

Care Standards

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

[2014].2265.EY

Heard on 5 February 2015 at Derby Magistrates Court

BEFORE

JUDGE MELANIE PLIMMER
SPECIALIST MEMBER BRIDGET GRAHAM
SPECIALIST MEMBER JAMES CHURCHILL

BETWEEN

RUKHSANA MIRZA

Appellant

-v-

OFSTED

Respondent

DECISION

Representation

The Appellant was represented by Mr Seeboruth (Counsel)
The Respondent was represented by Ms Birks (Solicitor).

Reporting order

1. There shall be a Restricted Reporting Order under Rule 14(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('the 2008 Rules') prohibiting the publication (including by electronic means) in a written publication available to the public, or the inclusion in a relevant programme for reception in England and Wales, of any matter likely to lead members of the public to identify any child or its family mentioned in the appeal.

The appeal and procedural history

2. The appellant appealed against a decision dated 1 August 2014 to cancel her registration as a provider of childcare on non-domestic premises on the Early Years Register and the voluntary part of the Childcare Register at Heatherton Schools Out in Derby.

3. After a telephone case management hearing on 16 October 2014 the Tribunal issued directions for the parties to comply with in readiness for a three-day final hearing. These directions included the requirement on both parties to serve on each other copies of witness statements and documents upon which they intended to rely by 20 November 2014. The Appellant through her then representative served a number of statements / letters from employees and ex-employees including one dated 8 November 2014 purporting to be made and signed by Mrs Jaz Johal, a former employee at Heatherton Schools Out.
4. On 19 December 2014 the Respondent's solicitors notified the Appellant that they wished Mrs Johal and another witness to attend the hearing in order to provide oral evidence. The Appellant responded on 22 December 2014 "*I have emailed Byrony and Mrs Johal has seemed to change her number and moved to Coventry so I'm not relying on both of the[m]..*". The Tribunal adjourned the January hearing at the Appellant's request, and it was relisted to be heard for three days from 10 February 2015.
5. The Tribunal issued directions on 29 December 2014 and 13 January 2015 requiring the Appellant to provide contact details she holds for Mrs Johal together with details of all contact she had with Mrs Johal since 1 October 2014. The matter was listed for a further telephone case management hearing on 19 January 2015. The Appellant had recently instructed Mr Seeboruth under 'direct access' arrangements and the Respondent was represented by Ms Birks. By this time Ms Birks had filed and served a witness statement from Mrs Johal dated 16 January 2015 in which she states that she had never seen the statement / letter dated 8 November 2014 ('Johal November statement') purporting to be from her. The Respondent made it clear that it applied to strike out the Appellant's appeal on two grounds. First, she had repeatedly failed to provide contact details for Mrs Johal in breach of directions. Second, the appeal has no reasonable prospects of success because the Appellant has relied upon a letter / statement that was falsified. Both parties agreed that it was appropriate to convene a preliminary issue hearing to determine the circumstances in which the Johal November statement came to be made and submitted. It was agreed by both parties that the Tribunal's findings on this issue might be determinative of the question whether or not the appeal has reasonable prospects of success. In the premises both parties agreed that the preliminary issue should be determined in advance of the three-day hearing, and not on the first day of the three-day hearing. The Appellant was ordered to serve a witness statement that addresses the preliminary issue and responds to Mrs Johal's statement dated 16 January 2015. The Appellant was also ordered to provide a full explanation for her failure to comply with directions. The time period for complying with this direction was extended at the Appellant's request.

Hearing

6. At the beginning of the hearing we sought to clarify the Appellant's position with Mr Seeboruth. The Appellant had submitted two witness statements for the purposes of the preliminary issue hearing but had not provided a clear explanation of the circumstances relevant to the making and service of the Johal November statement. In addition, in breach of directions, there was no skeleton argument from the Appellant outlining her position. Both parties agreed that in the circumstances a fair and proportionate way of proceeding was to hear from the Appellant first by the Tribunal clarifying her position with her.
7. The Appellant explained that the first time she saw the Johal November statement was when she received an email from Ms Birks attaching the bundle in or around December 2014. She explained that previously she had simply gathered together all

the evidence and emailed this to her representative who would have then provided it to Ms Birks. She accepted that the Johal November statement was entirely in support of her and her case but maintained that Mrs Johal deliberately provided this in order to later retract it, because the Appellant refused to give Mrs Johal her job back when she claimed it was requested in July 2014.

