First-tier Tribunal Health, Education and Social Care Chamber
Care Standards

Sitting at Peterborough
On: Monday 2nd September 2013

B E F O R E:

Deputy Chamber President Judge John Aitken
Mrs Margaret Diamond
Dr Keith White

1. Mrs Michelle Gill
2. Mr Michael Thomas Gill

Appellants

-v-

OFSTED

Respondent

[2013] 2060 .EY

The first Appellant was represented by Ms S C Wilkinson and the second Appellant appeared in person

The Respondent was represented by Ms R Birks.

DECISION

1. The First Appellant has worked in childcare since the age of 16, some 24 years ago. In 2008 she set up a business as a childminder. On 3rd February 2009, she was inspected by Ofsted and rated "good". The Second Appellant is her husband, he qualified as a childcare assistant in 2011, and they work together.

2. On the afternoon of 3rd April 2013 there was a serious incident. The First Appellant and Ms Brenda Farrow (the First Appellant's mother) were looking after 7 children in the lounge. The Second Appellant was making a cup of coffee in the kitchen. That coffee was intended for Ms Farrow. The coffee was made in a cup with a lid, the lid placed upon it and the cup placed on a chest of drawers by the Second Appellant. The appellants risk assessments indicate that hot drinks must be kept out of reach of the children. One of the children aged 15 months was exploring the lounge at the time and was able to reach the cup pulling it towards himself. He was scalded very badly across the neck

and chest, the lid apparently becoming detached. He was given immediate first aid in the form of removal of his clothing and showered with tepid water. An ambulance was called immediately and his parents notified. His parents arrived before the ambulance and were able to accompany him to the hospital. His scalds were serious and he required skin grafts to the chest, it seems certain he will be scarred permanently and may have other difficulties for many years.

3. Section 68(2)(c) of the Childcare Act 2006 enables the cancellation of registration where there has been a failure to comply with requirements imposed by regulations including the Early Years Foundation Stage (Welfare Requirements) Regulations 2012 and the statutory Framework fro the Early Years Foundation Stage

4. Ofsted considered the position following an investigation and on 19th April decided that the registration of both appellants should be cancelled. Although that cancellation was said to be on the grounds of failure to comply with the a requirement within ***The Early Years Foundation Stage (Welfare Requirements) Regulations 2012*** relating to staffing arrangements, we consider that the best fit for the alleged lapse was in fact to be found in the same statutory framework document at 3.53, namely "*Safety and suitability of premises, environment an equipment*" which reads in part "*Providers must have, and implement, a health and safety policy, and procedures, which cover identifying, reporting and dealing with accidents, hazards and faulty equipment.*". The facts and the core reasons have always been clear to all involved.

5. The use of hot drinks at the setting has not previously been criticised. It was thought that the child could not reach the cup. For those reasons the appellants consider that the accident was not foreseeable in any reasonable way. They have since changed their policy: no hot drinks are consumed in the same rooms as the children. In this way they suggest that the accident cannot be repeated. Ofsted consider that it is clear that the accident was avoidable, a cup with hot liquid was placed where a child could reach it. No criticism is made of the appellants' behaviour after the incident when they did all they could by way of first aid. The child's mother gave evidence before us and indicated that she believed that the appellants had not called for an ambulance until after her husband asked them to. We entirely accept that she was being truthful about this, and that her husband did ask for an ambulance, however we do also accept that it is likely that one had already been called by then. There was no other relevant factual dispute.

6. In evidence before us the First Appellant explained she had recognised the hazard that hot drinks represented, and had a written policy, i.e. "*Hot drinks placed out of reach of children*" In fact she accepted when questioned by Ms Birks that she was aware before the spill that 6 of the seven children present could reach the drink where it was placed on the sideboard, it appeared that she relied upon a combination of the age of the children, adult supervision and a cup with a lid made of silicone similar to takeaway hot drink cups. Given the low height of the furniture upon which the cup was placed (26 inches) and

the fact that it was not thought necessary to place the cup to the rear of the furniture we find that in fact the written policy had given way to a reliance upon adult supervision of hot liquids and using a cup with a lid on. This was the cause of the accident.

7. In connection with the cup we note that the First Appellant refers to the cup as a safety cup. We do not understand it to be such, it appears to be a cup that will enable an adult to carry it without much risk of spillage, however there is nothing to suggest that it would in fact resist being dropped (indeed it appears to be a china cup and would almost certainly break on a hard surface) or the lid detaching as happened in this case. Whilst it superficially looks as if it provides a greater level of safety than a normal cup, there is no doubt, as this incident indicates, that the level of safety it provides if any, in addition to a normal cup is very scant indeed. We do however consider that the First Appellant was sincere in her belief that she was protecting the children by the use of the cup.

8. Thus at the time of this accident we find that although there was a written policy it was not implemented as was required. There is a new clearer written policy, it is that no hot drinks are taken into rooms where the children are. We consider that despite the failure to follow their own policies in this area previously that the appellants following this accident will do so in future. We base that in part of course upon the 26 years that the First Appellant has been working with children without complaint.

9. In considering whether the registration of the two appellants is cancelled, which is a decision we take afresh, we have looked not only at the facts of this matter, but also their history in childcare, the history of this business, which has attracted no adverse comment in the past, and the references of the present parents of minded children, who all express their full confidence in the situation. We take into account that sometimes parents need to have an objective decision on things such as risk taken on their behalf since they are rarely in possession of all of the information that we have. We are also in a position somewhat different to that which Ofsted was in at the time their decision to cancel was made, having had not only the results of the investigation, but also the benefit of legal submissions and evidence of witnesses.

10. Looking at the situation overall, whilst we can envisage situations where a single error even if appreciated and regretted afterwards could be sufficient grounds to cancel registration we consider that the situation here indicates that children are not generally at risk from care by the appellants in the sense that the First Appellant in particular is able to point to a long and successful career looking after children which is good evidence that she is careful with them, and that this situation was an aberration rather than an indication of an underlying tendency to misjudge risk or to expose children to risk unnecessarily. We also note that one of the unintended consequences of proceedings such as these is to demonstrate in clear terms the high level of care expected to be present in such situations, and to subject appellants to

very intensive and no doubt uncomfortable scrutiny.

11. We are satisfied that the appellants deeply regret what has happened and will ensure that as far as humanly possible no harm befalls a child in their care again. In those circumstances the cancellation shall not have effect.

12. We may in such circumstances by virtue of ***Section 72(5) of the Childcare ct 2006*** impose conditions on the registration of the appellants, we are not aware of any conditions which would assist in these circumstances, however it may be that Ofsted consider that a welfare notice ought still to be issued in any event to ensure a clear record remains of this lapse.

Decision

The appeal is allowed, the cancellation shall not have effect.

Judge John Aitken
Deputy Chamber President
Health Education and Social Care Chamber

2nd September 2013