

First-tier Tribunal Care Standards

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

Hearing via Video Link on 29/07/21

[2021] 4342.EY-SUS VKinly

BEFORE

**Timothy Thorne (Tribunal Judge)
Suzanna Jacoby (Specialist Member)
John Hutchinson (Specialist Member)**

BETWEEN

SLH (A)

Appellant

-v-

OFSTED

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 9 July 2021 for a period of six weeks until 19 August 2021.

The Hearing (Attendance & Summary)

2. Ms. Wendy Gutteridge represented Ofsted. A was represented by Mr. Mark Ainsworth. 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.

Restricted Reporting Order

3. 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.

Facts leading to suspension

4. A is a registered childminder at her home address. The compliance and inspection history is set out by Ofsted and the Panel does not propose to repeat it in full. On 8 July 2021, Ofsted received information from the Local Authority Designated Officer (LADO) which raised concerns as to the suitability of SH the 19 year old daughter of the Appellant and a registered assistant at the setting. The LADO confirmed that information had been received from the local Mental Health Crisis Team regarding their involvement with SH since 5 June 2021. Since this date there had been incidents where SH had threatened to self-harm, and had been admitted to a Mental Health facility under section 2 of the Mental Health Act on multiple occasions. There was also records of incidents where SH had been violent towards medical professionals and the police. There was information shared that SH had recently been arrested after threatening to kill herself with a knife and that children were present at this time.

5. On 8 July 2021 Ofsted telephoned the Appellant who stated that her daughter had not been at home at the time she threatened self-harm, and that she was only a risk to herself, not others. On 9 July 2021, Ofsted contacted the Mental Health Team who confirmed that there had been a number of significant incidents with SH since 5 June 2021. On 5 June, SH had been threatening to kill herself with a knife in a supermarket car park. SH was later admitted to the Mental Health Unit, where SH inflicted violence on nursing staff. On 1 July 2021 SH was discharged from hospital but on the way home had an argument with the Appellant, got out the car and SH was readmitted and again discharged on 2 July 2021. On 4 and 5 July 2021 SH was taken to hospital after making threats to kill herself with a knife. SH had been admitted to the Mental Health Unit on four occasions since 5 June 2021. Ofsted was also informed that SH was drinking frequently and not currently taking her prescribed medications for her ADHD diagnosis.

6. A Case Review meeting was held on 9 July 2021 and the decision to suspend was taken. It appeared that A had not informed Ofsted of the incidents in June, nor the ongoing suitability of SH. The Appellant had previously failed to inform Ofsted of SH's

drinking driving offence and Ofsted had concerns as to the ongoing suitability of the Appellant, due to her failure to identify and manage the risks of the behaviours of SH. Ofsted stated that the suspension was being kept under constant review as required.

A's Appeal.

7. A submitted an appeal document which the Panel has fully considered. A denied that SH was a risk to children and that her mental health was much improved.

Late Evidence

8. The only late evidence was a further statement from A referred to below. There being no objection the Panel allowed its submission.
9. The witness statement of **William Roland Good [WG]** (an OFSTED Early Years Regulatory Inspector) dated 21 July 2021, was read following agreement between the parties. His evidence is reflected in the case summary outlined above. WG said that A failed to mention to Ofsted during an inspection on 12 February 2020, that SH had been arrested for drinking driving in December 2019. WG also said that on 7 July 2021 Ofsted received concerns from the LADO who had received a referral from Boston Mental Health Crisis team regarding SH's behaviours presenting a risk to minded children. SH had been having issues with her mental health, threatening to cut her wrists in the house and on 5 June 2021 had been violent towards nurses. There were also concerns about SH drinking alcohol excessively. There were records of a recent incident where SH was arrested and hand cuffed in front of the children after screaming, banging her head against the wall and grabbing a knife. WG spoke to A on 8 July 2021. A said that SH had some issues with her health but was fine now and that SH had only ever been a risk to herself.
10. WG held a case review with Mrs Kemp-Russell on 9 July 2021 and recommended suspension of A's registration. He was concerned (inter alia) that the Appellant had still not recognised the risk and could not be relied upon to manage the risk appropriately and lacked understanding of the importance of compliance with the regulations to keep children safe. WG held a meeting with Mrs Kemp-Russell on 13 July 2021 and remained concerned that children may be at risk of harm. WG received a telephone call from Jemma Parkinson LADO on 13 July 2021 who gave further details of the incident with the police on 4 July 2021. On 19 July 2021 WG made a telephone call to Wendy Thompson Boston Mental Health Crisis Team nurse. On 22

July 2021 WG spoke to Rotimi Omole Manager of Oak 1 ward at the Covell Centre where SH had been sectioned in June 2021. Mr Omole explained that during her time at the centre SH had been violent towards staff and on three occasions Cambridgeshire police had been called and A had collected SH with a child in the car.

