

Care Standards

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

Heard on 5 and 6 August 2014 at Oxford

BEFORE

**JUDGE MELANIE PLIMMER
MRS C WIGGIN
MS BRIDGET GRAHAM**

BETWEEN

[2014] 2188.EY

MARGARITA SERRANO BLANCO

Appellant

-v-

OFSTED

Respondent

DECISION

Representation: The appellant represented herself.
The respondent was represented by Ms Smith (Solicitor).

Reporting order

1. There shall be a Restricted Reporting Order under Rule 14(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('the 2008 Rules') prohibiting the publication (including by electronic means) in a written publication available to the public, or the inclusion in a relevant programme for reception in England and Wales, of any matter likely to lead members of the public to identify any child or its family mentioned in the appeal.

The appeal

2. This is the appeal of Ms Serrano, a registered child minder. She appeals against a decision of Ofsted dated 24 February 2014, to cancel her registration as a child minder. Ms Serrano has continued to childmind since that time as Ofsted did not consider that the threshold for suspension had been met.

Hearing

3. The appeal was heard over the course of two days. The parties had helpfully worked together to prepare a large bundle of extensive documentary evidence together with a Scott Schedule containing a summary of Ofsted's concerns with Ms Serrano's responses.
4. At the beginning of the hearing Ms Smith clarified the key ongoing issues of concern for Ofsted as being Ms Serrano's ability to meet the individual needs of and to properly safeguard each individual child in accordance with the Statutory Framework for Early Years Foundation Stage ('EYFST').
5. We first heard evidence from Ofsted's two witnesses: Ms Whinton, an Early Childhood Regulatory Inspector and Ms De Lastie, an Ofsted Senior Officer and the decision-maker in this case. Ms Serrano asked these witnesses questions with assistance from the Tribunal and by cross-referencing to the Scott Schedule. Ms Serrano has a very good command of English but she was assisted throughout the hearing from time to time with difficult words and phrases, by a Tribunal appointed Spanish interpreter. We are satisfied that Ms Serrano was able to fully follow the proceedings.
6. We then heard from Ms Serrano herself. She clarified a number of issues relevant to Ofsted's concerns. She also indicated that she would be prepared to continue childminding with conditions attached to her registration. Ms Smith then asked to take instructions. Upon return Ms Smith indicated that Ofsted might be in a position to agree to the imposition of conditions if that was what the Tribunal was minded to do. We indicated that we were considering the imposition of conditions. The parties were given further time to discuss this. Ms Serrano and Ofsted both agreed that they would be content with the following conditions:
 - a. Ms Serrano shall limit the number of minded children and shall cease to make use of an assistant;
 - b. The outside area / garden to her home shall be made fit for purpose and the trampoline, slide and swing shall be made safe or removed;
 - c. Ms Serrano shall seek voluntary or paid part-time employment / work experience / mentoring at a high quality child care provider;
 - d. Ms Serrano shall devise and implement daily planning and weekly targets.

7. Ms Smith clearly outlined Ofsted's view that the number of minded children should be limited to one child and outlined detailed reasons for this. The Tribunal indicated that we had a maximum of three children in mind with the caveat that the children should be at least 2 years old but that we would give careful consideration to Ofsted's position.
8. By the end of the hearing both parties accepted that this is a case in which it was appropriate not to cancel registration but for the Tribunal to order that conditions on registration are imposed, with a view to Ofsted conducting an unannounced inspection. There was however a disagreement regarding the number of children Ms Serrano should be permitted to childmind. We heard full arguments from both parties on this issue as well as the need for conditions generally, in light of Ofsted's concerns. At the end of the hearing we indicated that our written decision would follow shortly.

