

Care Standards

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

Heard on 23 and 24 May 2017 at The Royal Courts of Justice, London

BEFORE

Ms Melanie Lewis (Judge)
Mr Brian Cairns (Specialist Member)
Ms Caroline Joffe (Specialist Member)

BETWEEN:

Mrs Adel Lee

Appellant

v

Ofsted

Respondent

[2016] 2838.EY

AMENDED DECISION

Representation and Witnesses

1. The Appellant was represented by Mr Peggs Solicitor.
2. The Respondent was represented by Mr Toole Solicitor Ofsted legal services. Their witnesses were Mr Tarchetti Headteacher and Ms Plewinska Early Years Senior Officer.
3. We additionally read witness statements on behalf of Ofsted from:-
 - (1) Diane Burt EYRI Inspector
 - (2) Bradley Simmons Regional Director Ofsted
 - (3) Lisa Fuller Probation Officer
 - (4) PC Jacqui Ellis (the hearing had already been adjourned once for her to attend. She is currently on extended sick leave and the representatives agreed we should proceed to hear the case and attach such weight to her evidence as we saw fit.).

4. We additionally read witness statements on behalf of the Appellant from:-

- (1) Detective Constable McConnell. Child Internet Protection Team. Belfast.

Reporting Order

5. 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 any child.

The Appeal

6. This is an appeal by Mrs Adel Lee dated 11 October 2016 against a decision dated 6 October 2016 refusing to waive her disqualification by association in order for her to be employed in connection with the provision of early years or later years childcare provision in a school, to which section 76 of the Childcare Act 2006 applies. This was the second application to such a waiver, the first having been cancelled in June 2016 after OFSTED advised that they could not process the application because Mrs Lee had been dismissed from her employment for 'gross misconduct'.

7. She was disqualified by association as she lived with her husband Mr Edward Lee who committed the following disqualifying offences of downloading indecent images of children and was convicted on 16th of March 2016.

8. The offences were committed in Belfast. Mr Lee was arrested on 5 June 2014 and convicted by way of a guilty plea on 16 March 2016. The delay was caused by a strike in the court system. The offence details were: – Counts 1-14; Making indecent Photos/Pseudo contrary to Article 3 (1) of the Protection of Children(Northern Ireland Order 1978; Count 15; Possession of an extreme pornographic image contrary to section 63 of the Criminal Justice and Immigration Act 2008.

Background:

9. Mrs Lee is from Hungary. She spent some time in Northern Ireland working as an au pair before returning to Hungary to study, later coming back to Northern Ireland where she became a Teaching Assistant .She decided to make a career in education and is close to completing a relevant degree.

10. The couple had planned to move to England before he was arrested. The move went forward in September 2014 and Mrs Lee took up a position as a teaching assistant in a school. They married in June 2015.

11. In October 2014 the DfE issued supplementary advice to schools regarding childcare disqualification requirements: namely that the Childcare (Disqualification) Regulations 2009 applied to those providing early years childcare or later years childcare to children under 8 within schools, as well as

other settings. The wider disqualification criteria included disqualification 'by association' by virtue of living in the same household where another person who is disqualified lives or works.

12. On 16 March 2016, Mr Lee pleaded guilty to downloading indecent images at arraignment. Mr Lee learnt from PC Ellis on 31 March 2016 this was considered to be a conviction, not the point of sentencing. He telephoned his wife who was in Hungary for the school Easter break which meant that she had now been informed of the conviction of a member of the household. She notified her head teacher on the first day back on 11 April 2016.

13. Mrs Lee was subject to disciplinary proceedings and dismissed on 17 May 2016; the decision upheld at an appeal on 4 July 2016. Her view was that the decision was flawed: and borne out of the desire to avoid potential negative publicity for the school rather than any belief that she posed any risk to children. She had been employed for less than 2 years and had no recourse to an Employment Tribunal.

14. A key concern for the school and subsequently Ofsted, was that all staff at the school were asked to fill out a Self- Declaration form in February 2015. Mrs Lee replied 'no' to questions relating to her own status and the status of members of her household. She states that she received no background information from the school relating to this, but researched the information available by the Department of Education and Ofsted. Her husband sent the form (but not it transpired the last page) to his solicitor who advised that she could reply 'no' because at that point he had not been convicted or cautioned for a 'relevant offence'. She completed the form in the same way on 16 February 2016. At the time of completing these forms, those answers were technically correct.

