing did not grapple with J's inconsistencies. Rather, it relied on J's characterization of OS's conduct.

[22] JBOD, page 105.

[315] However, later in the same second interview, J said that when OS "gets mad", J had to take the child out.[23] This had happened twice, once with Child L who she took out of the room and once with Child J who she did not remove from the 3-5 room but took to a quiet area of the room.

[316] Accordingly, J's statement in her first interview that OS only got frustrated with Child L and her statement in her second interview that that she did not recall why OS told her to stop videotaping on November 28, 2018 conflicted with J's subsequent statements in her second interview that OS once got mad in the November 28, 2018 incident with Child L and so J had to take him out and that OS once got mad at Child J and so J took him elsewhere in the room. J also said that a three-year-old does not understand when they hear someone saying "I can't take this anymore. Take him away from here."[24] There was no credible evidence that what OS said harmed either Child L or Child J.

[317] With respect to Licensing's quote of J's comment in her second interview that "we are scared of her the way she [OS] is loud", this conflicts with J's statement in her first interview that OS did not raise her voice very much and in her second interview that OS was very nice to her and had never threatened her. Moreover, Licensing did not ask J to explain who J meant when she said "we", so it is not possible to extrapolate that everyone was scared of OS being loud.

[318] It is important to note that according to the evidence and ICare's job description for ECEs, the day care is typically loud and noisy. It would not be surprising that OS would raise her voice or change her tone to be heard over that level of noise. Licensing gave no explanation of how OS's volume of speech or "the way [OS] is loud" amounted to misconduct in the context of the loudness of a day care. We observe that no other staff member corroborated J's statement that they were afraid of OS because she was loud.

[319] In her third interview, J's statements changed in a yet more inflammatory way about OS's treatment of children and about the incident with Child L in particular. In contradiction with her statements in her earlier two interviews, J said for the first time that she had seen OS yell at Child L once and grab him. This happened in group time and related to an issue about a toy he had. J said that OS grabbed Child L and told J to take him away. She did not describe the grabbing and was not asked to do so. The problem with this changed statement is that it was clear by then that this was the same incident of November 28, 2018 that J described in contradictory ways in her first and second interviews, including by giving the false answer described above.

[320] Then, J added that she had seen OS yell at children sometimes. It mostly happened after lunch, when it would get messy, all the children would be roaming around and OS wanted her "quiet time". She said OS would start "screaming" to the teachers to take them outside. Most of the time she would yell at Child L and Child J. However, when Licensing

[23] JBOD, page 107.
[24] JBOD, page 106.

asked what OS would say to the children, J said: "I don't remember her telling anything to the children."[25] This contradicted J's claim that OS yelled at children.

[321] Nevertheless, J went on to add that the children were very scared of her. When asked what it meant to be scared of her, J said: "Can't think of anything…."[26] This showed that J could not back up her conclusory allegation that children were afraid of OS with objective evidence.

[322] In our view, J's multiple contradictions and unsupported statements seriously undermined her credibility in general and, in particular about the comments attributed to her in the above quoted part of Licensing's Decision.

[323] Moreover, Licensing departed from GW's explanation of how it determined truthfulness, i.e., that an interviewee's changes to their statements are treated as more truthful, because making changes are hard to do. In J's case, J changed her evidence in every interview, yet Licensing relied on J's changed statements in her second interview rather than her changed statements in her third interview, without explaining why it found her changes in the second were more trustworthy than those in her third.

[324] In the result, Licensing failed to apply a principled analysis of J's credibility. Nor did it explain how it reconciled the conflicts in J's contradictory and changed statements it chose to rely on and OS's version of events and why it preferred those statements over OS's version of events. Accordingly, we give J's statements little to no weight with respect to her evidence in the quote above.

J's "cobbled" sentence:

[325] We now turn to the sentence in the paragraph quoted above where J supposedly said: "It is emotional abuse for the kids and maybe they are afraid of her." There are three problems with this. The first is that this sentence is not an accurate quote. Licensing cobbled together two phrases from different contexts to make this sentence. That is, it took the part of the sentence "It is emotional abuse for the kids" from page 5 of J's second interview and the other part "maybe they are afraid of her" from page 6 of the interview.[27]

[326] Second, the phrase, "It is emotional abuse for the kids", was taken out of context. J stated, "she's a nice person. I've never seen her bullying children or doing anything as such. Maybe once as I told you. Since October I have not seen anything like that. Like abuse, no abuse at all."

[327] Licensing implicitly challenged J's response by posing a scenario where she hears somebody saying, "I can't take this anymore. Take him away from here", and asking "…what does that tell you about that situation? Do you think that that's abuse?" J immediately made a harsh, judgmental statement agreeing with Licensing's proposition. J

[25] JBOD, page 159.
[26] JBOD, pages 160-161.
[27] JBOD, pages 106-107.

said, “She should not be here because that is abuse, emotional abuse for the kids.” Licensing then led J to agree that this abuse was serious and involved a child. J concurred that “you cannot do that, yeah” and “It’s a three year old, they don’t even understand, you know.”

[328] Having obtained this answer, Licensing approvingly reassured J, telling her not to worry, that she was not the first person to share this information and that this information was very concerning to it. However, the problem with the statements that Licensing elicited from J, was that they were opinion evidence from someone who was not shown to have expertise in that area. Licensing was asking J to give an opinion on the very question that Licensing itself had to answer: whether OS abused the children, including by way of emotional abuse. Then, Licensing relied on J’s opinion as evidence to support its finding.

[329] Moreover, J was in a position of unequal power with respect to the Licensing Officers, who were in an authority position over her. And she had a motive to help Licensing as opposed to OS, given her request that Licensing help her open her own daycare. If she did not agree with Licensing’s proposition, it might harm her career plans. However, if she agreed with the answer, it might harm OS. In the circumstances, J’s agreement with Licensing that OS emotionally abused children has little to no weight.

[330] Third, the phrase “maybe they are afraid of her” was plucked out of an exchange where Licensing asked J about the difference in the behaviour of the children before and after OS was barred from ICare. J said:

> And in front of us those kids don’t behave as much as when Ofra is there so <u>maybe</u> they are afraid of her. And when we are here you know, <u>I don’t know</u>, that <u>could</u> be a difference. <u>Do you think so?</u>… Like when yeah they feel safe. Yesterday *mumbles* and when Ofra is there they act like adults. So we feel why when Ofra is there they listen more and when we are there they don’t. (underlining added)

[331] The suggestion that children behave better with a teacher because “maybe” they are afraid of her has no rational foundation in the evidence J described. It may simply have been that OS used different educational methods that elicited better behaviour from the children. The phrase “maybe they are afraid of [OS]” is speculative and has no reasonable connection with J’s statement that the children were emotionally abused.

[332] It served no purpose to cobble the phrase about emotional abuse together with the phrase about speculated fear, except to embellish the gravity of Licensing’s finding of emotional abuse against OS. Yet Licensing relied on this, which suggests a lack of neutrality. In the circumstances, the Panel gives no weight to the cobbled sentence.

Staff Member V:

[333] V’s statements followed a similar pattern as J’s. That is, they became increasingly negative and contradictory over her three interviews. With respect to V’s allegation that children were afraid of OS, we note that in her first and second interviews, V said nothing to suggest that children were afraid of OS. It was not until her third interview that she

asserted that children were afraid of OS. She quickly narrowed that to two children and named only one. V said she believed both boys' fear was in their mind, indicating that she did not think they had a reasonable basis for their fear. V did not say when this happened or how many times it happened. Her statement is inconclusive about whether this was a fleeting matter or a serious problem. This evidence is not sufficiently cogent and objective to establish a causal link between OS's alleged misconduct and children reasonably fearing her.

[334] The general allegation that "children" were scared of OS did not receive support from other interviewees. OS denied that children were afraid of her. She said she treated them respectfully. Staff member L, who predominately worked in the IT room, said the children loved OS and always looked happy to see her. Staff Member S disagreed that children were scared of OS and said all the kids loved her.[28] Staff Member M also said that the children were not afraid of OS and loved her.[29] There were other sources of evidence about whether children were afraid of OS that were not pursued, such as the children's parents, but Licensing strictly applied its policy of not interviewing them.

[335] It is trite to say that small children's emotions can be very changeable. Neither A's nor V's hearsay and double hearsay statements that children feared OS amounted to sufficient evidence on which to conclude that this was a serious or pressing matter that required regulatory intervention. Indeed, it may be that A and V were referring to the same one or two children.

[336] V's allegation that OS does not know how to control her anger is opinion evidence and unhelpful. This allegation and her allegation that OS yelled at and grabbed children, were contradicted by V's earlier statements. In her first interview, V denied seeing OS tired or frustrated and said OS arrived fresh in the morning. Additionally, she said that OS was "pretty good with the children". She denied that she had seen OS yelling at children, grabbing them, handling them roughly or threatening them.

[337] In her second interview, V said she sometimes saw OS yelling at some kids, especially when they are not listening. V only named one such child, Child L, who she said was a child that does not listen. However, when she was asked why OS would yell at Child L in particular, V started guessing. She said "I guess he, he doesn't listen most of the time…And he cries a lot…like over little things…very sensitive."[30] V gave an example of OS calling Child L to come for group time, when he was not listening. V also said that Child L did not speak much English, so OS spoke to him in Hebrew, which V did not understand, so V would not have known what OS said to Child L. In any event, speaking loudly for the purpose of attracting someone's attention to tell him to come to a new activity is not inappropriate, particularly in the noisy environment of a daycare.

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[28] JBOD, page 155.
[29] JBOD, pages 116-117.
[30] JBOD, page 096.

[338] In reading the transcript of V's second interview, she did not provide objective evidence of OS's anger towards Child L, other than during her description of OS's response to Child L's apology. There, V alleged that OS told Child L she did not accept his apology and said that he made her mad. We have already found that OS spoke to Child L in Hebrew, which V did not understand. So, it was not possible for V to know what OS told him. We note that Licensing went on in V's second interview to ask whether there were other children OS got angry with. V answered "not really".[31] Accordingly V's evidence in her first two interviews does not substantiate that OS got angry with children.

[339] In her third interview, V's evidence changed significantly and contradicted her statements in earlier interviews. She was asked again about the allegation that OS yelled at children and grabbed them by the hand or arm and pulled them roughly.[32] Licensing reminded V that she did not have a response to that allegation in her first interview and asked her if she had anything she wanted to share now. V responded: "Uh, Yeah. She's, like that. She's, like she doesn't know how to control her anger. And she just yells at them. And grabs them from the arm." Licensing relied on this quote in its finding that OS handled children roughly, a finding we concluded was not justified under the heading "Handling children roughly". We will not repeat our analysis here.

[340] Shortly afterwards, V alleged that OS grabbed and pulled children roughly about once a month and yelled at children daily. However, she also said she started at ICare in 2016, that when most of this happened she worked in the IT room, and that it was not until early December 2018 when she was assigned to work with OS in the 3-5 class for the last two weeks that OS worked in ICare's programs.[33] This statement puts in question V's opportunity to personally witness OS engaging in this alleged activity with the frequency she claimed. Licensing's reliance on V's allegations, without taking into consideration V's very limited opportunity to personally witness OS's conduct with the 3-5 class, was an obvious investigative and decision-making error.

[341] More importantly, as mentioned, V's statements about OS's abuse of children changed substantially over her three interviews. She went from saying in her first interview that OS was good with the children and did not become frustrated or yell or grab them, to stating in her second interview that OS only got angry at Child L, details of which were not credible as described above, to asserting in her third interview that OS could not control her anger and grabbed and pulled children at least once a month and yelled at them daily. Not only were these statements contradictory, but they included statements that were old, vague and lacking in particulars.

[342] In addition, in her third interview, V said that sometimes OS came and dropped off children by the door of the IT room and slammed the door loudly. Sometimes OS would

[31] JBOD, pages 096-097.
[32] JBOD, page 148.
[33] JBOD, pages 148-149.

return to find IT staff consoling the children and would tell them they did not need to do that and to leave the children alone. No one corroborated these allegations. V went on to say this usually happened with Child L. V's statement conflicted with her evidence in her first interview that only Child L had been brought to the IT room and that he was brought once or twice while she was there to calm down after a tantrum.[34] It also conflicted with the statement of Staff Member L, who had worked in the IT room for one and half years, that only Child L from the 3-5 room was brought to the IT room, that he was brought once and was only there for about 10 minutes.

[343] As mentioned, V did not provide a satisfactory explanation for changing her evidence. The transcript evidence demonstrates V had a motive to give evidence that favoured Licensing over OS, demonstrated by her request for help from Licensing, recorded in her transcript statement. Accordingly, V's version of the allegation that Licensing relied on above appears exaggerated, lacks credibility and is contradicted by V's earlier statements and by Staff Member L. We give her evidence little to no weight.

Staff member L:

[344] The comments quoted above and attributed to Staff Member L were made in her first interview on December 18, 2018. L made it clear that she only worked with OS in the 3-5 room when she first started working at ICare. Most of the time she worked in the IT room.

[345] Among other things, L said she never saw OS grabbing or being rough with children. She said that she had sometimes seen OS frustrated. For example, when the children were not listening in circle time, OS would get frustrated "and she is like ok go sit on the table." When asked what OS's frustration looked like, L said "sometimes she is raising her voice." She said that OS did not always do this, but it was not something new.

[346] In her second interview on February 22, 2019, L was again asked whether she had seen OS grabbing, roughly handling or yelling at a child. She denied seeing OS grab a child but said OS had talked loudly. Licensing did not pursue this. At the appeal hearing, GW testified that L said nothing new in this interview.

[347] It seems that L interpreted OS's raised voice as frustration. When asked if OS yelled, she did not agree; rather, she said that OS had talked loudly. In the Panel's view, raising one's voice or talking loudly in the noisy environment of a daycare for legitimate purposes does not amount to misconduct.

Staff Member M:

[348] Staff Member M, Child L's mother, provided helpful and culturally sensitive evidence on allegations about OS's conduct with children. Both OS and M are immigrants from Israel.

[34] JBOD, pages 067-068.

[349] With respect to the allegation that OS yelled at children, M had not seen OS yelling or her voice getting louder. M explained that sometimes OS would raise the tone of her voice a little higher than usual. But her tone would change and it sounded like she was unhappy at the moment. The children's reaction was to stop doing what they were doing, but they did not appear scared.[35]

[350] M said that her son, told her that he loved OS and that she really loved the kids. M said she knew that the kids loved OS.

[351] In her December 27, 2018 interview, M shed light on differences in Israeli expressions and mannerisms. She said:

> [OS] is very emotional. You can see when she's not happy. I mean. She's Israeli. We are from the same uh, you know. Israel is full of people like [OS]. We are very emotional…We are very um…you can see on Israeli face. Israeli people face that when they are happy, when they are calm, when they are upset, when they are sad. You can see the difference. [36]

[352] She also said OS is very honest; she will not lead someone to think she is happy with them if she is not happy. If she is busy or has a lot on her mind, she may sound strict.

[353] Licensing's reasons did not take M's evidence on cultural differences into consideration. In so doing, it failed to take a relevant factor into consideration.

IT teacher S:

[354] IT teacher S worked in the 3-5 room from mid-January to August 2018 and in the IT room on and after December 3, 2019. She said OS never raised her voice; she was always very professional.[37] She also said she had not seen OS frustrated or annoyed.

OS's evidence at the appeal hearing:

[355] OS testified that she was unable to yell or speak loudly. She said her voice is very quiet. She said that sometimes, when it is loud in the room, she will raise her voice an octave. She also said she had promised RJDS to keep the day care quiet. If it was too loud, someone from the school would come, as had happened before.

[356] OS said she asked Licensing what "yelling" means and did not get an answer. OS argued that yelling is objective. She said that there is a difference between raising one's voice and yelling. She suggested that what the complaint might be referring to was her tone of voice, not how loud it was. She acknowledged that her tone is clear and straight-forward – "no two ways about it".

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[35] JBOD, page 116.
[36] JBOD, page 118.
[37] JBOD, page 076.

[357] At the hearing, OS denied the children were afraid of her. She believed this was a fabrication. When she was away, the children would ask when she was coming back. They come to hug her and no one else. They come to her with their problems.

[358] With respect to J's allegation that staff were afraid of her "the way she is loud", OS said the fear might actually be respect for her as an authority. She was the owner, she paid their cheques, she would hope they respected her.

Acting Manager RC:

[359] RC testified that it was apparent to her that the children loved OS and missed her. They made pictures for OS and asked RC to take them to her. RC told Licensing that she had never seen children who love someone that much being taken away from them. OS was more than a day-care manager to them; she was like a grandmother to them.

Licensing Officer GW:

[360] GW testified she had seen OS yelling at staff across the room and had a word with her about it. When OS put it to GW that she had said OS had yelled at staff, GW clarified that OS had raised her voice. When OS put it to GW that she was referring to GW's tone of voice, GW said, "possibly".

Parents R, Y, and P:

[361] As mentioned under the heading "Shaming and Disrespecting Children", Parent R disagreed with Complainant A's allegations that OS yelled at and shamed her son, Child D. R was a witness to the Broken Toy incident in which OS was alleged to have yelled at her son. R said that the words OS used were said in a conversational way, and not yelled, for the purpose of a teaching moment.

[362] R testified that her son loved OS. She was like his grandmother. She saw his potential, empowered him and gave him confidence. He liked coming to daycare and did not want to go home. OS's absence affected him. He missed her and wanted to make a video to send to her. R also praised the way OS cared for another child, Child J, who her son was close to, and empowered him. He had been very intense and became calm and relaxed.

[363] Parent Y testified that he never observed his child afraid of OS. OS was her favourite teacher. He never observed OS yelling, threatening, grabbing or engaging in any misconduct. He had opportunities to observe when he dropped off and picked up his children and sometimes when he picked them up at mid-day. If he had the slightest doubt they were safe with OS, he would not have brought both his children to ICare and would not have left them there.

[364] Parent P testified about her children's experience with OS. Her son was in the 3-5 class and her daughter was in the IT Class. They were always excited and happy to go to ICare. OS treated them with respect. When OS was absent, they complained that they did not want to go. They said they missed OS.

Conclusion regarding allegations of emotional abuse

[365] Allegations of emotional or physical abuse are serious ones which are not to be taken lightly. The evidence substantiating such an allegation should be clear and cogent.

[366] It is clear that the evidence of the staff as a whole was not consistent about the allegations described in the passage quoted above. The two staff that Licensing primarily relied on – J and V - changed their evidence over their three interviews in a manner that was contradictory and increasingly negative towards OS. There was evidence that they had motives for doing so, which Licensing did not take into consideration in assessing their credibility, which was a decision-making and reasoning error.

[367] Licensing failed to interview parents, because of its policy against doing so, which fettered its statutory discretion. Some parents had relevant personal knowledge that likely would have altered the outcome of certain allegations, as Parent R's testimony at the hearing altered the outcome of this Panel's findings about certain allegations on appeal.

[368] Licensing failed to reconcile the contradictory and conflicting statements and explain why they relied on certain statements and why they preferred the statements of others over the statements of OS and those who corroborated her statements. This amounted to a failure to disclose key parts of its decision-making to the Appellants and as a result to the MHO, who relied on Licensing's findings and reasoning in her Reconsideration Decision. In the result, this Panel concludes that Licensing's finding was not justified.

7. Napping

[369] Licensing found that a complaint that OS stopped napping the 3-5 children (the "Napping" allegation) was substantiated:

> The allegation that [OS] made a decision that the children were no longer able to nap in the program was substantiated. [OS] made a decision that nap time was not going to happen anymore in the 3-5 program and the mats, cots and blankets were moved to the infant/toddler room. One parent complained about this so [OS] admitted that she sent their child to the other room to nap. [OS] stated, *"So I told the mother this is, we can't have naptime if we have naptime, everybody have to nap. We don't have naptime. It's not right that half of them sleep and half of them are awake."* (underlining added)

[370] On February 11, 2019, Parent J complained to Licensing that OS had stopped all napping in the 3-5 room in October 2018, while she and her family were out of the country. She received an email from OS dated October 19, 2018 stating that naptime had changed and that there were only 3-5 nappers now. However, the complainant said that was when naptime stopped. The family returned in early November 2018. Without naps, her child became tired and irritable. When she spoke to OS on November 15, 2018, OS said they did not nap children in her room. The complainant believed that napping was a licensing requirement, which it was not, and that napping was needed for toddler brain development. The complainant removed her child from ICare at the end of 2018.

[371] The allegation that OS had decided to stop naptime was first disclosed to her in her third interview of February 26, 2019 in the following terms: "[I]n October last year a decision was made by you that children no longer have naptime."

[372] Licensing did not disclose to OS that it had already obtained contemporaneous interview evidence from Staff Member J at her first interview of December 18, 2018, the day OS stopped attending ICare's programs, that some children were still napping in the 3-5 room. The topic arose because J asked her interviewers if naptime was compulsory. She said her experience elsewhere was that all children napped at naptime. Licensing clarified that children only have to nap if they need it. J told Licensing that ICare had beds and bedding and that some children tried to rest and sleep, but others did not. J said that the room was hard to separate for sleepers and non-sleepers but said they made room for both.[38] This evidence clearly confirmed that napping had not completely stopped at the time OS was barred from ICare, corroborating the October 2018 email.

