



## Care Standards

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

NCN: [2024] UKFTT 00226 (HESC)

[2024] 01057.EY-SUS

[2024] 01060.EY-SUS

Hearing held via CVP on 12 March 2024

BEFORE  
JUDGE CHRISTOPHER LIMB  
SPECIALIST MEMBER – M CANN  
SPECIALIST MEMBER – L JACOBS

IN THE MATTER OF AN APPEAL  
BETWEEN:

BRIGHT EYES NURSERY LTD

Appellant

-v-

OFSTED

Respondent

### DECISION

#### The appeal

1. This is a consolidated appeal (pursuant to the Order of Judge Khan on 27.2.24) by the Appellant against decisions by Ofsted to suspend its registrations as a provider of childcare at two separate premises, "Mount Pleasant" and "Park Street West". The periods of suspension are respectively from 7.2.24 to 19.3.24 and from 8.2.24 to 20.3.24. Mrs Shantelle Richards is the Nominated Individual (NI) in respect of both premises.

2. Ofsted suspended the registrations pursuant to section 69 of the Childcare Act 2006 and regulations 8 to 13 of the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 (the 2008 Regulations). In both cases the suspension was upon the basis that Ofsted reasonably believed that the continued provision of childcare may expose children to the risk of harm, and that the purpose of the suspension was to allow time for further enquiries to be made and/or for steps to be taken to reduce or eliminate any risk of harm.

### **The Hearing and Preliminary Issues**

3. The hearing was a remote video hearing. In the Tribunal's view, all issues could be dealt with effectively at a remote hearing, given the nature of the decision under appeal and the test the tribunal was required to apply. There were a few minor connectivity issues, but these were all quickly overcome.

4. The documents we were referred to were in an indexed bundle (265 digital pages), together with a Respondent skeleton argument. The Appellant made an application on 7.3.24 to admit 2 witness statements as late evidence (Katie-May Hawkins-Lee and Caroline Timms). The Respondent made no objection and the panel considered that it was fair just and proportionate to permit the evidence.

### **Attendance**

5. Mr James (not legally qualified) represented the Appellant. Mr and Mrs Richards, Mrs Hawkins-Lee and Mrs Timms attended. Miss Birks, solicitor, represented the Respondent (and Miss Hargreaves attended as an observer). Ms Elke Rockey, Ms Jacqueline Mason, and Mrs Julie Meredith-Jenkins attended.

### **Background**

6. The Appellant was first registered at Mount Pleasant in February 2020 and at Park Street West in October 2022. There have been 3 inspections at Mount Pleasant: in June 2022 with an overall outcome of "requires improvement", in March 2023 of "good", and in November 2023 of "requires improvement. There was a welfare requirement notice (WRN) in November 2023 relating to relating to individuals associated with the Appellant and staffing which had been met before the third inspection later that month (and we note the evidence of Mrs Richards in this regard referred to later). The events more directly giving rise to this appeal relate to 30 January 2024 and the actions relating to it on and after 6 February 2024, more fully referred to below. A student who had worked at Mount Pleasant reported on 6 February that a 1-year-old child (Child A) had been dropped on their head by the room leader Celia Lee while holding child A and going to pick up a bag at the same time. The student reported having seen injuries including a bump and graze on the head. The student said that the parents had been told that injuries were sustained in a fall by child A. The student had reported the incident to her advisor at university and on their advice then reported it to the local authority (LA) who then informed Ms Mason, Early Years Regulatory Inspector (EYRI) at Ofsted who was duty manager on 6 February 2024. Further detail is set out below and in the written statements of the Ofsted witnesses, but Ofsted then issued the suspension notices which are being appealed.

## Legal framework

7. Section 69 of the Childcare Act 2006 makes provision for regulations governing suspension of registration. The relevant regulations are the 2008 Regulations.

8. Pursuant to regulations 8 and 9 the Ofsted Chief Inspector may suspend the registration if he/she “reasonably believes that the continued provision of childcare by the registered person to any child may expose such child to a risk of harm”. We also note regulations 10 and 11 in relation to the period of suspension. Regulation 12 provides the right of appeal. Regulation 13 defines “harm” as in section 31(9) of the Children Act 1989, namely “ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another”. Section 31(9) also gives definitions of development, health, and ill-treatment.

