

# First-tier Tribunal Care Standards

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

2024-01082.EY-SUS  
[2024] UKFTT 00316 (HESC)

Hearing held via CVP on 16 April 2024

**BEFORE**  
Tribunal Judge Ian Robertson  
Specialist Member Dr Edward Yeates  
Specialist Member Dr David Cochran

**BETWEEN:**

IN

Appellant

-v-

Ofsted

Respondent

### DECISION

#### **REPRESENTATION**

The Appellant was represented by Ms McGonigle (Counsel)  
OFSTED were represented by Ms Khalique (Counsel)  
Witnesses – Kathryn Irvine and Danny Lyndon-Williams

#### **NATURE OF THE HEARING**

1. This has been a remote hearing which was not objected to by the parties. The form of remote hearing was remote via Video. A face to face hearing was not held as it was not practical and nobody requested it. All issues could be determined in a remote hearing. Due to the nature of the hearing (see below) we considered that this was fair and reasonable in the circumstances. There were no disconnections through the hearing.

#### **THE APPEAL.**

2. This is an appeal dated 22 March 2024, brought by IN against the decision of Ofsted to further suspend her Child Minder registration pending further investigation to 21 April 2024. This follows earlier

periods of suspension starting on 18 December 2023, 29 January 2024 and 11 March 2024. It is against this Notice that the Appellant appeals.

3. 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 to members of the public to identify the child, the parents and the owner in this case so as to protect their private lives.

#### **LATE EVIDENCE**

4. The Appellant asked the Tribunal to accept as late evidence a number of certificates showing additional training undertaken. There was no objection and the certificates are relevant to the matters at hand. We therefore allowed the additional material to be admitted.

#### **BACKGROUND**

5. IN has been registered with Ofsted as a childminder since 19 March 2021. She was previously registered but in May 2019 resigned following an inadequate rating coupled with enforcement action (suspension).
6. On 18 December 2023, the Respondent received notification from LADO Bexley LA regarding a serious safeguarding incident in which it was alleged that the Appellant had hit a child on the face/head with a phone and that the police were investigating the incident. The Appellant attended a voluntary police interview.
7. The incident is reported to have taken place on 13 December 2023 and was initially raised by both the child and their sibling to their parents, stating that the Appellant had hit the two year old child on the head with a phone. The parents contacted the Appellant to discuss their concerns and request the video footage.
8. On 20 December 2023, the Respondent received an update from the police regarding their investigation and the CCTV evidence, which appeared to have seven to nine seconds missing. The child's parents believe that this may be when the Appellant hit the child with the phone. This footage was shared with the Respondent as it had been provided by the Appellant to the parents of the child, and it had been sent to the police. The original footage from a Ring Doorbell is not available on the system as it appears to have been deleted.
9. A letter of suspension was sent on 18 December which lasted until 28 January 2024.
10. The most recent notice of suspension (dated 8 March 2024) states as follows:

*“We are continuing to suspend your registration because we believe children are or may be exposed to a risk of harm. This is because on 8 March 2024, an allegation of emotional abuse against you has been substantiated by the Local Authority Designated Officer. Following the regulatory telephone call with you on 7 March 2024 we are not satisfied that you demonstrate sufficient knowledge and understanding of managing children’s behaviour effectively. Therefore, we cannot be assured that children will not come to further emotional harm. We also need to assess your ongoing suitability to remain registered.*

11. On 27 February 2024 a Welfare requirement Notice was served stating the following,

3.57 Supporting and understanding children’s behaviour	<i>improve your knowledge and understanding of how to support and manage children’s behaviour in an appropriate way</i>	6 March 2024
3.42 Staff: child ratios	<i>improve your knowledge of how many early years children you may care for when working alone, and when working with an assistant.</i>	6 March 2024

*Evidence supporting the welfare requirements notice:*

*At the interview held on 1 February 2024 we found the following evidence which supports the welfare requirement notice laid out above:*