[373] OS, who had neither full or advance notice of the allegation, responded to the disclosure by focusing on "naptime". She explained that it had long been a problem for children who needed to nap to share the room with those who did not want to nap. Many parents complained that napping was disturbing their children's ability to sleep at night. OS canvassed the parents and children and found that almost all wanted napping to stop. So, OS emailed the parents to tell them that naptime would stop, but this could be reconsidered if there was a problem.

[374] It worked well. None of the children wanted to nap and OS could not force them to nap. One parent who was away when naptime changed later complained that her child was irritated at night because she was not napping. Since the child was only three, OS said she would try to nap her. She sent the child to nap in the IT room, and the child napped. The parent later withdrew the child from ICare.

[375] There is no dispute that napping is not compulsory, unless the child needs it. OS's statement did not conflict with this. There would be an issue if OS decided to stop napping children who needed a nap. Licensing did not find that there was a failure to nap the complainant's child. Nor did it find that OS failed to nap any child who needed a nap.

[376] Despite the fact that both the complainant parent and OS said OS sent an email on October 19, 2018 notifying parents about the change to naptime, Licensing did not obtain it or invite OS to provide it. The email was crucial evidence Licensing ought to have pursued. It contained OS's decision and showed that she had not decided to stop napping children altogether. Rather, it said that those who napped would continue to do so.

[377] In J's third interview on February 14, 2019, Licensing asked her about new information that OS had decided in October that the children would no longer have "naptime". J said that was true. Despite saying this, J went on to say that 3 to 4 children

[38] JBOD, pages 061-062.

napped in the 3-5 room.[39] J's first interview was clear. Children were napping in the 3-5 room as of December 18, 2018. Her third interview was also clear. Children were still napping in the 3-5 room.

[378] Staff Member S was a long-term employee who worked in the 3-5 room with OS, but went on leave from September to early December 2018, and was then reassigned to the IT room. She corroborated OS's reasons for stopping naptime except for the children who wanted it. She said that in December 2018 a few children were napping, including Child J and Child Y.

[379] At the hearing, OS's testimony about the naptime issue was somewhat different from the statements she made to Licensing. She explained that what she told Licensing was not the whole of what happened, and she should have elaborated. She repeated her earlier statements that almost all of the parents and children did not want naptime, but she added that there were still a few children that needed naps, such as Child J, Child L, and Child Y, who continued to nap. OS was not challenged on her evidence that these three children continued to nap.

[380] OS testified that she tried a number of scenarios to allow the children who wanted to nap to do so and to allow the rest of the children to engage in quiet play. She terminated naptime in the 3-5 room. She moved the mats to the IT room and allowed the children who wanted to nap to do so there.

[381] OS recalled that the complainant complained that her daughter was not napping and was irritable in the evening. OS took her to nap in the IT room, but the child did not nap. OS attributed this to the child suffering from jet lag after her recent return from Israel. This statement about the complainant's child contradicted OS's interview statement.

[382] OS said that napping the children in the IT room was not working. So, she brought half of the mats back to the 3-5 room and those who wanted could nap there, while the others had quiet time. After a half hour they went outside for a half hour. Then they would return for snacks. The older children did not nap and she was not going to force them to nap.

[383] OS's description of bringing the nappers back to the 3-5 room is consistent with J's December 18, 2018 description of the status quo when OS was barred from ICare, i.e., that room was hard to separate for sleepers and non-sleepers but they made room for both.

[384] During cross-examination, OS said that she sent an email to parents of 3-5 children telling them what was happening with naptime, but she did not recall whether it said naptime was going to stop. She agreed to look for that email and produce it if she found it.

[39] JBOD, pages 158-159.

[385] GW testified that there was no specific requirement in the Regulations for napping. However, it is part of child development. The regulatory requirement is to meet the needs of the children. The problem was that OS made a decision in October 2018 to stop napping the children. In Licensing's view, if the child needs to nap, they should be offered an opportunity to nap. GW said there was also a concern that children had not wanted to give up naps, that OS wanted to send the children outside because she wanted quiet time and that it was inappropriate to terminate naptime or to nap children in the 3-5 class in the IT room.

[386] However, there is no evidence that any child who needed to nap was prevented from napping. Nor was there a need to discuss terminating compulsory naptime for all children with Licensing, if OS stopped napping only those who did not need to nap.

[387] OS put it to GW that she had in fact discussed napping children in the IT room with GW, who told her she could do so. Then, GW said not to do so and Licensing staff helped her create a space in the 3-5 room where the nappers could nap and the others could do quiet table top activities. GW said she had no recollection of this. Such a statement is not a denial. It is not surprising that someone in GW's position might not recall in cross-examination in June 2021 a discussion like this that happened two and a half years earlier.

[388] When asked how Licensing balanced the probabilities about this allegation, GW said that Licensing's method of applying the balance of probabilities was based on a tally of how many said the alleged conduct happened and how many said it did not. She said that the number of the witnesses saying that OS terminated naptime and saying that she did not was two to two.

[389] When GW was asked which of the substantiated allegations could have been worked out with OS collaboratively, she indicated there was potential to collaboratively resolve the decision to stop napping. This indicates that the subject matter of the napping incident was not an irremediable contravention of the legislation.

[390] On July 6, 2021, after the evidentiary portion of the hearing concluded, OS supplied the CCALAB with a copy of the October 19, 2018 email/newsletter[40] in which she advised parents of her decision: napping had been changed, there were now 3-5 nappers and the rest would play or have quiet activities. OS argued that this demonstrated she had not terminated napping altogether.

[391] In the result, we find that Licensing did not take a principled approach to weighing the balance of probabilities. This task is not a simple matter of tallying witnesses. Rather, in determining whether a contravention occurred, a decision-maker must look not only at interview and testimonial evidence, but also at documentary evidence, and must take into account other relevant considerations. Its determination is to be based on a consideration

[40] Exhibit 10

of the totality of the evidence in the particular context and its consistency with the probabilities affecting the case as a whole. Licensing did not do this.

[392] Licensing failed to resolve the conflict between the evidence that OS decided to stop naptime for all 3-5 children and the evidence that OS did not make such a decision and that some children continued to nap. Further, it failed to explain why it preferred the evidence against OS over the evidence that supported her, including J's December 18, 2018 statement that some children still napped at that time and S's statement that Child J and Child Y napped in December 2018. S's statement naming two children who napped attracts additional weight.

[393] Perhaps more importantly, Licensing failed to pursue crucial documentary evidence before making its decision - the October 19, 2018 email/newsletter about naptime that was referred to by both the complainant and OS. The newsletter was created by OS contemporaneously with her alleged decision and was disseminated to the parents at that time. It confirms that OS did not make a blanket decision to stop all napping but said some napping would continue. J's December 18, 2018 statement that some children were napping at that time and J's statement that some children napped in December was consistent with OS's email.

[394] Licensing's failure to obtain this email amounted to a failure to conduct a thorough investigation and likely had a determinative effect on Licensing's finding against OS on the Napping allegation, as production of that email at the hearing had a determinative effect on the Panel's finding about this allegation on appeal. OS's statement in that October 2018 email that some children would continue napping, coupled with J's evidence in mid-December 2018 that some children still napped, evidenced that OS had specifically decided not to terminate all napping in the 3-5 program and followed through on that decision.

[395] In light of all of the foregoing, we find that that Licensing's finding against OS about the Napping allegation was not justified.

8. Forcing staff to take children outside

[396] Licensing concluded that the evidence substantiated an allegation that OS forced staff to take children outside so she could have quiet time in the classroom:

> The allegation that staff have been forced to take the children outside so that [OS] could have quiet time in the classroom was substantiated. [Staff Member J] stated *"I think she wanted free time by herself. When the kids are inside its noisy, she tells the staff 'just take them outside. I don't want them here, I want to rest"'* [...] Another [Staff Member V] stated that [OS] told her *"Take them outside. Take them into the gym. I need uh quiet time"* (underlining added)

[397] We note that this was not an allegation made by a complainant, but by Staff members J and V. The allegation that Licensing found was substantiated was disclosed to OS as follows: "...information came forward that children were often made to stop their

activity that they were doing and go outside so that you could have quiet time in the classroom or use the computer." Licensing failed to disclose the specific allegation that OS "forced" staff to take the children outside". This amounted to a breach of procedural fairness and natural justice.

[398] OS denied the part of the allegation that was disclosed to her. She said that she only stopped activities when she observed the children were not interested. At group time, she could tell the children were bored or disinterested in what she was doing with them if she saw them fidgeting, moving around or talking. If they were bored, she would change the activity. Either she would go outside with them or she would stay inside and do other things, such as cook lunch, while other staff worked with the children. She said that was one of the reasons why she employed more staff than needed to meet Licensing's staff-to-children ratios. The fact that she did so corroborated her evidence.

[399] None of the staff contradicted OS's assertion that she only stopped activities at times when the children were bored or uninterested in their activity. They consistently said that she stopped the activity and sent them outside when they were not listening, were making noise, or were roaming around after lunch. When asked whether she ever told "the group" to "take them outside I need some quiet time", OS disagreed. She said that it was not about what she needed, but what to do if the children were bored.

[400] Licensing relied on the evidence of J and V. J was first assigned to the 3-5 room on October 9, 2018. V was assigned there on or about December 3, 2018. OS was barred from ICare on December 18, 2018. Accordingly, each had a very limited timespan in which to observe the circumstances in which OS told staff to take children outside.

[401] J made the comments Licensing relied on in her third interview. Curiously, parts of the quote attributed to J were missing from the quote reproduced above. Those missing comments reveal that Licensing asked J why she thought OS decided to stop naptime and in response J told them what she thought, as follows, with missing parts restored:

> ...I think she wanted free time by herself when the kids you know are inside there is a lot of noisy. Some kids don't want to sleep and you know because they are not used to we don't have a proper room, it is not dark so probably that's why, that's what I think ....and she tells the staff, just take them outside, just take them outside. I want to rest. (underlining added)[41]

[402] This is an example where Licensing relied on speculation rather than objective evidence. J's thoughts about why OS decided to send children outside are not relevant to the allegation that Licensing found was substantiated. Nor are her thoughts about why OS sent non-nappers outside while nappers were sleeping. J could not know what was in OS's mind and her thoughts about that are not objective evidence.

[41] JBOD, pages 158-159.

[403] J added that after lunch it would often get messy and children would roam around "and she [OS] wanted her quiet time, wanted to write an email to the parents and things like that" (underlining added). OS would tell the staff "[C]an you take them outside…things like that." J's statements about what OS wanted are conclusory. J did not give evidence that OS actually made these comments or did these things while the children were outside.

[404] V made the statements attributed to her in her third interview. They directly conflicted with statements V made over her three interviews about the reasons why OS wanted the children to go outside. In her third interview, V first alleged that OS said she wanted the children to go outside or to the gym so she could have, as V put it, "…quiet time. Quiet room." V, too, did not state that OS said this or took quiet time.

[405] Then, V claimed, "…we had no choice" and had to take them outside. This appears to be the only statement supporting the allegation that staff were forced to take the children outside so OS could have quiet time. However, this statement contradicts V's statements in her first two interviews: (a) that OS was always busy and refused to rest, and (b) that V's concern about going outside was in fact a difference of opinion with OS – V thought it better to adhere to quieter routines and OS thought it better to respond to the children's needs in the moment.

[406] It also contradicts V's other statements elsewhere in her third interview, where she said that OS sent the children outside because the children were bored or would not listen or sit in group time. These statements support OS's explanation. Licensing did not seek explanations for these changes and conflicts in V's evidence.

[407] At the appeal hearing, GW relied on J's and V's statements as substantiating the allegation that OS put her own need for quiet time to write emails over the needs of the children.

[408] OS testified that teachers were refusing to take children outside. OS talked to GW about this. GW's advice was to write a policy requiring daily outdoor activities. OS followed that advice and wrote such a policy. This policy confirms that regular periods of time outside were part of the children's prescribed program. OS denied that she ever asked a teacher to take the children outside because she needed to rest. Indeed, she did not rest; there was a lot to do.

[409] The determinative fact against Licensing's finding is that there was no evidence that OS actually took "quiet time" when she sent the children outside. None of the interviewees said they had personal knowledge about what OS actually did while the children were outside. There was no evidence to contradict OS's statement that she worked when the children were outside. The fact that OS may have commented that she wanted a rest or quiet time matters little if there is no evidence that OS followed through with this by actually taking a rest or quiet time.

[410] Moreover, as manager, OS could decide how to manage the children's program and which staff to assign to what tasks, as long as ratio was met. This included deciding on

her own activities, such as whether to rest, to cook or to perform administrative tasks where there were sufficient staff to provide the children's care program. Licensing did not find there were insufficient staff to allow this.

[411] With respect to the allegation that OS "forced" staff to take the children outside, generally, we note that if an employer directs staff to take children outside, and that is part of their work duties, they are expected to do so. An employee does have a choice about whether to comply with an employer's direction; they can refuse to perform an employment obligation, but at the risk of discipline if the direction is lawful and within their employment contract. This is not a matter of an employer forcing staff to do something that it could not ask of them, but rather of requiring an employee to comply with a contractual requirement of their employment.

[412] Additionally, Licensing ignored the fact that J and V each described the circumstances in which OS would send the children outside in similar terms. J said that OS would typically send children outside after lunch when the children were noisy; the children did not want to nap, they were roaming around and it was messy. V said OS did this when the children were noisy, restless, bored, when they would not listen or sit at group time or when the weather was good.

[413] This corroborates OS's statement that she would send the children outside when she observed behavioural signs that they were restless and disinterested, in which case they were unlikely to rest, sit still or listen. This indicates that OS was attuned to the children. She was paying attention to their immediate needs where, in her opinion, they did not require a rest and, rather, required activity.

[414] Licensing failed to reconcile the conflicting evidence and explain in its Decision why it preferred the evidence it relied on, which includes speculative and conflicting evidence, over OS's evidence and, in particular, her uncontradicted evidence that she did not take quiet time because there was too much to do. This was an error in reasoning and a failure of procedural fairness and natural justice. In the result, Licensing's finding that OS forced staff to take children outside so that OS could have quiet time in the classroom was not justified.

9. Using food as a punishment or reward

[415] Licensing found that OS had used food as a punishment or reward:

> The allegation that [OS] has withheld dessert from the children if they don't eat their lunch was substantiated. In her interview [OS] said *"Yes. That's true. If you don't eat good food, then you cannot have junk food"* [...] [Staff Member L] said they heard [OS]say, *"Eat everything and you will have a cookie".* [...] [Staff Member M] was present on one occasion when a child put food inside their cup and tipped it over and stated *"She* ([OS]) *told him, you know what ... no cookie for you"* [...]**.**

[416] OS admitted that her mantra was "if you don't eat good food, you then cannot have junk food". She was not asked how often or how recently she had resorted to her mantra.

[417] The statements made by staff were inconsistent, and two, V and J, changed their statements.

[418] In V's first interview, she denied the allegation that OS used food as a punishment. When asked about this again in her third interview, V said this had happened maybe one or two times. Later, in the same interview, she also said she had seen OS withhold dessert if children did not eat their lunch a few times.

[419] In J's first interview, she said she had not seen OS deny children dessert if they had not eaten their lunch. However, in her third interview, Licensing again asked J about this. J said "Maybe they got treat. Like finish your food" (underlining added).[42] J's use of the word "maybe" is an equivocal one and is not sufficiently reliable to rely on as proof that OS engaged in the alleged conduct

[420] Staff Member L said that most of the time over the 1 ½ years she had been at ICare she worked in the IT room, but she had heard OS say, "If you are eating everything I can give you a cookie."

[421] Staff Member K said that she was usually present in the 3-5 room at lunch and she had not heard any threat to withhold food. Staff Member S said that she had worked in both rooms and never heard OS tell a child if they finished their food they would get a cookie.[43]

[422] Parent M said she was present when her son L played with his food. He deliberately spilled it and made a mess. She heard OS say, "No cookie for you".[44]

[423] At the hearing, OS said her philosophy was to encourage children to eat healthy food, including by persuading them to taste foods that were new to them. She denied that the cookies she gave the children were junk food. She said children were given cookies once or twice a week. She denied that she actually withheld dessert.

[424] GW said it is clear that food is not to be used as a reward. GW read OS's statement in her first interview[45], in which OS acknowledged that she agreed that children were told they could not have a cookie if they did not finish their lunch. OS said that if they do not eat good food, then they cannot have junk food.

[425] GW was asked whether she could have worked this out with OS collaboratively. She said the ability to resolve the issue of rewarding children with food would depend on how deeply OS held to her behaviour and philosophy. She did not know whether OS would stop this conduct if GW discussed it with her. Notably, GW did not speak to OS about this to determine whether a collaborative outcome could be achieved.

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[42] JBOD, page 164.
[43] JBOD, page 156.
[44] JBOD, page 117.
[45] JBOD, page 123.

[426] In cross-examination, GW admitted that when she made suggestions to OS to do things, such as take courses, OS would do so. In this light, the Panel is not able to rule out the prospect that successful collaboration could achieve compliance.

[427] The difficulty with most of the evidence of interviewees who said the alleged conduct occurred is that Licensing did not probe their statements to elicit reliable and credible information about when, in which classroom or how frequently this conduct occurred or to whom. For instance, V's changed statements were not credible or corroborated. J's changed statements included equivocal terms. L confirmed the alleged conduct occurred but did not provide detail. K's and S's statements supported OS.

[428] However, M's description of her observation of OS's response to her son's misbehaviour with his food was credible, especially given the detail with which she described the incident. Moreover, the fact that this incident involved her own son made it more likely to be something she would remember. OS's comment to M's son was a statement that he would not receive that reward because he was playing with his "good" food instead of eating it.

[429] Moreover, OS admitted her mantra. As a mantra, it was a message to the children that if they eat their lunch, they will get the reward of a cookie.

[430] On balance, the more credible evidence from the interviewees confirms that there were times when OS told children that if they did not eat their lunch, they would not get a treat, whether it was a cookie or dessert. However, the evidence establishes that only one child was denied a cookie as a punishment for misbehaviour.

[431] The Panel concludes that OS failed to establish that Licensing's finding that the allegation was substantiated was not justified. However, the evidence did not establish that her conduct was a serious or irremediable problem.

10. Special needs worker

[432] Licensing found that OS was receiving funding for a special needs worker for a child with special needs and designated a staff member who had no training to do so, as follows:

> The allegation that [OS] is receiving funding to have a special needs worker for one child and has appointed one of the staff, who has no training to work with children with special needs, to work with the child, was substantiated. [OS] stated in her interview that she didn't realize this was a requirement. *"She is ECEA, uh ECE. Why what does she need? … when we got the support I said 'You will be taking care of it'. I just chose her."* [...]. [Staff Member J] stated *"I'm not a special needs teacher but since I was told that you need to work with him, I said ok"* When asked by Licensing if the child has a support plan or care plan [Staff Member J] stated *"No. I don't know if it's autistic or what but yeah. I have to be with him"*

[433] The allegation ultimately found to be substantiated was not disclosed to OS in the terms described in the paragraph quoted above. In particular, Licensing did not disclose

that in order to receive special needs funding, OS was required to appoint a person who was a special needs teacher with a special needs certificate to work with a child with additional support needs.

[434] Rather, in OS's first interview of January 3, 2019, she was asked a number of questions about the funding for Child J, and the qualifications and experience of the staff member assigned to work with him, as well as the state of his care plan. Licensing did not suggest there was any impropriety with the manner in which the funding was being used. The discussion was about whether the "support worker" had the required training or experience to work with a child with additional support needs.

[435] Through a question-and-answer process, Licensing ascertained that Child Supported Development ("CSD") was in the second month of advancing funding to ICare to provide five hours of extra support to Child J on an interim basis. Ongoing funding had not yet been approved, because the child's mother had not yet taken some of the steps required to qualify for it.

[436] OS appointed Staff Member J to work with the child as his support worker. Neither OS nor J knew what the child's condition or diagnosis was that required additional support yet. Further, J's assignment had not yet been fully implemented, as CSD's Consultant had not yet created or approved an official care plan for Child J. The Consultant had visited ICare and discussed strategies for providing support with OS and J. However, she had not told them that J required any training.

[437] At OS's first interview, GW told OS that it can take up to six months to receive a care plan, so OS should come up with her own care plan in the interim. OS told them she had already done so.[46] OS had devised an interim care plan, which was not in writing, but which J was following to assist the child's inclusion in ICare's program. The Consultant was aware of this.

[438] OS's care plan was primarily addressed to fostering inclusion of the child in ICare's program. J was to keep an eye on him, as, although he was capable, he was unpredictable. OS was supervising J's care of the child. In OS's view, J had been working well with the child and he had been thriving. Neither OS's interim plan nor J's success with it was challenged by Licensing. Indeed, J carried on with it after OS was barred from ICare.

[439] However, Licensing told OS that although Staff Member J was an ECE, she required training or experience as a support staff to work with children with additional support needs, under section 19(3) of the Regulation. OS was not aware of this.

[440] Notably, Licensing had discussed J's role as support to Child J at her first interview. Licensing Officer LR told J that, although she was the child's support worker, she did not need to be with him all the time. LR told J that she was the person in charge or the lead of

[46] JBOD, page 133.

his support and could lead the group providing his support. Everyone should know what was in his care plan, and J just had to make sure he was getting what he needed.