8. The Appellant was then asked questions by Mr Seeboruth before being cross-examined by Ms Birks. We also heard evidence from Mr Qamar Saleem, the manager of Heatherton Schools Out and Ms Neelam Arurangzeb, a former employee there. They were both cross-examined by Ms Birks.
9. We finally heard evidence from Mrs Johal, who was cross-examined by Mr Seeboruth. After the completion of evidence we heard submissions from Ms Birks, who relied upon a very helpful skeleton argument. We then heard from Mr Seeboruth who apologised for the absence of a skeleton argument but was able to provide detailed submissions on behalf of the Appellant. The focus of his submissions was on the Respondent's failure to establish that the Appellant had deliberately and falsely submitted information she knew to be untrue, namely the Johal November statement.
10. We retired to consider the submissions before indicating orally that in our view the appeal has no reasonable prospect of success and should be struck out. We gave brief reasons at the time and indicated that fuller reasons would follow, which we now set out.

Legal Framework

11. Section 34(1) of the Childcare Act 2006 provides that a person may not provide early years provision on premises in England which are not domestic unless registered in the early years register in respect of those premises.
12. Schedule 2, Part 1 of the Childcare (Early Years Register) Regulations 2008 sets out the prescribed requirements for registration. This requires inter alia that the applicant is suitable to provide early years provision. Section 68(2) of the 2006 Act states that Ofsted may cancel a person's registration if it appears that these requirements cannot be satisfied.
13. Section 74(1) of the 2006 Act provides a right to appeal to this Tribunal. The legal burden remains vested in Ofsted, which must establish the facts upon which it relies to support cancellation on the balance of probabilities. It must also demonstrate that the decision to cancel the Appellant's registration is proportionate and necessary. We must make our decision on the basis of all the evidence available to us at the date of the hearing and we are not restricted to the matters available to Ofsted when the cancellation decision was taken. The powers of the Tribunal can be found in section 74(4) of the 2006 Act. Essentially the Tribunal may either confirm Ofsted's decision to cancel or direct that it shall not have effect.
14. The power to strike out is conferred by the 2008 Rules. The Tribunal has a discretion to strike out the whole or part of the proceedings "if the Tribunal considers there is no reasonable prospect of the applicant's case or part of it, succeeding" – see Rule 8(4)(c). It is for the Respondent to displace the burden that there is no reasonable prospect of the Appellant's case succeeding.

Issue to be determined

15. Both parties agreed at the telephone case management hearing and again at the preliminary issue hearing that we must decide what the Appellant's role was in making and submitting the Johal November statement. It was also agreed that we must then determine in light of our factual findings, whether we should strike out the Appellant's appeal on the basis that there is no reasonable prospect of her appeal succeeding.

Findings of fact

16. In reaching our findings of fact we have taken into account all the evidence contained in the preliminary issue bundle together with additional evidence filed late by the Appellant, and the oral evidence of all the witnesses.
17. Before turning to our findings we set out our broad assessment of the witnesses who appeared before us. We find that Mrs Johal provided honest evidence and we entirely accept that which is set out in her two witness statements dated 16 January 2015 and 1 February 2015. Mrs Johal was clearly very upset at the allegations being made by the Appellant but provided balanced and reliable evidence.
18. We did not regard the Appellant's evidence to be reliable or honest. In our view she offered an explanation for the Johal November statement that is entirely implausible, riddled with inconsistencies and incredible. We considered Ms Aurangzeb's evidence also unreliable. She was simply unable to cogently explain why she signed an affidavit in the presence of solicitors and then when told that she needed to attend the Tribunal hearing to provide oral evidence, sought to rewrite a new statement omitting large parts of the affidavit. We accept that Mr Saleem's evidence did not contain any inconsistencies, but he appeared surprisingly keen to entirely support the Appellant without carefully reflecting on the allegations against her. He seemed to brush aside Mrs Johal's detailed witness statements when invited by us to read them for the first time on the day of the hearing. Where there is a conflict in accounts between the evidence of the Appellant and Mrs Johal we prefer the evidence of the latter.
19. We entirely reject the Appellant's explanation for how the Johal November statement came to be made. The Appellant at first said that the first time she saw the Johal November statement was when she received an email from Ms Birks attaching the bundle in around December 2014. During cross-examination she repeated this but then explained that she actually first saw it when she found it in an envelope in a filing cabinet in around November 2014. When this inconsistency was put to her she then said that although she first saw it when she found it in the filing cabinet she did not read it. It is wholly incredible that the Appellant would find a statement / letter from an ex-employee and simply send this to her representative to disclose to the other side in legal proceedings without reading its contents. The Appellant accepted that she was surprised to find the envelope and simply could not explain why she did not read its contents. The Appellant was unable to explain the circumstances in which Mrs Johal would have been able to place the envelope with a statement / letter dated 8 November 2014 in the filing cabinet when she no longer worked there and had not been there since July 2014. The Appellant was also unable to credibly explain why Mrs Johal would not tell her about the statement / letter when it is so overwhelmingly positive about the Appellant. The Appellant suggested that this was a deliberate tactic on the part of Mrs Johal. She said that Mrs Johal wished to provide her with a supportive statement in order to retract it later and cause difficulties for her. We entirely reject this evidence and accept Mrs Johal's evidence that she never wrote any letter or statement to support the Appellant. We accept Mrs Johal's evidence that she did not leave the Appellant's employment with any 'bad

feelings' and they remained on friendly terms. We also accept Mrs Johal's evidence that she did not ask for her job back in July 2014.

