

First-tier Tribunal Care Standards

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

[2024] UKFTT 001023 (HESC)
2024-01267.EY-SUS

Hearing by video-link
on 7 November 2024

BEFORE
Tribunal Judge S Goodrich
Specialist Member David Cochran

BETWEEN:

King David Nurseries Limited

Appellant

-v-

Ofsted

Respondent

DECISION ON APPEAL AGAINST SUSPENSION **Amended under the slip rule**

Representation

Appellant: Mrs Emma Wyborn, Browne Jacobson LLP

Respondent: Mr Neil Smart, Ward Hadaway

The Appeal

1. By notice dated 20 October 2024 Kind David Nurseries Ltd appeals against the Respondent's decision made on 8 October 2024 to suspend its registration as a childcare provider at 81 Erith High Street, Erith, DA8 1FE on the Early Years Register, and also on the compulsory and voluntary parts of the Childcare Register for a period of six weeks until midnight on 18 November 2024.
2. The decision was made under paragraph 9 of the Childcare (Early Years and General Childcare Registers (Common Provisions) Regulations 2008 (the 2008 Regulations")

3. The sole director of the Appellant company is Ms Olufunmilayo Akande who is the registered Nominated Individual, the registered manager, and the designated safeguarding Lead (DSL) at the Erith Street location. When we refer hereafter to the Appellant, we are effectively referring to Mrs Akande.
4. The right of appeal lies under regulation 12 of the 2008 Regulations. The Appellant seeks a direction that the suspension shall cease to have effect. The Respondent resists the appeal and requests that the decision to suspend registration is confirmed.

Restricted Reporting Order

5. The Tribunal made 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 any minor child or the parents of any minor children in order to protect the privacy and best interests of the children involved. Accordingly, in this decision we anonymise the name of the minor children and their parents, adopting a form of identification with which the parties agreed.

The Background and Chronology

6. The key matters appear to be as follows:
 - a) The Appellant has been providing childcare since 2005 when the first King David Nursery was registered. In February 2014 the Elm Street nursery was opened. The inspection judgements made by Ofsted at regular intervals across the years have been “good”. At the time of last inspection at Elm Road in 2023 the Appellant had been the setting manager, as well as the Nominated individual. In January 2024 the Appellant registered an additional location at Erith High Street.
 - b) On Thursday 3 October 2024 Ofsted received a concern regarding the Appellant. The informer said that a parent had noticed bruising on her child’s forearms (child A) after spending time at the setting.
 - c) On Friday 4 October Ofsted made contact with the informer who raised safeguarding concerns about the Appellant’s setting. The informer alleged that there were unexplained injuries to the child B (child A’s sibling).
 - d) The same day Ofsted informed the Local Authority Designated Officer ('LADO') for Bexley local safeguarding partnership of the safeguarding allegations regarding the Appellant. The LADO informed Ofsted that a strategy meeting would be convened within a multi-agency safeguarding team (MASH).

- e) On Monday 7 October Mrs Parmar had a telephone call with the Appellant to assess whether the Appellant had taken any steps to mitigate the risk of harm.
- f) The Respondent conducted a case review on Tuesday 8 October 2024 and a decision was made by Mrs Layla Davies (EYSO) to suspend the registration of the Appellant at the Erith setting for a period of six weeks.
- g) On Thursday 10 October an "Allegation against staff/volunteers meeting" (ASV) was held convened by the LADO, attended by the police, the relevant social work team, the LA Early years team, the Deputy Director of Education and Ofsted.
- h) On Friday 25 October Ofsted received concerns from a parent of another child, C, who had attended the Erith Street nursery.
- i) On Wednesday 30 October a further ASV meeting was held and it was confirmed that investigations were ongoing.
- j) On Friday 1 November the Appellant was interviewed by the police under caution. The police said that they will contact her with the outcome as soon as possible.

The Parties' respective positions

- 7. In essence the Appellant's position is that the threshold test in regulation 9 is not satisfied so the suspension should be lifted. Suspension is not necessary, or justified, and is disproportionate.
- 8. In summary the Appellant has provided a lengthy witness statement dated 30 November in which she sets out her account of the events of 3 and 4 October regarding child A and her meeting with the mother of child A and B. The Appellant considers that the investigations made by Ofsted did not afford her the opportunity to share the information relating to the events of 3 October 2024. The Appellant's case is that she did not restrain Child A on 3 October and neither she, nor any of the staff on duty on 3 October 2024, were responsible for the bruises to Child A. The Appellant is of the view that Ofsted had made a decision to suspend the registration of the nursery during the very first call which took place on 7 October 2024.
- 9. The Appellant's position is that she has operated registered nurseries for 20 years and has received consistent judgements of Good in Ofsted inspections. The Appellant has not been the subject of a complaint in those 20 years and is confident that that she can work with Ofsted going forwards to maintain the highest standards of safeguarding and wellbeing at the nursery.