[441] Three facts are of crucial importance to the outcome of this complaint. First, Licensing did not tell OS that Child J's support staff must be a special needs teacher. Second, Licensing did not tell OS about the discussion it had with J about her lead or oversight role as the child's support worker. Third, Licensing did not consider any alternatives, and, in particular, did not inquire of OS whether there was anyone else at ICare who had a Special Needs Worker Certificate (a "SNWC") who could perform the lead or oversight role LR described instead of J. This is significant because at all relevant times, OS was certified as a Special Needs Teacher and was performing that lead or oversight role over J.

[442] Moreover, despite being aware that it could take months before a formal care plan was approved, there is no evidence that Licensing followed up with CSD to determine whether J, who lacked a SNWC, had the training and experience to perform OS's interim care plan (a) with OS's supervision or (b) without it.

[443] At the hearing, OS admitted that she had made an innocent mistake in assigning J to provide extra support to the child when she did not have the training Licensing said she required. This was the first time the daycare had received special needs funding, and the CSD did not tell her that the support person needed to meet certain qualifications. She repeated that she was not aware that the Regulation required these qualifications.

[444] GW testified that the Regulations are clear that if you accept a position to provide support, you need to fill the position with a person with training and experience. OS had not got the right person in the role. In cross-examination, GW was asked why she had not helped OS with her lack of familiarity with the Regulation instead of finding against her. GW replied that the expectation was that every Licensee has access to the legislation. Licensing was not required to tell a Licensee everything that is in the legislation.

[445] Later in the hearing, after testimonial evidence concluded, OS produced a July 10, 2019 letter from the Early Childhood Educator Registry. Notably, this letter refers to OS as having not only an ECE License but also a Special Needs Educator Certificate. If Licensing did not already have information about OS's certificate, it was put on notice that she had it when it received a copy of this letter.

[446] We find that Licensing's decision to substantiate the allegation that OS was receiving funding to have a special needs worker work with one child and had appointed someone with no training was not justified. There are four reasons for this conclusion.

[447] First, as noted above, Licensing did not clearly and directly disclose to OS the allegation it ultimately found substantiated – that OS should have used the CSD funding for someone with a SNWC to provide, lead or oversee Child J's special needs support. Had it done so, OS could have explained that she had that type of certificate and the finding would likely have been avoided. It is likely that the failure to disclose had a determinative

effect on the ultimate finding and amounted to a significant breach of procedural fairness and natural justice.

[448] Second, Licensing's finding that CSD funding was used to fund an employee to provide special needs support to a special needs child contrary to section 19(3) of the Regulation is inconsistent with the provision itself. Section 19(3) of the Regulation states:

> Without limiting subsection (2), if the duties of an employee include care for a child who requires extra support, a licensee must ensure that the employee has the training and experience and demonstrates the skills necessary to care for that child. (underlining added)

[449] Section 19 does not require that an employee providing extra support be trained as a certified special needs teacher. Rather, it requires that Licensing ensure the employee providing extra support to a child has the training, experience and demonstrated skills necessary to care for that individual child. Those legislated requirements do not necessarily require specialized training as a special needs worker in every case.

[450] This leads to the third reason. It was premature for Licensing to decide whether OS breached the Regulation. The evidence was that the official care program was not finalized and had not yet been implemented. Only OS's interim plan was in place and all it required was inclusion of Child J in the program. It was an error to decide that that OS breached the Regulation based on facts that were as yet unknown and might not be known for months.

[451] Moreover, there is no evidence that Licensing gave consideration to the interim nature of the facts that were known and in existence at the time. CSD had started the funding as an interim measure pending approval of ongoing funding and an official care plan. With CSD's knowledge, OS created an informal plan as an interim measure pending approval of the formal care plan. However, she did so without all of the information necessary to fully address the child's specific, but unknown condition. Licensing itself recommended that OS create her own plan, but she had already done so with CSD's knowledge and participation, and she described it to Licensing. Licensing did not challenge the propriety of the plan she devised. Nor did it find that J lacked training to provide OS's interim plan to Child J.

[452] Indeed, Licensing did not conduct a thorough investigation by failing to interview the CSD Consultant to determine whether J needed any further training to perform the interim care plan pending the completion of the official care plan or to perform the official care plan itself. This was crucial evidence that Licensing failed to pursue that could well have altered the outcome. This amounted to a failure to conduct a thorough investigation and take a relevant factor into consideration.

[453] Moreover, Licensing permitted J to continue perform OS's plan after OS was barred from the premises and, according to OS and V, she did well. Accordingly, Licensing condoned the continued assignment of J to this work, despite its finding that she lacked the requisite training.

[454] Additionally, at the hearing, GW conceded that this was a scenario that Licensing could have worked out in collaboration with OS. Accordingly, this allegation was not irremediable.

[455] Fourth, and more importantly, Licensing did not inquire whether there was any basis on which to conclude that OS or ICare otherwise complied with section 19. On the evidence, we reach an alternative finding that OS's actions in designating and supervising J as the child's support worker were justified. OS was qualified as a Special Needs Educator. As noted, LR told J that, as the child's support worker, she did not have to be with him all the time if she was providing support and leadership.

[456] OS was already providing that kind of support and supervision to J. Accordingly, as a person qualified as a special needs educator, the team leadership and supervision OS provided to J discharged the responsibilities of the support person under section 19 of the Regulation. As such, the work that J performed, which was supervised by OS, was permitted under section 19 of Regulation. However, Licensing did not explore this alternative justification for OS's alleged misconduct and take it into consideration. As a result, it failed to take a relevant factor into consideration.

[457] This Panel concludes that Licensing's conclusion about this allegation was not justified.

11. Allowing an IT child to be in the 3-5 room

[458] Licensing found the allegation that a child from the IT room was in the 3-5 room was substantiated:

> The allegation that there is a child under 30 months of age in the 3-5 room was substantiated. [OS] stated *"I thought it was just criminal to allow her to cry so much when her sister is right there and making her feel better. And they both feel better when they are together. So I made an executive decision … To keep them together. Just to make them feel better. I'm in the business of children not paperwork. I know you don't like it because it's paperwork but for them that was the best decision"*

[459] OS admitted to this allegation but explained that there were mitigating circumstances. She said that two Israeli sisters recently arrived at ICare. They only spoke Hebrew. The older one was placed in the 3-5 room, where there were others who spoke Hebrew. The younger one, Child Y, was placed in the IT room, where no one spoke Hebrew. The sisters were calm when they were together, but when they were separated and Child Y was left in the IT room where she had no one to talk to, she would scream inconsolably.

[460] At her first interview, OS said that the teachers could not cope with it. OS said she made "an executive decision. Is that the word?" (underlining added). OS decided to allow Child Y to go back and forth between classes "a little bit" periodically until she adjusted to the IT room, which she ultimately did. OS said that Child Y was able to stay in the IT class

because she was used to it.[47] Staff Members V, J, L and M all confirmed what OS told Licensing.

[461] At the hearing, GW testified that the allegation was true. Despite OS's description of Child Y's circumstances, there was no exemption for siblings from the Regulation's requirement that children be separated into age groups.

[462] In cross-examination, GW said the allegation was proven when OS acknowledged that she allowed the younger child to be in the 3-5 room without first obtaining an exemption from her Licensing Officer. The problem from GW's perspective was that OS said she made an "executive decision" to allow this. This was contrary to the legislative expectation that the Licensee would notify the Licensing Officer that she was having a challenge with children and they would then collaborate on a solution.

[463] A difficulty with GW's focus on OS's statement that she made an "executive decision" is that GW did not take the whole of what OS said in context. As noted, OS actually said she made "an executive decision. Is that the word?" (underlining added). While OS's knowledge of English was good, she was not completely fluent. OS's question about whether she used the right word indicated that she was unsure whether she was using the correct phrase.

[464] However, GW did not take this into consideration. She did not ask what OS meant and instead took an unduly strict view of part of what OS said. In particular she demonstrated little or no cultural sensitivity to either OS's lack of complete fluency with English or Child Y's extreme distress in transitioning from an Israeli environment to an English-speaking daycare class where she could not speak with anyone.

[465] When asked if she was aware this was a temporary situation, GW said she understood from staff interviews that this was more than a one-time occurrence, when the child was upset. However, she admitted that Licensing did not investigate all of the relevant circumstances, such as whether Child Y went back and forth between classes and how long she spent in the 3-5 room.

[466] GW acknowledged that there was a potential to collaboratively resolve Child Y's situation. GW also said that, had this come to the Licensing Officer's attention during an inspection of the facility or through the Licensee's proactive notification, they would have worked out an acceptable solution. But since it came up during an investigation, Licensing would not embark on solution-finding. Indeed, GW made it clear that this was a fact-finding investigation and not a "solution-finding one".

[467] In her testimony, OS said that Child Y was born in June and was two years old when she came to ICare. OS decided to make Child Y feel comfortable by introducing her to the IT room and, if she started crying, she would come back to her sister. Her time in the IT room gradually increased. By December, she was 2 ½, the age when she could legally join

[47] JBOD, page 124.

the 3-5 class. OS acknowledged in her testimony that she should have called Licensing for an exemption, but she did not see this as a reason to remove her from ICare. OS also said that she should have called and asked for clarification. She was not disrespectful. What she did was not evidence of someone who made up her mind to disregard the Regulation.

[468] The whole of the evidence indicates that the relevant information was in Licensing's possession when it made its decision. It demonstrated that OS made a reasonable and culturally sensitive decision to temporarily accommodate the emotional needs of a new immigrant child. Child Y could not speak a common language with anyone in the IT class to which she was assigned and was disconsolate to be separated from her older sister in the 3-5 class. The age of Child Y was so near to the age for entry to her sister's class that the passage of time made this a desirable, short-term situation. The success of the strategy resulted in the child gradually spending more time in her age-appropriate class and ultimately adjusting to it.

[469] Licensing's primary concern was that OS had made an "executive decision" and not sought a temporary exemption through collaboration with Licensing. However, it is clear that OS was working towards compliance with the age restrictions and achieved that end.

[470] Although the strategy appeared to be a breach of section 34(2) of the Regulation, it was not one in the circumstances, which warranted accommodation of the child's particular needs. It was not done in disregard of the Act and Regulations. Rather, it was undertaken to achieve compliance, albeit not as immediately as Licensing expected. OS's admission that she should have called Licensing for an exemption confirms that she ultimately understood and accepted her obligation to comply with the Act and Regulations.

[471] We find that Licensing failed to conduct a thorough investigation and failed to take into account relevant evidence and factors in determining that this was a breach of the legislation. Additionally, it adopted an officious and unduly rigid interpretation of section 34(2)(a) on the facts, which demonstrate that OS was employing a reasonable strategy to achieve compliance with the Regulation and did achieve compliance. In the particular circumstances of this allegation, OS has proven that Licensing's finding was not justified.

12. Lack of "personality, temperament and suitability" to continue in the role of manager

[472] Licensing went on to conclude that, based on its findings, there was an immediate risk to the health and safety of the children in care. In particular, OS had demonstrated that she presently lacked the "personality, temperament and suitability" required to continue in the role of manager.

[473] The manner in which its conclusions were framed indicates that Licensing founded its conclusion that there was an immediate risk to the health and safety of children in care on its conclusion that OS presently lacked the requisite "personality, temperament and suitability" for the role of manager under section 11(2)(a)(iii) of the Act.

[474] This finding was based on an error of law: there is no such test. The Act defines "manager" in section 1 of the Act as "an individual whom the licensee has authorized to manage the operation of the community care facility".

[475] Section 11(2)(b) of the Act provides that a MHO must not issue a license to operate a daycare facility to a corporate applicant unless it is of the opinion that the applicant has, among other things, appointed as manager of the daycare facility a person who meets the requirements under section 11(2)(a). One of which, and the one that Licensing relied on, is that the manager:

> (iii) has the personality, ability and temperament necessary to operate a community care facility in a manner that will maintain the spirit, dignity and individuality of the persons being cared for, ... (underlining added)

[476] Accordingly, the relevant test for determining whether OS lacked the relevant requirements for the role of manager under section 11(2)(a)(iii) of the Act was whether she had the necessary "personality, ability and temperament". Licensing erred by transposing the requirement for the necessary "ability" to "suitability", which does not have the same meaning, and wrongly applying the test of "personality, suitability and temperament".

[477] The Oxford Learners Dictionary provides the following definitions of "ability" and "suitability":

> "ability": noun
>
> [singular] ability to do something the fact that somebody/something is able to do something
>
> [uncountable, countable] a level of skill or intelligence
>
> "suitability": noun the quality of being right or appropriate for a particular purpose or occasion.[48]

[478] The Cambridge Dictionary provides the following definitions of "ability" and "suitability":

> Ability: noun the physical or mental power or skill needed to do something:
>
> Suitability: noun C1 the fact of being acceptable or right for something or someone:[49]

[479] As mentioned, Licensing did not disclose that it was considering the allegation that OS lacked the necessary "personality, suitability and temperament" for the role of manager. We note that it gave no reasons explaining its conclusion that OS lacked those particular requirements.

[480] In the result, Licensing erred in two respects. First, it breached the principle of procedural fairness and natural justice by failing to disclose and provide OS with the

[48] https://www.oxfordlearnersdictionaries.com/
[49] https://dictionary.cambridge.org

opportunity to respond to the allegation that she lacked the section 11(a)(iii) requirements for the role of "manager" and by failing to provide reasons in support of its findings. Second, it erred in law by failing to apply the applicable statutory test under section 11(a)(iii). This finding is not justified.

13. Sanction

[481] This Panel has found that the only substantiated allegation is that OS used food as a reward or punishment contrary to section 48(7) of the Regulation. This finding did not justify a conclusion that there was an immediate risk to the health and safety of the children in care or that OS lacked the statutory requirements to perform the role of manager set out in section 11(2) of the Act. Nor did it justify a summary action under section 14 in the form of the License Condition or the later action of September 11, 2019 to continue it under section 13. The sanction was neither reasonable nor proportional and was not justified by OS's much less serious misconduct.

[482] Moreover, Licensing imposed the summary action and action without disclosing its proposed sanctions in advance and permitting OS a meaningful opportunity to prepare and present a response. Further it imposed those sanctions without conducting any principled analysis of the proportionality of those sanctions in the circumstances and without providing reasons in support. In so doing, Licensing merely perpetuated the substance of the H&S Plan, which was also imposed and continued in a manner that breached procedural fairness and natural justice.

Conclusion Regarding Whether Licensing's Decision Was Justified

[483] For the reasons set out above, this Panel finds that there were substantial investigative failures and breaches of natural justice and procedural fairness in the investigation and decision-making process that led to Licensing's Decision, particularly as they relate to multiple, significant failures to disclose allegations ultimately found to be substantiated and provide OS with meaningful opportunities to prepare and present responses.

[484] Moreover, Licensing failed to apply principled approaches to assessing credibility, weighing evidence, and balancing probabilities in its investigation and decision-making processes. Further, it failed to provide reasons that were responsive, intelligible and justified.

[485] In the result, the Panel finds that Licensing's conclusions were not justified on all but one of the allegations – that OS used food as a reward or punishment – and that Licensing's June 5, 2019 Decision to impose and continue the License Condition was not justified.

C. Did the MHO make stand-alone errors in the Reconsideration Decision?

[486] In the November 27, 2020 Reconsideration Decision, the MHO confirmed Licensing's June 15, 2019 Decision to impose the License Condition. Below, we undertake a review of the MHO's November 27, 2020 Decision to determine whether it contains any stand-alone errors or flaws other than those related to Licensing's errors. We have identified two main errors: (1) misapprehending the Appellants' arguments regarding evidence of good character and (2) failing to consider parts of the Appellants' submissions.

1. Misapprehending argument re evidence of good character

[487] The MHO addressed the large number of letters and emails the Appellants submitted that contained, among other things, expressions of support for OS. The MHO described these documents as evidence offered to establish OS's "good character". The MHO found the probative value of the good character evidence was limited and said she considered it only with a view to assessing whether it showed that OS was unlikely to have committed the specific acts of misconduct alleged against her.

[488] However, the MHO misapprehended that the content these documents was solely comprised of evidence of OS's good character. Some of the authors described events they had personally witnessed that contradicted the allegations that OS engaged in specific instances of misconduct. For example,

a. Parent R described her personal knowledge evidence in which she denied Complainant A's version and supported OS's version of the Broken Toy incident where OS allegedly yelled at and shamed her son, Child D.
b. Parent M (also a staff member) described her personal knowledge evidence and other evidence corroborating OS's evidence contradicting the allegation that OS refused to accept her son Child L's apology.
c. Various parents had personal knowledge evidence that their children and/or other children love OS, were not afraid of OS and that OS had experience with and accommodated ESL and special needs children, which contradicted statements made by key witnesses relied on by Licensing.

[489] Additionally, some of the documentary evidence related to the impact on the Appellants of prohibiting OS from attending ICare. This included parents' personal knowledge evidence of the negative impact of OS's absence from ICare on the children in care, the daycare's ongoing business and the cultural and educational services it provided to the Richmond Jewish and Israeli community. Moreover, it included personal knowledge evidence of OS's reputation as a childcare educator and leader in the Richmond community.

[490] Some of the documentary evidence also related to the question of whether the H&S Plan and the sanctions imposed by Licensing were proportionate to the substantiated allegations.

[491] Accordingly, the MHO restricted her consideration of this evidence and failed to take into consideration material and relevant evidence contained in those documents. In so doing, she deprived the Appellants of procedural fairness and natural justice, impairing the fairness of the reconsideration process.

2. Failure to consider parts of the Appellants' submissions

[492] The Appellants argued that the MHO failed to consider and address their submissions under the heading of their July 24, 2019 Application for Reconsideration: "b. The Investigation arrived at erroneous conclusions". In particular:

a. conflicting responses were not resolved and the most damaging accounts were accepted;

b. OS's responses were misconstrued and taken out of context and the conclusions are contradicted by the parents' letters; and

c. OS's absence from the premises was not necessary to protect the children's health and safety.

[493] Under the heading "C. CCFL's Findings" of her November 27, 2020 Decision, the MHO disagreed with the Appellants' submissions:

> On the contrary, I think that CCFL relied on the evidence that was the most direct, specific and germane to the specific allegations arising out of the complaint. When considered in its entirety, the corroborative evidence from witnesses, including [OS], indicates that it is more probable than not that [OS] conducted herself as described by CCFL in its Analysis and Findings.
>
> In short, I think CCFL's findings are supported on the evidence. Further, I do not think that the general, "good character" evidence tendered by the Licensee has sufficient probative value to displace the inferences that arise when the corroborative effect of the evidence from interviewees is considered in its entirety.

[494] The MHO's comments we have quoted are conclusory, not explanatory. The MHO failed to provide reasons that were responsive, intelligible and justified. For example, as stated above, the MHO misapprehended the letters and emails supplied by the Appellants as being only "character evidence" and disregarded the personally witnessed statements they contained that contradicted key evidence on which Licensing relied and that was central to the outcome.

[495] Additionally, the MHO failed to address and resolve conflicts in the evidence of key witnesses that were central to the outcome and explain why she preferred their evidence to the evidence of others, as she was obliged to do. Licensing relied on witnesses whose evidence raised fundamental credibility issues. Their evidence conflicted not only with evidence they gave in the same or earlier interviews, but also with evidence of other witnesses, and the MHO did not address these contradictions.

[496] The MHO disagreed with the Appellants' argument that Licensing relied on the most shocking and inflammatory evidence, saying it selected the evidence that was the most direct, specific and germane to the allegations. However, Licensing did sometimes agree with the most damaging version of conflicting versions that a key witness provided, without explanation. For example, it relied on Staff Member V's statement that OS grabbed children at least once a month, and yelled at them daily, despite V having previously denied that OS engaged in such conduct and despite the serious questions about her credibility and opportunity to witness this.

[497] Additionally, the MHO failed to consider and address the interests of the Appellants and, in particular, their argument under their heading "4. iCare and Ms Sixto will suffer significant loss if the suspension is not granted".

[498] At the appeal hearing, the MHO testified that the paramount interests of the children trumped the Appellants' interests because they were not operating the facility in conformity with the legislation. However, the MHO also testified that she gave no consideration to whether there were any less serious alternatives than barring OS's attendance that would not compromise the paramount interests of the children's health and safety, as she was obliged to do.

[499] The mere fact that a licensee breaches the legislation, does not justify ignoring their interests on the basis that the children's interests trump any of the Licensee's interests. As noted above, in exercising discretionary powers, decision-makers must consider the interests of affected parties, subject to the paramount interests of children in care, and must determine whether there are any alternatives that have less impact on the licensee which do not compromise the children's health and safety. The MHO's failure to do this analysis by ignoring the Appellants' submissions about the adverse impact of the H&S Plan and License Condition on their ability to operate the daycare, without sufficient explanation, was a fundamental error in her decision-making and reasoning process.

D. How do flaws in Licensing's June 5, 2019 Decision affect the November 27, 2020 Reconsideration Decision?

[500] In this section, we will address how the flaws in the underlying decision affected the MHO's November 27, 2020 Reconsideration Decision.