20. We are satisfied that the Johal November statement was clearly not written or signed by Mrs Johal. There are a number of basic factual errors, which would not have been made by Mrs Johal. The Appellant maintained that Mrs Johal deliberately got these details wrong (such as the age of her own child) as part of a deliberate attempt to run her business down. We do not understand how the two can be sensibly linked. We regard the Appellant's explanation for these factual inaccuracies as implausible and incredible. The Appellant's continued insistence that Mrs Johal wrote and signed the Johal November statement in the face of overwhelming evidence that she did not do so reflects adversely on her credibility.
21. We are satisfied that the Appellant has deliberately lied to us about Mrs Johal asking for her job back. We prefer the evidence from Mrs Johal that she was happily settled at her employment. We are satisfied that Mrs Johal was not a disgruntled employee and had no motivation whatsoever to implement such a concocted conspiracy against the Appellant. On the other hand, the Appellant had a motive in submitting a supportive statement from Mrs Johal. Unlike her other witnesses Mrs Johal had worked with Ofsted in the past and the Appellant is likely to have held the view that support from Mrs Johal would be viewed particularly favourably. We note that within the very first line of the Johal November statement it is said that "*my other job was working for Ofsted*".
22. We are satisfied that the Appellant has not been open and honest about the evidence she has sought to rely upon from Ms Aurangzeb. We were told that she had prepared four statements. The first statement is dated 10 October 2014. This is unsigned but is in a similar format to Mr Saleem's statement and the Johal November statement. Ms Aurangzeb then wrote another brief statement emailed on 19 October 2014. The grammar and spelling is poor and it is written in a different style to the first statement. We do not accept that Ms Aurangzeb wrote the first statement. The use of language, grammar and style is wholly different to the second statement, which Ms Aurangzeb accepted reflected the way she wrote. The first statement also inaccurately states that Ms Aurangzeb worked for the Appellant for 3.5 years when she actually worked for her for 2.5 years as set out in the second statement. Ms Aurangzeb was unable to provide a credible explanation for this inaccuracy. In addition, Ms Aurangzeb could not offer a credible explanation for making another statement so shortly after the first statement. The third statement is an affidavit dated 26 January 2015. Ms Aurangzeb explained to us that she had rewritten this statement omitting sections of it. At first Ms Aurangzeb indicated that she just changed small aspects because it did not read well. It however became very clear that she wished to no longer rely upon substantive aspects of the affidavit critical of Mrs Johal and as such she asked the Appellant to provide the Tribunal with a rewritten statement. The Appellant then indicated to the Tribunal that she had emailed this amended statement to the Tribunal and the Respondent. We stood the matter down to enable the Appellant to provide us with confirmation that the email had been sent because such an email had not been received by either the Tribunal or the Respondent. Upon resumption of the hearing Mr Seeboruth said that such an email had not been sent to the Tribunal because the amended statement had only been received the night before. Neither the Appellant nor Mr Seeboruth provided an explanation for why the Appellant seemed adamant that an email attaching the amended statement had been sent or why the amended statement was not drawn to the Tribunal's attention at the beginning of the hearing. We are satisfied that this is another example of the Appellant being prepared to mislead the Tribunal and the Respondent. Had Ms Aurangzeb not volunteered this information the Tribunal would not have been told that she no longer wished to rely on the affidavit.

