

First-tier Tribunal Care Standards

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

**NCN: [2021] UKFTT 473 (HESC)
[2021] 4469.EY-SUS**

Heard On the papers on 30 December 2021

BEFORE
Siobhan Goodrich (Tribunal Judge)
Ms Kerena Marchant (Specialist Member)
Ms Michele Tynan (Specialist Member)

BETWEEN:

JS

Appellant

-v-

Ofsted

Respondent

DECISION ON APPEAL AGAINST SUSPENSION

The Appeal

1. The Appellant appeals against the Respondent's decision, notified in writing on 26 November 2021, to suspend her registration to provide childcare on both the voluntary and compulsory parts of the Childcare Register, for a period of six weeks until 6 January 2022.

2. The right of appeal lies under regulation 12 of the Childcare (Early Years and General Childcare Registers (Common Provisions) Regulations 2009, ("the Regulations"). The Appellant seeks immediate reinstatement i.e. she seeks a direction that the suspension shall cease to have effect. The Respondent resists the appeal and requests that the decision to suspend registration be confirmed.

Restricted Reporting Order

3. The tribunal is not today concerned with fact-finding, but with the assessment of risk in the context of nature of the allegations/issues of concern at this stage. A suspension order (if one were to be made) can involve consideration of allegations that may not ultimately be pursued. Even

if allegations are pursued, they may not ultimately be proven. 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 applicant, the children or any individuals involved. In this decision we will avoid reference to names that indicate a locality, and where necessary will use anonymisation in square brackets [].

The Background and Chronology

4. This appears to be as follows:

a) The Appellant is a registered childminder on domestic premises at her home address. She has been a registered childminder since 14 June 2012.

b) During the late afternoon on 25 November 2021, several reports were made to Ofsted by various members of the public, notifying Ofsted of serious concerns regarding an incident that had taken place that morning. The reports all alleged that on the morning of 25 November 2021, the Appellant had allowed a pushchair containing a minded child to roll into the road, into the path of an oncoming vehicle. The reports further stated that the vehicle had been able to stop, but that the Appellant had not noticed the event until alerted by members of the public. It is alleged that the Appellant had three dogs with her and was distracted attending to one of the dogs, leaving the pushchair unattended at the time the incident occurred.

c) Ofsted held an urgent case review and the decision was made to suspend the Appellant's childminding registration. This was communicated to the Appellant by telephone at the end of the working day and was followed by a written decision dated 26 November 2021.

d) On 25 November 2021 Ofsted also made a referral to the Local Authority Designated Officer (LADO) in line with the published guidance 'Working Together to Safeguard Children 2018'.

e) In the days following the suspension, Ofsted continued to receive further reports from various sources, which raised additional concerns regarding the Appellant's care of children. Ofsted commenced making enquiries and gathering further information regarding these concerns.

f) The LADO held an initial multi-agency Allegations Management Meeting (AMM) on 14 December 2021. A further AMM is scheduled for the second week of January 2022. The role of the LADO is to determine whether an allegation against a person in a position of trust with children is substantiated. The LADO is continuing their enquiries and is not yet in a position to make that determination.

The Respondent's position

5. The Respondent contends that the Appellant has a significant history of concerns being raised with Ofsted and other agencies and that the following are of particular relevance to the current incident and the reason for suspension:

- May 2014 – report received by Ofsted that one of the Appellant’s dogs had bitten a minded child. Ofsted issued the Appellant with a Notice to Improve requiring her to ensure that children’s environment was safe in relation to the hazard posed by her dogs.
- May 2017 – report received by Ofsted from the LADO regarding reports of a safeguarding nature. The Appellant’s childminding registration was suspended pending investigation by other agencies. A Notice to Improve was issued to the Appellant requiring that she improve her safeguarding knowledge and practice, and the suspension was lifted.
- June 2018 – following an inspection where the rating was judged to be “inadequate”, a Welfare Requirements Notice was issued to the Appellant with six actions, including the implementation and maintenance of attendance registers for children.
- October 2019 – the City council received a complaint that one of the Appellant’s dogs had bitten a child outside the [X] Primary Academy school. The council issued a Community Protection Warning to the Appellant.
- February 2021 – the City council received a new complaint that one of the Appellant’s dogs had nipped a child’s hand outside the [X] Primary Academy school. A letter was sent by the council to the Appellant reminding her of the Community Protection Warning requiring that the Appellant did not take her dogs to the school.
- September 2021 – concern reported to Ofsted that the Appellant had left a child in a park. The Appellant’s registration was suspended whilst enquiries were carried out. The suspension was lifted because the Appellant implemented an attendance system.

6. Amongst other matters the Respondent is concerned that:

- a) the Appellant appears to minimise events and fails to recognise the risks to which she has exposed minded children in her care.
- b) the Appellant does not have the capacity to foresee risks in the future.
- c) Further, her failure to report significant events to Ofsted (and to the parents of the child involved) raises concerns that future events will again go unreported.
- d) the Appellant again had dogs with her at [X] school, despite having

being told twice by the council not to do so. The Respondent considers this another example of the Appellant's failure to recognise previously raised concerns and to adequately risk assess.