[501] As mentioned above, the Appellants' made their first application for reconsideration on July 4, 2019, seeking to overturn Licensing's June 5, 2019 Decision, which immediately imposed the License Condition as a summary action and later imposed it, with further terms, as an action. This effectively continued the H&S Plan that had been in effect since December 18, 2019 for a total of nearly two years, when Licensing suspended and then cancelled the License.

[502] In the circumstances, the H&S Plan was inextricably linked to the License Condition, given that the design of each sanction was substantially the same, neither was the subject

of a principled analysis supporting its design, implementation or continuation and each was imposed without consideration of any other alternatives.

[503] The MHO issued her November 27, 2020 Reconsideration Decision almost two years after OS was initially prevented from attending ICare. At the appeal hearing, the MHO testified as to why the Appellants' second reconsideration application was decided first. The MHO had been dealing with the Appellants' lawyer in connection with the first application for reconsideration of July 4, 2019 when Licensing made its September 19, 2019 Decision. At the request of the Appellants' lawyer, the MHO turned away from the Appellants' first application for reconsideration to their second one, because it related to the suspension and proposed cancellation of the License and so was more urgent than the first application for reconsideration.

[504] As noted above, the MHO confirmed Licensing's Decision to suspend and cancel the Appellants' License on October 18, 2019. However, the MHO did not return to and complete her reconsideration of the first application. She testified this was because she did not receive a response to her October 18, 2019 cover letter to the Appellants' lawyer containing her October 18, 2019 Reconsideration Decision, in which she asked the Appellants:

> In light of the attached Reasons and Decisions, I request that you confirm to me by November 15, 2019 whether you wish to continue with your request that I reconsider the summary action and the action taken by CCFL that a condition be placed on ICare's Licences.

[505] Clearly, the MHO wanted to know whether the Appellants still wanted her to proceed with their first reconsideration application before she resumed work on it. In the absence of a response from the Appellants, she did not pursue the matter further. In the meantime, the Appellants appealed her October 18, 2019 Reconsideration Decision.

[506] The MHO said she returned to and decided the Appellants' outstanding July 2019 reconsideration application because she learned from Licensing much later, in 2020, that the earlier reconsideration application had become an issue between the parties.

[507] At the appeal hearing, the MHO testified that she reviewed and considered everything that was put before her by OS, her lawyer and Licensing, including every transcript and letter. However, she also testified that her memory of making the November 27, 2020 Reconsideration Decision was vague after all the time that had passed since she made it. She pointed out that the Covid-19 pandemic had occurred in the intervening period.

[508] Below, we review the MHO's November 27, 2020 Reconsideration Decision in the order in which she organized it. As we do so, we address key issues she raised and decided. We note that the MHO generally followed the order of the Appellants' July 4, 2019 application for reconsideration.

[509] The MHO commenced her decision by, among other things, summarizing Licensing's June 5, 2019 Decision, reviewing correspondence relating to the substantive basis of the Appellants' application for reconsideration, quoting from correspondence relating to the Appellants' request to delay or suspend Licensing's summary action and action, addressing various preliminary issues, explaining why she had not previously proceeded with the Appellants' July 4, 2019 application for reconsideration, detailing the allegations made by the complainants, and summarizing the chronology of Licensing's interviews.

[510] Under heading A, "Evidence of Good Character", the MHO addressed letters and emails the Appellants submitted in their support and decided to consider this evidence only in relation to whether it showed that OS was unlikely to have committed the specific acts of misconduct alleged against her. This is discussed above.

[511] Under heading B, "Allegations of Procedural Unfairness", the MHO addressed the Appellants' allegations that Licensing had made errors of procedural unfairness, relating to the development and implementation of the H&S Plan, the nature of notice of allegations given to OS in advance of her interviews, the failure to interview character witnesses, the multiple re-interviews of staff, and allegations put to interviews as fact. The MHO found that Licensing made no errors of procedural fairness relating to these matters.

[512] Under heading C, "CCFL's Findings", the MHO said that Licensing found allegations to be substantiated when they were sufficiently corroborated by evidence obtained from witnesses and the Licensee. The MHO reproduced three pages of Licensing's Decision which she described as the salient parts of Licensing's Reasons for Decision. After summarizing the Appellants' position, the MHO disagreed and stated it was more probable than not that OS conducted herself "as described by CCFL in its Analysis and Findings". She found that CCFL's findings were supported on the evidence.

[513] Under Heading D, "The License Conditions", the MHO found that the condition imposed by Licensing was reasonable, proportionate, and justified in the circumstances. She went on to confirm the summary action and action taken by Licensing pursuant to paragraph 17(3)(b) of the Act.

[514] We now look more closely at the Appellants' allegation of procedural fairness and the MHO's conclusion that Licensing made no errors of fairness.

i. The Health and Safety Plan

[515] The Appellants argued that the H&S Plan was implemented in a manner that did not accord with the intent of section 12(2) of the Regulation and was procedurally unfair. They argued that GW did not request a plan from OS, which might allow for less drastic measures to be considered and discussed, but rather required it immediately and dictated its terms to her as though it was mandatory and non-negotiable. Afterwards, OS's

requests to amend the H&S Plan when the adverse consequences became apparent went unanswered and the Appellants suffered significant prejudice and loss.

[516] Section 12(2) of the Child Care Regulation states:

> 12 (2) If requested by a medical health officer, a licensee who is being investigated must provide to the medical health officer a plan to ensure the health and safety of children during the investigation.

[517] In exercising discretionary powers (including H&S plans, summary actions, and actions), a decision-maker has the obligation to consider what avenues may be open to it to minimize adverse impacts of its actions on the legitimate interests of an affected person, such as a licensee or operator of a licensed daycare, without compromising the welfare of the children.

[518] We take notice that it is not unusual for a regulatory authority to require close supervision by way of imposing a chaperone requirement, a shadowing requirement or additional supervision requirements either as pre-decision measures pending final determinations in cases of serious allegations or as a post-decision measure where serious allegations are substantiated.

[519] Moreover, the obligation to implement the least restrictive measure that sufficiently protects the children in care is an on-going one, particularly when there is a change in the circumstances.

[520] The MHO stated that there is nothing in the Act or Regulation requiring a minimum number of complaints or a formal written hearing process before Licensing can request H&S Plans under section 12(2) of the Regulation. We agree.

[521] Despite this, there are a number of problems with how the MHO dealt with the Appellants' submissions about procedural fairness. First, the MHO applied a minimal standard of fairness to Licensing's disclosure rather than the higher standard that is called for in the circumstance, as explained above. She condoned Licensing's refusal to provide any disclosure to OS before the H&S Plan was set or before her interviews other than the name of the part of the Act that the complaint related to: "Care, Supervision and Staffing".

[522] Additionally, the MHO justified the level of disclosure OS received from Licensing on the basis that OS would have and had taken the opportunity to make fulsome submissions in a reconsideration process where the MHO would apply "more robust procedures" in making her decision. However, the MHO herself did not provide OS with the higher standard of fairness she said would be provided as part of the "more robust procedures" of the reconsideration process. As the MHO described it, she read everything that was provided to her, agreed with Licensing's findings and confirmed Licensing's Decision. This was not a more robust procedure.

[523] Moreover, the Appellants were unable to make fulsome submissions in the reconsideration process about the H&S Plan, because of Licensing's failure to disclose material matters, such as significant aspects of the allegations it ultimately found to be

substantiated, described above, and a number of issues that it did not disclose at all. Additionally, it did not disclose in its Decision that it made certain material findings or considered certain material evidence.

[524] For example, at the appeal hearing, GW stated for the first time that Licensing's consideration of whether to modify the License Condition was "impacted" by telephone calls from staff saying that "they" had not told the truth in prior investigations because they were afraid for their jobs. As discussed above, this was an exaggeration. On January 31, 2019, a single caller alleged that she had not told the truth in a 2016 investigation, because OS had threatened to fire staff if they spoke to Licensing. She made no mention of other staff having lied. Licensing made no finding that this allegation was substantiated in its Decision yet acted on the basis of this allegation to refuse to modify the H&S Plan. Accordingly, Licensing relied on an unsubstantiated allegation as determinative in deciding it would not implement any less onerous H&S Plan. It did so without disclosing this to OS or in its Decision.

[525] This was a significant breach of procedural fairness and natural justice that adversely impacted the Appellants by continuing the H&S Plan, which later became the License Condition, without modification for almost two years. As Licensing did not disclose this information until the appeal hearing, the MHO was not aware of the reliance of this information and was unable to address this. This is an example of an error by Licensing affecting the MHO's Decision and supports the Appellants' argument that there were breaches of procedural fairness from the outset that were not addressed by the reconsideration process.

ii. Notice of allegations in advance of interviews

[526] The Appellants' argued that it was procedurally unfair for Licensing to interview OS without first providing her with specifics of the allegations, including particulars of the incidents, identities of the complainants and the supporting evidence then known to Licensing.

[527] The MHO found that providing such disclosure in advance "would very likely result in the interview subject preparing and tailoring their responses (which should be honest and accurate statements of fact) in a way that would impede the fact finding process." Additionally, she wrote "it is not realistic or practical to suggest that the subject of the complaint should be provided with an opportunity to comment on the complaints before those complaints are even properly understood by Licensing."

[528] In case she was mistaken, the MHO was satisfied that Licensing's June 5, 2019 Decision provided complete and detailed particulars and a fulsome written response could be presented in the reconsideration application before her.

[529] VCHA argued that OS's interviews were conducted during Licensing's investigation and that the standard of fairness owed during its investigations was minimal. As mentioned above, the proceedings conducted by Licensing were not solely investigative.

They were quasi-judicial and involved both an investigation and decision-making process. We have found that these proceedings attracted a higher standard of fairness. Moreover, as mentioned above, the MHO herself did not provide OS with a higher standard of fairness as part of the "more robust procedures" she testified was expected in the reconsideration process.

[530] It is clear from the MHO's November 27, 2020 Reconsideration Decision, that she applied a minimal standard of fairness to Licensing in deciding that the level of disclosure provided to OS before her interviews was adequate. The MHO rejected OS's argument that she was entitled to a higher level of disclosure before her interview, as to do so would impede the fact-finding process, parenthetically implying that OS would not be honest or accurate in her interviews. The MHO did not refer to any evidence that would lead her to believe that OS would tailor her evidence so it would be dishonest or inaccurate, nor did she refer to any case-law in support of this implication.

[531] We observe that the MHO's concerns that advance disclosure would likely result in the affected party tailoring evidence and learning about their case before Licensing understood it are inconsistent with the principles of procedural fairness and natural justice. The obligation to give advance notice (disclosure) of the case against an affected party and provide a meaningful opportunity to prepare and respond to it by correcting or contradicting it is a core safeguard of our system of administrative justice. It not only has the objective of preventing hearing by ambush, it also promotes the early discovery of the parties' respective cases, enabling them to assess the strength of their case and the case against them, making it difficult for them to conceal the truth from one another, and encouraging them to settle dishonest or invalid claims. Indeed, failure to give notice is such a serious breach of fairness that it may invalidate the hearing.

[532] The fact is that Licensing could not confidently understand the case before disclosing it to the affected party and obtaining that party's response. The suggestion that it could is contrary to the relevant, material evidence.

[533] With respect to the MHO's alternate opinion that Licensing's Decision provided complete and detailed particulars that would allow a fulsome response in the reconsideration process, we disagree. As described above, Licensing engaged in a number of disclosure failures that amounted to serious breaches of procedural fairness and natural justice. Many of these are not reflected in Licensing's June 5, 2019 Decision, or in the MHO's November 27, 2020 Reconsideration Decision. However, they were apparent on a detailed comparison of the interview transcripts and documentary evidence in the record and on the evidence adduced at the appeal hearing.

[534] All of this had a profound adverse impact on the fairness of the procedures that led to the decisions of Licensing and the MHO in this matter. Additionally, they had a significant negative impact on the Appellants in marshalling and conducting their defense in the reconsideration application.

iii. No interviews of parents

[535] The MHO stated that the Appellants argued that it was a procedural fairness error for Licensing not to interview persons who might attest to OS's good character. In so doing, the MHO misapprehended and failed to respond to the Appellants' submissions that Licensing erred by failing to interview parents of current iCare students, who had reliable evidence about two questions at issue in the proceedings: whether the health or safety of the children at iCare were at risk and whether OS had a suitable temperament to work with children.

[536] Licensing gathered evidence only from complainants and current staff. As a result, the narrow selection of evidence was skewed against OS. It was limited to the evidence of complainants and staff, including four complainants who had been dismissed by OS. As discussed above, at the appeal hearing, GW testified that there was an unwritten policy against interviewing parents, which she was unable to explain.

[537] There is no evidence that the MHO was aware that Licensing had a policy not to interview parents in its investigations at all, unless they are also complainants or current employees of a daycare facility with personal knowledge of the alleged misconduct. Nor did she address the procedural fairness of a policy against interviewing parents. This negatively impacted the fairness of the hearing on reconsideration.

[538] The fact that parents had material personal knowledge evidence that Licensing did not pursue is substantiated by the letters they supplied in support of OS's appeal. Many parents had direct evidence that related to specific allegations, such as whether children were yelled at, shamed, or embarrassed by OS and whether children feared OS.

[539] For example, Parent R had direct and crucial evidence about an incident she observed involving her child, Child D. Licensing did not interview her, despite knowing she was present. Nor did the MHO require Licensing to interview Parent R, despite Parent R's written descriptions of the incident. Parent R gave persuasive evidence about the incident at the appeal hearing. Other parents likely had direct and crucial evidence, for example about whether their children napped during a period that Licensing found OS terminated naptime altogether.

[540] Additionally, many of the parents' letters contained evidence relevant to other issues and findings, such as the risk OS may have posed to the children, and how Licensing dealt with that risk and the adverse impact this had on OS, her business, livelihood, employment and reputation. For example, some parents, such as Parent R and Parent Y, had direct personal evidence about the adverse impact of the H&S Plan and License Condition on ICare's programs, whether the care of their children suffered and what happened to the educational program when OS was barred from the facility. As mentioned elsewhere, in exercising discretionary powers, a decision-maker must consider the interests of affected parties, subject to the paramount interests of children in care, and must determine whether there are any less alternatives that have less impact on the licensee which do not compromise the children's health and safety. The parents' evidence

about the adverse impact of the H&S Plan and the License Condition on the Appellants' legitimate interests was relevant to this analysis.

[541] The Panel finds that the MHO erred in misapprehending and failing to address the Appellants' submissions about this issue and failing to appreciate that the parents' letters that were submitted as part of the Appellants' application for reconsideration contained material evidence relevant to issues before her.

[542] Moreover, Licensing's errors in failing to pursue and take into consideration crucial evidence from parents, such as their personal knowledge evidence about the allegations against the Appellant, seriously and adversely impacted the fairness of the MHO's Reconsideration Decision. These errors amounted to serious breaches of procedural fairness and natural justice that impaired the fairness of the reconsideration and decision-making processes leading to the MHO's Decision.

iv. Staff were inappropriately reinterviewed

[543] The MHO described the Appellants' argument as being that employees were interviewed multiple times when Licensing received additional information and complaints and, in so doing, Licensing committed a procedural error to revisit allegations they had already been questioned about.

[544] We agree with the MHO that it is not a procedural error, *per se*, to conduct further interviews with interviewees on receipt of additional information and complaints. Nor is it an error to ask interviewees if they had anything to add or change to statements they made at prior interviews.

[545] However, any changed statements may require further scrutiny for credibility and reliability, according to principled analyses. Licensing did not do this. Neither did the MHO when the Appellants raised issues of credibility on reconsideration.

[546] For instance, the Appellants argued that key witnesses, J and V, gave materially different answers when they were asked in subsequent interviews about questions they had already answered; that these new answers were significantly more damaging to OS; and that Licensing relied on these new answers without explanation. It was incumbent on Licensing to explain, in the face of these changed answers, how they resolved these conflicts in the witnesses' own evidence and why they preferred their changed answers over the earlier answers and over the Appellants evidence These were serious errors on Licensing's part.

[547] Here, too, the MHO failed to address Licensing's errors. The Appellants' arguments went to the credibility and reliability of the evidence of Licensing's key interviewees. As noted above in connection with our review of Licensing's June 5, 2019 Decision, there were significant issues affecting the credibility and reliability of the key witnesses on which Licensing relied, Complainant A and Staff Members J and V, to the point that this Panel placed little weight on their evidence unless corroborated by independent evidence. The MHO missed this and erred in so doing.

[548] In confirming Licensing erroneous findings about credibility, the MHO effectively "baked" those errors of procedural fairness into her Reconsideration Decision and it, too, was rendered unfair.

v. Changed scope of the investigation and decision-making process

[549] As noted, the Appellants submitted that after the initial complaint in December 2018, a flurry of complaints were spontaneously made in the two-week period of January 31 to February 11, 2019. This could not have been a coincidence, given that the complaint process was to be confidential. The only explanation was that someone contacted them to make their complaints, possibly in breach of confidentiality. The Appellants argued that Licensing should have properly assessed the credibility of these complainants by taking into consideration their motives. If it did not do this, Licensing committed a serious flaw in the investigation.

[550] At the appeal hearing, OS testified that each of the new complainants had motives adverse to her. We observe that inferences might be drawn of adverse motivation arising from the substance and circumstances of the new complaints. For example, complaints were made by employees OS had previously terminated and by one parent whose complaint had been dismissed after investigation years earlier who remained dissatisfied.

[551] The MHO did not consider these submissions about Licensing's failures. As mentioned above, motive is a factor to take into account when assessing witness credibility. The MHO erred by failing to consider and respond to these submissions and instead confirming Licensing's conclusions without conducting a principled analysis of the credibility issues raised by the Appellants. In the result, she incorporated Licensing's findings made without such an assessment into her Reconsideration Decision, impairing the fairness of her Decision.

vi. Allegations put to interviewees as facts

[552] The MHO characterized the Appellants' argument as being that Licensing erred by putting allegations to interviewees as fact. She reviewed the examples the Appellants provided and produced extracts that supported her conclusion that the witnesses would have understood that they were being questions in relation to certain "allegations" arising from certain "complaints". There was a reasonable basis for the MHO reaching this conclusion on those examples, so the Panel does not find any error under this heading.

E. Conclusion regarding the MHO's November 27, 2020 Reconsideration Decision

[553] With respect to the appeal of the MHO's November 27, 2019 Reconsideration Decision confirming Licensing's June 5, 2019 Decision, this Panel has found that the MHO made stand-alone errors in her Reconsideration Decision and that her Decision was also adversely impacted by serious flaws in Licensing's investigation and decision-making processes that she confirmed, which included fundamental breaches of procedural fairness and natural justice.

[554] On the evidence before us relating to the merits, the sole contravention of the Act and Regulation was OS's use of food as a reward or punishment, contrary to section 48(7) of the Regulation. This contravention did not warrant (1) imposing and continuing the H&S Plan without modification until June 5, 2019, (2) taking summary action of imposing the License Condition pursuant to section 14 of the Act or (3) taking the action of imposing the License Condition with additional terms pursuant to section 13 of the Act. We return to our conclusions about the MHO's November 27, 2020 Reconsideration Decision when discussing the issue of remedy later on in this decision.

III. WAS THE MHO'S OCTOBER 18, 2019 RECONSIDERATION DECISION JUSTIFIED?

[555] We now turn to the appeal of the MHO's October 18, 2019 Reconsideration Decision (also referred to as the "Cancellation Decision") which confirmed Licensing's September 19, 2019 Decision to suspend and cancel ICare's licenses.

[556] In the Cancellation Decision, the MHO stated that the Appellants admitted that OS breached the License Condition by attending at ICare on several occasions during operational hours. The MHO agreed with the Appellants' argument that OS's attendances did not breach the H&S Plan because it was no longer effective once the License Condition was imposed on June 5, 2019.

[557] The MHO confirmed Licensing's findings that OS's lack of candour with Licensing and failure to abide by the License Condition by attending its facility on at least eight occasions gave rise to an immediate risk to the health and safety of the children in care. The MHO also confirmed Licensing's summary action of immediately suspending the License under Section 14 of the Act, as well as its action of cancelling the License under Section 13 of the Act.

[558] In particular, the MHO was satisfied that Licensing's cancellation action was reasonable and supportable on two independent bases. The first was that OS contravened the License Condition eight times. The second was that OS had demonstrated that she was ungovernable. In this latter regard, the MHO was satisfied that OS was not candid with Licensing when questioned about her eight attendances and that OS breached the License Condition with little regard for the governing legislative regime.

[559] As mentioned above, the Appellants took the position that they were denied procedural fairness throughout the proceedings that led to the MHO's October 18, 2019 Decision. Additionally, the MHO failed to take their July 4, 2019 submissions into account.

[560] At the appeal hearing, OS admitted to attending the premises on a number of occasions in August 2018 in breach of the License Condition, which she said was wrongly imposed in the first place. She maintained she attended when necessary to do.

[561] OS denied lacking candour when questioned by Licensing Officers. She testified that she and her sister attended one meeting with Licensing Officer GW and PM on

September 5, 2019, where she answered Licensing's questions as truthfully as she could, based on her recollection at the time. We observe that this was before OS was shown RJDS's access records. OS said she was motivated to tell the truth because she knew, as Licensing did, that RJDS had surveillance systems throughout its premises and Licensing could easily discover if she was lying. She told GW and PM that she would tell them if she remembered anything more of her attendances and did so in two subsequent emails sent shortly after the meeting.

