

First-tier Tribunal Care Standards

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

2024-01315.EY-SUS

Neutral Citation Number: [2024] UKFTT 001131 (HESC)

Hearing held remotely via CVP
on 16 December 2024

Before
Tribunal Judge Faridah Eden
Specialist Member Denise Rabbetts

Between:

Mrs Kathryn Elizabeth Brierley

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal

1. This is an appeal by Mrs Brierley ('the Appellant'), a childminder, against a decision made by Ofsted ('the Respondent') on 14 November 2024 to suspend her registration under section 69 of the Childcare Act 2006 and The Childcare (Early Years and General Childcare Registers (Common Provisions) Regulations 2008. The suspension applied to the Appellant's registration on the Early Years Register, the compulsory part of the Childcare Register and the voluntary part of the Childcare Register. The suspension took effect immediately and is due to expire on 25 December 2024.
2. On 27 November 2024, the Appellant sent her appeal against the decision to the First-tier Tribunal. The appeal was case managed and listed for a remote hearing (video) on 16 December 2024.

Attendance

3. The Appellant represented herself. She gave oral evidence but called no additional witnesses.

4. Ofsted was represented by Ms Lucie Keeler, in house solicitor. Ofsted's witnesses were Ms Lois Hulley (Early Years Regulatory Inspector) and Ms Ann Law (Early Years Senior Officer).

Preliminary issues

5. Prior to the hearing, the Appellant sent an email saying that she has undiagnosed ADHD and is going through the menopause and that she struggles with word retrieval. In addition, the Appellant appeared vulnerable throughout the proceedings. We applied the Senior President's Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses. We asked the Appellant what support she would like to help manage her word retrieval difficulties. We agreed that we would give her time to focus on questions, would take regular breaks and that she could take a break if she needed one. She became distressed at one point during cross examination and left the screen. We took a ten minute break and she was able to proceed after the break. We were satisfied that she was able to present her case in full.
6. There was late evidence on both sides. Ofsted produced a further witness statement from Ms Hulley following a regulatory visit which took place after the final evidence deadline. The Appellant objected to this because she disagreed with what was said in the statement. We explained that she would have an opportunity to object during the hearing. We admitted the witness statement because there was a good reason why it was late and it was highly relevant to the appeal.
7. The Appellant produced three screenshots of a WhatsApp exchange dated 14 September with someone called Robert. Ofsted did not object. We admitted this late evidence so that the Appellant would have the opportunity to put her case to the best of her ability.
8. The hearing was held remotely by video. There were no connectivity difficulties.

Background

9. The Appellant has been a registered childminder with Ofsted since 2007. She has also been, until recently, an approved foster carer with Lancashire County Council.
10. On 6 February 2023, the Appellant notified Ofsted that her son, Brandon Green, had taken an overdose of Ketamine requiring hospital treatment. On 27 February 2023, Ofsted undertook a regulatory visit to the Appellant's home and served a welfare requirement notice. Ofsted undertook a further regulatory visit on 8 March 2023 and was satisfied that all requirements were met.
11. On 8 November 2024, the Appellant emailed Ofsted asking for advice because Brandon had been released from prison after being on remand for importing cannabis. He was convicted and received a suspended sentence. The Appellant gave her home address (the registered childminding premises) as his release address. She was interviewed by an Ofsted officer by telephone on 14 November 2024 and the suspension notice was issued.

Legal Framework

12. The statutory framework for the registration of childminders is set out in the Childcare Act 2006 (as amended) ('the Act'). Section 69(1) of the Act provides for regulations to be made dealing with the suspension of a person's registration. The relevant regulations are 6 to 11 of the Childcare (Early Years and General Childcare Registers) (Common Provision) Regulations 2008 ('the Regulations'). The section also provides that the Regulations must provide a right of appeal to the First-tier Tribunal.
13. When deciding whether to suspend a registered provider's registration, the test to be applied by the Respondent and this Tribunal, on an appeal, is set out at Regulation 9 of the 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'. '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'.
14. It is not necessary for the Tribunal to be satisfied that there has been actual harm or even a likelihood of harm, but merely that a child may be exposed to a risk of harm.
15. The immediate duration of a suspension under Regulation 7 is for six weeks. However, it may be extended to 12 weeks. Pursuant to Regulation 8, a suspension may be lifted at any time if the circumstances described in Regulation 9 cease to exist. This imposes an ongoing duty on the Respondent to monitor whether the suspension remains necessary.
16. The decision of the Upper Tribunal in *Ofsted v GM and WM* [2009] UKUT 89 (AAC) sets out principles.
17. The Tribunal stands in the shoes of Ofsted at the date of the hearing. The first issue to be addressed by the Tribunal is whether, as at the date of the hearing, it has reasonable cause to believe that the continued provision of 5 childcare by the Appellant to any child may expose such a child to risk of harm ('the threshold test').
18. The burden of satisfying the Tribunal that the threshold test at Regulation 9 is met rests with the Respondent. The standard of proof is 'reasonable cause to believe' and that falls somewhere between the balance of probabilities test and the 'reasonable cause to suspect' test. 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 further guided by GM at paragraph 20:

