



Care Standards

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

Considered on the papers on 30th June 2017

Before:

Ms Siobhan Goodrich (Judge)
Ms Caroline Joffe (Specialist Member)
Mrs Michelle Tynan (Specialist Member)

Between

KAA

Appellant

-v-

Ofsted

Respondent

[2017] 3046.EY-SUS

Decision and Reasons

The Appeal

1. By notice of application dated 19 June 2017 the Applicant appeals to the Tribunal against the Respondent's decision made on 12 June 2017 to suspend her registration on the Early Years Register and both the compulsory and general parts of the General Childcare Register for six weeks from 12 June 2017 to 23 July 2017 pursuant to section 69 of the Childcare Act 2006 ('2006 Act').
2. The Applicant seeks a direction that the suspension shall cease to have effect so that she can resume childminding again as soon as possible.

Paper Determination

3. The Applicant requested consideration on the papers and the Respondent did not object. The appeal was listed for consideration on the papers,

pursuant to rule 23 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('2008 Rules').

4. Although the parties are in agreement about consideration on the papers the Tribunal must consider whether it is able to decide the matter without a hearing. We consider that we have sufficient evidence regarding the nature of the allegations made, the Applicant's response to the allegations and the basis for the decision made. In the circumstances, we consider that we can properly make a decision on the papers without a hearing.

Restricted Reporting Order

5. The Tribunal makes a restricted reporting order under Rule 14(1) (a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents 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. In this appeal this includes anonymization of the Applicant's identity and avoidance of the identification of the locality involved.

The Background and Chronology

6. We set out below a summary of background and the main events that led to the imposition of suspension on 12 June 2017. This has been taken from information provided by the Respondent.
 - a) The Applicant was registered on 30 June 2016. She provides child care for a number of children at her home address. She has a son, M, who is aged 15. When he is not at school he is at his family home.
 - b) On 12 June 2017 the Designated Officer for Allegations (the DOFA) at the relevant County Council notified Ofsted that an allegation had been made in relation to the Applicant's son, M. The parent of the child has reported that her five-year old daughter had returned home from the Applicant's care, had undressed and crouched naked in a ball in her wardrobe. She told her mother that M had kissed her on the lips and this had happened on a couple of occasions. She stated that this happened when she went upstairs "where special things happen." She had told her mother that M had begged her not to tell her mother and that he would "marmalise her" if she did. It is recorded that E explained that this meant that he would tickle and cuddle her.
 - c) The Police confirmed that they had spoken to E who had been articulate, clear and concise in her description of what happened.
 - d) Ms Haylet, the Early Years Senior Officer, concluded at the care review later that day that there was reasonable cause to believe that children may be at risk of harm in the Applicant's care and that time was needed for the circumstances of the alleged incidents to be investigated. It was decided to suspend the Applicant's registration

- e) The police later interviewed M who denied the allegations.

The Legal Framework

7. 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.
8. 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.”
9. “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”.
10. 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.
11. The powers of the Tribunal are that it stands in the shoes of the Chief Inspector which basically means that the Tribunal can make any decision open to the Chief Inspector. The first issue to be addressed by the Tribunal is whether as at today's date 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.
12. The burden of satisfying us that the threshold is met lies 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.

Our Consideration of the Evidence

13. We have read and considered the bundle consisting of 60 pages. We will not refer to every aspect of the evidence but have taken all the information before us into account.

14. The bundle includes detailed reasons for the appeal signed by the Applicant on 19 June 2017, in addition to her detailed witness statement dated 26 June 2017.
15. In summary, the Applicant raises a number of matters which she considers cast doubt upon the reliability of the account apparently given by E. She places particular emphasis on a number of incidents that support that E is not a reliable witness and is known to have made up detailed stories a number of times, including one about a teaching assistant which, it is alleged, turned out to be a complete fabrication. On the Applicant's evidence, the mother of E appeared to doubt that the allegation made about M was true. The disclosure of which the Applicant was informed by the mother on 9th June was that M had forced E to have a hug and a kiss and was told by M not to tell her mother about it. She refers also to the apparent development of E's account between the account given to her mother on 9th June and that apparently given to the Headteacher and in the ABE interview. She is concerned about the circumstances in which E was asked to give an account by her Headteacher as this may have had an impact on what E said. She disputes that E has ever been allowed upstairs except under her supervision. She considers that she is extremely aware about safeguarding and child protection. She is waiting for Ofsted to visit her. She has conducted a risk assessment and had new written procedures. She says that other parents wish her to care for their children, including a parent who is also the teacher of E. She does not believe that the children are at risk of harm from her son.
16. We noted that whilst the applicant was expressly invited to provide Ofsted with any additional information she believed may affect the suspension of her registration, (see the suspension letter dated 12 June 2017 at page 16), she has not provided the risk assessment that she says she has formulated to Ofsted. The effect of her evidence is that she thought that Ofsted would visit her in the near future and she intended to discuss this then. We simply note that the opportunity to explain in writing how she now views the issues and to demonstrate her attitude and insight into safeguarding issues raised by the allegation is still open to the Applicant.
17. We note from the Response to the appeal that the view held by Ofsted at the allegations management meeting on 12 June 2017 was that it would be unreasonable to suspend the Applicant's registration immediately unless the police would be proceeding with an investigation. The police then confirmed that they would be conducting a criminal investigation. It is, however, not clear when the police investigation will be completed. Ofsted's view is that further investigation is required before it can consider lifting the suspension.
18. The Respondent relies on the statements from Vanessa Redmond, the Early Years Regulatory Inspector (see pages 46-48) and Mr Anton Hammond, the DOFA (see pages 57-60).

