

Care Standards

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

[2018] 3297.EY-SUS

Oral Hearing on 24 April 2018

BEFORE

JUDGE - JOHN BURROW
SPECIALIST MEMBER – MIKE CANN
SPECIALIST MEMBER – WENDY STAFFORD

IN THE MATTER OF AN APPEAL
BETWEEN:

EAACD

Appellant

v

Ofsted

Respondent

DECISION

1. A restricted reporting order is made under Rule 14(1)(a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents or matters likely to lead members of the public to identify the appellant, or any child minded by the appellant, the complainant or any member of the families of these individuals and directing that reference to them must be by initial so as to protect their private lives.
2. The appellant, Mrs KL appeared with her husband, Mr KL. With them was Ms H, a supporter. Ofsted was represented by Mr Toole and Amelia Curtis. They called Ms Pauline Nazakowdeh, senior officer and Catherine Greene, Regulatory Inspector, and Ms SF, childcare worker as witnesses. Other Ofsted witnesses, whose witness statements appeared in the bundle, were JG, LH, SO from R school, and SD and LG from E school. Mrs B attended as supporter for Ofsted.
3. The hearing bundle contained submissions, orders, notices, appeal application and response, and notes of inspections and interviews and

other documents from both parties. The witness statements of Ofsted witnesses included in the bundle stood as their evidence in chief. Mr and Mrs KL served their witness statements late, but were allowed in evidence and stood as their evidence in chief.

4. Mrs KL is a director, with others, of EAACDA, a private limited company which is a registered childcare provider on non-domestic premises in North London. The company is registered on the voluntary and compulsory parts of the Childcare Register. On 9 February 2018, the Chief Inspector of Ofsted suspended the Appellant's registration on both parts of the Register for 6 weeks to 22 March 2018. On 22 March 2018 the Chief Inspector imposed a further period of suspension for 6 weeks to 2 May 2018. On 4 April 2018 Mrs KL appealed against the decision of 22 March 2018 to suspend registration.

The Legal Framework

5. Regulation 9 of the 2008 regulations sets out the test for suspension which is where:-
"The Chief Inspector reasonably believes that the continued provision of childcare by the registered person to any child may expose such a child to risk of harm."
6. "Harm" is defined in Section 31(9) of The Children Act 1989 as "ill treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill treatment of others."
7. Regulation 12 of the 2008 Regulations provides for an appeal to the First Tier Tribunal against the Chief Inspector's decision to suspend. The FtT may confirm the Chief Inspector's decision to suspend or direct that the suspension shall cease to have effect. On appeal the FtT steps into the shoes of the Chief Inspector and remakes the decision. Accordingly the question for the Tribunal is whether, at the date of the Tribunal's decision a child may be exposed to risk of harm from childcare by the registered person.
8. The burden of proof is on the respondent. The standard of proof is "reasonable cause to believe" which lies 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 the relevant information, would believe a child may be at risk. The decision must be proportionate and necessary. The Notice of Suspension states the purpose of the suspension is to allow time to investigate whether a child may be exposed to a risk of harm. Regulation 11 provides that if the circumstances have changed and there is no longer a risk of harm then the suspension must be lifted. Here Ofsted have indicated that following the current suspension proceedings they intend to proceed to seek cancellation of the registration.

The case for Ofsted

9. The premises were inspected on 12 July 2017. The inspectors found that staff caring for children inside and outside the setting did not have an appropriate first aid qualification. Further there were concerns there were insufficient staff to care for the children, and staff caring for and in regular contact with children had not undergone Disclosure and Barring Services (DBS) checks. Further there were risks to children's safety from stacked and unsecured luggage. The inspectors concluded that not all the requirements for Registration were met, and issued a Notice to Improve requiring Mrs KL to take action to meet the identified concerns by specified dates in July 2017.
10. During the course of the Inspection Mrs KL was asked about the involvement of her brother (who is not DBS checked) in looking after the children. One child had said her brother collected him from school. Mrs KL said her brother was not a member of staff, but at times she asked him to assist her in caring for the children. She was asked for evidence that her brother had a DBS check and Mrs KL unsuccessfully searched two laptops for the check, but said he did have one. No DBS certificate was produced, despite searches.
11. The premises were revisited on 10 August 2017 to check compliance with the notices to improve served following the inspection on 12 July 2017. The inspectors found that the provider had still not ensured all staff had obtained a DBS check. Mrs KL's brother was still on the premises, and Mrs KL was still unable to produce a DBS certificate for him.
12. A further full inspection of the premises was carried out on 5 February 2018. In the morning visit, the inspectors found Mrs KL's husband at the premises with a member of staff, Ms SF and two children. Mr KL was described as the acting manager. He said Ms SF did not have a DBS check and was not left alone with children unsupervised. While in the presence of Mr KL, Ms SF agreed she was not left alone with children. Mrs KL was not on the premises.
13. Inspectors returned to the premises at 2 pm and accompanied Mr KL on two pick up runs to E primary school and H College. During the trip, Mr KL got on the bus going the wrong way, and had to change to a bus going the opposite direction. Mr KL phoned H College to inform them he would be late. The inspector noted Mr KL appeared to have difficulty walking and he said he has recently had a hip operation.
14. When collecting children from E primary school, SD, the Deputy Head approached Mr KL and asked him to identify himself. Mr KL later claimed to the inspector he was well known at the school, and he did not know why the teacher had approached him. At the end of the visit

