

First-tier Tribunal Care Standards

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

NCN: [2023] UKFTT 82 (HESC)

[2023] 4815.EY-SUS

Before

Mr H Khan (Judge)

Ms J Heggie (Specialist Member)

Ms M Harris (Specialist Member)

BETWEEN:

Mrs Caroline Ofori-Atta

Appellant

-v-

Ofsted

Respondent

DECISION

Appeal

1. Ms Caroline Ofori-Atta (“the Appellant”) appeals against the decision of Ofsted (“the Respondent”) dated 16 December 2022 to continue the suspension of registration for a third period of time as a childminder on the Early Years Register and both the compulsory and voluntary parts. The period of suspension was for a further six weeks from 19 December 2022 to 29 January 2023.

Attendance

2. The Appellant was represented by Mr David James (Counsel). The Appellant dialled into the hearing and gave oral evidence.
3. Mr S White represented the Respondent.
4. The Respondent’s sole witness was Ms Joanne Wildman (Early Years Senior Officer).

The Hearing

5. The hearing was conducted as a video hearing.

Restricted reporting order

6. 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.

The Appellant

7. The Appellant has been registered as a childcare provider on domestic premises since 28 March 2003 and cares for children at her home in North London.

The Respondent

8. The Respondent is the body responsible for the regulation of registered providers under the Childcare Act 2006 and the various regulations made under that Act. Its primary concern in performance of this role is the welfare and safeguarding of children.

Events leading up to the issue of the notice of statutory suspension

9. The suspension was initially imposed on 29 September 2022 following an unannounced inspection where the Respondent sets out that significant concerns were once again raised about the Appellant's knowledge of the Early Years Foundation Stage, which included child protection and safeguarding concerns. It was imposed for a period of suspension six weeks from 29 September 2022 to 9 November 2022. The September visit resulted in a Welfare Requirements Notice (WRN) being issued.
10. On 2 November 2022, the Respondent alleges that a further visit demonstrated the Appellant still had not satisfactorily improved her safeguarding knowledge (and had subsequently failed to comply with the outstanding WRN). A further suspension was imposed on 7 November 2022. The period of suspension was for a further six weeks from 7 November 2022 to 18 December 2022.
11. The earlier two suspensions had not been appealed by the Appellant.
12. During the last visit to the Appellant's premises on 8 December 2022, the Inspector noted the Appellant's safeguarding knowledge had improved and was satisfied that the WRN had been met. The Respondent concluded that although this was a positive change, it imposed a further suspension as set out in its letter dated 16 December 2022 to continue the suspension of registration for a third period of time. The period of suspension was for a further six weeks from 19 December 2022 to 29 January 2023.

Legal framework

13. The statutory framework was set out in the Respondent's skeleton argument. There was no dispute about the legal framework so we have adopted the legal framework as set out in the Respondent's skeleton argument.
14. 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.
15. Under the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008, when deciding whether to suspend a childminder the test set out in regulation 9 is:
 - a. *'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'.*
 - b. "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".
16. Regulation 10 sets out further provisions relating to suspension. Regulation 10(2) deals with further periods of suspension which allows a further period of up to 6 weeks suspension to be imposed if it is based on the same circumstances as the previous period of suspension. This may only be exercised to give a continuous period of suspension of 12 weeks unless subsection 3 is satisfied, in which case the period of suspension may continue beyond 12 weeks.
17. Regulation 10(3) provides that where it is not reasonably practicable to complete any investigation (10(3)a)) or for any necessary steps to be taken to eliminate or reduce the risk of harm (10(3)(b)) the suspension may continue until the investigation is concluded or the risk of harm is eliminated or reduced. It is the Respondent's position that 10(3)(b) applies and that the steps being taken by Ofsted are to cancel the Appellant's registration.
18. The case of *Ofsted v GM and WM [2009] UKUT 89* established that on an Appeal under Regulation 12 *"The First-tier Tribunal stands in the shoes of the Chief Inspector and so, in relation to Regulation 9, the question for the First-tier 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"*;
19. The threshold is clearly a low threshold. The threshold is that a child *may* be exposed to a *risk* of harm (emphasis added). 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 there may be a risk; and

