

First-tier Tribunal Care Standards

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

[2021] 4368.EY-SUS (V)

Video Hearing V KINLY on 23 August 2021

BEFORE

**Melanie Lewis (Tribunal Judge)
Mr Michael Flynn (Specialist Member)
Mr Roger Graham (Specialist Member)**

BETWEEN:

Charlotte Williams

Appellant

-v-

Ofsted

Respondent

DECISION

Representation

Ofsted were represented by Ms. Sukhveer Kandola Counsel, Ofsted Legal Services. The Appellant was represented by Ms Jennifer Agyekum Counsel

Witnesses

Ms Trisha Turney: Early Years Regulatory Inspector .
Mr Sally Wride -Senior Ofsted Inspector.
Father Y - Father of Child X

By agreement of the Tribunal and the Appellant raising no objection Mr Matthew Hedges Senior Inspector observed

Appeal

1. This appeal by Caroline Williams (“the Appellant”) relates to the decision of Ofsted on 20 July 2021 to suspend her registration as a childminder on the Early Years

Register and both the compulsory and voluntary parts of the Childcare Register for a period of six weeks until midnight on 30 August 2021.

2. The Appellant is registered as a childminder, operating from her home address at 209 Mount Pleasant Road, Shrewsbury, SY1 3JA. The Appellant has been a registered childminder since 08 June 2010.

3. On 15 March 2021 the Appellant notified Ofsted of an incident involving the Appellant and child X aged 4 which occurred on 10 March 2021 at about 16.45 pm. She initially said this was 11 March 2021, but this was an error which she later corrected. In a phone call to the child's mother shortly after the event the Appellant acknowledged that her hand had touched the child's elbow in an attempt to stop her ripping the play mat. The child visited her father that weekend and said the Appellant had 'hit' them. An issue that will have to be determined is the degree of force used and how severe the red marking was.

4. Following the 16 March 2021 visit by an Ofsted EYRI, a case review was held with the Senior Officer and the Early Years Regulatory Inspector. The decision was made to suspend the Appellant's registration from the 16 March 2021 for an initial period of six weeks. The Appellant accepted that there had been physical contact and knew it was wrong but other concerns came to light, around her health and that she had been minding over numbers. Whilst the Appellant did not appeal against the first period of suspension, she has now with the benefit of legal advice lodged an appeal against the period of current suspension.

5. On 29 June 2021, Ofsted issued the Appellant with a notice of intention to cancel registration. The Appellant sent correspondence objecting to this step on 30 June 2021. She has now filed a very detailed statement with an Action Plan, certificates for courses undertaken and a medical report. It is accepted that she has responded to the Welfare Notices served and has now taken steps to comply with the ratios. The medical report confirms that there is no medical reason why she cannot childmind.

6. The Tribunal also makes a restricted reporting order under Rule 14(1)(a) and (b) of the Tribunal Procedure (First-tier Tribunal) (Health Education and Social Care Chamber Rules 2008 ('2008 Rules'), prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify any children or their parents in this case so as to protect their private lives. For that reason we have not been specific on some details relating to children or the Appellant's health, as this decision will go on a public website.

Preliminary Issues

7. This was a remote hearing by video and audio which was not objected to by the parties. The form of remote hearing was a fully remote video hearing from (Vkinly). A face to face hearing was not held because it was not practicable and all relevant issues could be determined in a remote hearing.

Background

8. Ofsted have carried out three inspections since registration: on 18 October 2010, 26 March 2014 and 10 May 2018. All three inspection outcomes resulted in a good judgement.

9. It was stated in the Response that Ofsted has received '*numerous concerns*' about the Appellant but only one was mentioned. On 23 July 2019 Ofsted received anonymous concerns that the Appellant did not speak appropriately to children as she was "*snappy*" and "*unkind*" and may be caring for too many children. Ofsted made the decision not to take immediate investigation but to consider this at the next inspection or visit.

