[2019] UKFTT 465 (HESC)

Care Standards

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

Heard on 11, 12 June, 4, 5 July 2019 at the Royal Courts of Justice

[2018] 3399.EY

BEFORE

Clive Dow (Tribunal Judge)

Ms S Prewett (Specialist Member)

Ms H Reid (Specialist Member)

BETWEEN:

Sharon O'Garo

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal

1. Mrs Sharon O'Garo (the Appellant) appeals to the Tribunal against the Respondent's decision dated 18 June 2018 to cancel her registration from the Early Years Register, the compulsory part of the Childcare Register and the voluntary part of the Childcare Register.

Restricted Reporting Order

2. 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. The child concerned in this appeal is referred to as RC. The child's mother is referred to as KC.

Attendance

3. The Appellant was represented by Mr David Welch (Counsel). We heard oral evidence from the Appellant.

4. Ms Zoe McGrath (Solicitor) represented the Respondent. The Respondent's witnesses were Ms Seema Parmar and Ms Siobhan O'Callaghan, both Early Years Regulatory Inspectors, and Pauline Nazarkardeh, an Early Years Senior Officer. All three witnesses are employed by the Respondent. KC also attended and gave evidence.

Events leading up to the issue of the notice of statutory suspension

5. The Appellant has been a registered child minder since 7 June 2006, operating from her home address.

6. Since registration, the Appellant has been inspected on three occasions. She was inspected on 29 November 2006, 7 December 2010 and 3 November 2015. On each occasion her provision was assessed as 'Good'.

7. On 12 September 2019 the Appellant was minding RC, a one-year-old child, at her home along with two other infant children. RC arrived with no obvious injuries and in good health, although it was noted that he had received his 'one year' inoculations very recently and had cold-like symptoms. At a point late in the afternoon the Appellant attempted to make contact with RC's parents to inform them that RC's leg was showing signs of soreness, peeling and blistering. It is not agreed between the parties exactly who the Appellant spoke with, at what time, or what was said. it is common ground that a telephone conversation took place between the Appellant and one of the parents at sometime between 5pm and 6pm.

8. KC arrived at the Appellant's premises at around 6pm. On arrival, she undressed RC and saw blistered patches on his wrist and leg which she believed to be burns. The Appellant said that the injuries may have been a reaction to the baby wipes she had used when changing his nappy earlier. KC took RC to a nearby accident and emergency department where he received pain relief and treatment for burns throughout the course of the evening. RC was discharged at around midnight. He received follow-up treatment at a hospital burns unit as an outpatient the following day and then on three subsequent occasions.

9. On 13 September 2017 both the Appellant and KC reported the incident to the Respondent. The Appellant's registration as a childminder was suspended by the Respondent on 14 September 2017. Investigations by police and the Local Area Designated Officer (LADO) concluded at the end of November 2017. No further action was taken by them. However, the Respondent's suspension remained in place and their investigation continued. During the period of suspension, the Respondent's Early Years Regulatory Inspectors completed five visits to the Appellant's home address for both suspension compliance purposes and for the purposes of their investigation into the incident. Sometimes these visits combined these purposes.

10. On 30 November 2017, the Regulatory Inspector, Ms Siobhan O'Callaghan visited the Appellant's setting. She conducted a suspension compliance visit including a search of the Appellant's property. She also photographed or took away records, certificates and other documents related to her investigation.

11. On 11 January 2018, Ms O'Callaghan visited the Appellant's setting again to interview her about the incident. The Appellant subsequently complained about Ms O'Callaghan's conduct and behaviour toward her.

12. Ms Seema Parmar, another Regulatory Inspector, took over the case on 7 February 2018. She met with the Appellant at the Respondent's London offices on 22 February 2018 and at the Appellant's home on 3 April 2018. At these meetings the Appellant was asked to account for the injuries sustained by RC and to explain why she had not administered first aid, called for emergency assistance or advice. The Appellant maintained that the only explanation she could offer was that RC had reacted to the wipes she had used on the affected skin areas when changing his nappy. The injuries were localised to those skin areas, the Appellant said, because she had used the baby's usual wipes around the groin and bottom. At that point in the task she exhausted the supply and completed it using different wipes but only on the specific areas where the injuries showed. When asked to explain why she had re-dressed the baby having discovered the injuries, the Appellant said that the injuries had not appeared severe at the time.

