

Care Standards

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

Heard on 27 June 2017
At the Royal Courts of Justice, London

[2017] 3033.EY-SUS

Before

Mr H Khan (Judge)
Ms B Graham (Specialist Member)
Mr M Flynn (Specialist Member)

Between:

Seahorses Bek Ltd

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal

1. The Appellant appeals to the Tribunal against the Respondent's decision dated 26 May 2017 to suspend their registration from the Early Years Register for six weeks to 7 July 2017 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').

Attendance

2. The Appellant was represented by Mr David Welch (Counsel). We heard oral evidence from Ms Amuludun.
3. Mr Praveen Saigal (Solicitor) represented the Respondent. The Respondent's witnesses were Ms Pauline Nazarkadeh and Ms Jennifer

Gee although it was agreed by the parties that Ms Gee would not be required to give oral evidence.

Restricted reporting order

4. 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

5. The Appellant provides full time and part time day care for children between the ages of three months and five years. The Appellant is in receipt of funding for the provision of free early education for children aged two, three and four years. At the time of the suspension, there were approximately 16 children on the role.
6. The setting was originally registered to Ms Adeola Oluwatosin Amuludun, as an individual, on the Early Years Register on 18 March 2009. In May 2015, ownership of the provision transferred to the Appellant, a company limited by shares, and a new certificate of registration was issued by the Respondent on 25 April 2016. The change was in form rather than substance. The business continues to be owned by Mrs Amuludun, who is the Appellant's sole director, its nominated individual and its manager. Mrs Amuludun also operates two other nurseries in the London area.
7. On 22 May 2017, the Respondent received a referral from an individual on behalf of her mother, who had recently worked at the setting as a cook for a short period. The referral was regarding an incident which allegedly took place on 3 May 2017. The allegation was made against the Deputy Manager Ms Alison Goldstone. The nature of the allegation was that a two year old child (Child A) had been taken to the conservatory as a form of punishment and left crying. It was alleged that this was due to Child A not tidying away and tipping the toy box over. Child A was in the room for about half an hour.
8. On 23 May 2017, the Early Years Regulator Inspector, Ms Pauline Nazarkardeh discussed the concerns with Mr Nick Pratt, the Local Authority Designated Officer ("LADO"). He did not consider that the matter would meet his threshold at that stage but he had not received a referral from the setting regarding the concerns. He confirmed that he would keep the case open. It was agreed that Ms Nazarkardeh would make an unannounced visit to the setting and feedback her findings.
9. On 25 May 2017, Ms Nazarkardeh attended the setting unannounced and met with Ms Amuludun and provided her with details of the

allegation dated 3 May 2017 and interviewed staff. Further concerns were identified.

10. At the end of the visit, Ms Nazarkardeh confirmed to Ms Amuludun that a Welfare Requirements Notice would be served and that Ms Nazarkardeh would return to check whether it had been complied with. Ms Amuludun was advised that she should make a referral to the LADO
11. On 26 May 2017, Ms Nazarkardeh reported her findings to the LADO who said that he would immediately send a referral form to the provider to complete and said he would pass the information to the police.
12. Later that day, Ms Nazarkardeh telephoned the setting to speak with Ms Amuludun and was told she was not present. Ms Nazarkardeh then called the provider on her mobile phone. Ms Amuludun confirmed that she had not yet completed the referral to the LADO and that the Deputy Manager Ms Goldstone was still in post and in charge of the nursery in her absence.
13. On 26 May 2017, a case review was held. The Respondent considered the findings of its investigation and the Appellant's failure to act on those findings. A decision was made to suspend the Appellant's registration due to a reasonably held belief that the continued provision of childcare by the Appellant may expose a child to the risk of harm. The nature of the allegation related to inappropriate behaviour management and the suspension was needed to remove risk to the children as the Deputy Manager was still in post and to allow further investigation of the Respondent's concerns. That decision was communicated to the Appellant by telephone on the same day.

Legal framework

14. 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.
15. 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.”

16. “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”.

17. 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.
18. 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.
19. 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

20. We took into account all the evidence that was presented in the bundle and to us at the oral hearing.
21. Ms Nazarkardeh gave evidence around her inspection. This was on 25 May 2017. There had been a previous inspection in January 2017. This was following receipt of numerous concerns. The nursery had received a grading of “inadequate” at the January inspection. A notice to improve was issued relating to risk assessments and sleeping arrangements.
22. On 25 May 2017, Ms Nazarkardeh confirmed that she visited the premises. The Deputy Manager, Ms Goldstone was at the premises and showed Ms Nazarkardeh around until Miss Amuludun arrived. During the tour, further concerns were identified in relation to the system in place to record children’s attendance, poor arrangements to meet the needs of all children during sleep time and children sleeping directly on plastic mattresses. There were also concerns identified including poor risk assessments, children were observed to be leaning into open top bins, trailing wires in the hall where babies were seen crawling and plastic bags within the reach of young children.
23. Ms Nazarkardeh had also spoken to another staff member, Ms Miriam Butt. Ms Butt confirmed that she was aware of the incident on 3 May 2017 but it had occurred due to Child A throwing a toy and hurting another child. She alleged that a member of staff had taken Child A to the conservatory and tied him in a high chair. Ms Butt confirmed that although Child A was left in the conservatory with the door closed, a

member of staff was watching him. Ms Butt set out that this was how they managed children's behaviour and that it worked well.