11. WG stated that “Until I have been able to complete my enquiries, I reasonably believe that children may be at risk of harm, and that the suspension should remain in place.”

He outlined what further investigations were required. They included:

- a. making a request for Boston Mental Health Crisis teams and the Covell Centre for notes of their involvement with SH and A
- b. speaking to Cambridgeshire & Lincolnshire police to obtain details of their involvement with SH and A.
- c. arranging an interview with A

12. **Beverly Kemp-Russell** [BKR] (an Ofsted as an Early Years Senior Officer) was called to give evidence. She adopted her witness statement dated 16 July 2021 which corroborated much of what was in the witness statement of WG. In addition it stated that “I believe children are, or may be, exposed to a risk of harm as the Appellant has failed to identify and manage risks associated with a household member’s behaviours.” BKR also stated that Ofsted needed to complete its enquiries to further assess the risk in relation to SH’s behaviours and A’s ability to manage this appropriately. Ofsted needed to assess SH’s suitability to live on the premises. The reasons for the decision to suspend were as follows: “*We believe children are, or may be, exposed to a risk of harm in your care following information we received on 8 July 2021. The purpose of this suspension is to allow time for the circumstances to be investigated and for steps to be taken to reduce or eliminate the risk of harm.*” BKR said that A lacked a sound knowledge of safeguarding practice and had failed to follow procedures. Also A was still not identifying the risks SH’s behaviours may present to children. BKR outlined the further investigations that Ofsted needed to undertake set out by WG above.

13. Her oral evidence can be summarised as follows. She said that as SH had returned to the family home with A her suitability had to be re-assessed by Ofsted. In cross examination she said that she thought that SH had returned home or was planning to do so on 09/07/21. The concerns centred on SH and A’s failure to disclose information

about SH to Ofsted as well as doubts about whether A would cooperate and work with Ofsted going forward. She said she was sure that WG had pursued his enquiries diligently. She knew that he had been chasing up the various agencies to provide the necessary information that Ofsted needed. He went on annual leave on 26/07/21 and was due back to work on 03/08/21. In his absence the investigation was being progressed by his colleague Christie Davie.

14. BKR said that Ofsted was still waiting for medical records from Boston Mental Health Crisis Team and the Cavell Centre as well as information from the police and said that merely having information communicated over the phone to WG was not good enough. She disagreed with the point made by A's counsel that one could assume that the information given over the phone would be comprehensive. She said that Christie Davie had sent further emails 2 days ago to chase up this information. They were informed that Ofsted needed to obtain SH's written consent for access to such records but had not yet sought it. That would be part of the next steps Ofsted would take prior to the expiry of the temporary suspension.
15. She agreed that SH had been medically assessed in 2019 as being a suitable person to live with A whilst child minding but there were concerns that SH's mental health had deteriorated since then and an up to date assessment or health declaration was now needed. Ofsted had not yet started the process of organising such an assessment. That would be another part of the next steps Ofsted would take prior to the expiry of the temporary suspension. She explained that WG had spoken to A about interviewing her but needed the further information outlined above before doing so. She agreed that perhaps WG should have arranged this already but stated that this too would be another part of the next steps Ofsted would take prior to the expiry of the temporary suspension.
16. She agreed that A had good working relationships with other professionals from the council and social services. However given her history she still had concerns about A's past and future relationship with Ofsted. She said that Ofsted was awaiting further information (including information from the police as to whether children were present during the incident involving them and SH at A's house on 04/07/21) before making a current risk assessment and planned to have a further review meeting prior to the expiry of the suspension.

