

## Care Standards

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

[2018] 3498.EY-SUS

Heard on 13 November 2018 at Crawley Magistrates' Court

**BEFORE**  
**Tribunal Judge G K Sinclair**  
**Specialist Member Ms C Joffe**  
**Specialist Member Mr J Hutchinson**

**BETWEEN:**

**SARA BRAND**

**Appellant**

**-v-**

**OFSTED**

**Respondent**

### **DECISION**

#### **Representation:**

Appellant: Douglas Lloyd, Counsel instructed by Markel Law LLP

Respondent: Duncan Toole, Solicitor, Ofsted Legal Services

#### **The appeal**

1. The Appellant childminder appeals against Ofsted's notice dated 12<sup>th</sup> October 2018 of its decision to suspend her registration as a childminder for a period of six weeks until 22<sup>nd</sup> November 2018.

2. Please note that as certain children and one parent are named in documents filed in connection with this appeal the tribunal makes a restricted reporting order under rules 14(1)(a) & (b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify any children concerned in this case either directly or through the identification of their parents.

#### **Background**

3. The Appellant was first registered on 15th January 2009 as a childminder on the Early Years Register, Compulsory Childcare Register and Voluntary Childcare Register. She has been the subject of three Ofsted

inspections in November 2009, February 2011 and November 2015; all of which resulted in a “Good” or Grade 2 assessment.

4. As a result of reports received by Ofsted concerning an allegation of force feeding when minded children were at a local indoor soft play venue on 10th October 2018 an Early Years Regulatory Inspector made a compliance visit to the Appellant on 12th October 2018 and discussed the matter with her. She was concerned by some of the Appellant’s answers and considered that her understanding of safeguarding was less than should be expected, so as a result (and after discussion by phone with a senior officer), the decision was taken by the latter to serve a Notice suspending the Appellant’s registration with immediate effect. The Appellant had volunteered a detailed explanation of events but denied that what had occurred was force feeding.

5. On 24th October 2018 the Appellant filed her appeal application form, directions were given following a telephone hearing on 25th October, and Ofsted filed its response on 30th October. The hearing was listed for 13th November 2018, with the result that this decision is being reached just one week before the six week suspension expires. It is hoped that this decision will provide some guidance as to what happens next.

#### **Applicable legal provisions**

6. The issue of suspension of registration is governed by section 69 of the Child Care Act 2006 and regulations 8 to 12 of the Childcare (General Childcare Register) Regulations 2008, as amended.

7. The material parts of section 69 provide that:

(1) Regulations may provide for the registration of a person registered under Chapter 2, 3 or 4 in the early years register or the general childcare register to be suspended for a prescribed period in prescribed circumstances.

(1A) Regulations under subsection (1) may in particular provide that registration may be suspended generally or only in relation to particular premises.

(2) Regulations under subsection (1) must include provision conferring on the registered person a right of appeal to the Tribunal against suspension.

(3) A person registered under Chapter 2 in the early years register as an early years childminder —

(a) may not provide early years childminding at any time when his registration under that Chapter is suspended generally in accordance with regulations under this section;

(b) may not provide early years childminding on particular premises at any time when his registration under that Chapter is suspended in relation to those premises in accordance with regulations under this section.

8. Regulations 8, 9, the material parts of regulation 10, and 11 and 12 provide:

8. **Suspension of registration**

The registration of a person who is registered under Chapter 2, 3 or

4 in the early years register or the general childcare register may be suspended, generally or only in relation to particular premises, by the Chief Inspector, by notice, in the circumstances prescribed in regulation 9 for the period prescribed in regulation 10.

**9. Circumstances in which registration may be suspended**

The circumstances prescribed for the purposes of section 69(1) of the Act are 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.

**10. Suspension of registration: further provisions**

(1) Subject to paragraph (2), the period for which the registration of a registered person may be suspended, generally or only in relation to particular premises, is six weeks beginning with the date specified in the notice of suspension given in accordance with paragraph (4).

