

## **Care Standards**

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

**Considered on the papers on Friday 14 June 2013**

**Before**

**Tribunal Judge Melanie Lewis  
Specialist Member Margaret Halstead  
Specialist Member Caroline Joffe**

**Mrs Katherine Goldburn**

**Appellant**

**-v-**

**OFSTED**

**Respondent**

**[2013] 2039.EY-SUS**

**DECISION**

#### **Background**

1. On 9 May 2013 OFSTED suspended the Appellant's registration from the Early Years Register for 6 weeks to 19 June 2013 on the basis that there was reasonable cause to believe that children were or may be exposed to risk of harm. A child aged 2 years and 8 months at the time alleged that the Appellant slapped her.
2. On 17 May 2013 the Appellant filed a notice of appeal against the suspension. On 20 May the Appellant indicated in writing that in an effort to re-open the nursery, which accorded with the wishes of the parents, she was minded to agree to the imposition of a condition. The condition was that she should have no access to the premises or any children cared for at the premises during the hours in which care was

provided. The condition was imposed on 21 May 2013 and the suspension lifted.

3. Ofsted took it that the Appellant was not only waiving her right to have that condition reviewed under Section 73 (4) Childcare Act 2006, but that it extinguished her right of appeal.
4. On 24 May 2013 following a telephone case management Hearing, Deputy Chamber President Aitken concluded that it did not extinguish her right of appeal under Section 74 CA 2006.
5. He abridged time and allowed the Appellant to file an appeal against the imposition of the condition and made directions to bring the case on within a short period.

### **The Appeal**

6. The Appellant appeals to the Tribunal against the Respondent's decision dated 21 May 2013 to impose a condition upon her registration.
7. Further to the directions of DCP Aitken, the parties considered whether the matter could be dealt with on the papers. Having considered the further papers, we are satisfied that we can agree to their joint request. There are no major factual issues save the Appellant denies slapping the child. At this stage our task is not to find facts but weigh risk to children if the Appellant is on the premises with them.
8. The Tribunal 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, prohibiting the disclosure or publication of any document 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.

### **Background**

9. Murray Park Day Nursery has been functioning for 37 years under the leadership of Mrs Goldburn, but not always on the same site. Mrs Goldburn has been supported by long-serving members of staff. Her deputy has worked with her for over 30 years.
10. There has been no history of concerns. The 2011 Ofsted report rated it as 'good' with 'outstanding' in four areas
11. The allegations concern two children aged 2 years and 8 months at the key time. They started the nursery on 17 April 2013 and left on 26 April 2013.

12. The dates and time scales of the incident are not clear. Mrs Goldburn denies that she slapped and screamed at either child at some point between 17 – 26 April 2013. The record book kept by the nursery shows that the children were there for a total of 8.5 hours.
13. On Monday 29 April 2013 the deputy received a call from the mother advising that the children would not be returning to the nursery as she felt they were too young. Mrs Goldburn then spoke to the mother directly and said she was sad to hear that she felt that way. Mrs Goldburn followed this up with a letter stating that '*the removal was a little confusing to us all*', and that the girls had made progress after the initial separation. The letter stated, as Mrs Goldburn said when she was eventually interviewed by Ofsted, that the nursery operated a policy that 'mummy knew best' and if the mother believed they were not ready, then so be it'.
14. Concerns were raised to the Local Authority on 2 May by the Single Point of Access (SPA) for the Children's Services Team by the Manager at a Children's Centre Manager, to whom the mother had spoken. The child had told her uncle that she didn't like going to nursery and had been slapped by 'Auntie Kathy' whilst attending Murray Park Nursery. The mother also said that she was concerned about things she had witnessed at the nursery, including favouring white children over Asian children and a regressive attitude towards her and the children.
15. On 7 May 2013 the mother took one of the children to the GP **saying there was** a change in behaviour since the alleged incident. She reported that the child had been getting nightmares, waking at night, and found on the stairs crying. She had reverted to wearing nappies. The GP referred the child to the Child and Adolescent Mental Health Service.
16. Ofsted involved the Local Authority. Following a strategy meeting it was decided to carry out a Section 47 Children Act 1989 investigation as concerns were significant.
17. It was only on 13 May 2013 that the social worker visited the mother and the two children at home. She spoke to the children in the presence of their mother as they were unwilling to let go of her. She formed the view that both children were articulate. When the subject of nursery was raised the child said that it was 'bad' and when asked why she said Auntie Kathy had slapped her on the face. When asked why, the other child said that she was crying for Mummy.
18. The social worker formed the view that the parent hadn't tried to influence the investigation. The children were spontaneous and she didn't believe the allegations were malicious. She stated that it was her professional opinion that the allegation was true and the outcome of the Section 47 investigation was 'substantiated'. That was because the

children were clear in their accounts, their emotional reactions were consistent with the responses to the questions asked and there didn't appear to be prompting or leading from the parent. .

19. No further action was taken by Social Services or the Police.
20. Diana Plewinska, the Senior Officer within the Compliance Investigation Enforcement Team held a case review on 16 May 2013. She identified what steps were to be taken to assess whether the nursery could re-open without Mrs Goldburn, and other actions.
21. The only apparent further investigation was that the Appellant was interviewed by Ms Fisher and Ms Roberts on 7 June 2013. The PACE interview lasted over 2 hours but there wasn't time to complete it. Ofsted has not presented any evidence of an assessment of risk.

