

Care Standards

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

**Considered on Papers
On Monday 4 August 2014**

BEFORE

**First-tier Tribunal Judge Melanie Plimmer
Specialist Member Michael J Flynn
Specialist Member Wendy Stafford**

BETWEEN

LINDA WHITEHEAD

Appellant

v

OFSTED

Respondent

DECISION

[2014] 2238 EY-SUS

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 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 16 July 2013 to suspend her registration as a childminder on the Childcare Register for six weeks to 27 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) 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 has been a registered childminder since 2006. She entered into a voluntary agreement with her relevant local authority on 22 May 2014 in which she agreed that she would not allow her partner on the premises whilst childminding was taking place. The reason for this was because it was alleged on 21 May 2014 that he had inappropriately touched a primary school aged (but not a minded) child. He is on bail and his conditions include no unsupervised contact with any child under 16 years and to live and sleep each night at the home he shares with the appellant.
5. On 14 July the appellant indicated to an Ofsted inspector, Ms Flynn (in no way related to or known by Specialist Member Michael J Flynn) that she had breached this agreement by permitting her partner to be at the premises for a short period when a minded child was present because the parent was late picking up.
6. A case review was held on 16 July and Ofsted took the decision to suspend the appellant's registration.

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 against the appellant’s partner. The allegations have not been particularised in any detail in the material available to us but they are considered sufficiently

serious to justify both police bail conditions and a local authority entering into a voluntary agreement with the appellant. We have been told that the next bail hearing is due to take place on 22 September 2014.

15. We have considered the witness statements relied upon by Ofsted together with the appellant's reasons for appealing against the decision to suspend. It is to the appellant's credit that she brought the breach of the voluntary agreement to the attention of Ofsted. She has explained the circumstances leading to this breach in some detail. Her partner would generally be out of the house between 6am and 7.30pm to avoid any contact with minded children. A parent of a particular child was 'consistently late' to collect and the appellant asked her to sign a risk assessment regarding her husband being in the house. The parent signed this agreement. On one occasion that parent was exceptionally late and arrived at 8pm. The appellant has stated that her partner was only in the house at the same time as the child on this occasion but they had no contact with each other whatsoever because he remained upstairs.
16. We are concerned that the appellant did not seek to attempt to amend the voluntary agreement she had with the local authority in order to deal with the difficulties caused by late parents in all the circumstances of the case. We are also concerned that in her detailed reasons for appealing the appellant has not expressed any remorse for breaching the voluntary agreement or outlined any steps that she has taken to ensure that it is not repeated.
17. The appellant has undoubtedly breached the voluntary agreement currently in place. Whilst it is to her credit that she was open and honest with the relevant parent and disclosed the incident to Ofsted, we remain concerned that the appellant could and should have done more to avoid a breach of the voluntary agreement. There remains an ongoing police investigation to justify a reasonable belief that a child may come to harm at this stage unless there is strict compliance with the voluntary agreement. There is at present a reasonable prospect of the investigation showing that the suspension is necessary.
18. We do however make the following observations. First, we understand that an investigation of this type is complex and often difficult, but 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. 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”

19. Second, the relevant local authority was sufficiently confident in the appellant’s ability to safeguard children, notwithstanding the allegation against her partner, that they entered into a voluntary agreement. That agreement was breached on one occasion but the appellant has been honest about this. It may well be that further arrangements and discussions can lead to a more robust and practically workable voluntary agreement. Whilst on the evidence available we are satisfied that suspension is proportionate at this stage, this must be kept under review and it may be helpful for the relevant parties to consider any proposed changes to the agreement in order to ensure the safety of children.

Decision

20. 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: 7 August 2014