(2) Subject to paragraph (3), in a case in which a further period of suspension is based on the same circumstances as the period of suspension immediately preceding that further period of suspension, the Chief Inspector's power to suspend registration, generally or only in relation to particular premises, may only be exercised so as to give rise to a continuous period of suspension of 12 weeks.

(3) Where, however, it is not reasonably practicable (for reasons beyond the control of the Chief Inspector)—

(a) to complete any investigation into the grounds for the Chief Inspector's belief referred to in regulation 9, or

(b) for any necessary steps to be taken to eliminate or reduce the risk of harm referred to in regulation 9, within a period of 12 weeks, the period of suspension may continue until the end of the investigation referred to in sub-paragraph (a), or until the steps referred to in sub-paragraph (b) have been taken.

**11. Lifting of suspension**

If, at any time during a period of suspension under regulation 8, it appears to the Chief Inspector that the circumstances prescribed in regulation 9 no longer exist, the Chief Inspector must lift the suspension.

**12. Appeal against suspension**

(1) A registered person whose registration has been suspended, generally or only in relation to particular premises, under regulation 8 may appeal to the Tribunal against the suspension.

(2) On an appeal under paragraph (1), the Tribunal must either—

(a) confirm the Chief Inspector's decision to suspend registration, or

(b) direct that the suspension shall cease to have effect.

(3) In a case where the suspension of a registered person's registration ends before the Tribunal determines the appeal in accordance with paragraph (2), the Tribunal must dismiss the

appeal.

9. While regulation 9 provides the relevant threshold criterion that the continued provision of childcare by the registered provider to any child may expose that child to a “risk of harm” the Upper Tribunal (Administrative Appeals Chamber) provided some additional guidance in the case of *Ofsted v GM & WM* 1. At paragraph 21 the court said this:

1 [2009] UKUT 89 (AAC) (Carnwath LJ (SPT), Hickinbottom J & Upper Tribunal Judge Rowland)

Ms Broadfoot initially submitted that the Care Standards Tribunal in *LM v Ofsted* [2003] 181.EYSUS had erred in saying that “‘reasonable cause to believe’ falls somewhere between the balance of probability test and ‘reasonable cause to suspect’ in section 47 [of the 1989 Act]”, whereas Mr Rowley invited us to approve that dictum. However, both accepted that little was to be gained in this context by considering whether one statutory formulation meant exactly the same as another. Regulation 9 is expressed in ordinary English and means what it says.

10. At paragraph 22 the court went on:  
Regulation 9 sets a threshold but the mere fact that the threshold is passed does not necessarily mean that the power of suspension in regulation 8 must be exercised.

11. Of significant relevance to this case is the passage beginning at paragraph 25:

25. Where there is a suspicion or belief that a childminder may have caused a non-accidental injury to a child, the local authority children’s services department, the police and Ofsted may all be required to carry out investigations. Those bodies are all involved because each has a different rôle, with the result that each of their investigations has a different goal. Nonetheless, they are rightly expected to co-ordinate their efforts. It may often be the case that Ofsted ends up as the junior partner, unable to carry out its own investigations straightaway lest it compromise other investigations that are considered more immediately important or because other investigators have greater expertise and powers. However, where that is so, Ofsted is entitled to expect to be kept abreast of developments and assisted in its function of deciding whether it needs to take any action under the 2006 Act and, in the meantime, whether a suspension that has been imposed should be lifted. Regulation 11 of the 2008 Regulations requires Ofsted to keep any suspension under review.

26. Ms Broadfoot submitted that the approach to circumstances in which there are on-going investigations taken in *MP v Ofsted* [2005] 0618.EYSUS was correct. In that case, a child had alleged that he had been injured by the childminder and an investigation into both that allegation and another, unspecified, allegation was under way. The tribunal dismissed the childminder’s appeal against suspension, saying that it accepted that “the enquiry was neither frivolous nor that

the allegations are bound to fail". Mr Rowley submitted that that was too low a test. However, the observation of the tribunal was made in the context of a continuing police enquiry that (the tribunal had found) could have led to criminal charges against the childminder. In that context, that observation seems to have been entirely appropriate.

