

Care Standards

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

[2015] 2472.EY-SUS

BEFORE

Tribunal Judge Hugh Brayne
Specialist Member Pat McLoughlin
Specialist Member Maxine Harris

AB

Appellant

-v-

Ofsted

Respondent

DECISION

Determined by the panel on the papers in telephone conference on 29th July April 2015 at 10 am.

The appeal

1. The appellant appeals against the respondent's decision dated 6th July 2015 to suspend her registration as a child minder for six weeks until 17th August 2015.

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 and determined the appeal on 29th July 2015.
9. The tribunal had a bundle of papers including the decision to suspend, the appeal together with supportive witness statements from parents of minded children, the response to the appeal, witness statements from the respondent with exhibits, and submissions from the appellant's representatives.
10. 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

11. The appellant was registered with the respondent on 24th October 2007. She has received "satisfactory" grades following inspections in 2008 and 2011 and received a "good" grade in July 2013.
12. The appellant operates her childminding business from her home address.

Events leading to the issue of the notice of statutory suspension.

13. The respondent's decision followed a phone call from a member of the public on 3 July. Neither the appellant nor the Tribunal has been informed of the identity of this person. Ofsted's records of the telephone call show that the informant reported having personally seen the following incidents
 1. AB slapped two children on the hand on two separate occasions with an audible slap, causing visible upset to the children and the skin of the hand to go red, and that AB told the informant she does this often.
 2. AB left a child unattended outside a classroom in her pram while dropping off another minded child in a classroom approximately 150 yards away, where AB could not see or hear the child, leaving the informant to talk to the child.
14. The informant reported having been told by other childminders of the following incidents:
 1. AB withheld food for an entire day from a child because that child did not say thank you.
 2. AB slapped a child so hard on the back that the child fell off the sofa onto the floor.
15. The informant told Ofsted of a further concern, but the record does not make clear if the concern is based on the informant's own observation or on information received
 1. AB was talking to other parents and did not notice that a minded child had walked off, over a busy car park, the child then being returned by another parent.

Evidence and submissions contained in the appellant's grounds of appeal

16. In her appeal the appellant said she had "never slapped a child on the hand, and left a mark". She had never pushed or slapped a child. There had been an occasion when she gave a child her lunch slightly later than normal during a trip to the beach. The three children she dropped off at school were never left out of her sight and had never wandered off and been returned to her. She referred to the lack of detail in the allegations, which made it difficult to provide a fuller response to them.

17. With her grounds of appeal the appellant provided four written statements from parents, two by the same person. LM confirmed there had been occasions when AB had asked her to watch the children in her care while she escorted a child to the child's classroom. She had never witnessed a child being left alone. LM provided a character reference in which she said, as parent of two minded children, she had had no cause for concern with AB's care or treatment of her children. KO'B said that AB always knows where the children in her care are; that AB does not enter individual classrooms when taking children to school; and that the children minded by AB are happy when around AB, who does not raise her voice to them. CP is the mother of a minded child, and expressed strong support for AB, saying that she is "extremely professional" and that her son, who has been minded by AB for four years, is very upset not to be able to go to her now.

Additional evidence

18. Ofsted relies on concerns raised about AB in December 2014 and May 2015. For reasons set out below these are not considered further in this appeal.

19. In the course of discussion between one of Ofsted's witnesses, an Early Childhood Regulatory Inspector NB, and AB on 6 July 2015 AB supplied names of other childminders she worked alongside at times. Ofsted made contact with these individuals and the summary of information supplied during the telephone calls is exhibited to the witness statement of KM, who is an Early Childhood Senior Officer employed by Ofsted.

20. NC is recorded as providing the following information. She was concerned that supplying this information would "come back on her". She had been at the beach with AB the previous week when AB refused to give a child of two food for the duration of the visit, because the child had refused to say "ta". NC had tried to offer food to the child but was told not to. AB said she was trying this approach on the advice of another childminder. She had been at the beach with AB for about two or two and a half hours, leaving at approximately 13.30. It was a hot day. AB had had three children with her and the others had eaten. The child who had not eaten was non-verbal and delayed. NC knew she should have herself contacted Ofsted but this was the first time she had had any concerns with AB's practice. In a later phone call NC said she thought the child concerned had been given water during the visit to the beach, but not juice, because the child had not said "ta".