17. The panel then heard evidence from the **Appellant** who adopted her witness statement dated 23/07/21 in which she outlined her personal and professional history. She explained that SH was diagnosed with ADHD and Autism for which she is prescribed Methylphenidate (Concerta XL). She referred to the report from Divik Seth (Consultant Child & Adolescent Psychiatrist) dated 5 August 2019 and the 15 August 2019, report from Dr I S Robinson, a Consultant Occupational Physician on behalf of Ofsted which stated that she was fit to be her assistant.
18. A also spoke about various past incidents involving SH including the drink drive conviction and the many problems she had after leaving home to go to university resulting in her not taking her medication and subsequent mental health issues. On 5 June 2021, and again on 10 June 2021 SH was detained under Section 2 of the Mental Health Act at the Pilgrim Hospital. SH went back to the Cavell Centre on 28 June 2021, but was discharged on 1 July 2021. A picked her up and described an incident where they argued in the car SH got out and was later taken back to hospital by police and later discharged on 3 July 2021. A also gave further details about the incident on 4 July 2021 when the police arrested SH at A's home. A also gave details about how SH stayed at a hotel until she returned to live with A on 10 July 2021. A described that SH was now in better health and that SH would stay in the house whereas any minded children would be in a playroom located at the bottom of the garden. There is a 3ft gate between house and the garden which can be locked.
19. The statement also dealt with the concerns reported by MB, the mother of a child whom A cared for. It also dealt with legal action brought by A against MB for alleged unpaid fees and an ongoing dispute with a neighbour both of whom had made allegations against A to Ofsted. The statement also dealt with issues concerning the suitability of two assistants, a trampoline, recording hours of attendance, inappropriate food, her contact with (and seeking of advice from) Lincolnshire Council, and Beverly Barker (Early Years), Social Services. She also gave details of the vulnerable babies that she had cared for. In addition she stated that her safeguarding practices are effective and did not believe a further suspension was necessary. She said that parents are struggling without childcare and those who were autistic were not coping well because their routine has been disrupted. She also adopted a further witness

statement exhibiting photographs of the doors at the front and rear of her house together with the gate used to access Mummy Daycare.

20. Her oral evidence can be summarised as follows. She gave further details of the child minding facility in the garden and how it was separate from the house. However she accepted that her registration covered both the child minding facility in the garden and the house. She also accepted that in the past minded children had come into the house to use the toilet or to eat. She planned in future only to mind children who did not need to come into the house.
21. She reiterated that when SH lived at home she could ensure that she took her medication. It was only when she went to university and during the pandemic lockdowns that her mental health deteriorated and A was unable to ensure that SH took her medication. Now SH was back home she was again able to ensure that she took her medication. She said that now SH was “fine”. SH took her siblings to school. The plan was for SH to stay with her in her house for the foreseeable future until SH was re-housed by the council. She did not know how long that would take. She doubted that SH would ever return to university.
22. She said that SH had been offered a job at Tesco’s that was due to start next Wednesday. SH had requested undertaking a 12 hour shift starting at 6am 4 days a week. She was asked how she would manage any risk posed by SH to minded children. She explained that SH would be out of the house for extended periods because of the job. When she was at home she would stay in the house and could not access the garden as access was locked. SH only had a front door key. SH’s bedroom was upstairs overlooking the garden but the widows only opened a few inches and SH had never shouted out of the bedroom before into the garden. In addition A would talk to her more often and work less. Also A would ensure SH took her medication. She also stated that she would no longer employ SH as an assistant regarding minded children.
23. She also said that she realised that in the past she had been confrontational to Ofsted inspectors because she wanted to ask them questions. She also accepted that she was wrong not to have disclosed information to Ofsted in the past. However, now and

going forward she wanted to build a better relationship with Ofsted and would inform them of any problems immediately.

24. It was put to her that there was evidence from hospital staff that SH had been violent to others and had self-harmed. She said that she knew nothing about SH harming herself and did not believe that she had ever harmed anyone in the past or would ever in the future. She said that SH had never behaved in a violent or inappropriate way in front of children but accepted that SH had argued with her in the car in front of her own child when she had been forced to pull over and let SH sit in a field. She also said that she had no support from the Community Psychiatric team. She had tried to arrange help but there were delays because everyone was working from home because of the Covid 19 pandemic.

25. The panel then heard **submissions** which we have fully taken into account.

Legal Framework

26. 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.

27. 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."

28. "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".

29. 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.

30. 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.

31. 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.

-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. (para 28)"

Conclusions

32. 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.

33. Reasonable belief that the continued provision of childcare by the registered person to any child may expose such a child to a risk of harm

34. The panel accepts that the evidence establishes that as at the date of this decision SH now lives with A in A's house and will be living there for the foreseeable future. This was made clear by A herself as outlined above. A also accepted that her registration covered both the child minding facility in the garden and the house. She also accepted that in the past, minded children had come into the house to use the toilet or to eat.

