

Care Standards

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

Heard on 3 December 2018 at the Royal Courts of Justice
Deliberations on 4 December 2018

[2018] 3527.EY-SUS

BEFORE
Tribunal Judge – Melanie Lewis
Specialist Member -Mr Michael Flynn
Specialist Member- Mr John Hutchinson

BETWEEN

Kisimul Group Limited

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal:

1. This is an appeal on behalf of the Kisimul Group Ltd (“the Appellant”) against the decision of Ofsted (“the Respondent”) dated 31 October 2018 to suspend the Appellant’s Registration to carry on providing services at Kisimul (“the Home ”) pursuant to section 20B of the Care Standards Act 2000 (“CA 2000”).
2. The period of the suspension is from 31 October 2018 until 22 January 2019.
3. 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 (‘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. For that reason and also

because a police investigation is ongoing, we have not always recorded the close detail of the allegations that we read.

Background:

4. The Appellant operates three children's homes in Lincoln. The two larger sites in Lincoln have attached schools.

5. The subject of the appeal consists of five houses. The Home has been registered with Ofsted since 27 December 2002 to care for and accommodate up to 55 children with severe learning difficulties, autism and challenging behaviour. Some children are subject to Care Orders. All have Education, Health and Care Plans.

6. The Home has a positive inspection record. All published inspection reports of Ofsted record that the Respondent has judged the Appellant to be either 'Good' or 'Outstanding' following each inspection visit.

7. In particular, in the recent Inspection Report in August 2018 ~~the residential aspect School~~ the Respondent awarded the Appellant's residential service 'Good' in all categories. The narrative records that young people are *'safe, and every member of staff, no matter what their role, makes this a priority. Risks to young people are identified and managed thoroughly'*. It continues *'management of staff is good, the managers monitor the performance of staff. Where this is not as good as it should be, managers address well. Staff receive regular supervision'*

8. On 31 October 2018, the Respondent served a notice of suspension pursuant to section 14 A of the CA 2000 on the grounds that they had reasonable cause to believe that a 'person will or may be exposed to risk of harm'.

9. On 4 October 2018, Ofsted received information from the police who had visited the Home on 3 October 2018. Ofsted established on 5 October 2018 that a whistleblower had contacted the police on 3 October 2018 and made allegations of widespread and systematic abuse, which were they then developed in the following weeks and on which other witness statements now have been taken.

10. On 22 October 2018, Ofsted attended a multiagency strategy meeting organised by the Local Authority Designated Officer (LADO). The police identified four main allegations, based on what the whistleblower had reported to that date. These were:-

i. a staff member pulling the sleeping child off the bed and encouraging the whistleblower to kick them;

ii. new information suggesting that an incident at the Home in September 2017, whereby a child sustained and no case to answer may have been a non-accidental injury;

iii) child being dragged from his room by his throat and taken around the corner where he was punched and strangled other carers standing by and watching and failing to intervene

iv) carer(s) stuffing tea towels down children's throats

11. In addition, the whistleblower has given further information about other incidents, staff practices and an overall culture in which staff reporting abusive practice were not listened to and/or allegations of abuse were not properly investigated and/or covered up.

12. All 48 children/young people have now been removed from the Home, although some of them continue to attend the school, which we clarified in part depends on their placing Local Authority and the home location.

13. At the current time, the Home continues to employ 50 **115** members of staff, who still attend for work and are undergoing training activities. This includes staff who are currently being interviewed by the police. Those against whom there are allegations have been suspended.

Preliminary issues:

14. The Appellant did not object to a second updating witness statement from Detective Chief Inspector Richard Myszyszyn dated 2 December 2018, providing an update regarding the police investigation into the allegations of abuse since his previous statement dated 20 November 2018.

15. The Respondent did not object to the Appellant submitting a Facebook page and emails, submitted to show communication between key witnesses and question their motive.

16. Mr Saigal did not pursue an objection to disclosing the internal Ofsted Review dated 30 October 2018. Whilst in general, the Tribunal will take the view that internal memos (especially when as here legal advice was given) are privileged and not relevant evidence for a Tribunal which considers the matter afresh. However, a pragmatic approach was taken and to read the document saved time.