13. A case review followed where the decision-maker, Ms Pauline Nazarkardeh, considered the evidence and Ms Parmar's recommendations. On 25 April 2018 a Notice of Intention to cancel registration was sent to the Appellant (B2). The Appellant objected to the Notice of Intention. As a result, her case was reviewed by a different Early Years Senior Officer. On 18 June 2018 a further notice confirming cancellation of her registration was sent by the Respondent to the Appellant.

Issues

14. The Respondent's position can best be summarised in that the Appellant was no longer suitable to be a registered childminder for three reasons:

    a. On balance, the injuries were as a result of a thermal scald caused or allowed by the Appellant's negligence. She had failed to keep the child safe from harm and/or safe and well;

    b. As a result of a thermal scald or any other cause, the Appellant had failed to respond to the injuries by either administering first-

aid or seeking emergency assistance or advice. In that regard, she had also failed to keep the child safe and well or had failed to act in accordance with the first-aid qualification she was required to keep; and

c. The Appellant had both through her failure to offer a plausible explanation for the injuries and through her refusal to cooperate satisfactorily with the Respondent's investigation, shown herself unwilling or unable to be regulated by them and so not suitable to be registered.

15. The Appellant denied each of these allegations. She further asserted that the cancellation was neither necessary nor proportionate.

Legal framework

16. There was no dispute about the legal framework. The grounds for cancelling the registration of a childcare provider are set out in section 68 of the Childcare Act 2006 (The Act). The Chief Inspector for Ofsted (i.e. the Respondent) may cancel a childminder's registration under section 68 (a) or (c) of the Act if it appears to them that the childminder has failed to comply with the prescribed requirements in the Childcare (Early Years Register) Regulations 2008 and the Childcare (General Childcare Regulations) 2008.

17. In the current proceedings, the prescribed requirements include that the registered person is 'suitable' to provide the service. In respect of the Early Years Register, this arises from section 36(3) of Act and Regulation 3 and Schedule 1, paragraph 1 of the Childcare (Early Years Register) Regulations 2008. Schedule 1, paragraph 6 also requires the childminder to have an appropriate first aid qualification.

18. In relation to the Compulsory part of the Childcare Register the suitability requirement arises under section 55(3)(b) of the Act and Regulation 4(1) and Schedule 1, Part 1 of the Childcare (General Childcare Register) Regulations 2008, which also provides that childminders shall have an appropriate first aid certificate.

19. In respect of the Voluntary Part of Childcare Register, the suitability requirement arises under section 63(4)(b) of the Act and Regulation 10 and Schedule 4, Part 1 of the Childcare (General Childcare Register) Regulations 2008, which also provides that childminders shall have an appropriate first aid certificate.

20. In respect of both the Early Years and General Childcare Registers, providers have a duty to keep children safe from harm, where harm is defined as: treatment or the impairment of health of development *per* section 31(9) of the Children Act 1989.

21. Section 40(2)(b) of the Act also imposes a duty on childminders to implement the Early Years Foundation Stage (EYFS) Statutory Guidance. Section 3, Paragraph 3.2 of the EYFS requires that 'providers must take all necessary steps to keep children safe and well'. It is also relevant that Annex A of the EYFS sets out the criteria for effective First Aid Training in compliance with the EYFS requirement under Section 3, Paragraph 3.25.

22. It is for the Respondent to demonstrate, on the balance of probabilities, the facts upon which it relies and that the decision to cancel the registration is proportionate and necessary. The Tribunal must make its decision on the basis of all the evidence available to it as at the date of the hearing. The Tribunal is not restricted to matters available to the Respondent when the cancellation decision was taken.

23. Under section 74 of the Act, the Tribunal must either confirm the Respondents decision to cancel or direct that it shall not have effect. If the Tribunal decides that cancellation should not have effect, then it may impose a condition on the Appellant's registration.

Preliminary Issues

24. At the start of the hearing. Ms McGrath handed up several exhibits missing from the Tribunal Bundle. While contrite for the Respondent's earlier failure to include them in the bundle, she said these documents were referred to in witness statements, had placeholders in the bundle and had been sent to the Appellant. As such, she said, they were not late evidence. Mr Welch could not assist. He had not received them and the Appellant was not sure. We decided to include the missing exhibits in the bundle but to ensure no prejudice to the Appellant, we allowed an opportunity for Mr Welch to consider them before we began taking oral evidence.