Legal Framework

9. The legal framework for the registration and regulation of childminders is to be found in Part 3 of the Childcare Act 2006. It is uncontroversial that these new provisions elevate and regularise the standard of childminding. The demands now made on childminders are wide-ranging and significant and the standards are high. They are required to comply with the EYFIS in a similar way to nurseries.
10. The requirements are prescribed by the Childcare (Early Years Register) Regulations 2008 and include "...that the person registered is suitable...". In assessing suitability it is relevant to consider the willingness and ability to comply with the EYFS. Section 68(2) of the 2006 Act enables Ofsted to cancel a person's registration if it appears that this requirement cannot be satisfied.
11. Section 74(1) of the 2006 Act provides a right to appeal to this Tribunal. The legal burden remains vested in Ofsted, which must establish the facts upon which it relies to support cancellation. It must also demonstrate that the decision to cancel the Appellant's registration is proportionate and necessary. The standard of proof to be applied is the balance of probabilities. We must make our decision on the basis of all the evidence available to us at the date of the hearing and we are not restricted to the matters available to Ofsted when the cancellation decision was taken.
12. The powers of the Tribunal can be found in section 74(4) of the 2006 Act. Essentially the Tribunal may either confirm Ofsted's 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 appellant's registration, or vary or remove any of the current conditions.

Findings of fact

13. This is a case in which we found the evidence of all three witnesses we heard from to be honest and straightforward. Where they did not know an answer or were unsure they were candid in making that clear. We found Ofsted's witnesses to be measured and even-handed, prepared to give Ms Serrano the benefit of the doubt, where appropriate. Both Ms Whinton and Ms De Lastie were keen to stress that Ms Serrano had a number of strengths: honesty, enthusiasm, commitment to childcare, good creative ideas. They were impressed by her polite, warm and welcoming personality and so were we.
14. This is not a case which particularly turned on competing versions of events. Ofsted have set out a number of concerns regarding Ms Serrano's implementation of the EYFTS. We found that whilst Ms Serrano genuinely believed that she was acting reasonably and in the spirit of the EYFTS, her implementation of these requirements in some respects has been lacking, particularly when minding a large number of children that included babies.
15. Ms Serrano was registered in November 2011 and received a good inspection in May 2012. However, Ms Whinton carried out an announced visit in January 2013 and identified a number of concerns including inter alia a failure to notify that she was working with an assistant and as such the relevant checks had not been completed. In those circumstances the assistant should not have been having unsupervised access to minded children. Ms Serrano was also not keeping legally required records and information in respect of all minded children.
16. Ms Serrano then received two inadequate inspections in March and September 2013. We appreciate that Ms Serrano does not agree with the outcome of these inspections. We were impressed with the manner in which Ms Serrano was able to put her own views across clearly, whilst respecting the views set out by Ofsted. Having considered all the evidence in the round we are satisfied that the conclusions in these inspections reflected Ms Serrano's practices at the time. The inspections were completed by two different Inspectors and set out concerns that had been identified previously and repeated subsequently.
17. At the March 2013 inspection a number of important strengths were identified including importantly that the children were happy, relaxed, confident and enjoyed their time in Ms Serrano's company. The provision was however considered inadequate because inter alia, at the time the childminder's assistant had not completed first aid training and was left alone with children; there was insufficient implementation of fire evacuation; Ms Serrano did not work in effective partnership with parents and other providers to help children meet their individual needs.

18. The reasons for the inadequate September 2013 inspection are of even more concern. There were some improvements regarding parental communication but Ms Serrano was found to be in breach of a number of legal requirements including the failure to keep accurate daily attendance records, information and records were not easily accessible and there had been a failure to obtain parents' permission to leave children with an assistant. Planning was considered weak as it was targeted toward the whole group rather than individual children and younger children were observed to have been left to cry in highchairs for an inappropriate length of time.
19. Following this inspection a number of actions were given on 8 November 2013 in the form of Welfare Requirement Notices (WRNs) and Notices to Improve (NTIs).
20. This was followed by an unannounced monitoring visit on 26 November 2013. This found a repetition of some of the concerns identified as recently as the September 2013 inspection. In particular, Ms Serrano had not recorded children's arrival times; she had still not obtained an up to date first aid paediatric certificate; there was ineffective implementation of behaviour management of children; a young child was left sitting in a highchair for a very lengthy period; the assistant did not know the emergency fire evacuation procedures.
21. At an unannounced monitoring visit on 17 December 2013 Ms Whinton identified some of those concerns as continuing. She has provided evidence which we accept that at times children's activities were not individualised in order to meet children's differing stages of development and sometimes children's behaviour was not managed appropriately to help ensure different needs were met.
22. Ofsted held a case review on 19 December 2013. Ms De Lastie told us and we accept that the decision to proceed with cancellation at this stage was a very difficult one. She was told by Ms Whinton that Ms Serrano had a number of strengths and was very enthusiastic. She however decided that Ms Serrano was unable to provide a high level of quality care consistently and that there had been ongoing and repeated concerns for nearly 12 months such that a decision to cancel had to be taken. A decision was taken to continue to monitor progress with a view to giving serious consideration to revoking the cancellation decision if Ms Serrano was able to demonstrate sufficient progress.
23. We accept that Ofsted approached Ms Serrano with an entirely open mind and were hopeful that she would improve, and approached subsequent monitoring visits with this in mind. We accept that during the course of 2014, and particularly since the decision to cancel Ms Serrano has made a number of improvements, albeit further improvements are necessary.

