

Care Standards

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

[2019] 3780.EY-SUS

Before

Judge G K Sinclair
Specialist member C Joffe
Specialist member M Flynn

GATEHOUSE FARM CHILDCARE LIMITED

Appellant

-v-

Ofsted

Respondent

DECISION

Before the tribunal, considering the appeal on the papers on Tuesday 27th August 2019.

The appeal

1. The appellant company, of which Ms Claire Mildenhall is sole director and shareholder, provides childcare from a converted farmhouse on Secmaton Lane, Dawlish, in Devon. It appeals against Ofsted's decision to suspend its registration to provide childcare on the Early Years Register, the compulsory part of the Childcare Register and the voluntary part of the Childcare Register for a period of six weeks from 25th July 2019, expiring on 4th September 2019.
2. The initial notice of the decision to suspend was issued on 25th July 2019 but was wrongly addressed not to the company but to Ms Mildenhall personally. This was corrected by an amended notice addressed to the company dated 13th August 2019.
3. Please note that as certain children are named in documents filed in connection with this appeal the tribunal has already made, but repeats, 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 or other adult family members.

Background

4. The appellant was first registered on 23rd May 2017 as a nursery (provider of childcare on domestic premises) on the Early Years Register, Compulsory Childcare Register and Voluntary Childcare Register, but in a previous format the business had operated from the current premises since 2015. Prior to that Ms Mildenhall ran her own childminding business. The appellant company has been the subject of two Ofsted inspections: on 24th September 2018, when it was rated as “Good”, and most recently on 22nd May 2019, when this had changed to “Inadequate”.
5. As a result of following up reports received by Ofsted from staff members the latest inspection was carried out without prior notice. Within days the deputy manager had resigned, being replaced by two newly appointed deputy managers on 21st and 31st May respectively. Concerned by:
 - a. their manager’s unprofessional approach to recruitment, safeguarding issues, etc,
 - b. her frequent complaints about staff and about being ill,
 - c. a mass walkout by most of the existing staff,
 - d. lack of leadership support, and
 - e. learning on 9th June that Ms Mildenhall had been admitted to hospital and that they would be required to manage a new setting with unfamiliar children, poor records, and too few staff, they independently decided to hand in their notice on 12th July, both resigning with effect from 19th July 2019.
6. A letter from Ms Mildenhall’s GP, dictated on 13th August 2019, refers to her recently being diagnosed with multiple sclerosis and – on the subject of her forthcoming hearing – her anxiety to avoid undue stress.
7. Although the service was by then closed Ms Mildenhall was contradicting herself about whether she was planning soon to re-open it or not (and past staff members had been approached about returning in September, but they refused), so the decision was taken by Ofsted to serve notice of suspension while investigations continued.
8. On 7th August 2019 an appeal application form was filed by solicitors Blake Morgan LLP on behalf of Ms Mildenhall (the notice to suspend at that stage having been sent to her rather than the company), directions were given on 8th August, and Ofsted filed its response on 13th August. Further agreed directions, limiting the amount of oral evidence to be given, were issued on 16th August, but when the case was finally listed for hearing at Taunton the appellant’s solicitors informed the tribunal that Ms Mildenhall felt unable for health reasons to travel that distance and would prefer that the appeal be dealt with by paper

determination instead. By consent, an order to that effect was made on 23rd August 2019. As a result this decision is being reached just one week before the six week suspension expires.

Applicable legal provisions

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

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.

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.

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.

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.

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.
12. 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 paragraphs 21–24 the court said: 21. 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.

22. 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.
 23. The First-tier Tribunal observed that the 2008 Regulations do not expressly provide that the purpose of the first 12 weeks of suspension has to be either "to allow time for the circumstances giving rise to the Chief Inspector's belief to be investigated" or "to allow time for steps to be taken to reduce or eliminate the risk of harm" as was the case under regulation 3(2) of the Child Minding and Day Care (Suspension of Registration) (England) Regulations 2003 (SI 2003/332) which the 2008 Regulations replaced. However, Ms Broadfoot suggested that no change had been intended – and it is certainly difficult to see on what other grounds suspension under regulation 8 could be justified, given the statutory scheme for cancellation and for other urgent action under section 72, even though regulation 10(3) expressly applies those restrictions only to any extended period of suspension.
 24. In any event, the suspension in the present case was for the purpose of allowing time for an investigation to be completed and it is necessary for us to consider how the power to suspend should be exercised in such a case.
13. I ignore paragraph 25, which concerns cases where there are ongoing investigations by external parties such as the police or local authority, and continue at paragraph 26:
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

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

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.
14. This tribunal summarises the position thus. Continued suspension is justified if:
- a. The threshold criterion in regulation 9 is met. This is quite a low threshold, but evidence-based, suitable for an interim rather than a final decision.
 - 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 children being cared for (and their parents), continuation of the suspension is a proportionate response.

