

First-tier Tribunal Care Standards

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

[2021] 4319.EY-SUS V Kinly

Hearing held using the Kinly video service
on 5th July 2021

Before

**Tribunal Judge Gareth Brandon
Specialist Member Denise Rabbetts
Specialist Member Paul Richardson**

**The Kinder-Set Ltd
(Malton Montessori School & Nursery)**

Appellant

-v-

Ofsted

Respondent

DECISION

The Application

1. The Appellant appeals the decision of Ofsted to suspend the registration as a childcare provider on domestic premises on the Early Years Register and both the compulsory and voluntary parts of the Childcare Register and applies to the Tribunal to order that the notice of suspension dated 28th May 2021 should cease to have effect.

Attendance

2. The Appellant was represented by Mr Peter Gilmour of counsel. Their witnesses were Ms Anja Rutter (owner and manager of Malton Montessori Nursery) and Ms Freja Madeley (Employee of Malton Montessori Nursery and daughter of Anja Rutter).
3. The Respondent was represented by Wendy Gutteridge, Solicitor. Their witnesses were Mr Duncan Gill (Ofsted Early Years Senior officer), Mrs Melanie

Arnold (Ofsted Early Years Regulatory Inspector ('EYRI')) and Mrs Julie Kaye (Local Authority Designated Officer (LADO))

4. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was video, using the Kinly service. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that we were referred to are in a bundle of 187 pages including late evidence admitted at the hearing, the contents of which we have recorded. The order made is described at the end of these reasons.

Late Evidence

5. In advance of the hearing the Respondent applied to admit as late evidence a further witness statement of Julie Kaye, Social Worker of North Yorkshire County Council, dated 1st July 2021, with two exhibits, JK8 and JK9. The exhibits were, respectively, a document sent to the witness by Anja Rutter on 28th June 2021 concerning manual handling of children and detailing her training in and understanding of techniques of lifting children by their clothing, and a copy of a letter received by the witness on 30th June which had been sent to parents of the nursery on 24th June 2021 by Anja Rutter and which contained an account of an incident which had been referred to the LADO.
6. Mr Gilmour indicated the Appellant had no objection to this material being admitted in evidence. We considered that the material was relevant to the issues in the appeal and decided to admit it in evidence.
7. The Appellant applied to admit as late evidence a further witness statement of Freja Madeley and five exhibits, labelled MM21-MM25. Mr Gilmour stated that the witness was unwell at the time evidence was served in the appeal and therefore her statement had been taken late. The Respondent indicated there was no objection to the evidence being admitted. We noted that Ms Madeley was the subject of the allegation which gave rise to the suspension under appeal in these proceedings. We considered that the evidence was relevant to the issues in the appeal, that it was in the interests of justice, proportionate to the issues in the case to admit it, and that no prejudice would be caused to the Respondent in so doing.
8. The Appellant at the hearing applied to admit as late evidence a character reference for Anja Rutter from a parent of a child at the nursery and a certificate indicating that Anja Rutter had on 3rd July completed a course and assessment in practical safeguarding with the Sue Overton Applied practice. There was no objection from the Respondent to the material being admitted. We considered that it was relevant to the issues in the appeal and decided that the evidence should be admitted.
9. The Appellant applied on 1st July 2021 under Rule 15(1)(e)(ii) of the Tribunal Procedure Rules for the witness statement of Alison Barker to be read. The Appellant had intended to call Ms Barker as a witness at the hearing but stated that she was unwell with stress and anxiety and unable to attend the video

hearing. The Appellant argued that the hearing could proceed with witness evidence from the Appellant's manager and employee involved in the incident in question, that the Respondent would still be able to make submissions on the witness statement of Ms Barker and that the Tribunal can decide what weight to attach to the evidence, taking into account the impossibility of cross-examination. The Respondent opposed the application and requested that Ms Barker attend the hearing, noting that there was, at the time of the application, no medical or other evidence of Ms Barker's condition.

10. We took account of the submissions of both parties. We noted that at the hearing there was evidence submitted in support of the application from a GP Dr Green dated 2nd July confirming that Ms Barker had reported stress-related symptoms including gastrointestinal symptoms, felt unable to attend the hearing and that in the Dr's view this was an appropriate decision. We took account of the urgent nature of these proceedings and the strong interests of justice that matters are determined swiftly. We decided that it was in the interests of justice and proportionate to the issues in this appeal, for the evidence of Ms Barker to be read from her witness statement.
11. The panel raised with the parties that the evidence in this appeal identifies individual children and parents and invited submissions on whether the Tribunal should make a direction restricting the reporting of proceedings to avoid the identification of children or their parents. Both parties agreed this would be appropriate.
12. 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.

Background

13. Malton Montessori Nursery is part of Malton Montessori School and Nursery. Anja Rutter is the owner, nominated individual and manager of the Nursery and head teacher of the primary school. This appeal concerns only the nursery. The Appellant has been a registered childcare provider since September 1996.
14. Ofsted inspections in 2004 and 2006 resulted in 'good' outcomes, inspections in 2009 and 2013 resulted in 'outstanding' outcomes, and an inspection in 2019 resulted in a 'good' outcome. The last inspection on 11 May 2021 resulted in an outcome of 'inadequate', due to safeguarding concerns. Welfare Requirement Notices were issued, which included actions on safeguarding and managing behaviours.
15. The Appellant's registration was previously suspended on 22 March 2021 following notification from both the LADO and the Appellant on 19 March 2021 that during an inspection a notebook and two mobile telephones containing sexually explicit content had been found in the staff locker of an employee at the setting. The notebook had been discovered approximately one year prior in

Spring 2020 but was not reported at the time. This suspension was lifted in April 2021.

