

Care Standards

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

Heard on the Papers on 9 March 2017

[2017] 2947.EY-SUS

Before
Judge Jane McConnell
Mr Jeff Cohen (Specialist Member)
Mrs Wendy Stafford (Specialist Member)

Lisa Barnes

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal

1. The Appellant appeals to the Tribunal against the Respondent's decision dated 14 February 2017 to suspend her registration as a childminder on the Childcare Register for six weeks to 28 March 2017 pursuant to section 69 of the Childcare Act 2006 ('2006 Act') and the Childcare (Early Years and General Childcare Registers) Common Provisions) Regulations 2008 ('2008 Regulations').

Paper Determination

2. The appeal was listed for consideration on the papers, pursuant to rule 23 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('2008 Rules'). Both parties must consent, which they have in this case, but the Tribunal must also consider that it is suitable to decide the matter without a hearing. In this case, we have sufficient evidence regarding the allegations made and the conclusions reached. In the circumstances, we consider that we can properly make a decision on the papers without a hearing.

Restricted reporting order

3. The Tribunal makes a restricted reporting order under Rule 14(1) (a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the children or their parents in this case, so as to protect their private lives.

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

4. The Appellant was first registered as a childminder on 31 December 2008. Since that time, she has received two full inspection judgements from OFSTED and was rated “satisfactory” in March 2010 and “good” in December 2013.
5. On 10 February 2017, the Respondent received a telephone call raising anonymous concerns including that the Appellant was providing care from a room at the Cinnamon Brow Farm Club which was not suitable for children as it was “really dirty” and that she had “a lot of children there”. These concerns triggered an investigatory visit by Regulatory Inspector Richard Sutcliffe on the 13 February 2013, who arrived at the Cinnamon Brow Farm Club at 2pm that afternoon unannounced after failing to contact Mrs Barnes by telephone.
6. On arrival, the inspector was met by the Appellant who explained she had been at the Farm Club all day and that she had three early years children with her. When asked whether she was at the Club every day the Appellant said “Sometimes. I have been here more over the winter for the last 3 months”. When asked if this was every day, she replied “pretty much, sometimes every other day”. It was confirmed by a Mrs B, who runs the “mum and tots group”, that the group is usually held on two days a week. However, there is some flexibility and the group may open 3 or 4 mornings to suit parents and carers.
7. Whilst the Inspector was with the Appellant, one child was collected by their parent and therefore he believed that only two children remained under her care. The inspector then asked for the names and ages of the children the Appellant had on the premises and she gave details of six children. She was then asked to open a closed door which had keypad access and there were three further children in that room with a Mrs L. Hildrop, who the Appellant explained was a friend who helped out “when numbers are like this” but was not her assistant. When questioned by the Inspector, she confirmed that Mrs Hildrop was not DBS checked.
8. The inspector raised with the Appellant that he was very concerned about the situation he had found and considered that she may be operating as unregistered day care or in breach of what is permissible childminding. He also made Mrs Barnes aware that he considered her to have intended to mislead him about the number of children present in her care. He considered her to be overminding and had concerns

about her ability to meet the needs of all the children in her care. In addition, she had also placed children at risk by leaving them with an unregistered adult who did not have a DBS check. Following discussions by telephone with his manager, Ms E. White, the decision was made to immediately suspend the Appellant's registration. The inspector then returned to inform the Appellant of the decision, inspected the premises further and stayed with her whilst arrangements were made for the children in her care to be collected.

9. A Notice of Decision to suspend registration was issued by the Respondent dated 14 February 2017. It detailed sixteen different areas of concern which led to the decision being made, including operating as a childminder from a non-domestic address; that the premises inspected were not secure, dirty and unhygienic; sleeping arrangements for children were not acceptable; over numbers childminding and leaving unsupervised children in the sole care of an unchecked person.
10. On the 17 February 2017, the Inspector met with the Appellant again, having failed to make successful contact with her since the day of the inspection.
11. An application to appeal the decision was received by the Tribunal dated 21 February 2017.
12. The Respondent claims that the decision to suspend the registration had been made on the basis that the children for whom the Appellant is responsible may be exposed to a risk of harm. The decision was taken to allow for all matters to be considered and to request further information from other agencies.

