

First-tier Tribunal Care Standards

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

NCN: [2024] UKFTT 00856 (HESC)

2024-01170.EY-SUS

Heard by Video Link on 29 July 2024

BEFORE:

Mr H Khan (Judge)

Ms D Rabbetts (Specialist Member)

BETWEEN:

Mrs Kara Jewell

Appellant

-v-

Ofsted

Respondent

AMENDED DECISION

Appeal

1. Mrs Kara Jewell (“the Appellant”) appeals against the decision of Ofsted (“the Respondent”) dated 26 June 2024 to continue the suspension of registration as a childminder on the Early Years Register and both the compulsory and voluntary parts of the Childcare Register. The period of suspension was for a further six weeks starting from 27 June 2024 to 7 August 2024.

Attendance

2. The Appellant was represented by Mrs E Waldron (Counsel). The Appellant dialled into the hearing and gave oral evidence.
3. Mr N Smart, Counsel, represented the Respondent.
4. The Respondents witnesses were Ms Nicole Atkinson (Early Years Regulatory Inspector) and Ms Cheryl Walker (Early Years Senior Officer).

The Hearing

5. The hearing was conducted as a video hearing. The hearing bundle consisted of 315 pages.

Restricted reporting order

6. 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 the children or their parents in this case so as to protect their private lives.

Late evidence

7. The Appellant made an application to admit late evidence. This consisted of a letter from Ms Michelle Gosney dated 25 July 2024 and an assessment summary from Ms Rebecca Lever (Cognitive Behavioural Therapist) dated 25 July 2024. The Application was agreed between the parties.
8. The Respondent made an application to admit the supplemental witness statement of Ms Nicole Atkinson dated 26 July 2024. The Application was agreed between the parties.
9. In considering any late evidence, the Tribunal applied rule 15 and took into account the overriding objective as set out in rule 2 of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008. We concluded that it is appropriate to admit the late evidence as the evidence related to the issues that we have to determine. However, the parties were free to submit what weight should be attached to any late evidence.

The Appellant

10. The Appellant has been a registered childminder on the Early Years Register, the compulsory part of the Childcare Register, and the voluntary part of the Childcare Register since 2003.

The Respondent

11. The Respondent is the body responsible for the regulation of registered providers under the Childcare Act 2006 and the various regulations made under that Act. Its primary concern in performance of this role is the welfare and safeguarding of children.

Events leading up to the issue of the notice of statutory suspension.

12. The Respondent was notified of concerns on 7 May 2024 from a Local Authority relating to information they had received regarding the Appellant. This information referred to a crisis situation at Sparkle Lodge

CIC regarding a LADO investigation. It also stated that the Appellant was in hospital and was being sectioned under the Mental Health Act.

13. The Respondent was informed on 16 May 2024, that the Appellant had experienced an adverse reaction to antibiotics and that the Appellant had collapsed in the street. Further details about an attempt by the Registrant to self-harm were shared by the LA to the Respondent on 28 May 2024.
14. A decision to suspend the Appellant was initially made on 16 May 2024, following the Appellant's release from the adult mental health inpatient ward. The Appellant's registration was initially suspended from 16 May to 26 June 2024. The Appellant accepted that the initial suspension was correct and justified and did not dispute that this was the right decision at the time.
15. The Respondent also informed the Appellant on the same day that a health declaration form was going to be sent to her. On 29 May 2024, a health declaration form was sent to the Appellant.
16. The Respondent carried out a monitoring visit on 10 June 2024. During this visit, The Respondent was concerned about the state of the Appellant's property, which is the setting where prior to the suspension, she cared for a child. The Respondent was also concerned about the Appellant's mental state as it was alleged that she was presenting as manic.
17. A decision was made to continue the suspension of the Appellant's registration on the grounds that the signed health declaration had not been returned. The hand-signed completed health declaration was sent by the Appellant to the Respondent on 8 July 2024 (after the end of the first period of suspension). Upon receipt of the health declaration form and following concerns raised regarding the Appellant's behaviour, the Respondent decided that the Appellant should be assessed by the Respondent medical advisors, in order to be assured that children would not be placed at risk of harm.
18. The Respondent's position was that the suspension is necessary to safeguard children. The Respondent position was that it continues to have reasonable cause to believe children are, or may be, exposed to the risk of harm and maintain that the suspension is both justified and proportionate in the circumstances. Without a professional medical opinion, the Respondent is not assured that children would not be exposed to a risk of harm.
19. The Appellant's position was that Multiple use of Suspension Notices in this case is draconian and a misuse of the Respondent's power under the Regulations: suspension is clearly intended to be an interim measure only. The Appellant submitted that the Respondent cannot reasonably maintain the position that they are without medical evidence going to the Appellant's suitability.