16. On 21st May 2021 the LADO was contacted by Ellie Duffin, deputy designated safeguarding officer (DSO) at the nursery and a report was made of an incident which had taken place at 14:45pm on 20th May 2021 of the handling of a child by a member of staff, Freja Madeley, the daughter of Anja Rutter. The report stated that another staff member had witnessed Ms Madeley to have “grabbed a child by his t-shirt near his neck and carried to the bathroom like this”. The report was not immediately made to the nursery designated safeguarding lead (DSL), as this was Anja Rutter, and the allegation concerned her daughter.
17. On 23rd May this matter was reported to Ofsted by the LADO.
18. On 26th May Ellie Duffin contacted the LADO. As a result of this contact the LADO concluded that Anja Rutter had placed pressure on her staff to contact the LADO and say that the situation was a mistake and should not have been reported.
19. On 27th May the nursery sent to the LADO a revised manual handling policy, dated 25th May 2021, which included a section advising staff that it was acceptable to restrain or lift a child by their clothing as an emergency measure as a last resort to prevent harm or avoid danger.
20. The LADO does not carry out investigations itself and on 28th May directed the nursery to conduct its own investigation into the incident and report their findings to her. This investigation was undertaken by Alison Barker, the new DSO of the nursery. Ms Barker completed her investigation on 15th June 2021 and submitted it to the LADO, who requested further information including details of the technique Ms Madeley had used and the behaviour management training she had undertaken.
21. On 28th May 2021 Ofsted notified the Appellant of its decision to suspend the registration of the nursery on the Early Years Register, the compulsory part of the Childcare Register and the voluntary part of the Childcare Register for 6 weeks until 8th July 2021.

Legal Framework

22. Ofsted is the body responsible for the regulation of registered providers under the Childcare Act 2006 and the various regulations made under that Act.
23. Section 69(1) of the Childcare Act 2006 provides for regulations to be made dealing with the suspension of the registered provider’s registration. The section also provides that the regulations must include a right of appeal to the Tribunal.
24. Under the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 when deciding whether to suspend a provider,

the test set out in regulation 9 is:

‘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’.

25. “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”.

26. On appeal the Tribunal steps into the shoes of the Inspector and the question becomes ‘as at the date of the decision, does the Tribunal reasonably believe continued provision of childcare by the Appellant may expose a child to a risk of harm?’

27. “[T]he mere fact that the threshold is passed does not necessarily mean the power of suspension ... must be exercised” [para. 22 *Ofsted v. GM & WM* [2009] UKUT 89 (AAC)]

28. The standard of proof lies on Ofsted between the balance of probabilities and a reasonable case to answer. 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. The burden of proof is on Ofsted.

29. Ofsted gave the following as reasons for its suspension (exhibit JK1): that it believed that:

“children are, or may be, exposed to a risk of harm because there is a poor safeguarding culture in the nursery, which puts children at risk of harm. A staff member has allegedly inappropriately handled a child by lifting them by their clothing. The nominated individual, Anja Rutter, completed their own investigation into the allegation without consulting the Local Authority Designated Officer (LADO), which is not in line with safeguarding procedures. LADO confirms procedures in relation to managing allegations against those who work or volunteer with Children have not been followed. A physical close handling policy has been implemented/updated on 26 May 2021 after the alleged incident occurred to minimise the strategies used by the staff member who picked the child up by their clothing. This shows a lack of safeguarding knowledge and a lack of appropriate leadership and understanding of appropriate behaviour management strategies to safeguard children. Appropriate action was not taken when the allegation was made to protect the accused staff member or children, as this staff member was allowed to continue to work with the children. Anja Rutter has challenged the need for a referral to LADO showing a concerning culture of safeguarding in the setting where safeguarding risks are minimised to support staff. Children's safety is not prioritised, and we are not reassured that if there are further allegations of abuse or inappropriate actions by staff, that these will be identified, dealt with, reported and managed appropriately to safeguard children.”