*Supporting and understanding children’s behaviour*

*At the interview we viewed video footage of you managing a two-year-old child’s behaviour when they had failed to wipe their face to the standard you expected. Within the footage you are observed to be raising your voice and talking in a very stern manner during which time the child is heard to be crying. You tell the child that they are ‘acting crazy’. When asked about this footage, it is of concern that you did not recognise anything concerning about your behaviour in the footage. You talked about this being your normal method for managing children’s behaviour and that you wouldn’t behave any differently in front of parents. Furthermore, you talked about how the child had been ‘out of sorts’ throughout the day but failed to recognise any other potential reasons for this which might have required you to respond to their actions in a more sensitive manner. It is of concern that you do not demonstrate an ability to understand children’s behaviour, or how to manage it in an appropriate way that supports children’s emotional development. This puts children at risk of emotional harm.*

*Staff: child ratios*

*Within the video footage there are five children present, and you confirmed all these children were in the early years age range. You*

*confirmed you were working alone as your assistant had gone home. Furthermore, in looking at the registers of children's attendance and the assistant's sign in sheet that you provided it can be clearly evidenced that when your assistant goes home, usually at 5.30pm you are caring for more children in the early years age range than permitted. This puts children's safety and welfare at significant risk.*

12. On 22 March 2024 the Appellant lodged an Appeal and set out her grounds of appeal as follows;

*It is the Appellant's case that Ofsted have had ample time to conduct their investigations: they have had over 13 weeks to date. In this time, Ofsted have liaised with other agencies (i.e. the Local Authority and Police) and the Appellant consider that investigations of all other agencies have now largely concluded. Continued suspension on the ground that it has not been reasonably practicable for the Respondent to complete any investigation is not sustainable.*

*Even if, which is denied, further investigations did need to take place, following the case of GM & WM, a suspension imposed on the grounds that there is an outstanding investigation can be justified only as long as there is a reasonable prospect of the investigation showing that further steps to reduce or eliminate a risk might be necessary.*

*The Appellant aver that for suspension to continue, the Respondent would need to prove, on the balance of probabilities, that suspension is justified on the basis that it is not reasonably practicable for necessary steps to be taken to eliminate or reduce the risk of harm referred to in regulation:*

*In this case, considerable action has been taken by the Provider, including as follows:*

*a. The initial incident was reported to Ofsted and the LADO without delay.*

*b. The Appellant promptly went to the Police for a voluntary interview, and assisted agencies by providing the video footage of the incident.*

*c. Training has been undertaken in the interim period and the Provider has reflected on the incident in depth.*

*d. The Appellant appreciates that this is a serious safeguarding incident, highlighted through her reporting of it. She recognises and is remorseful for how her tone and choice of words was received. Going forward she would utilise the training she has undertaken and would adopt new strategies to deal with an issue differently if it arose in the future.*

*e. The Appellant has sent her health documents through to Ofsted to address their concerns.*

*f. An action plan will be implemented in its entirety once the setting reopens, but the Provider can only show that the practices (for example complying with ratios) as set out in the action plan are taking place and becoming embedded once she reopens.*

*The impact of closure on the Provider for such a sustained period of time is obvious but it also has a detrimental effect for the families which rely upon the provision, many of whom have now had to find alternative childcare owing to the increased period of suspension. This is wholly undesirable.*

## **THE LAW**

13. By S69 Childcare Act 2006 power is granted to make regulations governing the suspension of registration for, inter alia, Child minders. The relevant Regulations are the Childcare (Early Years and General Child Care Registers (Common Provisions) Regulations 2008.

14. The test to be applied is set out in Regulation 9;

The circumstances prescribed for the purposes of section 69(1) of the Act are 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.

15. Further provisions that apply here are set out in Regulation 10

**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. "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"*.

17. Our powers as set out above are limited to agreeing the suspension or setting it aside. We apply the same test in Regulation 9, the burden of proof is on the Respondent and the Standard of Proof is the balance of probabilities. It is not for us at this stage to make findings of fact.