10. The Appellant maintains that although she had not attended refresher training as a DSL since 2017 she was up to date with safeguarding procedures. She had not contacted the LADO following her conversation with the mother of Child A and B on 4 October as she had not assessed that the mother was making any kind of allegation against her or the nursery. She has since attended refresher DSL training.
11. The Respondent's position is that the suspension decision was and remains necessary, justified and proportionate.

The Legal Framework

12. The statutory framework for the registration of nursery provision is provided under the Childcare Act 2006. Section 69(1) of the Act provides for regulations to be made dealing with appeal against the suspension of a person's registration: see regulations 8-13 of the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 (hereafter "the 2008 Regulations").
13. When deciding whether to suspend registration the applicable test is that set out in regulation 9 of the 2008 Regulations. It 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."
14. "Harm" is defined in regulation 13 as having the same definition as in section 31(9) of the Children Act 1989 which, (as amended by s 120 of the Adoption and Fostering Act 2002) provides as follows:

*"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; and
"ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical."*
15. The immediate duration of suspension under regulation 9 is for a period of six weeks. It may, however, be extended to 12 weeks under regulation 10. This provides that:

"Suspension of registration: further provisions
10.—(1) Subject to paragraph (2), the period for which the registration of a registered person may be suspended is six weeks beginning with the date specified in the notice of suspension given in accordance with paragraph (4).

(2) Subject to paragraph (3), in a case in which a further period of suspension is based on the same circumstances as the period of suspension immediately preceding that further period of suspension, the Chief Inspector's power to suspend registration may only be exercised so as to give rise to a continuous period of suspension of 12 weeks.

(3) Where, however, it is not reasonably practicable (for reasons beyond the control of the Chief Inspector)—

(a) to complete any investigation into the grounds for the Chief Inspector's belief referred to in regulation 9, or

(b) for any necessary steps to be taken to eliminate or reduce the risk of harm referred to in regulation 9, within a period of 12 weeks,

the period of suspension may continue until the end of the investigation referred to in sub-paragraph (a), or until the steps referred to in sub-paragraph (b) have been taken."

16. Under regulation 11 suspension “*must*” be lifted by Ofsted if the circumstances described in regulation 9 cease to exist. This effectively imposes an ongoing obligation upon the Respondent to keep the need for suspension under review.
17. The first issue to be addressed by the panel is whether 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).
18. 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.
19. We are guided by **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.”
20. If the threshold test is met, the Respondent bears the overall burden of persuading the panel that the decision under appeal is in accordance with the law, justified in terms of a legitimate public interest objective, and is proportionate in all the circumstances.

The Hearing on ~~1 October~~ 7 November 2024

21. The judge explained at the outset that the panel had read the indexed e-bundle consisting of 201 pages (PDF) in advance, the contents of which are fully set out in the bundle index. We had received also a supplementary bundle (63 pages PDF) as well as skeleton arguments from both parties.
22. There were some difficulties with video connection but these were resolved. The difficulties did not affect the panel's ability to conduct a fair hearing or the ability of each party to participate.

Additional Evidence and other preliminary matters

23. Each party had lodged a T109 application seeking to adduce late evidence. The Respondent's new evidence was an updating statement from Ms Parmar, Early Years Regulatory Inspector. On 25 October a different parent contacted Ofsted regarding her child, C. The matters raised by the parent include that the individual needs of her child were not taken into account, particularly when there was a history of domestic violence/traumatic events in the family. Amongst other matters, it is alleged that C, not typically being a tearful child, was tearful in nursery and reported that he "did not have the words" when the informer asked the child what had happened at nursery that made him cry. The Appellant's new evidence is her lengthy witness statement dated 5 November in response and by which she responds to the matters raised and with multiple exhibits. It is her firm belief that the complaint made to Ofsted by the parent of Child C is malicious and without merit. The parties were in agreement that the late evidence from each side should be received by the panel. The panel agreed to do so because the evidence was relevant and it was fair to admit it.

