First-tier Tribunal Care Standards

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

[2023] 5162.EY-SUS
Neutral Citation number: [2023] UKFTT 1072 (HESC)

Heard by video-link on 30 November 2023

BEFORE
Tribunal Judge Siobhan Goodrich
Specialist Member David Cochran
Specialist Member Denise Rabbetts

BETWEEN

RD

Appellant

v

Ofsted

Respondent

DECISION ON APPEAL AGAINST SUSPENSION

AMENDED pursuant to rule 44 to delete the reference to names in para 22 in their entirety so as to prevent identification

The Appeal

1. By notice dated 13 November 2023 the Appellant appeals against the Respondent's decision made on 9 November 2023 to suspend her registration to provide childcare on the Voluntary part of the Childcare Register, for a (further) period of six weeks to 20 December 2023.

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.

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 involved.

The Background and Chronology

4. The Appellant was registered as a childminder with Ofsted on 15 September 2021. She has previously worked in childcare for 16 years including as a manager in two nurseries.

5. The matters that led to the suspension order relate an allegation made by her son, S, who is aged 14.

6. In summary following concern expressed by a member of the public the police spoke to S on 26 September 2023. He had been in a public house. He had a mark to his face. He said that his mother had assaulted him by hitting him on the head and had thrown a book at him the previous evening.

7. We noted that S had been at school that day. It is not suggested that he had returned home after school. It appears that the allegation of assault relates to the previous evening. The Appellant has consistently denied that she assaulted her son at all. Her position is that there was an argument at the weekend (and not the previous evening) because she would not allow S to access TikTok.

8. S was placed in foster care under a voluntary section 20 agreement on 26 September 2023.

9. The Appellant notified Ofsted on 27 September 2023. It is not disputed that she made her own independent decision to close the setting for 2 days.

10. The first suspension decision was made on 28 September 2023 and was to last until 8 November 2023.

11. According to the Appellant the LADO (the Local Authority Designated Officer) the MASH (Multi Agency Safeguarding Hub) and the police concluded their investigations within a few weeks.

The Appellant's Position

12. In summary, the Appellant's position is that the allegation made by her son is not true. S has special educational needs and attends a special school. She struggled long and hard before an EHCP was provided. She has always had a very careful risk assessment in place regarding her child minding and S. She is very frustrated by the length of time it has taken for social services to assess and act. The current position appears to be that social services are working towards a therapeutic programme regarding the mother/son relationship with a view to S returning home. The programme has not yet begun. She is also concerned that the Respondent had extended the suspension in November 2023, notwithstanding that Social Services had no concerns with her care of her two younger children aged 2 and 5. The impact of the suspension was devastating. She had asked that she be allowed to provide childminding between 9 am and 3 pm but this was refused.

Legal Framework

13. 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.

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**."
> (our **bold**)

15. 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".

16. 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.

17. 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).

18. 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.

19. 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."

20. 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 and proportionate in all the circumstances.

Attendance

21. The hearing was attended by:

- the Appellant who represented herself
- Mrs Dominque Allotey, an Early Years Regulatory Inspector
- Mrs Champu Miah, the Early Years Senior Officer who made the decision.
- Ms Keeler, who represented the Respondent.

We also received the written witness statements of Ms Samantha Pewis and Ms Teresa Norman, both of whom are Senior Officers who had been involved in the decision-making process.

The Hearing

22. We had read the indexed e-bundle in advance. We need not relate its contents in detail. We were assisted by the Respondent's skeleton which the Appellant confirmed she had read. We were also assisted by the Appellant's responses to the matters raised as well as the supportive and impressive character evidence before us.

23. There were some initial difficulties with the video connection but these were resolved.

24. At the start of the hearing the judge took some time to explain the legal framework and, in particular, that the panel is not concerned with fact-finding, but with the assessment of risk in the context of nature of the allegations made and the issue of proportionality.

25. She explained the framework regarding suspension and the process for future decision making by the Respondent. To this end we heard evidence from the Ofsted witnesses about the scope of the further investigation intended, and the likely time scales involved.

The Evidence

26. We heard live evidence from Mrs Allotey and Mrs Miah who each adopted their statements and gave additional evidence to seek to explain their reasoning. The judge assisted the Appellant by asking questions that were relevant to her concerns and the Appellant asked questions herself. We also heard evidence from the Appellant.

