

NCN: [2021] UKFTT 266 (HESC)

First-tier Tribunal Care Standards

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

[2021] 4341.EY-SUS VKinly

VKinly Hearing by video-link on 28 August 2021

BEFORE

**Siobhan Goodrich (Tribunal Judge)
Ms Maxine Harris (Specialist Member)
Dr Elizabeth Stuart-Cole (Specialist Member)**

BETWEEN:

DAR

Appellant

v

Ofsted

Respondent

DECISION

The Appeal

1. By notice dated 9 July 2021 the Appellant appeals against the Respondent's decision made on 7 July 2021 to suspend his registration to provide childcare on the Voluntary part of the Childcare Register, for a period of six weeks to 17 August 2021.

2. The right of appeal lies under regulation 12 of the Childcare (Early Years and General Childcare Registers (Common Provisions) Regulations 2009, ("the Regulations"). The Applicant seeks a direction that the suspension shall cease to have effect. The Respondent resists the appeal and requests that the decision to suspend registration be confirmed.

Attendance

3. The hearing was attended by:

- the Appellant, who was supported by Mrs J B, his former foster mother. We made clear that we would allow any time necessary for Mrs B and the Appellant to confer privately as needed.

- Mr James Norman, the Early Years Senior Officer who made the decision.
- Ms Suzanne Taylor, the Early Years Regulatory Inspector who conducted the interviews with MH and the Appellant. In her written evidence she analysed the main discrepancies/conflicts between their respective accounts and recognised the need for investigation in a number of areas.
- Ms McGrath, who represented the Respondent.
- Mr Hedges, an Ofsted observer.

Restricted Reporting Order

4. 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 instigator, the children or any care staff involved. We anonymise most names.

The Background and Chronology

5. The matters that led to the suspension order relate to the Appellant's role as a home carer for the three children of the "Instigator", MH. The children are aged 10, 12 and 14. They are all vulnerable having diagnoses of autistic spectrum disorder. MH is also vulnerable due to her own medical conditions that prevent her caring for the children full-time. She has her own carers.

6. We set out below the Respondent's summary of the complaint made by MH to the police on 1st July 2021:

a)The Appellant would stay at the home until 3am and would watch films with the children in their bedrooms;

b)He was physically affectionate with the middle child and was constantly kissing him on the cheek and forehead and cuddling him;

c)The Appellant became very intoxicated on alcohol at a family BBQ, he asked to sleep in a tent in the garden because he was unable to get himself home and then insisted that one of the children should stay in the tent with him overnight;

d)On a second occasion the Appellant slept in a tent in the garden and again insisted that one of the children stay in the tent with him. The middle child says that he woke up to the Appellant spooning him/cuddling him, which made him feel uncomfortable;

e) The Appellant took the children to his home, without the mother's permission and knowing that the mother's permission was not given;

f) Whilst the children were at the Appellant's home, he had a bath and came out of the bathroom wearing swim shorts and a bathrobe;

g) The Appellant persuaded the children to give him their spare PS4 and used it to communicate with the children via the headset at all times of the night, sometimes as late as midnight or 3am;

h) The Appellant would not respect the children's privacy and would enter their bedrooms without invitation;

i) The Appellant had used a knife to open a latch on the middle child's door to gain access to his bedroom despite the child asking for privacy given that he is going through puberty. This made the child very uncomfortable.

7. We noted the nature of the further matters raised by MH when interviewed by Ms Taylor. The Appellant was interviewed by Ms Taylor on 20 July and gave his account.

The Appellant's position

8. In summary, the Appellant's position is that many of the factual allegations are not true and/or are a distortion of what had really happened. He has responded to the allegations and has provided (undated) statements which were sent on 15 and 25 July 2021, and which include screenshots of contemporaneous evidence.

Legal Framework

9. The statutory framework for the voluntary registration of childminders is provided under the Childcare Act 2006. Section 69(1) of the Act provides for regulations to be made dealing with the suspension of a person's registration: see regulations 8-13 of the Regulations.