30. The Respondent submitted that the threshold test for suspension was a low one and that suspension is not a punishment but allowed time for enquiries to be conducted and to remove any possible risk. Regarding the suspension, Ofsted had reviewed the suspension and determined the circumstances still existed and relied upon their witness evidence in this respect.
31. The Respondent argued that the allegation of improper handling of a child was a catalyst and that the reason for suspension was the poor safeguarding culture at the setting and the manner in which the Appellant has handled the allegation.
32. The Respondent argued that it is for the LADO to conduct the enquiry into the manual handling incident, that the enquiry is ongoing, and that further information is awaited from the Appellant. Ofsted argued that it would be inappropriate for it to undertake its own enquiries in respect of safeguarding practices until the LADO has made a determination in respect of the incident and it would be premature to lift the Appellant's suspension until it can undertake an assessment at the setting.
33. The Appellant argued that the nursery had experienced two minor incidents in March and May 2020 and argued that Ofsted had wrongly concluded there is a concern over the safeguarding culture at the nursery. The Appellant argued that the suspension amounted to an overreaction and was unjustified.
34. The Appellant argued that it had a good track record of inspection results including consistent 'good' and 'outstanding' results until May 2021, that the notebook incident had been resolved, the member of staff in question had left the nursery and no risk had been posed to children. The Appellant argued that it had followed the correct procedure in reporting the manual handling incident to the LADO and that there had been no proper investigation by Ofsted of this incident. The Appellant denied that the child had been carried to the bathroom as alleged by the member of staff who witnessed the incident.
35. The Appellant denied Ofsted's assertion that Ms Rutter carried out her own investigation into the matter and argued that the investigation had been carried out properly by the nursery's DSO, Ms Barker. The Appellant argued that the decision not to suspend Ms Madeley was appropriate, that the physical handling policy of the nursery had been improved and that, by the date of the hearing, all staff will have undertaken further physical handling training, all staff will undergo refresher training on safeguarding procedures and Miss Madeley will no longer work with children.
36. The appellant submitted that the suspension was no longer necessary in any event due to the changes made by the setting outlined above. It was therefore no longer necessary or proportionate and should be revoked.

Evidence

37. All witnesses had provided written statements which the panel had read in

advance of the hearing. These statements, with the agreement of the parties, were taken as the evidence in chief of each witness.

38. Mr Gill stated that he was involved in this matter on 27th May and received an allegation, that there were concerns about safeguarding at the nursery. He stated that Ofsted did not have powers to suspend the school, that would be the remit of the Department for Education and not Ofsted, he stated that Ofsted had passed on its concerns to the Department for Education.
39. He stated that where a DSO was a family member there should be procedures in place to deal with situations where an allegation was made against the family member.
40. Mr Gill stated that the role of the DSO included liaison with the LADO.
41. Mr Gill stated that continuing review had been carried out and that Ofsted had concerns over the handling of the allegation, that Ms Rutter had not contacted the LADO when she found out about it, that she had undertaken her own investigation when there was a family member involved, that there had been pressure put on staff members by Ms Rutter to contact the LADO and minimise the allegation.
42. Mr Gill stated he was concerned about the implementation of a new physical handling policy which was implemented after the allegation, in his view, to minimise the handling technique used. He was concerned about the lack of acceptance that there was a safeguarding concern.
43. Mr Gill stated that at the moment there was an ongoing investigation, the outcome of which Ofsted awaited and until that was completed Ofsted could not carry out its own work in the setting.
44. Mr Gill was asked regarding the guide to safeguarding procedure published by North Yorkshire County council, exhibit MM16 which, Mr Gilmour asserted, stated that

“Any allegation or concern which arises should be reported immediately to the Senior Manager identified in the employer's internal procedures, unless that person is the subject of the allegation, or where their relationship with the subject could compromise their independence, in which cases it should be reported to the designated alternative, who should then inform the LADO. Where there is no Senior Manager e.g. a self-employed person, the matter reported directly to the LADO. Where staff receive an allegation against someone from another organisation, this should be reported directly to the LADO.”
45. Mr Gill was asked if the process which was followed complied with this

procedure (that the incident was reported to deputy DSO at the setting, Ms Rutter being the mother of the staff member concerned). He replied that Ellie Duffin and the member of staff did comply with this procedure.

46. Mr Gill was asked about his concern that Anja Rutter completed her own investigation before informing the LADO and the fact that Melanie Arnold decided to withhold the fact of the allegation from Ms Rutter. He agreed that Ms Rutter only became aware of the allegation on 25th May, 4 days after it occurred. He agreed that Ms Rutter spoke to the LADO on 26th May, the day after it occurred. He disagreed that Ms Rutter had not conducted an investigation of her own in this time. He disagreed, stating that speaking to staff members in circumstances where there was a conflict of interest and encouraging staff to contact the LADO to withdraw the allegation amounted to an investigation and was inappropriate.
47. Mr Gilmour referred to an email dated 28th May from Julie Kaye (LADO) to Anja Rutter which stated "Can I ask that you conclude your investigation and determine next steps and an outcome please. I do feel in the circumstances that your DSL Ali Barker should conclude the investigation, due to a possible conflict of interest, as Freja is your daughter."
48. Mr Gill stated he believed that despite this email, Ms Rutter had conducted an investigation of her own and reached a conclusion. He stated that this belief was founded on information received from the LADO and from Ms Rutter.
49. Mr Gill was asked about the concern that OFSTED had about the safeguarding procedures at the setting. He stated that this related to Ms Rutter speaking to staff despite a conflict of interest and the creation of a new handling policy to minimise the technique used.
50. Mr Gill stated that staff had reported that they felt under pressure but could not say whether there had been any reprisals against staff for making the report to the LADO. He stated that the staff had reported the incident correctly and that the culture of safeguarding in the setting was at odds with this and that assertions were made to the reporting staff that they had not been correct to report the matter and had been told to tell the LADO that it was a mistake. He was referred to exhibit JK1 an email from Ellie Duffin to the LADO which stated:

"Anja spoke to me yesterday and is now aware that I was the one that contacted you. She was insistent that I contact you and said that this whole situation was a mistake. I feel I am acting on the best interest of the child, after Georgina came to me with this allegation. Due to the heightened emotions, I am feeling extremely intimidated and stressed with the whole situation at the moment. I still stand by my decision to report this allegation."
51. Mr Gill was asked if this could be interpreted as meaning that Anja Rutter was insistent that Ms Duffin contact the LADO and that the whole situation was a mistake. He disagreed and interpreted it as meaning that Anja Rutter had put pressure on Ms Duffin. He accepted he had not spoken directly to Ms Duffin.