[562] OS asserted that it was clear at the meeting that her interviewers had already made up their minds against her. Additionally, she submitted that she had been denied procedural fairness throughout the proceedings.

[563] OS denied she was ungovernable. She provided evidence that she had been responsive to Licensing's suggestions and criticisms in the past. She took courses to improve as a day care educator and, since Licensing's June 5, 2019 Decision, had continued to do so to address the concerns Licensing raised, and she was responsive to criticism from parents. Additionally, she testified that she had a good reputation in the community as a day care educator and operator and actively participated in efforts to support and improve the education of day care teachers.

[564] VCHA argued that the Appellants failed to prove that the MHO's Decision was not justified. It contended that OS's failure to comply with the License Condition and her lack of candour in answering the questions of Licensing Officers on September 5, 2019 constituted an immediate risk to the health and welfare of children in care and justified suspension and cancellation of the Licence, despite OS's additional disclosures in her subsequent emails, and regardless of whether the License Condition imposed on the License is subsequently rescinded on appeal.

A. Was Licensing's investigation and decision-making process fair and adequate?

[565] In its September 19, 2019 Decision, Licensing decided that OS breached the License Condition on eight occasions in August 2019. The issue of whether OS breached the License Condition turns on its interpretation, a question that neither Licensing, nor the MHO addressed in their decisions.

[566] It is important to bear in mind that ICare's premises were leased from RJDS and were located in two rooms in the back of RDJS's building. Licensing's diagram of the licensed facility is comprised of a map of the RJDS building on which the two rooms are outlined.

[567] According to Licensing's Decision, on August 21, 2019, Licensing learned from RJDS staff that OS had been observed at RJDS during ICare's operating hours. Licensing was aware that RJDS had security systems and, on August 28, 2019, obtained RJDS's records of the use of OS's key fob to access the front door of RJDS's building from July 12 to August 26, 2019. They consisted of 5 pages of densely printed records of momentary usage of

that key fob. They do not indicate who used the key fob, how long the user was present on or in RJDS property or where the user attended.

[568] Licensing found a total of nine dates when the key fob was used during ICare's operating hours and created a list (the "List of Possible Breach Dates"). All of the dates were in a three-week period ending August 26, 2019. Licensing did not disclose RJDS's key fob records to OS until it met with her on September 5, 2019, and it did not disclose its List of Possible Breach Dates until its Decision. The same day, Licensing inspected ICare and learned from unnamed staff that OS had been present for about 15-20 minutes about two weeks earlier (i.e., around August 2019).

[569] On August 30, 2019, Licensing emailed OS to arrange a meeting to discuss possible breaches of the H&S Plan since December 18, 2018 and, in particular, several attendances "at the facility" during operational hours, as well as to advise that it would be conducting an investigation. It stated that the only purpose of the proposed meeting was to collect information from OS regarding her compliance with the H&S Plan. It did not mention the License Condition.

[570] The meeting was set for September 5, 2019. OS was told that a decision on a course of action would be made in the afternoon following the meeting. Prior to that meeting, Licensing did not give OS notice of the seriousness of the issue it was investigating, the importance of being truthful at the meeting, or the possible sanctions that could arise as a result of what transpired at the meeting. Nor did it give notice that it might consider the issue of whether OS met the statutory requirements for the role of manager, whether she was ungovernable or whether it might suspend and cancel the License.

[571] GW and PM met with OS and her sister on September 5, 2019. The meeting departed from Licensing's investigation and decision-making practices, procedures and policies, as described by GW in her testimony. The meeting was not recorded. There was no transcript or contemporaneous notes. No one else with personal knowledge of the events was interviewed, such as ICare's staff and RC, its then-Acting Manager, whose personal knowledge is described below.

[572] Licensing's Decision contains an incomplete description of the meeting. There is a critical dispute about what was said in the meeting, which we address later in these reasons. According to the Decision, OS was asked whether she had been "on site" during ICare's operational hours since the H&S Plan was implemented. OS admitted attending on a number of occasions, in particular in August 2019, but said she did not remember the dates. We will address the dispute further, below.

[573] Four emails from OS and from her lawyer were sent to Licensing on September 6, September 9 and September 10, 2019.

[574] After the meeting, Licensing decided to check OS's account of her attendances. On September 10, 2019, it attended RJDS and viewed its video surveillance records. It took screen shots of those records showing that OS accessed RJDS' front door on eight

occasions, not nine, in August 2019, as well as a short video of OS with children outside ICare's classrooms, all during ICare's operating hours. There was no record or admission of OS attending in ICare's classrooms.

[575] Licensing did not disclose the newly acquired video surveillance records to OS or provide her with an opportunity to respond to them before making its Decision to suspend and cancel the License.

[576] We have broken down our analysis of this issue into two sub-issues: (i) Disclosure and Opportunity to Respond and (ii) Throroughness and Neutrality of the Investigation.

i. Disclosure and Opportunity to Respond

[577] As mentioned above, VCHA argued that OS's interviews were conducted during Licensing's investigations and that the standard of fairness owed during its investigations were minimal. As discussed above, the Panel has found that the proceedings conducted by Licensing were not solely investigative; they were quasi-judicial and involved both an investigation and decision-making process. As such, they attracted a higher degree of procedural fairness.

[578] As explained above, a core safeguard flowing from the duty of fairness is the obligation to give adequate notice (disclosure) of the case against the affected party and a meaningful opportunity to prepare and respond to it by correcting or contradicting it. This is a cornerstone of natural justice. The underlying rational for this safeguard is to prevent hearing by ambush. Failure to give notice is a breach of fairness that may potentially invalidate a proceeding.

[579] The duty of fairness is inconsistent with the view that disclosure should be limited because a dishonest party might tailor her responses to conceal the truth or might interfere with the willingness of witnesses to speak honestly with investigators or decision-makers. As mentioned, Licensing did not disclose in advance of the September 5, 2019 meeting or before its Decision:

a. its allegation that OS made eight or nine attendances in August 2019 in breach of the H&S Plan or the License Condition or a summary of the evidence in support. Rather, it simply disclosed the broad allegation that she may have attended in breach of the H&S Plan since December 18, 2018 and gave her RDJS's key fob records after it questioned her, without any summary of the evidence on which it relied;

b. its allegations that (i) OS lacked the personality, temperament and suitability for the role of manager and that (ii) OS was ungovernable; or

c. that it was considering the sanctions of suspension and cancellation of the Appellants' License, and further.

[580] Licensing did not give the Appellants a meaningful opportunity to prepare and present a response to these allegations and issues. The Panel finds that these disclosure failures amounted to a serious breach of procedural fairness and natural justice.

ii. Investigation: Thoroughness and Neutrality

Thoroughness - Incomplete Investigation

[581] When Licensing conducted its sole interview of OS on September 5, 2019, its investigation was not complete. Licensing later gathered additional video surveillance evidence, that, with one exception, focused on pictures of OS in the vicinity of the RDJS front door, and a short video of OS outside with children. As mentioned, it did not disclose this new evidence to OS before issuing its Decision. Despite this, Licensing relied on this new evidence to make findings against OS.

[582] This deprived OS of the opportunity to know about the significant, newly gathered evidence in Licensing's case against her and to correct or explain it before Licensing made its decision to impose the strongest sanction available to it: to suspend and cancel the License.

[583] This deprivation prevented OS from using the newly gathered evidence to refresh her memory or add further information about her attendances to Licensing, including the dates and reasons for her attendances, which she could have done, as she did in the appeal hearing. This information could have been, but was not, taken into account in determining whether OS lied or forgot about some of her attendances, whether OS acted in disregard of the health and safety of children and whether there were any mitigating or aggravating circumstances in her conduct to take into account in determining any sanction. By limiting its investigation of OS in this way, Licensing disabled itself and the MHO from taking the results of that additional information or explanations into account.

[584] The inference to be drawn from the foregoing is that Licensing decided it had gathered sufficient information from OS at the September 5, 2019 interview on which to base its decision and did not require more from her or anyone else. This appears to be because it conducted itself as though any attendance in or on RJDS' property breached the H&S Plan and the License Condition. We address this below.

[585] However, there was further information to be had from disclosing the new evidence to OS and obtaining her response. For example, at the appeal hearing, OS was able to identify from the pictures some of the reasons why she attended on the particular occasions depicted in them. For instance, she was able to see herself carrying groceries on more than one occasion, something she said she recalled doing once in the September 5, 2019 meeting and advised that she would disclose if she remembered more.

[586] Moreover, despite obtaining additional evidence from RJDS to firm up its conclusions about OS's statements in the September 5, 2019 meeting, Licensing did not interview any ICare employees about OS's attendances to ascertain whether they had any knowledge of when, where and why OS attended, and for how long.

[587] Most importantly for the purposes of determining whether OS had specifically breached the License Condition, Licensing did not try to obtain evidence from OS or anyone else about where OS attended other than in the vicinity of RJDS's front door on seven of the eight occasions the surveillance evidence showed her there – the eighth being OS's attendance outside with the children. The failure to do this is crucial to the analysis of whether OS indeed breached the specific terms of the License Condition, how serious her conduct was, as well as whether there were any mitigating or aggravating circumstances – analyses Licensing did not conduct in its Decision.

[588] For example, Licensing did not interview RC, ICare's Acting Manager, in the summer of 2019. RC had crucial evidence about Licensing's contribution to one of OS's attendances that was not revealed in its Decision.

[589] RC testified about the circumstances in which OS came to work outside with the children in August 2019 as depicted in the short video. She said that in August 2019, OS was short-staffed, as it was hard to find qualified staff, and OS was worried that ICare was going to have to close.

[590] OS managed to hire two new teachers, Staff Members H and E, who were qualified ECEs. There was a new process for obtaining Criminal Record Checks ("CDC") which had to be initiated by the daycare, and although the CDCs for these two were still in process, they started working.

[591] RC said that soon after, she received a message from H at about 4 or 5 am, giving notice that she could not come to work that day, because Licensing told her that if she came back she could lose her license. H was terrified about this prospect and very upset. RC had personal knowledge that H was licensed, because H had been RC's student and RC had attended her graduation. E told RC much the same thing. Neither of them wanted to come back to ICare.

[592] RC testified that she and OS tried unsuccessfully to find other staff to come in. They called everyone and begged some of them to come. RC was scheduled to work as a Practicum Instructor for her usual employer that day. She asked her employer to let her leave early, so she could be at ICare by lunch time, and her employer refused.

[593] RC called Licensing Officer L and told her that about the two qualified staff awaiting CRC clearance who would not return to work after what Licensing told them, RC asked L why Licensing had not promptly contacted her about this, but L answered that they did not do so because they knew she was away. RC told L that was why she had previously given L her personal telephone number.

[594] As noted, Licensing had earlier told OS that the children's safety would not be at risk as long as ICare met ratio. Licensing's conduct in not promptly notifying ICare about what it had done impaired ICare's ability to ensure it had the staff to make ratio the following day.

[595] OS testified that Licensing had previously permitted qualified teachers whose CRCs were in process to start work at ICare before they were completed in the past. This was a change in its practice. She was not challenged on this.

[596] Despite finding that OS breached the License Condition by attending that day, Licensing failed to take into account its part in creating the circumstances in which ICare could not find substitutes and in jeopardizing ICare's ability to make ratio. This was a mitigating factor deserving of being taken into account.

[597] According to GW's testimony, she and PM had some knowledge of the circumstances relating to Licensing's advice to these teachers, ie. that they did not show up for work after receiving Licensing's advice. However, the impact of this on ICare's operations, and in particular on OS's attendance at ICare with children, was not pursued in Licensing's investigation or mentioned in its Decision.

[598] In failing to interview persons with personal knowledge about alleged misconduct, Licensing deviated from its policies, procedures and guidelines relating to the conduct of investigations and failed to gather and take relevant personal knowledge evidence into consideration. In the result, we conclude that Licensing's investigation was not thorough and breached procedural fairness and natural justice. Moreover, Licensing actions and omissions, and failures to mention this on the record, deprived the MHO of this evidence.

Neutrality

[599] As mentioned, Licensing's investigation departed markedly from the manner in which its witness, GW, testified that it conducted investigations. There is no explanation for this.

[600] Among other things, Licensing did not record the September 5, 2019 meeting with OS and transcribe it, as it did in the investigation leading to its June 5, 2019 Decision. It did not produce contemporaneous notes of the meeting. It did not disclose the evidence it acquired after that meeting to OS and give her a meaningful opportunity to respond. It was a short meeting. OS had the impression her interviewers had already made up their minds.

[601] Moreover, Licensing interviewed only OS. It did not interview people, such as RC and other staff, who had personal knowledge of some of the matters that resulted in its September 19, 2019 Decision, including alleged breaches of the License Condition, as well as OS's qualifications for the role of manager.

[602] OS said "maybe" she attended on the 15th and the end of August to deliver staff their pay cheques. At the hearing, VCHA contended that the absence of key fob records for those attendances was evidence of OS's lack of candour. The Panel takes notice that pay cheque delivery is not always prompt. Staff could have easily answered whether, when and how they received their pay cheques in August 2019, particularly if Licensing had asked them promptly, but it did not ask them at all. It is highly unlikely they were not paid.

[603] Licensing's conduct of this investigation and treatment of OS contrasts dramatically with GW's testimony about Licensing's standard investigations, as well as the repeated interviews Licensing conducted of, and the broad leeway and credulity it gave to, key witnesses who repeatedly changed statements relied on in its June 5, 2019 Decision.

Conclusion Regarding Fairness

[604] In our view, License's disparity of treatment, lack of pursuit of available, crucial evidence that supported OS or mitigated her conduct, insufficient disclosure of newly gathered evidence to OS and departure from standard practices of investigation that were afforded to witnesses against her, reflects a failure to conduct a thorough hearing and a lack of neutrality on the part of Licensing's investigators and decision-makers about the matters that resulted in Licensing's September 19, 2019 Decision.

[605] Licensing's conduct demonstrates that it had not completed its investigation by September 5, 2019. Despite GW's evidence that Licensing typically conducts a post-investigation interview to disclose to the party named in a complaint what allegations had been substantiated and provide that party with an opportunity to respond, it did not do so in this case. Further, it did not interview staff with personal knowledge of the matters at issue, despite GW's evidence that it was standard procedure to do so.

[606] Indeed, Licensing did not put the material allegations and evidence it relied on to OS before it made its decision. At the September 5, 2019 meeting, Licensing did not draw OS's attention to the List of Possible Breach Dates and ask OS any questions about them, such as whether she attended on those dates and if so why, where and for how long. Afterwards, Licensing did not show OS the photographic and video evidence and its calculations of the length of her visits and did not put to her its new allegations. Licensing's failure to put these allegations to OS deprived her of the opportunity to explain that she would not and did not lie because of the availability of surveillance evidence.

[607] Additionally, Licensing failed entirely to disclose and allow the Appellants to respond to its allegations that OS lacked the "personality, temperament and suitability" for the role of Manager and that she was ungovernable. Nor did it disclose that it was considering suspension and cancellation of the Appellants' License. In so doing, Licensing failed to afford OS the higher level of fairness owed to her.

[608] In our view, Licensing failed to afford procedural fairness and natural justice to the Appellants in the investigation and decision-making process leading to its September 19, 2019 Decision. This amounted to a fundamental flaw in the Decision.

B. Was the September 19, 2019 Licensing Decision Justified?

[609] Again, the Panel is cognizant that the ultimate question before us is whether the MHO's October 18, 2019 Cancellation Decision was justified. However, in order to fully understand the basis for the MHO's Decision and assess the Appellants' arguments that it was not justified, we must first look at the underlying decision and determine how, if at all,

any flaws in it affected the MHO's Decision. We have broken our analysis of this issue into the following sub-issues:

i. Candour
ii. Breach of License Condition
iii. Risk to Health and Safety of Children
iv. Personality, Suitability, Temperament for Role of Manager
v. Governability
vi. Sanction

i. Candour

[610] In its Decision, Licensing found that at the September 5, 2019 meeting, OS was untruthful in her account the number of times she accessed the facility, the door she used to access the facility and the reasons for her visits.

[611] Licensing did not explain how it reached the conclusion that OS was not telling the truth when saying that she did not remember all of her attendances in that meeting. Additionally, its description in that Decision of what transpired at the meeting conflicted with Licensing's evidence at the appeal hearing in a crucial and determinative way.

[612] Licensing relied on the following description of what transpired at the meeting contained in Licensing's September 19, 2019 Decision, which GW affirmed in her testimony in chief:

> [OS] was informed that Licensing had received information that [OS] was on site during daytime hours. She was asked if she had been on site between the hours of 7:45 and 5:00 since the Health and Safety Plan was implemented. She stated that she has been there every day at 5:30 in order to bring/cook food, prepare lessons and art activities, and set up the tables with activities for the following day.
>
> On one occasion she was there on a Sunday for a party with the children and parents, and interacted with them.
>
> On one occasion she was there during program hours to bring milk for the babies but believes that no-one saw her as she came in through the side door.
>
> On one occasion she was there early morning to fix the hose for the pool but believes that no-one saw her as she was outside.
>
> She has maybe been there to drop off cheques on the 15th or at the end of the month but calls the staff to come out and collect them.
>
> [Mr. M] clarified that [OS] was saying that these were the only occasions that she was on site between the hours of 7:45 and 5:00 since the Health and Safety Plan was implemented, and [OS] stated that was correct.

> [OS] was then provided with a copy of the list of dates that the key fob assigned to [OS] was used to access the front door, to which [OS] stated that she gave her key fob to one of her employees and uses her swipe card to access the side door (stating that she does not use the front door). [OS] was unable to remember which staff she gave her key fob to and [PM] asked her to please provide us with the name. [OS] said she would let us know. (underlining added)

[613] This shows that OS did not deny any attendances; none were put to her. Rather, she was asked if she had been "on site" during ICare's operational hours since the H&S Plan came into effect. She answered affirmatively by telling PM and GW she did not remember the dates and describing a number of attendances by the reasons she attended.

[614] At the hearing GW staunchly maintained that OS lied during that meeting when PM asked her a clarification question about whether the attendances she described were her only ones and OS answered that was correct. That lie was the basis of the finding that OS was untruthful and lacked candour when answering Licensing's questions. GW testified that this was because OS had spent two full days at the facility in breach of the ban on her attendance that she did not disclose. GW said she did not believe OS could forget that. Later emails from OS or her lawyer advising of other visits did not exonerate the lie.

[615] However, in cross-examination, GW made a critical admission. She agreed with OS that the description of the clarification question failed to include the whole of OS's answer to PM's clarification question. That is, when OS answered PM's clarification question, OS went on to tell GW and PM that if she remembered any other times she was there, she would let them know. This piece of the exchange was not mentioned in Licensing's September 19, 2019 Decision or the record and was not disclosed to the MHO.

[616] This omission demonstrates not only that Licensing's description of the meeting was not a fulsome report of what transpired; its description of OS's answer to the clarification question was inaccurate. This inaccuracy was crucial because it directly contradicts Licensing's finding that OS lied and was not candid at the September 5, 2019 meeting and sheds a different light on OS's subsequent emails that is consistent with her version of events.

[617] After the Thursday, September 5, 2019, meeting, OS and her lawyer sent Licensing a number of emails disclosing relevant information, such as:

- a Friday, September 6, 2019 email request from OS's lawyer for another copy of RJDS's key fob records, which OS left at the meeting, so she could review it. The copy was not delivered until September 9, 2019;
- a Monday, September 9, 2019 email saying that OS attended one more day to observe the teachers from the portable because of complaints she had received from parents about them; and
- a Tuesday, September 10, 2019 email saying OS was at the daycare in the summer, she could not remember the date, when one of the teachers did not show up and

she could not get a substitute, so OS stayed there with another teacher for the children's safety. OS was not alone with the children and ratio was met. OS wrote that if she remembered other times she would let them know.

[618] As mentioned, in its Decision, Licensing wrote that OS was untruthful in her account of the number of times she accessed "the facility, the door she used to access it and the reasons for her visits." This is contradicted by the facts that at her only meeting with Licensing, on September 5, 2019, OS did not deny attending, admitted the attendances she remembered, added to her remembrances within two or three business days thereafter and then admitted all the attendances Licensing later alleged that she made. However, OS did not admit that she ever attended in ICare's leased area, i.e., its two classrooms, nor is there evidence that she did so.

[619] Moreover, no one asked OS for the times of day, how long she had attended on each occasion or the reasons for her visits. Rather, as the Decision indicated, the discussion focused on the secondary issues of who used OS's key fob and what door OS used to access RDJS's building.

[620] It was clear to the Panel from OS's testimony at the appeal hearing that OS remembered her attendances by her reasons for attending, and that she did not remember the dates. With little effort, Licensing could have investigated whether some attendances could have been proved without dates. For instance, Licensing could have contacted staff to ask more about OS's paycheck deliveries and other possible attendances, but it did not do so.

[621] Similarly, Licensing could have disclosed the pictures and video to OS and provided her with a meaningful opportunity to respond to that evidence by correcting, contradicting or explaining it, as she did at the appeal hearing. There was no explanation for its failure to do this.