## **THE EVIDENCE.**

18. We had read the Bundle that runs to over 330 pages and five MP4 files said to be video downloads from the appellants "ring camera" and have heard evidence from Kathryn Irvine and Danny Lydon-Williams on behalf of Ofsted and IN. The primary facts of the case are not fully agreed but the case has been presented with a great measure of balance by both advocates and we are very grateful for this.
19. Ms Irvine confirmed her involvement from 22 December 2023, she had a number of meetings and telephone calls with IN and expressed that her main concerns were the attitude displayed towards child A as seen on the video, the failure to undertake safeguarding checks on her assistant and the breach of ratio requirements. She felt that despite doing research and courses IN showed limited insight into her behaviour towards the child. Ms Irvine said that Ofsted were trying hard to get IN to be much more reflective, she felt she still did not understand the impact upon child A. A professionals meeting took place on 7 March 2024 where police indicated no further action was being taken but the consensus at that meeting was that Child A had suffered emotional harm. A phone call took place between Ms Irvine and IN on 22 March 2024 at which IN indicated that did not accept there had been emotional abuse but said she would approach matters differently now. There was no reflection upon the impact on Child A or the other children in the household.
20. Ms Irvine indicated that from consideration of the video it was clear that IN was caring for 6 early years children without support in breach of guidance (no more than 3 early years children). IN said that an assistant had left some minutes earlier. Ms Irvine further confirmed that she had not received a suitability form for the assistant IN was apparently using.
21. Mr Lydon-Williams confirmed that he was the decision maker who determined that the current suspension should take place on the basis that he feels that IN has not shown insight or understood the impact upon the child or that her actions were emotionally harmful.

22. IN gave evidence. Credit must be given to the fact that she reported the complaint to Ofsted and IADO immediately. On the day in question child A had some yoghurt to eat, her mouth was not clean although she did eventually wipe it. She accepted that she spoke harshly to her. She said her Assistant had left 15 minutes before the events on the video. She said child A was displaying odd behaviour. She said having seen the video that she disciplining her quite harshly and that now she wouldn't now tell her off in the same way. She said she was not shouting but it seemed she was directly under the microphone. Now after her training she would be calmer and more holistic. She accepted her tone and language was not appropriate. IN discussed the training she had done in particular via open university and an online module, she has also turned to a safeguarding expert. She described her health as currently good. Financially now in debt and credit score very poor now.

## DISCUSSION

23. The issue here is whether IN's attitude regarding her behaviour towards child A shows an understanding of the impact upon the child and those around of that behaviour. Having viewed the video it shows a really harsh and punitive approach towards a 2 year old child. IN is shouting, hectoring and humiliating the child by involving other children. It is hard to understand this approach to a 2 year old child who's problem seemed to be having yoghurt on her face. The child and her sibling complained she had been hit with the phone seen in her hand. There is a 7-9 second gap in the video recording that is not properly explained. On the back of this the police took no further action.
24. The LADO however and others at a professionals meeting on 8 March 2024 concluded that Child A had suffered emotional abuse. Following this meeting IN was given the opportunity via a telephone discussion with Ms Irvine to reflect upon matters. This followed what IN described to us as intensive training. To Ms Irvine she minimised the impact upon her behaviour and justified her harsh actions towards the child. In evidence IN remained defensive whilst paying lip service to acceptance of her behaviours as harsh, she denied shouting when she patently was.
25. We are concerned that at the point of this incident occurring she was looking after 6 early years children alone. We cannot be sure that this was a one off incident given her previous suspension for the same thing. We do not know if this contributed to the actions on that day but it undoubtedly must have increased levels of stress and lack of supervision.
26. We were taken by Ms McGonigle to the Upper Tribunal decision in **Ofsted v GM & WM [2009] UKUT 89 (AAC)**. This was an extremely powerful bench consisting of Lord Justice Carnworth, Mr Justice