24. We have carefully considered the evidence relevant to the monitoring visits for the first half of 2014. We have paid particular attention to the more recent visits between April and June 2014 and have reached a number of conclusions.
25. First, at times the appellant was childminding a large number of children with an assistant who did not appear to be very experienced or proactive. We are concerned that this meant that Ms Serrano was unable to consistently meet all the individual needs of the younger children. Ms De Lastie attended the monitoring visit with Ms Whinton on 13 June 2014 because she wanted to see for herself whether there was any chance of revoking the decision as Ms Serrano had always been described as demonstrating some very positive attributes. Ms De Lastie was very impressed by Ms Serrano's enthusiasm and passion for childcare but she shared Ms Whinton's concern that Ms Serrano was unable to manage the large number of children sufficiently well to ensure that individual needs were consistently met. One younger child was left in a highchair for a lengthy period whilst Ms Serrano coordinated activities with older children. Although her assistant was with this child she did not have the skills or experience to engage appropriately.
26. Second, the appellant has become increasingly aware of the EYFS learning and development requirements and engaged the older children in creative activities. There was evidence that Ms Serrano was able to use fun activities to develop the children's mathematical and literacy skills. Third, although it took some time the relevant checks, first aid certificates and further online training have been completed. Fourth, Ms Serrano had made improvements regarding the records and information for the children although a fuller understanding of the reasons for these requirements is necessary. Fifth, Ms Serrano had actively and enthusiastically responded to Ofsted's concerns. For example, Ms Whinton was impressed with her introduction of greater privacy to toileting. In addition, a child who had been previously been placed in highchair for meals was seated more appropriately at a low level table. Sixth, whilst Ms Serrano's awareness of good practice was improving she struggled at times to cascade this to her assistant. Seventh, Ms Serrano needed to pay greater attention to improving the outside space / garden so that it is fit for purpose and safe.
27. We accept that Ofsted were entitled to have a number of concerns regarding Ms Serrano's understanding of the EYFS and her lack of experience in implementing those standards. We accept that Ms Serrano has not demonstrated:
- a. complete understanding of why those assistants whose suitability has not been completely checked should not have unsupervised contact with children;
 - b. that she has provided sufficient induction, training and supervision for assistants;

- c. that she has undertaken comprehensive planning to meet the needs of a large number of children of different ages;
- d. complete understanding of reasoning behind the requirements on records and information for children.

28. Although we find that Ofsted have demonstrated concerns in these areas, at present we are not satisfied that Ms Serrano is not suitable to be a registered child minder. We entirely agree with Ms Whinton that Ms Serrano has the potential to be a very good childminder in the future and that she would benefit enormously from experience with a high quality provider of childcare in order to develop her knowledge of and the practical means of implementing the EYFS. We have no doubt that Ms Serrano is thoroughly honest and trustworthy. She is committed to childcare and very enthusiastic. She has some very creative ideas to develop children. She has demonstrated to us that she is eager and willing to build positive relationships with parents, the local authority and Ofsted. She is keen to undergo further training and reacts well to constructive criticism.