Legal framework

13. The statutory framework for the registration of childminders is provided under the 2006 Act. Section 69(1) of the Act provides for regulations to be made dealing with the suspension of a registered person's registration. The section also provides that the regulations must include a right of appeal to the Tribunal.
14. When deciding whether to suspend a childminder, the test is set out in regulation 9 of the 2008 Regulations as follows:

“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.”

“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”.

15. The suspension is for a period of six weeks. Suspension may be lifted at any time if the circumstances described in regulation 9 cease to exist. This imposes an ongoing obligation upon the Respondent to monitor whether suspension is necessary.
16. 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 its decision it reasonably believes that the continued provision of child care by the registered person to any child may expose such a child to a risk of harm.
17. 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.
18. The Tribunal must look at whether the suspension is both necessary and proportionate. We make no finding of fact.

Evidence

19. We took into account all the evidence that was presented in the bundle (consisting of 170 pages). We have summarised some of the relevant evidence.
20. The Appellant’s case is that she is the victim of a malicious and false complaint made by a disgruntled client. She refers to her past record and the fact she has never had any complaints until recently. The Appellant submitted twelve letters of support from family member of the children she has or does childmind which give individual reasons why they consider her to provide an excellent service. A further four letters confirm that the Appellant attends other play groups/settings with the children in her care. The Appellant claims that the Inspector arrived with a pre-conceived idea and “twisted” what he observed to meet this narrative. In the process, the Inspector made a number of incorrect claims to justify the suspension decision. She gave examples of the inspector wrongly claiming that a previous inspection had noted that she does not spend enough time at home with the children and that she fails to keep accurate attendance records. As a result, in her view, the decision is wrong.
21. The concerns raised by the Respondent which lead to the suspension are clearly detailed in the letter of notification and their response to the appeal dated 28 February 2017. In their response to the appeal, the

Respondent is clear that OFSTED do not rely on the content of the anonymous concern raised in defending the appeal. Witness statements from Mr R. Sutcliffe, the Inspector, and Ms E. White, Senior Officer for OFSTED, give further evidence about the process followed in making the decision to suspend the Appellant's registration and the investigative steps taken subsequently. Contemporaneous records of the Inspector's visits on the 14 and 17 February 2017 contained in the Childcare Investigation Toolkit Evidence Reports provide a comprehensive record of the conversations between the parties and observations made by the Inspector.

The Tribunal's conclusions with reasons

22. The standard required to justify a suspension rests on there being a likely risk of harm. During the short period of the suspension, it is for the Respondent to investigate matters to determine if there is a case for longer-term enforcement action, or whether the outcome of the investigation is that there is no longer reasonable cause to believe children may be at risk of harm. We reminded ourselves of this lower threshold for confirming the suspension and reminded ourselves that at this stage we are not finding facts.
23. In reaching our conclusion, we have considered a number of factors. The Appellant is under investigation. Childminding is her livelihood and she is at possible financial risk. Parents depend on and value her services. The suspension has caused disruption to the lives of the children in her care.
24. We found the evidence from the Respondent, particularly the reports submitted as part of the Childcare Investigation Toolkit Evidence covering the Inspector's visits on the 14 February and 17 February 2017, to be comprehensive and persuasive. Detailed notes of conversations between the Appellant and Respondent record different facts given by her in relation to the numbers of children that the Appellant was minding on the day of the inspection, the role of support staff and her use of a non-domestic premises.
25. We are not clear from the Appellant's grounds of appeal or subsequent submissions whether she accepts that she had more children in her care on the day of the inspection than the three she is allowed under her registration. Her story has changed from the date of the inspection and in later submissions, it is claimed that she was supported on the day of the inspection by a further member of staff who had been DBS checked but was not registered with OFSTED. Even if that was correct, it appeared to the inspector on the day of the inspection that children were left alone with a person who had not been DBS checked and who was not registered by OFSTED as the childminder's assistant. These are issues that we conclude need to be fully investigated and the facts established.

26. For these reasons, we agree with the decision taken by the Respondent as it was based on the evidence before the Inspector on the day. We have decided that the continued provision of child care by the Appellant to any child may expose such a child to a risk of harm.

Decision

27. The Appeal against the interim suspension is dismissed and the suspension is confirmed.

**Tribunal Judge Jane McConnell
Care Standards
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 14 March 2017