

Care Standards

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

[2016] 2738.EY-SUS

Before
Mr Hugh Brayne (Judge)
Ms Marilyn Adolphe (Specialist Member)
Mr James Churchill (Specialist Member)

BETWEEN:

ND

Appellant

-v-

Ofsted

Respondent

DECISION

Determined by the panel on the papers in telephone conference on 12 July 2016

The appeal

1. The appellant appeals against the respondent's decision dated 20 June 2016 to suspend her registration as a child minder for six weeks until 14 July 2016.

The hearing

2. The appellant asked for a determination on the papers. The respondent agreed to proceed without an oral hearing. We apply Rule 23 Tribunal Procedure (First-tier Tribunal)(Health, Education and Social Care) Rules 2008 and make this decision without an oral hearing.
3. The Tribunal had a bundle of papers including the decision to suspend, the appeal, ND's grounds of appeal dated 27 June 2016, and Ofsted's response to the appeal dated 5 July 2016. ND provided further written submissions and two supportive statements from parents. Ofsted provided witness statements and exhibits from Linda Williamson, an Early Years Regulatory Inspector, and Sarah Haylett, Early Childhood Senior Officer, South West Region, and a witness statement from James Norman, Early Years Senior Officer for the West Midlands

Region. Exhibits include toolkits (i.e. contemporary records of visits by Ofsted officers); a statement from the safeguarding officer for the local authority, Helene Schwartz; statement from the Designated Officer for Allegations (DOFA) for the local authority, formerly known as LADO Anton Hammond; a joint statement from Angela Brennan and Jean Carter, Childcare Co-ordinator and Childcare Officer respectively for the local authority; an investigation report into an incident on 28 January 2016; and an email from a former deputy manager, SC.

4. 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 appellant, any child minded by the appellant, or any member of the families of these individuals, so as to protect their private lives.

The background and events leading to the suspension on 20 June 2016

5. The role of Local Authority Designated Officer has been replaced with the role of Designated Officer for Allegations. Both terms are used in documentation, but for simplicity we use only the acronym DOFA.
6. The chronology which follows is not itself disputed, though the allegations contained in it are, in the main, in dispute.
7. The appellant ND was registered with the respondent in June 2010 as a provider of childcare on non-domestic premises on the Early Years Register, the compulsory part of the Register, and the voluntary part of the Childcare Register. She resigned this registration in April 2013.
8. She was reregistered on 23 March 2015. She manages a setting (which we describe by its initials, the LA Nursery), at which she currently employs three members of staff, her husband MD, a manager and a cook. The setting caters for children of varying ages, including some with special educational needs. The setting is owned by a limited company in which the shareholders are family members: those we can identify in documents are ND's father Mr Y and ND's brother MY. There is also reference to Mr and Mrs Y being involved as owner in an investigation, and it may be that this is the same Mr Y who is ND's father.
9. The provision has not been inspected since the registration in March 2015. It has, however, been visited by the respondent on a number of occasions following notification of concerns.
10. Ofsted's concerns are listed in the response. We ignore a complaint made in October 2015, as this is described by Ofsted as insufficiently specific.
 1. 3 February 2016: a complaint made by the Nursery's then deputy manager SC to the DOFA was passed to Ofsted. SC is reported to have said that MD shouted at a child and pushed a

ball into the child's face. ND suspended MD and arranged for an independent investigation on guidance of the Local Authority (rather than herself investigate her husband). Following the investigation a written final warning was placed on MD's file for six months.

2. 9 March 2016: a member of staff reported after one day of employment that the ND was shouting at children, and the setting was "chaotic". Ofsted visited on 5 April and found procedures and staffing issues to be satisfactory.
3. 18 May 2016: the DOFA reported to Ofsted complaints received from SC that
 - on 30 March MD had threatened to hit a child with a wooden block;, ND had, it was alleged, been told about this and had done nothing about it;
 - on 13 May 2016 an unqualified member of staff without a DBS check was present while another member of staff was changing nappies;
 - on the same date an unqualified member of staff was left with children unsupervised;
 - on 16 May 2016 MD shouted at a child with SEN and pulled the child by the arm, causing the child to be distressed and to ask to be left alone.

11. SC made further general complaints:

- MD and ND would routinely shout at children, use inappropriate language and smoke on the premises.
- an unqualified and unvetted member of staff, MD's sister, was left unsupervised with children;
- SC had been left to manage the provision alone despite not being qualified or sufficiently experienced to do so.

12. Ofsted visited on 20 May to investigate the matters raised by SC.

13.2 June 2016: Ofsted received a complaint that a parent had found a hand print on a child's back; enquiries revealed that this child had sustained three accidents in two days at the setting. The parent had removed the child. It was not possible given the delay in reporting the incident, the quality of photographic evidence provided, and the many possible causes of the reported marks, to reach conclusions on what had caused the marks.

14.20 June 2016: a member of staff reported to Ofsted that MD had yanked a child, causing the child's t-shirt to tighten around the child's neck, and that NC was shouting and swearing in front of children. When Ofsted inspector Vanessa Redmond visited the Nursery on 20 June 2016 none of the three members of staff present corroborated these allegations.