7. The Respondent contends that the threshold test for suspension is met and that suspension pending further investigation and decision making is necessary, justified and proportionate.

The Appellant's position

8. In summary, the Appellant's position is that:

- a) the matter she has been suspended for was an accident over which she had no control and was not a dereliction of her duty of care. As an experienced childminder she had applied the brake to the pushchair. She definitely applied the brake, and can only assume that one of the children running to the school knocked against the pushchair or hit it accidentally with their bag causing the pushchair to move.
- b) she believes incorrect information has been given to Ofsted, who are "investigating" unfounded allegations that were not notifiable and have already been looked at by the City Council. She considers that assumptions about both her honesty and integrity are unfounded. She did everything correctly to ensure the safety of this child and other children in her care. Her case is that on her return home (on 25 September 2021) she completed an incident report, did a self-reflection and informed the child's parents that this accident had happened.
- c) Ofsted seems to believe that she had received a Community Protection Warning which put a legal requirement on her to not take the dogs "on a school run". She disputes this stating that all she received were warning letters. On the basis of her conversations with the Enforcement Officer she believed it was merely an agreement to not tie the dogs to the grounds of the school.
- d) The recent suspensions seem to be judged on grouping together historic events and allegations from up to 7 years ago and using them in justification for increasing punitive action, which is extremely unfair.
- e) She states that she fails to see what else there is to investigate. The dog allegations were investigated by the council and there was no evidence, so she does not believe that a further investigation by Ofsted and now the LADO will result in a different outcome. It is a waste of resources.
- f) Ofsted have failed to ask what measures she is willing to put in place even this far into the suspension, all she had been told is that they are still investigating.

9. Overall, the Appellant's position is that the suspension is not necessary or justified and the impact of suspension on herself and families affected is disproportionate.

Legal Framework

10. The statutory framework for the voluntary 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 person's registration: see regulations 8-13 of the Regulations.

11. 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.”

(our **bold**)

12. It is not necessary for the Chief Inspector, (or the tribunal), to be satisfied that there has been actual harm, or even a likelihood of harm, merely that a child may be exposed to a risk of harm. “Harm” is defined in regulation 13 as having the same definition as in section 31(9) of the Children Act 1989 which includes:

“ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill treatment of another;

“*development*” means physical, intellectual, emotional, social or behavioural development;

“*health*” means **physical or mental health:...**”

13. The immediate duration of a suspension under Regulation 9 is for a period of six weeks. It may, however, be extended to 12 weeks under Regulation 10. Suspension may be lifted by the respondent at any time if the circumstances described in regulation 9 cease to exist. This imposes an ongoing obligation upon the Respondent to monitor whether suspension remains necessary.

14. The powers of the tribunal are that it stands in the shoes of the Chief Inspector. The first issue to be addressed by the panel is whether, as at today's date, 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 (the threshold test).

15. The burden of satisfying us that the threshold test under regulation 9 is met lies 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 may be exposed to a risk of harm.

16. We are further guided **Ofsted v GM and WM** [2009] UKUT 89 (AAC)) at [21]

“Although the word “significant” does not appear in regulation 9, both the general legislative context and the principle of proportionality suggest that the contemplated risk must be one of significant harm.”

17. Even if the threshold test is satisfied by the Respondent, that is not an end of the matter. We accept that the effect of the decision amounts to an interference with the Appellant's private life interests such as to engage Article 8 of the ECHR. The Respondent therefore bears the persuasive burden of satisfying us that the decision is in accordance with the law, is necessary and justified in pursuit of a legitimate public interest, and is proportionate.

Hearing on the papers

18. We are satisfied that following a directions hearing on 14 December 2021 the Appellant agreed to a hearing on the papers. However, we were mindful of the need to make our own decision as to the mode of hearing. We duly received an e-bundle (pages 1-212) in customary format. This included the statements and exhibits of:

- Ms Dianne Plewinska, the Early Years Senior Officer who made the decision.
- Ms Aimee Hill, the Early Years Regulatory Inspector
- The Appellant

19. We read the indexed e-bundle in advance. We were also assisted by:

- the Appellant's submissions dated 23 December and sent by email at 16.00 that day
- the Respondent's skeleton sent by email at 16.03 on 23 December 2021.

20. We decided that the appeal against the suspension decision could be determined fairly and justly on the papers.

The Tribunal's consideration

21. We will not refer to every aspect of the material before us, including the Respondent's skeleton or the Appellant's submissions. Whether or not we

specifically refer to any particular part, we have considered all the information before us and have taken it into account.

22. We are not involved in resolving disputed facts. Our task is essentially that of a risk assessment as at today's date. This risk assessment falls to be made in the context of the nature of the allegations before us, (about which there is significant dispute in part), and in circumstances where the evidence is incomplete.

