

## Care Standards

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

[2016] 2781.EY-SUS

Before

Mr H Khan (Judge)

Mr M Flynn (Specialist Member)

Ms D Forshaw (Specialist Member)

Heard on 13 September 2016 at Manchester Tribunal Centre

**BETWEEN:**

**New Street Playgroup Committee**

**Appellant**

-v-

**Ofsted**

**Respondent**

### **DECISION**

#### **The Appeal**

1. The Appellant appeals to the Tribunal against the Respondent's decision dated 29 July 2016 to suspend its registration from the Early Years Register, the compulsory part of the Childcare Register and the voluntary part of the Childcare Register for six weeks upto the 16 September 2016 pursuant to section 69 of the Childcare Act 2006 ('2006 Act') and the Childcare (Early Years and General Childcare Registers) Common Provisions) Regulations 2008 ('2008 Regulations').
2. The appeal was received by the Tribunal on the 16 August 2016 and dealt with under the agreed expedited procedure.

#### **Attendance**

3. Ms Sarah Donlan attended on behalf of the Appellant and gave evidence. She was supported by two colleagues, Ms Diane Hill and Ms Sarah Davies who did not give evidence.
4. Mr Duncan Toole, solicitor represented the Respondent. The Respondents witnesses were Ms Alison Tranby, Early Years Regulator Inspector, Ms Ann Flynn, Early Years Regulator Inspector and Ms Kathryn Bell, Early Years Senior Officer.

### **Events leading up to the issue of the notice of statutory suspension**

5. The Appellant is a registered daycare provider and has been registered since 17 December 2003.
6. The registered person is the committee. The committee is made up of Suzanne Mackay who is also the Nominated Individual and her daughter Sarah Donlan. Ms Donlan has been on the committee since 2007 and is the manager of the setting.
7. On 29 July 2016, the Respondent received a call from Pauline Kruger (St Helen's Local Authority) confirming that they had received a call on Wednesday 27 July 2016 from Sarah Donlan informing them that the setting had been burgled between Monday, 25 July and Tuesday 26th July 2016. As a result of the information, Ms Kruger had telephoned the setting on Thursday 28 July and had spoken to Ms Donlan and heard children in the background. Ms Kruger followed this up with an unannounced visit on 29 July 2016 and found Ms Donlan was looking after one child at the setting. Ms Donlan informed her that she was looking after the child as a favour to a friend and was not being remunerated for it. Ms Donlan was unable to provide any risk assessments or other documents such as a DBS records that were requested by Ms Kruger. Ms Kruger reported that the whole setting looked messy and disorganised and there was no clear playing provision for children.
8. On 29 July 2016, Ms Allison Tranby, Early Years Regulator Inspector, contacted Ms Donlan by telephone. Ms Tranby was concerned as she found Ms Donlan to be incoherent and confused. Ms Donlan confirmed that she was taking antidepressants and Ms Tranby ascertained that there were two children at the setting whom Ms Donlan said she was trying to find alternative care for because the outdoor area was "*not right*" but could not specify what was wrong with it. Furthermore, Mrs Tranby became concerned about Ms Donlan's demeanour on the phone as she was taking several deep breaths and seemed upset and overcome by the conversation.
9. Ms Tranby consulted with Elaine White, a senior officer, who decided after an urgent case review that the registration of the Appellant would be suspended with immediate effect. This was because of the security and safety of the setting and the current presentation and mental

health of the manager/committee member. It was agreed that the Inspector would serve the suspension notice and would also advise Ms Donlan that a medical assessment would need to be completed by her.

10. The Respondent claims that the decision to suspend the registration was made due to its serious concerns about the safety and risk of harm to minded children in the care of the Appellant. This was down to two reasons. The first was because of the security and safety of the setting and the second was a current presentation and concerns about the mental health of the manager/committee member.
11. The period of suspension would allow it to ensure that the setting is made safe following the break in and for it to complete its investigations into the current health of the manager. The latter is dealt with by a process which can only be completed once the Health Declaration Booklet is sent back to the Respondent.
12. The Respondent believes that children in the care of the Appellant may be exposed to a risk of harm and that suspending the registration is an appropriate and proportionate step to take in the circumstances at this particular time.

### **Legal framework**

13. The statutory framework for the registration of childminders is provided under the 2006 Act. 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.
14. When deciding whether to suspend a childminder, the test is set out in regulation 9 of the 2008 Regulations as follows:

*“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.”*
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. 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.

17. 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.
18. The burden of proof is on the Respondent. The standard of proof '*reasonable cause to believe*' falls somewhere between the balance of probability test and '*reasonable cause to suspect*'. 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.