"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. Even if the threshold test is satisfied by the Respondent, that is not an end of the matter because the panel must decide whether the decision is necessary, justified and proportionate in all the circumstances.

Evidence

21. In addition to the late evidence, there was a hearing bundle of 181 pages. We heard oral evidence from Ms Hulley, Ms Law and the Appellant. Page references below are to the numbers in the paginated bundle.

The Tribunal’s conclusions with reasons

22. Ofsted produced a skeleton argument dated 12 December 2024.
23. Essentially, Ofsted’s witness evidence was that there were three reasons for suspending the Appellant. First, she had failed to notify Ofsted about significant information. She did not inform Ofsted that Brandon had been admitted to a drug rehabilitation programme in September 2023 and she did not notify Ofsted about changes to her own health which required minor surgery. Secondly, she was unable properly to assess the potential risks associated with Brandon’s drug use. Thirdly, she had given a number of different versions of events and it was Ofsted’s view that she was not being open and honest. This made it impossible to work with her to address the potential risks associated with Brandon.
24. The Appellant’s response was that she understood the risks associated with Brandon and could manage them. She said that Brandon was no longer allowed in her home. He is living with a friend. She had informed Lancashire County Council about his drug use and had agreed measures to mitigate the risks, including regular searching of Brandon and his room and keeping his room door locked. She said that Brandon was never on the premises when she was minding children. She said that she had never given a false account to Ofsted but had made honest mistakes about dates and times, which could be confusing for her.

Threshold for suspension

25. We consider that the test for suspension in regulation 9 is met. There are sufficient grounds for a reasonable belief that the continued provision of childcare by the Appellant may expose children she cares for to risk of significant harm.
26. We agree with Ofsted that the Appellant has minimised the risks associated with Brandon’s drug use. We are concerned that the Appellant only made her notification about Brandon’s conviction after it came up in relation to her role as a foster carer. She was asked on 8 November 2024 by the LADO whether she had informed Ofsted and said that she had a week to do so (page H2). Although Shannon Taylor-Flood, the supervising social worker did not attend to give oral

evidence, this account was not disputed by the Appellant.

27. In oral evidence the Appellant said that she saw her fostering social worker more often than Ofsted and realised she should have been telling Ofsted everything she told her fostering social worker. She said it was a mistake that she would not make again.
28. However, this is not the first time that the Appellant has failed to make a notification about Brandon's drug use. She agreed in oral evidence that she had not told Ofsted about Brandon going to a drug rehabilitation and that she should have done. She said that she thought at the time that he was going to get better.
29. We find that the Appellant has not kept Ofsted informed at least in part because she does not consider that Brandon's drug use is an important issue for Ofsted. This interpretation is supported by the Appellant saying that the decision not to allow fostered children in contact with Brandon was "ridiculous" (page H57). The Appellant says in her appeal form (page G5) that she does not remember using the word and it may have been a slip of the tongue. However, we consider that the choice of word, even if advertent, is revealing.
30. We were also concerned that the Appellant's account of why she decided to stop fostering is very different from the account in Ms Taylor-Flood's statement. Ms Taylor-Flood says that the Appellant resigned because Brandon could not be in contact with looked after children following his conviction and then sought to retract the resignation (page H3). The Appellant's account was that she gave notice because a foster child was stealing from Brandon and because she needed to reregister as a single foster carer. She said that she discussed whether to have a foster review and Ms Taylor-Flood said that there was no point when she would have to reregister in any event. We are mindful that Ms Taylor-Flood did not attend to give evidence and there may be a simple explanation. However, we are concerned that there is a difference of emphasis between the two accounts, with the Appellant failing to understand the significance of the concerns raised by Ms Taylor-Flood.
31. Furthermore, we do not consider that the Appellant appreciates all of the risks associated with Brandon's drug use. She is, understandably, optimistic about his chances of recovery and says he is now doing well. However, her own evidence was that she did not know that he was addicted before he went for rehabilitation. She did not know that he had gone to Thailand before he was arrested for drug trafficking. She is often unaware of his whereabouts and what he is doing. There may be many other factors of which she is unaware.
32. Ms Hulley's witness statement records that the Appellant was not able to identify the wider risks associated with habitual drug use (page H9). In oral evidence, the Appellant mentioned risks but did not elaborate on them or describe any measures she had taken to counteract them. She described events putting her and Brandon at risk, such as her paying money to avoid Brandon being harmed in prison and Brandon receiving a threatening telephone call, which she said was a joke from a friend. However, she did not appreciate that these risks could materialise in her home and put the children she looks