The Tribunal's consideration

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

28. 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.

29. 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 allegation before us, about which there is very strong dispute, and in circumstances where the evidence is still incomplete/awaiting assessment because additional allegations have been made.

30. In summary Mrs Allotey explained that she was satisfied as to the Appellant's understanding of safeguarding and had been actively considering removal of the suspension but she then received information that S had made further disclosures of assault by the Appellant to the Family Support Worker at his school. It necessary to rise to enable the email exchange to be disclosed. In our view it was, to say the least, unfortunate that this evidence had not been provided as an exhibit before. It meant that the Appellant had to read and absorb distressing material in the middle of a hearing.

31. The impact of the information gleaned by Mrs Allotey was that in addition to the further seemingly historic allegations made by S, it appears that the 5 year-old sibling has said that the appellant hit S, and also that an older sibling had in the past alleged assault by the Appellant. We noted the Appellant's evidence that the older sibling currently lives at the Appellant's home although she stays at her boyfriend's home. The evidence suggests that whatever the historic issues may or may not have been she and her mother have a good relationship.

32. We accept that this new information regarding allegations of past assault raises additional issues that bear on suitability in the round.

33. 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.

34. 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.

35. The issue is proportionality, having regard to the serious consequences of what amounts to the further period of suspension for the Applicant pending further investigation.

36. 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. 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 at this particular stage.

37. We considered the impact of the suspension. The Appellant is very upset and concerned about the process involved. She immediately closed the operation of her child minding for 2 days. She would have wished to continue thereafter and even with reduced hours to seek to accommodate concerns but this was rejected by the Respondent. We noted that she now no longer wishes to be a child minder. She is now pursuing a very different employment opportunity given that she has recently been awarded her degree in Forensic Psychology. In our view the fact that the Appellant has another career path should not affect our objective consideration of the merits of her appeal.

38. Suspension is always a very 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 and those affected.

39. We balanced the harm to the Appellant's interests against the risk of harm to children who might be looked after by her whilst these allegations are investigated. However, we are not deciding disputed facts or making any decision on the rival versions of events.

40. As set out above we decided that on the face of the material before us the threshold test is met by the Respondent. In our view, the real issue is proportionality. In our view the statements relied on by the Respondent did not address this adequately. We had to seek and be provided with the email sequence between Mrs Allotey and the social worker. This sequence should have been exhibited within her statement. The following matters are relevant:

    1) This is, on any analysis, a case where social services have considered it appropriate for the Appellant to continue to care for the younger children in her family. Our experience is such that we consider it unlikely that this decision was made without, at least, a risk assessment and/or a Section 47 assessment regarding the interests of the Appellant's children aged 2 and 5 years old having already been made. This raises a serious issue as to why it is proportionate to continue to prevent the Appellant from looking after minded children of similar ages in her home.

    2) It became clear that the Respondent considered that it was the further disclosure made by S to the FSW of further historic allegations alleging assault by his mother that had affected the need for continuation of the suspension, as well as the current account of the 5 year-old and a historic complaint by an older sibling. However, there is no evidence that these matters have materially affected the risk assessment of social services regarding the needs of the appellant's younger children.

3) Some reference was made to the need to protect the public interest i.e. by reference to public confidence in the system of regulation. In our view the issue of public confidence has no real place when considering a suspension order. The issues are the potential risk of harm to minded children pending further investigation, and proportionality.

4) We reminded the Respondent of the need to keep in mind always the proper focus in terms of proportionality: what is needed for the Respondent to make a substantive decision as soon as reasonably possible bearing in mind that the serious consequences of suspension and that these are allegations may not be ultimately proven. Information was obtained over the midday adjournment that Social Services have now said that the single assessment (SA) will be available by 6 December. We had been informed by Mrs Allotey that she understood that there will then be a Child Protection Conference and that a Section 47 assessment may follow.

5) In our view there was a degree of confusion in the evidence regarding what investigation has already been, or might be, undertaken by social services in future. We agree that Mrs Allotey had diligently asked all relevant questions of the social worker but we consider that the overall analysis of the impact of the information provided was lacking.