25. At the Tribunal's request, Ms McGrath produced a skeleton argument outlining the legislative framework supported by legislative extracts and the Early Years Foundation Stage statutory guidance.

26. Both parties produced late evidence during the course of the hearing. In each case, the parties argued the need for late evidence arose from answers given in oral evidence. The Appellant produced a single page document, with the heading 'Dynamic Tots' which was the Appellant's daily record for 12 September of key events in RC's day with her. The Respondent did not object to this document except to the extent that they did not accept that the timings describing when RC's nappy had been changed had been completed contemporaneously. It was the Respondent's case that a copy of the document without any such timings had been provided by the Appellant to KC when she arrived to collect her son. However, KC did not produce that copy.

27. Mr Welch also produced an email from a plumber to the Appellant, which confirmed that he had attended her house to fix a broken washing machine on 2 May 2018, the same day as she said the Respondent had visited her home and she had not allowed them access. There was no objection to that document being admitted, except that Ms McGrath said it was the Respondent's position that the visit had taken place on 3 May 2018.

28. The Respondent produced a 35 page Care Review Record. Ms McGrath explained that this comprised a summary of the information available to Ms Nazarkardeh when considering whether to cancel the Appellant's registration. She said this had not been included in the bundle because the Respondent had not foreseen the Appellant's criticism of the decision-making process. Mr Welch objected on the basis that he had not had sufficient time to consider it or put its contents to previous witnesses. We allowed him time over lunch to consider it.

29. The Respondent also produced additional photographs of RC's injuries, covered by an email from KC, explaining they had been taken by her and her husband at the hospital during the evening of 12 September. Ms McGrath said the Respondent had not been aware of these additional photographs until KC mentioned them in oral evidence. The Respondent wished to rely on them to the extent that they might rebut the Appellant's claim that the injuries were not severe when she discovered them. Mr Welch objected on the basis that KC could not be asked about when they were taken but later he did not object when copies of the same photographs were produced as screenshots of the mobile phone on which they were taken, purporting to show the date and time that they had been taken.

30. In considering all the late evidence, the Tribunal applied Rule 15 and took into account the overriding objective as set out in Rule 2 of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008. We considered that both the photographs and the care review record were potentially relevant and could assist us in reaching fair decision. The Care Review Record was particularly relevant because it was a key part of the material on which the Respondent had based their decision. We considered that the Appellant's objections had been largely mitigated by the additional time we allowed for Mr Welch to consider them and by the opportunity for him to make submissions about what weight we should place on them. We therefore decided to admit both documents. There being only a qualified objection to the Record and email produced by the Appellant, we decided to admit those documents, reminding ourselves of the objection when we came to deliberate.

Evidence

31. KC adopted her written statement (D215). She clarified that RC did have allergies to egg and dairy products but that he hadn't had any such products in the days before 12 September 2017. When he had been given those foodstuffs previously his allergic reaction was red and streaming eyes, projectile vomiting and hives. There was nothing similar in his presentation on 12 September. KC also said that RC had been given his one-year vaccinations a few days before 12 September. She had observed him to have cold-like symptoms and he was teething but otherwise she was not concerned by his health.

32. KC said she had used many different types of baby wipe on RC including the same Sainsbury's sensitive wipes that the Appellant said had caused his injuries. KC had taken these wipes from the Appellant at the time of the incident and had used them on RC since. She said there had never been any reaction.

33. Turning to the incident itself, KC said she was sure she had spoken to the Appellant between 5pm and 6pm. KC said that they had spoken about a rash on RC's leg which the Appellant had said was like a blister. KC said the Appellant had mentioned baby wipes during that conversation but could not recall whether the Appellant said she thought the wipes had caused the blistering. She could hear RC crying in pain during the call.

34. On arriving at the house KC said that RC was still crying in pain and that it was a different sound to normal crying. KC said that RC's trousers were wet from the weeping injuries. She undressed RC and then noticed a red patch on his wrist as well as his leg. KC recalled that the Appellant had not previously mentioned the wrist and appeared surprised by it. On being shown the injury, the Appellant had explained that RC had put his hand in his nappy so that it needed wiping.