10. 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**."*

*(our **bold**)*

11. It is not necessary for the Chief Inspector, (or the Tribunal), to be satisfied that there has been actual harm, or even a likelihood of harm, merely that a child may be exposed 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”.

12. The immediate duration of a suspension under Regulation 9 is for a period of six weeks. It may, however, be extended to 12 weeks under Regulation 10. 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 remains necessary.

13. The powers of the Tribunal are that it stands in the shoes of the Chief Inspector. The first issue to be addressed by the panel is whether, as at today’s date, it 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 (the threshold test).

14. The burden of satisfying us that the threshold test under regulation 9 is met lies 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 may be exposed to a risk of harm.

15. We are further guided by **GM** at [21]

“Although the word “significant” does not appear in regulation 9, both the general legislative context and the principle of proportionality suggest that the contemplated risk must be one of significant harm. “

16. Even if the threshold test is satisfied by the Respondent, that is not an end of the matter because the panel must decide whether the decision is necessary, justified in terms of the public interest, and proportionate in all the circumstances.

The Hearing

17. We had read the indexed e-bundle in advance. We need not relate its contents in detail. We have also been assisted by the Respondent’s skeleton which the Appellant confirmed he had read. We were also assisted by his witness statements which explained his concerns.

18. There were no difficulties the video connection. In his oral submissions, the Appellant volunteered that he had been re-assured by the Tribunal process.

19. At the start of the hearing the judge took some time to explain the legal framework to the Appellant and, in particular, that the Tribunal is not

concerned with fact-finding, but with the assessment of risk in the context of nature of the allegations made. She explained the threshold test to the Appellant.

20. At this early stage, the Appellant said that the threshold test was clearly met. The judge checked to ensure his understanding. The Appellant said he has made some poor decisions, but he wanted to challenge that he is a risk to children. There was no previous history. He has never been fired before. He felt that he had been treated unjustly. He has been completely honest. He has worked with many families and with some for years. He wanted to work with Ofsted and under interim conditions. He considers that the allegations made by MH are a backlash because he had had to challenge MH. If she felt that he was a risk to her children, why had she not raised this before?

21. The judge explained that the focus of the hearing would be on the panel's assessment of risk in the context of the nature of the allegations made, and the issue of proportionality bearing in mind the impact of the suspension upon him. She explained the framework regarding suspension and the process for future decision making by the Respondent. In this regard she explained that the panel would wish to hear from Ofsted witnesses today about the scope of the further investigation intended, and the likely time scales involved.

The Evidence

22. We heard evidence from Mr Norman and Ms Taylor who each adopted their statements. With the Appellant's agreement the judge assisted him by asking questions that were relevant to his concerns and he asked questions himself.

23. In summary Mr Norman said that he understood the distinction between the Appellant's acceptance that the threshold test was met, and acceptance that he posed a risk. The appellant had made clear that he denied the allegation that he poses a risk to children. Ofsted have not made any assumptions but are still gathering evidence. The Appellant wants to work with Ofsted and would be difficult to conduct a fair and proportionate investigation without his engagement. Ofsted will certainly speak to the Appellant again about supplying evidence. The line of inquiry are: further information from the police (which is in the process of being set in train); other potential witnesses in the employment of MH.

24. In answer to the judge's query re text messages between the Appellant and MH and the Appellant and the children. Mr Norman said that the Appellant could supply further texts. It was an avenue that Ofsted will now consider.

25. In answer to the Appellant Mr Norman said that he was not aware that the Appellant had been told that he would not be able to provide character references. He confirmed that the Appellant could provide Ofsted with

character and other evidence which they would consider. It was in everyone's interests that evidence was gathered as quickly as possible.

26. Mr Norman also said that Ofsted will follow up regarding the section 47 report by Children's Services. This will provide background about MH and the working relationship with the Appellant. If it has an impact on the decision Ofsted would look to obtaining a witness statement from the local authority to put the report into evidence. Inquires would be made regarding the concerns raised by the Appellant with the council and with the social worker to MH.

