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

BETWEEN:

Ms G Masterson

Appellant

V

Ofsted

Respondent

[2013] 2132.EY

DECISION

BEFORE:

GILLIAN IRVING QC

JEFF COHEN

SALLIE PREWETT

REPRESENTATION:

The Appellant was unrepresented.

The Respondent was represented by Mr Toole of PS Law LLP

SITTING:

In Birmingham on the 3rd day of March, the 23rd of April, and the 2nd June 2014.

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DECISION

1. BACKCLOTH AND CHRONOLOGY TO APPEAL

Gillian Masterson was registered as a child-minder in 2003. She is registered to care for a maximum of 5 children. She is registered on the Early Years Register and also on both the compulsory and voluntary parts of the Childcare Register.

2. Prior to the concerns which gave rise to the Notice of Intention to Cancel Registration in July, 2013; there had been but one inspection of the Appellant in 2009. At our request that report was provided to us and we have taken its content into account when reviewing the decision and the proportionality of it. In summary in that inspection the service provided by the Appellant was described as “good” and there were no significant concerns. Between the date of registration and 2013, the papers reveal 3 previous occasions when concerns had arisen, they included exceeding the number of children permitted, conduct in front of the children and her management of aspects of children’s behaviour. In listing the concerns we do not start from the premise that the concerns were well founded but merely record them as part of the chronology of management of the Appellants registration as a Child-Minder.
3. In March 2013, the Appellant attended a training course entitled “Communicating and Engaging with Disabled Children”. The course was organized by Birmingham City Council. The Appellant complained to the organisers that she was suffering from a bad back which meant that she could not fully participate in the course. She also attended without any reading glasses and could not read the course material. In the opinion of

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those running the course the Appellant showed a worrying lack of awareness about child protection matters and safeguarding. They were also concerned that she was continuing to offer a child minding service despite her complaints that she was in severe pain. As a consequence they made a referral which was ultimately brought to the attention of the Respondent in April, 2013. The detail of that referral can be found at B72 and B73 in the bundle.

4. On the 28th May, an unannounced inspection took place by an agency inspector, Susan Hodges. We have that report available to us. Clearly the Appellant was unhappy about the unannounced inspection and she was found to be caring for more children than permitted. Although there were several positive aspects emanating from the inspection there was an identifiable concern that the Appellant appeared to lack understanding and insight into child development and learning. She did not have any plans or assessments for the children nor any mechanism by which their progress could be monitored. In particular because the numbers permitted had been exceeded, she was unable in the view of the Inspector to monitor the children's activities and she had insufficient time to attend to their individual needs. Areas of the home were not considered clean, in particular the kitchen. The Garden contained obstacles and obstructions and was also unsafe. The space was cramped. A number of actions were raised and we make specific mention of the requirement that she develop knowledge and understanding of the statutory framework for the Early Years Foundation Stage in terms of learning and development. She was required to monitor each child's progress and plan experiences catered to their respective individual needs. She was also required to complete a review of each child's progress when they were aged between 2 and 3 years of age and provide parents and carers with a short written summary of their child's development.

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5. It is the Respondents case that the Appellant failed adequately or appropriately to respond to the Notice to Improve.
6. On the 25th June, 2013 a further referral was received this time from a member of the public who was supported by her friend. They alleged and indeed subsequently it was accepted, that the Appellant was caring for too many children and took several to school at the same time. They described the Appellant struggling to control them and they suggested that the children could suffer physical harm by running out into the road as she was unable to manage the children properly. Those witnesses were called by the Respondent and were Holly Pierpoint and Karen Mooney.
7. In response to this on the 3rd July, Ms Jandu, an Inspector made an unannounced visit to the Appellants home. She was not made welcome and encountered rude and aggressive behaviour from both the Appellant and her daughter. Young children were present and saw and heard the exchanges. The visit was cut short by the Inspector who returned the following day. We heard evidence in relation to this and our findings appear below. It suffices to say that as a consequence of those attendances, on the 10th July the Respondent took the decision to suspend the Appellants registration. She appealed and the appeal was dealt with on the 21st August 2013. The appeal was upheld and the interim suspension overturned.
8. During the currency of the appeal against suspension, on the 12th July, 2013 a further visit was made by Inspectors Kinzett and Johnson predominantly to serve the interim suspension notice.
9. The Notice to Cancel her Registration was dated the 24th July 2013. The Respondent had and has a wide range of concerns surrounding the

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Appellants registration which include her behaviour around minded children, her attitude to officials from the Respondent and her ability to work openly and honestly with them, caring for too many children and, a lack of understanding into the educational, welfare and development needs of children. There were also concerns about her knowledge and application of safeguarding principles.