20. The Tribunal must apply the test in Regulation 9 at the date of the hearing.
21. 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.
22. As the test is that there needs to be only “reasonable grounds to believe” that the threshold is met, the Tribunal does not need to make any findings of fact.
23. If the Tribunal is satisfied that the threshold for suspension contained in Regulation 9 is satisfied, the Tribunal would also need to consider whether the suspension is proportionate.
24. Suspension may be lifted 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 is necessary

Evidence

25. We took into account all the evidence that was presented in the bundle and what was presented to us at the hearing. We have summarised some of the evidence before us and we wish to make it clear that the following is not intended to be a transcript of the hearing.
26. Ms Wildman set out that she had concerns about the Appellant. Ms Wildman explained that there are continued concerns about her ability to keep children safe on an ongoing basis and that whilst she was verbally able to recite correct childcare procedures, she did not consider she had the ability to implement these whilst operating as a childminder.
27. The Appellant had been registered for 20 years. The Appellant had never received an inspection grading of “good or better” despite being inspected five times (in 2006, 2009, 2015, 2021 and 2022) during the course of the registration.
28. Ms Wildman was concerned about the Appellant’s safeguarding knowledge and her ability to improve and sustain improvements. In her view, the safeguarding knowledge of the Appellant “*fluctuated*”. Ms Wildman was not convinced that the Appellant could apply it.
29. Ms Wildman described how the Appellant would “*recite*” the safeguarding procedures and within months would forget what needed to be done.

30. Ms Wildman's statement set out that on 8 December 2022, a suspension monitoring visit was conducted by Ms Winks (an Inspector). The outcome was that Ms Winks concluded that the Appellant had been able to verbally demonstrate an understanding of child protection procedures in order to meet one of the outstanding actions.
31. However, although Ms Wildman had taken into account Ms Winks conclusions, nevertheless, she concluded that the suspension would be extended as there was evidence of the Appellant's fluctuating and inconsistent knowledge and implementation of the EYFS requirements.
32. Ms Wildman accepted that she could not think of what else the Appellant could have done to ensure the risk of harm is eliminated or reduced over and above what Appellant had done.
33. The Appellant accepted that following on from her inspection on the 20 October 2021, she accepted that she may have been unable to properly explain the safeguarding policies and procedures. She accepted that she had not kept her knowledge up to date due to her personal situation which included looking after her mother. However, she had now taken steps to address this. She had completed the PACEY online safeguarding course and had also completed a safeguarding course with the LA.
34. Furthermore, the Appellant felt more confident with safeguarding procedures and was confident she could sufficiently safeguard children. For example, during a visit by the Ms Winks on 8 December 2022, she was asked questions by the inspector around safeguarding and answered them all correctly, as noted by the Inspector.
35. The present position was that the Appellant did not agree that she had insufficient understanding and knowledge about safeguarding concerns. The safeguarding policy had been updated and was in line with Haringey Council Guidance.

The Tribunal's conclusions with reasons

36. We remind ourselves that the standard required to justify a suspension is not a high one. During the short period of the suspension, it is for the Respondent to investigate matters to determine if there is a case for longer-term enforcement action, or whether the outcome of the investigation is that there is no longer reasonable cause to believe children may be harmed.
37. We reminded ourselves of the lower threshold for confirming the suspension and reminded ourselves that at this stage we are not finding facts.
38. We would like to place on record our thanks to all the witnesses including the Appellant who gave evidence at the hearing.