52. Mr Gill was asked about the revised safeguarding policy. He stated he would expect contact with the LADO before reviewing the policy and that in this case it had been done to minimise the allegation. He stated he was not sure when this policy, exhibit MM15, dated 26th May, was completed and accepted he could not say if this was created before or after Ms Rutter spoke to the LADO.
53. Mr Gill was asked about the revised handling policy ex MM13 which stated that:
- “It is acceptable to restrain or a lift a child by holding on to surplus folds of clothing, providing it is:
- done as a last resort,
 - for a short period
 - to prevent harm or
 - avoid danger”
54. He accepted that this was correct in emergencies where there is an immediate risk of imminent harm, but that he did not believe that this was appropriate in this incident.
55. Mr Gill was asked if he agreed with the policy and would not be drawn on the generality of it but replied that there were incidents of emergency where it would be appropriate.
56. Mr Gill stated that he felt this policy introduced for the first time reference to handling children by clothing and attempted to minimise the incident whereas in his view it was not appropriate to use such a technique as there was in existence no emergency to necessitate it. He stated that Ms Rutter had expressed her belief that the technique was appropriate in the circumstances.
57. Mr Gill stated that he was concerned that Ms Madeley had intervened because of her own concern that another member of staff had attempted to lift the child by the arm, and this in itself was not reported as a safeguarding concern. Mr Gill agreed that no-one from Ofsted had asked Ms Madeley about the circumstances of the incident. He agreed and stated that the LADO investigation had not been completed. He was asked whether this should have been referred, as it was not behaviour that harmed or may have harmed a child. He replied that Ms Madeley said she was concerned for the welfare of the child about an inappropriate lift or attempted lift and this met the criteria.
58. Mr Gill agreed that on previous inspections the safeguarding culture at the nursery had been assessed to be good. He stated that the facts of this case indicated to him that the culture was no longer good.
59. Mr Gill stated that Ofsted awaited the LADO coming to a conclusion of whether the allegation is substantiated or not before attending the setting to assure itself that any future allegations would be managed appropriately. He stated the LADO awaited information from the setting, statements taken by Ms Barker as part of her investigation.
60. Mrs Arnold stated that she had been involved with an allegation in March 2021

regarding a sexually explicit notebook and phones with sexual images on them being discovered at the nursery, but not referred to the LADO until one year later. She stated that Ofsted was concerned at the delay in notifying LADO and that the material was not considered by the nursery to be potentially harmful at the time they were discovered. Mrs Arnold stated that there was a new safeguarding officer in place at that time and that the suspension had been lifted. She stated that there had remained a reporting requirement on the nursery at the time the material was first discovered in 2020 despite the closure of the setting at that time due to Covid-19.

61. Mrs Arnold was asked about the revised handling policy and stated she agreed that it described an appropriate use of handling by clothing, namely in emergency situations only.
62. Mrs Arnold stated she felt this had been put in place to justify Ms Madeley's action in use of the technique, though it had not been an emergency situation, she stated.
63. Mrs Arnold was shown exhibit JK9, a letter to parents from Ms Rutter, which stated that the use of the technique was to extract a child from a dangerous situation. She stated that this was not an accurate depiction of what happened and her view was that the child had not been in a dangerous situation, based upon the information from the staff member who made the report that the child had a nappy that needed to be changed and was refusing to go to the bathroom, that she did not consider the child to have been at a risk of harm which would have justified lifting him by the clothing.
64. Mrs Arnold stated that the suspension had been kept under review and she had been in contact throughout with the LADO. She stated that the suspension remained in place as Ofsted remained concerned that this event had occurred and there were concerns over the safeguarding procedures in the setting, that no one had challenged the behaviour of Ms Madeley in use of the strategy and the setting had sought to justify the technique, that Ofsted had no confidence that future allegations would be reported or addressed properly.
65. Mrs Arnold stated that the report of Mrs Barker had not led to the lifting of the suspension as they did not agree with her conclusion that the use of the technique had been appropriate in the circumstances, that there was no indication that the behaviour was challenged and that if this happened again it may not be recognised as a safeguarding concern or reported appropriately.
66. Mrs Arnold stated that the appointment of Mrs Barker as DSO gave her no assurances about safeguarding at the setting as she had attempted to justify the use of the technique and that she had not contacted the LADO or liaised with the LADO after she was informed that the allegation had been made.
67. Mrs Arnold stated that Ofsted was not assured by anything the setting had done so far. She addressed the safeguarding certificate presented by Ms Rutter and stated that this was the second time Ofsted had concerns of a safeguarding nature regarding the setting. They had been assured previously that Ms Rutter

had improved her understanding of safeguarding but had not applied that in this case and so Ofsted would have to examine what Ms Rutter had learned from this course.