35. KC confirmed that the Appellant had offered to come with her to the hospital but she had declined. She wanted to get away from the Appellant. KC said she had left the house with RC dressed in a short-sleeved vest. He had been crying but had stopped on the way to hospital, when he appeared drowsy. KC had worried then that RC was in shock. It took her 10 minutes to drive to the local accident and emergency department. RC was seen quickly and his injuries were cleaned and dressed. Photographs were taken during the course of the evening and on return to the burns unit the next day. KC said that she had believed from the outset that the injuries were burns and that hospital staff, including Mr Barnes, had been vocal in saying that the injuries were the result of a scald. The injuries took around two months to heal but on medical advice she was still applying cream daily approximately two years later.

36. KC said she did not think the injuries had been caused intentionally but that they had occurred while RC was in the Appellant's care. KC was

particularly concerned that the Appellant had done nothing to treat or soothe RC before she arrived.

37. Ms O'Callaghan adopted her written statement (D111). She had been the Early Years Regulatory Inspector allocated the Appellant's case on 30 November 2017. She had spoken with KC and then visited the Appellant's house the same day to check that she was not providing childcare while suspended. Ms O'Callaghan denied that she had been surveilling the property before knocking the door, or that her records showed she had arrived earlier than she was now asserting. Ms O'Callahan said that on arrival she had struggled to park and so had asked the Appellant for advice before parking on the opposite side of the road.

38. Ms O'Callaghan said that she noted that the Appellant's own children were at home and then she had asked to search the whole property including the attic area where the Appellant's husband kept an office. She said that she had been in that room only for a few seconds to confirm there were no children present and had taken no interest in any papers or any other items. The only purpose of her search was to check whether the Appellant was minding any children.

39. Ms O'Callaghan said the visit on 30 November 2107 was not to explore the incident on 12 September 2017 but she did discuss it with the Appellant, had inspected her records and had taken away some documents. She accepted that her actions may have been confusing for the Appellant and that her power to enter and search property may not have been clearly explained to the Appellant because Ofsted's suspension notice did not explain what monitoring might entail.

40. Ms O'Callaghan denied that she was annoyed when the Appellant told her that the police planned to take no further action or that she said she would attempt to reverse that decision. Ms O'Callaghan said she simply confirmed to the Appellant that Ofsted's investigations were for a different purpose and would continue. Ms O'Callaghan described the Appellant as hostile to her.

41. Ms O'Callaghan acknowledged that on 30 November 2017 she had taken a copy of the relevant accident record and had retained it by mistake. She should have returned it. Having been asked to do so, she located it on the desk of her home office and returned it six weeks later.

42. Ms O'Callaghan denied that by passing further information to the police and meeting with them on 18 December 2017 she had been seeking for them to re-open their investigation. She said it was simply important to share the evidence she did have and that she had retained an open mind herself.

43. Ms O'Callaghan visited the Appellant again on 11 January 2018 to interview her. Ms O'Callaghan had challenged the Appellant's

explanation that the injuries had been caused by wipes and the Appellant had become angry and defensive. Ms O'Callaghan had also challenged the Appellant's decision not to take any action to treat or seek treatment for RC's injuries. In her oral evidence, Ms O'Callaghan acknowledged that she was no more a medical expert than the Appellant but maintained that as a matter of commonsense the Appellant should not have got RC dressed again and should have taken some further action, including bathing the injuries. Not to do so amounted to neglect, she said.

44. Ms O'Callaghan acknowledged that the Appellant had complained about her and she had subsequently been replaced as the case officer. She had not been disciplined or admonished in any way but continued to work on the case in a supporting role to the case officer.

45. Ms Parmar adopted her written statements (D1 and D90). She was the case officer appointed to take over from Ms O'Callaghan. She had undertaken suspension compliance monitoring visits and conducted Ofsted's investigation, with meetings at Ofsted's offices on 22 February 2018 and at the Appellant's home on 3 April 2018. Ms Parmar had been concerned by the Appellant's decision to take legal advice, to insist on correspondence via a solicitor and not to agree to a meeting without a solicitor present. However, she had agreed to that request and a solicitor had been present at the 3 April visit.

46. Ms Parmar also described occasions when the Appellant had apparently failed to cooperate with compliance visits. On one occasion, which she had recorded as 3 May 2018, the Appellant had refused to open the door, saying that she had a flood caused by a broken washing machine. On another occasion, she had not been at home. Ms Parmar acknowledged that with no notice, it was unrerasonable to expect the Appellant to be at home, particularly as she had then been forced to take other employment because of the length of the suspension. However, Ms Parmar said that she found the Appellant's overall attitude disturbing and that the Appellant's mistrust of Ofsted was a reason that she should be removed from the register.

