

Care Standards

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

In the First-Tier Tribunal (Health, Education and Social Care)

Considered on Papers

On Friday 22nd August 2013

Before

**Deputy Chamber President Judge John Aitken
Specialist Member Ms Maxine Harris
Specialist Member Mr Richard Beeden**

HH

Appellant

v

Ofsted

Respondent

[2013] 2080.EY- SUS

Decision

1. This matter was listed for consideration on the papers. That is permissible under rule 23 of the Procedure Rules. However, not only must both Parties consent, which they have but the Tribunal must also consider that it is able to decide the matter without a hearing. In this case we have a good picture of the allegations made, the response and the level of risk present, from the papers. There appears to be no substantial factual dispute which might affect our decision (although of course we will not decide the facts of the main allegations rather whether such allegations have been made and matters which arise from that relating to risk) and we consider that we can properly make a decision on the papers without a hearing.

2. The appellant appeals to the Tribunal against the respondent's decision dated 2nd August 2013 to suspend the appellant's registration to provide childcare on non domestic premises on the Early Years part of the Childcare Register under Section 69 of the Childcare Act 2006, for six weeks until 12th September 2013.

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*, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the children or their parents, or the appellant in this case so as to protect their private lives.

Events leading to the issue of the notice of statutory suspension

4. The appellant is the registered provider of a Pre-School provision and two out of school clubs. The appellant is the manager of the pre-school and one of the school clubs. Children up to 10 would be cared for during the school holiday period.

5. Ofsted received information on 29th July 2013 that there had been an incident at the provision a few days earlier when the appellant had an argument with a member of staff. On the 29th that member of staff made allegations against the appellant concerning the wellbeing of the children. The appellant had reported this to the Local Authority Designated Officer.

6. The main concerns reported to Ofsted by the staff member were:

- a. That the appellant has fairly regularly physically restrained children in a chair.
- b. that the appellant points at, shouts and threatens children, that they would be told they could no longer attend
- c. Frequently inadequate staff ratios
- d. Inadequate supervision during outings.

7. An unannounced visit took place on 30th July 2013, some inadequacies were noted:

- a. Two children were sitting alone unsupervised.
- b. A child was on his own outside the provision without a staff member.

8. Further allegations have been made that the appellant's husband who also works at the provision has in effect been sexual harassing staff, using a mobile phone whilst driving children around. There is also overall a suggestion from some staff and former staff members that standards in the provision are generally in decline, with poor management. This view is supported by the comment of the Ofsted Inspector on 30th July during the feedback to the appellant "that if we were doing an inspection today they would have got an "inadequate" grading (page 64). When last inspected in 2010 the provision was found to be "outstanding"

The Law

9. The statutory framework for the registration of childcare providers is provided under the Childcare Act 2006. This Act establishes two registers of childminders: the early years register and the general child care register. Section 69 (1) Act provides for regulations to be made dealing with the suspension of a registered persons' registration. The section also provides that the regulations must include a right of appeal to the Tribunal.

10. Under the ***Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008*** when deciding whether to suspend provision the test set out in regulation 9 is:

“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.”

11. The suspension shall be for a period of six weeks. 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 is necessary.

“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 powers of the tribunal are that it stands in the shoes of the Chief Inspector and so in relation to regulation 9 the question for the tribunal is whether at the date of its decision it reasonably believes that the continued provision of child care by the registered person to any child may expose such a child to a risk of harm.

13. The burden of proof is 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 might be at risk.

Issues

14. Ofsted are concerned about the specific allegations but also the general decline in standards and the possibility that a culture in which reporting of a

serious incident may be discouraged.

15. The appellant denies the specific allegations made, but accepts that she lost her temper with a member of staff, needs to improve her practice, and has expressed a willingness to do so. She points to the lack of any evidence of physical harm coming to a child and no parental dissatisfaction.

Conclusions

16. Our role is not to resolve the overall factual situation. The allegations which are made are not wholly incredible, and in looking at the risk to children we have assumed they may be correct. There seem to be multiple indications that the provision is not as well run as it was previously. In such a situation irrespective of particular allegations there comes a point when the provision is unable to protect children from harm, we have born that in mind. We consider that in the circumstances of this case the test of risk of harm is not quite established. In coming to that conclusion we have looked at the nature of the allegations, in particular that it was not until there was a clear argument that anyone felt it was necessary to involve Ofsted, it has always been open to the present witnesses to report that children were unsafe. We fully appreciate that it is not easy to make such reports, and in a situation which may be described as incremental in nature it is not easy to identify when something moves from undesirable to unacceptable to unsafe, however we bear in mind that the act of suspending a registrant is very likely to cause a review of behaviour, and where that behaviour is not malicious towards children there exists the opportunity to draw back and improve the situation. Given the scrutiny this provision is likely to attract in the short term; that the specific issues like inadequate staffing levels, restraint and poor behaviour management techniques are rapidly correctable plus the appellants stated willingness to improve seem to us, on balance, to make it much less likely that any such failings that may harm a child are likely to occur at least in the short term.

17. We make no decision on the long term situation, whether it is sustainable at all, or requires new management and or training to be described as effective; that is a matter between Ofsted and the appellant, and if Ofsted feel appropriate for cancellation proceedings. Many of the criticisms made of the appellant whilst applicable to suspension are more relevant to cancellation, and this is of course frequently the case, looking after children is a demanding and dynamic business, and no doubt Ofsted will wish to carefully consider how the appellant runs the provision in the near future and whether any further degradation might cause a risk of harm to children.

18. We understand the concerns of Ofsted in this case; they could not be criticised for their actions. The combination of specific allegations and general management deficiencies do indicate a worrying situation. Looking at the

situation overall however we consider that in the short term that children minded by the appellant would not be at risk over the period we are considering.

Decision

The appeal against interim suspension is allowed, the suspension ceases to have effect.

**Judge John Aitken
Deputy Chamber President
Health Education and Social Care Chamber
Friday 23rd August 2013**