after at risk.

33. Finally, we consider there is a risk that Brandon may need to return to the Appellant's premises. The Appellant said that her address was Brandon's official release address. She said this was given to the criminal court on the understanding that Brandon would not be living with her. However, she confirmed that her address was the address held by the Probation Service. She said that Brandon is currently living with a friend called Declan. She said Declan is a former foster child who stayed with her. He has a one bedroomed flat and Brandon is sleeping on the floor. Brandon has made multiple attempts to find housing. He is a priority, but nothing has yet been allocated to him. It seems to us that this arrangement may well break down, leaving the Appellant in the difficult position of deciding whether to allow Brandon to return home. There is a significant risk that her understandable family loyalties would lead her to allow him to be on the premises.
34. We agree with Ofsted that the Appellant has given changeable accounts of events such as the circumstances in which Brandon came out of drug rehabilitation, whether Brandon has ever been in the house at the same time as minded children, and whether he had stayed overnight since his release from prison. We do not need to make findings of fact as to what happened on these occasions. Our role in relation to a suspension is to assess risk.
35. We are mindful of the Appellant's vulnerabilities, and we agree that some of the inconsistencies may be due to difficulty in remembering dates and times. The Appellant presented as vulnerable when giving evidence. She is also experiencing a number of difficult life events, including ill health, divorce from her husband, the situation with Brandon and the regulatory investigation by Ofsted.
36. However, there were some areas in which the inconsistencies were such that we considered that the Appellant had actively sought to mislead. She has produced statements from her cleaner (page I3) and her child minding assistant (page I9) saying that Brandon had not been in the house at the same time as minded children. This was in direct contrast to a report from Brandon's probation officer (page H10 and H43). We consider that the Appellant is likely to have asked these individuals to vouch for her and Brandon, regardless of what actually happened. It is significant that when cross examined about these statements, the Appellant became distressed and needed a break from the hearing.
37. We agree with Ofsted that the Appellant's lack of reliability, whether through an inability to give a clear account or through a deliberate attempt to mislead creates a high level of risk because it is impossible to be sure that she has given a correct account. Without clear and accurate information, Ofsted cannot quantify and mitigate the risks associated with Brandon.

Proportionality

38. We go on to consider the proportionality of the suspension. We take into account the significant impact that the suspension has on the Appellant's

livelihood and business. The suspension also impacts negatively on the children settled in her care and the parents relying on her for childcare. We also took into account the significant stresses which the Appellant is facing.

39. Set against the detriment to the Appellant, the children and the parents, we must consider the potential risk of harm to the children. There are significant risks associated with the Appellant's son Brandon because he has been convicted of a drug trafficking offence. There are risks of the children being caught up in the activity of drug dealers, being exposed to drug paraphernalia and being exposed to unpredictable behaviour from Brandon. The Appellant does not appear to take those risks seriously enough and it is not possible to rely on her giving accurate information to Ofsted so that the risks can be mitigated.
40. In oral evidence, Ms Law said that this would not be an appropriate case in which to impose conditions as opposed to a suspension because of the nature of Brandon's conviction. We agree that conditions are unlikely to be an effective safeguarding tool. Ms Hulley's second witness statement says that there will be a case review on 18 December and that she will be recommending a cancellation of the Appellant's registration as a childminder.
41. Therefore, we consider the suspension to be proportionate.

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

Tribunal Judge Faridah Eden

First-tier Tribunal (Health Education and Social Care)

Date Issued: 18 December 2024