35. There is information before Ofsted and the Panel that concerns were identified by the LADO who had received a referral from Boston Mental Health Crisis Team regarding SH's recent behaviours presenting a risk to minded children. The information raised serious concerns about the present state of SH's mental health, including reports of threats to cut her wrists and violent behaviour towards nurses. There were also concerns about SH drinking alcohol excessively. There was also reference made to alleged drug-abuse in early 2021. There were also reports of a recent incident where SH was arrested and hand cuffed in front of children after screaming, banging her head against the wall and grabbing a knife. SH has only recently been discharged from hospital after being "sectioned" under the Mental Health Act and there have been reports of her making threats to harm herself in public and violence towards health professionals and the police.

36. These reports raise serious concerns about the risk of harm that SH may pose to minded children in A's home and garden facility. It is not merely the risk of physical harm but also the risk of psychological harm if such behaviour is witnessed by minded children. The Panel has read the reports from Divik Seth (Consultant Child & Adolescent Psychiatrist) dated 5 August 2019 and of Dr I S Robinson, a Consultant Occupational Physician, dated 15 August 2019. However they do not deal with the present state of SH's mental state or the risk she may pose to minded children now.

37. The Panel take into account the assurances given by A that SH is now "fine" but can only give limited weight to this evidence. This is because A is not medically qualified and has a history of not reporting her concerns about SH to Ofsted. In addition there is a long history of concerns raised by Ofsted in the past about other matters which calls into doubt A's reliability. The Panel accepts that A may have a good working

relationship with other professionals from the council and social services. However given her history there are concerns about A's past and future relationship with Ofsted.

38. Moreover, A is unwilling or unable to accept that SH has been violent towards hospital staff and has self-harmed despite information to the contrary. In the absence of up to date independent evidence of SH's current mental state and in light of the information about SH's recent behaviours the Panel concludes that there is a continuing risk of harm to minded children.
39. The Panel concludes that in light of SH's recent behaviours and A's attitude towards them, that A fails to recognise that there is a risk of similar incidents in the future and the risk these may present to minded children. Moreover in light of the history of A's relationship with Ofsted there is a risk that A cannot be relied upon to inform Ofsted of further incidents involving SH. For example A had previously failed to inform Ofsted of SH's drink driving conviction and failed to inform inspectors of more recent events concerning SH.
40. In coming to this conclusion the Panel has also taken into account the evidence of A as to what she plans to do to minimise or remove the risk that SH may pose to minded children. The Panel note, however, that there is inadequate evidence of the nature of any employment that SH may take up next week and to what extent such work will take her outside the house. There is no documentary evidence of the job offer or the times of any future shifts.
41. Moreover, although access to the garden is regulated, SH has a front door key and can come and go from the house as she pleases. Moreover her bedroom overlooks the garden and there is a risk that she will interact with minded children there. The Panel recognises that A said that SH had never shouted from the windows before, but the panel is also mindful that A claimed that SH had never behaved inappropriately in front of any child but also stated that she had engaged in an argument in the car in front of A's own child which resulted in her having to pull over and let SH go and sit in a field.
42. In addition although A says that she is able to ensure that SH will take her medication, the Panel gives only limited weight to this assurance as there is no independent

reliable evidence that this is happening and A is not receiving the help from the Community Mental Health Team which she has requested.

43. The proportionality of the continued suspension and the reasonable prospect of the investigation showing that further steps to reduce or eliminate a risk might be necessary.

44. The panel accepts the evidence of GM and Beverly Kemp-Russell that the purpose of the suspension is to allow time for the circumstances to be investigated and for steps to be taken to reduce or eliminate the risk of harm. The Panel accepts that Ofsted needs to complete their enquiries to further assess the risk in relation to SH's recent behaviours and assess A's ability to identify such risks and manage them effectively now SH is living in her house.

45. In particular the Panel accepts that Ofsted need to pursue their enquiries with other agencies, including the police, Boston Mental Health Crisis Team and the Cavell Centre. The panel concludes that that merely having information communicated over the phone to WG is not adequate and one could not assume that the information given over the phone would be comprehensive. It is necessary to have access to the full information contained in the written notes. In addition the Panel accepts that it is also necessary to obtain SH's written consent for her records to be shared and for an interview to be conducted with A once the necessary information has been obtained.

46. The Panel acknowledges that Ofsted's investigations could have been progressed more quickly but in light of all the circumstances (including the ongoing impact of the Covid 19 pandemic) the Panel concludes that their investigation has been conducted in a reasonable and proportionate manner. In particular the Panel accepts that Ofsted have a clear purpose to the continuing investigation, have mapped out the next steps, and are keeping the matter under continual review.

47. Conclusion

48. 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 minded children in the care of A.

49. 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.

50. 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

The appeal against the suspension is dismissed.
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: 05 August 2021