Care Standards

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

Heard **24-25 January 2017**
Royal Courts of Justice, London

Determination **26 January 2017**

Before
Mr Laurence Bennett (Tribunal Judge)
Ms Caroline Joffe (Specialist Member)
Mr Brian Cairns (Specialist Member)

BETWEEN

Dionne Roach

Appellant

v

Ofsted

Respondent

[2016] 2749.EY

DECISION

Appeal

1. Miss Roach appeals pursuant to Regulation 11 of the Childcare (Disqualification) Regulations 2009 and Section 74 of the Childcare Act 2006 against the refusal by Ofsted to grant a waiver from disqualification for caring for children under Regulation 10 of Schedule I of the Childcare (Disqualification) Regulations 2009.

Attendance

2. Miss Roach attended the hearing.

3. Ofsted was represented by Mr Gordon Reed of Sternberg Reed Solicitors.

4. Ofsted's witnesses were Mrs Pauline Nazarkardeh, an Ofsted Early Years Regulatory Inspector, Mrs Julia Crowley, an Ofsted Early Years Regulatory Inspector and Mr Martin Jeffs, an Ofsted Early Years Senior Officer and Decision Maker.

Hearing

5. The hearing took place in the Royal Courts of Justice, London.

Preliminary

6. The appeal was registered on 11 July 2016.

7. Case management took place including a telephone case management hearing.

8. In case management directions dated 18 August 2016 (C17) Judge H Khan ordered: "No material which may identify or lead to the identification of any child or family may be published or disclosed to any third party without the permission of the Tribunal." This order remains in force.

9. Both parties provided updated skeleton arguments and lists of issues at the hearing.

10. Page references in this decision relate to the paginated hearing bundle.

Background

11. By a notice dated 19 November 2014 (D37) Ofsted cancelled Miss Roach's registration as a childminder for reasons which include breach of safeguarding and welfare requirements. These relate to record keeping, sharing information and management issues, staff to child ratios and leaving children with persons for whom appropriate checks had not been completed.

12. Miss Roach appealed the cancellation and the appeal was opposed.

13. The cancellation appeal ended with the decision of Judge Plimmer on 12 February 2015 (D4). The decision states at paragraph 5: "The Appellant was suspended by the Respondent and appealed against the decision but withdrew her appeal at an oral hearing on 12 January 2015 on the understanding that the legal test to be applied is one of risk and not actual harm to children. At this hearing the Tribunal gave directions for the cancellation appeal. A hearing date was set down for 16 and 17 February 2015." The appeal was struck out and cancellation was effective from 12 February 2015.

14. Miss Roach's understanding of the disqualification appeal process and evidence relating to her perception of the suspension procedure prior to the disqualification is referred to below.

15. On 30 November 2015 Miss Roach applied for a waiver from disqualification on a form for early years provision in schools. It related to her wish to register as a nanny on the voluntary register (B1).

16. Following an interview on 13 April 2016 a decision was taken by Mr Jeffs on 19 April 2016 to refuse the waiver application. The notice of refusal is dated 9 May 2016 (B54a).

17. Following Miss Roach's notice of this appeal dated 11 July 2016 (C1) and process which included applications to strike out the appeal, Miss Roach was again interviewed by Ofsted on 19 December 2016.

18. A detailed chronology was submitted by the Respondent (A12).

19. Ofsted's letter of 9 May 2016 refusing consent to waive the disqualification (B54a) sets out "Her Majesty's Chief Inspector has decided to refuse to grant consent to waive your disqualification. We have decided to refuse your application because your application form and subsequent interview raised concerns for us that you are not willing to work with Ofsted as the regulator. You failed to demonstrate an understanding of the concerns leading to your cancellation as a childminder and minimise the reasons for cancellation as 'minor misdemeanours.' It is our view that you cannot be trusted to comply with requirements for the general childcare register."

Evidence at the hearing

20. Although their statements were included within the bundle, oral evidence was given at the hearing by Mrs Nazarkardeh, Mrs Crowley, Mr Jeffs and Miss Roach.