Hickinbottom and UT Judge Rowlands and they made a number of findings:

The Upper Tribunal agreed with Ofsted's submissions that regulation 9 of the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 (SI 2008/976), as amended, sets a low threshold, and lower than thresholds for intervention in the Children Act 1989. It also held that the general legislative context and the principle of proportionality meant that the risk of harm referred to in regulation 9 meant a risk of significant harm to a child. Regarding the exercise of the power to suspend, the Upper Tribunal held that although regulation 9 set a threshold, the mere fact that the threshold was passed did not necessarily mean that the power to suspend in regulation 8 must be exercised. Regulation 11 required the suspension to be kept under review and a suspension imposed on the ground that there is an outstanding investigation could only be justified for as long as there was a reasonable prospect of the investigation showing that such steps were necessary. It was not the case that the suspension should automatically be maintained until the formal completion of a police investigation. At para 27 they stated as follows;

27. On the other hand, we do not consider that, in all cases, a suspension imposed while there is a police investigation need be maintained until that investigation is formally concluded. If Ofsted is kept informed of the progress of an investigation, as it should be, it may be able to lift a suspension earlier. What is important is that Ofsted should keep its focus on the steps it may need to take depending on the outcome of any investigation, because a suspension imposed on the ground that there is an outstanding investigation can, in our judgment, be justified only for as long as there is a reasonable prospect of the investigation showing that such steps are necessary.

28. We stress that the exercise of the judgment required by regulation 8 will turn very much on the facts of a particular case. If Ofsted wishes to resist an appeal against a suspension on the ground that further investigations need to be carried out, it needs to make it clear to the First-tier Tribunal what those investigations are and what steps it might wish to take depending on the outcome of the investigations. It may well be, for instance, that the fact that a child has suffered a non-accidental injury that may have been caused by a childminder will prompt a detailed examination of the childminder's records and interviews with other parents, conducted by Ofsted itself after the police have released any records they have seized and said they will not be interviewing such witnesses themselves. If that be the

case, Ofsted should explain that to the tribunal, because the tribunal must consider whether any continuation of the suspension has a clear purpose and therefore is capable of being proportionate having regard to the adverse consequences not only for the childminder but also for the children being cared for and their parents.

27. This is a case that falls under Regulation 10 (3) the case having moved beyond the 18 week initial suspension. This is not a case where the Chief Inspector is investigating themselves but in accordance with the evidence is one where they are reliant upon the investigation of the police. In that situation Reg 10 (3) (b) applies

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

(b) for any necessary steps to be taken to eliminate **or reduce** the risk of harm referred to in regulation 9 (our emphasis)

28. It seems clear to us that once the initial period of immediate suspension has passed the Chief Inspector is duty bound to reconsider the situation to see if there is any way risk can be eliminated or reduced. In order to do this one has to evaluate what the actual risk is.

29. There is a really difficult balance to be drawn in cases such as this. Ofsted must take safeguarding seriously and must be seen to act where allegations of abuse are made in respect of a child. They must however act proportionately. They are also dealing with a persons livelihood and their actions can cause grave financial hardship and serious emotional harm to the suspended child minder. It is their duty to look for ways to reduce the risk of harm in all cases.

30. Having viewed the video and listened to IN's responses in the light of additional training undertaken, we cannot see that she has developed any insight into her behaviour. We cannot be assured that any child minded by her will be safe from a repetition of the appalling behaviour we viewed. We also take into account that at the time the incident occurred she was looking after 6 Early Years children without support and that this is a recurrence of previous behaviour that led to an earlier suspension. For both these reasons we consider there remains a very real risk of harm to any child minded by IN. We do not consider that allowing her to continue minding to test out whether there are changes in attitude and the putting in place a regime of visits will safeguard children sufficiently.

## **DECISION**

In the light of the above we dismiss the appeal against IN's suspension.

**Judge Ian Robertson**

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

**Date Issued: 18 April 2024**