[622] In its Decision, Licensing wrote that OS had spent two long days at the facility, and although she had disclosed one day, she did not disclose the other. OS did not spend two long days "in the facility"; there was only one long day. Licensing's Decision stated that OS's lawyer disclosed in a September 9, 2019 email that OS attended for a day in the portable to observe the teachers. However, the evidence was that the portable was not part of ICare's facility at the relevant time. GW acknowledged in the appeal hearing that the other long day may have been when OS attended outside with the children, which was depicted in the video. Licensing's Decision reveals that OS disclosed this attendance in her September 9, 2019 email, mentioned above.

[623] Since Licensing did not ask OS the length of her attendances, in or after the September 5 meeting, it is not surprising that she did not mention it. We do not find that OS was untruthful about questions she was not asked.

[624] There is no evidence that OS recalled but withheld disclosure of her attendance outside with the children during the September 5, 2019 meeting. However, if she did, she

disclosed it so soon thereafter that the failure to disclose was mitigated significantly, if not completely. OS was not asked about that specific attendance before she disclosed it, and she voluntarily disclosed it before Licensing disclosed that it learned of it otherwise. We are reminded that Licensing accepted changed statements of key witnesses against OS and note that Licensing did not extend the same leniency to OS.

[625] Moreover, this was OS's first interview on the subject of her attendances. As mentioned, GW agreed during the hearing that failure to disclose particulars in advance prevented OS from preparing responses in advance. GW also agreed that, when allegations are disclosed and discussed at a first interview with the person named in a complaint, it can be very emotional for them and they might have trouble focusing on the questions asked and providing the information they might want to give if they had notice.

[626] In its Decision, Licensing also relied on a letter from the ECE Registry to OS dated July 10, 2019, advising that her ECE certificate had been suspended pending investigation of the matters described in Licensing's June 5, 2019 Decision. Licensing claimed that OS was prohibited from working with the children on August 23, 2019, the day depicted in the short video. However, OS's uncontroverted evidence at the appeal hearing was that she did not receive the letter before then, probably because she had moved to another city. Licensing could have asked OS whether and when she received the letter but did not do so. Instead, it assumed, without proof, that she received it before August 23, 2019. Notably, although this does not appear to have been noted in the record, the evidence at the appeal hearing was that the ECE Registry later reinstated OS's ECE Certificate.

[627] The manner in which Licensing conducted its investigation, without disclosure of its allegations and evidence against OS, breached procedural fairness and natural justice.

Conflicts in the Evidence About OS's Candour

[628] VCHA argued that OS's testimony at the appeal hearing was not credible and her memory was inaccurate.

[629] We have addressed issues of credibility elsewhere and will not repeat our comments here, except to observe that both OS and GW demonstrated memory issues and that aspects of their testimony at the appeal hearing differed from evidence available closer to August and September 2019. GW's and OS's testimony at the hearing about what was said and disclosed at the September 5, 2019 meeting and in the days afterward was different from the findings in Licensing's Decision in a number of significant ways.

[630] For example, GW appears to have forgotten the whole of OS's response to PM's clarification question at the September 5, 2019 meeting until she was cross-examined at the appeal hearing. That memory lapse was the basis of Licensing's conclusion that OS lied about her attendances at that meeting and was therefore determinative of its finding that she was not candid.

[631] Additionally, GW testified that certain disclosures Licensing's Decision identifies as being made in the September 2019 meeting were not made until after the meeting, and that other disclosures referred to in the Decision were not made at all.

[632] GW testified that Licensing concluded that OS had not been candid during the September 5, 2019 meeting about the number of times she had been present "in the program" and had accessed "the facility", the length of time she was there on each occasion and the reasons for her visits. However, as noted above, OS was not asked those questions at that meeting. Moreover, Licensing's Decision establishes that OS was asked if she had been on "site", not whether she was in "the program" or "the facility". The word "site" is different from the terms used in the License Condition and the Act and was capable of a number of interpretations.

[633] OS's testimony at the appeal hearing about her attendances and her reasons for attending, after reviewing Licensing's pictures and video, also differed from what she had disclosed to Licensing at and shortly after the September 5, 2019 meeting, before those disclosures. However, that evidence revealed that the purposes of her visits were consistent with the purposes of the visits she disclosed.

[634] GW made it clear in her testimony that Licensing drew a hard line between what OS disclosed at the September 5, 2019 meeting and what she disclosed within days afterward. In GW's view, it was OS's failure to disclose all of her attendances at the September 5, 2019 meeting in the face of her answer to PM's clarification question that amounted to a lie. That lie was not mitigated by OS's disclosures shortly thereafter.

[635] As mentioned, we disagree. It is true that OS did not disclose her attendance outside with the children at the September 5, 2019 meeting. However, if she recalled and withheld that information, she mitigated that significantly or completely soon thereafter by disclosing it voluntarily in a manner consistent with her advice that she would inform Licensing if she recalled any more attendances.

[636] There could have been many reasons for that, including that: she forgot while being questioned without prior disclosure of the specific allegations against her, she may have recalled it once she reviewed RJDS's key fob records, or she may have wanted to consult counsel, first. However, she disclosed it promptly, voluntarily and before Licensing disclosed it to her.

[637] GW testified that she and PM also concluded, without explaining their reasoning, that OS's failure to be truthful amounted to an immediate risk to the health and welfare of children in care. Additionally, it demonstrated that she lacked the "personality, suitability and temperament" to be the manager of the program. Moreover, OS's willingness to breach the H&S Plan and the License Condition demonstrated a disregard for the regulatory system. They decided, without explanation, that OS was ungovernable. So, there was no option but to take further action.

[638] GW testified that candour and truthfulness are crucial to the relationship between Licensing and a Licensee and to ensuring the health and safety of children. Licensing relies on Licensees to share if there are any reportable incidents putting anyone at risk. She testified that any untruthfulness breaks this trust and is hard to rebuild. A foundation of truthfulness is needed to ensure the relationship can be rebuilt.

[639] We find that this is an unreasonable and unworkable standard. There is a spectrum of seriousness of "untruthfulness", which could be said to range from white lies and inadvertent lies to lies that have serious consequences and lies that reveal moral turpitude. The seriousness of a lie must be assessed in the context of the case. Licensing failed to do this.

[640] Notably, GW did not say that the trust relationship could not be rebuilt, only that it is hard to rebuild. There is no evidence of any attempt to ascertain whether it could be rebuilt. Accordingly, Licensing's finding did not establish that the relationship with OS, if she was untruthful, could not have been rebuilt.

[641] In any event, at the appeal hearing it was clear that Licensing's conclusion that OS was untruthful relied solely on OS's answer to PM's clarification question, where OS was said to have agreed that she had disclosed all of her attendances. However, GW's admission at the hearing that during the clarification exchange OS had also said that she would let Licensing know if she remembered any other attendances, and the evidence that OS did so, (a) contradicts Licensing's findings that that OS lacked candour in the September 5, 2019 meeting and (b) undermines Licensing's use of that ground as a basis for finding that OS lacked the "personality, suitability and temperament" for the role of manager.

[642] OS testified that there was no point to lying about her attendances. RJDS had surveillance systems everywhere and any lie could be easily detected. She maintained that she shared with Licensing in the September 5, 2019 meeting what she remembered of her attendances and said that if she remembered more, she would tell them. She disclosed her other attendances as soon as she remembered them. As mentioned, OS said she did not receive the ECE's July 10 letter because she moved to another city. Licensing did not challenge this.

[643] This Panel finds that Licensing failed to conduct a principled analysis of OS's credibility in determining that she lacked candour in answering Licensing's questions. The law on assessing credibility is set out in the BC Supreme Court's Judgment of *Bradshaw* (quoted in part at para. 90, above), relied on by VCHA in this case. It is discussed above and will not be repeated here, except to say that Licensing's reasons did not disclose that it applied this type of analysis.

[644] The evidence and Licensing's Decision reveal that there was a significant disagreement between the parties about OS's attendances and in particular, the number of attendances, and what OS did during her attendances. OS told the Licensing Officers what she recalled of her attendances. Licensing maintained that OS was not truthful about

her attendances. OS contested this. Licensing provided reasons that omitted part of a crucial exchange and failed to take an essential element into account.

[645] This Panel finds this omission, considered in light of the evidence adduced at the appeal hearing, is crucial and determinative of the issue of OS's candour. In the Panel's view, OS's conduct and admissions at the September 5, 2019 meeting and in the days following is not consistent with the conduct of someone who lacked candour about breaching the H&S Plan and the License Condition. Rather, it is more consistent with someone who was called to a meeting mid-investigation without prior disclosure of Licensing's specific allegations or RJDS's records and who was not given a fair opportunity to prepare and respond to them at that meeting. It was consistent with the part of the crucial exchange that was omitted from the Decision. OS did follow up afterwards with important information and admissions. It is also consistent with the conduct of a person telling the truth, knowing that there was a serious risk of not doing so, since there existed security surveillance evidence and records that would reveal any lie. Had she lacked candour, we would have expected very different conduct and responses.

[646] In the Panel's view, Licensing took an unduly strict and literal view of what OS said at the September 5, 2019 meeting. Its advice to OS that it would make its decision in the afternoon after that meeting signaled a potential rush to judgement. It based its decision on her credibility on a partial investigation that deviated markedly from its usual procedure. It did not interview persons with personal knowledge of the alleged misconduct. It did not take the crucial exchange into account. In so doing, it did not appropriately assess OS's candour and weigh OS's subsequent disclosure of two additional attendances. It failed entirely to disclose the balance of the evidence it collected and give OS an opportunity to respond to it before making its decision. This was a serious breach of procedural fairness and natural justice.

[647] In light of the foregoing, the Panel has concluded that OS did not lack candour or lie in her dealings with Licensing.

ii. Breach of License Condition

[648] We turn to Licensing's finding that OS breached the License Condition on eight occasions.

Scope of the Interview Question

[649] OS was told the September 5, 2019 meeting related to potential breaches of the H&S Plan. OS was asked in that meeting if she had been on "site" during operational hours since the H&S Plan was implemented ("Licensing's Question"). Licensing's Question made no mention of the License Condition. Licensing relied on OS's answers to this critical question in making its decision.

[650] Despite this, Licensing decided in its September 19, 2019 Decision, that the H&S Plan and the License Condition were substantially the same, a finding the MHO noted in

her Reconsideration Decision. Additionally, Licensing found that OS breached not only the H&S Plan, but also the License Condition.

[651] This raises the following questions: (1) What is the relevant question at issue (the "Relevant Question") and what is its answer?; and (2) Did Licensing ask and answer the Relevant Question?

[652] This is important, because it is clear that reasonable people could and did interpret the H&S Plan and the License Condition as covering different ground. Indeed, a drafter of the H&S Plan and the License Condition, GW, interpreted them differently, yet she failed to clarify that difference to OS. In particular, the transcript of Licensing's interview with Staff Member V, which GW attended, shows that Licensing told Staff Member V, one of the people in charge at ICare's premises during operational hours, the following about whether OS's attendances in RJDS's areas other than ICare, such as in a kitchen outside ICare's two classrooms, breached the H&S Plan: "…[OS] dropping off food in the kitchen and you not seeing her, is fine…as long as she doesn't come into the program." [50] (underlining added)

[653] GW testified she agreed that the message given to Staff Member V appeared to be that it was acceptable for OS to come into the kitchen as long as she did not come into the program. However, GW went on to say, without explanation, that "was when the H&S Plan was in place, but not the summary action [i.e., the interim License Condition]."

[654] This shows that a drafter of the prohibition in the H&S Plan, GW, intended that it would apply only to OS's attendances in "the program" and not to the whole of RJDS's property, as long as OS was not seen. Accordingly, we find that the direct message Licensing gave a person in charge in OS's absence was that its only apparent concern was that OS stay out of, and not be seen in, the program. OS complied with this interpretation, with one exception on the day she could not find a substitute teacher at the last minute and attended outside to make ratio.

[655] If GW believed that the bar to OS's attendance in the License Condition was broader than the bar in the H&S Plan, she ought to have disclosed this to OS and ensured OS clearly understood this when that condition was implemented. GW knew OS well enough to know that English was not her first language, that she did not have legal training, and that she was unlikely to understand fine distinctions made in the new language introduced into something as important as the bar to OS's attendances at "her center". GW did not do so.

[656] As noted below, in the MHO's Reconsideration Decision, the MHO found that the alleged breaches could not be founded on the H&S Plan, because it had expired on June 5, 2019, when the License Condition was imposed. Therefore, in asking what the Relevant Question was, we will focus on only the alleged breaches of the License Condition.

[50] JBOD, page 100.

[657] Accordingly, the Relevant Question is whether OS's eight attendances breached the License Condition, and not whether she breached the H&S Plan. The question of whether Licensing answered that question depends on an interpretation and application of the scope of the License Condition. Licensing did not address this.

What is the Scope of the License Condition?

[658] In order to answer the Relevant Question, we must determine the scope of the prohibition against OS's attendance as specified in the License Condition. Then we must address whether OS attended within that scope on the eight occasions identified by Licensing.

[659] The License Condition at the time of the eight attendances was the "interim condition…immediately placed on the licence that [OS] not be allowed on the premises of the facility during operational hours of the program."

[660] In order to determine the scope of the License Condition, we first turn to the question of what did Licensing license. During the appeal hearing, Licensing produced a diagram of RDJS's property which outlined two rooms at the back of the building as being part of the building comprising the facility licensed to ICare.

[661] We turn next to the terms used in the License Condition: "facility" and "premises", as well as related statutory definitions. For convenience, we reproduce certain definitions found in section 1 of the Act, which are set out below in relevant part:

> **"care"** means supervision that is provided to
>
> (a) a child through a prescribed program
>
> **"community care facility"** means a premises or part of a premises
>
> (a) in which a person provides care to 3 or more persons who are not related by blood or marriage to the person and includes any other premises or part of a premises that, in the opinion of the medical health officer, is used in conjunction with the community care facility for the purpose of providing care, … (underlining added)
>
> **"premises"** means a building or structure and includes outside areas adjacent to the building or structure ordinarily used in the course of providing services

[662] The terms "care" and "premises" are defined in the Act. Since Licensing can only license a facility that is a "community care facility", we ascribe the statutory definition of that phrase to the word "facility" used in the License Condition. On these statutory definitions, the License Condition attached to the License on June 5, 2019 barred OS from attending ICare's premises ("ICare's Premises"), which comprised:

a. the part of RJDS's premises used by the Appellants for the purposes of providing care to the children by way of providing supervision to children through a prescribed program during ICare's operational hours: i.e., the two rooms in the RJDS building for which Licensing licensed ICare to provide such care, as outlined in Licensing's diagram of RJDS;

b. those internal areas of the RJDS building used by the Appellants in conjunction with providing the care described in (a), such as the nearest bathroom and RJDS gym; and

c. the outside areas adjacent to ICare's Premises that ICare ordinarily used in the course of providing services.

[663] Accordingly, in this case, where the Appellants are licensed for part, but not all, of a building, the "premises of the facility" are limited to the places in the building where the Appellants are licensed to provide supervision to children in care through prescribed programs, as they may be extended by the applicable statutory definitions quoted above. In the Appellants' circumstances, those premises do not include the balance of RJDS's building and adjacent property.

[664] The geographic scope of the License Condition is limited to the areas where the Appellants are licensed to provide and do provide the prescribed program. For example, a child does not enter ICare's care at or near RJDS's front door, reception area or parking lot. Rather, the child enters ICare's care when the child comes under the supervision that ICare provides to that child in its prescribed program. In this regard, its scope is substantially similar to the scope that GW ascribed to the scope of the H&S Plan referred to at para 652, above. This is consistent with the terms of the Act.

[665] The Panel draws an analogy to circumstances where a daycare center situated in a public shopping mall is licensed to provide programs in the rooms it leases from the owner of the mall. The child does not enter the daycare's care until the child arrives in the program. It would be unreasonable to interpret a prohibition against a manager or staff member's attendance in the "premises of the facility" to include the shopping, parking and common areas of the mall, where the Licensee does not provide supervision to children in care in prescribed programs.

[666] We observe that in a case such as this where restrictions and prohibitions are crafted by a regulator, such as Licensing, that are likely to have or have had severe impact on an affected party, such as on their ability to operate a business, earn a livelihood or pursue a profession, the language used in those restrictions and prohibitions, including statutory language, is to be strictly interpreted against the regulator, according to the modern approach to statutory interpretation.

What is the Answer to the Relevant Question?

[667] To answer the Relevant Question, a determination must be made about whether OS attended within the scope of the License Condition. In other words, does the evidence establish that OS attended within the geographic scope of where ICare is licensed to provide its programs, as that scope is described in the License Condition?

[668] The RJDS records Licensing obtained did not demonstrate that OS attended in the prescribed program that ICare was licensed to provide, at all, with the single exception of the August 23, 2019 video recording of OS outside with children, an attendance OS

disclosed on September 10, 2019, well before Licensing disclosed the video to her. The rest of the records did not show OS attending premises used by ICare for the purposes of providing care to the children by way of providing supervision to children through a prescribed program. The pictures showed OS in or near the front door of RJDS, outside that door in RJDS's parking area or outside a fence edging RJDS's property.

[669] In the result, we find that there was evidence of OS breaching the License Condition on only one occasion, when she attended with children in an area adjacent to ICare's premises on August 23, 2019, the day the scheduled teacher did not show up. Licensing's finding that OS's other seven attendances breached the License Condition would have required a much broader interpretation of the scope of the License Condition than is supported by the Act and the evidence delineating the perimeters of ICare's facility.

[670] An inference can be drawn from Licensing's investigation and decision-making processes that in making these findings, it treated the scope of the License Condition as though it applied to the whole of RDJS's building, property and, to some extent, its surrounds (e.g. where OS spoke to a child from outside a fence). However, Licensing failed to conduct an analysis of the interpretation of the License Condition that took the statutorily defined terms it contained into account and explain its interpretation of the scope of the License Condition, as well as how OS's various attendances breached that License Condition.

[671] In the result, the Panel finds that Licensing failed to answer the Relevant Question. Our finding on this issue has consequential impact on other crucial findings in Licensing's September 19, 2019 Decision.

Conclusion Regarding Breaches of License Condition

[672] The Panel finds that Licensing applied the License Condition in an overbroad and unjustified manner by treating it as though it applied to the whole of RJDS's building and property, without explanation. Licensing undertook no analysis of whether the evidence about OS's attendances demonstrated that she attended on the "premises of the facility" where care was being provided to the children pursuant to ICare's prescribed program so as to breach the License Condition. This was a crucial gap in Licensing's reasons and constitutes an error of law.

[673] The Panel finds that the Appellants have satisfied the burden of proving that Licensing's conclusion that OS attended on seven of the eight occasions it alleged she attended in August 2019 in breach of the License Condition was not justified. The only finding of a breach of the License Condition that was justified was the occasion when OS attended in ICare's prescribed program with children in care outside ICare on August 23, 2019 as depicted in the video obtained from RJDS.

[674] As a consequence of Licensing's findings that OS breached the License Condition, Licensing decided to immediately impose a 30-day suspension and then cancel the Applicant's Licence, based on:

a. Its belief that there was an immediate risk to the health and safety of the children in care;

b. Its conclusion that OS consistently demonstrated that she lacked the "personality, suitability and temperament" for the role of manager;

c. Its conclusion that OS was ungovernable; and,

d. Its decision that the suspension and cancellation of the License was warranted.

iii. Risk to Health and Safety of Children

[675] In its Decision, Licensing found that there was an immediate risk to the health and safety of the children in care "based on the findings".

[676] The Panel has found against Licensing's findings that (1) OS lacked candour and (2) knowingly violated the ECE Registry's suspension. Additionally, we found on an interpretation of the License Condition that only one of OS's attendances breached the License Condition.

[677] OS argued that there was no evidence to justify the conclusion that her attendances in August 2019 amounted to a risk to the health and welfare of children so as to justify an immediate 30-day suspension of the License, followed by its cancellation. The VCHA argued that the measure was warranted and justified on the evidence.

[678] Section 14 permits an MHO to suspend a license without notice if the MHO has reasonable grounds to believe that there is an immediate risk to the health and safety of a person in care – in this case, a child in care. However, Licensing's September 29, 2019 Decision did not refer to or apply a principled approach to determining whether there were reasonable grounds to believe that OS's attendances amounted to such a risk, let alone a risk so serious that it warranted immediate imposition of an interim suspension without notice.

[679] Moreover, with respect to the single substantiated breach of the License Condition, GW testified at the appeal hearing that the video of OS with the children outside on August 23, 2019 did not show that the health and safety of the children was compromised by OS.

[680] In the absence of evidence there was an immediate risk to the health and safety of the children, and in the face of GW's evidence that Licensing did not find that OS posed a risk to children when she attended outside with them on August 23, 2019, we find there was no basis to impose the summary action of suspension under section 14 of the Act.

iv. Personality, Suitability, Temperament for Role of Manager

[681] Licensing found that OS had consistently demonstrated that she lacked the "personality, temperament and suitability" for the role of manager. In particular, it said her willingness to breach the H&S Plan and License Condition demonstrated a disregard

for the regulatory system in which she had operated. This finding was one of the bases for Licensing's conclusion that the License should be immediately suspended and cancelled in the near future.

[682] We find that OS has demonstrated that Licensing's conclusion with respect to this finding was not justified for two reasons.

[683] First, Licensing failed to disclose the allegation and a summary of the evidence in support and give her an opportunity to give a meaningful response. This was a breach of procedural fairness and natural justice.