15. A member of staff present during Ms Redmond's visit on 20 June contacted Ofsted later that day to say she did in fact support the

allegations but had felt unable to be honest when speaking to Ms Redmond.

16. Ofsted was aware when NC was registered as a childminder that her brother MY was serving a custodial sentence for a Schedule 1 sexual offence (rape and sexual assault against a step child or children). NC had told Ofsted she visited him in prison with her own son, but would not allow MY to access the nursery on his release. NC does not accept her brother's guilt and is prepared to let her own children have contact. MY is a shareholder in the company which owns LA Nursery.
17. There are two ongoing investigations. The police are investigating a possible criminal offence by MD. Social services are conducting an assessment of risk (as we understand it, risk to ND's own child and her unborn child) under section 47 Children Act 1989.

The legal framework

18. The statutory framework for the registration of childminders 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.
19. Under the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 when deciding whether to suspend a childminder 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."
20. 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.
21. "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".
22. 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 the respondent's decision the respondent reasonably believed that the continued provision of child care by the registered person to any child may expose such a child to a risk of harm.
23. 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.

Tribunal's conclusions with reasons

24. We have carefully read all of the documents provided, and we have paid particular attention to the submissions and evidence provided by ND. Her case is, in summary, that there has been a vendetta against the nursery by former staff members; the nursery is highly valued by parents, and to avoid further disruption to these parents the suspension should be lifted; factual allegations are denied, save those involving MD when she suspended him. ND accepts that she needs more management training herself, but has tried and failed to get enrolled onto an on-line course. She will remove MD from any role involving contact with children. Her brother, while owning a share of the business, plays no part in its management.
25. We focus on the allegations contained in the response, though there are matters in evidence (such as an allegation of falsification of records) which also help us to address the concerns raised in the response. For the avoidance of doubt we do not consider every possible matter of concern which can be found in the evidence. This is not necessary to address the central question to which this appeal relates, which is whether the test set out in Regulation 9 above is satisfied.
26. The Tribunal is not required to make findings of fact where evidence is disputed. We remind ourselves that the test Ofsted must apply when suspending a registered provider, and when reviewing that suspension throughout the period of the suspension, is whether there is a reasonable belief that minded children may be at risk. During the suspension Ofsted must investigate that risk and reach conclusions as to whether that risk is no longer believed to exist, or whether in light of findings other enforcement action is required. On an appeal against suspension the Tribunal's task is to determine whether Ofsted has satisfied us that there is, at this point in the suspension process, a reasonable belief that there may be a risk of harm.
27. The concerns outlined in the appeal submissions and the response raise the following questions for the Tribunal:
- Is the evidence relied on by Ofsted so tainted by evidence of a vendetta by former staff that it is unreliable as evidence of risk?
 - In employing her husband, MD, to work in the nursery, and continuing to do so following a number of allegations against him, has ND shown a failure to understand and action her safeguarding concern responsibilities such that children may be at risk?
 - Does ND's admitted need for management training indicate that children may be at risk?
 - Do high staff turnover and present staffing levels indicate children may be at risk?

- Does ND's attitude to her brother's involvement indicate risk?
28. We take these questions in turn.
29. ND says one former member of staff is known to be wanting to get the nursery closed down. We do not have detail to enable us to determine how accurate this report is and the exact words said to have been used. ND relies on the very rapid staff turnover as evidence in support. Six members of staff have left between March and June of this year. In her appeal submissions she implies she feels let down by staff for whom she made great efforts to accommodate their particular requirements. She says allegations of shouting are fabricated. Some of the matters reported by SC had not been mentioned to ND before SC's complaints were made to Ofsted. She says the only time inappropriate language was used was by one of the staff, not by herself.
30. ND can point to no direct evidence of a vendetta or concerted action by the former members of staff. A reported belief that a nursery should be closed down, could alternatively be described as evidence of appropriate professional concern. We do not have to make a finding of fact on this question, but we can say with confidence that the feeling – probably genuinely held by ND – that former staff are hostile and critical does not necessarily undermine what these former staff report. Given the test we must apply, ND is effectively having to argue that former staff evidence is so tainted by malice that it could not possibly give rise to a reasonable belief that children may be at risk. This is a conclusion we could not reach. The allegations require investigation because they suggest there may be risk. It is Ofsted, or other statutory agencies relied on by Ofsted, which must investigate the concerns raised. If it then turns out that the whole raft of complaints has been fabricated (unlikely as that seems to us) then, but only then, would Ofsted conclude it has no reasonable belief a child may be at risk because of those allegations.
31. MD is subject to a final written warning. He is under police investigation. Despite glowing reports about his work from two parents, he is now reported by ND to have said that working with children is perhaps not for him. ND's case, following the suspension, is that MD will not work with the children again. ND would appear to acknowledge, through this decision, that MD's involvement may have given rise to risk, and she also explicitly acknowledges that a husband and wife team is not appropriate in this setting. To that extent the question of whether MD poses a risk has now been addressed, so long as Ofsted can be satisfied that measures will be in place to ensure that MD in reality ceases all opportunity to work with children.
32. However ND employed MD until her suspension and it is her own judgement and her own ability to have the level of insight required to safeguard children which must also be considered in light of the allegations against MD. It is of concern that she did not herself report MD's behaviour (which led to his warning) to Ofsted. It is of concern that there is a factual dispute between herself and SC over whether SC reported to NC the serious allegation that MD made threats to a child in