15. However, the disclosure forms also contained a declaration at the end, which read as follows:-

'I understand my responsibility to safeguard children and am aware that I must notify the Headteacher of anything that may affect my suitability or that of anyone living in my household'

16. It was this wording that caused the concern that Mrs Lee had not displayed the qualities of openness and transparency that might reasonably be expected of a childcare professional. She told us that she believed the final page of the SDQ to refer back to the yes/no questions she had already truthfully answered.

The Law

17. The Childcare (Disqualification) Regulations 2009 (the 2009 Regulations) are made under section 75 of the Childcare Act and set out the circumstances in which an individual will be disqualified for the purposes of section 75 of the 2006 Act. Section 76 (2) of the 2006, provides that a person who is disqualified under the 2009 regulations may not provide relevant childcare provision or be directly concerned in the management of such provision.

18. Pursuant to section 76(3) 2006 Act schools are prohibited from employing a disqualified person in connection with relevant childcare provision in the setting who was disqualified, and commit an offence if they do so.

19. The 2009 regulations came into force on 1 September 2009. Schedule 3, paragraph 3 includes an offence under article 3 of the Protection of Children (Northern Ireland) 1978

20. Pursuant to Regulation 9 2009 Regulations, a person who lives in the same household as another person who is disqualified from registration, is disqualified from registration.

21. Regulation 10 2009 regulations set out that Ofsted can waive disqualification for various purposes, including to allow someone to be employed in connection with the provision of early years or later years care.

22. Section 74(1) of the 2006 Act provides a right to appeal to this Tribunal. The legal burden remains vested in the Appellant. The standard of proof to be applied is the balance of probabilities. We must make our decision on the basis of all the evidence available to us at the date of the hearing and we are not restricted to the matters available to Ofsted when the decision was taken. Any decision must be proportionate and necessary.

Late additional evidence

23. We raised, so that the parties could deal with the point, our understanding that a large proportion of the persons 'disqualified by association' in relation to relevant work in school had been granted. That was agreed even if the precise number couldn't be established. In consequence, we were assisted by the parties presenting the following Additional documents as late evidence:-

- (1) Department for Education "Keeping children safe in education: childcare disqualification requirements" - supplementary advice published October 2014
- (2) Early Years compliance Handbook. Paragraph 377-402.
- (3) Letter Disclosure & Barring Service to Mrs Lee dated 16 October 2016, confirming that following her dismissal she might be barred.
- (4) Further letter from DBS dated 14 March 2017 confirming that it was not appropriate to include her on the Children's Barred List or the Adults 'Barred List.

The reasons for refusing a Waiver

24. The Response sets out the background and is the summary of the concerns raised by Ofsted in refusing the waiver. Mr Lee had downloaded child pornography over a period of 9 years. Only a total of 2559 images and videos were graded (being the maximum number agreed for codification), of which the vast majority were in Category 1. However there was concern that

they had been stored, in hidden folders in a very sophisticated manner with file names which he had chosen.

25. We therefore set out the concern verbatim as they give a clear summary of the concerns and the range of evidence/views considered.