[684] Second, and more fundamentally, for the reasons set out above in our analysis of the November 27, 2020 Reconsideration Decision, Licensing's Decision was based on an error of law as it failed to apply the correct statutory test. Licensing found that OS lacked the "personality, suitability and temperament" for the role of manager, under section 11(2)(a)(iii) of the Act, when the statutory test in that section is "personality, ability and temperament".

v. Governability

[685] Licensing determined, without prior disclosure to OS, that OS was ungovernable. Licensing's reasons do not demonstrate that it considered and applied a principled analysis of whether OS was ungovernable. Indeed, Licensing's reasons with respect to the issue of both "personality, temperament and suitability" and governability are only three sentences long and are merely conclusory. They lack any explanation of what these terms mean and how these characteristics were assessed.

[686] In light of the Panel's findings that OS did not lack candour and only breached the License Condition on one occasion, as well as that Licensing applied the wrong test in determining that OS lacked the requirements necessary for continuing in the role of manager of ICare, we find that Licensing's analysis and reasons were wholly inadequate to support its finding that OS was ungovernable.

vi. Sanction

[687] Licensing decided to impose the sanction of immediate suspension followed shortly afterward by permanent cancellation of the Appellants' License. However, Licensing did not disclose to the Appellants that it was considering sanctions as serious as suspension and cancellation of the Appellants' License or provide them an opportunity to make submissions in response. This was a breach of procedural fairness and natural justice.

[688] Moreover, Licensing issued its decision on sanctions, without providing reasons. Accordingly, it failed to demonstrate that it undertook a principled approach to deciding the scope and proportionality of the sanctions. We find that Licensing's analysis and reasons regarding sanctions were wholly inadequate with respect to supporting the sanctions it imposed.

Conclusion Regarding Whether Licensing's Decision was Justified

[689] For all of the above reasons, the Panel concludes Licensing's September 19, 2019 Decision, which formed the basis for the MHO's October 18, 2019 Cancellation Decision, was unjustified.

[690] Licensing's investigation and decision-making processes were so fraught with breaches of procedural fairness and natural justice that its resultant Decision was fundamentally flawed.

[691] Licensing's conclusion that OS lacked candour and was untruthful was flawed and this Panel has determined that OS did not lack candour or lie to Licensing at the September 5, 2019 meeting.

[692] Similarly, Licensing's findings and analysis on the issue of whether OS breached the License Condition were seriously flawed. Among other things, it erred in its interpretation and application of statutorily defined terms it used in drafting the License Condition. This Panel finds that OS breached the License Condition on one occasion on August 23, 2019 when she attended ICare outside with children and another teacher to substitute for a scheduled teacher, who did not show up as a result of Licensing's intervention without notice to the Appellants with the result that OS could not find a substitute. This was mitigated by the fact that Licensing contributed to the circumstances and the fact that OS did not put the children's health and safety at risk during this attendance.

[693] In these circumstances, there was no basis for the summary action of suspending the License under section 14. The action of cancelling the License was not justified by or proportional to OS's single breach of the License to ensure ratio was met.

[694] Licensing's conclusion that OS lacked the "personality, suitability and temperament" for the role of manager was based on the wrong statutory test. Moreover, its conclusions that OS lacked those qualifications and that she was ungovernable were not supported by the evidence. Further, there was a lack of analysis of how Licensing came to this conclusion and the conclusion that OS was ungovernable.

[695] As in the case of Licensing's June 5, 2019 Decision, had Licensing's September 19, 2019 Decision been the end of these proceedings, its errors of procedural fairness would have rendered the Decision invalid or unjustified. However, the Appellants' pursued the reconsideration and appeal processes under the Act. The matter now at issue is the Appellants' appeal of the MHO's October 18, 2019 Reconsideration Decision. Accordingly, this Panel has taken Licensing's failures of procedural fairness and natural justice as well as its other failures into consideration in deciding the Appellants' appeal of that Reconsideration Decision.

C. Did the MHO make stand-alone errors in the Reconsideration Decision?

[696] Below, we address whether the MHO made any stand-alone errors in her October 18, 2020 Reconsideration Decision. We have identified two main errors: (1) failing to address the scope of the License Condition and (2) failing to consider parts of the Appellants' submissions.

1. Scope of the License Condition

[697] An essential part of the MHO's task in reconsidering Licensing's Decision was to consider whether each of OS's eight attendances Licensing found to breach the License Condition actually fell within the scope of the License Condition. In order to do so, she was obliged to reconsider Licensing's interpretation of the License Condition and, if it did not conduct an interpretation, do it herself. This, she did not do.

[698] As mentioned above, Licensing failed to undertake an interpretation of the License Condition and determine whether OS's attendances fell within its scope. Instead, it appeared to conduct itself as though any attendance on or in RJDS property breached the License Condition As we have already set out above in the context of Licensing's September 19, 2019 Decision, this interpretation was an error of law.

[699] The fact that the Appellants previously applied to reconsider Licensing's June 5, 2019 Decision implementing the License Condition, leaving the interpretation of that License Condition outstanding, did not relieve the MHO of the obligation of interpreting it in the course of her October 18, 2019 Reconsideration Decision, given that it was raised as an issue by the Appellants' submissions, as described below.

[700] The MHO compounded Licensing's error of law by ignoring this issue rather than conducting a principled interpretive analysis. The MHO failed to specifically address the scope of the License Condition and whether the evidence actually demonstrated that OS had attended within its perimeters. For example, the MHO observed that Licensing found that OS had attended "at the facility" on eight occasions in August 2019. She did not address what "the facility" meant. The MHO accepted Licensing's tally of OS's attendances and found that they all breached the License Condition, without any explanation in her reasons.

[701] As mentioned above, specific and defined statutory terms were used in the License Condition. However, no consideration was given to the meaning of these terms when determinations were made about whether OS breached the License Condition by her attendances.

[702] At the Panel's request, Licensing provided a diagram of RJDS that outlined the location of ICare's licensed area within RJDS. This document was part of the Appellants' licensing file and defined the perimeters of the licensed facility. However, the diagram was not in the record previously provided to the MHO.

[703] The evidence demonstrated that ICare's daycare facility comprised the two leased classrooms. Additionally, the perimeters of the facility were statutorily extended when ICare used certain areas inside and outside RJDS to provide licenced care to the children. Notably, neither the leased rooms nor these other areas were near RJDS's front door. This fact was not taken into account.

[704] The Panel's finding that the MHO made no analysis of whether Licensing's evidence about OS's attendances demonstrated that she attended on "the premises of the facility" where care, as defined by the Act, was being provided to the children, so as to breach the License Condition, is confirmed by the MHO's testimony at the appeal hearing. The MHO testified that she saw photos and videos of attendances, and she was aware that the facility was located in another building, but she did not know where it was located in that building. She did not remember whether there was evidence of OS attending in the facility – i.e., the two classrooms - with the children during operational hours. She believed that generally, the premises of a facility is the grounds on which the facility is located.

[705] At the appeal hearing, the MHO's attention was drawn to the statutory definitions of the terms "facility" and "premises", and she acknowledged that she had not carefully considered what they meant when a facility was within another building. It was clear from her answers to questions about what the "facility" and the "premises" were, that she was not familiar with the statutory terminology and meanings of these terms.

[706] As a result, the Panel finds that the MHO did not determine whether OS actually breached the terms of the License Condition, in light of the statutorily defined terms. Rather, she relied on Licensing's bare conclusion, made without explanation, that OS's eight attendances breached that condition. This was a fundamental gap in reasoning.

[707] As noted above, the Panel has decided that, of OS's eight attendances, only one fell within the scope of the Licence Condition: OS's August 23, 2019 attendance in the program with the children with another teacher outside ICare's classrooms. As a result, this Panel finds that the MHO erred in law in failing to interpret and apply the License Condition to the facts of the case. This gap had a critical and determinative impact on the MHO's Decision to confirm the suspension and cancellation of the Appellants' License and fundamentally impaired the reasonableness of that decision.

[708] This Panel concludes that the MHO's finding that seven of the eight attendances breached the License Condition was not justified, because of the MHO's interpretive error. On the Panel's interpretation of the License Condition, only one attendance breached that Condition, but that breach was largely if not fully mitigated by Licensing's conduct, as discussed above.

2. Failure to consider parts of the Appellants' Submissions

[709] The Appellants expressly requested in their September 24, 2019 submissions that the MHO review their initial request for reconsideration of Licensing's June 5, 2019 Decision as part of their request for reconsideration of the September 19, 2019 Licensing

Decision.[51] The MHO testified at the appeal hearing that she read everything put before her. However, it does not appear that she took relevant parts of what she read into account in making her Decision. In particular, the MHO failed to take into account submissions that were relevant to procedural fairness of the processes on which the validity of the License Condition was based and the reasonableness and proportionality of VCHA's sanctions.

Submissions relating to the License Condition

[710] In their September 24, 2019 application for reconsideration, the Appellants argued that their initial July 5, 2019 request for reconsideration of the License Condition, which remained at issue, was fundamentally related to Licensing's Decision to suspend and cancel the License.

[711] The Appellants' July 5, 2019 reconsideration request disputed the validity of VCHA's conclusions that led to the License Condition, and asked that it be rescinded. Among other things, they argued at length that the investigation leading to the June 5, 2019 Decision to impose the License Condition was not procedurally fair, that the findings were inaccurate and that the License Condition was not reasonably necessary to protect the health and safety of children.

[712] The MHO did not address these submissions. Rather, as mentioned below, she applied the License Condition as valid without considering the Appellants' arguments about the procedural fairness of the underlying investigation which led to the conclusions on which its validity was founded. This amounted to a breach of procedural fairness and natural justice.

Adverse Impact of Sanctions

[713] The MHO did not take into account the Appellants' submissions in their July 5, 2019 and September 24, 2019 reconsideration requests about the damage and loss they had experienced and would experience as a result of Licensing's sanctions.

[714] The July 5, 2019 reconsideration request described losses as including the costs of hiring additional and replacement staff, loss of revenue due to parents removing students, employees quitting due to stress and interpersonal conflict, and OS's personal stress and difficulties managing the business from afar. OS was forced to obtain loans to cover increased operating expenses and legal fees and the Appellants also suffered intangible, unquantifiable harms.

[715] The application also included evidence from OS and parents that ICare was no longer providing the cultural and educational services that parents expected it to provide. Letters from parents confirmed that staff were not performing all of their supervisory and

[51] September 24, 2019 request for Reconsideration of Licensing's September 19, 2019 Decision, at page 3 [Appeal Record, page 143].

care duties and, in some instances, were not ensuring the health and safety of children in care. The MHO failed to address any of this in connection with the sanctions.

[716] The Appellants argued in their September 24, 2019 application for reconsideration that the suspension and cancellation of a license is the ultimate penalty VCHA can impose. It had significant detrimental effects, not only on the licensee, but on the children, their families, the teachers and the community, particularly the small Jewish and Israeli community in Richmond who had no other daycare that provided ICare's services to them in the vicinity.

[717] At the hearing, VCHA argued that OS successfully managed the daycare from afar for nine months. However, in addition to the evidence of damages and loss described above, the personal knowledge evidence of OS, RC (the Acting Manager in summer 2019) and a number of parents at the appeal hearing contradicted this, as did a number of the letters submitted by parents. RC and parents testified that staff were not performing their jobs. They also testified to the negative impact OS's absence had on ICare's operations. One parent testified that staff were not maintaining health and safety standards for the children. These witnesses confirmed OS's testimony that Licensing's sanctions – the H&S Plan and License Condition - prevented the Appellants from continuing to manage and operate the business as before and that the business deteriorated.

[718] RC testified that when OS hired her as Acting Manager in June 2019, OS was concerned that the daycare was falling apart. By August, OS was concerned that it would have to close. When she started work, the daycare and its programming were in chaos. RC's efforts to restore order among the staff were unsuccessful.

[719] OS testified that by August 2019, ICare's business was in its death throes. She could not manage from afar with the restrictions Licensing placed on her. The daycare was no longer what it was supposed to be. The children were no longer receiving Hebrew language and Jewish education. The programs were not being followed by staff. Parents were complaining about staff not doing their work, or not doing it safely, and were removing their children. It was difficult to find qualified teachers. ICare was losing money. OS stopped taking on new students and turned to trying to sell the business.

[720] Licensing knew or ought to have known that its prohibitions against OS's attendance during operational hours in the H&S Plan and License Condition would harm her ability to manage the daycare business and would substantially contribute to the deterioration of the business. It is clear from the evidence that neither Licensing nor the MHO were attuned to the impracticalities of managing the daycare from afar while the H&S Plan and License Condition were in force. They did not take the interests of the affected parties into account when fashioning those prohibitions. As described above, Licensing refused to make adaptations to the H&S Plan or the License Condition to ameliorate these impacts.

[721] As discussed above, when exercising the broad discretionary powers granted by the Act to impose H&S Plans, summary actions and actions on parties like the Appellants,

statutory decision-makers must take the impact of their decisions on affected parties into account, including their business interests, except where it compromises the health and safety of children in care. The obligation to balance the interests of the affected parties and the protected public operates on an ongoing basis. This includes taking into consideration the workability and practicality of summary and other actions, with a view to amending them where their impact does not achieve statutory objectives, whether by ameliorating where they are unduly onerous, or by strengthening them where they are insufficient.

Conclusion on failure to consider parts of the Appellants' Submissions

[722] The MHO failed to take the Appellants' July 5, 2019 submissions into account and respond to them when reconsidering the suspension and cancellation of the Appellants' License. We find it useful to reproduce the following excerpt from *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, where a majority of the Supreme Court of Canada explained the importance of a decision-maker's consideration of the parties' submissions (at para. 127):

> The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard [...] The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[723] The same majority explained at paragraph 133 that a decision-maker's obligation to justify its decision in response to an affected party's key issues and central concerns is heightened where its decision has harsh consequences for an individual's dignity or livelihood. The Panel observes that the consequence of immediate suspension of the Appellants' License followed shortly thereafter by permanent cancellation of the License is the harshest and ultimate consequence that Licensing can mete out to a daycare Owner and Licensee.

[724] Accordingly, the MHO's failure to take into account the Appellants' July 5 and September 24, 2019 submissions when reconsidering sanctions and provide responsive, intelligible and justified reasons in answer to them was a fundamental flaw in reasoning that renders the decision unjustified.

D. How do flaws in the underlying investigation and decision-making process affect the October 18, 2019 Reconsideration Decision?

[725] Pursuant to section 17 of the Act, the MHO conducted what is referred to as a "paper hearing". Licensing provided her with a record of the evidence that was before

Licensing when it made its September 19, 2019 Decision that included, among other things, its June 5, 2019 Decision, the Appellants submissions of July 4 and September 24, 2019, the transcripts of witness interviews, the materials it obtained from RJDS and the letters from parents and members of the community supporting OS.

[726] In the first part of the MHO's October 18, 2019 Reconsideration Decision, the MHO dismissed the Appellants' application to suspend the summary action and described Licensing's September 19, 2019 Decision, largely by cutting and pasting from that Decision or by incorporating parts of it by reference.

[727] The MHO briefly described the facts and circumstances which led to the H&S Plan and later to the License Condition Licensing found that OS breached in August 2019. She declined to summarize Licensing's evidence about OS's attendances, because it had already been detailed in Licensing's September 19, 2019 Decision. In so doing, she adopted Licensing's description of that evidence in whole.

[728] The MHO observed that Licensing interviewed OS about possible attendances before obtaining video evidence. She also said Licensing gave OS a "list of dates of attendances based on key fob records". This was in fact a five page record listing extensive key fob use. Licensing did not tell OS which dates in that record it relied on as evidence that OS breached the License Condition. It gathered that evidence later. The MHO did not address the procedural fairness implications of the manner in which Licensing conducted its investigation. Those are addressed below.

[729] The MHO reached four primary conclusions in her Decision. First, she found that OS's lack of candour with Licensing and failure to abide by the License Condition imposed pursuant to Licensing's June 5, 2019 Decision on at least eight occasions gave rise to an immediate risk to the health and safety of the children in care, warranting License suspension pursuant to section 14 of the Act.

[730] Second, the MHO found that the action of License cancellation taken by Licensing was reasonable and supportable on the basis that OS "contravened a term of the Licence within the meaning of subsection 13(1)(c) of the CCALA" by virtue of her eight attendances at ICare in August 2019.

[731] Third, she found that the action of License cancellation was warranted on the basis that OS had demonstrated herself to be "ungovernable".

[732] Fourth, she confirmed the summary action and action imposed by Licensing, namely suspension and cancellation of the Appellants' License.

[733] The Panel has identified several shortcomings with respect to the MHO's analysis and ultimate reasons which we discuss below in the context of the following sub-issues:

i. The MHO's Findings of Fact

ii. The MHO's Conclusions with Respect to

   a. OS's lack of candour;

b. OS's breaches of the License Condition and risk to the children; and

c. OS's governability; and

iii. The MHO's Confirmation of the Suspension and Cancellation

i. *The MHO's Findings of Fact*

[734] The MHO began her written reconsideration of Licensing's September 20, 2019 Decision by addressing how the License Condition originated in the H&S Plan. She wrote that the License Condition was placed on the License in substantially the same terms as the H&S Plan on June 5, 2019.

[735] The MHO did not mention that Licensing's June 5, 2019 Decision was the subject of an outstanding application for reconsideration filed by the Appellants on July 4, 2019 which, among other things, challenged the validity of the H&S Plan and the License Condition. More importantly, the MHO did not address the validity, interpretation or application of the License Condition to the facts.

[736] However, the MHO was aware of the outstanding reconsideration application. She testified at the hearing that she had been dealing with the Appellants' counsel about the July 4, 2019 application when Licensing issued its September 19, 2019 Decision, to which Licensing's June 5, 2019 Decision was appended. Indeed, the MHO paused her consideration of the July 4, 2019 application to consider the Appellants' more important September 24, 2019 application for reconsideration of Licensing's September 19, 2019 Decision to suspend and cancel the License.

[737] The MHO proceeded with the new reconsideration application on the basis that the License Condition continued to apply. However, she did not turn her mind to how to interpret it for the purpose of applying it. In the result, the MHO approved the manner in which Licensing applied it, inferentially adopting Licensing's interpretation, without question or explanation.

[738] The MHO's written reconsideration then mentioned that Licensing interviewed OS on September 5, 2019 about possible attendances at the facility. The MHO went on to say that OS was "less than forthcoming to CCFL". However, instead of explaining how she reached this conclusion, the MHO reproduced the five-paragraph part of Licensing's reasons titled "Analysis and Findings" and "Conclusion" containing its finding. We return to this below.

[739] As set out above, the evidence at the appeal hearing discloses that Licensing's conduct of the September 5, 2019 meeting departed markedly from what its primary witness, GW, testified were its policies, procedures and guidelines when conducting investigations that culminate in decisions. This was not disclosed to the MHO.

[740] For instance, Licensing conducted its investigatory interview on September 5, 2019 without recording and transcribing it and without taking contemporaneous notes or later

disclosing such notes. During the interview, it did not disclose to OS the specific allegations against her that it had already identified.

[741] As the MHO was aware, that was the only interview Licensing conducted of OS, and it was conducted before Licensing completed its investigation. Licensing went on to gather significant video and pictorial evidence on which it ultimately relied. It then reduced nine allegations to eight and found they were substantiated.

[742] However, Licensing did not disclose its new evidence to OS and give her an opportunity to respond before issuing its Decision. Licensing did not mention in its Decision that it had not disclosed this video and pictorial evidence to OS. This disclosure failure would not have been apparent to the MHO from the record.

[743] The new evidence was comprised mostly of pictures captured from RJDS's surveillance records plus one video recording. They were viewed at the appeal hearing. The photos showed seven occasions of OS being in the vicinity of RJDS' front door during ICare's operational hours. The video showed OS outside ICare in its program with children in care during operational hours.

[744] As discussed above, evidence at the appeal hearing revealed that Licensing did not provide a fulsome description of its investigation and the evidence in its September 19, 2019 Decision. As mentioned, Licensing's Decision described an exchange that GW testified was determinative to its conclusion that OS lacked candour in the September 5, 2019 meeting. In cross-examination, GW admitted that the Decision omitted a crucial part of that exchange in its reasons. This omission has a determinative impact on this Panel's finding that OS did not lack candour.

[745] The MHO was not apprised of this omission. Accordingly, she proceeded on the basis that OS had lacked candour at the September 5, 2019 interview. She relied on, but declined to describe, Licensing's evidence of OS's eight attendances "at the facility", preferring instead to rely on Licensing's description. It was in this context that the MHO reproduced the five paragraphs of Licensing's September 19, 2019 Decision relating to its analysis, findings and conclusion. The MHO then addressed her conclusions under the heading "The Application for Reconsideration".

[746] At the appeal hearing, the MHO said that she accepted all of Licensing's findings. The MHO repeated the statutory language, pointed to Licensing's findings, quoting them in part, and then simply endorsed them without explanation. Some might describe this as "rubber-stamping". This does not amount to responsive, intelligible and justified reasoning.

ii. The MHO's Conclusions

[747] At page five of her Decision, the MHO stated she was satisfied that OS had lacked candour and that her attendances breached the License Condition on eight occasions. The MHO confirmed the summary action of immediately suspending the License on the basis

that these two findings established that there was an immediate risk to the health and safety of the children.