The Hearing

17. Detective Chief Inspector Richard Myszyszyn had made two statements: 20 November 2018 and updating statement dated 2 December 2018. He is the senior officer in the investigation which is being upscaled, with additional officers being allocated to the enquiry, which in a time of decreased resources means they are being taken off other duties. The enquiry will be time limited and focused. He had made arrangements for the evidence to be presented to the Crown Prosecution Service for review by early January 2019. That would be the end of the first stage of the investigation.

18. The allegations went back to May 2015. Since the initial allegation was made, four further witnesses had been seen with detailed accounts recorded and all agreeing to provide evidential statements. These provided further details corroborating aspects of the initial allegation from the whistleblower and some other incidents. On 29

November 2018, three persons were arrested on suspicion of abuse in the Home, interviewed under caution and released on conditional bail.

19. When cross-examined, DCI Myszyszyn confirmed that the bail condition not to be directly involved in the care of persons in a residential care home setting, was to prevent further offences.

20. He stated that 24 witnesses and 9 further suspects will be interviewed over the coming week.

21. Mr Nicholas McMullen is the Senior Inspector and decision maker. His statement is dated 21 November 2018. He confirmed that Ofsted have continued to keep the decision under review.

22. When cross-examined, the only point put to him was that he had only considered the risk to children rather than wider factors. His response indicated that he saw that as the key issue, but when re-examined he sought to elaborate that answer. He confirmed that there had been no discussion with the CEO of the Home.

23. Mr McMullen acknowledged that the Appellants had faced the allegations and not sought to minimise them. They had put forward conditions for the Tribunal to consider. His key point was that the prime issue and current nature of the concerns was a culture of systemic abuse. At this point it was not clear who was safe and who was not. The police enquiries would clarify this. To lift the suspension at this point would be premature. However, it would be kept under close review.

24. Mr McMullen acknowledged that this had implications for children's education/care. The Tribunal raised the issue that this profile of children in particular would find transitions and change difficult. He agreed. However, for children to move back and then to possibly have to move again would also be a risk factor.

25. By agreement the statement of Tracy Murty Social Care Regulatory Inspector dated 20 November 2018 was read. She set out what her role in the process been. At the Case Review on 30 October 2018 she stated that consideration was given to a range of possible options to ensure the immediate and ongoing protection of children and young people placed in the Home. This included consideration of the restriction of accommodation, non urgent suspension and monitoring visits.

26. We read the statement and heard evidence from Ms. Margaret Hill, the Chief Executive of the Home, which started over 40 years ago. She assisted the Tribunal setting out staff training and recruitment procedures, which she believed were rigorous and in line with current practice.

27. In her statement, she set out a detailed response to issues raised in Ofsted's Response re the Home's recent compliance, enforcement and investigation history. None of these issues were ongoing at the time the decision to serve the suspension was made and her evidence was that all has been acted on appropriately.

28. Ms Hill also responded to points of the Ofsted evidence re the inspection history of the five related Homes, in the context of a group that also has 19 registered adult homes, all of which have been rated as 'good' or 'outstanding'.

29. The Appellants had been provided with a note from the police and were working from these to respond to the specific allegations. They were not clear which the whistleblower had witnessed themselves and which were hearsay. In summary, the broken jaw incident in September 2017 had been thoroughly investigated. In relation to the incident in September, the member of staff had been suspended. e.

30. The Home had suspended members of staff named and identified in the allegations made by the whistleblower and had a 'no lone working policy for all remaining staff' until the police investigation was concluded.

31. Other proposals were made, which the Tribunal were invited to order as conditions. Whilst they will come at a financial cost, she confirmed that they would be put in place regardless of the outcome of the appeal. In particular there will be an increased management presence throughout the day and night. There is already an increased senior management presence. There will be an increased frequency of staff supervision, and refresher training. If children return to the setting, staff will be provided with a number for a new external whistleblowing line. .

32. Further, the Home will subject itself to further external scrutiny, including safeguarding audit, regular inspections by an experienced independent social worker, and an increased analysis and monitoring of all behaviour incidents.

33. When cross-examined, Ms Hill raised some issues about the whistleblower but did not seek to challenge the need for the police investigation.

