

First-tier Tribunal Care Standards

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

[2024] UKFTT 001142 (HESC)
2024-01317.EY-SUS

Hearing held via CVP on 18 December 2024

Before
Tribunal Judge Boyce
Specialist Member Dr Cochran

Between:

IN

Appellant

-v-

OFSTED

Respondent

DECISION

Attendance

The Appellant was not represented and did not call any witnesses. OFSTED were represented by Ms Shafiq, solicitor. Their witnesses were Ms Afful and Ms Wildman.

Nature of the Hearing

1. The hearing took place remotely via video link. All parties agreed to the hearing taking place remotely and no party requested an in-person hearing. We were satisfied that this was fair and reasonable in the circumstances, due to the nature of the hearing. There were no connection issues during the course of the hearing.

The Appeal

2. This is an appeal made against the decision of OFSTED dated 16 November 2024 to extend the suspension of the Appellant's registration as a childminder in domestic premises. The renewed suspension expires on 29 December 2024. The suspension has been continuously renewed since 18 December 2023.
3. The reporting restriction order made on 18 April 2024 under Rule 14(1)(a) and (b) of the 2008 Rules remains in place. This prohibits the disclosure or publication of any documents or matter likely to lead member of the public to identify the children involved in these proceedings. For the avoidance of doubt, this will include disclosure or publication of the names of the parents, the children and the

Appellant, given the fact that the Appellant was only caring for a small number of children.

Late Evidence

4. The Appellant requested the admission of five witness statements as late evidence. As these were statements of character and not statements of fact, there was no objection raised by the Respondent and we agreed that the additional evidence should be admitted.
5. The Respondent applied to admit the earlier decision of this Tribunal, dated 18 April 2024, as late evidence. The Appellant objected on the basis that it would be prejudicial. We determined that the earlier decision was not evidence and therefore could not be admitted as such but that it was a matter of record and was part of the chronology of the case and in those circumstances, it could be referred to as a matter of fact, but would not form any part of our decision today. Both parties indicated that they were happy with that approach.

Background

6. The Appellant was registered on the early years register on 19 March 2021. She had previously been registered from 19 January 2012 to 8 July 2019, when she resigned following an OFSTED rating of inadequate, which led to the suspension of her registration in July 2019.
7. On 15 December 2023, the Respondent received notification from LADO Bexley regarding a safeguarding incident in which it was alleged that the Appellant had hit a child in the face/head with a phone. This was reported by the Appellant on the same date. The police investigated and the Appellant attended a voluntary police interview on 18 December 2023 and a letter of notice confirming suspension of registration was issued by the Respondent the same day.
8. The Appellant was interviewed by the Respondent's inspectors on 1 February 2024. On 5 March 2024, the police concluded their investigation with no further action, as there was insufficient evidence for a charging decision to be made. On 8 March 2024, the LADO investigation substantiated the allegation regarding emotional harm.
9. On 25 March 2024, the Respondent issued a notice of intention to cancel the Appellant's registration in accordance with s68 Childcare Act 2006. This was confirmed on 26 July 2024 and a notice of decision to cancel was issued.
10. The period of suspension has been renewed continually since 18 December 2023. The reasons given in the latest notice of continued suspension on 15 November 2024 were as follows:

“The reason for the continuation of the suspension of your registration is because professionals with responsibility for safeguarding have deemed that you caused emotional harm to children in December 2023 as a result of your behaviour. As stated in previous notices, it is accepted that you have attended various training aimed to improve your practice since that time. However, we continued to be concerned that your stated intentions to address your practice do not differ from

your stated intentions at the point of registration in 2021. You haven't been able to satisfactorily address why you did not implement these behaviour strategies consistently, which ultimately led to your unacceptable behaviour towards children.

Furthermore, we remain very concerned about your ability to meet the safeguarding and welfare requirements of the EYFS which are in place to ensure the safety and welfare of children. Throughout the course of your suspension, you have provided inconsistent and conflicting information regarding your use of assistants and individuals whose suitability had not been checked. In addition to providing misleading documents about children's attendance. You continue to change your accounts of those present and do not demonstrate that you understand the ratio requirements, or that you are able to work with Ofsted in an open and transparent manner. As such, we are not assured that you can be trusted to meet requirements to ensure children's safety. Your suitability is of significant concern to Ofsted, which in itself poses a risk to children. We are taking steps to cancel your registration."

11. On 28 November 2024, the Appellant lodged her appeal with the Tribunal. In her grounds of appeal, she states that she has completed a number of relevant training courses since her suspension began and she has enrolled on a degree with the Open University for Childhood and Youth Studies and Child Psychology. She states that she has reputable references from clients who have continued to wait for her suspension to be lifted and that she has continued to cooperate with Ofsted since the beginning of the suspension period.

Legal Framework

12. The statutory framework for the registration of childminders is provided under the Childcare Act 2006. Section 69(1) of the Act provides for regulations to be made dealing with the suspension of a registered person's registration. The section also provides that the regulations must include a right of appeal to the Tribunal.
13. When deciding whether to suspend a childminder, the test is set out in Regulation 9 of the 2008 Regulations as follows:

"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."

"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".

