

Care Standards

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

[2016] 2854 & 2855.EY-SUS

Considered on the Papers on 21 November 2016

Before

Mr H Khan (Judge)

Ms M Adolphe (Specialist Member)

Ms D Rabbetts (Specialist Member)

Mrs Lesley Bates and Mr Roger Bates Partnership

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal

1. The Appellant appeals to the Tribunal against the Respondent's decision dated 4 November 2016 to suspend their registration from the Early Years Register for six weeks to 15 December 2016 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').

Paper Determination

2. The appeal was listed for consideration on the papers, pursuant to rule 23 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('2008 Rules'). Both parties must 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 and the conclusions reached. In the circumstances we consider that we can properly make a decision on the papers without a hearing.

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 up to the issue of the notice of statutory suspension

4. The Appellants have two jointly owned private day nurseries, both known as Redroofs Day Nursery. One is located in Warmley, South Gloucestershire. This nursery operates from purpose-built premises in the grounds of the Appellant's home. It is managed by the Appellants daughter Ms Joanne Roach. The other nursery is located in the St George's area of Bristol. It operates from an extended detached house.
5. On 14 September 2016, the Respondent received a complaint that raised concerns about one of the Appellants, Ms Lesley Bates. The complaint originated from someone who was at the time a member of staff at the nursery in South Gloucestershire. The nature of the allegation was that on 9 September 2016, Ms Bates had forced a three-year-old child with special educational needs (undiagnosed global delay) to eat her main meal by forcing her mouth open, squeezing her cheeks and putting the spoon with food on it into the child's mouth. The member of staff described the child as being unable to communicate, talk or walk and the incident had left the child extremely distressed. The member of staff had also reported this to staff at City of Bristol College who had reported it to the Local Authority Designated Office ("LADO").
6. On 15 September 2016, Ms Roach notified the Respondent that a member of staff had made an allegation about Ms Bates. She did not feel it was appropriate for her to investigate her mother and she arranged for someone independent to investigate the allegation.
7. On 7 October 2016, as the Respondent had not received the outcome of the investigation, Ms Redmond, Early Years Regulator Inspector, telephoned Ms Roach to chase up the investigation report. Ms Roach was not in the office.
8. On 11 October 2016, an unannounced visit took place at the nursery at Warmley, South Gloucestershire. The Respondent was made aware that there were previously allegations of children being force-fed. One allegation had been made in June 2014 in relation to the Deputy Managers child and which also involved Ms Bates.
9. The Respondent was also made aware of an incident at the Appellants other nursery in Bristol which occurred in March or April 2012. It was brought to the attention of the LADO for that area in August 2013 by a

former member of staff. That allegation centred around Ms Bates putting food on a spoon, opening a child's mouth and force-feeding them. The result is said by Ms Rogers to have left the child "*gagging and being sick*".

10. On 13 October 2016, The Respondents officers (Ms Rogers and Ms Haylett) visited the nursery in Warmley, South Gloucestershire and were given the assurances that Ms Bates would not be on the premises at either nursery while the Respondent completed its investigations. As a result of the assurances made by the Appellants, a suspension was not imposed. The Respondent believed that the risk of harm to the children at the nursery had been minimised and a Welfare Requirements Notice was served on the provider.
11. A strategy meeting was held on 19 October 2016. At this meeting, information was shared about previous allegations. The allegations included complaints which had been made about Redroofs nursery in Warmley and St Georges relating to alleged force-feeding.
12. On 31 October 2016, LADO was informed that the police were taking no action in relation to the complaints. The Respondent's officers visited the premises on 3 November 2016 and interviewed 11 members of staff. During the interviews, the Respondent was informed by the staff that since 13 October 2016 when Ms Roach had assured the Respondent that Ms Bates would not be at the nursery premises, Ms Bates had in fact "*regularly*" been present at the premises.
13. Furthermore, staff members informed the Respondent that they had seen Ms Bates making a child drink her milk. It was alleged that Ms Bates walked into the room and wanted to know why the child had not drunk her milk. The staff member stated that Ms Bates had told a child, in an assertive way, to drink her milk. She alleged that Ms Bates picked up the cup and placed one hand on the back of the child's head while trying to pour the milk into the child's mouth. The child did not open her mouth and the milk spilled down the front of her clothing.
14. During those interviews, further allegations were made regarding Ms Bates concerning her behaviour towards young children at mealtimes involving food. The members of staff also alleged that they were not confident to challenge Ms Bates over the incident even though they had been told by Ms Roach that Ms Bates was not to interact with the children. The staff members did not feel comfortable reminding Ms Bates that she was not supposed to enter the premises or interact children.
15. As a result, on 4 November 2016, the Respondent made the decision to suspend the registration at both nurseries. This was on the ground that Ms Bates has been on the nursery premises and interacted with children. The Respondent alleges that as a result, it could not be