- a. The seriousness of the offences committed by Mr Lee, including the number of images and the fact that images in the most serious Categories were found on his laptop
- b. The length of time that indecent images had been viewed, collected and stored (9 years)
- c. That the police view Mr Lee as 'high risk' and that he is not due to begin any Treatment programme until 2017 (whilst it is accepted that this is through no fault of his own)
- d. That the Appellant did not promptly inform the school of the position with her husband, either at the time of the arrest or at the time of charge – not because she was disqualified, but because as an employee in a position of trust, there is a responsibility on her to be open and transparent with her employer due to her position.
- e. That the Appellant completed two declaration forms at her school after Mr Lee had been charged and at a time when she knew that he had made full admissions in interview and did not inform the school, despite the declaration containing the words 'anything that may affect my suitability or that of anyone living in my household'.
- f. PC Ellis describes that she had to push hard to get Adel Lee to tell the school about her husband's conviction
- g. The delay in the Appellant informing the school after her husband's conviction. He was convicted on 16 March 2016 and she did not inform the school until 11 April 2016. Ofsted do not accept that this delay was caused by the Easter Holidays (which did not begin until 28 March 2016) and in any event, the school put to Mrs Lee that she should have notified them by telephone or e-mail during that period. This appears to support the assertion of PC Ellis. Further, the Appellant had gone to some significant lengths, researched and taken legal advice in relation to what the terms 'conviction' meant. Therefore, Ofsted do not accept that the Appellant would not have known that entering guilty pleas constituted a conviction.
- h. The Appellant told the school in the initial meeting on 22 April 2016 that at the time of completing the disclosure forms, there was no doubt in her mind that her husband would be convicted. She said that she knew it would not stay a secret and that she would eventually have to inform the school; but it was not easy to talk about and she was just trying to put this off. She now appears to have changed her stance and says that she was 'following the guidelines'. This explanation does not sit well with Ofsted and goes against her initial explanation that she was in fact just trying to 'put this off'

- i. That the Appellant made the decision to marry Mr Lee in August 2015, at a time when she knew he had been charged with serious offences involving children and she knew that he had made full admissions to the police
- j. The suggestion from PC Ellis that Mr Lee is quite controlling in his behaviour. This coupled with the calculated method of concealing indecent images in hidden files, causes severe concerns for Ofsted.
- k. The suggestion from the Appellant that Mr Lee 'would not do any harm and did not mean any harm' and her willingness to accept that he will not offend again, when he has not received any treatment for his offending behaviour and remains high risk in the eyes of the police
- l. The comments made by the Appellant about the age of the children in the pictures and the fact that the offences involved no contact. These comments only serve to demonstrate the complete lack of awareness on the part of the Appellant about the abuse that children suffered when these images were created and demonstrates her poor understanding of safeguarding

The evidence

26. In advance of the hearing the Tribunal read Tabs A to F: totaling 175 plus the late evidence. We summarise the evidence briefly, only insofar as it is necessary to explain our decision.

27. As PC Lee could not attend the adjourned hearing it was agreed that we would attach such weight to her evidence as we thought fit. It is key evidence as other professionals placed weight on her views. In her statement dated 25 January 2017, PC Ellis confirmed that the first time she had visited Mr Lee on 31 March 2016, he was alone. She told him that his wife would have to disclose his conviction and he essentially said that they knew that but they were waiting until they really had to. She also said she couldn't advise Mrs Lee because she wasn't there. That is key because every other professional who worked on this case from a number of perspectives, interpreted this as Mrs Lee had shown a reluctance to disclose. PC Ellis notified the Local Authority Designated Officer on 4 April 2016 and expressed her concerns about Mr Lee. She confirmed that the first meeting took place with Mrs Lee on 30 August 2016 although she had a number of telephone calls with Mr Lee. She felt Mrs Lee was minimising her husband's behavior.

28. Mr Tarchetti adopted his witness statement. It was confirmed that there were no issues about Mrs Lee's capabilities as a Teaching Assistant. The Self Declaration forms had been drawn up by the Local Authority Human Resource department and not the school. The forms were shown to staff at a briefing exercise, which he agreed Mrs Lee had not attended as she was caring for children. The Information about the new safeguarding regime would have been put up on the school noticeboard, but he could not know if she read it. When she was appointed, the guidance was not in place. He contrasted what he saw as her lack of transparency with two other members

of staff, who had come forward to query whether they needed to disclose speeding convictions or Child Access arrangement orders for members of their household.

29. He presented his case to the disciplinary panel, outlining his concerns that firstly, by living with a registered sex offender there was a potential for parents and the school to question her safeguarding of children in the year group. She was employed in a position of trust and had a duty to protect a child. There was a danger that she would be desensitised to risk and will not take appropriate action. He believes that in seeking advice from the solicitors she clearly knew that she should declare the offences to which her husband and admitted but not yet appeared in court. . He believed she had knowingly withheld information from the school and that it was imperative that she should have advised them, at the first opportunity, due to her position.

30. Ms Plewinska conducted a desktop paper review, relying on an interview held by Ms. Burt the local officer with Mrs Lee In August 2016. She too placed reliance upon the reports from PC Ellis, which it was agreed were weakened if in fact she had only ever met Mrs Lee at a meeting in August 2016. The range of sources that she drew in making the overall decision are reflected in the summary of concerns that we have listed.

