



**IN THE FIRST-TIER TRIBUNAL
CARE STANDARDS
[2014] 2190.EY**

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

Heard on 10 July 2014 at Reading

BEFORE

**JUDGE MELANIE PLIMMER
MRS SALLIE PREWETT
MRS WENDY STAFFORD**

BETWEEN

MRS BELINDA RUSSELL

Appellant

-v-

OFSTED

Respondent

DECISION

Representation: The Appellant represented herself.
The Respondent was represented by Ms Birks (Solicitor).

Reporting order

1. There shall be a Restricted Reporting Order under Rule 14(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('the 2008 Rules') prohibiting the publication (including by electronic means) in a written publication available to the public, or the inclusion in a relevant programme for reception in

England and Wales, of any matter likely to lead members of the public to identify any child or its family mentioned in the appeal.

The appeal

2. This is the appeal of Mrs Russell, a registered child minder. She received a good inspection as recently as 8 May 2013. She appeals against a decision of Ofsted dated 28 February 2014, to cancel her registration as a child minder. On 3 October 2013 Ofsted notified Mrs Russell of the suspension of her registration from the Early Years Register and the Childcare Register, and she has continued to be suspended since that date. An appeal against the decision to suspend on 13 December 2013 was unsuccessful.

Hearing

3. The appeal was heard over the course of a full day in Reading. The parties had helpfully worked together to prepare a large bundle of extensive documentary evidence. Mrs Russell submitted documentary additional evidence without any objections from Ofsted.
4. At the beginning of the hearing we clarified the key issue for the Tribunal to determine as being what happened when Mrs Russell went to the school on 2 October 2013 to pick up minded children. Mrs Russell did not accept the accounts provided by Ofsted's witnesses and regarded her conduct to be entirely appropriate and reasonable. Both parties agreed that this was the key factual dispute. Mrs Russell drew our attention to three recordings that she had made. None of these directly assisted us to determine the key factual dispute and we indicated that we would not be assisted by listening to them.
5. We first heard evidence from Ofsted's witnesses: Mrs Swain, a teaching assistant; Mr Searle, a teacher; Mr Dust, a Deputy Head Teacher; Mr Chesters, a Head Teacher; Mr Clarke, a Police Community Support Officer; Mr Mitchell, a Police Constable; Ms Sunter, an Ofsted Inspector; Mr Hill, an Ofsted Senior Officer and the decision-maker in this case.
6. We then heard from Mrs Russell herself. We clarified with Mrs Russell that she did not have any other witnesses and she explained that she did not wish to call her husband (who was present throughout the hearing) or her son, Jordan.
7. Both parties assisted the Tribunal with their thorough preparation for the hearing. At the end of the evidence we heard helpful submissions from Ms Birks and then Mrs Russell. We reserved our decision, which we now provide with reasons.

Legal Framework

8. The legal framework for the registration and regulation of child minders is to be found in Part 3 of the Childcare Act 2006. It is uncontroversial that these new provisions sought to elevate and regularise the standard of child minding and the demands now made on child minders or potential child minders are wide-ranging and significant.
9. The requirements are prescribed by the Childcare (Early Years Register) Regulations 2008 and include "...that the person registered is suitable...". Section 68(2) of the 2006 Act enables Ofsted to cancel a person's registration if it appears that this requirement cannot be satisfied.
10. Section 74(1) of the 2006 Act provides a right to appeal to this Tribunal. The legal burden remains vested in Ofsted, which must establish the facts upon which it relies to support cancellation. It must also demonstrate that the decision to cancel the Appellant's registration is proportionate and necessary. The standard of proof to be applied is the balance of probabilities. We must make our decision on the basis of all the evidence available to us at the date of the hearing and we are not restricted to the matters available to Ofsted when the cancellation decision was taken.
11. The powers of the Tribunal can be found in section 74(4) of the 2006 Act. Essentially the Tribunal may either confirm Ofsted's decision to cancel or direct that it shall not have effect. If the Tribunal decides that cancellation should not have effect, it may impose conditions on the appellant's registration, or vary or remove any of the current conditions.