47. Ms Parmar acknowledged several inconsistencies between the Appellant's account of the investigation, Ms Parmar's contemporaneous notes and the statements she had subsequently produced. She said that these inconsistencies had been due to the need to transfer contemporaneous records between systems.

48. Asked about specific aspects of the investigation that could have supported the Appellant's position, Ms Parmar said she could not recall being shown the 'dynamic tots' form (Appellant's late evidence) that showed the times that RC's nappy had been changed and where the Appellant described the incident. Asked why Ofsted had not sought to arrange a further 'patch test' on RC using the same wipes used on 12 September 2017, Ms Parmar said that it was not Ofsted's place to

arrange such a test nor could they require KC to consent to that being done.

49. Ms Nazarkadeh adopted her written statement (D92). She was the Senior Compliance Officer and the decision-maker in the Appellant's case, acting on the authority of the Chief Inspector. She explained that in the usual way, Ms Parmar as the case officer had come to her with a recommendation and she had made a decision.

50. Ms Nazarkardeh said she had carefully considered the Appellant's account, particularly her explanation for the injuries and her offer to accompany KC to hospital. She also took into account the Appellant's unblemished record over 12 years and the difficult situation that the Appellant had found herself in as a result of her suspension.

51. Ms Nazarkardeh said she was persuaded by the evidence of Mr Barnes that RC's injuries were caused by a thermal scald and very concerned that the Appellant had not offered a plausible explanation for such injuries. She did not believe the Appellant's account. She was also concerned that on discovering the injuries the Appellant had failed to act correctly, or indeed at all, except to call parents. In Ms Nazarkardeh's view, accepting KC's account and having viewed the photographs of the injuries taken a few hours later, the correct action would have been to call emergency services, or at least NHS Direct.

52. Ms Nazarkardeh denied basing her decision to cancel the Appellant's registration on her conduct during the investigation. Instead, she said she had listened to the Appellant's complaint and acted to resolve it, albeit informally. Ms Nazarkardeh confirmed that it had been usual for a senior officer to direct an inspector to gather evidence during a compliance visit. She acknowledged the pitfalls of that approach.

53. Ms Nazarkardeh said that the incorrect date on the Notice of Intention letter was unfortunate. She also said that it was unfortunate that the letter informing the Appellant of the confirmed decision following review was misleading because the decision had been Ms Nazarkardeh's. It had simply been upheld following review. That was the usual position at the time but the process had since been changed.

54. The Appellant gave evidence and adopted her second written statement (E36). She said that she did not believe the investigation into the incident was fair or open-minded and she did not accept that the decision to replace Ms O'Callaghan as case officer had answered her complaint. She said that Ms Nazarkardeh had told her that a formal complaint would not be answered while she remained under investigation herself. Ms Parmar, she said, had told her that she thought Ms O'Callaghan's removal as case officer was wrong.

55. The Appellant said she had become upset when Ms Parmar told her she could not challenge the medical evidence that the injuries were

caused by a scald. It was then clear that she was not believed. The Appellant said that Ms Parmar had already made up her mind and was influenced by Ms O'Callaghan's notes and opinions.

56. The Appellant described her relationship with KC as good. She recalled that KC and RC had visited her setting and they had talked about allergies. KC had revealed RC's allergies quite late on in the process and the Appellant had asked her to fill in a form (D81). KC had filled out the form but it did not show what RC's reaction could be if he was exposed to the allergic foodstuffs.

57. The Appellant remembered a conversation with KC at a later time about his reaction to eggs. KC had told the Appellant that his reaction included peeling skin, but she had not appended that information to the form. She conceded that it might have been helpful to do so but she didn't need to because she didn't plan to give RC eggs or dairy food. She could not explain why KC denied any such conversation or said that peeling skin was never among RC's symptoms.

58. Turning to the incident on 12 September 2017, the Appellant said she was looking after three children of a similar age. One child was having his first day at the setting. Her own children had arrived home between 3.20pm and 3.30pm. The older child had gone to the front room to complete homework. The younger child had played in the childminding setting.

59. The Appellant said that on removing RC's nappy around 5pm she was shocked by what she saw, as she had never seen anything like that before. She then clarified that she had seen a similar reaction in a gluten intolerant child. That, along with the conversation she had previously had with KC about RC's reaction to eggs was why at the time she had thought it was an allergic reaction to food or perhaps wipes.