satisfied that children attending the nursery would be safe from a potential risk of harm.

16. The Respondent acknowledges that although Ms Bates visits the St Georges nursery less often than the Warmley one, she was still known to visit on occasions and therefore a similar decision was taken in relation to both nurseries. The Respondents view is that the concerns about the practice and the culture of the nurseries appeared to be endemic to both settings. This was on the grounds that both settings use the same policies and procedures and staff have had the same level of training.
17. The Respondent claims that the decision to suspend the registration has been made on the basis that the children may be exposed to risk of harm. The decision was taken to allow for all matters to be investigated. The investigations into both nurseries is continuing and Ms Bates was interviewed about the allegations on 10 November 2016. The outcome of those further enquiries will inform the Respondent's decision as to whether the suspensions need to continue, and whether any further enforcement action is necessary.
18. As the appeals concerned broadly the same issues and was based on broadly the same evidence we dealt with it as one appeal.

Legal framework

19. 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.
20. 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.”
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 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.

23. 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.
24. 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.

Evidence

25. We took into account all the evidence that was presented in the two bundles. We have summarised some of the evidence.
26. The Appellants case is that children have been attending their nurseries for 37 years and they have had a "*good*" or "*outstanding*" report from the Respondent. They do not think this has been taken into account. Ms Bates is said to be devastated at the thought of anyone thinking she would intentionally harm a child.
27. They accept that Ms Bates did occasionally pop into the nursery to speak to staff as she lives next door but at no point was she part of any staff/child ratios and/or working directly with children. The Appellants acknowledged that Ms Bates was on the premises on 21 October 2016. Furthermore, they explain the incident with the child involving milk as an occasion where she went into the building to say goodbye to her staff before she left on holiday and to check that they were okay. Whilst in the building, she "*instinctively reacted*" when she saw children in small groups having their drinks and helped a child with her cup, putting it to the child's mouth and asking her to drink it after she had refused to do so.
28. Furthermore, they have offered to suspend Ms Bates from the nursery premises completely whilst the investigation continues and that this suspension will be upheld by their staff. They argue that this suspension will carry more force than the "*voluntary agreement*" they had with Ms Bates previously.
29. Furthermore, the Appellants had provided copies of their response opposing the appeal which sets out in detail their responses to the Respondents position. There were also some testimonials from some parents confirming the standard of service provided.

30. The Respondents position is set out in the detailed statements of their officers including Sarah Haylett, Champa Miah, Heather Morgan, Lorraine Sparey and Vanessa Redmond.
31. The statement of Vanessa Redmond confirmed that the current proceedings had started after an allegation was made that on 9 September 2016, Ms Bates had forced a three-year-old child with special educational needs to eat her main meal by forcing her mouth open, squeezing her cheeks and putting the spoon with food on it into the child's mouth. There had been other complaints which allege historical force-feeding of children by Ms Bates and which were all similar in description.
32. Ms Rogers stated that the Respondent had accepted the Appellants assurances given on 13 October 2016 that Ms Bates would not be on the premises while the investigation was continuing. This was the reason that an earlier suspension had not been imposed. However, since then the Appellants own staff had confirmed that Ms Bates had worked directly with children after the 13 October 2016.
33. Furthermore, on one occasion (21 October 2016) it was alleged that Ms Bates walked into a room at the Warmley nursery and wanted to know why the child had not drunk her milk. The staff member had informed the Respondent that Ms Bates told a child, in an assertive way, to drink her milk. She alleged that Ms Bates picked up the cup and placed one hand on the back of the child's head while trying to pour the milk into the child's mouth. The child did not open her mouth and the milk spilled down the front of her clothing. This practice was concerning enough for staff to report it to the deputy manager.
34. The reason for the suspension was that they believed that the continued provision of childcare to any child may expose such a child to a risk of harm.