9. The case of *Ofsted v GM and WM [2009]UKUT 89 (AAC)* confirmed that “risk of harm” means a significant risk of harm to a child when considered against the general legislative context and the principle of proportionality. It also confirmed that regulation 9 is expressed in ordinary English and means what it says.

10. The threshold is low – by reference to “may” and “risk of harm.” The tribunal steps into the shoes of the Chief Inspector as at the time of the appeal hearing. The tribunal makes no findings of fact; it exercises a risk assessment. The tribunal must either confirm the decision to suspend or direct that the suspension shall cease to have effect.

## Issues

11. The key question for the tribunal is whether as at the date of hearing a reasonable person assumed to know the law and possessed of the information and evidence would believe that a child may be at risk of harm.

12. We had a written skeleton argument from the Respondent. We had oral opening remarks from Mr James and oral closing submissions from both parties. The following two paragraphs are no more than a brief summary of the principal aspects of the parties’ positions.

13. The Appellant contends that the suspension is based upon facts that have not been substantiated or proven. Suspension is based upon the student’s report which has been accepted by the police as not being correct or fully correct. Mrs Richards (as NI) has not been able to fully investigate the facts (because of the bail conditions of the two employees who are still being investigated by the police, and Ofsted not making further investigations at present). The Appellant has not been given the opportunity to demonstrate remediation or put it into action and has a good history in relation to safeguarding. Suspension is disproportionate when considering the reputational and financial impact on the Appellant.

14. The Respondent contends that suspension was and remains reasonable and proportionate. The Appellant misunderstands the test to be applied and wrongly

seeks findings of fact upon whether the information/allegations of the student are proven on a balance of probabilities. Whilst Mrs Richards is no longer a suspect in the police criminal investigations, Ofsted has not been able to progress its own investigations because the police have requested them not to do so until the police have completed their investigations, which they have not yet done. The information currently available gives rise to a reasonable belief of a risk of harm. Mrs Richards has not shown an open mind as to the facts but minimises the seriousness of the information and presumes that the staff did not behave as alleged, and she has alleged that Ofsted has shown an “embellished” response to a “simple and well managed minor safeguarding issue”. The information refers to staff, for whose oversight and management she is responsible as NI, having covered up the true circumstances of a serious incident of harm and shown a lack of integrity. Mrs Richards has not suspended the staff members under investigation by the police or taken any other steps to prevent harm in the future.

## **Evidence**

15. We have considered all the written and oral evidence. This decision gives no more than a summary of the evidence.

16. All witnesses who gave oral evidence affirmed the truth of their evidence by oath.

17. Each of the three Ofsted witnesses have made written statements which are in the bundle and which they confirmed to be correct, except that Ms Rockey corrected the date in paragraph 8 from 7<sup>th</sup> to 6<sup>th</sup> February.

18. In her statement Ms Mason says that on 6<sup>th</sup> February she was the Early Years Regulatory Inspector (EYRI) duty manager and was informed of a referral by the LA relating to an incident when a 1-year-old child had been dropped on their head by a member of staff at Mount Pleasant. She then joined a Local Authority Designated Officer (LADO) strategy meeting. She provided the regulatory history and the LA indicated that they had concerns. It was agreed that the Multi Agency Safeguarding Hub (MASH) would contact the student who made the allegation. The police indicated that they would investigate. Later that afternoon she received further information from the LA following contact with the student indicating that the manager Caroline Timms had not referred the allegation to the LADO nor informed the parents of the possible severity of injury; that Mrs Richards as NI had overall responsibility; and that other staff had either witnessed the incident or become aware of it but had not followed whistleblowing procedures. After discussion with Diane Andrews, Early Years Senior Officer (EYSO), the case was reallocated to another EYRI who was based closer to the setting. She had no further involvement.

19. In answer to Mr James’ questions, she said that it was not her role to give advice to the any of the other agencies involved. Ofsted didn’t want to investigate further while the police were doing so. At the time of the strategy meeting on 6<sup>th</sup> February (ie before MASH had spoken to the student), the threshold for suspension was not met on the information available.

