

Care Standards

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

Hearing via Video Link on 27th March 2020

[2020] 4023.EY.SUS

BEFORE

Mr Timothy Thorne (Tribunal Judge)
Mr James Churchill (Specialist Member)
Ms Lorna Jacobs (Specialist Member)

BETWEEN

LC LTD (A)

Appellant

-v-

Ofsted (R)

Respondent

DECISION

The Appeal

1. A appeals to the Tribunal against Ofsted's decision to suspend its registration as a provider on the Early Years Register and both the compulsory and voluntary part of the Childcare Register from 28 February 2020 for a period of six weeks until 9 April 2020.

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 users of the service in this case so as to protect their private lives.

Background

3. A has been registered as a childcare provider since 6 March 2017. CM is the sole director and nominated individual of the company A, and the manager of the setting.

4. A was suspended on 17 January 2020 for a period of six weeks until 27 February 2020. It is the subsequent second suspension (imposed from 28 February 2020 until 9 April 2020) which is the subject matter of the present appeal.

Late Evidence

5. Neither party applied to submit late evidence.

Evidence (Summary & Analysis)

6. Mr. Simon White represented Ofsted. A was represented by Mr. Peter Gilmour of Counsel. The hearing was conducted via video link. The panel took into account all the written and oral evidence that was presented. It also read and took into account the helpful skeleton arguments submitted by both parties.
7. CM gave oral evidence on behalf of A. All other witnesses were read. They were as follows:
 - a. William Good (on behalf of Ofsted)
 - b. Lesley Booth (on behalf of Ofsted)
 - c. Kathryn Bell (on behalf of Ofsted)
 - d. CM (CM's sister on behalf of A)
 - e. MM (on behalf of A)
 - f. PJ (on behalf of A)
 - g. SS (on behalf of A)
8. The evidence that gave rise to Ofsted's decision to suspend A's registration is set out in the witness statements of Kathryn Bell, Lesley Booth and William Good. These witnesses outline the concerns raised about CM and her niece (N) who lives with CM under a special guardianship order. N has made allegations that CM assaulted her and that she was sexual assaulted by another child whilst in CM's care. In addition, N's school has also raised concerns about N's presentation. The following is a summary of the evidence and the panel's analysis thereof.
9. On **26 July 2018** Leicester City Council (LCC) informed Ofsted of alleged physical abuse of CM's niece (N) by CM. It was alleged that CM hit N on the head with a mobile phone. CM described an incident where N who was 5 years old at the time had gone to run into the road. CM explained that she thought she may have caught her on the forehead with her mobile phone. She had been angry with her and she "speaks with her hands" and CM apologised. She explained that N went to school the next day and accused CM of hitting her. A referral was made to LCC and CM's family was signposted for Early Help interventions.
10. On **07 November 2018** CM informed Ofsted of another allegation made by N, who was then 6 years old, that she had slapped her. N reported the allegation to her school. CM explained to Ofsted that she was taking N to her sister's and N was misbehaving and screaming so CM had to take her

out of the car. CM said she tapped her niece on her leg to say “get out” and N must have misunderstood. CM also stated that N had also made false allegations against her teachers. CM also admitted that a grandparent had gained access to her pre-school without her knowledge. The Local Authority Designated Officer (LADO) confirmed to Ofsted that there had been two allegations made against CM by N.

11. On **12 June 2019** CM notified Ofsted of a further allegation of physical abuse made against her by N, that she had hit her on the leg. CM reported that she had been contacted by N’s teacher on 4 June 2019. The teacher had told CM that N had made the allegation the day before. N claimed that CM had hit her on the leg following N’s refusal to clean her room. N had a mark on her leg. CM also informed Ofsted that she had been contacted by a social worker on 11 June 2019 and that they would be conducting an assessment.
12. On **13 June 2019** Kathryn Bell Early Years Senior Officer (SO) telephoned CM to discuss the allegation. CM explained that she had issues with N who was not able to see her parents following an incident in the holidays where two children were alleged to have been made to kiss each other. CM explained that seven children (her nieces and nephews) including N had been playing hide and seek in her bedroom. They had broken a wooden pole off the wardrobe. CM said she “talks with her hands” and had the broken part of the wardrobe in her hand. She stated that she did not think the pole had hit N as her niece did not say at the time and she had no injuries. Kathryn Bell asked about safeguarding at the setting and CM said she was not sure what to do - she was waiting for contact from children’s social services.
13. On **14 June 2019** Ms Bell spoke to CM again by telephone. CM explained the arrangements at the nursery to safeguard children while the social care assessment was completed. CM said that N had told her that she knew the allegations she was making were untrue and did not want to get CM into trouble.
14. On **22 July 2019** there was a LADO meeting and the allegation made by N in June 2019 was deemed unfounded.
15. On **24 October 2019** Ofsted received further concerns from the LADO, referred from N’s school. This related to remarks made by N and her dirty and unsuitable clothing. N was seen by the school to be continuously upset with poor confidence and displayed behavioural issues.
16. On **17 January 2020** William Good an Early Years Regulatory Inspector (‘EYRI’). attended a LADO meeting where it was concluded on the balance of probabilities that CM had harmed N and or placed her at risk of harm through neglect of her emotional and physical care needs. William Good exhibited the LADO meeting minutes as WG/3. They included the rationale for the decision as follows:
 - a. CM’s presentation and daily care appeared poor.