31. When cross-examined she said she had refused four waivers but two had been overturned by a senior manager. She agreed the majority were granted. It was open to Mrs Lee to reapply at any time.

32. Mrs Lee was examined, cross-examined and asked questions by the panel for nearly 4 hours. She confirmed that she had never attended a briefing at the school on the new safeguarding guidance. She updated that her husband had now started an Offenders Re-rehabilitation course which they regularly talked about. Both his and her family now knew about the offences and they had also shared information about the convictions. .

33. She was asked to amplify the written evidence and clarified she had known her husband for only about 10 months before they married. They had planned to move to England before he was arrested but due to his convictions he could now not pursue his chosen career path. She married him knowing about the offences, because she believed fundamentally he was a good person and could be a better one if he could overcome what she described as an 'addiction'.

34. In closing submissions Mr Toole accepted that Mrs Lee was an honest and credible witness, who tried to answer searching questions truthfully. For example, she volunteered that there was a detail of the offences that she had not known about, namely that her husband had picked up a pair of child's pants in Hungary and used them when viewing the images and videos. She had not known about this until she had read the bundle. She had chosen not to read his court papers and he had not mentioned it.

35. She has never denied that she knew her husband was going to plead guilty to the charges and that it could mean he would go to prison. She said that that with hindsight she would have made a different decision and told the

school sooner. At the time she understood from her husband talking to his solicitor in Belfast and from information she read, that he was not disqualified. She volunteered that the last page of the disclaimer she had signed in the school had not been sent to the Belfast solicitor.

36. We were assisted by reading the notes Ms Burt made of her meeting with Ms Lee on 19 August 2016. She was pressed to explain safeguarding, which she had been trained on as part of school inset training on an 'away day'. Her answers were accepted as showing sufficient understanding.

37. Mr Tarchetti has agreed that Mr Lee had never been in the school nor were there any opportunities for Mrs Lee to use her phone inappropriately. Mrs Lee is not it was established barred from working with children so could say, work with a voluntary community group. She said she would not set up in a domestic setting and pointed out that the school, have their own safeguarding policies in place. The Regulations only disqualified her from working with the early years and Mr Lee's sexual interest had been in prepubescent children, so in the older age group.

38. Mrs Burt's notes are helpfully full and Ms Burt spoke with Jackie Fuller the probation officer on 23 August 2016, who confirmed that there had been a delay in starting the internet Sex Offenders treatment programme. Ms Fuller is reported as saying that she did not envy the decision-making as it seemed unfair to Mrs Lee, but again she placed reliance on the fact that PC Ellis had to be really strong about the need to tell the school. Ms Fuller worked with the offender not the wife

39. Ms Burt spoke with PC Ellis on 7 September 2016 who reported back on the meeting held on 30 August 2016. Mrs Lee said that she was only an observer at the meeting and that she only spoke directly with PC Ellis for about 10 minutes. If she appeared to minimize the offences that was not her true feeling but she had had to live with the knowledge for some two years and the couple had to try to move on.

40. Mrs Lee and husband now share a computer, with no passwords. This is checked by the police every three months. They spend a great deal of time together when they're not both at work and if that changed she might see that as a sign something was not right.

41. In response to questions from the Tribunal she said she had undergone 'in school' safeguarding training but had not done or been offered any reading or courses on this particular type of sexual abuse. She would be willing to go on such a course if it was offered. She was clear that the children were victims and told us that her husband will address victim empathy over the next part of the course.

Conclusion and Reasons

42. In deciding this appeal, we have had regard to all the evidence even if we have not specifically referred to it. We carefully examined the D of E Guidance , the situations that Mrs Lee would be able to work in given that she

is not subject to any barring order and the age ranges that she would be disqualified from working with in a school.

43. We clarified that this is the first appeal of its kind. We used this opportunity to try to identify guidelines and factors to be taken into account when granting a waiver. Mr Toole did not step back from the difficulties of applying the Regulations which apply to many thousands of childcare settings, whilst acknowledging that in many ways a school inevitably has to be a safer setting than a domestic setting because of the safeguarding and other restrictions in place.