27. Ms Taylor confirmed that she agreed with Mr Norman's analysis of what the further investigation would entail, and said that she had not reached any prior conclusions pending the further investigation. She kept an open mind.

28. The Appellant did not give evidence. In our view it was not necessary to require this formality because Ms McGrath said that she did not wish to ask him any questions. The Appellant, who had explained his position during the hearing, was content to address us after Ms McGrath made her final submissions.

The Tribunal's consideration

29. We will not refer to every aspect of the material before us, the skeleton or oral submissions. We have taken all the information before us into account.

30. We are not today involved in finding facts. Our task is essentially that of a risk assessment as at today's date in the light of the nature of the allegations before us, about which there is very strong dispute in part, and in circumstances where the evidence is necessarily incomplete because further investigation is required.

31. We add that whilst reference is drawn from case law to our "placing ourselves in the shoes of the Chief Inspector", we are an independent panel making a risk assessment as at today's date against the threshold set out in paragraph 9, and on the basis of the evidence available as at today's date.

32. In very broad outline, the Appellant believes that the complaint made to the police by MH was motivated because he had already contacted Nim at the Council and Xola, MH's social worker, because of his concerns about the children. One particular matter of concern to him was that F, one of MH's carers, had moved into the bedroom of one of the children with the result that the child had to sleep on a mattress on the lounge floor. If what the Appellant says is true, there were difficulties/differences and tensions between him and MH and MH's carers.

33. The Appellant is particularly upset regarding para 12 the Respondent's skeleton which stated that:

“The Police have undertaken checks of the Appellant as part of their investigation and have recorded that the Appellant was formerly known as Dean Ian Turner and under that name he is known to the police as a victim, suspect and IP for domestic related issues, harassment and stalking. Police intelligence suggests that the Appellant suffers from an attachment disorder and has been reported to have caused damage to his father’s house and car, tampered with gas and electric supply, assaulted his father and step-mother and openly masturbated in front of his father and held his then 7 year old sisters head underwater.” (sic)

34. The Appellant’s case is that he had informed Ofsted of his change of name. We are not fact finders, but this appears to be borne out by the Inspection Report in October 2020 (D 26) which reflects his current name. It also appears borne out by the fact when suspending the Appellant that Ofsted wrote to him using the new surname by which he is now officially known.

35. The Appellant’s position is that he is frustrated and distressed that reliance is being placed by Ofsted on police “intelligence” about events when he was a child, and with no apparent attempt to date or to consider other sources of information about his circumstances at that time, his later background or how, having been taken into care, he had since “turned his life around”.

36. The information provided by the police is that he was involved as “*victim, suspect and IP for domestic related issues, harassment and stalking*”. In our view this information is vague, unexplained and undifferentiated as to date and/or context.

37. The Appellant is concerned that the statements he has provided have not been considered by Ms Taylor with an open mind. He is particularly upset that the information provided to Ofsted by the police about his personal history has not been viewed objectively, or with an understanding of the real facts, context, or his background. He is concerned that the Regulator does not seem to understand that, given his past experiences, and having been a child in care, he has worked extremely hard to turn his life around. His case is that he understands safeguarding and would never place a child at risk.

38. The Respondent has satisfied us that the threshold test under regulation 9 (and applying the guidance on **Ofsted v GM and WM** [2009] UKUT 89 (AAC)), is met. Although “significant” harm is not required under Regulation 9, we consider that the significance of (potential) harm is relevant to proportionality. We also consider that “harm” is defined in wide terms under the regulations. In our view, embraces harm to the emotional well-being of a child.

39. Applying **GM**, we reminded ourselves that Regulation 9 sets a low threshold. However, the mere fact that the threshold has been met does

not necessarily mean that the power of suspension in regulation 9 is justified and/or should be exercised.

40. In our view the continuation of the suspension at the present time has a clear purpose, namely to enable Ofsted to complete its own investigation in order to make a decision as to whether steps can be taken to sufficiently reduce or eliminate risk, and to allow time for the statutory process involved in making a decision as whether the Appellant's registration should, or should not, be cancelled on the grounds of suitability.