10. However, Ms Turney said in oral evidence that in her original statement that she had included detail that in January 2018 Children's Services had received a complaint from the daughter of the Appellant's partner's that she had thrown a shoe at her. There had also been an issue recorded about an altercation with a neighbour. No action was taken in relation to these matters and on legal advice they were taken out of her statement. For the first time in oral evidence, we heard from Child A's father that his child had previously told him that Charlotte had hit them. On that occasion and following consultation with the child's mother, they had made a joint decision not take the matter further.

11. The Appellant was interviewed by the Police but on the advice of the duty solicitor, gave a no comment interview. The Police are taking no further action nor are the Local Authority .

12. It is agreed that investigations are now complete.

Respective Cases of the Parties

13. Ofsted still have a number of reasons for being concerned that a child may be at risk of harm.

14. The Appellant accepts that she acted inappropriately on 10 March 2021. The issue is how much force she was used. Ofsted's concern is that in the two interviews with Trish Turney she changed her story moving from 'tap', 'hit' or 'slapped' to that she only tapped the child and was attempting to minimise the degree of force used. They concluded that she was not honest and seeking to minimise her behaviour. They were concerned that there was evidence that she had done it before. The risk to children was so serious they were moving to cancelation.

15. The Appellant had said that she also strapped children into the buggy as a means of restraining them and spoke about an occasion when she had placed her arm over a child's legs to restrain them. This all suggested she used restraint inappropriately.

16. In addition, the Appellant admitted that she was over ratio and looking after too many children, which she sought to explain by reference to the exceptional circumstances thrown up by the COVID-19 pandemic and parent's changing work patterns. However, when questioned by the inspector, she did not demonstrate a secure knowledge of what the ratios were.

17. In her second interview with Trish Turney the Appellant was very emotional and said her health including her mental health issues might have impacted on her behaviour that day.

18. The Appellant had put in an Action Plan including completing updating courses, in particular Behaviour Management courses. This was knowledge that she should already have. She had demonstrated that she did not know how to appropriately manage children's behaviour.

19. The Appellant denies that she was seeking to avoid that she had acted inappropriately on 10 March 2021. She had immediately contacted the child's mother and engaged with the Local Authority and Ofsted. The fact that she had given a "no comment" interview with the police was on legal advice and should not be used against her.

20. The Appellant frankly acknowledges that she had worked over ratio but thought this fell within 'exceptional circumstances'. She did accept she needed to be tougher with parents and say 'no' in future when they asked her to cover.

21. The Appellant is dyslexic and acknowledged that her record keeping and notifications needed to be improved. She has reviewed her forms and taken advice from the "Access to Work" group on using voice activated recording on the new laptop she has purchased since the incident. She had given thought to the best way to record which children were in her care and when they left and how to record incidents, that would work best for her.

22. She had submitted herself for medical examination as requested by the Respondent. Ofsted accepts there is no medical reason why she could not work. The Appellant has undertaken a number of well-being courses and reflected holistically on how she could keep herself physically and mentally well.

23. The Appellant produced references from two apprentices who had worked with her and parents who had used her services. It emerged in oral evidence two of the children minded by her were placed and paid for social services due to concerns about their care at home.

The Evidence

24. We are not making findings of fact at this stage we summarise the oral and written evidence briefly, highlighting the key points. However, the parties agreed that there were no further investigations to be made and that the evidence will remain unchanged unless further evidence/issues arise.

25. Ms Turney had made a detailed witness statement with appendices setting out her notes and relevant documents from the two visits she had made on 16 March 2021 and 13 April 2021. She stated that her job was to see the Appellant and gather information. This is why she very carefully recorded what she said word for word on the day.

26. On 16 March 2021 the Appellant stated there was a slight mark on the child's arm, smaller than 50 piece pence. The child told her that it *"tickled three or four times"*. She also said when asked for her views on corporal punishment *"I don't condone it at all, I'm just shocked that it did get to this extent"*. She did say that she put one child in the buggy had to restrain them and accepted she hadn't recorded this incident.

27. On 17 March 2021 the Appellant sent an email to Ofsted in response to the suspension notice. She contradicted previous statements and now said there was no red mark on the child after the incident and again showed she wasn't clear on notification requirements or ratio requirements.