### **Evidence**

19. 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.
20. Ms Tranby submitted that she was the duty officer on 29 July 2016. She referred to a telephone conversation with Ms Kruger from St Helens LA, who had informed her of the break in and confirmed that there were children at the premises on 27 July. Further Ms Kruger confirmed that a child had also been present when she visited the premises on 29 July. Ms Kruger had explained to her that the whole setting looked messy and disorganised. The outdoor area had been broken into and toys had been broken and stolen.
21. Ms Tranby confirmed that she had spoken to Ms Donlan on 29 July 2016. Ms Donlan was not clear in her responses and appeared to be breathing heavily. Ms Donlan had informed her that there were two children present but was generally incoherent and not completing her sentences. Ms Donlan was concerned about the outdoor area but could not explain what the issue was. Ms Tranby explained that she became so concerned about the conversation that she asked a colleague if it was possible for it to be recorded. According to her Ms Donlan was very upset and informed her that she was not coping very well. Ms Donlan confirmed to her that she was taking anti-depressants.
22. Ms Flynn gave evidence that she had been involved with the case for some time. However, at the time the notice of suspension was served she was on annual leave. She had recently undertaken a monitoring visit on 18 August 2016 and found the setting locked and not operating in accordance with the terms of the suspension. However, the outdoor area contained rubble, would, stacked crates and was in her view unsafe for children. We were shown photographs which demonstrated that there was rubble in the pathway leading up to the entrance to the setting as well as in the play areas.

23. Ms Bell gave evidence around what happens during a period of suspension. She confirmed that Ofsted would ascertain the current status of the setting in terms of safety and security. A link to the health declaration booklet had been sent to Ms Donlan but a completed version had not been returned to them as yet. The process was that once completed by Ms Donlan, it would then be sent to her GP who then send it back to the Respondent for a specialist team to review. This team specifically assessed an individual's suitability to work with children. Following their review, the Respondent would decide whether there was information to confirm the individual's medical suitability. If more information was required then a referral would be made to Ofsted's independent medical advisers for their assessment and recommendation. However, she made it clear that the process could not be started until the health declaration booklet had been completed. She confirmed that if the health declaration booklet is returned, this could be prioritised so that a decision is reached quickly.
24. Ms Donlan confirmed that there had been a break-in between the 25 - 26 July 2016. Furthermore, she confirmed that whilst the Appellant had carried out substantial work inside the property, it had not carried out any work to the outside but would be doing so over the next few days. She accepted that the outside play area as it stood was not suitable for children. She accepted that there was rubble, wood and stacked crates on the premises, however, gave assurances that this would be dealt with over the next few days.
25. She also submitted that the conversation on 29 July with Ms Tranby whereby she appeared to be incoherent and was struggling to breathe was due to asthma. She claimed that she was having an asthma attack but could not convey that to the inspector.
26. Furthermore, although she was initially evasive about confirming whether or not she had completed health declaration booklet, she confirmed that she now had completed it and her GP had completed his part of it. Instead of sending it to Ofsted, he had returned it to her.
27. However, she had not sent the health declaration booklet back as she had received some advice that it was discriminatory "*as it was discrimination by perception*". However, she did not elaborate on why she took that view other than to say that is what she had been advised. She also confirmed that when she initially applied to be registered she had completed a health declaration booklet. She could not understand why other managers were allowed to produce a letter from the GP, whereas she was being asked to complete a health declaration booklet. She referred the Tribunal to a letter from her GP dated 25 August 2016 which confirmed her diagnosis and treatment.

### **The Tribunal's conclusions with reasons**

28. 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.
29. We concluded that we were satisfied that there may be a risk of harm to a child placed in her care. Our reasons were based on the fact that Ms Donlan on behalf of the Appellant accepted that the setting was not suitable to take children as it stood. There was rubble, wood and stacked crates at the setting and by her own admission this had not been cleared at the date of the hearing. Whilst the Appellant has said she has undertaken some improvement works inside the property, it is somewhat disappointing that despite being aware of this since the end of July 2016, the Appellant has not taken any steps to deal with outdoor areas such as the play area or the entrance. We were satisfied that there may be a risk of harm to a child placed in her care due to the state of the setting. We would have considered this ground alone would have been sufficient to justify the suspension.
30. However, we did go on to consider the issue of the manager's health. We were satisfied that given the way Ms Donlan presented to the professionals including Ms Tranby and Ms Flynn, it was reasonable for the Respondent to impose a suspension which would allow it to complete its investigations into her current health of the manager. The letter from her GP is limited and does not address her suitability to work with children. Furthermore, it mentions that her asthma is well controlled through medication and we find that given that she discussed various matters on the 29<sup>th</sup> July, it would have been reasonable for her to mention her asthma attack during the conversation with Ms Tranby.
31. Furthermore, the Appellant operates in the childcare environment and it is important that all those who work with children are assessed as being medically capable of doing so. There may be circumstances whereby the manager has to convey critical information to others, for example, in a medical emergency. In the circumstances, it is important that the manager is coherent and able to complete the task quickly and effectively. We therefore were satisfied that there may be a risk of harm to a child placed in the appellants care.
32. The suspension period will allow the Respondent to complete its investigations into the current health of the manager. That process may well have been dealt with more quickly had the manager completed the health declaration booklet as soon as it was sent to her. We had no reasons to doubt the assurances of the Respondent that if the premises and the health issue had been addressed earlier, the Respondent would have reviewed the need for the suspension. However, clearly that could not be done as Ms Donlan accepted that

the premises were not suitable for children at this stage and she had not completed the health declaration booklet.

33. We conclude therefore the continued provision of child care by the Appellant to any child may expose such a child to a risk of harm.

**Decision**

34. The Appeal is dismissed and the suspension is confirmed.

**Judge Habib Khan  
Lead Judge Primary Health Lists/Care Standards  
First-tier Tribunal (Health Education and Social Care)**

**Date Issued: 16 September 2016**