19. The Respondent's case is that suspension is in accordance with the law and is necessary and proportionate pending further investigation. As matters stand M is subject to an ongoing criminal investigation and, as such, D S Faulkner has stated that the Police would have ongoing safeguarding concerns in respect of other children in the home of M.
20. The Respondent is particularly concerned that the Applicant appears unable to contemplate that something may have happened. Ofsted places particular emphasis on the fact that until the police investigation is complete, it is unable to reach a view as to the Applicant's ability to safeguard the children in her care. At the moment the information it has regarding the Applicant's ability to safeguard children in her care is extremely limited because she had not shared her risk assessment and appears entirely focussed on her belief in her son's innocence.

The Tribunal's conclusions with reasons

21. We reminded ourselves of the lower threshold involved when considering a suspension. We reminded ourselves also that at this stage we are not finding facts or determining issues. Our task is essentially that of a risk assessment as at today's date in the light of the body of evidence before us, about which there is considerable dispute.
22. We add that whilst reference is drawn from case law as to our "placing ourselves in the shoes of the Chief Inspector", we are an independent Tribunal making a risk assessment as at today's date against the threshold set out in paragraph 9.
23. On the information before us the account apparently relayed to the Applicant on 9 June 2017 was that E had told her mother (on 8 June) that M had kissed and hugged her and told her not to tell her mother. In our view that allegation, if true, provokes legitimate concern. Further disclosure, if true, suggests that E's account is that this was not an isolated incident and that other incidents had occurred upstairs. The need to safeguard M against false allegations is also part of the picture. It would appear that both the school and the Applicant had noted that E had been quiet and withdrawn even before the alleged incident on 8 May and that her parents had recently separated. In short, the resolution of the issues of concern require sensitive and thoughtful handling by all concerned, including the Applicant.
24. We note that the Applicant has explained in some detail her conversations with the mother of M. The Applicant's account is that E's mother doubted that what her daughter said was true. It would appear that E's mother brought her son to be cared for by the Applicant on 12 June and had implied, at least in the morning, that E would also be collected from school by the Applicant because she had bought E's clothes for her to change

into after school. The Applicant's case is that she was not sure that there was an allegation. We take account of the applicant's concerns regarding the advice she was given when she contacted the office of the DOFA but was unable to speak to the DOFA himself. We cannot determine this matter, but have taken due note of it when considering the representations made by both sides.

25. In our view further investigation need to take place as soon as possible. The investigation is being undertaken by the police. So far as we can see, only E and M have been interviewed. It is not clear to us what further investigation is planned by the police. It is not known, for example, if the police intend to interview M's mother and/or the Applicant and/or school staff as part of their inquiries. Until the police progress the investigation or make a decision that their enquiries at an end, Ofsted is unable to conduct their own investigation because to do so may prejudice the police investigation.
26. We fully recognise that there is a live dispute regarding the allegation and the additional allegations made. The Respondent has satisfied us that there are reasonable grounds for us to believe that the continued provision of childcare by the Applicant to any child may expose such a child to the risk of harm. We consider that it is not currently reasonably practical for any necessary steps to be taken to eliminate or reduce the risk of harm. The investigation which is being conducted by the police is still at an early stage and more information is needed before Ofsted can form a view.
27. We recognise that the decision impacts adversely upon the private life interests of the Applicant, not least because the suspension will prevent her from earning her living. We are satisfied that the decision we have made is in accordance with the Regulations and is necessary in order to protect the public interest in the safety and welfare of children in the childcare setting.
28. Applying **Ofsted v GM and WM** [2009] UKUT 89 (AAC), we reminded ourselves that Regulation 9 sets a low threshold but the mere fact that the threshold is passed does not necessarily mean that the power of suspension in regulation 8 must be exercised. In our view the continuation of the suspension at the present time has a clear purpose, namely to enable the police investigations to be completed, hopefully in early course, after which Ofsted will have to take a view regarding the capacity of the applicant to safeguard children and whether adequate and proportionate arrangements can be put in place to safeguard children minded by her. The issue is proportionality having regard to the adverse consequences not only for the Applicant and her family but also for the children being cared for and their parents.
29. In reaching our decision on the issue of proportionality, we took into account that the impact of the suspension is very significant indeed. Not only is the Applicant prevented from earning her living but, in this particular

appeal, there is also a serious and continuing impact upon M and doubtless on other members of the family. It may appear very hard and unjust for the family to have to await the outcome of the police investigation against M. There is also the impact on the parents who use the Applicant's childminding services. We recognise that the impact of the decision is such that the Applicant will be unable to resume her childminding services at least whilst the outcome of the investigation is awaited and further consideration is given to the issues by Ofsted. This may impact upon the Applicant's business in the longer term even if the suspension is lifted at some stage. Having considered all the matters placed before us we balanced the harm to the Applicant's private life interests and those of others affected against the risk of harm. The serious nature of the issues raised by the disclosure made by E, in the context of all the information before us, led us to conclude that, at this point, the continuation of the current suspension is both necessary and proportionate to the need to investigate further.

30. We reminded ourselves that 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 the suspension continues to be necessary and to consider alternative options. We recognise that it is only after the police have completed their investigation that Ofsted will be able to fully assess the issue of risk and consider what action, if any, is proportionate moving forward. We recognise the pressures under which the police operate and the difficulties that may be involved but we would ask that Ofsted convey to the police that, given the needs of both children involved, it is desirable that the further investigation deemed necessary by the police is undertaken as quickly as possible.

Decision

The decision to suspend registration is confirmed and the appeal is dismissed.

Tribunal Judge Siobhan Goodrich
Care Standards
First-tier Tribunal (Health Education and Social Care)
Date Issued: 06 July 2017