34. The Tribunal read the detailed witness statement of Mr. Martyn Jackson the Registered manager of the Home. The representatives did not require him to be questioned, but the Tribunal were assisted by his evidence on the background of how children were funded and placed in the Home and linked school.

35. We additionally read the witness statement of Ms Donna Varley-Turner, the Chief Operating Officer of Kisimul group. Closing submissions. Essentially, she confirmed that resources will be made available suspension was having a significant impact on staff, the children accommodated at the Home and on the group's finances. Both she and Mr Jackson were having to field questions from concerned Local Authorities and parents who wanted to know when the Home would reopen

The Law

36. Section 20B CA 2000 provides for an emergency procedure when the notice of suspension takes immediate effect. It enables Ofsted to suspend a registration in an emergency when it has "reasonable cause to believe that unless it acts under this section, any person will or may be exposed to the risk of harm".

37. The period of the suspension can be extended on one or more occasions if sufficient reasons are given: see section 14A (4) CA 2000.

38. Section 21 CA 2001 provides a right to appeal to the Tribunal. On appeal the Tribunal steps into the shoes of the Inspector and the question becomes "as at the

date of the decision, does the Tribunal have reasonable cause to believe that the continued provision of care by the Appellant will or may expose any person to a risk of harm?"

39. The Tribunal does not make findings of fact this stage of the process but must have regard to the cogency and weight of the evidence, when determining necessity, justification proportionality.

40. The burden of proof is on Ofsted. 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 person will or may be at risk.

41. In the case of *Ofsted v GM & WM* [2009] UKUT 89 (AAC), the Upper Tribunal laid down the following guide lines:

- on an appeal the First-tier Tribunal stands in the shoes of [the Respondent]m and must consider whether grounds for suspension exist at the date of the hearing (paragraph 10)

-[The relevant regulation] sets a low threshold – that there "may" be a "risk" – but the fact that the threshold has been passed does not necessarily mean that the power of suspension.....must be exercised (paragraph 22);

-it is difficult to see on what grounds a suspension can be justified other than for the purpose of investigating a belief that there may be a risk or to allow time for a risk to be reduced or eliminated (paragraph 23);

-a suspension imposed on the grounds that there is an outstanding investigation can be justified only as long as there is a reasonable prospect of the investigation showing that further steps to reduce or eliminate a risk might be necessary

Submissions

42. We were assisted by the thorough presentations of two very experienced representatives. We briefly record the skeleton arguments and brief oral submissions, but have the points very clearly in mind. In short summary, the case for Ofsted was that the risk was rising and not abating during the course of what was a live an active police investigation. Conditions would not manage that risk, if it was right that there was systemic abuse and a failure of management. Ofsted had not acted immediately kept the case under review. There was a live and active police investigation, which supported that the allegations were more than fanciful or misinformed.

43. Mr Butler made a number of powerful points on behalf of the Kisimul Group. This is a large group which operated in compliance with the regulations. The need for police investigation was conceded, but this could take time. He emphasised that the Home should not be shut due to a sum allegations. He drew an analogy that if schools and hospitals were close following disclosures made by employees as to alleged incidents, then public services would be reduced drastically. He guided us to have regard to the significance of the allegations, whether they were current or historic, how they were corroborated, how the registered provider have responded to the allegations

to ensure that any risk to children was removed or reduced. There was a clear public interest in permitting the Appellant to continue providing care and education.

44. Given the financial operation of the Home, the effect of the suspension was particularly draconian. All 48 children had been removed and as time moved on, it became more inevitable that some would not return as their home Local Authorities found other options. We were reminded that the damage to the Appellant is irreversible and incapable of compensation. The financial consequences were very real given the high number of staff who were still being paid needed to be, in readiness for the return of this high needs group of children/young people.

Conclusions

45. For the reasons given below the panel concludes that the Respondent has proved to the requisite standard that the threshold for suspending registration was met on 31 October 2018 (when the Respondent suspended the Appellant's registration) and that this threshold continues to be met now. There are 2 elements to this test and each will be dealt with in turn below.

Is there reasonable cause to believe that the continued provision of such care by the Appellant exposes, or may expose, one or more of the children/young people cared for by that person to the risk of harm?