21. We found Ofsted witnesses factual and cogent. Their evidence reflected their statements and exhibited documents and explained the judgements they reached.

22. Miss Roach submitted an Educational Psychologist's report dated February 2008 which summarised an assessment and concluded that she has Specific Learning Difficulties/Dyslexia and that examination concessions should be made. We found her processing difficulties apparent in her presentation and endeavoured to assist her focus. She answered questions put to her and in some instances developed her response in the light of growing realisation of the issues before her.

23. Whilst Miss Roach held an understanding that the Tribunal may wish to reconsider the events which led to her disqualification and had submitted evidence to contradict the grounds for disqualification, she accepted during the hearing that the disqualification was a fact and as directed by Judge Khan on 21 October 2016 (C24) that "AND UPON Ms Roach confirming that she understands that the burden of proof is upon her to demonstrate that it is appropriate for a waiver to be granted to her. Furthermore, she also confirmed that she understands that the Tribunal has no jurisdiction to reopen the decision to cancel the Appellant's registration and her claim for compensation from OFSTED. She indicated that she had included the information around the cancellation and compensation in her witness statement due to her lack of legal training….. Ms Roach has accepted what the Tribunal can consider in these proceedings and will ensure that her evidence focuses on her reasons for requesting the waiver. She has accepted that the Tribunal cannot reopen the circumstances around the cancellation nor can it consider the issue of the compensation. She has acknowledged that this is an appeal against the refusal to grant a waiver of the Appellant's disqualification from caring for children."

24. Overall, we found Miss Roach truthful in her evidence.

25. At the direction of the Tribunal the Respondent presented its case first.

Evidence and submissions

26. The chronology referred to above sets out the factual matrix of the appeal events. Ofsted witnesses referred to the procedure they had followed involving 2 interviews each of which led to confirmation by Mr Jeffs as Decision Maker of their

recommendation that the waiver should be refused. Each witness emphasised that they had themselves found it inappropriate for Miss Roach to be placed on the voluntary register as they did not consider she had sufficiently accepted the reasons behind her prior cancellation nor sufficiently appreciated her responsibilities, particularly in relation to safeguarding and therefore there was an unacceptable risk of harm to children within her care whether or not limited to the role of a nanny.

27. Each of the Ofsted witnesses clarified their reasons for conclusions. They emphasised their joint view that Miss Roach did not have sufficient integrity or knowledge of safeguarding. This was tested in interview by scenarios recorded in the transcripts available within the bundle. They do not consider she could work with Ofsted as a Regulator as was clear from her reaction to the disqualification and subsequent actions. These extended to personal allegations against Mrs Crowley and attacking Ofsted's own integrity and ability as an organisation to safeguard children.

28. Miss Roach's statement of issues provided on the day of the hearing refers to events such as documents taken from her home, in her view unlawfully during the disqualification process and to press articles in respect of other Ofsted enquiries.

29. Whilst Ofsted noted improvements between the 2 interviews and the training undertaken by Miss Roach, they do not consider she has reached a standard which removes the risk of harm to children and meets the requirements for registration. Mrs Crowley referred to Miss Roach's response to scenario questions about how she would respond about an accusation made against her, looking after 2 children and reliance upon staff in locations such as Sure Start and Children's Centres. Mr Jeffs said that Miss Roach had not addressed the reasons for cancellation in the first interview as might have been expected. His view is that she does not accept that the disqualification was well founded and sought to minimise the reasons for disqualification.

30. Mr Jeffs said that unusually Miss Roach was interviewed twice because of the period of time that had elapsed during the appeal process and the further information she provided after initial interview and decision. He had read the documentation thoroughly including transcripts of the lengthy interviews and considers his decision is correct.