Legal framework

20. Section 69(1) of the Childcare Act 2006 provides for regulations to be made dealing with the suspension of the registered provider's registration. The section also provides that the regulations must include a right of appeal to the Tribunal.

21. Under the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008, when deciding whether to suspend a childminder the test set out in regulation 9 is:

a. *'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'.*

b. "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".

22. Regulation 10 sets out further provisions relating to suspension. Regulation 10(2) deals with further periods of suspension which allows a further period of up to 6 weeks suspension to be imposed if it is based on the same circumstances as the previous period of suspension. This may only be exercised to give a continuous period of suspension of 12 weeks unless subsection 3 is satisfied, in which case the period of suspension may continue beyond 12 weeks.

23. Regulation 10(3) provides that where it is not reasonably practicable to complete any investigation (10(3)a) or for any necessary steps to be taken to eliminate or reduce the risk of harm (10(3)(b)) the suspension may continue until the investigation is concluded or the risk of harm is eliminated or reduced. ~~It is the Respondent's position that 10(3)(b) applies and that the steps being taken by Ofsted are to cancel the Appellant's registration.~~

24. The case of *Ofsted v GM and WM [2009] UKUT 89* established that on an Appeal under Regulation 12 *"The First-tier Tribunal stands in the shoes of the Chief Inspector and so, in relation to Regulation 9, the question for the First-tier Tribunal is whether, at the date of its decision, it 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"*;

25. The threshold is clearly a low threshold. The threshold is that a child *may* be exposed to a *risk* of harm (emphasis added). It is not necessary for the Chief Inspector or the Tribunal to be satisfied that there has been actual harm, or even a likelihood of harm, merely that there may be a risk; and the Tribunal must apply the test in Regulation 9 at the date of the hearing.
26. The standard of proof lies on the Respondent between the balance of probabilities and a reasonable case to answer. The belief is to be judged by whether a reasonable person assumed to know the law and possessed of the information, would believe that a child might be at risk. The burden of proof is on Ofsted.
27. As the test is that there needs to be only “reasonable grounds to believe” that the threshold is met, the Tribunal does not need to make any findings of fact.
28. If the Tribunal is satisfied that the threshold for suspension contained in Regulation 9 is satisfied, the Tribunal would also need to consider whether the suspension is proportionate.
29. Suspension may be lifted at any time if the circumstances described in regulation 9 cease to exist. This imposes an ongoing obligation upon the Respondent to monitor whether suspension is necessary.

Evidence

30. We took into account all the evidence that was presented in the bundle and what was presented to us at the hearing. We have summarised some of the evidence before us and we wish to make it clear that the following is not intended to be a transcript of the hearing.
31. Ms Atkinson confirmed that she was not the decision maker but had been involved in the case leading up to the Notice of Decision. Ms Atkinson set out that the reason for the suspension related to the Appellant’s medical suitability. There were some concerns regarding safeguarding and premises. Ms Atkinson set out her dealings with the Appellant. Ms Atkinson set out that she considered that the suspension should remain in place due to the review of the Appellant’s health not being complete.
32. Ms Walker made it clear that the reason for the suspension was on medical grounds. The Respondent needed to make contact with medical professionals concerned with the Appellant’s recent hospital admission to enable a fully informed decision to be made about her ongoing suitability. This would also involve an appointment for the Appellant to see the Respondent’s medical adviser.

33. Ms Walker acknowledged that this had taken some time but that she was open to the idea of progressing this quickly. There had already been some discussion about having a “fast track” approach to the matter.
34. Ms Walker explained that following receipt of all the required information, and review of any other information that may arise, she would be in a position to make a decision on whether or not to lift the suspension of the Appellant’s childminding registration.
35. Ms Walker did not consider it appropriate to lift the suspension at this stage as it may pose a risk to children without getting that information about the Appellant’s state of health. Ms Walker explained that without a professional medical opinion, the Respondent could not be assured that the children would not be exposed to a risk of harm. Further such a risk could be heightened due to the Appellant working in a lone working situation.
36. The Appellant set out that throughout her career as a registered childminder, she had never experienced any issues with the Respondent.
37. She accepted that the initial suspension was correct and justified and she did not dispute that this was the right decision at that time. Her mental health was seriously impaired due to the side-effects of an antibiotic she was taking after experiencing food poisoning. However, she considered that the change in her mental health was temporary and not reflective of her usual state. This was an unusual situation and not something that she could have predicted. She did identify that her own behaviour changed and had sought help.
38. The Appellant set out the impact that the suspension had on families that she was caring for, particularly those with special needs. She also set out the impact on her personally. She acknowledged the Respondent’s concerns but considered this to be an isolated incident that did not compromise or reflect her ability to care for children in a childminding situation.