60. The Appellant said that she didn't treat RC or seek medical advice or attention because RC didn't appear to need it. She maintained that RC was never distressed and the injuries did not appear to her nearly so bad as when they were photographed later. For the same reason, she had considered it reasonable to dress RC again. The Appellant said that while she contacted parents, which was what she was trained to do, she had shown RC love and kept him close to her. She said that he had been somewhat clingy all day as a result of his cold-like symptoms.

61. If presented with the pictures in the evidence, the Appellant said, she would have called an ambulance but it was not a straightforward situation and she thought she was doing the right thing at the time.

62. The Appellant said that she had attempted to call both KC and her husband and that she had only spoken with the latter. She denied

speaking with KC at any time before her arrival at 6pm, although they had exchanged brief text messages. The Appellant thought that Ms O'Callaghan must have wrongly suggested to KC that they did have a conversation and so the thought was in KC's mind.

63. The Appellant said that KC did not appear upset with her at the time but their conversations had been brief because another parent arrived to pick up their child. The Appellant said that KC must be wrong about RC being distressed because other parents would have recalled that and intervened at the time. She did recall having a brief conversation with KC where she asserted that the injuries must have been caused by reaction to a wipe.

64. The Appellant said she had completed the 'dynamic tots' record of RC's day shortly before KC's arrival and gave it to her as she departed.

65. The Appellant said she was surprised when the hospital called later and asked her about spilling coffee or other liquids. She could only explain the injuries were as a result of wipes. She had only used the Sainsbury's wipes in very specific areas because she had nearly finished cleaning RC with his usual wipes. The Appellant agreed that if she had used the wipes anywhere else the same injuries would have resulted.

66. The Appellant denied being over-stretched with five children in the house including her own. She denied ever leaving the minded children alone that afternoon. She said that she had no cause to do so because she could even take her comfort breaks in the small WC off the kitchen. She had minimal contact with her own children and had comfortably managed to feed all the children at around 4.30pm.

The Tribunal's reasons with conclusions

67. We took into account all the evidence that was presented in the bundle as well as the late evidence presented to us at the hearing and the oral evidence of the witnesses. We have summarised some of the evidence before us and we wish to make it clear that the summary above and the evidence we refer to in our findings below is not intended to be a transcript of everything that was said at the hearing.

68. The first issue for our decision was whether we believed RC's injuries had been caused by a thermal scald, as maintained by the Respondent, or through some other cause, as maintained by the Appellant. The could only explain RC's injuries as being some allergic or chemical reaction to the type of wipes she had used for a very specific part of the task of changing RC's soiled nappy at 12.00 noon or thereabouts.

69. The Respondent maintained that because the Appellant had not challenged the written evidence of Mr Barnes, we must accept it as

correct. Mr Barnes, the consultant plastic surgeon who had treated RC on 13 September 2017 on his follow-up visit to the hospital, said that he believed *'on the balance of probabilities, it is more likely that [RC's] injuries were sustained by a thermal scald than by an allergic reaction to baby wipes'.*

70. We did not accept that the position was so straightforward as the Respondent submitted. The Appellant had chosen not to challenge an expert opinion which had left considerable room for doubt about how the injuries had been caused. The Appellant relied on that doubt and sought the benefit of it. Specifically, the Appellant relied on the evidence recorded in the police records (ppH46-H47) that, on being asked by a police investigator, Mr Barnes could not rule out RC's injuries having been caused by the wipes.

71. In that circumstance, Mr Welch submitted, the Appellant was entitled to give her explanation. If we believed her, we were entitled to set her account against the medical evidence and find, on the balance of probabilities that we preferred the Appellant's evidence as to how the injuries were caused.

72. We carefully considered the Appellant's explanation, recorded in the various notes and reports of the Respondent's investigation contained in the bundle, in the comprehensive witness statements the Appellant had made in support of her appeal and in the oral evidence she gave over the course of three hours at the final hearing.