Findings of fact

12. The majority of the evidence before us turned on what is alleged to have taken place on 2 October 2013 when Mrs Russell attended a primary school in order to collect children she was minding at the time. In summary, Ofsted's position is that Mrs Russell was not in a fit state to look after children and that she exercised very poor judgment and decision-making skills having been repeatedly told by senior school staff and then a police officer that she should return home without the children. On the other hand Mrs Russell believes that she acted reasonably in seeking to respond to an unjustified allegation that she was under the influence of alcohol and in seeking assurances regarding the safety of the children. The allegation that Mrs Russell was under the influence of alcohol was made by Mr Chesters. It was based upon her behaviour and presentation at the school that day.
13. We heard detailed oral evidence from witnesses to the incident at the school on 2 October 2013. Having considered all the evidence in the round we have no doubt in deciding that Mrs Russell was significantly impaired by reason of some form of ill-health that day and this meant that she was unfit to look after children. We also find that Mrs Russell

exercised very poor judgment and decision-making skills when this was pointed out to her.

14. We were particularly impressed with the forthright evidence provided by PC Mitchell regarding Mrs Russell's behaviour at the school. We found his evidence, together with the evidence of Mr Clarke and the teaching staff to be honest and straightforward. Where they did not know an answer or were unsure they were candid in making that clear. We also found them to be measured witnesses, prepared to give Mrs Russell the benefit of the doubt, where appropriate. We completely reject any allegation on the part of Mrs Russell that they conspired against her or 'had it in for her'. Where there is a conflict in account we prefer the evidence of Ofsted's witnesses, each of who was temperate, balanced and fair. This is a case in which Ofsted promptly investigated what happened on 2 October 2013 at the school. As such the Tribunal had the benefit of an Ofsted toolkit dated 4 October 2013 summarising Mrs Russell's account of what took place together with summaries from each relevant member of staff taken on 16 October 2013. Each witness to the incident also provided statements, obtained on 27 November 2013. There were also short supplementary statements. Ofsted's witnesses provided broadly consistent evidence. Whilst there were a few inconsistencies we did not regard these to be material to the key issues for us to determine.
15. We did not find that Mrs Russell provided completely reliable evidence. Her evidence contained numerous inconsistencies. She did not accept the accuracy of Ofsted's toolkit dated 4 October 2013 yet when we asked her to go through the toolkit to point out the inaccuracies, she focused on immaterial matters of minor detail. Mrs Russell was unwilling or unable to make admissions regarding errors of judgment and unwilling to answer a number of direct straightforward questions. She was also unable to properly and fully acknowledge examples of her own poor decision-making. Her almost instinctive reaction was to deflect justified concerns about her behaviour and approach on to others or to seek to answer a question by posing another question. We have no doubt that Mrs Russell is an intelligent woman with a firm grasp of Ofsted's expectations, yet when asked straightforward questions about specific incidents she was unwilling (even with the Tribunal's assistance) to answer pivotal questions directly. We formed the view that when this happened it was not because of an inability to answer questions directly but in order to avoid having to provide an answer that she believed may cast her judgment and decision-making in a poor light.
16. Having considered all the evidence in the round we now set out our findings relevant to the chronology of events on 2 October 2013.
17. We find that Mrs Russell was feeling unwell that morning. Mrs Russell accepts that on the way to the school 'leant over a bush and regurgitated fluid'. She maintains that although she had a cold for a long time, the

'on-going and increasing pain behind [her] sternum' came on suddenly. We do not accept that Mrs Russell has provided a full and accurate account about the onset of her illness that day. We find that Mrs Russell had been feeling unwell prior to leaving her home and she demonstrated poor decision-making skills in failing to make alternative arrangements for the minded children. We do not accept that the onset of illness was sudden.

18. We find that Mrs Russell had a cold but had also vomited at home and some of this had gone on the dog. Mrs Russell was adamant to us that she did not vomit at home. This is inconsistent with what her son told Mr Dust. This is supported by Ms Shukla's statement that Jordan told her that his mum 'had been sick but he was not allowed to see her'. Ms Shukla also said that Mrs Russell told her that 'she wasn't well and had been sick'. Mrs Russell sought to distinguish between the regurgitation of fluid, being sick and vomiting. When making our findings we have borne in mind that there can be confusion caused when a person refers to feeling sick (or feeling unwell) as distinct from being sick (which sometimes means vomiting). However Mrs Russell's evidence regarding her illness has been completely inconsistent even allowing for any confusion that has arisen regarding this terminology. Mrs Russell denied that she was feeling particularly unwell (over and above her cold symptoms) until she left her home and then this came on very suddenly. When we tried to clarify this at the hearing Mrs Russell gave unsatisfactory evidence. We asked her to explain why her son Jordan had said to Mr Dust that she was sick on the dog at home. Mrs Russell at first said that Mr Dust's memory is mistaken. She then said that he might have said that she was sick but that might mean anything and in any event Mr Dust should not have been questioning her son. We reject this and we accept Mr Dust's evidence that he remembers her son saying that his mother was sick on the dog very clearly because they had 'a bit of a laugh about it'. Mrs Russell then admitted that she had done a loud gaseous burp near the dog. She said that she asked her son to wipe the dog because it was 'sticky' albeit from regurgitation and not vomit. We find that Mrs Russell was sufficiently unwell that she vomited on the dog. When her son said to Mr Dust that she was sick on the dog and when her son and Mrs Russell said to Ms Shukla that she had 'been sick' we find that they were clearly indicating that Mrs Russell had been sick in the sense of having vomited. It is difficult to see how else the dog became sticky and required wiping down. We wholly accept Mr Dust's evidence that he was told by Jordan that he had requested his mum not to go to school as she was not well enough and that she vomited on the dog. We also find that Mrs Russell then vomited again on the way to school. Mrs Russell's failure to acknowledge that she had vomited twice that day before collecting the children reflects adversely on the credibility of her version of events.

