

Care Standards

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

**Considered on Papers
On Thursday 31 July 2014**

BEFORE

**Tribunal Judge Melanie Plimmer
Specialist Member Graham Harper
Specialist Member Denise Rabbetts**

[2014] 2236.EY-SUS

BETWEEN

DONNA HENRY

Appellant

v

OFSTED

Respondent

DECISION

1. This matter was listed for consideration on the papers. That is permissible under rule 23 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('2008 Rules') however not only must both parties consent, which they have in this case, but the Tribunal must also consider that it is able to decide the matter without a hearing. In this case we have sufficient evidence regarding the allegations made, the response and the level of risk present, from the papers, and there appears to be no substantial factual dispute which might affect our decision. In the circumstances 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 4 July 2013 to suspend her registration as a childminder on the Childcare Register for six weeks to 15 August 2014 pursuant to section 69 of the Childcare Act 2006 ('2006 Act') and the Childcare (Early Years and General Childcare Registers) Common Provisions) Regulations 2008 ('2008 Regulations').

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 or their parents 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 a registered childminder since September 2013. On 4 July 2014 she notified the respondent that two foster children (brothers) that she had previously cared for had made allegations against her. These allegations included physical chastisement, locking them in their room, not letting them use the bathroom and making them use a dustbin as a toilet.
5. That day the respondent contacted the relevant Local Authority Designated Officer ('LADO'). She advised that the police intended to interview the children concerned on 9 July and the appellant after that. After a case review meeting that same day the respondent made a decision to suspend the appellant's registration. The respondent took into account that the appellant was not currently childminding but indicated that she might advertise to look after children during the summer holidays. On 7 July a notice of suspension was sent to the appellant.
6. On 22 July the respondent sought an update from the LADO who indicated that the police had not yet interviewed the children. The respondent spoke to the police on 24 July. They confirmed that the appellant had been interviewed and had denied the allegations and that the children would be interviewed in the next four weeks. The police offered a two fold explanation for the delay in interviewing the children: it is a historical allegation and does not take priority and the children are now accommodated out of area necessitating liaison with another police station. In a witness statement, Ms Troop, a Senior Officer at Ofsted states that she would be writing to the police to expedite the investigation.

Legal framework

7. The statutory framework for the registration of childminders is provided under the 2006 Act. Section 69(1) of the 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.
8. 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.”
9. “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”.
10. The suspension is 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.
11. 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.
12. 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.
13. **Ofsted v GM & WM [2009] UKUT 89 (AAC)** provides helpful guidance on the proper approach to suspension pending investigation. The Upper Tribunal made it clear that they did not consider that in all cases, a suspension imposed while there is a police investigation need be maintained until that investigation is formally concluded and that Ofsted may be able to lift the suspension earlier [27] depending on the

facts. If Ofsted wish to resist an appeal against a suspension on the ground that further investigations need to be carried out, it needs to make it clear to the Tribunal what those investigations are and what steps it might wish to take depending on the outcome of the investigations.

Findings

14. We make no findings of fact with regard to the allegations. The allegations have not been particularised in any detail in the material available to us but we have been told that they are considered sufficiently serious to justify both a local authority and a police investigation. Those investigations do not appear to be supported by police interviews with the children. We are concerned at this and the delay in conducting these interviews, but note that these will take place imminently and that the period of suspension comes to an end on 15 August 2014. The allegations are comprehensively denied by the appellant. The impact of suspension on the appellant is not particularly great in this case because she has not actually worked as a childminder. Although she has indicated an intention to possibly childmind during the summer holidays we understand that she has not advertised this and at this stage in the holidays it would be difficult to successfully advertise.
15. We consider in all of those circumstances the respondent is entitled, as do we in his place, to consider that there is an ongoing police investigation into such matters to justify a reasonable belief that a child may come to harm at this stage. In short, there is presently a reasonable prospect (but no higher than that) of the investigation showing that the suspension is necessary.
16. We do however make the following observation. An unreasonably delayed police investigation could not support such reasoning, which would then have to rely upon the actions and evidence held by Ofsted directly. In this case the investigation has begun only to a limited extent. The appellant has been interviewed but not charged. The children are yet to be interviewed. We are concerned at the delay in interviewing them and unimpressed with the reasons for this. We note that the appellant was investigated regarding an allegation of physical chastisement by one of the brothers in July 2013. This allegation was found to be unsubstantiated and the relevant local authority commended her on the good work that she has done with the brothers and the improvements they had made under her care. We have also considered the detailed contemporaneous logs provided by the appellant regarding any concerns arising from the brothers' behaviour and her detailed response to the allegations in her statement 24 July

2014. On the evidence available to us we are impressed at the appellant's commitment to caring for these children. They have had a very difficult childhood and have displayed very challenging behaviour. It is of considerable importance for all concerned that they are interviewed promptly by the police and a decision made on future steps.

17. We understand that an investigation is complex and often difficult, but the livelihood of the appellant and her ability to support and care for other children in need rests upon a speedy conclusion. The appellant has provided a number of very impressive references concerning her work with vulnerable children. We would expect to see in any further appeal that may come before us in this matter some clear evidence of progress with regard to the police investigation if that were still given as the reason to suspend or continue to suspend. The appellant is entitled to know that whilst she is suspended because of an investigation, that investigation is progressing appropriately. In most cases the police form a preliminary view of witnesses and from that the general merits of an investigation, and some allegations may end there. Knowing that an investigation is progressing in areas such as that is fundamental to it being fair to suspend in these circumstances. In that way Ofsted is able to discharge its duty to justify a suspension. As the Tribunal stated in **Ofsted v GM & WM** at paragraph 27:

"...a suspension imposed on the ground that there is an outstanding investigation can, in our judgement, be justified only for so long as there is a reasonable prospect of the investigation showing that such steps are necessary"

18. It is plainly necessary for the respondent to satisfy itself that the Police are actively investigating the case to continue to hold their reasonable belief. Thus far in this case the respondent has diligently sought updates from LADO and the police. We also understand that a request for expedition has been made.

Decision

19. The appeal is dismissed and the notice of suspension served is confirmed.

Judge Melanie Plimmer
Lead Judge Care Standards & Primary Health Lists
First-tier Tribunal (Health Education, Social Care)
Date Issued: 1 August 2014