73. We accepted that the Appellant's core account of the day was given consistently at every opportunity she was given to offer it. However, we did not find it credible in several fundamental respects:

    a. First, we did not accept that the Appellant herself could have been in such proximity to RC at all times during that day that she could categorically discount the possibility of a thermal scald. As sole carer for three infant children there must have been times when her attention was given to the other two children. There must have been times when she was not in direct sight of the infants, for example when taking a comfort break or putting the minded infants down for naps. The Appellant's answers to these points, that she was in direct sight of RC at all times was implausible. We also know that the Appellant's own two children returned from school during the afternoon. Again, we found the Appellant's answer that she had minimal contact with her own children, especially her younger child, was implausible.

    b. Second, we found that the Appellant's accounting for the isolated appearance of the injuries by reference to swapping wipes at the very end of the lunchtime nappy change was relatively unlikely. We preferred KC's evidence that there ought to have been a plentiful supply of RC's usual wipes such that

there was no reason to swap to another type. Further, the explanation that the Appellant had managed to clear all other areas of soil to the extent that she only needed to apply the second type of wipe to two relatively small and discrete areas on the arm and leg as implausible. Even taking into account the Appellant's explanation that RC was apt to grab at his exposed genitals, we found it beyond belief that RC would have been soiled only above his wrist such that it was the only place on his hand or arm that the Appellant needed to apply a wipe. We accepted KC's evidence that the Appellant had appeared unaware of the injury to RC's wrist until KC pointed it out to her We found that the Appellant's explanation for that injury was manufactured to fit the explanation she had already fabricated.

c. Third, as regards the appearance of the injuries at 5pm, we found the Appellant's answers inconsistent and evasive. The injuries were, in her words, simultaneously 'shocking' such that she sought immediate advice from parents about an allergic reaction but also not so serious that she felt compelled to seek medical attention or provide RC with any relief through medication or application of cold water, or even to leave his clearly irritated skin open to the air. It appeared to us that the Appellant's recollection of the injuries was that they were more or less serious dependent on whether the answer seemed to her helpful to her account.

d. Fourth, we do not accept that injuries which, on the Appellant's account, must have been caused at the noon nappy change, could have presented such that they did not require attention at 5pm but were so serious at 6pm that KC immediately decided that RC required immediate medical attention at an accident and emergency department. While we make allowances for the possibility that the appearance of injuries may worsen over time, KC's evidence was that at 6pm the injuries looked equally as bad as one of the photographs showed at around 8pm. We prefer KC's evidence on that important point as well as the related point that RC was visibly distressed when she came to pick him up. We find it inconceivable that RC was not distressed by such serious injuries.

e. Fifth, leaving aside for now the correctness of her other actions on discovering the injuries, the Appellant could not give a satisfactory answer as to why she chose to cover up the injury to RC's leg by replacing his trousers. Even on her own account that RC's skin was not hot or apparently sore, it seems to us thoughtless, if not cruel, to have covered up his peeling and blistered irritated skin. It seems to us inexplicable why she would do so unless she was seeking to conceal his injuries or else affecting a degree of nonchalance about their seriousness. As it was, we preferred the evidence of KC that on inspecting him,

RC's clothes were wet from his weeping wounds and when exposed the wounds were hot to the touch, which makes the Appellant's actions in having covered them up even less reasonable.

74. Having rejected the Appellant's account about how the injuries were caused and how they presented to her at 5pm, there are no further reasons for us to qualify the evidence of Mr Barnes. Applying the relevant legal test and based on the evidence as a whole, we find that on balance, RC's injuries were caused by a thermal scald and not by an allergic reaction to wipes.

75. Having made that finding, it is not necessary for us to speculate on how such a scald was caused. It may be that the Appellant does not know the full facts because she was not present at the relevant time or the scald was caused by the act or omission of some other person. Equally it may be that she does know and has chosen to conceal how the scald was really caused.

76. However, in the absence of a plausible explanation by her we are entitled to find, and we do find, that the scald must have been caused directly or indirectly by some act or omission by her, as sole carer for the child at that time. The Appellant's failure to prevent RC's serious injuries is, of itself, sufficiently serious that it should bring into question whether she is suitable to be a childminder.

77. Equally seriously, however, the logical conclusion of our findings on the primary issue is that the Appellant has not told the truth to the police, the Respondent or the Tribunal. Her account of 12 September 2017 and her actions in calling parents with concern about allergies may be a calculated deception to conceal the real and known cause of RC's injuries. We do not need to make a finding about that because, at the very least, she has not told us all the facts within her knowledge that would adequately explain what happened that day and allow us to decide whether she had exercised sufficient care for RC and the other children.

78. The further consequence is that even if the Appellant's account and her actions on the evening of 12 September 2017 were not a deliberate deception, if a person in the Appellant's position cannot be trusted to tell the whole truth about matters which go to the core of her professional competence and responsibilities, she cannot be said to be suitable to be a childminder within the meaning of the statutory framework that we are to apply.