20. In her statement Ms Rockey indicates that she is a EYRI and was allocated this case on 7<sup>th</sup> February. She exhibits the emails and meeting minutes available before

her involvement. She notes that the information from the student was that a staff member called Celia had been holding the child with one arm and leant over to pick up a bag but dropped the child while doing so and the child landed on his head. The student witnessed the incident and the child had injury to the head including a graze and bump. Some of the staff were related and staff colluded and decided to tell the mother that the child had fallen over. The student raised concerns about the height from which the child had fallen but this was not relayed to the parents. The student left Mount Pleasant and reported the incident to her supervisor who advised her to contact the LA social care team. Her statement then outlines the registration history. She attended a case review meeting on 7<sup>th</sup> February at which it was noted that the police were going to investigate further. It was decided to suspend the registration of Mount Pleasant, reasons including that a child was harmed, and staff did not follow safeguarding responsibilities to refer to either Ofsted or LADO. She attended a case review meeting on 8<sup>th</sup> February when the decision was made to suspend registration of Park Street West, after Mrs Richards had been arrested by the police (paragraph 24). She notes that the police investigation and arrest of the NI indicated the seriousness of the incident including a possible cover-up. The overall responsibility of the NI for safeguarding was considered. Mr Richards (a director) was not considered a suitable alternative NI in the light of the WRN and his conflict of interest in the context of his wife's position. The police said that the NI and 2 other staff had been arrested on suspicion of child neglect and conspiracy to pervert the course of justice. She refers to further reviews and in particular on 27<sup>th</sup> February (after the police had confirmed that Mrs Richards was no longer considered a suspect) it was considered that Ofsted could not consider/discuss measures to reduce the risk of harm with the NI because Ofsted could not impede the police investigation. It was considered that the application to appeal indicated that Mrs Richards was minimising a safeguarding incident. The police continued to request that Ofsted pause their enquiries until the police had completed their enquiries to "ensure no cross-over between their investigation and Ofsted enquiries."

21. Most of Mr James' questions asked what advice or opinion was given by Ofsted to other agencies involved including the police. The response of Ms Rockey was that no opinion or advice was given, that meetings and contacts involved exchange of information and not advice to the others, and that each agency made their own decisions. Ofsted did not make further factual investigations whilst the police were still investigating.

22. Mrs Meredith-Jenkins is an Early Years Senior Officer (EYSO). She reviews the involvement of Ofsted and confirms the opinion that the information available indicates that a conflicting account had been given to parents which was a risk of harm based on potential head injury, that no first aid or medical attention was given giving rise to a risk of harm, that the child was allowed to sleep despite questioning as to whether this was appropriate giving rise to a risk of harm and a question as to whether staff could be relied upon to protect children, that the incident was not reported to either Ofsted or LADO, and that the integrity of staff in respect of safeguarding was called into question. She confirmed that the purpose of suspension was to enable further information to be obtained, and to assess risk of harm and any steps to mitigate or eliminate risk of harm. She states that the suspension has been and will be kept under review, and that the impact of suspension both on the Appellant's business and on children's care has been

considered, but that because of the significant safeguarding and suitability concerns relating to the NI there were no alternatives which would ensure children's safety and welfare. She confirms that the police have requested Ofsted to pause their enquiries and Ofsted is therefore unable to progress their own enquiries. She confirms that she still considers that the threshold for suspension is met.

23. In answer to Mr James' questions she confirmed that Ofsted assesses the risk of harm and does not at this stage judge whether allegations are proved or not. It was not the role of Ofsted to "validate" (Mr James' word) the information of the whistleblower. She confirmed that Ofsted would want to conduct their own enquiries when the police indicated that their investigation was complete. She confirmed that she considered that the appeal application was considered to indicate that the NI minimised the seriousness of the incident. Suspension allows time to make further enquiries.

24. We have the written statement of Caroline Timms, and she also gave oral evidence. Her statement refers to her experience and her role as manager of the Mount Pleasant nursery. She says that on 30<sup>th</sup> January 2024 she saw child A sitting on the lap of staff member Celia who filled in an accident form. She says that she spoke to the father when he collected the child and later to the mother. Her statement does not give detail of what happened on her understanding but implicitly indicates that it was a fall. In her oral evidence she said that the student did not speak to her. She said that staff were aware of safeguarding practice and were comfortable to share concerns or to whistle blow. In answer to a tribunal question she confirmed that the incident form at I21 was completed by her and was not the form completed by Celia.