28. On March 2021 the Local Authority Designated Officer (LADO) confirmed that the parents did not wish to take formal action or for the police to speak to their daughter. The mother said that there might have been small red mark but she hadn't examined it carefully when she picked up the child. The father said he'd seen a small red mark on 15 March 2021 when the child was undressed.

29. On the second visit which was a monitoring visit to make sure that the Appellant was complying with the suspension, she , was again asked about the incident on 10 March 2021.

30. She now said that she went to the child's level to just tap on her arm to get her hand out of the way, although she did say it was a bit harder than she probably should have done. What she demonstrated to the Inspector didn't suggest any degree of force, such as to leave a mark. This was the basis of concluding that she was now trying to backtrack and minimise what she had done. In the contemporaneous note of exactly what she said, she accepted that she had been under a lot of stress. She became upset and was crying and this was all recorded.

31. Ms Turney then went on leave and Ms Wride took over the case. On 23 April 2021 the case review was held it was discussed that the Appellant had admitted to physically intervening to stop a child's negative behaviour but was now saying that what she did, could not be described as a slap or a smack.

32. On 23 April 2021 Ms. Wride had attended a case review. It was discussed that the Appellant had admitted to physically intervening to stop a child's negative behaviour. It was discussed that the Appellant had said that what she did to the child could be described as a slap or a smack. She said that she heard the sound of it like a slap. The concern was that he had changed her account several times regarding the severity of the contact and whether there was any mark left. This called into question her honesty and integrity.

33. The case review on 27 May 2021 again considered what had happened, the changing story and that that the Appellant had admitted that her recordkeeping and become complacent as her laptop was no longer working and due to her dyslexia she did not always promptly record things. The Appellant had shared information about family stresses, her own health, that she was taking a number of medications and that she had felt stressed due to the changing situation of the pandemic and how it affected her life.

34. Child X's father confirmed the evidence in his statement, namely that his child told him that Charlotte got angry with her and lost her temper and smacked her, demonstrating that this was a full swing to her elbow. This had upset her but she was also upset that Charlotte had got cross with her. He confirmed that he had never actually been to the house, as the mother did the drop-off, so he could not comment on the care offered. However, his overall impression from what the mother and child said was that the child was happy with Charlotte. He volunteered that the child had asked about why she couldn't go back to Charlotte.

35. There was some suggestion in the papers that the Appellant's case was that he had never wanted the child to be placed with her. Also, that the mother and the Appellant were friends. As this was not a full fact finding hearing, Ms. Agyekum only suggested he was exaggerating, which he denied. He said that he had no ulterior motive. It would've been his first preference for the child to attend nursery because he felt they were subject to more regulation, but he did not see this as any different to the considerations many parents go through and ultimately he was happy to go with the mother's choice. Whilst he acknowledged the Appellant could remediate herself, he would not want his child to return, as for him the trust had gone.

36. In her statement the Appellant set out that she had reflected on the incident and what had happened. She had reflected on her physical and mental well-being and the impact of the COVID-19 pandemic which have been difficult for her and the children. She had re-looked at her policies. She had taken advice about methods of recording. She had long-standing health concerns. Standard procedures that had previously alleviated her condition, have been delayed due to Covid 19. She was chasing up on a surgical procedure and was considering whether she might pay privately to expedite this.

37. She said that parents of children previously minded were asking to send the children back but she will review this if she was going to have an operation as she would not want the children to be have to start back and then stop again.

38. When questioned by Ms Kandola, she agreed that corporal punishment was only permitted in very limited circumstances. In response to a question from the Tribunal she agreed that there was a very good reason never to use physical chastisement, because not only was it prohibited but it could so easily become an overreaction especially if you were stressed.

39. Her case is that she cannot always find the right words due to her dyslexia and that she felt under pressure during the interviews. She said that she didn't strap children in the buggy regularly. There had been one child who by agreement with the mother she had sat in the buggy to talk to them about their behaviour but that strategy hadn't worked and she agreed a different tactic with the child's mother.