21. LD is recorded as providing the following information. AB had told LD in the previous week that she does not feed the child (the same child as is mentioned in the previous paragraph) until that child has said "ta" and that the child is unable to say "ta". She said that AB is abrupt with children and loud, and has seen her tapping children on the hand or

pushing a child's hand away when they have taken their shoes off. She had observed AB bringing a child back along a path to the school car park and AB said the child had wandered off. She said AB spends a lot of time with children strapped into buggies, including when AB gets her nails done and when she goes shopping "a lot". She said she saw AB "dragging" children along when they walk to school. She made other criticisms of a general nature.

22. DW is recorded as providing the following information. She made criticisms of AB, including her latching on to her and LD "like a bad smell". Two weeks previously AB had come to DW's house with children. DW's daughter, aged 17, had seen AB slap a child hard on the back and had pushed or placed her roughly onto the floor after the child had bitten AB. DW's sister had seen AB "drag" a child along outside a supermarket. DW had herself seen AB slap a child's hand because the child took their shoes off outside school.

23. The appellant has sent a response to the evidence submitted by Ofsted. She objects to reliance on historic allegations, which have never previously been raised with her. She "strenuously denies that she has ever slapped any child on the hand and/or left a mark." She accepts that she has on occasion gently tapped a child on the hand "to provide gentle discipline". She has never hurt a child or "slapped any child hard enough to leave a mark". She says no named witness has seen this happen so she cannot properly respond to the allegation. She accepts that on one occasion she asked a child to say thank you before giving her lunch and that following that she then forgot to give the child lunch until she was in the car on the way home, which she regrets. She had done this at the suggestion of LD who said it was a way to get children to say thank you. It was LD who had taken the food away from AB when the child refused to say "ta". AB had given the child water not juice because of parental preference for water. She denied ever slapping a child on the back or causing a child to fall off a sofa. No witness statement had been obtained from the witness, DW's daughter. A child had bitten AW and had been asked to apologise. AW had not been rough with the child. She had never left a child out of sight or hearing. The most she had done is leave a minded child with a trusted adult while accompanying another child to a classroom. AB did not recall the incident in which she was said to have allowed a child to wander off.

Tribunal's conclusions with reasons

24. We agree with the appellant that reliance on historic concerns, which have not yet been put to the appellant, is of little help in determining the question which this Tribunal must address, namely whether Ofsted (and now the Tribunal) reasonably believes a child may be at risk.

25. It is clear, and acknowledged by the appellant, that the evidence requires further investigation. Witnesses have only been spoken to on

the phone; some of the evidence is second hand. The identity of the original informant is unknown and his or her evidence has not been tested in any way, simply recorded.

26. However the purpose of a suspension is to allow time to investigate, while at the same time ensuring, if there is a reasonable belief in risk to children, that that risk is removed. The question for us is whether there is reasonable cause for belief in such risk.
27. Much of what the original informant said to Ofsted has been substantiated. There was an incident on the beach when a child was denied food for not saying thank you. A minded child has been left in the hands of another adult while AB takes another child into school. AB agrees she does use physical chastisement (even if she says it is only a gentle tap on the hand). There was an incident where a child bit AB, even though what then happened (rough handling according to the daughter of witness LD) is not further substantiated. There is enough in the corroboration supplied by the appellant herself to confirm to us that Ofsted was right in identifying a risk of harm while these allegations are further investigated.
28. Put simply, we share Ofsted's concerns that withholding food is acknowledged to have been used as a strategy, whoever suggested it to AB; that children are tapped on the hand for disciplinary purposes; that children are left in the hands of non-registered adults in the school yard. We consider, further, that Ofsted is right to be concerned, pending investigation, that AB may have roughly handled a child after the child bit her. The witness needs to be formally interviewed. Concerns about allowing a child to wander off in the direction of a car park need to be investigated. Pending the outcome of these investigations, there is sufficient cause to believe children minded by the appellant may be at risk to justify the suspension.
29. We have taken into account the evidence that witnesses admit not liking AB and admit not fulfilling their duty to report concerns to Ofsted before being approached. These factors, in our minds, are not capable of undermining the conclusions we have reached, firstly on the basis of what the appellant has herself admitted, and secondly, on the basis that the witnesses have knowingly put their own status as childminders at risk by providing the evidence to Ofsted. There is no good reason to doubt the overall credibility of what they say.

Order

The appeal is dismissed.

Judge Hugh Brayne
Primary Health Lists/Care Standards

First-tier Tribunal (Health Education and Social Care)

Date: 31 July 2015