24. Ms Nazarkardeh spoke to Ms Amuludun. She could not say why she had not notified the LADO in accordance with the procedure. Ms Amuludun was the safeguarding lead but had not complied with procedure. Ms Amuludun stated that the CCTV covering the area was not working and she had called the engineer. Ms Amuludun was told about Ms Nazarkardeh's findings and told that the Respondent would be issuing a Welfare Requirements Notice because of the significance of her findings. Miss Amuludun was told to contact the LADO and to let Ms Nazarkardeh know as soon as she had done so.
25. Ms Nazarkardeh confirmed that the Respondent had initially sought to deal with the matter by way of the Welfare Requirements Notice. She was of the belief that the issuing of a Welfare Requirements Notice would bring about the necessary improvements which would be assessed on her return visit.
26. On 26 May 2017, Ms Nazarkardeh confirmed that she reported her findings to the LADO. He confirmed he wasn't aware that Child A had been strapped into a high chair. He requested that the Appellant's send him a completed referral and to complete a risk assessment to determine whether any measures relating to this member of staff needed to be put in place to reduce the risk to the other children whilst this was investigated. He would also be consulting the police to establish whether they felt the incident warranted their involvement.
27. Ms Nazarkardeh called the Appellant on 26 May 2017. She was told that the Appellant was not present at the setting. She then called the Appellant on her mobile phone. The Appellant told her that the Deputy Manager, Ms Goldstone was still in post and in charge of the nursery in her absence. Further, she confirmed that referral to the LADO and the risk assessment had not been completed. On the basis of this information, the Respondent decided to suspend the Appellant's registration.
28. On 30 May 2017, the LADO confirmed that the Police would not be taking any action in relation to the allegation. On 9 June 2017, the Respondent concluded that the Appellant's internal investigation had been inadequate.
29. On 16 June 2017, the LADO determined that the allegation was unsubstantiated. It was only at this point that the Respondent could complete its investigations. In the week commencing 19 June 2017, the Respondent arranged with the Appellant to interview its staff as well as the Ms Amuludun on the 4 and 6 July 2017.
30. The next steps in the investigation are to carry out a further investigation visit, check the current policy for safeguarding and its

impact on practice and investigate particular behaviour management at the nursery. The purpose is also to ensure that staff are aware of what they must do in such situations.

31. 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. They still believe this is the case. They are concerned about the information they were given in relation to behaviour management at the nursery.
32. The Appellants case was that she accepts that it is a serious allegation and that the Respondent needs to investigate. She also accepted that her internal investigation was inadequate and that she did not deal with this in a timely manner. She has, on the advice of the LADO, commissioned an independent external investigation. There is a report but it is in draft form. It has not been shared with the Respondent or the Tribunal but it has been shared with the LADO.
33. She confirmed that the Deputy Manager is now suspended. She was suspended on 26 May 2017. Ms Amuludun stated that she only became aware of the allegation on 25 May 2017 after the Respondent's inspection. Her actions and/or omissions were guided by third parties such as a LADO and an Employment Consultant. She does not condone any method of behaviour management that involves isolating a child or chastisement and the nursery's behaviour management policy does not promote such approaches.
34. She accepts that she did not apply her usual high standards in dealing with this situation. Her staff attended training on safeguarding on 20 June 2017.

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. 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 continued provision of child care by the registered person to any child may expose such a child to a risk of harm for the reasons set out below.
37. The Appellant accepts a number of the Respondent's key submissions in this case. She accepts that the allegation made is a serious one and one which originated from her former employee. It involves a child

under the age of two. She acknowledges that she did not deal with matters in a timely way.

38. The Appellant also accepts that the allegation requires investigation and that her own initial investigation was inadequate. As a direct consequence of her own inadequate investigation, an independent investigation, commissioned by her (on the advice of the LADO) is being carried out, and we were told that a draft report had been prepared although it had not been shared with the Respondent or the Tribunal. She also accepted that there was a clear purpose to the Respondent's investigation which was to safeguard children.
39. We acknowledged that the Police and the LADO are not pursuing the allegation(s) at this stage. Whilst the Appellant states that the Respondent has delayed matters, the LADO only communicated its position to the Respondent on Friday, 16 June 2017. The Respondent then got in touch with the Appellant in the following week and arranged with the Appellant to go and interview her staff as well as the Appellant on the 4 and 6 July 2017. That is a reasonable timescale in our view given the date on which the Respondent was notified by the LADO and the fact that the Respondent can only complete its investigations after the Police and LADO have completed theirs.
40. The Appellant submits that she and her staff have attended a safeguarding course on 20th June 2017 and her confirmation of this should be sufficient to allay the Respondent's concerns about the Appellant and the ability of its to deal with any safeguarding issues. However, we took into account that this was not the first time that safeguarding has been raised as an issue. The inspection on 25 January 2017 concluded that the arrangements for safeguarding were ineffective and that did not prevent a serious allegation being made by one of the Appellant's former staff.
41. The Appellant states that she was acting on advice given to her by an external HR company and the LADO. However, whilst that may have been the case, as the lead for safeguarding, she acknowledged that looking back she should have acted quicker than she did.
42. Furthermore, we noted that the Appellant does not deny that an incident on 3 May 2017 took place. In addition, these were allegations that were made by the Appellant's own staff.
43. We also noted that the Respondent plans to progress the investigation as quickly as possible. It is clear that the Respondent will need to investigate claims that the Appellant does not condone any method of behaviour management that involves isolating a child or chastisement. We had no reason to doubt the assurances given by the Respondent that it would make a decision after it had interviewed staff and the Appellant. This was likely to be on the 6 July 2017 although this was dependent upon the timings of the interviews. In our view, it is

reasonable for the Respondent to look to interview staff as part of the investigative process to assure itself that they were aware of safeguarding procedures to see what lessons have been learned for the future.

44. 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: 3 July 2017