The Tribunals conclusions with reasons

35. The standard required to justify a suspension is not a high one. During the short period of the suspension it is for the Respondent to investigate matters to determine if there is a case for longer-term enforcement action, or whether the outcome of the investigation is that there is no longer reasonable cause to believe children may be harmed.
36. We acknowledged the Appellants had been running nurseries for over 30 years. We had no reason to doubt that the nurseries involved had received "Good" and/or "Outstanding" ratings by the Respondent.
37. However, we reminded ourselves that the test for the Tribunal was 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. We concluded that it would for the reasons set out below.

38. Although the current investigation was started after an allegation was made of an incident which took place on 9 September 2016, there have been a number of allegations made. We acknowledge that some of the complaints are historical. However, the allegations are all similar in their description. The Respondent accepts that it did not look at the investigation that was completed in 2014 with sufficient rigour and the gaps in the investigation completed by the provider were not identified.
39. Furthermore, we took the view that these were serious allegations that were made against Ms Bates. It involved children, at least one with a medical condition and alleged that they were being force fed. The allegations affect both nurseries and there is a common thread of forcing children to eat, not meeting their needs and making children do what they do not want to do. In addition, these were allegations that were made by the Appellants own staff. They needed investigating and Ms Bates needed to allow time for that investigation to be completed.
40. Furthermore, we concluded the Respondent's initial response had been proportionate at that stage. It relied on assurances given by the Appellants about not allowing Ms Bates on the premises when assessing whether any children were at risk of harm. It therefore did not impose a suspension.
41. We considered the action plan put forward by the Appellants following the Respondents visit on 11 October 2016 which included agreeing to "*suspend*" Ms Bates whilst any investigation is taking place. The suspension was said to have immediate effect until the investigation was completed. We were deeply concerned that despite the Appellants clear action plan, the Appellants own staff confirmed that she had been at the nursery "*regularly*". We did not accept that a suspension in the terms now proposed by the Appellants would be any more effective than the "*voluntary arrangement*" or "*suspension*" that was in place previously.
42. Furthermore, we noted that the Appellants do not deny that the incident on 21 October took place nor does Ms Bates deny being on the premises. The Appellants, instead, argue that that it was a well-intentioned and an "*instinctive response*" by Ms Bates. However, in our view, this was not an emergency situation which left Ms Bates with no choice but to be on the premises and take the action that she did. She should have recognised the seriousness of the allegations and complied with the assurances that were given to the Respondent pending the outcome of the investigation. We were also troubled by the fact that it was a staff member who recognised and appreciated the seriousness of Ms Bates being on the premises rather than the management and/or owners.

43. In our view, this was a failure to recognise the importance of Ms Bates not having contact with children whilst serious safeguarding issues were under investigation. This failure to recognise the seriousness of the allegations compromised the Appellants ability to fully put into place adequate steps to safeguard the children whilst the investigation was taking place. The suspension imposed is in our view also proportionate given that the Appellants have failed to comply with what they said they would do whilst the investigation was ongoing.
44. We also noted that the Respondent plans to progress the investigation as quickly as possible. This includes interviewing the managers of both sites and taking statements from the complainants in order make an informed decision. The Regulations make provision where it appears to the Chief Inspector that the circumstances for a suspension no longer exist for the Chief Inspector to lift the suspension. That, of course will be a decision for the Respondent once it has concluded its investigations and assessed the evidence.
45. We conclude, therefore, that the continued provision of child care by the Appellants to any child may expose such a child to a risk of harm.

Decision

46. The Appeal is dismissed and the suspension is confirmed.

Judge H Khan
Lead Judge Primary Health Lists/Care Standards
First-tier Tribunal (Health Education and Social Care)

Date Issued: 23 November 2016