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. The suspension is for a period of six weeks. 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. Under Regulation 10 (subject to paragraph 3 of Regulation 10) 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.

16. The powers of the Tribunal are that it stands in the shoes of the Chief Inspector and so in relation to regulation 9 the question for the Tribunal is whether at the date of its decision it reasonably believes that the continued provision of child care by the registered person to any child may expose such a child to a risk of harm.

Evidence

17. We carefully considered all the written evidence submitted to the Tribunal in advance and the oral evidence given to us at the hearing even if we do not mention it. We have read the bundle, which is comprised of 560 pages, and watched the MP4 files of video downloads from the Appellant's ring doorbell camera and we heard evidence from Ms Afful, Ms Wildman and the Appellant. We have also considered the late evidence admitted at the start of the hearing, in the form of character references for the Appellant. We do not intend to rehearse that evidence in this judgment and will just highlight the key parts that have informed our decision.

The Tribunal's conclusions with reasons

18. We reminded 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.

19. We reminded ourselves of the lower threshold for confirming the suspension and reminded ourselves that at this stage we are not finding facts.

20. The Appellant has been a registered childminder since 2012, with a period of three years from 2019 to 2021 where she resigned her registration. The trigger incident for these proceedings was the allegation in December 2023 that the Appellant had struck a child with a phone. The video provided does not show that incident but we note that there are 6-7 seconds missing from the video recording. As a consequence of the missing footage, the police determined that there was insufficient evidence to reach a charging decision. We have seen on the footage however, accepted behaviour on the part of the Appellant towards a young child, where she is seen to belittle and berate her for having yoghurt on her face. The Appellant accepts that this behaviour was wrong and states that she has taken steps to avoid a recurrence and has broadened her understanding of the impact this would have had on the child concerned, through the training she has undertaken. It is to the Appellant's credit that she reported this incident immediately to the regulator. We have also considered the various positive character references provided by the Appellant, all of which show an awareness of the nature of these proceedings.
21. The LADO concluded that the child had suffered emotional abuse. Ms Wildman was clear in her evidence that her concern was that the issues of behavioural management were not isolated and she remained unconvinced from discussions with the Appellant that any significant improvements had been made, which would alleviate the risk of harm. She described the Appellant as lacking insight and said she would not be willing to place children in her care as the risk of harm is too great. Ms Wildman also said that she was worried by the statement provided by the Appellant's cleaner, which was admitted as character evidence. She said that the presence of the cleaner onsite during the hours the Appellant was providing care to children, should have been reported to OFSTED and was not. Ms Wildman's view was that this was another example of the Appellant's lack of understanding of the requirements.
22. Ms Wildman referred to her belief that until such time as a cancellation process can be concluded, children would continue to be at risk of harm at the Appellant's setting and that only continued suspension of the registration would protect from this. We reminded ourselves that there was a difference between a suspension (Section 69), cancellation (Section 68) and an urgent cancellation under section 72 of the Childcare Act 2006. The power under section 69 should not be confused with the power under section 72.
23. The Appellant in response stated that the cleaner was only present for ten minutes whilst she got the children ready for the school run but this did not accord with the cleaner's statement, which describes the Appellant being "often found on the floor with the children playing". The cleaner also says that she spends 2-4 hours at the address and has not heard the Appellant raise her voice to the children in an aggressive way on a single occasion. This suggests that the cleaner spends much more time at the property than merely a ten minute overlap before the school run. This is damaging to the Appellant's credibility and casts doubt on the rest of the evidence she has provided.
24. We were not persuaded by the Appellant's evidence that the accepted risk of harm to children had been alleviated by any of the training the Appellant had done. We found her to have limited insight into the harm caused by her actions and we found

her compliance with the regulator to be borderline at best. The Appellant confirmed that she had done a DBS check for the cleaner but was waiting for the result of that to submit the form to notify the regulator that the cleaner was occasionally present on site during childminding hours. The Appellant conceded when questioned that the cleaner had worked for her for a number of years and offered no coherent explanation as to why the regulator had not been notified previously.

25. We have considered the relevant case law referred to in both skeleton arguments, particularly the Upper Tribunal decision in Ofsted v GM & WM [2009] UKUT 89 (AAC). We note that the Chief Inspector is bound to reconsider the situation to see if risk can be eliminated or risk, which requires a risk assessment. It is clearly a balancing exercise between the impact on the provider and the risk to the children and it is accepted that the Chief Inspector has a duty to find methods to reduce the risk of harm, however, the video evidence demonstrates a clear risk of emotional harm to children. We remain concerned about the Appellant's lack of insight and lack of a coherent plan to avoid a risk of harm in the future. At the time of the incident, she was looking after 6 Early Years children without assistance, which is a repeat of behaviour which led to an earlier suspension and we were not persuaded that the Appellant had clearly identified a support plan to avoid this happening in the future. We do not therefore, consider that it is proper to allow the Appellant to resume her practice as the safeguarding risk to the children remains too high.

26. We are satisfied that the Respondent has proved that there is reasonable cause to believe that the suspension should continue to apply.

Decision

The appeal against suspension is dismissed.

Judge Boyce

First Tier Tribunal (Health, Education and Social Care)

Date Issued: 19 December 2024