68. Mrs Arnold was asked about the notebook which was discovered at the nursery. She confirmed that the notebook contained words, and not pictures and could not be interpreted by a child who could not read. She stated that some of the words were sexual terms and some described alcoholic drinks. She stated that there was concern over the content or what it was being used for. She agreed that it did not contain any indication of child sexual exploitation or non-consensual sexual activity. She agreed that it had been found in a staff locker and no indication that it had been outside of the locker. Mrs Arnold stated that the notebook itself could not harm a child and the safeguarding concern was that the owner of the notebook was not suitable to work with children. She stated that the concern was that it was in the setting and had not been raised as a safeguarding concern. She stated that Ms Rutter had been unable to supply evidence of the staff member being told to take it home and not bring it back in.
69. Mrs Arnold agreed that the existence of the notebook had been alerted to the LADO when it was rediscovered a year later, in March 2021.
70. Mrs Arnold stated that there was no evidence of staff being pressured not to report the existence of the notebook. She stated that the staff member was suspended at the recommendation of the LADO and Ofsted were satisfied by the action the setting was taking at the time.
71. Mrs Arnold was asked whether Ms Rutter should have contacted the LADO when she became aware of the allegation. She stated that she should have done so and denied that she and the LADO had decided to keep from Ms Rutter the existence of the allegation. She stated that she discussed with the LADO that they had wanted to await information from Georgina Russell and after a conversation on 25th May, the LADO had decided to inform Ms Rutter. She stated it had been Ofsted's view that Ms Rutter ought to be informed. She was asked if Ms Rutter should have been informed straight away and replied that it was important to gather sufficient information first. She stated that in hindsight it might have been better to have informed Ms Rutter earlier.
72. Mrs Arnold stated that she would expect Ms Rutter to have spoken to the LADO to determine how the investigation should proceed. She agreed that in the circumstances it was reasonable for Ms Rutter to ascertain the bare facts, but that she had gone beyond this, she thought, that there had been conversations between Ms Rutter and members of staff. She was asked if she was concerned that there would be bullying or reprisals if the allegation had been reported to Ms Rutter and she replied that this was possible.
73. Mrs Arnold stated she did not accept the conclusions of Mrs Barker and stated that she should not have conducted her investigation before speaking to the LADO. She stated that Mrs Barker's conclusions were based on the information presented to Ofsted and the LADO and deemed that it was appropriate to pick

up a child by clothing. She accepted that Mrs Barker had spoken to Freja Madeley whereas the LADO and Ofsted had not.

74. Mrs Arnold stated that the revised safeguarding policy had been put in place to attempt to justify the handling of the child, which Mrs Barker stated had been an appropriate technique. She stated that the term 'helicopter lifting' had been taken out of context in this regard.

75. Mrs Arnold was shown exhibit MM20, an email from Georgina Lee dated 25th May to Anja Rutter which stated:

"I was in the classroom on Thursday 20th May 2021 at 1445 when a child WB needed changing. I tried to take him to change him when Freja said she would do it. She tried to lead him by the hand when he dropped to the floor. Freja took hold of the child by holding his rear clothing, lifting him off the ground and 'helicoptering' him off. My instinct told me this is not acceptable."

76. She accepted under cross examination that Mrs Barker's report sought to justify the incident as she had determined it had happened.

77. Mrs Arnold stated that the LADO awaited witness statements taken by Ali Barker and regarding the training undergone by Ms Madeley. She stated there were discrepancies in this information regarding when the training took place. She accepted that the LADO had received a response to their request for information.

78. Mrs Arnold stated that the statement of Ms Madeley was the first acknowledgement that the technique was not appropriate and there was still no such acknowledgement from the senior staff at the nursery, though Ms Madeley's statement was positive.

79. Mrs Kaye stated that the LADO does not directly investigate allegations, their role is to receive referrals and to ensure that an investigation takes place at the end of which a safeguarding outcome is agreed. She stated that Anja Rutter should have had a conversation with the duty LADO in the first instance. She stated that sometimes people undertake an initial fact find but, in this case, there was a conflict of interest as the subject of the allegation was her daughter and she should not have undertaken the fact finding.

80. Mrs Kaye stated that her exhibit JK/1, an email received by her on 26th May which she interpreted as meaning that Ms Rutter had suggested that the referral was a mistake and that the writer was feeling stressed and intimidated.

81. Mrs Kaye stated that she was waiting for documents in this investigation. She stated that she had not been initially sure whether the matter met the threshold for referral as there was not much detail in the referral. She stated that the LADO had received further information over the weekend (22nd and 23rd May) and had asked to be contacted by the person who witnessed the incident.

82. Mrs Kaye stated that the person who made the referral had concerns about Ms

Rutter and she wanted to get the information before speaking to Ms Rutter, as staff were concerned about reprisals.