31. Mr Jeffs and Mrs Crowley said that Ofsted could not be confident Miss Roach would apply knowledge she had gained from her courses in respect of safeguarding in situations where she had sole responsibility for children. He did not consider the fact that she has limited her application to nanny activities mitigated the risk as she would still have sole responsibility for children. He and the other Ofsted witnesses explained that as a nanny/ home childcarer or childminder Miss Roach still had to comply with the requirements of the Childcare Register. Reference was made to the Ofsted guidance in respect of waivers (G139 and 140: para 397). Mr Jeffs said all these matters were taken into account.

32. Mr Reed's skeleton argument (A21) set out a list of issues within the statement of reasons for cancellation of Miss Roach's registration which should be taken into account and comments on the written case submitted by Miss Roach.

33. Miss Roach sought to contradict some of the findings upon which the cancellation was based, particularly in relation to leaving children with a member of staff who was herself disqualified. Miss Roach considers this the fault of Ofsted. She emphasised that no child had come to actual harm and expressed anger in Ofsted's actions when investigating the issues including speaking to her daughter and taking materials. She said account was not taken of improvements at the time, for example, record keeping, giving parents details of the early years framework and she was not given a sufficient period to meet welfare requirements that had been identified. She said that 4 weeks was not enough to retrain staff and introduce new procedures. She believed she had appropriate systems for staff recruitment. Having repeated these matters throughout her evidence, she also acknowledged that she accepted the issue before the Tribunal was not the cancellation of registration but she said she needed to show by reference to matters which were not heard at the time in an appeal that she has integrity, could work with Ofsted and that children would not be at risk.

34. Miss Roach said that her major reaction to the cancellation was that she did not want the responsibilities of looking after children in her own home nor supervising staff and on reflection she should be a nanny. Although she can act as an unregistered nanny, she wanted to be part of the voluntary register and recognised as a professional.

35. Miss Roach said that her problems with Ofsted arose from her own discussion with Hackney Learning Trust relating to Dolores Wilson whom she employed.

36. Miss Roach said that her integrity has been demonstrated by her honesty and stance during each of the interviews. She could have merely accepted the Ofsted position but felt that she had to put forward how she saw matters and feels that her standing up for herself has worked against her.

37. Miss Roach gave evidence of training including Level 3 Safeguarding. She said that she has not been in practice looking after children for some 2 years and considered it unreasonable for her to have detailed knowledge. She would be willing to be supervised and would update training. She mentioned points where she considers Ofsted has an incorrect expectation, such as referral to the Local Authority's Designated Officer now that they are part of the Local Authority Safeguarding Team. She said that her current employment requires high integrity and she has been security cleared.

38. Miss Roach suggested how circumstances might arise, for instance, when looking after 2 children when one required the toilet or was sick; she may have to rely on familiar staff in an appropriate location such as a child centre, having assumed all staff would be reliable, qualified and registered.

39. Miss Roach disagrees that she has minimised the reasons for her cancellation but said that she disagrees with some. She did not seek to shift blame but sought to justify and explain what had happened. She said that she withdrew from taking part in the cancellation appeal because she had originally appealed the prior suspension but when she attended the hearing she gained the impression that consideration was already being given to cancellation prior to suspension and that cancellation had already been decided prior to the suspension appeal. Miss Roach indicated

that she felt the relevant test is significant harm and not risk of harm as mentioned in Judge Plimmer's judgement.

40. Miss Roach summarised that she has a good rapport with children and that most of the reasons for cancellation will not apply in practice as a nanny. Whilst she might have been considered cantankerous in the 2 interviews, she did not seek to reopen the cancellation but wished to revisit particular events as part of the answers to the questions she was asked.

41. Mr Reed's closing remarks emphasised the importance of safeguarding and Miss Roach's inability to give adequate answers to questions, her lack of absorption of the training she has since undertaken and responses in interview which did not show expertise but would be expected from any member of the public. Mr Reed submitted that Miss Roach considers Ofsted's concerns are exaggerated as apparent from her statement and on that basis she could not be relied upon to contact Ofsted in necessary circumstances. He further submitted she lacked trust in the Tribunal process. Her integrity is in question and one could not rely on assurances or the accuracy of what she said. He gave as an example her conduct during the cancellation investigation. He does not consider integrity can be learned at a course but is a characteristic. He referred to Judge Plimmer's decision.