40. She acknowledge that she had behaved inappropriately, but did not accept that she was minimising the event by lying, in an attempt to save her registration. The behaviour management training she had undertaken had already been booked, but had been postponed due to the pandemic. She accepted that she needed to do more to keep within ratio and record accurately.

41. The Tribunal had picked up in their pre reading of the papers, that two children placed with her had social workers. One child had a high level of need and the concerns about him were such that the social worker had visited to approve the Appellant as a childminder for that specific child. The placement was funded by social services. So was the one other child who was now the subject of a Care Order, as was their sibling. It was that child who she did not mind, that she had restrained by putting a arm over their legs but to stop them kicking the mother in the face. The family support worker not the social worker had visited the Appellant to see if she was a suitable placement but she emailed the social worker about the child's progress. She was aware that at home the child had presented with challenging behaviour and issues around eating. She had worked with this child and found strategies around this. The child was calm and settled in her care.

42. In response to questions from the Tribunal, we learnt that the Appellant is now 48 years of age. She has always worked in childcare, which included both in private households as a nanny and in children's homes. She described working with a number of challenging children and training courses that she has undertaken in order to do this work including for example the 'Team Teacch' method.

The Law:

43. The test for suspension is that the Chief Inspector has grounds to conclude that continued provision of child care by the registered person to any child may expose such child to a risk of harm. That is set out in Regulation 9 of the Child Care (Early Years and General Child Care Registers), Provisions Regulations 2008.

44. 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, for example impairment suffered from seeing or hearing the ill treatment of another.

45. In any appeal, the Tribunal stands in the place of Ofsted's Chief Inspector in reaching its conclusion – as of the date of the decision, does the Tribunal reasonably believe that continued provision of childcare by the Appellant may expose the child to a risk of harm? The burden of proof rests on Ofsted and the standard of proof of having a "reasonable cause to believe" lies somewhere between the balance of probabilities and a reasonable cause to suspect. Accordingly, the threshold is not an especially high one, and it does not require us to make findings of fact about what has happened. We need to judge any 'belief' on the basis of whether a reasonable person, assumed to know the law and possessed of the relevant information would believe that a child may be at risk. We need to consider the position as at today. Even if the threshold of the regulation is met, we need to consider whether a suspension is necessary and proportionate.

46. The periods of suspension are prescribed by regulation 10 of the 2008 Regulations. Any suspension is for an initial period of 6 weeks, which can be extended for a further 6 weeks where based on the same circumstances.

47. Thereafter, the suspension can only be extended again where it is not reasonably practicable for the Respondent, for reasons beyond its control, to either complete any investigation into the grounds for its belief under regulation 9 or for any necessary steps to be taken to eliminate or reduce the risk of harm referred to in regulation 9. Even then, the suspension may only continue until the end of the investigation, or until the steps have been taken. The courts have emphasised that suspension is intended to be only an interim measure. The Respondent has an ongoing duty to monitor whether suspension continues to be necessary and the suspension may be lifted at any time if the circumstances in regulation 9 cease to exist.

Consideration

48. We have balanced a number of factors. We have weighed all the evidence for a suspension in the round and taken an holistic approach. This is a case where the investigations are now complete. We have in mind that a suspension must not be a 'stopgap' or a pre-judgement. Cancellation is a separate process. We also have in mind that parents place enormous trust in a childminder when they place their children in their care. Corporal punishment is not acceptable other than in very limited circumstances and should not be used. Parents are entitled to expect a high standard of integrity and honesty from those they entrust with the care of their children.

49. Examining the current risk of harm there was one incident on 10 March 2021. The other incidents referred to were not acted upon by Ofsted or the parents of Child X. Two were related to personal issues relating to the Appellant or there was insufficient evidence to trigger an immediate investigation.

50. The Appellant accepts she behaved inappropriately on 10 March 2021. No more is likely to be known. There are only the accounts of the Appellant and the child's father for us to consider and what she said to Ms Turney after the event. There is no medical evidence about the injury or statement from the mother.