41. The issue is proportionality, having regard to the serious consequences of what amounts to (interim) suspension for the Applicant pending further investigation – and which may well take considerable time.

42. The Appellant explained that he recognises that he has made some mistakes in judgement. He disputes that many events were as described by MH, and/or says that the context was different. It is acknowledged that he has cooperated, and wants to work with Ofsted. He says that he recognises that the home childcarer role is fraught with risks. He has raised the possibility of conditions to enable him to work, for example, in a nursery setting.

43. There is no provision under Regulation 12 to enable this panel to impose conditions instead of suspension. The Tribunal's power on appeal against a suspension decision is to confirm the decision or direct that the suspension cease to have effect. (As the judge explained there is, however, the power to impose conditions (if appropriate) in the event of an appeal against a substantive decision on cancellation – if such a decision were to be made.) Consideration of the prospects that any perceived risk might be capable of being mitigated in some way is, however, a means by which it is possible for this Tribunal panel to mentally cross-check the proportionality of suspension. We considered this. In our view, in the overall context of the allegations, it is not realistic for conditions to be considered by Ofsted until their further investigations have been completed.

44. We considered the impact of the suspension. We recognise that, if the suspension order is confirmed, it is likely it will be extended for another six weeks on or before its expiry on 17 August 2021, and may very well be extended thereafter until Ofsted are able to make a decision about whether it is necessary and proportionate to cancel registration, or whether conditions might mitigate risk in a manner sufficient to address any safeguarding concerns. We take fully into account that obtaining further information: from the police, from the council and from MH's social worker regarding the matters said to have been raised by the Appellant; and/or from children's services concerning the general background of MH and her family, may well take considerable time. The statutory process required for Ofsted to meet its obligations when considering suitability will take time thereafter.

45. We recognise that the length of time likely to be involved in further investigation will have a serious impact upon the finances, reputation and career of the Appellant, as well as on his well-being. He is very upset and concerned about the allegations, and that his career in childcare, about which he is passionate, is at risk.

46. Suspension is always a serious matter because of the adverse impact on livelihood, professional reputation and standing. We have taken full account of the personal and professional impact upon this Appellant, as well as the suspension of a home carer resource for families when, at inspection on 26 October 2020, the Appellant he was considered to be compliant with the VCR.

47. We have borne fully in mind the effect of his representations: against an obviously difficult childhood, he has worked hard to obtain his qualifications and build his career in childcare; there is no adverse history since his registration in 2018; he intends to provide evidence of his character and testimonials to regarding his work as a carer for children over the past seven or so years.

48. We balanced the harm to the Appellant's interests against the risk of significant harm to children who might be looked after by him whilst these allegations are investigated. Our assessment is that the allegations appear to have sufficient substance to show that there are serious concerns regarding what happened whilst the Appellant was caring for MH's children. However, we are not deciding disputed facts or making any decision on the rival versions of events. We noted that the Appellant accepts that he slept in the same tent with one of the children on one occasion at the home. He also accepts that he took the children to his own home, although he contends that this was at the request of MH. He has acknowledged that some of his actions lacked judgement in some respects.

49. In our view, the nature of the allegations before us, if true, may amount to an overall picture of "grooming". We consider that the serious nature and apparent substance of the allegations made is that suspension is necessary and justified in order to protect children from risk of harm, pending further investigation and decision-making.

50. The real issue is proportionality. We have carefully considered all the matters raised by the Appellant. We recognise the profound impact of suspension on him. We have balanced the Appellant's interests against the need to safeguard children from risk of harm. In our view that the need to protect the health and welfare of children outweighs the adverse impacts of suspension on the Appellant.

51. We consider that it is fair, reasonable and proportionate to the public interest in the safety and well-being of children that the Appellant's registration is suspended pending further investigation.

Decision

The decision to suspend registration is confirmed and the appeal is dismissed.

Tribunal Judge Siobhan Goodrich

First-tier Tribunal (Health, Education and Social Care)

Date Issued: 02 August 2021