10. Following the success of the Appellants appeal against interim suspension, the decision which we have read, further inspections took place on the 25th September, 2013 and 28th October, 2013. The Appellants objections to the Notice to Cancel her registration were considered by the Senior Compliance and Enforcement Officer and the Notice of Intention to Cancel Registration was confirmed and served on the Appellant on the 15th November, 2013. The Appellant lodged an application with this Tribunal on the 25th November, 2013 to appeal against the same. It first came before the Tribunal in January 2014 by way of a telephone directions hearing.
11. Whilst waiting for the Appeal to be heard, which has been prolonged by the fact the Appellant is in person and a wholly inaccurate estimated length of hearing was provided, the Respondents have visited the Appellants home on the 5th February, 2014, and 2nd April, 2014. These were for the purpose of reviewing what if anything had changed and to ascertain what steps had been taken in response to the concerns which had been served upon her.
12. The Appeal hearing before us commenced on 3rd March and thereafter went part-heard until 22nd April and 2nd June, 2014.

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13. THE LEGAL PROVISIONS GOVERNING THIS APPEAL

Section 68(2) of the Child Care Act, 2006 enables the Respondent to cancel a person's registration if it appears:

- a. That the prescribed requirements for registration which apply in relation to the person's registration under that chapter have ceased, or will cease, to be satisfied.
- b. That the person has failed to comply with a condition imposed on his registration under that chapter.
- c. That he has failed to comply with a requirement imposed on him by Regulations under that Chapter.
- d. In the case of a person registered under Chapter 2 that he has failed to comply with Section 40(2)(a) or
- e. In any case, that he has failed to pay a prescribed fee.

14. In this case the Respondent asserts that the Applicant is in breach of Section 68 (2).

15. By virtue of Section 74(1)E, the Appellant has a right to appeal to this Tribunal. The legal burden remains vested in the Respondent who must establish the facts upon which it relies to support cancellation. It must also demonstrate that the decision to cancel the Appellants registration is proportionate and necessary. The standard of proof to be applied is the balance of probability.

16. The powers of the Tribunal can be found in Section 74(4) of the 2006 Act. Essentially the Tribunal may either confirm the Respondents decision to cancel or direct that it shall not have effect. If the Tribunal decides that cancellation should not have effect, it may impose conditions on the Appellants registration, or vary or remove any of the current conditions.

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17. THE LEGAL FRAMEWORK FOR THE REGISTRATION OF CHILD MINDERS RELEVANT TO THIS APPEAL

The Legal Framework for the registration and regulation of child minders is to be found in Part 3 of the Child Care Act 2006. It was previously governed by the Children Act 1989. The relevant provisions of the Child Care Act 2006 came into force on 1st September 2008. It is uncontroversial that these new provisions sought to elevate and regularize the standard of child minding in this country and the demands now made on child minders or potential child minders are significant.

18. By virtue of Section 32 CCA 2006, OFSTED, the Respondent, is responsible for maintaining the Child Care Registers, the Early Years Register (EYR) and the General Childcare Register (GCR).
19. Section 96 of the 2006 Act provides the relevant definition of early years and later years' provision, it is drafted in a manner which is most unhelpful and one must cross-reference to other Sections in the Act. In summary, early years' provision means provision of childcare for a child aged 5 and under on domestic premises for reward. Later years' provision means provision of childcare for a child between the age of 5 and 8 on domestic premises for reward.
20. Section 35 of the 2006 Act governs the application for registration by potential early years' child minders. The Respondent must grant the application if the Applicant is not disqualified from registration and it appears that any requirements prescribed by Section 35(3) are satisfied and are likely to continue to be satisfied.

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21. The requirements are prescribed by the early Childcare (Early Years Register) Regulations 2008 and include:
 - a. That the person registered is suitable.
 - b. That the Early Years Foundation Stage (EYFS) learning and development requirements are met.
 - c. That the EYFS welfare requirements are complied with.

22. The EYFS learning and development requirements and welfare requirements can be found in Sections 2 and 3 of the EYFS Statutory Framework. This was given statutory force by a number of provisions including Section 39 of the 2006 Act. The consequence is that compliance with Sections 2 and 3 of the Statutory Framework document is a requirement of registration of the Early Years Register.

The areas covered by the learning and development requirements are set out in Section 41(2) and 41(3) CCA 2006:

41(2) The learning and development requirements may specify in relation to each of the areas of learning and development:

- a. The knowledge skills and understanding which young children of different abilities and maturities are expected to have before the 1st September next following the day on which they attain the age of five ('early learning goals').
- b. The matters, skills and processes which are required to be taught to young children of different abilities and maturities ('education programmes') and
- c. The arrangements which are required for assessing children for the purpose of ascertaining what they have achieved in relation to the early learning goals ('assessment arrangements').