25. We heard oral evidence from Mrs Richards. She confirmed that she was responsible for staff and had oversight of safeguarding, although not directly involved in day-to-day management at the site. The nursery manager oversees the site and Mrs Richards checks up. Recruitment includes references and DBS checks. In relation to the incident of 30<sup>th</sup> January she would expect a check of what had happened and then informing the parents. She accepts and understands Ofsted's requirements for safeguarding. She has in the past made reports to MASH. She explained that the WRN was in the context of her husband being a director of the company and registered at Companies House but playing no part in running the business in practice and that he had not been included in information given to Ofsted. She had supplied the relevant information after the WRN. She considered the suspension unfair/premature. She was only aware of the student's version of the incident a couple of hours before her arrest and had not been able to investigate (or take safeguarding measures) thereafter, either with the staff members who were arrested (due to their bail conditions) or with Ofsted. If the suspension were lifted, she would install CCTVs to make investigations easier.

26. She was questioned by Miss Birks. She said that when she was arrested, she did not have all information available. She understands the need for Ofsted to investigate. The child was not seriously harmed. She felt like she was the target when the matter was escalated. She has been cleared by the police. She does feel that there was exaggeration/embellishment to some extent. She is not now able to investigate further. She agrees that if staff have covered up facts that is serious, but

she doesn't know if that is the case. She understands that, after attending hospital, the child was considered to be well. She referred to the allegations about her personal involvement which she had demonstrated (to the satisfaction of the police) to be incorrect. In answer to tribunal questions, she said that she tried, so far as able to, to find out what happened on 30<sup>th</sup> January. She is not sure where she stands legally. She was told of messages on social media from the whistleblower which indicate different facts from those she reported to the safeguarding agencies.

27. We have both the written statement and oral evidence of Katiemay Hawkins-Lee, manager of the Park Street West nursery. She spoke of her qualification and experience and the high standards at Park Street West including standards of safeguarding. Her nursery has not any formal Ofsted or LA inspections. Miss Birks had no questions.

### **Conclusions with Reasons**

28. It is fundamental to our conclusions to reiterate the tests to be applied. When deciding this appeal, we are not making findings of fact as to what did or did not happen on 30<sup>th</sup> January 2024. This is not (for example) a decision upon cancellation of registration or even suspension after a full factual investigation by Ofsted. We are deciding whether we do or do not consider that there is reasonable belief that continued provision of childcare by the Appellant MAY (our emphasis) expose children to a risk of harm. It is a risk assessment. It is a decision based upon the evidence and information currently available.

29. We accept that it is reasonable for Ofsted not to undertake its own further investigations when requested not to do so by the police due to the risk of impeding or harming the police investigation. We note that the potential offences being considered by the police (and still actively being considered against two of the Appellant's employees) are serious. Ofsted may or may not remain of the view that there is a risk of harm after it has undertaken its own investigations, and any evidence available from other sources such as the police after police investigations are complete.

30. The two employees who are currently bailed by the police remain employees, and the Respondent points out that there has been no suspension of those employees pending the outcome of the investigation by the police. There are no defined proposals from the Appellant as to how the risk of harm will be minimised or removed in the context of the allegations currently being investigated and how the risk of a repeat of the incident alleged (if it is in due course shown to have happened as alleged) would be minimised or removed. We accept that the appeal application indicates that the Appellant has already come to a view that there was a "simple and well managed minor safeguarding incident" prior to there being a full investigation. In other words, the Appellant in the person of Mrs Richards did not have an open mind before investigation. If the allegations of the student as currently reported are correct there was an incident with potentially a serious risk of harm, a cover-up of the true facts, and a failure to take appropriate care in the context of a potential head injury or to give full information to assist the parents to do so. Those same considerations indicate reasonable grounds to question the integrity of staff in relation to

safeguarding. The NI accepts that she has oversight of staff and is responsible for safeguarding. The foregoing considerations give rise to reasonable belief that there may be a continuing risk of harm. Those considerations do not arise from factors individual to the specific premises but relate to the business as a whole and therefore to the Park Street west site as well as the Mount Pleasant site.

31. It appears that the Appellant largely proceeded upon the false basis that this appeal would be decided upon the basis of fact-finding as to the allegations made.

32. We accept that there is reasonable belief that continued provision of childcare may expose children at the Appellant's nurseries to a risk of harm. Suspension is proportionate in the context of the potential seriousness of harm and the lack of any defined measures to minimise or remove the risk.

### **Conclusion**

33. In all the circumstances we consider that it is appropriate to confirm the suspension of registration in this case.

### **Decision**

34. The appeal is dismissed.

**Tribunal Judge Christopher Limb  
Care Standards  
First-tier Tribunal (Health Education and Social Care)**

**Date Issued: 15 March 2024**

