

Care Standards

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

[2014] 2286.EY-SUS

Mrs CB

Appellant

-v-

Ofsted

Respondent

**Tribunal Panel: Mr Brayne (Tribunal Judge)
Mrs Rabbetts (Specialist Member)
Mrs Stafford (Specialist Member)**

DECISION

Considered on the papers on 23 October 2014 via telephone conference

The appeal

1. The appellant appeals against the respondent's decision dated 1 October 2014 to suspend her registration as a child minder for six weeks until 12 November 2014.

The legal framework

2. The statutory framework for the registration of childminders is provided under the Childcare Act 2006. This Act establishes two registers of childminders: the early years register and the general child care register. Section 69 (1) Act provides for regulations to be made dealing with the suspension of a registered persons' registration. The section also provides that the regulations must include a right of appeal to the tribunal.
3. Under the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 when deciding whether to suspend a childminder the test set out in regulation 9 is that the chief inspector reasonably believes that the continued provision of childcare by the registered person to any child may expose such a child to a risk of harm.
4. The suspension shall be for a period of six weeks. Suspension may be lifted at any time if the circumstances described in regulation 9 cease to exist.

5. "Harm" is defined in regulation 13 as having the same definition as in section 31 (9) of the Children Act 1989, " ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill treatment of another".
6. The powers of the tribunal are that it stands in the shoes of the Chief Inspector and so in relation to regulation 9 the question for the tribunal is whether at the date of the respondent's decision the respondent reasonably believed that the continued provision of child care by the registered person to any child may expose such a child to a risk of harm.
7. The burden of proof is on the respondent. The standard of proof 'reasonable cause to believe' falls somewhere between the balance of probability test and 'reasonable cause to suspect'. The belief is to be judged by whether a reasonable person, assumed to know the law and possessed of the information, would believe that a child might be at risk.

The hearing

8. The appellant asked for a determination on the papers. The respondent agreed to proceed without a hearing. We applied Rule 23 Tribunal Procedure (First-tier Tribunal)(Health, Education and Social Care) Rules 2008 and proceeded to make a decision without a hearing. The panel met by telephone conference on 23 October 2014 in order to determine the appeal.
9. We first considered the application of the appellant for a postponement to enable her to answer the allegations against her, the details of which she did not yet know. In light of our reasoning below we did not consider a postponement to be in the interests of the appellant.
10. The tribunal had a bundle of papers including the decision to suspend, the appeal, the response to the appeal, witness statements from the respondent, with exhibits, and a witness statement from the appellant.
11. The Tribunal makes a restricted reporting order under Rule 14 (1) (a) and (b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the appellant, any child minded by the appellant, or any member of the families of these individuals, so as to protect their private lives.

The background

12. The appellant is registered on the Early Years Register, the compulsory part of the Child Care Register and the voluntary part of the Child Care Register, for the provision of childcare on non-domestic premises. Further details of the appellant's registration have not been provided, but are not important for this decision.

The respondent's case

13. The respondent's case is set out in the response, and is based on the evidence of witness JN, an Early Childhood Senior Officer, and witness KKJ, an Early Childhood Regulatory Inspector, and exhibits, in particular an email from Detective Sergeant RB dated October 17 2014.
14. Witness JN states that on Thursday 25 Sept, "Ofsted received information which raised safeguarding concerns about the owner and registered provider of [the appellant's childminding business] and suggested that children are or may be at risk of harm in her care." This led to review by the respondent's regulatory officer and a referral was made to the local authority designated officer. On 1 October a case review took place, following which JN decided to suspend registration. In paragraph 16 of his statement he says "I took this decision because:
- The information we had received indicated that the continued provision of childcare by the appellant would mean that children would be at risk of harm
 - The appellant was the sole registered person for [the appellant's childminding business]] so there was no-one else who could take on legal responsibility for the setting if she was to withdraw from involvement during the investigation
 - I do not believe that there was any alternative to suspension which would remove the risk to children."
15. The witness then states that the local authority designated officer was already aware of concerns regarding the appellant and had already held a "Position of Trust meeting on 29 September and 13 October 2014". Contact has been maintained with the police, who are undertaking a criminal investigation into the concerns raised. He describes this new information as "very concerning" and says that it reinforced his belief that suspending the appellant's registration was the appropriate step to safeguard the children cared for by her. Finally he confirms the respondent's intention to progress its inquiries with the appellant once the police have confirmed that this can go ahead.
16. Witness KKJ's evidence is consistent with the above account. She exhibits to her statement an email from DS RB dated 7 October in which the sergeant states that there is a live police investigation and that "the sanctions in place regarding the [childminding] service and [the appellant] are being challenged and that the court date is next week. I would ask that a generic statement of "inappropriate behaviour and unethical practises [sic] is used to sum up the matter the police are looking into. To disclose the specifics of the nature of the allegations at this early stage of the investigation, would seriously frustrate and undermine the investigation. It would allow [the appellant] to identify and potentially interfere with key witnesses before police have had chance to speak to them as well as allowing [the appellant] to prepare

