First-tier Tribunal Care Standards

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

2024-01081.EY-SUS
[2024] UKFTT 00308 (HESC)

Hearing held remotely via CVP
on 11 April 2024

Before
Tribunal Judge Faridah Eden
Specialist Member Denise Rabbetts
Specialist Member Matthew Turner

Between:-

Zainab Patel

Appellant

-v-

Orange Moon Childcare Community Interest Company (trading as @Home Childcare)

Respondent

DECISION

The Appeal

1. On 22 March 2024, the Appellant appealed against the Respondent's decision dated 11 March 2024 to suspend her registration as a childminder.

2. The Respondent is a childminder agency and, therefore, the right of appeal arises under regulation 9 of the Childcare (Childminder Agencies) (Cancellation etc) Regulations 2014 (SI 2014/1922) ("the Regulations").

Attendance

3. The Appellant attended and was represented by Mr Nicholas Leviseur, Counsel. His instructing solicitor Miss Maisie Greenhalgh also attended.

4. Mr Philip Dayle, Counsel represented the Respondent. The Respondent's witness was Mr Barrington Oliver-Mighten.

Late Evidence

5. There were two pieces of late evidence, both from the Appellant. The first was a supplementary witness statement from the Appellant dated 10 April 2024. The second was a covering email dated 11 April 2024 and a report by Tina Botley, who is a prevention officer on the Leicester City Council Phoenix Programme. The report related to work she had done with the Respondent's son, Mohammed Uzaid Khan.

6. There was no objection by the Respondent to the late evidence. We considered it relevant, and we admitted it.

Background

7. The Appellant has been a registered childminder with the Respondent since 6 February 2023. She operates a childminding business from her daughter's house, around two miles from her own home.

8. On 11 February 2024, the Appellant was arrested on suspicion of assisting an offender following an altercation involving a number of youths outside her home. She was released without charge and the police have informed her that there is insufficient evidence to proceed (page 19 of the bundle).

9. The Appellant was inspected by the Respondent on 26 February 2024 and judged to be good. It is common ground that she did not disclose her arrest to the Respondent at the inspection or at any other time.

10. On 6 March 2024, an anonymous caller contacted Ofsted and subsequently the Respondent to raise concerns about the Appellant. He made allegations that the Appellant and her children are involved in gang culture and drug dealing and that the Appellant's husband, who has conviction for child sexual offences attends the house.

11. The Respondent made a LADO referral on 7 March 2024 and suspended the Appellant on 11 March 2024. There have been two meetings during the LADO process. A further meeting is scheduled for Tuesday 16 April 2024. The suspension expires on 22 April 2024.

Legal Framework

12. The statutory framework for the registration of childminders is provided under the Childcare Act 2006 as amended. Provision about childminder agencies is made under Chapter 2A of Part 3. Sections 35 and 37 provide for childminder agencies to register childminders operating from domestic premises.

13. Section 69(1) of the Act provides for regulations to be made dealing with the suspension of a person's registration: see regulations 6-11 of the Regulations.

14. When deciding whether to suspend a childminder, the test is set out in regulation 6 of the 2008 Regulations as follows:

"in circumstances where the agency reasonably believes that the continued provision of childcare by that provider to any child may expose such a child to a risk of harm."

15. The decision of the Upper Tribunal in *Ofsted v GM and WM* [2009] UKUT 89 (AAC) was in relation to the power of Ofsted to suspend. That decision predates the creation of childminder agencies. The suspension test is in identical terms for Ofsted and childminder agencies. Therefore, we consider the principles set out in *GM* to be equally applicable in this case.

16. It is not necessary for the agency, (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 6 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".

17. The immediate duration of a suspension under regulation 7 is for a period of six weeks. It may, however, be extended to 12 weeks. Under regulation 8, suspension may be lifted at any time if the circumstances described in regulation 6 cease to exist. This imposes an ongoing obligation upon the Respondent to monitor whether suspension remains necessary.

18. The Tribunal stands in the shoes of the agency. 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 Appellant to any child may expose such a child to a risk of harm (the threshold test).

19. The burden of satisfying us that the threshold test under regulation 6 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.

20. 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."

21. 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

22. As well as the late evidence, we considered a 136 page bundle, including witness statements from the Appellant and Mr Oliver-Mighten. We heard oral

evidence from both the Appellant and Mr Oliver-Mighten.

The Tribunal's conclusions with reasons

23. Both parties provided skeleton arguments, which we considered. The Respondent did not have legal representation before the hearing and its arguments developed during the course of the hearing.