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41(3) The areas of learning and development are as follows:

- a. Personal, social and emotional development.
- b. Communication, language and literacy.
- c. Problem solving, reasoning and numeracy.
- d. Knowledge and understanding of the world.
- e. Physical development.
- f. Creative development.

The general welfare requirements include safeguarding and promoting children's welfare, ensuring suitable adults are looking after or having contact to children, ensuring that the premises are suitable, that records are maintained and policies and procedures are in place and that there is a plan for each child to ensure they have an enjoyable and suitably challenging learning experience.

23. Section 52 of the 2006 Act governs applications for registration on the General Child Care Register for later years' child minding.
24. The requirements for registration and regulations governing the provision of later year's child minding are contained in the Child Care (General Child Care Register) Regulations 2007. To a large extent these Regulations mirror those prescribed by the Early Years Register.
25. The Respondent is required to inspect early years' provision and later years' provision and follow every inspection by sending a letter to let the provider know whether or not they are meeting the registration requirements. It has the power to serve notices on a provider requiring improvements. The issue of a Welfare Notice is a serious matter and failure to comply with it can lead to Prosecution.

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26. Pursuant to Section 75(3)(f) CCA 2006 a person whose registration has been cancelled by the Respondent is disqualified from registration on either Register.

27. THE EVIDENCE AND OUR FINDINGS

27.1 On the first day of the hearing we heard from 4 lay witnesses, Holly Pierpoint, Karen Mooney, Lorraine Monaghan and Kelly Gardener. The witnesses Monaghan and Gardener were called on behalf of the Appellant. It was Ms Pierpoint who had made the referral on the 26th June 2013 concerning the number of children the Appellant had in her care and how she dealt with them when traveling to school. Albeit the Panel were somewhat divided as to the quality of this evidence and the manner in which it was delivered, having heard from the Appellant we were driven to accept that the Appellant was at times caring for more children than her registration allowed and consequently there were on occasions more children being taken to the schools/ nursery than was safe and appropriate. We acknowledge that nothing ever happened to any child whilst on this journey but there was a real risk that something could have happened and her ability to control or prevent a child running into the road was impaired. We are not satisfied that the evidence enables us to conclude that children were “pulled” along or spoken to roughly and loudly. The praise heaped upon the Appellant by Ms Gardener and Ms Monaghan and indeed that which is evident from the character testimonials filed on her behalf, do not detract from the fact that she was caring on occasion for too many children and that it was something that had been raised with her previously.

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27.2 Although we did not hear from the author of the initial referral in April 2013 we had a copy of it and heard from the Appellant. The concerns expressed by those running the course were understandable and it was appropriate that they raised them. The Appellant had overall a somewhat cavalier approach to complying with the requirements for ongoing professional training and attendance at courses to improve her skills and knowledge. Her attitude to the course in March 2013 was unsatisfactory. She really could not participate and she knew she couldn't before she went. She did not want to be charged a penalty fee for not attending. The importance of full participation was not understood by her. She was in some difficulty with her back but at the same time was still working full time as a child-minder and minding some very young children who would be physically demanding. At our request given we were told that the Appellant had been prescribed Methotrexate we asked that the Respondent arrange for her to be seen by a Consultant Physician which it did. By the time we returned in April 2014, the report obtained indicated that there was no medical reason which prevented the appellant caring for any child.

27.3 Turning then to the evidence concerning the visits in May and July 2013. We heard from Ms Johnson and Ms Jandu. It is important that when the Respondent is advancing a case such as this that it gives fair and balanced evidence. Mindful of the 2009 inspection conclusions together with the feedback from parents of children she was caring for, there were some positives to illicit about the Appellant in her role as a child-minder. We were unimpressed by the comment by Ms Johnson that she could not think of anything positive to say about the Appellants care of the children she looked

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after at all. Although the inspection in May had raised some concerns it was not all negative and that should have been properly acknowledged by witnesses for the Respondent.

That being said we have no hesitation in accepting the evidence of Ms Jandu about the visits in early July. Where her evidence differs from that of the Appellant, we accept Ms Jandu's evidence. She was a careful impressive witness who gave a balanced and temperate analysis of what she experienced, even seeking in her evidence to explain and excuse the Appellants wholly unacceptable response to her. Given the period during which the Appellant had been a child minder she ought to have known that the Respondent was duty bound to investigate referrals and to make unannounced visits when required. No official in the discharge of their official duty should have to tolerate abuse and antagonism. It is unprofessional. Where that occurs in the hearing or eyesight of children it shows a lack of insight and understanding into the effect of such conflict upon them and it is unacceptable.

- 27.4 Members of the Panel were frustrated by what at times seemed an over-dogmatic approach by Ofsted inspectors to some of the exchanges with the Appellant and her use of language when dealing with and describing the children and their families. Whatever the Appellants deficiencies it was unequivocal that she cared for all the children that she looked after and that she was held in high regard by the families she provided for. Despite there being opportunity for the Respondent to consult and communicate with families of cared for children that wasn't done. We accept that the

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weight that can be attached to what they had to say must be viewed carefully but nevertheless it was an opportunity that was missed.