for any subsequent police interview. Based on what we have already established I would strongly oppose the lifting of sanctions as it would raise serious safeguarding concerns.”

17. The allegations which led to the police to open a criminal investigation, and to the respondent deciding to suspend the appellant’s registration, are not known to the Tribunal. The respondent, before the deadline for disclosing witness statements, contacted the Tribunal to make enquiries about whether it could provide the material to the Tribunal without the appellant receiving copies. The procedure for withholding potentially harmful information from a party is set out in The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, Rules. Rule 14(3) provides as follows:

If a party (“the first party”) considers that the Tribunal should give a direction under paragraph (2) prohibiting the disclosure of a document or information to another party (“the second party”), the first party must—

(a) exclude the relevant document or information from any documents that will be provided to the second party; and

(b) provide to the Tribunal the excluded document or information, and the reason for its exclusion, so that the Tribunal may decide whether the document or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).

18. On 21 October Judge Brayne declined to make an order in response to the application for an indication, but referred the respondent to Rule 14(3) should the respondent wish to make such an application. No application has been received. Neither the Tribunal nor, as far as the Tribunal is aware, the appellant knows the allegations which have led to the criminal investigation and the suspension.

The appellant’s case

19. We do not need to set out the appellant’s case in detail. She is not in a position to counter the allegations against her, as she does not know them. She believes the allegations to be of a child protection nature. She believes the allegation arise out of a malicious campaign against her by a third party. She refers to a person alleging she took a deposit for a place for a child and had not returned it, an allegation she denies. She refers to conflict within the family of one of the children placed at the nursery. She refers to support received from parents at a meeting following the suspension notice. She refers to her willingness to co-operate with Ofsted, and to the difficulties parents have experienced finding alternative placements.

Tribunal’s conclusions with reasons

20. As noted in paragraph 6 above, this Tribunal stands in the shoes of the Chief Inspector, and considers whether, in light of the information

available to the Chief Inspector, he or she had reasonable cause to believe that a child might be exposed to harm.

21. The fact that there is a right of appeal means that the Tribunal must itself determine the reasonableness of the Chief Inspector's reasons for believing there is a risk of harm. To do so we must have access to the evidence, or sufficient evidence, taken into account by the Chief Inspector. It would be unjust and wrong in law to simply accept the word of a party that the criteria are met without enquiring into the merits of the Chief Inspector's belief. The Tribunal, regrettably, does not have sight of the evidence and has no information as to the actual allegations against the appellant. The appellant has not been enabled to answer the allegations. The respondent has not elected to apply for that information to be provided to the Tribunal while being withheld from the appellant, even though it has had both time to do so and guidance from the Tribunal as to the procedure to enable it to do so. Nor has the respondent applied for a postponement of the deadline for disclosing evidence to enable it to make such an application.
22. The respondent's case, therefore, is that because the police assert that there is a safeguarding issue and because the respondent's officers believe there is a risk of harm, the Tribunal should uphold the suspension. The Tribunal has not, effectively, been asked to carry out an independent evaluation of the reasonableness of cause for that belief, and is unable to do so. The appropriate test is not that the Chief Inspector says he or she has reasonable cause for a belief in the risk of harm, but that the Tribunal, in the shoes of the Chief Inspector, with the information available to the Chief Inspector, finds that belief to be reasonable.
23. We remind ourselves that, although the threshold for establishing risk is low – reasonable cause in the mind of the Chief Inspector – the burden of proof falls on the respondent, and this means there must be some evidence. An assertion of belief is not evidence and does not satisfy the burden of proof. The appeal must succeed.

Order

24. The Tribunal does not postpone the determination of this appeal.
25. The appeal against suspension is allowed.

Mr Brayne, First-tier Tribunal Judge
Mrs Rabbetts, Specialist Member
Mrs Stafford, Specialist Member

27 October 2014