23. We add that whilst reference is drawn from case law to our "placing ourselves in the shoes of the Chief Inspector", we are an independent panel making a risk assessment as at today's date against the threshold set out in paragraph 9, and on the basis of the evidence available today.

24. On any basis, on the morning of 25 November 2021, a pushchair in which a 17-month old minded child was seated, and for whom the Appellant was responsible, ended up in the narrow and busy road in which [X] school is situated. Whilst there is dispute about some aspects, it appears that an oncoming car had to stop suddenly. On the Appellant's case she was attending to the toileting needs of a dog she was looking after and for which she was responsible. She also had with her two dogs of her own. This is against a background that a Community Protection Warning had been issued to the Appellant in October 2019 and which, at least on the face of the documentation before us, was (and is) still in place. It is also against a recent regulatory background of suspension in September 2021 that had been imposed because the Appellant had left a minded child in a park, which went unnoticed by her for a (disputed) period of time until she was contacted by the child's school, (the child having, fortunately, been taken back to school by a member of the public.)

25. In our view in the context of the bare facts about the events of 25 November 2021 any neutral assessor would conclude that the child sat in the pushchair which went onto the road was subjected to the risk of significant harm. The Appellant was in a position of responsibility to the child but it would appear that the child was not her focus. This is not the first occasion that the Appellant has failed to focus on the needs of a child in her care. On her own evidence in September 2021 she left a child in a public park because she was distracted by personal news. We reasonably believe that the continued provision of childcare by the Appellant to any child may expose such a child to a risk of harm.

26. Applying **GM**, we reminded ourselves that Regulation 9 sets a low threshold. However, the mere fact that the threshold has been met does not necessarily mean that the power of suspension in regulation 9 is justified and/or should be exercised.

27. We are satisfied that the continuation of the suspension at the present time is in accordance with the law. It has a clear purpose, namely to enable the LADO and the Respondent to complete their investigations. The allegations appear to have sufficient substance to show that there are serious

concerns regarding what happened on 25 November 2021, and later that day, and which carry possible implications regarding the Appellant's suitability.

28. We are satisfied that suspension is necessary and justified in order to protect children from the risk of harm, pending further investigation and decision-making.

29. The real issue is proportionality, having regard to the serious consequences of what amounts to (interim) suspension of the Appellant pending further investigation and decision making.

30. We considered the impact of the suspension. We take into account that the decision of the LADO may take some time. There is also a time specific-statutory process that Ofsted has to follow if it were to decide that there is a suitability issue that may merit a decision to cancel registration. We recognise that, if the suspension order is confirmed, it is likely that it will be extended for another six weeks on or before its expiry on 6 January 2022, and might even be extended thereafter if necessary.

31. The Appellant has effectively said in her submissions that she is willing to abide by measures (i.e. conditions). There is no provision under Regulation 12 to enable this panel to impose conditions. The tribunal's power on appeal against a suspension decision is either to confirm the decision or to direct that the suspension cease to have effect. (There is, however, the power to impose conditions (if appropriate) in the event of an appeal against a substantive decision on cancellation of registration – if such a decision were to be made.) Consideration of the prospects that the perceived risk might be capable of being mitigated in some way is, however, a means by which it is possible for the panel to mentally cross-check the proportionality of suspension. In our view, in the overall context of the allegations before us, it is not realistic or reasonable for conditions to be considered by the Respondent until the investigations by the LADO and its own investigations have been completed. The latter will include an interview with the Appellant. Amongst other matters there are disputed issues regarding notification of the incident to the Respondent, and also as to when, on 25 November 2021, and in what terms, the Appellant informed the child's parents about the incident.

32. Suspension is always a very serious matter because of the adverse impact on livelihood, professional reputation and standing. We have borne fully in mind the effect of the Appellant's representations. We recognise that a decision to confirm suspension will have a very serious impact upon her livelihood, reputation and career, as well as on her well-being. She is very upset and concerned about the allegations. She believes that accounts of the incident provided to Ofsted have been improperly motivated and/or affected by gossip. We also recognise that on the evidence before us that the Appellant has the support of a large number of parents, many of whom have children with special needs. They speak very highly of her qualities as a child minder. We recognise that suspension will deprive many parents of a resource they value, and at a very difficult time in the lives of many given the pandemic.

33. We have balanced the Appellant's interests against the need to safeguard minded children from the risk of harm on an interim basis. In our view the nature and apparent substance of the incident on 25 November 2021 is such that the need to protect the safety of minded children on an interim basis outweighs the adverse impacts of suspension on the Appellant and others affected.

34. We consider that it is fair, reasonable and proportionate to the public interest in the safety and well-being of minded children that the Appellant's registration is suspended pending further investigation and decision making.

Decision

The decision to suspend registration is confirmed and the appeal is dismissed.

Tribunal Judge Siobhan Goodrich

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

Date Issued: 31 December 2021