27.5 However, even without the incidents in July 2013 and the breach of condition as to the number of children cared for, there was at the heart of this Appeal the assertion by the Respondent that the Appellant did not adequately understand the needs and development of children and in consequence did not appropriately provide for them. We were driven to accept that as a conclusion particularly in light of the Appellants own evidence. The evidence from the May 2013 inspection, which appears at B78 in the bundle, identified the need for the Appellant to develop knowledge and understanding of the statutory framework for the Early Years Foundation Stage learning and development requirements. She needed to assess and monitor each child's progress which she was failing to do. She was also failing to plan appropriately to enhance that development. There were no reviews or plans relating to each child's progress and nothing available to parents with the exception of a review of child RM, - see below. Of course one way of acquiring that knowledge was to attend a training course. Between May 2013 and May 2014 that did not happen. The Appellant sought to mislead us and the Respondent in both her written and oral evidence on that issue but it was clear that she had made little effort to address the failings in this regard.

In the September and October 2013 inspections, the inspectors found that daily records for attendees were not being kept either at all or in proper form. Some were being signed in advance of attendance. We are not completely satisfied that the Appellant

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actually understood why this was unacceptable and how important it was they were kept accurately. Even when she gave evidence to us in June 2014, she did not appear to understand the demands now made of child minders and how she could not rely on the fact that the parents were happy and she was doing what they wanted to excuse her failure to comply with the registration demands.

27.6. After every visit the Appellant would be served with a Notice to Improve which would set out what she had to do. A review visit would follow to see whether the requisite changes had been implemented. In February, 2014 an unannounced visit was made by Ms Johnson. Details of that visit and what was found is set out in her statement dated 12/02/2014 and we accept its content. The Appellant was not able to demonstrate how she planned activities across the seven areas of learning to promote learning and development. It transpired during the Appellants evidence that documents she had sent to the Respondent relating to child RM in November 2013, while detailing the individual needs of RM, had in fact been prepared by her daughter and it wasn't even clear that she had read them. Certainly the requirements articulated to her in May 2013 had not been met and indeed continued to be ignored up until the hearing concluded.

27.7 On the 2nd April 2014 there was a further inspection by Lorraine Lawton. This was an unfortunate visit as the Appellants grandson was ill and had to be taken into hospital. We have no doubt she was concerned and anxious. Nevertheless mindful of her own evidence we accept the Inspectors evidence that there remained a lack of insight and understanding of the core requirements of child

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mindings. This was not an unannounced visit and it was surprising that no planning had been undertaken in preparation for it. Again the Appellant sought to hide behind the belief that because the parents were happy she did not have to do anything else. Child-minding has changed. It is no longer akin to baby-sitting. The demands made now upon child minders and what they are expected to know and do is much greater than ever before. Many shall say that it is necessary if a child is to make the best progress he/she can.

27.8 In her evidence the Appellant sought to admit all the failings alleged. Indeed at times we were left wondering why the hearing had taken 3 days. She sought to say she was changing and had changed her approach. For example in relation to the attendance records she said she no longer filled them in in advance. She admitted she had not been on any training course and sought to persuade us that there had not been any vacancy to facilitate her attendance. We do not accept that. The Appellant was not a reliable historian and indeed was not open and honest with us or the Respondent. It transpired in her evidence that she had been communicating with Leanne Stokes of the Early Years Development Service in Birmingham. There had been no mention of this in any document or at any visit. It became clear why. Following a request from the Tribunal, Ms Jandu contacted the service and it was discovered that Ms Stokes had been visiting the Appellant at her request and trying to help her since July 2013. Indeed her first visit was on July 3rd the day she had behaved so badly to Ms Jandu. The Appellant had over the months cancelled

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visits planned to assist her. The Appellant had not been in touch with the service since 22/1/2014.

The Appellant was forced to admit that she had been given every opportunity to take steps to improve her knowledge about learning and development in the last year but had not. She accepted that her responses had been poor but sought to persuade she was doing her best. She accepted that there had been no improvement in her knowledge.

Faced with this it was transparent that the Appeal would not succeed.

28. The decision therefore is the Appeal is dismissed. There has been no improvement and insight remains partial at best.

29. In evaluating the proportionality of the decision it is important that a Panel has previous inspection reports as they can indicate a course of conduct and provide a benchmark from which to start. Also it is helpful to know at the commencement of a hearing when the Appellant was registered and upon which register. Perhaps these comments can be taken forward in future cases.

GILLIAN IRVING QC

**Tribunal Judge
Health Education and Social Care Chamber
Date of Issue: 03 July 2014**

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