79. Notwithstanding the Appellant's previous unblemished record as a childminder, given the seriousness of the injuries to RC and the grave breach of trust by the Appellant in failing to properly account for it, we find that it is necessary and proportionate to cancel her registration.

80. Given our conclusion based on the first issue before us, it is not strictly necessary for us to go on and make findings in respect of the other issues before us. However, in case we are wrong about our finding on the first issue and our decision based upon that alone, we briefly set out our findings on the other issues:

81. We were not satisfied that the Respondent's witness evidence or submissions made out a persuasive case about what the Appellant should have done on discovering the injury. The witnesses had different ideas about what the correct actions might have been. It was never clear whether the Respondent's case was that the Appellant should have sought professional advice, administered first aid or given RC pain relief. It was variously suggested that the Appellant should have bathed the injuries in cold water, given RC Calpol or antihistamines.

82. However, having found that RC's injuries were caused by a thermal scald; that the Appellant knew or ought to have known that was how they had been caused; and that they were obvious and serious, we found that to do none of the things suggested by the witnesses did fall below the standard of a reasonably competent childminder who held an appropriate qualification in first aid. In particular, we were concerned the Appellant could give no reasonable explanation why she did fully undress and inspect RC's skin and why she did not at least apply cold water to the injuries: an apparently risk-free measure that would have helped soothe the injuries. We also found that it was unreasonable for the Appellant to have covered up the leg injury that she knew about by dressing RC in his nappy and trousers.

83. We did not find that the Appellant's failure to act in respect of the injuries were sufficient by itself to justify the cancellation of her registration as a necessary and proportionate measure. However, the Appellant's failure to act at all to relieve RC's pain and her inexcusable decision to put RC's clothes back on did add considerable additional weight to our conclusion that cancellation was necessary and proportionate.

84. We did not find that the Appellant's behaviour during the Respondent's investigation amounted to a further reason to remove her from the registers and we placed no weight on that limb of the Respondent's argument.

85. We found Ms O'Callaghan's evidence about her visit to the Appellant's home on 30 November 2017 concerning. At the very least, the dual purposes of the visit were not explained to the Appellant, which we find accounts for her enmity. We observe that in similar cases, OFSTED may wish to carry out visits for the purposes of suspension compliance at different times to their visits for the purposes of carrying out an investigation into the circumstances that led to the suspension so that no confusion arises in the mind of the person being investigated.

86. We also accepted the Appellant's evidence that Ms O'Callaghan was displeased on learning from the Appellant that the police investigation had been concluded with no further action. The evidence as a whole, including the written records, supports a conclusion that Ms O'Callaghan had formed strong views about the Appellant's culpability from an early stage. As a result, we were not persuaded that her visits to the Appellant's home on 30 November 2017 and 11 January, were as coolly professional, detached or sympathetic as she sought to maintain.

87. To the extent that it was argued by the Respondent, we reject any suggestion that the Appellant's unhappiness with the process of the investigation, her indignation at the challenge to her account or recourse to legal were themselves reasons to consider her uncooperative with their investigation or otherwise reasons to consider her unsuitable to remain on the registers.

88. Finally, we should acknowledge that in addition to her primary position on the facts around the incident on 12 September 2017, much of the Appellant's arguments were based around: the procedural shortcomings and inconsistencies of the Respondent's investigation; the communication of its decision; its handling of the Appellant's objections; and the presentation of its case to the Tribunal. For its part, the Respondent acknowledged some of these criticisms but not all.

89. In addition to our observations on Ms O'Callaghan's conduct on 30 November 2017, we do find that the Respondent's conduct in its investigation and communication of its decision did not always meet the high standards one expects from a public regulatory body. However, we were satisfied that the Respondent's conduct in its own investigations was essentially fair; that action was taken when the appearance of fairness was challenged; that the Appellant had ample opportunity to put her account; and that both her account and her previous good record were considered by the decision-maker.

90. More to the point, since the Tribunal acts by way of redetermination of the decision to cancel the Appellant's registration and we did not find anything in the Respondent's case that prevented us from reaching a fair decision.

91. We therefore confirm the Chief Inspectors decision to cancel the registration.

Decision

92. The appeal is dismissed.

93. The Chief Inspector's decision to cancel the registration is confirmed.

Tribunal Judge C Dow
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date Issued: 24 July 2019