42. Miss Roach stated in conclusion that she understands safeguarding and she could re-familiarise herself in detail within 14 days. She has experience of children, including older children. Her son is 15. She acknowledged that her understanding of the law had been different but she did not seek to reopen the cancellation, she wished only to mention contradictory evidence relevant to the waiver application. She mentioned circumstances leading up to cancellation and pointed to documentary evidence in the bundle which she felt is inconsistent with some of the grounds. Miss Roach did not seek to switch responsibility to parents or other people. She restated she did not lack integrity and could retrain in safeguarding. She offered to accept weekly visits from Ofsted and to undertake any training they might consider. She also said she would attend with the child she was looking after several times a week at an Early Years Centre.

43. Further evidence and submissions are set out in the Tribunal's conclusions.

The Law

44. Paragraph 10 of the Childcare (Disqualification) Regulations 2009 provides that "Where a person would be disqualified from registration ……. the Chief Inspector may give consent to waive the disqualification for any or all of the following purposes." These include voluntary registration.

45. Paragraph 11 provides that any determination made by the Chief Inspector as to whether to give consent under Regulation 10 is a prescribed determination for the purposes of Section 74(2) of the 2006 Act.

46. Section 74(2) of the 2006 Act provides a right to appeal to this Tribunal. In this appeal the burden of proof is on the Appellant who must establish the facts upon which she relies to support a waiver on the balance of probabilities.

47. 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 refusal decision was made. 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 refuse or grant a waiver.

Tribunal's conclusions

48. The bundles including the Appellant's and Respondent's documents are lengthy; the Tribunal had an opportunity to study and consider the documents which include transcripts of interviews, one of which lasted some 3 hours. Whilst the written and oral evidence has not been reproduced in detail in this decision; it has been taken into account by the Tribunal.

49. We have noted the cancellation of Miss Roach's registration as a childminder and the reasons stated. We also have had regard to the decision of the Tribunal striking out Miss Roach's appeal against the cancellation and note the decision was not the subject of an appeal.

50. We have borne in mind the guidance utilised by Ofsted within the Early Years and Childcare Registration Handbook which was referred to by Ofsted. Whilst the status of that is guidance and does not have statutory force it sets out matters which we find appropriate to be considered in what is effectively a risk assessment that must be undertaken in connection with this application. We find that we should consider the position at the date of this determination and are not reviewing Ofsted's process. It is for Miss Roach to establish why she should be granted a waiver.

51. It is consistent with our approach that Ofsted by the agency of the Decision Maker, Mr Jeffs reviewed the position in December 2016 following a second interview after the previous refusal of waiver. We note that he postponed his decision until he had had an opportunity to consider documents including a transcript of the 19 December 2016 interview. We further note Mr Jeffs said any such request would be kept under review and account would be taken of the purpose of the waiver. He suggested that should an applicant wish to work in a supervised setting, it may be looked at more favourably, the applicant would not be alone but with others with safeguarding responsibilities.

52. We accept from the cancellation notice that the matters then taken into account were significant and that it is appropriate to take the cancellation into account as the starting point for consideration of the waiver application. Miss Roach disputes many of the aspects upon which the cancellation was based. However, the purpose of this appeal is not to consider the veracity of the information informing the cancellation but to note the grounds and the steps Miss Roach has taken to move on.

53. Despite Miss Roach stating she did not wish to reopen the cancellation we find both from the documents she submitted in the appeal, the transcript of the interviews and her repeated comments at the hearing that she does not accept Ofsted's findings. We note that during the hearing she accepted the fact of cancellation but still has a sense of injustice and realised she could not revisit and reopen those issues.