Oral Evidence

24. We heard brief evidence from the following:

For the Respondent
Mrs Parmar, EYRI
Mrs Layla Davies, Early Years Senior Officer

For the Appellant:
Ms Olufunmilayo Akande

The Tribunal's consideration

25. We have taken all the evidence and the material before us into account including the skeletons arguments from each party, the oral evidence and the closing statements/submissions. If we do not refer to any particular piece of evidence, argument, or particular submission, it should not be assumed that these have not been considered.

26. 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 against the threshold set out in paragraph 9, and on the basis of the information available today.
27. It needs to be emphasised that we are not today involved in making any findings regarding any disputed facts. Our task is that of a risk assessment in the light of the nature and substance of the evidence regarding the concerns/allegations before us.
28. Some of the evidence includes basic matters about which has been little or no real disagreement. Assessing the issue of risk requires us to consider the disputed evidence before us to assess whether the concerns/allegations raised have apparent substance, and to consider the nature, seriousness and/or potential significance of the allegations made, if true. This is a very different exercise to fact finding.
29. We have considered all the material before us. The allegation/concerns are that it appears that child A sustained bruising to both of her forearms, which bruising may be consistent with finger marks left by an adult. It is alleged that this was caused by Mrs Akande on 3 October. The allegation regarding child A is plainly serious and requires investigation. Mrs Akande very strongly denies that she restrained Child A or caused the child any injury. There appear to be conflicting accounts as between the mother and Mrs Akande as to the conversations between them on 3 October and the meeting on 4 October. The instigator also alleged that child B, A’s sibling, also had unexplained marks behind his ears on 4 October which had not been there before he went to the nursery.
30. The material before us in relation is such that we reasonably believe that a child *may* be exposed to a risk of harm.
31. Applying **Ofsted v GM and WM**, we remind ourselves that Regulation 9 sets a low threshold. However, the mere fact that the Respondent has satisfied us that the regulation 9 threshold test is met does not necessarily mean that the exercise of the power of suspension is necessary, justified or proportionate.
32. The justification relied on is the need to protect children against the risk of harm pending investigation by the police as part of the Multi Agency Safeguarding Hub arrangements. We accept that it has not been, and will not be, possible for the Respondent to conduct its own investigations until the police investigation is concluded or until the police have agreed that Ofsted may now make its own inquiries. The Appellant confirmed that she was interviewed by the police under caution on 1 November 2024 and was told by the police that she would be informed of the outcome as soon as possible. We are satisfied that it has not to date been reasonably practicable for the Respondent, for

reasons beyond the control of the Chief Inspector, to complete its investigation or to make a decision as to any necessary steps to be taken to eliminate or reduce the risk of harm. We are satisfied that the Respondent has to date done what it can to progress such matters as it can in a timely way.

33. We are satisfied that the decision made by the Respondent was/remains in accordance with the law and was/remains necessary to protect the public interest in the protection of the health, safety and welfare of children pending further investigation.

Proportionality

34. Suspension is always a very serious matter because of the adverse impact on livelihood/income, professional reputation, standing and business viability. A decision whether or not to suspend is never a decision to be taken lightly. We have carefully considered all the matters raised on the Appellant's behalf.

This includes a track record of success across 20 years. It appears that the nursery provision at Erith High Street, which has 25 children enrolled, is popular and is valued by parents, some of whom have been able to place their children at the Elm Road setting. We bear fully in mind that nursery provision and childcare can be very difficult to secure and that any period of suspension is likely to have a significant impact on families and children, some of whom have special needs.

35. We have little doubt that the fact of suspension, although intended to be a neutral act pending investigation and/or a substantive decision, is likely to have had a significant adverse impact on the Appellant's reputation, and on her income and livelihood.
36. We balanced the harm to the interests of the Appellant and others affected against the risk of harm to children looked after by the Appellant pending further investigation.
37. Having considered the material before us we consider that the need to protect young children against the risk of harm pending further investigation and decision making by the Respondent outweighs the adverse impacts of suspension on the Appellant and all others affected. The decision made was/is fair, reasonable and proportionate to the public interest in the protection of the health, safety and well-being of children.
38. We should explain, however, that had the allegations/concerns before us related solely to the matters raised regarding Child C it is doubtful that we would have considered suspension to be proportionate.
39. We confirm the decision ~~made on~~ to suspend the Appellant's registration for the period of six weeks from 8 October 2024.

Decision

**The decision to suspend registration dated 8 October is confirmed.
The appeal is dismissed.**

**Tribunal Judge S Goodrich
First-tier Tribunal (Health, Education and Social Care)**

Date Issued: 13 November 2024

Amended Under Rule 44 Date Issued: 18 November 2024