- b. There have been concerns about supervision in the family home. For example, before and after school where older children had been left responsible for caring for N.
 - c. There have been concerns about CM enabling unsupervised contact between N and her birth family from whose care she was removed. It was recorded that part of N's special guardianship order had a safety plan for CM to ensure N was supervised when with her family. This was denied by CM.
 - d. There was concern (casting doubt about her safeguarding abilities) that CM had not been proactive in responding to the allegation that N had been sexually touched.
 - e. There was concern that CM lacked ability to manage N's behavioural and emotional needs safely and consistently.
 - f. There was concern that CM had presented as negative and blaming of N.
17. On **17 January 2020** A's registration was suspended by Ofsted. On **28 January 2020** the LADO informed Ofsted that an investigation was to be conducted by social care in relation to N's allegation of sexual assault.
18. On **24 February 2020** the LADO informed Ofsted that N was now subject to a Child Protection Plan under the category of "risk of physical abuse and neglect". The reasons for this were said to be due to concerns raised over a period of time about N being hit by CM and being neglected by her.
19. The plan is due to be reviewed on 4 May 2020 by the Independent Chairperson along with the agencies and the family involved. It is anticipated that a decision would then be made about whether the child protection plan would continue. On **28 February 2020** A's registration was further suspended. On **10 March 2020** A lodged the present appeal.
20. CM gave oral evidence before the panel and adopted her witness statement. In her evidence she denied the allegations of assaulting N. She was taken in detail by her counsel through each of the allegations and said that in each case N was either exaggerating, had misunderstood or was simply lying. In addition, she explained that N used to sometimes go to school wearing dirty clothes that she had hidden under outer garments she was wearing. She also concluded that N had made up the allegation of sexual touching because she had fallen out with the boy she had accused.
21. She reiterated that N was a troubled child and could not be believed. Moreover, N's challenging behaviours required the intervention of child mental health services and a paediatrician. She also made it clear that none of the allegations made by N had resulted in a police investigation and Social Services had found an allegation of physical chastisement to be unsubstantiated.
22. She also made the point that N had made other unsubstantiated allegations against others.

23. She stated that she had a great deal of experience minding children and that has never been subject to an individual complaint. None of the parents of the children in her care had made complaints against her. She reiterated that N had had a traumatic childhood and exhibited challenging behaviour, which includes the making of false allegations.
24. The panel also read and took into account the following written evidence:
- a. Witness statement of CM (CM's sister) in which she said that N had behavioural issues even from the age of 2. "She would just scream at the top of her voice for hours on end for no apparent reason. CM's neighbours would knock on the door asking what was going on. It was very difficult for CM to deal with her behaviour and I was concerned about CM having to deal with it on her own. She said that she had no direct knowledge of N's allegations against CM but knew that CM denied them: "She is very caring and would never do anything like that. I therefore believe that our Niece made this allegation up." She also opined that N had made up the sexual touching allegation as well.
 - b. Witness statement of MM in which he said that he had little knowledge of the A. However, he knew CM and thought highly of her. He did not understand why if N's allegations against CM were true that she would still be allowed to live with her. He knew that N's behaviour was "worrisome" and "erratic." She often misbehaved in church.
 - c. Witness statement of PJ who had little knowledge of the A. However, the witness knew CM and was worried that she had agreed to care for N. The witness had personal knowledge of N's very difficult behaviour. She often told lies.
 - d. Witness statement of SS who had little knowledge of the A. However, the witness knew CM and knew she was well regarded. The witness had "first-hand experience of the challenging behaviour of N and believed that she often told lies.
 - e. A number of character references from the parents of minded children who spoke highly of CM and the quality of the care she provided.
 - f. A 5 page joint letter from N's Class teacher and SENCo requesting that N should see a paediatrician. This outlined N's difficulties, noting that the "concerns are at school and at home. N's emotional outbursts are most disabling to her as she is unable to control herself and becomes extremely cross, shouts, screams and becomes physically aggressive.... It can take 30 minutes to an hour from start of outburst to the end."