May 2016. There are two possible explanations. SC is lying, or ND is lying. If the latter, it is an extremely serious matter, which goes to the root of her ability to understand the consequences of not safeguarding children in her care. It is a matter which has to be investigated, not just because of the potential risk from MD and possible criminal behaviour on his part, but also because if SC is telling the truth, ND has ignored a complaint and is now lying to cover up that fact. It is clear to us, if not to ND, that such a serious allegation is a cause for a reasonable belief that children may be at risk. This does not mean we have concluded that SC is right and NC is a liar: the test is, does this allegation give reasonable cause for believing there may be a risk of harm, and the answer is that it does.

33. There are many issues, some acknowledged by ND herself, which suggest management weaknesses on her part, not least that she realised this herself when it was pointed out by SC in February 2016. She has so far tried to enrol on an on-line course, but evidence that this was not successful appears to be the totality of evidence of her trying to address this need. The rapid staff turnover may itself show a need to learn about managing people. Whether her own training needs relate just to her management skills also requires consideration if risk is to be reduced. It may be required to cover a much wider range of matters such as safeguarding, child protection, monitoring and supervision of staff, record keeping and reporting procedures, so as to adequately deal with the allegations of falsification of records, failures to report concerns to Ofsted, and the alleged failure to hear and act on concerns raised by her deputy manager about MD's behaviour. The need to address management issues should also be seen in the light of concerns about shouting (ND admits a need to reduce noise levels so voices do not have to be raised), and about "chaotic" procedures, raised by a member of staff who felt compelled to leave after only one day.
34. The general impression, notwithstanding very high praise from the two parents whose letters we were pleased to see, is of a manager struggling to keep on top of this nursery and its staffing. These management inadequacies do not in themselves create risk to children, but they would have to be shown to be addressed (or to be unfounded following further investigation) before the risks which are more directly evidenced can be accepted to have diminished or been addressed.
35. Management training may also have to address the issue of alleged intimidation of staff. It is of very great concern that staff have alleged that they cannot speak honestly with the regulator. This on its own creates a risk of harm if true, since a setting cannot be demonstrated to operate safely if vital information may be suppressed through fear. If ND is unaware that she has had this effect on staff, or that she and her husband together made staff feel this way, it may well account for her feeling that the staff complaints are then fabricated, but the way forward may, instead of blaming the staff and accusing them of a vendetta, be to learn how to create a climate of professional openness and the willingness to recognise and accept that complaints of abuse

happen in any organisation. The Tribunal were concerned that staff said they were unaware of vital whistle blowing policies to safeguard children in their care.

36. The nursery, without MD, currently would operate with two staff and ND, and that appears not to be viable. ND says that she is recruiting more staff, and if this is the sole remaining ground of concern, the suspension could be lifted once the required number of sufficiently qualified staff is in place. However at present, and taken together with the severe difficulty this setting has had retaining its staff, the present levels of staffing are likely to be inadequate. Inadequate levels of staffing present a risk to welfare and safety of children. Given allegations that an unvetted family member was left unsupervised with children – a matter still not resolved, as it is denied – we also have concerns that ND might be tempted to keep the nursery open with the help of unqualified people.
37. The role of ND's brother MY, a convicted sexual offender, in the nursery is that of shareholder, not participant. Ofsted is concerned that other family members are involved (we know that a Mr and Mrs Y interviewed staff concerning allegations) but this does not in itself mean MY would or might be involved. At present he is in prison, and there is no suggestion that his release is imminent. During any likely period of suspension we do not consider his involvement may cause risk of harm to children. Further the evidence shows ND readily disclosed MY's conviction when applying to be registered, and also has freely disclosed her own visits with her own child. If anything arises from the section 47 assessment this will be able to be dealt with at that time.

Conclusions

38. ND provides a nursery with which those parents who so helpfully contacted Ofsted about this appeal are extremely happy. It is, as they say and ND herself says, very disruptive for these arrangements to be suspended. However Ofsted's statutory duty is to safeguard all children who are placed, or may be placed, at the LA Nursery, and the duty may involve suspension while safeguarding and management concerns are investigated if they may cause risk. As Ofsted explains both in its letter setting out the reason for the suspension, and in its submissions to the Tribunal, the suspension must last only so long as the risk may exist. At the moment there are many matters not resolved – who is telling the truth, why staff cannot be retained, does ND have the management skills, knowledge and the level of insight required to protect and safeguard children's welfare and safety? The evidence shows ongoing concerns of intimidation of staff, harm to children caused by MD's behaviour, shouting at children by both MD and ND, all of which must be resolved. Until then this Tribunal, in the shoes of the Chief Inspector, has reasonable cause to believe children may be at risk of harm if the suspension is lifted.

Order

The appeal is dismissed.

**Judge Hugh Brayne
Care Standards
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 12 July 2016