6) It appears to be the case that the SA which is now imminent will be provided to the Appellant first. The Respondent's position was that the SA may provide key lines of inquiry that the Respondent might wish to pursue in an interview of the Appellant but that the Appellant has said that she will not agree to disclosure of the SA and/or any Section 47 report. Mrs Miah said that there are means by which such information can be obtained by Ofsted i.e. by the order of an appropriate court if necessary.

7) It appears to be the case that there may be a delay in the provision of the SA to the Respondent unless the Appellant consents. We can understand why the Appellant has reservations regarding the exposure of historic and sensitive material given the overall historic circumstances of the family. We are also aware that generic information is properly gathered by the Respondent when considering suitability with a view to considering its potential relevance. It seems to us that part of the problem is that the Appellant fears that historic and sensitive family information may not be viewed in proper context. We can understand why, given her experiences, she might hold such fears. The Respondent's approach has been to say that any refusal to agree to the disclosure of the SA and/or any Section 47 report is a breach of the duty of transparency and this, in itself, may provide potential grounds for a finding of unsuitability etc. In our view this is not a helpful or appropriately sensitive approach. The simple fact is that, as Mrs Miah agreed, it is not reasonable or proportionate to

expect the Appellant to provide a blanket consent to disclose a document which has not yet been provided to her. She needs to be given the opportunity to consider the SA and/or any Section 47 assessment when provided.

8) We noted that the Appellant said that she has always been happy for the LADO to provide information. It is clear to us that she has a good understanding of safeguarding issues and the importance of information sharing. In short she trusts the LADO. It occurs to us that there are means by which any issues regarding disclosure can be handled with tact and sensitivity – and possibly with the assistance of the LADO if needed.

41. Further and in any event, it is not, in our view, appropriate for the Respondent to continue to defer to the longer term the need to make its own decision regarding any substantive action pending any future Section 47 assessment regarding the needs of S or his siblings and/or pending any period of rehabilitation measures between mother and S. The "bottom line" regarding suitability may be whether the Respondent will be able to establish on the balance of probabilities that S was assaulted by his mother.

42. It appears to us on the evidence before us that there has also been a degree of confusion between the needs of S, and the issue of the risk posed by the Appellant to other children as a child minder. We consider that it is only reasonable to infer that social services decided in late September 2023 that it was in the best interests of the two younger children, aged 2 and 5, that they continue to live with their mother. That position had not changed to date. We are not persuaded on the material before us that there is a real prospect that this will change in the near future.

43. This is a case where the Appellant did not dispute the need for the initial suspension. We can see that the SA may provide information that is material to the respondent's potential lines of inquiry. However, in our view the Respondent's view that there is a need to keep in place a suspension order just in case evidence may change at some stage further down the line is not appropriate or proportionate. In particular, the prospect was raised by the Respondent that a care order might be imposed regarding S or his siblings which would be an automatic reason to render the Appellant unsuitable. As matters stand a care order for S seems remote. It seems even more remote that a care order is likely to be made regarding his siblings who remain in the Appellant's care. The fact is that if such order (s) were to be made then there are means by which the Respondent can take immediate and necessary steps.

44. In our view, there comes a time when, both in terms of fairness and proportionality, the Respondent has to make its own substantive decision regarding suitability. The Respondent's substantive decision-making process builds in adequate protection regarding any further information - were it to come to light - because a substantive decision (which affords a right of appeal) is made on the basis of the evidence as at the date of the decision. Further, on appeal against a substantive decision the Tribunal can take into account up to date evidence which post-dates the decision.

45. In overall summary, we are persuaded that, albeit on a very fine balance, the continuation of the order until 20 December 2023 is today currently justified in terms of proportionality. It may or may not be that the SA will then be available by then but it is today proportionate that a short period of time is at least permitted for the consideration of the SA which is said to be imminent. That said, come what may, the Respondent needs to focus on its own decision-making process regarding the Appellant's suitability and in the context that the Appellant is not considered to be a risk to her children aged 2 and 5 years old.

46. As we explained to the Appellant if the Respondent were to seek to impose a further period of suspension on 20 December 2023 then that decision will give right to a further right of appeal.

Decision

47. The appeal against the decision to impose suspension until 20 December 2013 is refused.

Judge Siobhan Goodrich

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

Date Issued: 06 December 2023
Date Re-issued: 22 December 2023