Legal framework

25. The statutory framework for the registration of childminders is provided under the Childcare Act 2006. Section 69 (1) of the Act provides for regulations to be made dealing with the suspension of a registered person's registration. The section also provides that the regulations must include a right of appeal to the Tribunal.

26. 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.”
27. “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”.
28. The powers of the Tribunal are that it stands in the shoes of the Chief Inspector. Therefore, 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 childcare by the registered person to any child may expose such a child to a risk of harm.
29. 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.
30. The Upper Tribunal (UT) laid down the following guidelines in the case of **Ofsted v GM & WM [2009] UKUT 89 (AAC)**:
“ - on an appeal the First-tier Tribunal stands in the shoes of [the Respondent] and must consider whether grounds for suspension exist at the date of the hearing (paragraph 10)
-[The relevant regulation] sets a low threshold – that there “may” be a “risk” – but the fact that the threshold has been passed does not necessarily mean that the power of suspension.....must be exercised (paragraph 22);
-it is difficult to see on what grounds a suspension can be justified other than for the purpose of investigating a belief that there may be a risk or to allow time for a risk to be reduced or eliminated (paragraph 23);

-a suspension imposed on the grounds that there is an outstanding investigation can be justified only as long as there is a reasonable prospect of the investigation showing that further steps to reduce or eliminate a risk might be necessary.”

Conclusions

31. For reasons given below the panel concludes that the Respondent has proved to the requisite standard that the threshold for suspending the registration was met when the Respondent suspended the Appellants’ registration and that this threshold continues to be met now. The panel is satisfied that the continued provision of childcare by the Appellant to any child may expose such a child to a risk of harm. The panel is also satisfied that continued suspension is necessary to progress the investigation of that

risk and to identify what steps might be taken to reduce or eliminate that risk.

32. The panel accepts that the witness statements submitted by Ofsted (which were taken as read and which were not challenged by A) establish that a number of serious allegations have been made by N against CM. They involve allegations of physical violence. There is also evidence that A has made an allegation that a child has sexually touched her whilst they were both in the care of CM. Moreover, there is evidence that teachers at N's school have raised serious concerns about CM's care of N in that the child has attended school in dirty clothes and has exhibited signs of neglect.
33. The panel acknowledges that these allegations remain merely allegations and that they are denied by CM. The panel also recognises that the evidence establishes that N is a troubled child who may exhibit challenging behaviours. The allegations made by N must be treated with the utmost caution but they cannot be ignored. Moreover, there is clear evidence from N's school that she did attend in dirty clothes and in the opinion of her teachers, exhibited signs of neglect.
34. In addition, Ofsted allege that CM allowed unsupervised access to N by members of N's birth family. CM agrees that this took place. Ofsted assert that this is contrary to the requirements of N's special guardianship order safety plan. CM denies that there is such a requirement in the plan and that she has been told by professionals who have seen the Order that any supervision is at her discretion.
35. In the context of the test that the panel must apply at this stage, in the judgement of the panel all of the aforesaid matters require further investigation and without further enquiry they presently constitute a risk of harm to N and therefore to any child in the care of CM.
36. In light of all the evidence outlined above (when considered in the round) the panel is satisfied that it is reasonable to believe that children at A's setting may be exposed to a risk of harm. Therefore (applying the appropriate test) the panel is driven to conclude that the continued suspension of A's registration is necessary and proportionate in order to allow the circumstances to be investigated and steps to be taken to reduce or eliminate the risk of harm. The panel is satisfied that until the outstanding investigations have been concluded (or have progressed), children in the care of A may be at risk of harm and that the suspension is therefore necessary and proportionate.
37. In coming to this decision, the panel has balanced a range of factors including the financial and reputational damage to A and that parents who use A's services may depend on it to allow them to work. Nonetheless the panel concludes that the continued suspension is proportionate and necessary for the reasons given above.

Decision

38. The appeal against the suspension is dismissed.

39. The suspension in relation to the Appellant shall continue.

**Tribunal Judge Timothy Thorne
Care Standards
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 01 April 2020