83. Mrs Kaye was asked about the person reporting the allegation being classed as a whistle-blower and anonymised. She stated that this had been done due to her expressing concern over reprisals in the setting and had asked for her name to be kept confidential. She accepted that her colleagues had used the name of the deputy DSO, Ellie Duffin. She accepted that Ms Rutter already knew it was Ms Duffin who had referred the matter to the LADO.
84. Mrs Kaye was asked about a telephone call between her and Mrs Arnold on 25th May. She stated she could not recall this and accepted that there was no record of this in her witness statement. She stated that she had felt there was insufficient information to determine if the referral met the threshold and she sought more detail before speaking to Ms Rutter and had also considered the fact that Ms Rutter was the mother of Ms Madeley.
85. Mrs Kaye stated that it was not that she lacked concern initially, but that in order to properly assess the allegation she required more detail and gave the example of the word 'grabbed' which was capable of various interpretations and that an understanding of the context was required.
86. Mrs Kaye was referred to paragraph 18 of her witness statement which set out the further information which she obtained in a telephone call with Georgina Russell. She stated that the referral had been made by a person who had difficulty in describing how the child had been held. She stated that she had obtained the information in a telephone call on 28th May but accepted she had spoken to Ms Rutter on 26th May. Mr Gilmour suggested that she did not obtain great detail in this call. She stated that the LADO did not carry out an investigation but had been satisfied from this information that the referral related to an inappropriate handling and the referral met the threshold for a LADO referral. She stated that she had not heard of any attempt to use de-escalation strategies. She stated that at age three, such an intervention was disproportionate in the circumstances as the child was not in any danger, that she had been told that the child had soiled himself and this did not amount to a risk of imminent harm to him. She stated that she would expect the setting to be using positive behaviour strategies to encourage the child to walk to the toilet. She stated that this was not a criminal offence and had been referred back to the setting to conduct their investigation.
87. Mrs Kaye stated that the technique of holding a child by the back of his clothing and lifting him was not one that she was familiar with in her time working in safeguarding. She accepted that it may be appropriate in an emergency such as when a child was about to run into a road.
88. Mrs Kaye stated that the technique was not a reasonable and proportionate way of picking up a three-year-old child, there was a risk of pulling garments up around the neck area and indeed the policy of the nursery stated this.
89. Mrs Kaye stated that she did not find the revised handling policy difficult to read

and whilst she understood what it said she did not see the relevance of the detail contained in it. She was asked if this could have been an exaggeration on the part of Georgina Russell and stated she could not answer.

90. Mrs Kaye stated that she had not seen the 'worry log' completed by Georgina Russell, had requested this from the nursery and had not seen it. She was referred to exhibit MM10. She stated that she had received an email from Ms Rutter regarding the training undertaken but awaited this document and the statements taken by Mrs Barker in her investigation. She stated that she had not received this evidence until she received the bundle of evidence the morning of the hearing.
91. Mrs Kaye stated that she did not accept that Ms Rutter had not conducted an investigation before speaking to the LADO, that there was a conflict of interest and she had had a discussion with other staff members. She stated that she contacted Ms Rutter about the incident on 26th May and heard from Ms Rutter during a phone call on that day that the child who had been lifted was assertive, would kick out, that Ms Madeley had lifted the child off a seat, which indicated to her that Ms Rutter had looked into the matter and had quite a lot of detail, and had said that Ms Madeley had used a manual handling technique she was unfamiliar with and panicked, that the deputy DSO had come to LADO directly in panic, when in fact this was an appropriate channel.
92. She stated that Ms Rutter had said that she would amend the handling policy to contain more detail about the technique to be used when children 'dead leg'. She stated that she did not know her motivation in doing this and from her perspective the policy was amended retrospectively to contain more information about the technique but that other staff members had not been trained in this technique.
93. Mrs Kaye stated that the difficulty in this case had been the conflicting accounts of what happened in the incident.
94. Mrs Kaye agreed that the referral to LADO had been made properly. She stated that the referring member of staff said that Ms Rutter had insisted that she contact the LADO and say the whole situation was a mistake.
95. Mrs Kaye stated that she anticipated the setting completing its own report, but that it had not been very detailed and had asked for more information from witnesses on 28th June, before a safeguarding outcome could be agreed. She stated that she had a concern about the understanding of safeguarding processes.
96. The Respondent confirmed that they had no questions for Ms Madeley and her statement was considered in evidence by the panel.
97. The statement of Ms Madeley stated that she had all relevant mandatory training in place, was employed by the nursery as an administrator. She stated that she had found the notebook in a staff member's locker but not reported it immediately to her mother, waiting from March until May 2020 as her mother

was ill with covid-19 and that she had no involvement after this point.

98. Ms Madeley stated that on 20th May she had intervened to lift the child by his clothing because she saw her pregnant colleague about to lift him by the arm in a way that would cause him pain and she was aware that her colleague should not be carrying out any lifting, that she felt the child could have been harmed by other children as he was lying on the floor. She stated that she failed to motivate the child to get to his feet and had lifted the child to his feet by his clothing and that this was a technique she had been taught. She stated that she then carried him, but not by his clothing.

99. Ms Madeley stated that she had completed a refresher course on manual handling for childcare settings and that:

“I wouldn’t use this manoeuvre now. The correct manoeuvre would, for example, be a tripod lift. My mother, Anja, has also undertaken this training and her certificate is enclosed at Exhibit MM/25. I am aware that all staff have been asked to complete this training this week.”