27. On the other hand, we do not consider that, in all cases, a suspension imposed while there is a police investigation need be maintained until that investigation is formally concluded. If Ofsted is kept informed of the progress of an investigation, as it should be, it may be able to lift a suspension earlier. What is important is that Ofsted should keep its focus on the steps it may need to take depending on the outcome of any investigation, because a suspension imposed on the ground that there is an outstanding investigation can, in our judgment, be justified only for as long as there is a reasonable prospect of the investigation showing that such steps are necessary.

28. We stress that the exercise of the judgment required by regulation will turn very much on the facts of a particular case. If Ofsted wishes 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 First-tier Tribunal what those investigations are and what steps it might wish to take depending on the outcome of the investigations. It may well be, for instance, that the fact that a child has suffered a non-accidental injury that may have been caused by a childminder will prompt a detailed examination of the childminder's records and interviews with other parents, conducted by Ofsted itself after the police have released any records they have seized and said they will not be interviewing such witnesses themselves. If that be the case, Ofsted should explain that to the tribunal, because the tribunal must consider whether any continuation of the suspension has a clear purpose and therefore is capable of being proportionate having regard to the adverse consequences not only for the childminder but also for the children being cared for and their parents.

**12.** This tribunal summarises the position thus. Continued suspension is justified if:

- a. The threshold criterion in regulation 9 is met
- b. The suspension is for the purpose of carrying out or completing an investigation,  
and
- c. Weighing the nature and extent of the risk and the state of the investigation against the interests of the Appellant and the minded children (and their parents), continuation of the suspension is a proportionate response.

### **The hearing and evidence**

**13.** Witness statements were provided by Ofsted from Lisa Watson (an Early Years Regulatory Inspector) and Lisa Troop (an Early Childhood Senior Officer, South East Region). Ms Troop was and is the decision maker in this case. Both gave oral evidence. The respondent also filed witness statements from the two initial complainants, Adele Clayton (also a registered childminder) and Natalie Rose-Smith (an employee at the soft play venue). Neither was called to give oral evidence.

**14.** An oral hearing was sought by the Appellant, yet although she filed statements by herself and by the relevant child's mother she did not give oral evidence and the case was considered on the oral evidence of the two Ofsted officers and the written statements. For completeness, the Appellant also submitted five written character references from parents of children that she minds or has minded. Apart from two historic references dated December 2010 and June 2011 the other three were from parents who, the tribunal was informed, were aware of the incident provoking the present suspension. It is fair to say that one of the latter (dated as recently as 5th November 2018) referred extremely positively about how the Appellant had "dealt with a potentially catastrophic situation, when my daughter had an anaphylactic reaction to a previously undiagnosed allergy, calmly and appropriately."

**15.** While the request for an oral hearing and then electing not to give evidence was an odd choice for the Appellant, it may not have worked to her advantage. It was only at the hearing that Ofsted disclosed that it had taken (but not yet served) one further witness statement and was intending to obtain more; and that despite requesting CCTV footage from the venue's legal department it was still awaited (allegedly "in the post"). Although the site manager who had downloaded it to a USB stick had apparently said that it not really assist, it was suggested that he does not know what Ofsted may be looking for.

**16.** On 11th October 2018, the very day after the alleged incident and before Ms Watson visited the Appellant, Ofsted was informed by the local MASH that it considered that the allegation did not meet its threshold, and the approach by the LADO in West Sussex is that she will not investigate personally but has invited the Appellant to nominate an independent person approved by LADO to conduct an "internal investigation" and report back. The police are not involved.

**17.** As the mother of the child believed to be involved in the alleged incident phoned the Ofsted office on 16th October it is surprising that – with Ofsted left as the only external investigator, and its stated intention at some time to interview the mother – no attempt was made either to interview her sooner or to acquaint her of the allegations made. It was said that it was the Appellant's duty to inform the mother, so was left to her.