The evidence

15. Witness statements were provided by Ofsted from its own staff, former staff at the appellant nursery, and from two Devon County Council staff members. Sarah Madge (an Early Years Regulatory Inspector) conducted an unannounced visit on 24th April 2019, later asked Ms Mildenhall to complete and return a Health Declaration Booklet in order to initiate further health checks, and carried out a formal inspection on 22nd May 2019. Further statements were provided by two more senior officers to whom she reported (the second stepping in while the first was on leave). They were Gill Wallace and Sarah Haylett, each of whom is an Early Childhood Senior Officer, South West Region. Ms Wallace was and is the decision maker in this case. Brief corroborative and “chain of evidence” statements were also provided by Katherine Lamb and Samantha Powis, each of whom is an Early Years Regulatory Inspector.
16. Exhibited to Ms Haylett’s statement, as they are not in the preferred format, are two documents described as supporting statements on behalf of Devon Early Years and Childcare Service. They are by Helen Stephenson, Early Years and Childcare Advisor assigned to the appellant service, and her line manager Sue Bolt, Locality Manager for the South and West Devon area.
17. A point worth recording from Ms Bolt’s evidence is that on or after 4th July 2019 she was able to get Ms Mildenhall to contact her. She says:

Claire then contacted me indicating she was ‘gathering’ information i.e. advice and guidance that would enable her to make an informed decision as to the next steps she would take. Within this she was clear with me that if she resigned then from an insurance point of view she would not be covered, whereas if her registration is cancelled then she would i.e. to the amount of £250,000. I advised Claire to re-check this with the insurance provider since this didn’t sound correct. I have not heard anything further on this matter.
18. The tribunal also had before it statements from three former deputy managers at the appellant nursery: Michelle Lake, Claire Knowles, and Michelle Tucker, and three other ex-members of staff: Teresa James, Jacqueline Plain and Paula Middleton.
19. In summary these statements, which no doubt Ms Mildenhall hotly contests, challenge her professionalism, the repeated undermining of staff, or setting one against the other, threats to those making (or thought likely to make) complaints – including by sending four generic “cease and desist” letters modelled on those she found on the internet, inappropriate behaviour and talk with staff members of a sexual nature, safeguarding failures involving older children at the premises, dog faeces in the garden, inappropriate discussion of safeguarding issues with parents, lack of support, discussion of her illness (at that stage not clearly diagnosed) with staff in the presence of young children, going upstairs to her own accommodation to lie down almost on a daily basis, and staying upstairs when a visitor attended for a pre-arranged meeting.

Discussion and findings

20. Having considered all the written statements before it the tribunal is satisfied that there is sufficient evidence to establish at the very least an arguable case that Ms Mildenhall is unreliable in what she says (e.g. about a police officer being with her at the time she was speaking with Ofsted on the phone), inconsistent, unwilling to co-operate with Ofsted's enquiry, and refuses to provide sufficient medical evidence as to her prognosis. She lacks staff, denies that she will restart the nursery, yet asks former staff to come back (which they refused) and informs Ms Wallace that she has a prospective new manager lined up from Plymouth. There is clear evidence of her poor treatment and undermining of staff members, inappropriate behaviour, the making of threats and the sending of "cease and desist" letters to staff (personally, not through solicitors or with any hint that she had received legal advice), a complaint about and wholly untrue threats of police action against Ofsted, and an inability to control older children and keep them away from the nursery setting.
21. Having received a rating of "Good" following the inspection in 2018, the tribunal notes that both staff and, it seems, some parents observed a rapid deterioration in the latter part of that year and into this. Initial concerns raised were about Ms Mildenhall's mental stability, her ability to manage the setting and provide guidance for staff. Whether some of the odder alleged behaviour may be attributed to her illness is not for this tribunal to judge, but it notes her GP's concern (and that of others) about imposing undue stress, and how she perhaps needs to concentrate on her own health first, before any plans to re-open the nursery at Gatehouse Farm.
22. For that reason Ofsted wrongly assumed that upon discharge from hospital it was her intention to apply to de-register the service, recover her health and consider her plans before deciding whether to apply again, with new staff available, to seek fresh registration. Whether her reluctance to do so, and thus avoid a potential move by Ofsted to cancel registration, is influenced by the comments about insurance cover recorded by Sue Bolt is not known. She should seek advice on this and perhaps think again.
23. On the evidence before it the tribunal 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 and determines:
 - a. that the threshold criterion is met,
 - b. that aspects of the investigation requiring co-operation from the appellant's sole director and shareholder (who is also the nominated individual), in particular detailed medical evidence as to her fitness to manage the setting, need to be concluded, and
 - c. 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 25th July 2019 (amended on 13th August 2019) 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 or other adult family members.

**Graham Sinclair
First-tier Tribunal Judge**

Date issued: 2 September 2019