the inspector gave some positive feedback on the inspection, but said further investigations about suitability checks and the arrangement from Mr KL to be the person in charge would need to be made.

15. As the inspector was leaving, she was approached by Ms SF who handed her a note with her phone number, saying she could not speak in front of Mr KL. Later that day the inspector called Ms SF who said she had not told the truth earlier in the day when she agreed with Mr KL that she was not left alone with the children. She said she was in fact frequently left alone with them, including picking up the children, despite not having a DBS check. Mrs KL was telephoned on 7 February 2018 and asked about leaving unchecked staff alone with children, but said Ms SF was never left alone with them. She confirmed this by email, and when interviewed on 22 February 2018.
16. The outcome of the inspection on 5 February 2018 was that requirements were not met. Notices to Improve were issued, requiring her to ensure any person caring for children was DBS checked, and to ensure the newly appointed manager was suitable with the necessary qualifications and the change being notified to Ofsted.
17. Mrs KL was interviewed on 22 February 2018, and she reiterated that Ms SF was not left alone with children, and was accompanied when she picked children up from school. Mrs KL was requested to submit an action plan setting out how the Notices to Improve were to be met. This was received on 20 March 2018, and said Mr KL had a teaching degree from overseas which met the regulation requirements. However there was no confirmation that this was equivalent to a Level 2 Qualification in Childcare. Mrs KL maintained his suitability checks had been carried out when he worked at the setting in Harlow. Notification of change of manager was appended. Mrs KL said Ms SF has now left the organisation, and there was no risk.
18. Statements were later obtained from staff at R school which confirmed a young black woman with long black hair, small build, early 20s called I (Ms SF's first name) collected child C on her own. (This description met that of Ms SF). It did not appear she was accompanied. The receptionist at the school said she was always alone, never with anyone.
19. SD, teacher and assistant head of E school said an afternoon club collected two boys. M (Mr KL's first name) collected them on one occasion. The after school club was often late in picking up the children in the afternoon and early in dropping them off in the morning. The boys would normally meet a young female adult. One of the boys was asked who was collecting them from the school and replied, 'the girl.' The staff at the school had never seen them picked up by a male. This was why, on 5 February 2018, when a male (Mr KL) came to collect them, he was challenged. This male seemed unaware of the

rule imposed by the school that adults picking up children were not allowed to walk through the school, but to walk around the playground.