54. It is submitted that Miss Roach has minimised the concerns leading to cancellation, we find that she has. She appears to have rationalised the reasons and concentrated on what she believes are unjustified conclusions. She did not show an appreciation of the reasons it was necessary for Ofsted to take action. Whilst it might be considered that she misunderstood certain technical requirements and whether the steps she took were sufficient to discharge a duty such as relating to Miss Wilson, it is clear the effect of what she did whether as a result of misunderstanding, oversight or deliberate action was to put children at risk and in as much as it is appropriate for his Tribunal to comment on the cancellation, we are not surprised at that outcome.

55. Noting the reasons for the cancellation we have considered what steps Miss Roach has taken in the period leading to her waiver application and to date. It is clear she has thought about the situation. She has chosen to apply to operate as a nanny without staff and has undertaken some courses. Although she has sought to explain events when a childminder, Miss Roach asserts that she can now work with Ofsted and indeed did so as demonstrated by the actions she took at the time and since. She acknowledged difficulties with the Ofsted inspectors who appeared as witnesses at the hearing who were the individuals involved in the cancellation. We note her comment that there must be others in Ofsted with whom she will be happy to be in contact.

56. Miss Roach made offers which amount to voluntary supervision and management by Ofsted. We find her attitude at best inconsistent and shows misunderstanding of the role of Ofsted as Regulator and the reasons it would be impractical and inappropriate. This does not give us confidence that we can rely on her relationship with Ofsted nor her independent ability to follow required regulation.

57. We take the view that a nanny's responsibilities for children are significant. Nannies are in sole charge of other people's children whether in their family homes or when taking them out. They need to meet the relevant requirements of the Childcare Register, whether or not they are registered. A point made by Ofsted at the hearing is that registration is a public and official endorsement that the registrant is a professional capable of caring for a child alone, and can meet those requirements. The standard in this respect is no different for a nanny or childminder.

58. Ofsted submits that Miss Roach does not have sufficient integrity. We have not found she has deliberately misled others although she might be selective in issues she has rationalised or does not appreciate. We have reservations whether in certain circumstances Miss Roach could be trusted to react appropriately. Further, if open cooperation with Ofsted is what is meant by integrity, we share their misgivings.

59. Miss Roach has undertaken training; some courses detailed in the bundle are not relevant and relate to employment, management and leadership issues. Level 3 qualification in safeguarding is clearly relevant. We note she completed that course on line. The evidence within the interviews demonstrates that the course material has not been sufficiently embedded and she did not show the precision in her responses that might be expected. We are not satisfied Miss Roach has sufficient knowledge of safeguarding procedures at this stage. We also have reservations whether she has sufficient understanding and awareness in respect of ability to

observe, assess and reduce risk and respond appropriately in operating circumstances. Comments she made about spotting risk and actual harm show confusion in what might constitute harm and the requirement to report and further the correct destination of such report.

60. We have particular difficulty with Miss Roach's answers regarding leaving children with others in the scenarios mentioned. Overall, we conclude she does not have sufficient knowledge or appreciation of safeguarding procedures and relevant risk management.

61. The cancellation is relatively recent and we do not find any mitigation in Miss Roach's activities to date. The evidence of the interviews and these proceedings show that Miss Roach has not come to terms with or appreciated the significance of the reasons for cancellation nor other than to dispute certain grounds has she acknowledged and addressed the concerns raised by Ofsted at the cancellation. We note Miss Roach feels they are not relevant in that she has now chosen to apply for a waiver to be a nanny.

62. In summary:

- We have reservations about Miss Roach's acknowledgement, acceptance and relevant action in respect of cancellation issues
- We do not consider Miss Roach understands or appreciates the role of Ofsted and is able to maintain the required relationship
- Miss Roach has yet to have sufficient working knowledge of safeguarding requirements such that it can be confident she would apply them in practice

We find overall that the grant of a waiver would not avoid unacceptable risk for children and it is inappropriate.

Order:

63. Miss Roach's appeal is dismissed.

Judge Laurence Bennett
Care Standards
First-tier Tribunal (Health Education and Social Care Chamber)
Date Issued: 31 January 2017