The Tribunal’s conclusions with reasons

39. We remind ourselves that the standard required to justify a suspension is not a high one. During the short period of the suspension, it is for the Respondent to investigate matters to determine if there is a case for longer-term enforcement action, or whether the outcome of the investigation is that there is no longer reasonable cause to believe children may be harmed.
40. We would like to place on record our thanks to all the witnesses including Ms Atkinson, Ms Walker and the Appellant who gave evidence at the hearing.

41. We found the evidence of Ms Atkinson and Ms Walker to be fair and measured. Ms Atkinson made it clear that although she wasn't the final decision maker, she had had involvement in the steps leading up to the decision. Ms Atkinson set out that the main issue was the Appellant's medical suitability although there was some reference to premises in the evidence. Ms Walker made it clear that the reason for the suspension was medical suitability.
42. We acknowledge the Appellant's evidence. She quite fairly accepted that the initial suspension was correct and justified. She did not dispute that this was the right decision at that time. She submitted that her mental health was seriously impaired due to the side effects of an antibiotic she was taking after experiencing food poisoning.
43. We reminded ourselves of the lower threshold for confirming the suspension and reminded ourselves that at this stage we are not finding facts. Ms Waldron on behalf of the Appellant accepted that this is typically a "low threshold" test. The Tribunal is effectively tasked with conducting a risk assessment as at the date of the hearing.
44. We note that there was reference to safeguarding and issues around premises. However, we noted that the Respondent's decision maker, Ms Walker made it clear that the reason for the suspension was medical suitability. Accordingly, we proceeded on this basis.
45. We concluded that we were satisfied that the continued provision of childcare by the Appellant to any child may expose such a child to a risk of harm. Our reasons for doing so are set out below.
46. We noted that the Appellant accepted that there was a temporary change in her mental health and that this change was due to major side effects from her medication. By the Appellant's own accounts, this led her to doing "*a series of very strange things that were completely out of character for her*". This included incidents such as "*forgetting how to start the car*" and family members telling her she "*was becoming manic*". Furthermore, by the Appellant's own admission, this led to drastic change in her behaviour. The Appellant accepts that as a consequence of this she was sectioned under the Mental Health Act and that this was the right decision at the time.
47. Whilst we acknowledge the Appellant's submissions around the change in her mental health being a temporary one and her returning to her normal self as soon as the antibiotics had left her system, nevertheless, we considered that the Respondent's submissions around the need for a professional medical opinion to be a reasonable one.
48. Whilst we acknowledge that the Appellant has provided medical evidence from, for example Michelle Gosney, Rebecca Lever as well as some information from her GP, we did not consider that this evidence at this stage adequately assessed the Appellant's current state of her

mental health and the risks or otherwise she may present to children in her care. For example, Ms Lever's letter dated 25 July 2024 set out information that the Appellant had provided to her and made reference to the Appellant scores on the MDS as being below what is considered "a *clinical level of significance*", in our view, this did not adequately assess the Appellant's current state of her mental health.

49. We took into account that the Appellant was childminding in a home environment and the Respondent's concerns were heightened in a lone working environment. In our view, given the Appellant's own admission regarding the change in her mental health, it is appropriate the suspension to remain in place until a professional medical opinion has been obtained.
50. We considered it reasonable for the Respondent to consider it necessary for the Respondent's medical advisors to consider her medical history and contact the medical professionals concerned with the Appellant's recent hospital admission to enable them to make a fully informed decision to be made about her ongoing risk to children in her care.
51. We acknowledge the impact that this has had on the Appellant. The Appellant stated that she has never been subject to regulatory action previously in her 20-year history as a registered childminder, she has previously been assessed as "outstanding" and there was no challenge to her submission that she has been recommended by the Respondent to other practitioners facing regulatory action as an "exemplary provider". We also acknowledge the financial and emotional impact of such proceedings.
52. We concluded that the reason why any investigation had not been completed or any necessary steps taken to eliminate or reduce the risk of harm. We acknowledge the amount of time this has taken and that this is the second suspension. In fairness, Ms Walker in her oral evidence acknowledged that and was open to exploring to getting the assessment completed as soon as possible. There was some reference to this being put on the "*fast track*". We hope that the Respondent does everything it can to progress this as quickly as possible so that any such assessment can be obtained as soon as possible.
53. We reminded ourselves that suspension may be lifted at any time if the circumstances described in regulation 9 cease to exist. This imposes an ongoing obligation upon the Respondent to monitor whether the suspension is necessary.
54. We considered all the circumstances of the case and concluded that the action taken is both proportionate and necessary.
55. We conclude therefore that the continued provision of childcare by the Appellant to any child may expose such a child to a risk of harm.

Decision

56. The Respondent's decision to suspend the Appellant's registration dated 26 June 2024 is confirmed and the appeal is dismissed.

Judge H Khan

Lead Judge

First-tier Tribunal (Health Education and Social Care)

Date Issued: 01 August 2024

Amended Under Rule 44 Date Issued: 12 August 2024