20. The nursery nurse at E school who has responsibility to ensure children go home at the end of the day with the correct adult, said the children were picked up by a young black girl in her twenties. This continued from September 2017 to February 2018. She believed the girl was always on her own. A male never collected them.
21. Ms SF gave a written statement dated 28 March 2018. She said although she completed a DBS application, the registration never arrived. She described starting at Mrs KL's setting in July 2017 and she was asked to pick up children alone from F school and R school. Later more children were added to her pick up list. She was also required to pick up children from E school. She regularly had to pick up 6 children. Mr KL collected children from H College, but he was in hospital for a period and a worker called AM was working with her.
22. Ms SL described being instructed by Mrs KL to take the children to the leisure center rather than the setting, to avoid Ofsted finding her alone with the children. She was sometimes there with the children until 6:30 when they would be picked up by parents. Once Mr KL was back in January 2018, the children were taken back to the setting. Ms SF said she was always left alone with child T at the setting in the morning, including on the day of the inspection on 5 February 2018. On that day Mr KL arrived with another child when the Ofsted inspector arrived.
23. In her oral evidence to the tribunal Ms SF reiterated her account of picking up children and looking after them while unaccompanied. She said she never had a DBS certificate while working for Mrs KL. In July 2017 when she first started, she had been shown which schools to go to by Mrs KL. After that she had been left alone to pick up the children from schools. She never went with anyone else. When Mr KL went into hospital, Mrs KL told her not to take the children back to the setting, but to the Leisure Centre to avoid trouble with Ofsted.
24. She had told the inspector on 5 February 2018 she had not been left unaccompanied because she was afraid of losing her job. In fact she often had to pick up and mind the children by herself. This continued through October, November, December 2017, and January and early February 2018. On 5 February 2018, Mr KL phoned her and told her not to pick child up from E School, so she went to the setting and waited.
25. A case review was held by Ofsted inspectors on 21 March 2018 and the decision was taken to suspend Mrs KL's registration. Mrs KL was re-interviewed on 13 April, where she again denied allowing Ms SF to collect or look after children alone and unsupervised.

The case for Mr and Mrs KL

26. In her statement Mrs KL said in the past she had worked at after school clubs and a welfare center for young people in Ghana. She had hosted radio shows for young people. She had been a teacher in two primary schools and had graduated as a professional teacher. She had 38 years' experience of working with children. She accused Ofsted of proceeding against her in bad faith, misusing their powers to close her business because of previous proceedings against her at her other premises in Harlow, in respect of which she had made a complaint.
27. Mrs KL said that on 12 July 2017, her brother had called and she asked him to go straight to the setting. She was at the swimming pool with Ms SF, and because of heavy traffic she was late to receive children being dropped at the setting by parents, so she asked her brother to receive them. Her brother did not have a DBS and she took responsibility for this mistake. She denied any risk to children from some bags piled at the setting, although the bags were later removed. There were sufficient staff to look after the children. She had two staff for 8 children. Mrs KL said she was told by an inspector Ofsted had inspected the London setting because of what had happened at the Harlow setting, in respect of which Mrs KL had made a complaint. Ofsted had initially said they were intending to revoke registration for both Harlow and London settings, but had then changed their minds about the London setting. They were now acting in bad faith in seeking to close the business.
28. In the Grounds of Appeal, it was said the allegations by Ms SF were false. Parents have written in support of the setting. It was denied any children were at risk. Ms SF has left and there is a new manager. It was said the feedback from the inspection on 5 February 2017 was positive. It was said Ofsted had assessed Mr KL through his managerial role at the Harlow setting.
29. Mrs KL said in her evidence and in the Grounds of Appeal, the effect of the suspensions had been to disrupt the parents' ability to care for their children, putting them at risk. She said the closure of the business had put her and her husband at significant financial loss, requiring them to take loans and putting them in arrears with their mortgage. She had had to borrow money to pay the rent at the setting.
30. In her evidence Mrs KL said the decision to suspend was made not because of the inspection on 5 February 2018, which was positive, but because of the allegations made by Ms SF which were untrue. Ms SF was making the allegation because she was paid late on occasion by the setting. Mrs KL said for the older children, who could go to and from school themselves, the setting was providing additional security. Mrs KL said the records of interview on 12 July 2017, 10 August 2017, 22 February 2018 and 13 April 2018 were inaccurate in several respects. She denied saying on 12 July 2017 that she asked her brother (who did not have a DBS) to assist her in caring for the

children. Mrs KL said now Ms SL had left, there was no risk to children. Mrs KL denied saying on 12 July 2017 that her brother had a DBS check. She said she had tried to get a DBS check for Ms SF, but it had never been sent. She accepted it was her responsibility to get it.