Validity of notice of suspension

24. Mr Leviseur raised a preliminary point which he said required us to dismiss the appeal. It is not disputed between the parties that the agency registered with Ofsted as a childminder agency is Orange Moon Childcare Community Interest Company, which trades as @Home Childcare. However, the notice of suspension at page 32 of the bundle is from @Home Childcare Limited.

25. In oral evidence, Mr Oliver-Mighten explained that @Home Childcare Limited is a separate company and the Orange Moon community interest company "sits under that". There is also a separate training company, Orange Moon Training because the business is an apprenticeship provider. He said that the suspension letter sent on 11 March 2024 was a mistake and this mistake was rectified in a further letter dated 20 March 2024 (page 18 of the bundle). This was sent on the correct letter head and confirmed the suspension after the Appellant challenged it in her letter of 12 March 2024.

26. We suggested to Mr Leviseur that this was not a point which the Tribunal had jurisdiction to consider. He disagreed and said that the Tribunal's powers under regulation 9 were either to confirm the suspension or direct that it ceases to have effect. He said that if the suspension was made by the wrong entity, an entity without power to suspend, we could not properly confirm the suspension so must direct that it cease to have effect.

27. We disagree with Mr Leviseur for the following reasons.

28. If Mr Leviseur is correct that the notice is not valid, his analysis does not follow. The appeal only arises if the registration has been suspended. Therefore, the Tribunal has no jurisdiction if the registration has not been suspended. Neither party made an application to strike out the appeal for lack of jurisdiction and we did not consider it appropriate to raise the issue of our own motion.

29. If the notice is not valid, the decision to suspend may fall into the category of voidable decisions, which remain valid until set aside by a higher court. This would make sense because the power to suspend exists to ensure the safety of children. It would be perverse for the safety of children to be put at risk because of a technical defect in a notice.

30. The Tribunal has no power to decide on the validity of a suspension notice. If there is an error and the decision to suspend is voidable, the Tribunal should treat the notice as valid and determine the appeal in the usual way.

31. We note that the Regulations do not provide for a notice to be in any particular form and do not say what a notice should contain (in contrast to Regulation 4 which sets out in detail what notices relating to cancellation of registration should say). We also note that the individuals running @Home Childcare and Orange Moon community interest company are the same individuals and that a notice from the correct company was sent on 20 March. Therefore, we are not persuaded in any event that there is no valid notice of suspension.

32. Mr Leviseur raised some other issues about the notice, including that the Respondent failed to draw the Appellant's attention to the fact that continuing to childmind whilst suspended would be a criminal offence. We also note that the Respondent did not draw the Appellant's attention to the right of appeal to the Tribunal until the further letter on 20 March. These issues do not relate to the validity of the notice. However, they do raise issues about the professionalism of the Respondent's exercise of its regulatory role. We return to this issue later on.

Substance of the decision to suspend

33. Mr Leviseur said that the basis for the suspension had changed since notice was given on 11 March 2024. If correct, this would not necessarily be relevant. *GM* is clear that suspension will almost always be for the purposes of an investigation (para 23) and different issues are likely to come to light during an investigation.

34. In this case, the suspension was said in the letter of 11 March 2024 to be due to the information contained in the allegation by the anonymous person, including information about the arrest and the "potential risk of harm to children". The Respondent's skeleton argument states that the Appellant was suspended due to her disqualification by association with her son and her failure to self-report on material matters. These were also the matters relied on by Mr Dayle at the hearing.

35. Taking into consideration the minutes of the two LADO meetings (pages 69 and 82 of the bundle), it is clear that the allegations made by the anonymous caller led to a wider investigation into the Appellant's associations and this led to concerns about the Appellant's son Mohammed Uzaid Khan, including concerns about reprisal attacks made on the Appellant's home. These further considerations flow from the grounds of the original suspension and the allegations made by the anonymous caller.

36. Mr Leviseur argued that the following factors mean that there is no likely risk to children. These are the distance between the Appellant's home and her childminding premises, the lack of evidence that the Appellant's son has been to her childminding premises, the childminding premises being on a busy road surrounded by public amenities, the Appellant having behaved appropriately during the incident leading to her arrest, the lack of evidence that the Appellant's son is involved in gangs, and the malicious nature of the anonymous call. He argues that the failure to report the arrest is not sufficiently serious to justify suspension.

Threshold for suspension

37. We consider that the test for suspension in regulation 6 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 significant harm.

38. We have concerns about the Appellant's son. We make no findings of fact as to his associations. However, the LADO minutes of 14 March 2024 record "119 niche occurrences" from police information (page 76) including aggression, violence, gang associations and drug supply. The late evidence progress report from Tina Botley records that he has been engaging with support. However, this is still in the early stages, as he has only been involved in the programme for two months.