19. We accept the evidence provided by the school staff that Mrs Russell presented at school as unsteady on her feet, slurring her speech, repeating herself and with vomit on her clothing. During cross-

examination Mrs Russell refused to admit that she was wobbly on her feet or slurring her speech. When she was asked why the other witnesses described her as such, she was unable to explain this and suggested that she did not know what these terms meant.

20. All the witnesses save for Mrs Russell were unanimous in their view that Mrs Russell was clearly not fit to look after children when they saw her. We find that Mr Chesters was justified in requesting Mrs Russell to go home without the three minded children on the basis that she was unwell and the school would retain responsibility for them. Mr Chesters accepted that there could have been a misunderstanding between him and Mrs Russell when she accepted having had 'a drink' that day. We do not accept that Mrs Russell ever admitted to having had an alcoholic drink that day. However, we find that Mrs Russell has not accurately recalled Mr Chester's approach to her. We do not accept that Mr Chester became 'apoplexic', as alleged by Mrs Russell in her witness statement. We find that Mr Chester acted professionally. Even if he mistakenly believed that Mrs Russell admitted to having an alcoholic drink, Mrs Russell reacted disproportionately to this in all the circumstances.
21. Mrs Russell did not have appropriate insight into her condition and refused to leave the premises, such that police assistance was requested and Mr Clarke arrived in response. We agree with Ofsted's assessment of the evidence that Mrs Russell became unnecessarily argumentative and inflexible. She was determined to be breathalysed and to obtain written assurances regarding the children. Her concerns for the children seemed to be solely based on her perception that without this 'proof' she would have difficulties with Ofsted. Mrs Russell maintained that she was acting in accordance with her illness and safeguarding policy at all times. We have been provided with a copy of her 'accident, illness and emergency policy'. This states that if she has an accident she will get the nearest responsible adult to help whilst her back-up people are contacted and they may then contact parents to collect their child. Whilst at the school, there were a number of eminently responsible adults. They indicated that they would be responsible for the children and would contact parents. We find it very difficult to understand why, in all the circumstances, Mrs Russell was insisting upon written assurances from the school.
22. Mrs Russell's behaviour worsened when PC Mitchell arrived. We accept his description of Mrs Russell when he arrived at the school. He described her as unsteady of her feet with slurred speech. He could not detect intoxicating liquor on her. He said that Mrs Russell seemed either unwilling or unable to process what she was being told. He informed her that for whatever reason she was not in a fit state to look after children and should go home. She was adamant and insistent that she should be breathalysed. We found PC's explanation for refusing to breathalyse Mrs Russell to be cogent. He could not smell alcohol, she was not driving and a negative test might just escalate the situation because he

believed that Mrs Russell would use this as 'ammunition' to cause further difficulties for the school.