### **Issue**

22. Ofsted remains opposed to the appeal on the basis of the conditions needed to remain in place to restrict the Appellant's access to the nursery premises and eliminate/reduce risk of harm. The Appellant agreed to the conditions, which was a persuasive factor in the decision to lift the suspension and a proportionate response enabling the nursery to remain open whilst the children are afforded protection.

### **The Law**

23. In effect this is a suspension appeal.
24. 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.
25. 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.*

26. The burden of proof is on the Respondent to show that 'there is reasonable cause to believe' is established. The standard lies somewhere between the balance of probabilities and 'reasonable cause to suspect'. Belief is to be judged by whether a reasonable person, assumed to know the law and possessed of the information believes that a child might be at risk. We must look at whether the condition is both necessary and proportionate

## **Consideration**

27. We have considered the Tribunal bundle sections 1-6. Both parties kept to the shortened timetable to expedite the hearing and filed evidence.
28. The question for us is whether the matters which legitimately cause Ofsted concern, justify the necessity of the condition continuing. There is no limit on the condition. We take into account that Ofsted can take further steps if their further enquires produce new evidence
29. That said, we are not clear what further investigations Ofsted need to carry other than a further interview with the Appellant who has always denied the allegations. The expedition of this appeal has speeded up the process so that we can consider the context and circumstances in which the allegation was made.
30. We were concerned that the Social Worker concluded that the allegations were 'substantiated'. It may be that she was simply referring to her investigation which appeared to be limited to speaking to the children and their mother. She does not state what her qualifications were in relation to conducting child protection interviews.
31. The Social Worker only considered whether the mother was, in effect, putting her children up to making allegations, and whether she herself had some malicious intent. There are of course other possibilities.
32. The child who made the key allegation is very young. It is not supported by any physical evidence of slapping.
33. We look at the context. Mrs Goldburn has worked with children for 37 years. Her deputy has worked with her nearly all that time. Other members of staff have worked with her for over 20 years. This is a very stable nursery.
34. There has been no history of concern about this nursery. We read the most recent Ofsted report which graded it 'outstanding' in a number of respects, including respecting and celebrating diversity. The calm atmosphere was praised. Parents also commented favourably on this.
35. Mrs Goldburn took a sympathetic position when the mother first approached her. The evidence establishes that she was prepared to make some financial allowances so that fees were only paid for one child. We do not give the reasons in any detail for reasons of confidentiality. The mother shared some difficulties with her. Both Mrs Goldburn and deputy noted that the mother was often tearful when attending the nursery.

36. The mother raised no direct complaint with the nursery. She didn't talk to them and see if there might be an alternative explanation for what the child was saying. The reason given for removing both children was that they had not settled.
37. Neither did the parent directly report this matter at the time. Only later did she raise it with a child care professional, who was of course bound to report it to Ofsted. This in itself isn't an acceptance that it was true or likely to be true; it was merely a following of the correct procedures.
38. Therefore there was no due process of the parent following a complaints procedure. The Ofsted report favourably commented on the parent's view of the service being valued by the nursery.
39. We saw a petition signed by 75 parents. We read a number of testimonials, at least 3 of which were from parents who themselves had attended the nursery.
40. We are satisfied that the nursery operates an 'open door' policy. In a number of the testimonials from parents they said that they regularly sat in, sometimes without notice and all the comments were positive, and observed nothing adverse. The Ofsted report 2011 again favourably commented on this policy of including parents. .
41. We place weight upon the detailed testimonials from a number of the parents. Ofsted were concerned when interviewing Mrs Goldburn that a parent was her supporter. They left the interview when confidential matters were discussed. We are satisfied on the basis of the very supportive testimonials that we read, that the ground swell of support came from the parents themselves rather than anything that she did.
42. The Appellant's defence set out the geography of the building. The nursery is in one room and the side room where the incident is alleged to have taken place is booked by other groups on some mornings. As to be expected in a nursery school, there are high staff/child ratios so Mrs Goldburn would be in sight most of the time, which we consider relevant both to the allegation and future risk. .
43. There appeared to be little consideration of the impact of shutting the nursery. Thirteen of the children were preparing for transition to primary school.
44. Ofsted's case relies wholly upon concerns raised by one parent and what was said by a child of 2 and half years, in the context of a very stable nursery that had run for 37 years with no incidents. An extensive population of experienced parents, including many education and social care professionals were unanimous in their praise of Mrs Goldburn and the provision at the nursery. She and her staff came in for high praise, which was also commented on in the Ofsted report 2011.

45. Our powers under Section 74 CA 2006 are to vary or remove the condition imposed upon the registration.
46. We are satisfied that the condition is not necessary or proportionate. Ofsted's investigations must nearly be completed and if they have any further concerns then there are steps that they can take. There are safeguards. The nursery has a very stable group of staff who are very experienced. The "Open Door" policy was favourably commented on by Ofsted and parents are in and out of the nursery all the time.
47. **The appeal is allowed.**

**Order**

**The condition imposed on the registration of the Appellant on 21 May 2013 by Ofsted is removed.**

**Judge Melanie Lewis  
Judge Care Standards  
Date Issued: 18 June 2013**