**18.** No clear answer could be provided by either officer as to when the investigation might be complete but the respondent's legal representative, Mr Toole, candidly explained that allegations of force feeding are taken very

seriously and if further investigation revealed that there were additional concerns then Ofsted may move towards cancellation.

**19.** At the outset of the hearing the tribunal noted that the suspension is due to expire next week, so it was highly likely that the investigation would not be completed by then and a decision would quickly have to be taken whether to extend the suspension for up to a further six weeks. Ms Watson assured the tribunal that a lot could be done in a short space of time and all the witnesses she wanted to see lived within an hour's drive from her home. The CCTV recording was still awaited, and even though it was put to her that Ofsted already had detailed statements from two persons present she insisted that it was important that it be viewed – amongst other things to identify if a second child was involved and, if so, who that was.

**20.** Each party had provided the tribunal with a helpful written skeleton argument, with the Appellant's points conveniently listed at points A to M in paragraph 15.

### **Discussion and findings**

**21.** Having considered the written and oral evidence the tribunal is satisfied that, if the allegation is true and the Appellant simply denies it, the manner of feeding reluctant children is potentially a serious risk to them. Whether the Appellant used the word "choke" in discussion with Ms Watson during her visit is not a finding that this tribunal need make. It is clear that by the Appellant bursting into tears at the mention of CCTV she appreciated that, whether or not she force fed the child in question, the appearance of what she did had caused alarm to some onlookers.

**22.** A Welfare Requirement Notice was issued to the Appellant after the visit, identifying various safeguarding issues. However, it does not help to allege that her documentation about safeguarding was extremely dated – and had not been used "for some time" – if the officer when challenged is unable to explain what she means by the expression without herself having to check.

**23.** It was accepted that the Appellant had a previously unblemished history and excellent references from supportive parents, and had recently completed an on-line safeguarding course. However, had she demonstrated her compliance with the requirement in the WRN of increasing her understanding of behaviour management or sought external advice on the feeding of children who were reluctant to cooperate then the tribunal's views on current and future risk of harm might have been different.

**24.** On balance, the tribunal considers that on the issue of feeding children the alleged behaviour and responses to questioning by Ms Watson on 12th October do raise concerns that minded children may be put at risk. The chances may be small, but the potential consequences life-changing.

**25.** After a speedy start the investigation does seem to have gone off the boil rather quickly. Initially confused about precisely when Ofsted was

informed of MASH's disinterest by an email from the assistant LADO dated 25th October, Mr Toole very properly referred the tribunal to Ms Troop's statement, where she stated that she had been informed on 11th October. In those circumstances the tribunal is puzzled and disappointed by the failure to inform the mother of the child named by the Appellant of its account (rather than hers) of the allegation, and of its failure quickly to take a statement from her. Although not present during the alleged incident, she can provide first hand evidence of a number of important features. Others also need to be seen, although in the case of other registered childminders this may also be for other purposes.

**26.** The tribunal can only urge Ofsted to get on with its investigation quickly and reach a decision that is proportionate to the allegation and how it should be weighed against a positive nearly 10 year history of childminding. No doubt the extent to which she may reflect on how her techniques can be improved, and how this can be demonstrated by her choice of future safeguarding and other developmental courses, may assist Ofsted in its assessment.

**27.** The tribunal expects that by next week Ofsted will need to consider whether to extend the suspension for a further period of up to six weeks. It will be mindful of its duty under regulation 11 to lift the suspension as soon as possible.

**28.** The tribunal therefore determines that the threshold criterion is met, that there are further aspects of the investigation that need to be concluded (but quickly), and that at present suspension remains a proportionate response.

**FOR THE ABOVE REASONS IT IS DETERMINED THAT:**

1. The appeal against the notice of suspension dated 12th October 2018 be dismissed.
2. The tribunal makes a restricted reporting order under rules 14(1)(a) & (b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the children in this case either directly or through the identification of their parents.

**Tribunal Judge Graham Sinclair  
Care Standards  
First-tier Tribunal (Health Education and Social Care)**

**Date Issued: 16 November 2018**