44. These Regulations do not readily apply to this situation. As she is not a barred person, Mrs Lee could for example work in a voluntary group or where all adults in the setting may not have undergone safeguarding training, which would give more potential for Mr Lee to have access to children. If he chose to ignore his sexual offenders prevention order which prevents him from having contact with a young person under the age of 16. The Regulations only apply in a school setting to those working in school nursery and reception classes and later years provision for those under 8. Mr Lee's interest was in older children aged 9 to 12 years. There is greater security within a school, as Mr Lee can have no access to pupils, not just because he is on the Sex Offenders Register but because of the usual restrictions on unknown persons entering the school.

Factors to be taken account of when granting a Waiver:

45. Each case will of course turn on its own facts but we approve the following factors to be taken account of:

Ofsted has 7 factors in their compliance handbook:

- the risk to children
- the nature and severity of any offences, cautions or orders
- the age of any offences or orders
- repetition of any offences or orders or any particular pattern of offending
- the notes of any interviews, including their explanation of and attitude to the disqualifying event
- any other information available from other authorities
- any mitigating circumstances

46. We conclude that the following factors are likely to be relevant. :

1. Whether there is any real concern that the A (Applicant or Appellant on appeal) would unwittingly expose a child to risk.
2. Whether the A would be capable of knowing if there was a re-occurrence of the offending or the danger signs.
3. Whether the A would come forward with any concerns that offences were again being committed (past behavior being informative but not conclusive)

4. When matters were first disclosed to an employer.
5. The attitude of the A to disclosing matters to an employer.
6. Any measures put in place to minimize risk.
7. Any rehabilitation received by the offender or treatment received.
8. The level of deceit involving the offender to the A.
9. Steps taken by A to understand the type of offending and whether they have been offered any professional or other support.

47. The facts in this case are straightforward. There's never been any suggestion that Mrs Lee knew or should have known her husband was committing the offences, the majority of which were carried out in the years before she met him

48. The offences are serious ones carried out over a long period of time, showing a sophisticated system of filing even if as Ofsted accepts that when he chose the file, the file name given may have been misleading as to the content.

49. This is not a case where the facts/offences emerged over time. They were clear to Mrs. Lee from the beginning. Mr Lee immediately accepted responsibility and that no one else was involved. The only issue on which there was some delay was whilst the computer was searched and the files graded.

50. There is no evidence that Mrs Lee gave any cause for concern in how she carried out her duties as a Teaching Assistant.

51. At the end of the case Mr Toole acknowledged that Mrs Lee was an honest and credible witness, although he was concerned that she had not told the full truth at the start. That is a view we share. Her evidence was well and truly tested. We accept that Mrs Lee was placed in a very difficult situation when her then boyfriend was arrested, which nothing in her personal or professional experience to date had prepared her for.

52. A number of concerns and subjective views were raised by professionals about Mrs Lee, which she has vigorously defended. Weight was given to views expressed by PC Ellis who only saw her in person for a short time in August 2016, 5 months after she had spoken to her head teacher. Some of those views were double hearsay and seemed to be accepted as a true reflection of what Mrs Lee thought. Some were highly subjective, for example Eastern European women minimise sexual offences. Ms Burt was the only professional who had an in depth discussion with Mrs Lee face to face. In for example the second Review Strategy Meeting on 19 May 2016, PC Ellis was present and said Mr Lee was of the opinion that he was just watching porn and Mrs Lee shared that view, but that was not as a result of anything Mrs Lee directly said to her. Mrs Lee challenged the words in that

meeting attributed to her by Mr Tarchetti that she would not be able to understand that children may disclose abuse to staff.

53. Our concern is that the input from services since Mr Lee's conviction has been solely with her husband, rather than meaningfully including Mrs Lee as his partner. We were concerned that she had been offered no real opportunities to develop a knowledge of this type of offending other than being told that she could ring PC Ellis, as this could be of great benefit. It was also of concern that Mrs Lee told us she had not sought out any further information or safeguarding training to increase her understanding, but she did say she would want to attend if it was available.