46. The whistleblower still works at the Home. Their motives and any collusion with other witnesses will form part of the police investigation. They did not use the internal whistleblowing process

47. The Home has taken the allegations seriously. They accept the need for a police investigation. They have taken legal advice. It is inevitably difficult for them to respond to allegations, when they are not aware of the finer detail but they have attempted to investigate and provide information.

48. There are four key allegations but it is clear that a number of other allegations are emerging. It is not just the evidence of the whistleblower (whose motives and possible collusion will have to be investigated) but other corroborative evidence is emerging from a number of witnesses. We cannot agree that the incident that occurred in September 2017, relating to a child with a broken jaw, which was internally investigated at the time could not be reopened if there was new or different evidence. In relation to the other incidents action was taken in relation to the staff involved. . The emerging evidence is of more recent abuse or incidents that were not properly investigated. We do not conclude it can be properly characterised as historic.

49. Evidence is emerging from a number of witnesses that there was systemic abuse and a failure of management to notice or listen.

50. In the light of all the aforementioned factors, the panel therefore concludes that there is reasonable cause to believe that the continued provision of care by the Appellant exposes, or may expose, a child or children cared for by the Appellant to the risk of harm.

Test 2 – Is the purpose of the suspension to allow time for steps to be taken to reduce or eliminate the risk of harm?

51. The purpose of suspension was to enable the police to investigate. There was no challenge to the fact that this is an active and live investigation, to which considerable resources have been deployed. This has been carried out by specialist unit in an expeditious and focused manner. That reflects the complex nature of the investigation, whereby a number of witnesses have to be interviewed. This is not a fishing expedition.

52. However, the panel is satisfied that there is reasonable cause to believe that the continued suspension remains necessary in order to allow time for steps to be taken to reduce or eliminate the aforementioned risk of harm.

53. The emerging evidence is not of 'one off' or isolated incidents. The evidence is not scant but mounting, so the risk remains. Time and further investigation will tell if it is in fact nothing, a few individuals or if there is a culture which allowed abuse to take place over a three-year period.

Proportionality

54. In coming to this decision the panel has balanced a range of factors, wider than those considered by Ofsted. Ofsted acted on legal advice and were guided to look number of factors.

55. Each party made a number of points, which in our analysis could be weighed either way. We must and do attach weight to the fact that this is a very vulnerable group of children/young people who cannot speak for themselves. However, many of these children/young people, most of whom have a diagnosis of autism will find transitions very difficult. We heard that some children are not able to attend the School since the suspension and some may now never return as alternative placements are identified. The suspension has ramifications for their families. We read the statement of one parent who set out the disruption to their child, their education and to their family life. These are undoubtedly real concerns with this cohort of children and ones we have weighed very carefully.

56. We take account of the Homes inspection record which is very positive. However, that is only one element although there is no current evidence from Local Authorities and parents of concerns. However, three Local Authorities have started a section 47 investigations.

57. We give positive weight to the fact that the Appellant has volunteered conditions which would allow for greater training and management scrutiny, which they will fund. This is in addition to retaining staff who are still attending to work, all of whom must be paid.

58. Having weighed up the range of factors, the Tribunal concludes that the continued suspension of the Appellant's registration pending the outcome of this process is necessary to protect children. The evidence is emerging from the current

police investigation goes beyond a few individuals. On current figures 10-15% of the staff are implicated. Giving the Home full credit for the steps it has taken and the openness is shown, it cannot be known at this stage how serious the risk is.

59. Overall, we have concluded that the suspension should remain in place but only until 8 January 2019. Delay must be avoided in order to minimise the risk to children. All the evidence will be reviewed. This should be the end of the first stage of the investigation. The evidence will be passed to the CPS but they may take some months to make a decision as to whether a prosecution will follow. However, the weight and nature of the allegations will be clearer and whether this is a systemic failure of management and culture or something much less, possibly concerning just a few individuals.

Decision

The appeal against the interim suspension is dismissed. The suspension is confirmand but the period of suspension shortened to 8 January 2019.

**Tribunal Judge M Lewis
Primary Health Lists/Care Standards
First-tier Tribunal (Health Education and Social Care)**

**Date Issued: 07 December 2018
Amended pursuant to Rule 44
Date: 21 December 2018**