39. Mr Leviseur argued that there was a lack of evidence to show gang involvement by Uzaid. However, we do not need to make any positive findings of particular behaviour. At this stage, it is enough for there to be concerns which need to be investigated. This threshold is met. The concerns do not come from the anonymous caller, who may well be malicious but from the professionals engaging in the LADO process.

40. We consider that the potential associations of the Appellant's son are likely to put her in danger. This danger is likely to spill over and affect the children in her care.

41. The 14 March LADO minutes record at page 76 the Appellant being the victim of an offence on 13 February 2024 where her home and car were damaged by masked males. The minutes of the LADO meeting on 27 March 2024 record a police report that there were two "reprisal attacks" on the Appellant's home.

42. On cross examination, the Appellant did not challenge the characterisation of these as reprisal attacks. She said that it was a one off and that those involved had been charged with witness intimidation. The Appellant resisted any suggestion that reprisals might take place at her childminding address. She said attacks would not take place there because of the distance from her home, the fact that the address is not widely publicised and the safe surroundings.

43. We consider that there is a significant risk that further reprisals might take place in a way which would put the children in the Appellant's care at risk. We were concerned that the Appellant minimised these risks in oral evidence. We do not consider that the location of the premises or the address not being publicly available mitigate these risks to the extent suggested by the Appellant. We do not consider it relevant whether the Appellant's son has visited the premises. The risk is of the Appellant and her business being subject a reprisal attack.

44. Mr Leviseur argued that the Appellant had acted appropriately during the incident on 11 February by administering first aid to a youth, calling the emergency services and giving a statement to the police. This is not disputed

and is reflected in the LADO minutes of 27 March. The police officer in attendance records her actions as "commendable" (page 82). However, we do not accept Mr Leviseur's argument that this behaviour shows there would be a mitigation of any risk. The children in the Appellant's care should not be put at risk of being in the middle of a violent attack in the first place.

45. As regards the Appellant's failure to report the arrest, she has recognised this as a failing. We understand that she did not consider herself to be at fault and has reported other incidents, including a road rage incident. Taken alone, the failure to report would not be sufficient to meet the threshold for a suspension. However, the failure to report can be seen as part of a wider pattern of the Appellant minimising risk relating to her son. The LADO minutes of 27 March record that the Appellant's son was arrested in relation to this incident and is still under investigation. The Appellant either did not make the connection between her son's associations and the incident outside her home or chose to ignore the connection.

Proportionality of suspension

46. 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, many of whom have written testimonials in support of her, included in the bundle.

47. Set against the detriment to the Appellant, the children and the parents, we must consider the potential risk of harm to the children. We have identified a risk of children being caught up in a reprisal attack. This could cause them physical harm, even put them at risk of death. If they were not physically harmed, they could suffer emotional harm from witnessing verbal or physical conflict. Children must feel safe in the place at which they are being cared for.

48. We note that the LADO process is ongoing and that there is an ongoing risk assessment at page 87 of the bundle. Mr Oliver-Mighten addressed in oral evidence the areas of that risk assessment which needed further input from LADO participants before it could be completed in full. We are satisfied that the Respondent needs the LADO process to complete before it can complete its risk assessment.

49. We are not tasked with making findings of fact but with addressing risk. The purpose of the suspension is to enable an ongoing investigation into the risk of harm to the children in the Appellant's care. This investigation is not complete and there are serious concerns identified and outstanding. It would be premature and inappropriate to end the suspension before the risk can be fully identified and assessed.

50. Therefore, we consider the suspension to be proportionate at this time.

Further comments

51. Although we have upheld the suspension, we have some concerns about the Respondent's overall approach. The original suspension letter was sent from the wrong company, as noted above. Furthermore, the evidence in the bundle did not demonstrate a clear and coherent decision making process.

52. Neither letter sent to the Appellant contained the sort of detailed information which would be expected and is, for example, contained in the letters sent by Ofsted to childminders regulated by it.

53. Mr Oliver-Mighten did not explain in detail how the Respondent came to the conclusion that a suspension was necessary or what processes the Respondent has in place to ensure that investigations are fair and as open as possible. Mr Oliver-Mighten said that it was his wife Yvette Oliver-Mighten who was responsible for the decision to suspend as she is the person in charge of Orange Moon. He said she had not attended to give evidence because she would find it "triggering".

54. The Respondent has chosen to take on the role of a regulator by registering as a childminder agency. This role must be exercised responsibly and professionally. We recommend that the Respondent carries out a review of how it exercises its regulatory functions, taking whatever professional advice is necessary.

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: 16 April 2024