51. We find it relevant to look at what the Appellant did at the time. She knew she had done something wrong and immediately telephoned the child's mother. Any mark was minor and had she been set on lying, she could have said nothing. The child's mother did not raise an issue when she collected the child shortly after. The father did not notify Ofsted of concern. He spoke to the mother who went back to the Appellant who then raised the incident, albeit not in complete detail.

52. We were assisted by the very detailed recording of Ms Turney. Whilst there is evidence of the Appellant moving on how to describe what she did, the terms 'tap', 'slap' or 'hit' are inevitably subjective. The issue is the level of force and how far the Appellant was seeking to minimise her action. However, in the round she did not seek to suggest that she had behaved appropriately or attempt to excuse her behaviour.

53. Overall her account is consistent on the 'what happened', other than the degree of force. The Appellants account is corroborated by the child who said Charlotte got cross with her for ripping the mat. However, the child was also concerned because they had upset Charlotte, whom she liked being with.

54. Having considered the evidence in the round it is clear that what Ms Turney saw and heard, particularly on her second visit was a very stressed childminder. The risk then is that the Appellant's own health and well being issues had overwhelmed her on 10 March 2021 and could do so again. The Appellant today does not think that was the case. The medical evidence supports that she is physically fit for childminding. The Appellant has taken active steps to seek help for her general well-being and from what we read and heard from her has actively reflected on how she can keep herself well.

55. The Appellant had as she accepts fallen down on record keeping. However, she has now demonstrated that she taken a number of very practical steps which were going to work for her, given her specific learning difficulties

56. The fact that she was over ratio is of concern because it's clear that could be a trigger factor for being overwhelmed by caring for too many children, especially if she was already under stress. She did not demonstrate a secure understanding of the number she could mind nor did she have robust system for recording which children were in her care and what time they were left. She has remedied that. She has reflected and realises that her attempts to support parents flexibly can result in her experiencing additional stress. She has stated that she will be tougher with parents in the future and say "no' when they seek extra minding.

57. The Appellant has put gather a very detailed Action Plan. Some of those actions she has completed. The Tribunal queried how this came about and were told the Appellant had worked on it with support and input from a Local Authority Officer.

58. This would appear to be a one off incident. We conclude that Ofsted have in our view not taken sufficient account of what are a considerable weight of positive factors, when balancing the current risk to children.

59. There were a number of very positive references from parents and two assistants who had worked with the Appellant. All knew what the issue was. We noted that one reference came from a parent who was an Educational Psychologist and who set out behaviours they had observed to support why they felt their child had developed well in the Appellant's care. They and other parents had found the Appellant caring and flexible.

60. Two children cared for by the Appellant have been paid for and approved by social services. These children have a high level of need. The level of concerns about one of those children are such that they are now subject to a Care Order. It was the sibling of that child who needed to have an arm placed on their legs to stop him kicking his mother in the face. Ofsted have not spoken with social services about these children.

61. Ofsted have picked on certain things the Appellant said to raise a concern that she routinely uses physical restraint. The Appellant has set out why she was misunderstood about that. She sat one child in the buggy to contain their behaviour but stopped that by agreement with the mother.

62. Overall, we conclude that Ofsted have not balanced the positive features factors including those that emerged at the hearing and kept the case under active review. The Appellant had worked with children, many of them with very challenging behaviour for over 28 years. She has worked in children's homes, private households and as a childminder for 10 years. She said she is currently working within the NHS.

63. Applying the lower standard of proof we are not satisfied that as at today's date Ofsted have established that there are real reasons to conclude that children in the Appellant's care would be at real risk of harm. The Appellant has provided a child minding service for many years and parents still wish to use her services to enable them to work. The Appellant wishes to continue to child mind but whether she returns immediately to childminding will depend on her getting a date for surgery. She can only demonstrate that the changes she has set out will happen and be embedded into her practice if she has a chance to work again.

Decision

We therefore direct that the suspension imposed on the Appellant pursuant to the decision dated 20 July 2021 shall cease to have effect.

Judge Melanie Lewis

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

Date: 26 August 2021