23. We are satisfied to the higher standard of proof that the Appellant knew the Johal November statement was not made or signed by Mrs Johal and she nonetheless submitted it to the Tribunal in the full knowledge and belief that it was a falsified document. We are convinced of this having considered all the evidence as a whole. First, the Appellant's explanation as to when she first saw the Johal November statement is inconsistent and incredible. Second, the Appellant lied about not reading the statement before submitting it. Third, the Appellant has made false allegations against Mrs Johal. Fourth, the Appellant was unable to explain why it was that the witness statements submitted by other employees were in a very similar form, used a similar font and contained similar wording to the Johal November statement. Fifth, the Appellant sought to rely upon forensic evidence that her work PC was not used to produce the Johal November statement. She made no reference to using her own laptop at work and did not provide any forensic evidence from this laptop. The first we heard of the existence of a laptop was when Mr Saleem gave evidence. He explained that he typed up his statement on the Appellant's laptop and not the work PC. We note the similarities between Mr Saleem's statement and the Johal November statement (same style of date, same font, use of 'yours sincerely' when it would be more appropriate to use 'yours faithfully' as the addressee is unknown, reference to Ofsted undertaking a 'witch-hunt' against the Appellant). Sixth, the Appellant failed to offer any clear and direct explanation for how the Johal November statement came to be made until the hearing itself even though this was the subject of explicit directions and a time extension in order to comply with directions. Instead the Appellant took the opportunity in the two witness statements she did prepare to make a number of wide-ranging, bizarre and irrelevant allegations against Mrs Johal. We consider these allegations to be a clear and blatant attempt to distract attention from the Appellant's own wrongdoing and omissions. We are also satisfied that the attempts to discredit Mrs Johal are unfounded for the reasons set out in Mrs Johal's second statement and paragraph 9 of the Respondent's skeleton argument. Seventh, we are satisfied that the Appellant has further mislead the Tribunal and the Respondent in falsely indicating that Mrs Johal had moved to Coventry and that she had no means of contacting her. It is clear that although Mrs Johal changed her phone number the Appellant was aware of her husband's phone number, as well as Mrs Johal's email and home address. The Appellant deliberately failed to pass these contact details on in direct breach of the Tribunal's directions in an effort to avoid Mrs Johal attending the hearing. Eighth, the Appellant attempted to mislead the Tribunal regarding Ms Aurangzeb's amended statement. Ninth, the Appellant had a clear motive to submit a supportive statement from Mrs Johal.
24. We cannot be sure that it was the Appellant who falsely wrote the Johal November statement and falsified the Appellant's signature on it. We are sure that when she submitted this statement to her representative at the time to be used within these proceedings, she knew and believed that it was not written or signed by Mrs Johal and she deliberately intended to mislead the Respondent and the Tribunal.

Application of facts to the strike out application

25. We accept that a decision to strike out proceedings must be a proportionate response to the conduct that has prompted it. We have a discretion whether or not to strike out. Striking out should generally only be used in the clearest of cases and should be used as a last resort. As made clear by Rule 8(4)(c) striking out may be appropriate for cases that simply cannot succeed.
26. We are absolutely clear that there is no reasonable prospect of the Appellant's appeal succeeding. This is not a decision we have taken lightly. We have considered detailed documentary evidence and heard evidence and submissions over the course of a full day. We have decided that the Appellant has been

deliberately dishonest regarding the making and submission of the Johal November statement. That deliberate dishonesty has continued up until the hearing before us when she put forward a series of explanations devoid of truth and sought to mislead the Tribunal regarding the evidence relied upon by Ms Aurangzeb.

27. We appreciate that there are a number of allegations against the Appellant, as set out in the schedule of issues for the main hearing. One of these includes the provision of misleading information against Ofsted. Even if we were to accept the Appellant's case on all of these issues, we are nonetheless satisfied that the Appellant has deliberately sought to mislead the Respondent, its legal representatives and the Tribunal over an extended period of time regarding the Johal November statement. The Respondent as the regulator is entitled to expect a provider to be trustworthy and honest in its dealings with it and in our view in failing to live up to these basic standards the Appellant has demonstrated that she is unsuitable to be registered.
28. During his submissions Mr Seeboruth invited the Tribunal to find that such an important conclusion could only be reached after hearing all the evidence at a final hearing. We disagree. We have been provided with and considered all the relevant documentary evidence. We have heard from all the relevant witnesses regarding the preliminary issue. The Appellant accepted through Mr Seeboruth that it was appropriate to conduct the preliminary issue hearing in the way that we have. We have reached clear findings of fact on the preliminary issue. It would be entirely disproportionate to go on to hear evidence regarding the Appellant's claimed past compliance when we are satisfied that even if she has been completely compliant in the past, her role in misleading the Respondent and the Tribunal during the course of these proceedings, has been so serious that the only proportionate response is a finding of unsuitability to be registered.

Decision

29. We strike out the Appellant's appeal under rule 8(4)(c).

Costs

30. The Respondent has made a costs application. We indicated to the parties and they agreed, that the most proportionate way of dealing with the issues of costs is by making the directions set out below.
- (i) The Respondent shall indicate in writing whether it wishes to pursue the costs application and if so, on what basis and over what period/s, together with a schedule covering the appropriate period/s sought, and file and serve this before 12noon on Friday 27 February 2015.
 - (ii) The Appellant shall respond to this in writing and file and serve that response before 12noon on Friday 13 March 2015.
 - (iii) The Tribunal shall determine the issue of costs on the papers on 20 March 2015.

Judge Melanie Plimmer
Lead Judge, Care Standards and Primary Health Lists
First-tier Tribunal (Health Education and Social Care)

Date Issued: 10 February 2015