23. Mrs Russell maintained that she was just being asked the same questions and was unable to go home as she was waiting for her son, who was not permitted to see her. She then alleges that her son was asked to wait for her thereby delaying her departure from the premises. We do not accept her evidence in this regard. We prefer the evidence of PC Mitchell to the effect that he was trying to get Mrs Russell to leave the premises but she was refusing. We accept that he came close to arresting Mrs Russell and sought the assistance of her son to encourage her to go home. PC Mitchell was so concerned about Mrs Russell's behaviour that he explained he would have taken the children into police protective custody if there was no other responsible adult available to look after them.
24. We do not accept that Mrs Russell was under the influence of alcohol or illicit drugs. We make that finding having noted that she has a conviction for driving under the influence of alcohol in 2012. We also bear in mind that two witnesses suggested at one stage they could smell alcohol on her breath. Both Mr Chesters and Mrs Swain properly conceded that they were not sure about this and what they smelt might be attributable to medication. Mrs Russell undertook a medical assessment, which concluded that she did not have any alcohol or drug dependencies. We find that Mrs Russell was in a very poor physical condition (and this was probably caused by a combination of illnesses), as described by PC Mitchell, and that she was unnecessarily argumentative, belligerent and 'obsessed' with being breathalysed. Mrs Russell was very concerned to emphasise to us that she was simply seeking 'objective' evidence of her condition and this could only be obtained by a breathalyser test. Mrs Russell was simply unwilling to accept that whatever the reason, she was unfit to look after children and should return home. We accept PC Mitchell's evidence that she became preoccupied with and insistent upon a breathalyser test and demonstrated a lack of insight into her own behaviour and a lack of respect for the judgment and advice of other professionals.
25. We accept that Mrs Russell has entirely complied with the requirements of her suspension and this is to her credit. We were however concerned that Mrs Russell demonstrated insufficient insight into her behaviour during the incident at the school and when giving evidence at the hearing. She remained adamant that it was entirely reasonable to demand a written assurance before leaving the school. When asked whether she should or could have acted any differently, Mrs Russell said that she should always walk with a pro forma to be completed in such situations. She was asked if she was troubled by PC Mitchell's description of her characteristics that day as being consistent with those he deals with outside public houses on a Friday or Saturday night. Mrs Russell refused to express any regret and said that what really troubled her is the failure to objectively test her. We find it very concerning that

Mrs Russell was unable to acknowledge that she was physically impaired in a significant manner that day. Mrs Russell was also unwilling to genuinely accept that she was not fit to look after children that day.

26. We also accept the evidence provided by Mrs Swain and PC Mitchell that in the weeks after the incident Mrs Russell sought to obtain further information from them in a manner that made them feel uncomfortable. Mrs Russell has explained that she was just trying to defend herself in these proceedings. We do not accept that asking Mrs Swain questions about the incident outside her workplace and recording her answers at a Church event was appropriate. Mrs Russell explained that this conversation was accidentally recorded. We found her evidence about this incredible. We find that the recording was deliberately made. Whilst there may have been no intention to cause Mrs Swain discomfort, Mrs Russell's decision to ask and record this conversation at an unrelated Church event is of concern. It is also concerning that she was unable or unwilling to see that Mrs Swain would and did feel uncomfortable being questioned at a Church event.
27. We also accept that Mrs Russell continued to contact PC Mitchell frequently after the incident, such that he raised his concerns regarding her behaviour with his supervisor.
28. We were also most unimpressed with Mrs Russell's evidence concerning her 2012 conviction. She appeared to regret the fact that she was stopped by the police more than her decision to drink excessive alcohol just before driving. She explained to us that she drank a tin of gin and tonic 'because it was there' and she was thirsty. Mrs Russell clearly said that she had served her punishment and now never drinks at all when driving. We are concerned however that Mrs Russell has not sufficiently demonstrated insight into her poor decision-making and judgment at the time of the offence. These deficits in decision-making and judgment were repeated on 2 October 2013 and then again when she interacted with PC Mitchell and Mrs Swain after the incident on that date.

Conclusions

29. We find that a number of clear and significant concerns have emerged from our findings of fact. These support our conclusion that Mrs Russell is not suitable to be a registered child minder. Mrs Russell has demonstrated poor decision-making skills and judgment over time. She has not been entirely open and honest with Ofsted and has sought to minimise her concerning behaviour. Mrs Russell has demonstrated a continuing failure to reflect on her poor behaviour and decision-making. Although she had a good inspection we find that a child in her care may be at risk of harm because of her poor behaviour, decision-making and judgment.

Proportionality

30. In considering whether the sanction imposed by Ofsted was proportionate we have regard to the duration of the concerns and the failure to demonstrate insight into their significance. Having had the benefit of observing and listening to Mrs Russell we find that the sanction imposed was and is appropriate. We have noted the positive references and she will probably find this a very hard decision to accept but we have no doubt that it is the correct one.

Decision

31. We dismiss the appeal and there shall be no order as to costs.

Judge Melanie Plimmer
First-tier Tribunal Judge (Health, Education and Social Care)

17 July 2014