29. We consider that Ms Serrano is suitable to be registered as a childminder provided that she maintains low numbers of children and does not employ an assistant. Having had the benefit of observing and listening to Ms Serrano and the Ofsted witnesses we find that in those circumstances cancellation is inappropriate and disproportionate at present. We acknowledge that this is a case in which Ofsted have been willing to give Ms Serrano a number of actions to improve and that she has not succeeded in achieving all of these. We however consider that there have been improvements and in all the circumstances it would be more proportionate to impose conditions on the registration of this particular appellant. After hearing from Ms Serrano and discussing this with her, Ofsted indicated at the end of the hearing that they agreed with this approach.

Conditions

30. We consider the following conditions to be necessary:

- a. Ms Serrano shall limit the number of minded children to a maximum of three and none of these children shall be below the age of two years old;
- b. Ms Serrano shall cease to make use of or employ an assistant;
- c. Ms Serrano shall seek voluntary or paid part-time employment / work experience / mentoring at a high quality child care provider;
- d. The outside area / garden to Ms Serrano's home shall be made fit for purpose and the trampoline, slide and swing shall be made safe or removed;
- e. Ms Serrano shall devise and implement daily planning and weekly targets for minded children.

31. We have taken into account Ofsted's strongly held view that any condition imposed by the Tribunal should limit the number of minded children to one. We note that Ofsted is concerned that any more than one minded child may lead to an unsatisfactory inspection. We are more optimistic that Ms Serrano has the experience and expertise to provide childminding for a maximum of three children provided they are aged two and over. Having considered the detailed evidence before us, we are of the view that Ms Serrano has struggled with younger children particularly when there is a mixed group of younger less mobile children and those who are older and able to take a more active role in the activities that she leads. We are concerned that younger children have been strapped in their highchair at times for longer periods than necessary or appropriate. We agree with Ofsted that experience in a high quality provider will assist Ms Serrano in the development of her skills generally and specifically in relation to under twos, and she is likely to benefit substantially from a period of mentoring / employment / experience in this regard. It would be particularly helpful for this to take place whilst Ms Serrano continues to childmind so that she has an opportunity to self reflect and implement good practice that she has experienced into her setting. We are satisfied that Ms Serrano is entirely suitable to childmind a small group of no more than three provided they are two years old and over. We note that the vast majority of concerns during the course of recent visits have arisen in relation to the younger children or because of weaknesses in balancing the different demands of the younger and older children. We also consider that minding one child at a time may not allow Ms Serrano to demonstrate sufficiently that she is able to balance and meet the needs of different children and may lead to a false or unrealistic picture emerging.
32. We are satisfied that Ms Serrano has been a little overly ambitious in the past in seeking to look after the maximum number of children by employing assistants. She has struggled to adequately train and supervise assistants. There have also been a number of issues regarding the completion of checks and what is expected when assistants need to be supervised.
33. We consider that Ms Serrano is able and willing to devise and implement more comprehensive planning for the children particularly if she is able to focus on a small group that does not involve under twos, and that she should seek to produce methodical plans. This planning is likely to be informed and influenced by her experience in a high quality setting. Ms Serrano made it clear that she is keen to sort the garden / outside space out. We consider this to be eminently achievable and necessary to secure compliance with the EYFS.
34. The conditions set out above shall take effect five weeks from the date that this decision is issued. This is to enable Ms Serrano to comply with the contractual arrangements she has with parents and her current assistant. We have been told and we accept that it is reasonable for

Ofsted to continue to monitor Ms Serrano until such time as she achieves a good inspection. We have also been told that Ofsted expects to conduct an unannounced inspection some time after four weeks from the date the conditions take effect. Any decisions taken after that inspection is a matter for Ofsted, subject to the appeal rights set out in section 74 of the 2006 Act.

Decision

35. We allow the appeal. The cancellation shall therefore not have any effect but we impose the conditions as set out at paragraph 31 above, which shall commence five weeks from the date this decision is issued.

36. There shall be no order as to costs.

Judge Melanie Plimmer
First-tier Tribunal Judge (Health, Education and Social Care)
Lead Judge, Care Standards & Primary Health Lists

8 August 2014