

## First-tier Tribunal Care Standards

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

[2023] 4822.EY-SUS  
NCN: [2023] UKFTT 00096 (HESC)

Hearing held via CVP on 31 January 2023

**BEFORE**  
Tribunal Judge Ian Robertson  
Specialist Member Michele Tynan  
Specialist Member Dr David Cochran

**BETWEEN:**

**OB**

**Appellant**

**-v-**

**Ofsted**

**Respondent**

### **AMENDED DECISION**

#### **REPRESENTATION**

The Appellant was represented by Ms Emma Waldron (Counsel)  
OFSTED were represented by Ms Francesca Lewington  
Witnesses – Kamaljit Kaur Jandu and Suzanne Taylor

#### **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 11 January 2023, brought by **OB** against the decision of Ofsted to further suspend her Child Minder registration

pending further investigation to 5 February 2023. This follows earlier periods of suspension starting on 23 August 2022, 3 October 2022, 14 November 2022 and 23 December 2022. 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, the owner and her husband in this case so as to protect their private lives"

## BACKGROUND

4. OB has been registered with Ofsted as a childminder since November 2007. Her inspection history is set out below:
  - a. 2008 – Good
  - b. 2012 – Good
  - c. 2015 – Requires Improvement
  - d. 2016 – Requires Improvement
  - e. 2017 – Good
5. At her last inspection, it was found, *inter alia*, that “arrangements for safeguarding are effective. Children play in a safe and secure environment.”
6. At 16:50 on 22 August 2022, two police officers arrived at OB’s home address. The officers asked to speak to OB in private about a minded child (Child A). Following this, the officers arrested OB’s husband in relation to an allegation that he had sexually assaulted Child A. Child A was at the time 23 months of age and just verbalising.
7. On 23 August 2022, OB notified Ofsted of the allegation that had been made against her husband. Her registration was subsequently suspended that day and further Notices issued as set out above. The police initially bailed the husband but lifted bail conditions on 24/ November 2022 and he was released under investigation. The police are now awaiting interrogation of his laptop. They have given an indicative date of April for this but it may be longer.
8. The most recent notice of suspension (dated 23 December 2022) states as follows:

*“We are taking this step as we continue to have reasonable cause to believe children are, or may be, exposed to a risk of harm. The purpose of this suspension is to allow time for the circumstances to be investigated and/or steps to be taken to reduce or eliminate the risk of harm”*

9. On 5 January 2023, the Appellant emailed Ofsted asking for the suspension to be reviewed and stating that she had conducted a risk assessment in order to mitigate any risk to minded children. The mitigations proposed by the Appellant were:
  - a. The Appellant's husband leaving the property at 07:00am, and returning at 17:30pm on the Appellant's operational days, to ensure no overlap with the Appellant's minded children.
  - b. The Appellant's husband working from his mother's house or an alternative venue in the event he cannot attend his office;
  - c. The Appellant's husband not taking annual leave days on the Appellant's operation days, or in the alternative, taking annual leave at the same time as the Appellant; and
  - d. The Appellant cancelling her childcare provision if her husband is ill and unable to work.
10. On 10 January, Ofsted (Ms Taylor) visited the Appellant to discuss the risk assessment and the Appellant's knowledge of the concerns regarding her husband.
11. On 11 January 2023, the decision was taken to keep the suspension in place.

## **THE LAW**

12. 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.
13. 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.

14. 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.

15. "*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"*.

16. 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.**

17. We had read the Bundle that runs to over 200 pages and have heard evidence from Kamaljit Kaur Jandu and Suzanne Taylor on behalf of Ofsted and OB. The facts of the case are effectively agreed (as above) and the case has been presented with a great measure of balance by both advocates and we are very grateful for this.
18. Both Ms Jandu and Ms Taylor were very balanced in their evidence. They were clear that they trusted OB's integrity and that nothing she had done could be open to criticism. Ms Jandu agreed with Ms Waldrons description of OB that "She understands her duties and shows willingness to work with us in an open, honest and transparent way". She further agreed that suspension was not to be used as a "stop gap". She agreed however that Ofsted would nonetheless apply the status quo to suspension until the police concluded their investigations. She agreed that this may be beyond April.
19. Of the safeguarding proposals made by OB she felt these were unworkable as the proposals for time sheets for her husband were not tested and could only work ex post facto and that the provision for cancelling a child in the event of OB's illness would not in practice work as OB would feel obligated to the parent.

20. **OB** gave evidence and said that she was not aware of anything untoward happening between her husband and the 23 month old child who she described as becoming verbal but not yet being able to put sentences together, She said her husband had little to do with the children she minded, being at work most of the time, and would have no opportunity to abuse them. Nonetheless when she was contacted by the police she notified Ofsted immediately, complying both with her Suspension Notice and the bail conditions initially imposed upon her husband, She described her husband as working flexitime and that there would be no difficulty his being out of the house on a Monday, Tuesday and Wednesday when she minded. She said her husbands firm had a clocking on system and that they could explore making these available as proof of compliance. She was asked what she would do if he turned up when a child were being minded and she said she would turn him away. When asked about letting a parent down if her husband were ill and cancelling on the day she said this was no different to her being ill and was clearly a term of her contract in any event in respect of any family illness and was known as a condition to parents.
21. She confirmed that the suspension had caused her financial hardship. She had used up all her savings, could not claim benefits and had two children going through university at the same time. She said that it had harmed her unimpeachable reputation and she was worried whether she could build up her business again.

## **DISCUSSION**

22. We were taken by Ms Waldron 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:

They 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.

23. 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)

24. 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. In this case that analysis shows a three stage process of risk;
- a) OB husband being in the house at the same time as a minded child;  
and
  - b) OB husband in contact with a minded child; and
  - c) OB Husband having the opportunity to abuse a minded child.
25. Ofsted have accepted that OB is in no way complicit in any alleged harm to "child A". They accept that she has an unblemished record as a child minder with no complaints against her. They accept that she has acted in good faith in their dealings with her and in immediately notifying them of the allegations. She has worked co-operatively and constructively with them. We found her to be an honest and impressive witness who has acted appropriately throughout. Her answers to questions were spontaneous and lacking guile. Given this we are surprised that the proposals she has made have not been accepted and used as a basis for negotiating a constructive way forward, that safeguards minded children, whilst allowing her to pursue her career.
26. We do not accept Ofsted's objections to the scheme advanced by OB. She is happy to enter a working agreement that her husband not be present in the premises whilst she child minded. This can if need be backed up by snap inspections or even made the subject of a condition under S38 Childcare Act 2006 (which carries criminal sanctions). Given the positive view that Ofsted have of her they may also rely upon trust. The argument that she would give into pressure and breach the agreement if her husband were ill does not bear scrutiny. As she told us her contract already allows for cancellation in the event of family illness and the illness of her husband is in effect no different to she herself being ill and having to cancel at very short Notice.
27. There is a really difficult balance to be drawn in cases such as this. To a degree Ofsted cannot win whatever they do. They 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 this case. That option has been presented to them and they have in our view failed to analyse the true risks and how the plan ameliorates that risk to an acceptable level.

## DECISION

28. In the light of the above we allow the appeal against OB's suspension.

**Judge Ian Robertson**

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

**Date Issued: 01 February 2023**

**Amended Date Issued: 09 February 2023**