[748] The MHO confirmed the action of cancelling the License. At page 9 she wrote:

> I am satisfied that [OS] was not candid with CCFL when questioned about her attendances at the facility. I am also satisfied that [OS] breached the condition imposed on the license on eight occasions and that she did so with little regard for the legislative regime under which she is expected to operate. I also agree with CCFL that [OS] has demonstrated herself to be ungovernable. Pursuant to paragraph 17(3)(b) of the CCALA, I confirm the action.

[749] This paragraph appears to rely on the finding that OS lacked candour and the finding that OS breached the License Condition to find (a) that OS was ungovernable and (b) the License cancellation was justified.

[750] In our view, this gives rise to the issue of whether MHO erred in her consideration and analysis of the following key issues:

a. that OS lacked candour when in her dealings with Licensing officials about her attendances;

b. that OS's attendances breached the License Condition and justified the finding that there was an immediate risk to the health and safety of children in care; and

c. that OS was ungovernable.

a. MHO's conclusion that OS lacked candour

[751] A central element of the MHO's decision to confirm the summary action of suspending the License and the action of cancelling the License, was her finding that OS lacked candour. However, the MHO's statement that she was satisfied that OS had lacked candour was based on the MHO's erroneous conclusion that OS had conceded she lacked candour. OS did not do this.

[752] The MHO described the Appellants' submissions as follows:

> The thrust of the Applicants' submission is that [OS]'s lack of candour with CCFL officials, and her failures to abide by the interim condition imposed on the licence on at least eight occasions, do not give rise to an immediate risk to the health and safety of the children in care. On the contrary, the Applicants assert in their application that this lack of candour and repeated non-compliance "demonstrate that [OS] cares deeply for her students and is committed to ensuring that they receive the best possible care."

[753] The above characterization of the "thrust" of the Appellants' submissions is inaccurate. Significantly, in her submissions, OS conceded that she had breached the License Condition on several occasions, but she did not concede the nature and seriousness of those breaches. OS submitted that the License Condition was not justified and that her attendances in breach of that condition did not justify the finding that there

was an immediate risk to the health and safety of children in care. OS did not concede that she had lacked candour with Licensing.

[754] Accordingly, the MHO made factual errors in her description of the Appellants' submissions that prevent us from concluding that her reasons were responsively and intelligibly justified with respect to the issue of candour.

[755] The only other basis to support this conclusion in the MHO's reasons is Licensing's bare statement in passages the MHO quoted from Licensing's September 19, 2019 Decision that OS was found to be "untruthful in her account of the number of times she accessed the facility, the door she used to access the facility, and the reason for her visits." The MHO did not cite evidence in support of this finding. In the Panel's view, this finding is not one that is based on an internally coherent and rational chain of analysis and that is justified on the facts.

[756] We have found above that the crucial exchange and OS's subsequent disclosures after the September 5, 2019 meeting showed that OS did not lack candour with Licensing. We find Licensing's failure to disclose the crucial part of the exchange at that meeting in its Decision amounted to non-disclosure of a critical and determinative fact. It was not mentioned in the record before the MHO. Moreover, Licensing failed to provide its reasons in its Decision for not believing OS's explanation that she did not remember all of her attendances at the September 5, 2019 meeting.

[757] In the result, these non-disclosures deprived the MHO of critical evidence and reasoning that likely affected the outcome of the reconsideration application before her as related to the finding that OS was untruthful and lacked candour. This amounts to a breach of procedural fairness and natural justice that deprived the Appellants of a fair hearing before the MHO.

[758] Based on the MHO's erroneous conclusion that OS "conceded" she lacked candour with Licensing, and Licensing's failure to disclose crucial information in its Decision, this Panel finds that the MHO's conclusion about OS's lack of candour was not justified.

b. MHO's conclusion that OS breached the License Condition and that the health and safety of children in care was at risk

[759] As noted, the MHO confirmed Licensing's suspension of the Appellants' License on the basis that OS breached the License Condition on eight occasions and that OS posed a risk to the health and safety of children in care.

[760] Section 14 permits an MHO to take certain summary actions without notice where there are reasonable grounds to believe that there is an immediate risk to the health and safety of a person in care.

[761] The MHO decided that OS's lack of candour and non-compliance with the License Condition on eight occasions gave rise to an immediate risk to the health or safety of the children in care, as follows:

> The primary purpose of the legislative scheme is to ensure the well-being of persons in care. Candor, cooperation and compliance with that legislative scheme is the minimum that can be expected from licensees. To put the matter another way, in the absence of such candor, and compliance, there is no effective mechanism to ensure the well-being of persons in care. (emphasis added)

[762] As noted, above, Licensing failed to apply a principled approach when determining whether there was an immediate risk to the children in care necessitating protective interim measures under section 14 of the Act. So did the MHO. As stated above, such an approach involves balancing the interests of affected parties in a manner consistent with the legislation, provided that the health and safety of children in care is not compromised.

[763] The MHO failed in her reasoning to take such considerations into account in determining whether to impose the summary action of an immediate suspension. In particular, there is no evidence that the MHO took into consideration the adverse impact of the immediate, interim suspension on the Appellants, and whether this sanction was the least intrusive measure that could be imposed without compromising the risk to the health and safety of the children.

[764] In any event, based on the evidence before this Panel, and our interpretation of the License Condition, described above, we have found that the MHO erred in finding that OS failed to comply with the License Condition on seven of eight dates identified by Licensing. The only substantiated breach of the License Condition is OS's single attendance outside with children on August 23, 2019, as depicted in the video. Licensing's intervention, which caused the exigent circumstances that led to OS's attendance in place of the missing staff member on that date, was not mentioned in Licensing's Decision or in the record before the MHO. Nor was GW's view that this attendance did not put children at risk.

[765] We accept GW's testimony that OS's attendance that day did not compromise the health and safety of the children. Accordingly, we find that OS's sole proven attendance in breach of the License Condition did not put the health and safety of the children at risk.

[766] We observe that the MHO stated in her Decision that the primary purpose of the legislative scheme is to ensure the wellbeing of persons in care. She went on to say that the minimum that can be expected from licensees was candour, cooperation and compliance with that scheme and that "in the absence of such candour, cooperation and compliance, there is no effective mechanism to ensure the well-being of persons in care".

[767] The MHO did not refer to any evidence in support of her conclusion that there was no such effective mechanism in place at ICare to ensure the children's well-being. Rather, her statement was a conclusory assumption. In fact, the Appellants had put an effective mechanism in place to ensure the children's health and safety. However, at the critical juncture, it was Licensing, not the Appellants, who did not use that mechanism.

[768] As Licensing was aware, the Appellants employed an experienced Manager, RC, as Acting Manager in the summer of 2019. She was that mechanism. RC testified that she

was in frequent contact with Licensing. As set out above, on August 23, 2019, the day that OS attended in the program with children, after RC learned early that morning that Licensing had persuaded the scheduled employee not to attend ICare that day, RC contacted Licensing Officer L and asked why Licensing had not contacted her about this. L answered that it was because Licensing knew she was away. RC told L that was why she had previously given L her phone number.

[769] Licensing made no mention of this in its Decision. Moreover, there is nothing in the record before the MHO to alert her to the fact that there was an Acting Manager at ICare who OS hired and who provided the effective mechanism the MHO found lacking at ICare.

[770] In the absence of this critical information, the MHO opined that, in the particular case, involving eight attendances in contravention of the License Condition and a lack of candour, she did not think the contraventions could be excused by saying there were good reasons for the attendances. Had there been such reasons, she would have expected, at minimum that the licensee would have first contacted Licensing before making the attendance contravention. She wrote: "The Applicants here have provided no evidence that this [prior contact] occurred. Consequently, pursuant to paragraph 17(3) of the CCALA, I confirm the summary action."

[771] The evidence at the appeal hearing established that RC did contact Licensing about the sudden absence of the scheduled teacher at Licensing's instigation. There is no evidence that Licensing took any steps to ameliorate the situation it had helped create.

[772] One question raised in this appeal is whether the health and safety of the children was at risk because, in the face of OS' eight alleged contraventions and her alleged lack of candour, Licensing could not trust OS to comply with its prohibitions against her attendance at ICare's premises or facility. The trust issue is a valid concern and in an appropriate case may have justified the measures Licensing imposed and the MHO confirmed.

[773] However, this is not an appropriate case. As explained above, the License Condition as drafted did not capture seven of the eight alleged contraventions, Licensing's investigation was fundamentally flawed and its decision omitted a key exchange that contradicted its finding that OS lacked candour. Additionally, it omitted the evidence that the Appellants employed an Acting Manager at the time of the alleged contravention who acted as an effective mechanism to ensure the children's health and safety, including by giving Licensing her telephone number for use in exigencies. It was Licensing, not the Acting Manager, who did not use that mechanism.

[774] As mentioned, this Panel has concluded that the evidence does not support the allegations that OS attended in breach of the License Condition on seven of the eight dates Licensing relied on and that she lacked candour in dealing with Licensing about those attendances. The evidence only supports the allegation that OS attended once in breach of that Condition, on August 23, 2019.

[775] Moreover, the evidence relating to this single attendance does not support the conclusion that there were grounds on which the MHO could justifiably find there was a risk of immediate harm to the health and safety of the children in care. As noted, we accept GW's testimony that OS's attendance with the children on the single occasion did not put them at that risk.

[776] In view of the foregoing evidence, we find that the MHO erred in finding that OS breached the License Condition on eight occasions and that her conduct put the health and safety of children at risk.

c. Conclusion that OS was ungovernable

[777] The MHO was called upon to reconsider Licensing's finding that OS was ungovernable. As noted above, this Panel has found that Licensing failed to give OS notice of the allegation that she was ungovernable and an opportunity to make submissions before making its Decision against her. This was a fundamental breach of procedural fairness and natural justice. The MHO made no mention of this issue.

[778] A key conclusion by the MHO in support of her decision to uphold the cancellation of ICare's License was that OS was ungovernable. The MHO's discussion of this issue spans four pages of her nine-page decision, most of which is an excerpted quote from the *Ahluwalia* case[52]. This Panel has no evidence that the MHO drew the Appellants' attention to this case and gave them an opportunity to respond to it. This too can be said to be a breach of procedural fairness and natural justice.

[779] Despite the MHO's lengthy quote from *Ahluwalia*, her reasons did not explain how she applied that case to the facts of the instant case. The only two sentences the MHO wrote that specifically related to the issue of governability were as follows:

> I am also satisfied that the "action" taken by CCFL [cancellation] is warranted on the basis that [OS] has demonstrated herself to be ungovernable. (p. 5)
>
> I also agree with CCFL that [OS] has demonstrated herself to be ungovernable. (p. 9)

[780] In *Vavilov,* the Court wrote, at paragraph 102:

> Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

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[52] *Ahluwalia v College of Physicians and Surgeons of Manitoba*, [2017] MJ No 25, 2017 MBCA 15, [2017] 7 WWR 127, 275 ACWS (3d) 434, 409 DLR (4th) 651, 2017 CarswellMan 33.

[781] Other than the two sentences quoted above, which bookended the lengthy quote from the *Ahluwalia* case, the MHO provided no reasons or analysis for her conclusion that OS was ungovernable. She did not demonstrate what factors set out in *Ahluwalia* she relied on and how or why she applied them to the facts of the case.

[782] The Panel finds that the MHO's reasons failed to show she engaged in the type of analysis called for by the *Ahluwalia* case. The fact that she included the lengthy quote does not assist. The MHO's lack of analysis and application of the *Ahluwalia* factors amounted to a fundamental shortfall in the MHO's reasoning on the issue of governability.

[783] Moreover, in light of the Panel's findings that OS did not lack candour, and that she only breached the License Condition on one occasion, that was created in part by Licensing and did not compromise the health and safety of children in care, the basis of the MHO's finding that OS was ungovernable cannot stand. The Panel concludes that the MHO's finding that OS was ungovernable was not justified.

iii. *The MHO's Confirmation of the Suspension and Cancellation*

[784] As noted, in its September 19, 2019 Decision, Licensing imposed an immediate suspension followed shortly afterward by cancellation of the Appellants' License. As set out above, the MHO upheld the immediate suspension of the License on the basis that OS's lack of candour and breaches of the License Condition created an immediate risk to the health and safety of the children in care as required by section 14 of the Act. She upheld the License cancellation on the basis that the breaches of the License Condition amounted to a contravention of a "term, or condition of the licence" as required by section 13(1)(c) of the Act, and on the basis of her finding that OS was ungovernable.

[785] However, as noted, the MHO failed to provide any reasons or analysis for her underlying findings regarding candour and License Condition breaches. Moreover, her analysis of governability was flawed, as described above.

[786] We again observe that bodies that regulate businesses or professions, whether part of government or self-governing organizations, wield considerable power over licensees that can have serious financial, reputational, and other consequences to the occupations and livelihoods of those persons. It is trite to say that suspension or cancellation of a daycare license can have serious consequences. These powers must be exercised fairly, by balancing the interests of the parties with a view to minimizing the adverse impact of interim measures, without compromising the health and safety of the children in care.

[787] A similar view was expressed by the majority in *Vavilov*:

> Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered

> the consequences of a decision and that those consequences are justified in light of the facts and law.[53] (emphasis added)

[788] A decision-maker in the MHO's position has an obligation to determine whether the action or sanction she selects balances and justifies the adverse impacts on those with legitimate interests in the daycare operation, as long as it does not compromise the health and safety of the children. In the instant case, there was no indication that these interests were taken into consideration in fashioning the sanction ultimately adopted.

[789] We find that it is simply inadequate to approve a Licensing Decision to impose the harshest possible sanction available on a Licensee to suspend and terminate a License on reconsideration without setting out significant analysis in a written decision of the proven facts, applying them to the applicable law, which in this case requires interpretation of statute and the License Condition, drawing inferences and balancing interests, and rendering a judgment that is reasonable, intelligible and responsively justified, particularly to the party detrimentally affected by it. The MHO failed to do this.

[790] In the circumstances, large parts of the MHO's Decision amounted to a rubber-stamping of a procedurally and analytically flawed Licensing Decision and was itself fundamentally flawed by breaches of procedural fairness and natural justice and by failures to apply principled analyses, such as those that related to fashioning sanctions.

[791] This Panel finds that there was no basis for immediately suspending the Appellants' Licensing under section 14. Further, the ultimate sanction of license cancellation was not justified under section 13, as the sole substantiated breach was largely if not completely mitigated by Licensing's contribution to the exigent circumstances that led to OS substituting for a missing teacher.

E. Conclusion regarding the MHO'S October 18, 2019 Reconsideration Decision

[792] In light of all of the foregoing, this Panel finds that, in addition to stand-alone errors made by the MHO, the October 18, 2019 Reconsideration Decision incorporated the errors made by Licensing in its September 19, 2019 Decision.

[793] The MHO failed to conduct a reconsideration process where, as VCHA argued, she applied a standard of fairness that incorporated the "more robust procedures" than the minimal standard of fairness Licensing was obliged to provide the Appellants. The MHO's October 18, 2019 Reconsideration Decision failed to meet the higher standard of fairness the Panel has found she owed to the Appellants. The failures of procedural fairness and natural justice commenced almost at the outset of these proceedings and permeated the proceedings throughout.

[53] At paragraph 135.

[794] This Panel also finds that the MHO erred in law in failing to undertake and apply an interpretation of the License Condition that incorporated a principled approach to interpretation in a manner consistent with the Act. Under a principled interpretation, OS's sole attendance that fell within the scope of the License Condition and breached it was her attendance in the program with children outside ICare on one occasion in August 2019. This attendance did not put the health and safety of children in care at risk and was significantly mitigated by Licensing's contribution to its occurrence. That sole breach did not warrant the severe sanctions of suspending and cancelling the Appellants' License. These sanctions were neither reasonable nor proportional to the facts as found above.

[795] Accordingly, the MHO's October 18, 2019 Reconsideration Decision was fundamentally flawed by breaches of procedural fairness and natural justice. In the alternative, it was fundamentally flawed by errors on the merits described above. In either event, the Appellants have satisfied the burden of proving that the MHO's October 18, 2019 Reconsideration Decision confirming Licensing's September 19, 2019 Decision to suspend and cancel the Appellants' License was not justified.

REMEDY

[796] The Appellants have not asked for a remedy beyond a finding that the MHO's decisions were not justified. As set out above, Section 29(12) of the Act describes the CCALAB's remedial jurisdiction as follows: "The board may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person whose decision is under appeal."

[797] This Panel finds that neither of the reconsideration decisions are justified. There are two branches of this conclusion that apply to both reconsideration decisions: (a) the remedy flowing from the breaches of procedural fairness and (b) the remedy flowing from the findings on the merits.

(a) Remedy re Procedural Fairness Errors

[798] The Appellants' primary ground of appeal is that there was procedural unfairness from the outset in the proceedings that led to the MHO's decisions under appeal. This Panel agrees for the reasons set out above. The Respondent argues that the CCALAB has cured any procedural unfairness in the reconsideration decisions via this hearing.

[799] We turn to the law on remedies for breaches of procedural fairness. That law demonstrates that, unless breaches of procedural fairness made by a decision-maker can be cured by an appellate tribunal on appeal (e.g., by the fairness of the proceeding before the appellate tribunal), the decision-maker's hearing and decision are void or invalid, whether or not the decision-maker made a reasonable or right decision, and ordinarily the matter is returned to the decision-maker to render a new decision. According to the Court of Appeal in *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97, the issue of whether proceedings as a whole are

rendered fair by a second decision-maker "depends on, among other factors, the nature of the breaches of the principles of natural justice (or procedural fairness) and the powers on appeal of the Tribunal" (at para. 40).

[800] The proceedings that resulted in Licensing's June 5, 2019 and September 19, 2020 decisions were based on procedurally flawed investigation and decision-making processes detailed above. The proceedings before the MHO incorporated those errors by confirming those decisions. Moreover, the MHO made serious errors of procedural fairness and natural justice in the proceedings before her, also detailed above. The proceedings before the MHO in her November 27, 2020 and October 18, 2019 decisions failed to meet the test of rendering the proceedings as a whole fair by the hearing before her.

[801] When the appeal proceedings are included in the proceedings as a whole and we apply the same test, we reach the same conclusion. The proceedings as a whole were not and could not be rendered fair by either the hearing before us or by remitting the matter back to the MHO because the evidence on the record and procedures utilized in the proceedings below are so permeated by fundamental procedural and natural justice flaws.

[802] There are numerous examples of these errors, which include, but are not limited to reliance on evidence of key witnesses that was not reliable or credible, excluding evidence of parents with personal knowledge of complained of events, and making and relying on an undisclosed finding that OS had threatened multiple staff in a prior investigation, in the proceedings that led to the MHO's November 27, 2020 Decision. They also include, but are not limited to, the procedural fairness flaws in the September 5, 2019 meeting and the failure to disclose and provide opportunities to respond to evidence gathered after that meeting, as well as the failure to disclose the critical part of OS's answer to the clarification question until the appeal hearing, that rendered unfair the proceedings that led to the MHO's October 18, 2019 Decision.

[803] Since the facility closed in 2020, and complainants, staff and families have dispersed, it would be impossible to return the matter to the MHO for new, procedurally fair proceedings and decisions based on newly gathered, reliable and credible evidence. The Panel also notes that there is no restorative remedy that can be ordered in light of the closure of the facility. The Appellants have indicated they do not seek to continue in the industry. In these particular circumstances, the Panel declines to order any remedy beyond finding that the decisions should be set aside or reversed. In addition, we find that that the Appellants have discharged the burden on them to satisfy the Panel that these decisions were not justified, because of the serious and fundamental breaches of procedural fairness and natural justice detailed above.

(b) Remedy re Findings on the Merits

[804] Had the Panel not found the MHO's November 27, 2020 Decision was not justified on the basis of procedural unfairness and natural justice, we would have found that the sole finding on the merits of contravention of the Act and Regulation that was justified on the evidence before us was the finding that OS used food as a reward or punishment,

contrary to section 48(7) of the Regulation. This sole contravention did not justify taking or confirming Licensing's June 5, 2019 summary action of imposing the License Condition pursuant to section 14 of the Act.

[805] Similarly, had the Panel not found the MHO's October 18, 2019 Decision was not justified on the basis of procedural unfairness and natural justice, we would have found that OS's sole attendance that breached the scope of the License Condition, as determined above, was her attendance in the program with children outside ICare on one occasion in August 2019. This attendance did not put the health and safety of children in care at risk and was significantly mitigated by Licensing's contribution to its occurrence. That sole breach did not justify taking or confirming Licensing's September 19, 2019 Decision to impose the severe summary action and action of suspending and cancelling the Appellants' License.

[806] As none of the sanctions confirmed by the MHO in her reconsideration decisions were reasonable or proportional to the facts as found by the Panel, above, the decisions were not justified. In the particular circumstances, the Panel declines to order any remedy beyond finding that the Appellants have discharged the burden on them to satisfy the Panel that these decisions were not justified.

CONCLUSION

[807] For the reasons set out above, both appeals are allowed.

"Alison Narod"

Alison Narod, Panel Chair
Community Care and Assisted Living Appeal Board

"Tung Chan"

Tung Chan, Member
Community Care and Assisted Living Appeal Board

"Donald W. Storch"

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