100. Ms Rutter gave evidence and confirmed the contents of her written statement as evidence in chief.

101. Ms Rutter stated that she had undertaken safeguarding training and stated that her staff needed additional training and that she recommended that her staff carry out the same training.

102. Ms Rutter stated that Ms Barker was unwell and had not been in work. She was asked if this was why documents were outstanding and not sent to the LADO. She stated it was. She stated that she was undertaking the role of DSO herself and she could call on Mrs Barker as necessary.

103. Ms Rutter was asked about her statement in which it stated:

“on 20 May 2021 Freja Madeley, my daughter and an employee of the nursery, was helping out in the baby room. Freja is primarily employed as an administrator, however at this time we were short staffed and so she was looking after the children as needed. Freja does have some childcare training; she carried out the full Level 4 in Montessori Pedagogy course, however she didn’t complete the final exam due to health issues. She therefore has a good understanding of Montessori education. She also has all of the other mandatory training that the staffing team has, including safeguarding level 3, various first-aid training, and food hygiene training.”

104. Ms Rutter stated that this was correct, that her daughter primarily did admin but had taken some time out as she was coming down with an ear infection.

105. Ms Rutter was asked why she had stated that she had not had sight of the referral to the LADO or the worry log and replied this was because she was not the investigating officer in relation to this allegation.

106. Ms Rutter was asked about the letter she sent to parents; exhibit JK9 dated 24th June 2021. She was asked why she described the incident differently in the letter to the evidence of her daughter and other staff. She stated that she believed the child was in danger and that this was reflected in the wording she used in the letter. She stated the phrase “caught hold” did not imply that he was falling or otherwise moving.
107. Ms Rutter was asked about her statement in the letter that the person most damaged by the incident was her daughter and replied that she stood by this.
108. Ms Rutter stated that she had been confused by the wording of the Ofsted suspension letter. She stated that she had felt that Ms Madeley’s account had not been requested by anyone except Mrs Barker and as a result the regulator’s action had been seen as punitive and not helpful.
109. Ms Rutter stated that the deputy DSO had told her that she had forgotten to request Ms Madeley’s account though she accepted that she did not need to do so before making a referral to LADO.
110. Ms Rutter stated that she had been informed by a parent that Ms Madeley had been referred to the LADO.
111. Ms Rutter was asked what a ‘lift/tilt manoeuvre was. She described holding a child being lifted by clothing to his feet from a lying position to a standing one and allowing them to take control of themselves.
112. Ms Rutter stated that not all staff had been trained in this technique and that further training had been due at the end of May and would have proceeded had the incident not taken place.
113. Ms Rutter was asked whether she would normally include in a policy techniques staff had not been trained on. She stated that the nursery was suspended shortly thereafter, and that training would have been arranged.
114. Ms Rutter stated that it was difficult for her to say what danger the child was in as she was not in the room at the time, but had formed the belief that the child was in danger as the pregnant staff member was crouched over the child and was concerned as she has a risk assessment preventing her from lifting and the child could end up underneath the staff member. Ms Rutter stated that the correct method would depend on the danger the child was in and that in the circumstances as she understood them, Ms Madeley had little or no choice.
115. Ms Rutter was asked by the panel how this situation should be dealt with if it arose in the future. She stated she was not sure that Ms Madeley could have handled this situation better. She stated that the staff member had already tried to reason with the child, but this had not worked. She stated that Ms Madeley could have pulled the pregnant member of staff away or waited a

little longer.

116. Ms Rutter was asked how she assures staff have read policies. She stated they are discussed at staff meetings before being signed off.

The Tribunal's conclusions with reasons

117. We took account of all the evidence presented at the hearing in oral evidence and took account of the written material in the bundle and admitted in late evidence. We recount above the evidence which we relied upon only and this should not be taken to be a full summary of all the evidence in the appeal.

118. We noted that the nursery had revised its handling policy after the incident. We were not given a copy of the original policy for comparison. Ofsted was concerned that this policy had been changed in order to justify the original use of the technique of lifting a child by its clothing and the consequences of doing so. We were not persuaded by this argument. The change to the policy was made after the referral to the LADO and no attempt was made to post-date the policy to before the incident. In cross-examination, Mr Gill and Mrs Arnold did not disagree with the wording of the new policy which confirmed the technique was to be used in emergency circumstances only.

119. During the hearing, though it did not feature in the suspension decision letter, Ofsted referred to the fact that the registration of the nursery had previously been suspended due to a notebook and mobile phones containing sexually explicit material being found in a member of staff's locker. The concern was that the matter had not been reported initially in 2020 and that the report had taken place a year later when the material was re-discovered. Mrs Arnold stated that this gave her concern, as although the suspension had been lifted in April 2021, with the nursery assuring Ofsted that it had appropriate safeguarding procedures, the present incident had arisen shortly afterwards and she was concerned that this showed that the nursery had not improved its practice.

120. We did not consider that this in itself was strong evidence of a poor safeguarding culture at the nursery, as it related to an incident which had been reported and, after action had been taken by the nursery, Ofsted were satisfied sufficiently to lift the suspension. We did not conclude that the incident was directly related to this matter which was of a different nature.