54. At the conclusion of the case it was accepted on behalf of Ofsted that had Mrs Lee shared this information with the school at the first opportunity, then she would be unlikely to be in the position she has found herself in. The police officer who work directly with Mr Lee formed the view that he was controlling. He is recorded as having a view that Mrs Lee would be able to get a waiver. They have funded legal advice and representation when we read that they have struggled financially, as both lost their jobs. As PC Ellis's contact was only with him, it was clearly he who was firmly told Mrs Lee must tell the school. We do not conclude Mrs Lee was being devious or manipulative. Instead she seemed to be 'putting it off' in a way that allowed her and her husband not to have to face up to what they knew was coming, including a possible prison sentence.

55. Having heard her evidence we are confident that Mrs Lee has reflected on and understood that she might have kept her job had she been open and honest at the first opportunity. She complains of professionals making subjective snapshot judgments about her, but had she spoken out she could have shown she understood the severity of the offences and that regardless of her relationship with her husband, she was putting her own professional position and duty to children first.

56. Having concluded Mrs. Lee was overall an honest witness, we have no reason not to accept that she was only told by her husband on 31 March 2016 that he was in fact convicted on 16 March, although we consider they both should have sought legal clarification in advance. We find it understandable that she wanted to talk to the head teacher in person, rather than as he suggested send him an email during the school holidays.

57. In short the answer she gave on the two annual Self Declaration forms regarding convictions were technically correct but not in the spirit of what might be expected from a professional working in this area. We pressed Mrs. Lee to explain how she might deal with concerns raised by parents who might learn of Mr Lee's offending. She said she would be honest with them and seek the help of the head teacher or other senior teacher to talk to them.

58. Mrs Lee appeared to recognise that there are no guarantees that Mr Lee will not repeat his behaviour. Given the restrictions in place in a school we find no real evidence that the Appellant had unwittingly exposed children to risk of harm or would do so. She understood that viewing images was abusive of children. The children were victims.

59. Is the Appellant capable of knowing if there was a re-occurrence of the offending or the danger signs? She has shown insight into describing what Mr Lee had done as an 'addiction'. He may still do it, albeit out of the house and on a private device. She acknowledged that but said she spends time with him and they talk about his course. She had to have faith in him and believe he was a good person who could change, but she was clear she would not stay if he offended again. She is clear viewing pornography is abusive of children. They have told friends and family and they could be a source of support to Mrs Lee who said she would go to them if she had concerns.

60. Mr Lee has had to wait to go on a Sex Offenders course through no fault of his own or any lack of willingness, on his part. Mr Toole submitted that we should not grant a waiver until he had completed it and the risks were better identified. We reject that course because it does not mean he will not re offend. It was submitted on her behalf that she could not ever trust him in this regard and we conclude that must be right, given the length and severity of his offending.

61. Whilst points, especially her lack of open and transparent sharing of the offences at the first opportunity causes us concern, we find no clear evidential basis to conclude that Mrs Lee is a demonstrable risk to children in a regulated school setting. That is the real difficulty in this and no doubt other cases.

62. PC Ellis said she felt that Mrs Lee minimised Mr Lee's offending due to her loyalty to her husband. The other risk factor raised was a possibility that she might be desensitised. We find no clear evidence that either are on balance likely. We also had regard to the limited opportunities she would have as a Teaching Assistant, working with others and where her duty to safeguard would be in reality to report any concerns to a more senior member of staff. There is no risk, as it is acknowledged, that her husband could gain access to a school and she would not be in a position to take images of children home.

63. Balancing all the factors we have concluded that the decision refusing to issue a waiver should not be upheld. The real risk in this case is that Mrs Lee will not be seen as open and transparent unless she puts this history behind her and is upfront and honest with any new employers. Mrs Lee will have to disclose Mr Lee's convictions on any Self Declaration form. The Agency said that they would always say she was subject to a waiver. However, any rigorous interview process will probe the gaps in her employment history and why she left her last employment.

Decision

APPEAL ALLOWED

The decision dated **6 October 2016** not to waive disqualification for employment in schools with ~~Just Teachers Teaching Agency~~ is not upheld.

**Judge Melanie Lewis
Primary Health Lists/Care Standards
First-tier Tribunal (Health Education and Social Care)**

**Date Issued: 12 June 2017
Amended under Rule 44 date issued: 23 June 2017**