39. We acknowledge that Ms Wildman has to make difficult and carefully balanced decisions which can impact on the lives of others. Whilst Ms Wildman responded to all the questions, it would have been helpful if Ms Wildman had addressed the specific question asked in order to assist the Tribunal in understanding the reasons behind the suspension. Whilst we acknowledge that giving evidence can be stressful, we observed that on occasions a generic repetitive response was given to legitimate questions that were asked.
40. We found the evidence of the Appellant to be credible and sincere. The Appellant was frank in acknowledging her previous shortcomings in relation to her knowledge around safeguarding. She addressed each question that was asked in a calm and clear manner. Her answers were consistent with the documentary evidence before us.
41. The Respondent submitted that the question for the Tribunal was whether, in the circumstances, there is a reasonable belief that the continued provision of childcare *may* expose children to a risk of harm. We concluded that the answer to that question was no. Our reasons for doing so are set out below.
42. We acknowledge that by the time of the hearing, the issue focused on the Appellant's safeguarding knowledge and her understanding of it. Other issues, such as the issues around the premises had been resolved.
43. We were not persuaded, at this stage, as to Ms Wildman's suggestion that the Appellant was simply "*reciting*" safeguarding knowledge. There was no dispute between the parties that there was a gap in the Appellant's safeguarding knowledge previously. The Appellant acknowledged this clearly in evidence. Furthermore, the Appellant has acknowledged that some criticism could be properly merited from previous inspections.
44. However, the Respondent's own evidence on from the suspension monitoring visit on 8 December 2022 (from Ms A Winks) clearly states that:
- "The evidence collected during monitoring visit shows that the childminder took steps to meet the requirements of EYFS. She also confidently stated that she will continue her training and studying to ensure her practice improves. This shows that she gained necessary knowledge and understanding to meet relevant requirements. She knows the importance of keeping her knowledge up to date."
45. We acknowledge Ms Wildman's point that she would be looking at a much wider picture than Ms Winks. However, the feedback summary from Ms Winks was clear with regards to the Appellant's knowledge and understanding. Ms Wildman had earlier explained that she also relied on the observations from the Inspectors as well as other factors in reaching her decision. However, the conclusions of Ms Winks appear to contradict Ms Wildman around knowledge and understanding. Ms

Winks was evidently satisfied as her written evidence did not consider it warranted any further new actions.

46. We note that the suspension can thereafter can only be extended, under regulation 10 where it is not reasonably practical for the Chief Inspector, for reasons beyond her control, to complete any investigation into the grounds for her belief under regulation 9, or, for any necessary steps to be taken to eliminate or reduce the risk of harm referred to in regulation 9.
47. We were not made aware of any outstanding investigation that the Respondent needed to complete. We considered the issue of whether or not any steps could be taken to eliminate or reduce the risk of harm.
48. Ms Wildman was unable to say what else the Appellant could do to eliminate or reduce the risk of harm despite being given a few opportunities to do so. Ms Wildman referred to the history of the Appellant and in particular the outcome of previous inspections. Whilst we acknowledge Ms Wildman's evidence that the Appellant's knowledge fluctuated, nevertheless, the Respondent's most up-to-date evidence clearly demonstrated that not only did the Appellant have knowledge of the EYFS, but she also had an understanding of it. Furthermore, the Respondent's own evidence (as set out by Ms Winks) state the following about the Appellant;

“...She was confident in explaining correct procedures when allegation is made against her, and explained the correct procedure in line with her local safeguarding partnership in relation to reporting allegation made against household member. This shows that she has a secure knowledge of safeguarding policies and procedures in line with her local authorities safeguarding partnership.”
49. We took into account the Appellant's evidence that she had attended training provided by the LA and by PACEYS. We had no reason to doubt the Appellant's evidence that she had studied the LA's safeguarding procedures and policies. Furthermore, she had signed up to updates from the Respondent's own website in order to ensure that she kept up to date.
50. We were particularly impressed by the Appellant's self-reflection and insight. For example, this was evidenced in the fact that she did not, perhaps sensibly, challenge the first two suspensions because she did not consider herself in a strong position to do so. This suspension was challenged as the Appellant felt that she had a better understanding of safeguarding and the evidence presented (including that of the Respondent) supported that.
51. In reaching our decision, we also took into account a range of factors including the Appellant's personal circumstances. The Appellant has been a registered childminder since 2003. It was made clear in Ms Wildman statement that despite the long history of poor inspection

outcomes, the Respondent had not received complaints or concerns from parents. There had also been no evidence to date that any child has been physically harmed whilst in the Appellant's care.

52. In our judgement, considering the matter overall, including the reasons imposed for the suspension, we concluded that, at this point, based on the evidence presented to us, the suspension action taken was neither proportionate nor necessary.

53. We conclude therefore that as at the date of the hearing and based on what we read and heard, we do not consider that there is a reasonable belief that the continued provision of childcare by the Appellant *may* expose children to a risk of harm

54. We wish to make it clear that we are aware that there are separate cancellation proceedings and our decision relates only to the suspension decision. We make no observations on the merits or otherwise of any other proceedings.

Decision

55. We therefore direct that the suspension imposed on the Appellant pursuant to a decision dated 16 December 2022 continuing the suspension from 19 December 2022 to 29 January 2023 shall cease to have effect.

Judge H Khan

Lead Judge

First-tier Tribunal (Health Education and Social Care)

Date Issued: 26 January 2023