121. Despite the above matters, having considered the evidence available at the time of the hearing we concluded that the evidence substantiated a reasonable belief that a child may be at risk of harm and therefore that a suspension was justified. We concluded that the imposition of a suspension was proportionate.

122. In reaching this conclusion we were persuaded by the following evidence:

123. The LADO had received an allegation of inappropriate handling of a

child. We heard that they had directed the setting to undertake their own investigation. This had been completed by the DSO, Ms Barker, but the LADO had requested further information, had outstanding concerns and had not been able to conclude an outcome to the safeguarding referral. There remained a concern about the use of handling techniques at the setting and what constituted a 'danger' in order to justify the use of handling techniques involving clothing.

124. Although it is not the role of the tribunal to make determination of the facts of the allegation, we concluded that there was a credible allegation which was made by a member of staff and it was correct that this should be fully investigated and we accepted Ofsted's submission that the purpose of the suspension was to enable this process to be undertaken. We were concerned by the evidence of Ms Rutter that she felt that Ms Madeley was being punished by this process and that her daughter had received the most damage from this situation. This supported the concern expressed by Ofsted that Ms Rutter lacked understanding of the safeguarding process, which is for the protection of staff members and children.

125. Regarding the concern Ofsted expressed about the process of safeguarding and referrals to LADO, and Ofsted's concern that further incidents such as this would not be reported in future, we noted that it was clear that this incident had been reported by the correct member of staff, the deputy DSO, as the allegation concerned a family member of Ms Rutter, and it was reported in the required timeframe to the LADO.

126. There was evidence to substantiate this concern regarding the actions of Ms Rutter after the referral was made. We were persuaded by the evidence of Mrs Kaye that the deputy DSO Ellie Duffin had told her that she had been pressured by Ms Rutter to contact the LADO and tell them that the referral had been a mistake. Mr Gilmour proposed an alternative interpretation of this evidence, an email from Ms Duffin, that Ms Rutter had been keen that the deputy DSO contact the LADO but we did not find that interpretation credible and it was rejected by the witness who had been in direct contact with Ms Duffin and was best placed to give evidence of Ms Duffin's demeanour and the concerns she had expressed to the LADO. We were persuaded that this evidence was a reasonable basis on which to conclude that Ms Rutter may have sought to undermine the referral of a safeguarding concern which could lead to it not being assessed properly by the LADO or by Ofsted, and may lead to children being harmed if this is repeated.

127. We were concerned by the evidence from Mrs Kaye that the head of the Nursery, Ms Rutter, had not been involved in the LADO process for 4 days whilst further information about the allegation was sought to determine if it met the threshold for a LADO referral. In this time, we heard that Ms Rutter spoke to staff members before contacting or being contacted by the LADO. The evidence of Mrs Kaye and Mrs Arnold was clear that this was not appropriate given the conflict of interest involved in Ms Madeley being Ms Rutter's daughter. We concluded that this was evidence of a lack of understanding by Ms Rutter of the correct safeguarding process or of her unwillingness to follow it, bearing

in mind the nursery had operated the correct process in the deputy DSO making the referral to the LADO without reference to Ms Rutter due to the conflict of interest.

128. We were concerned at the lack of insight demonstrated by Ms Rutter. When questioned about how the incident might have been handled differently, she sought to justify the actions of her daughter, whereas Ms Madeley in her statement said she had undertaken further training in safeguarding and manual handling and now appreciated the proper technique to use in that situation. The letter Ms Rutter wrote to parents characterised the incident differently from other evidence presented of it and did nothing to mention the potential risk to a child posed by being lifted by his clothing which was a concern of Ofsted and known to her at that point in time.
129. Ms Rutter stated that Ms Duffin had not taken a statement from Ms Madeley before making the referral to the LADO. We viewed this as correct procedure, indeed Ms Rutter accepted this was not required before a referral is made, and it had been Mrs Barker who was tasked with the investigation on her commencement as DSO and she had taken this statement.
130. From the above conclusions we were satisfied that there was at the time of the hearing reasonable cause to believe that children were at risk of harm from the use of improper handling techniques upon them and Ms Rutter's lack of appreciation of safeguarding procedures resulting in unsafe practices not being addressed and corrected through referral to regulatory bodies.
131. We considered that the imposition of a suspension was a proportionate response to the risk of harm outlined above. We took account of the obvious disruption this will cause to the children and parents who use the nursery, but considered that this was proportionate in light of the risk of harm to children of which we concluded there was evidence to support a reasonable belief and which was being assessed by the LADO and Ofsted.
132. An investigation into the incident of handling a child was being overseen by the LADO and had not reached a conclusion. We heard that after its completion the LADO will agree with the setting an outcome and Ofsted will commence their work in the setting to investigate the safeguarding practices at the nursery. We concluded that it was appropriate and proportionate for the suspension to continue whilst this process is completed.

Decision:

1. The appeal is dismissed.
2. The decision of Ofsted to suspend the registration as a childcare provider on domestic premises on the Early Years Register and both the compulsory and voluntary parts of the Childcare Register dated 28th May 2021 is confirmed.

Judge GPB Brandon

First-tier Tribunal (Health, Education and Social Care)

8th July 2021