31. She said either she or her husband, Mr KL had accompanied Ms SF when she went to pick up the children. He did not go into the schools because of his bad foot. He sat in his car or waited outside the school. She accepted sometimes he went by bus or walked. Mr KL had helped with pick-ups from early November 2017. Mrs KL had accompanied Ms SF in July and Mr KL had accompanied her from November to February 2018. AM helped with the pickups in November when Mr KL was recovering from his operation. In November and onwards she had been at the Harlow setting.
32. Mr KL said in his evidence that on 5 February 2018 he had arrived at the setting with two children. He had seen the Ofsted inspector pressing the buzzer at the front door, so he had gone in a side door, and then gone to let the inspector in. He said on 5 February 2018 he was the manager at the premises.
33. He said before September 2017 he had been working at the Harlow setting. In September 2017 and early October 2017 he was in hospital, and he had two weeks recuperation afterwards. When he started work at the London setting, on Monday, Tuesday and Wednesday he accompanied Ms SF to pick up children. On Thursday and Friday he picked up children from H College and St F's school himself. He said he had a foot problem. The reason he did not go into schools with Ms SF was that he stayed outside looking after a child with SEN, to keep him calm. Sometimes Ms SF would meet him at the school.
34. On Monday to Wednesday he went to the first school at 2:45, the second at 3:00 and the third by 3:15, all by bus. He phoned the school and told them if they were going to be late. He said the teachers knew him at E School and he could not explain why the deputy head teacher had challenged him and asked for identification. It may have been because he walked through the school. On the day of the visit on 5 February 2018 he told Ms SF to come to the setting to be there to meet parents if they came early.

Consideration by the Panel

35. Suspension proceedings are interim proceedings, initiated to enable Ofsted to investigate where they reasonably believe there may be a risk of harm. We should determine that proceedings are not unreasonably delayed, and that any suspension is proportionate to the risk of harm.
36. Because these are interim proceedings, it is not for the Tribunal to resolve contested issues of fact. The Tribunal must be satisfied there

may be risk of harm. Here the risk arose primarily from the use of unchecked and unsupervised staff in caring for the children. We should consider whether there is a prima facie case on this issue. The Ofsted representative submitted that in this appeal, in order to establish a prima facie case we should assess the credibility of the main witnesses, Mr and Mrs KL and Ms SF. This is because the case depends to a significant extent on their evidence. We accepted this submission.

37. We had regard to the evidence of Ms SF. She gave detailed evidence of her duties in picking up and looking after children when alone. The details provided in her original statement were reiterated, confirmed and expanded in her oral evidence at the hearing. We noted her account of picking up children over a period of several months was supported by the evidence of the E and R schools. When she made these allegations she could not have known that they would confirm her story unless her evidence was true. She was a good witness, firm under cross examination, and generally consistent when asked for further information. We did not accept the allegation by Mr and Mrs KL that she was making up the allegations in order to get revenge for late payment of her salary. We concluded, by way of prima facie assessment on the evidence in these proceedings, that she was a truthful, credible and accurate witness.
38. In respect of Mr and Mrs KL, it was claimed by both witnesses that Mr KL had been to the schools to pick up children for a period of over 4 months. We did not accept that he would not have been seen at all by school staff during this period, even if he had waited outside or in the grounds while Ms SF actually collected the children as claimed. This was particularly so as he said he phoned the schools if he was late. He had no explanation as to why he was challenged and asked for identification on 5 February 2018 at E school.
39. Further we noted Mr KL gave the reason for not going into the schools was to look after another child, while Mrs KL gave the reason as being his bad foot. We did not accept that either conflicting explanation was credible. We further concluded that it was inherently unlikely that Mr KL, with his apparent walking difficulties, could collect children from three separate schools in the afternoon by bus. We had regard to the long history of child care by Mr and Mrs KL, but we concluded there was a prima facie case that they were unreliable witnesses who had not told the truth about Ms SF's unsupervised care of children. We accepted there was a prima facie case on the evidence in this case that Ofsted were right to have concerns about their honesty and integrity.
40. We further accepted there was a prima facie case that of discernible pattern of poor adherence and poor appreciation of the importance of DBS checks by Mr and Mrs KL. This had been the case for AM, for Mrs KL's brother and for Ms SF. Mr and Mrs KL seemed to believe the

problem was resolved when Ms SF left the setting. They appeared to have no insight into their own inappropriate attitude to DBS testing, and its importance in preventing risk to children.

41. We had regard to the financial and other difficulties caused to Mr and Mrs KL and to the difficulties caused to the parents of the minded children arising from the suspension, but we concluded these did not outweigh the risks of unchecked staff having unsupervised access to minded children. The suspension was in our view proportionate. The investigations had proceeded at a reasonable pace and there was no undue delay. We concluded there was an on-going risk of harm to children.

ORDER:

We confirm Ofsted's decision to suspend registration.

**Tribunal Judge John Burrow
Care Standards
First-tier Tribunal (Health, Education and Social Care)**

Date Issued: 30 April 2018