

Care Standards

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

Heard on the papers on 3 January 2018

BEFORE:

**Judge Meleri Tudur, Deputy Chamber President
Ms Marilyn Adolphe, Specialist member
Mr James Churchill, Specialist member**

BETWEEN:

Marie Diligent-Parker

Appellant

v

Ofsted

Respondent

[2017] 3212.EY-SUS

DECISION

Events leading to the issue of the notice of statutory suspension.

1. The Appellant appeals to the Tribunal against the Respondent's decision to suspend her registration as a childminder on the Childcare Register for six weeks from the 14 December 2017, 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 Appellant is a registered childminder, first registered in October 2004. On the 1 December 2017, the Appellant notified the Respondent of a safeguarding issue in relation to child on a flight from Paris to London on the 5 November 2017.
3. The Appellant had provided her contact details to the police on arrival into the UK and was told that the police or Safeguarding Board would be in contact with her the following day.

4. Two days after the incident, the Appellant received a letter from the airline Jet2 regarding her conduct on the flight, but that letter had not been disclosed in evidence.

5. She heard nothing further from the police regarding the matter until she was contacted by the responsible officer on the 1 December 2017. He invited the Appellant to a voluntary interview at Otley. She contacted Ofsted on the same day to notify of the significant event and attended the interview on the 7 December 2017.

6. The Appellant's registration was suspended on the 14 December 2017.

7. The Respondent appealed against the suspension and the appeal was considered on the papers on the 3 January 2018. The Tribunal had in evidence before it the hearing bundle pages 1 – 203 together with a statement from Dr Christine Williamson, which was accepted as late evidence on the basis that its substance was already in the hearing bundle at page 197, hence there was no prejudice to the Respondent in its admission in evidence in the revised format.

Legal framework

8. 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 persons' registration. The section also provides that the regulations must include a right of appeal to the tribunal.

9. 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.”

10. “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”.

11. 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.

12. The powers of the tribunal are that on appeal it stands in the shoes of the Chief Inspector and so, 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.

13. 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.

14. The tribunal considers only whether the decision to temporarily suspend the Appellant's registration was justified and should continue and does not consider the veracity of the allegations made. The test is as set out in paragraph 12 above. The tribunal does not make any findings of fact at this stage in relation to the allegations made, and does not test the evidence in support of those allegations.

Evidence

15. The Respondent relied on evidence from police interviews about the allegation that an incident had occurred on a flight from Paris to Leeds-Bradford airport on the 5 November 2017, when it was alleged that the Appellant had been involved in an assault on a five year old child. The police provided a copy of a redacted witness statement taken on the 27 November 2017 from a passenger on the plane who reported noticing the Appellant's right hand make contact with the front of the child's face in "what appeared to be a pushing action" to push the child back into her seat. The witness confirmed at the end of the statement, their agreement to attend court as a witness to the incident if necessary.

16. A second statement by the Appellant made to the police on the 7 December 2017, set out her version of events where it was recorded that there was contact between her hand and the child's hair. She described the child's mother's response, shouting at her and calling a member of the crew. The Appellant confirmed that she had heard the mother's allegation to the police officer, and that she had denied the allegation to the police officer before leaving the plane.

17. The statement of Diane Plewinska made reference to the statutory framework for the Early Years Foundation Stage which requires providers to notify Ofsted of any allegation of serious harm or abuse by any person looking after children as soon as practicable and in any event within 14 days. A registered provider who, without reasonable excuse, fails to comply with the requirements commits an offence. There are corresponding provisions in regulations relating to both parts of the Childcare Register.

18. The statement of Ms Plewinska confirmed that Mr Peter Lloyd was allocated the case as the Regulatory Professional, and that he contacted the Appellant on the 11 December 2017, was told that the police were considering a possible charge of common assault and that the allegation had changed from pulling the child's hair and scratching the child to having slapped the child.

19. On the 13 December 2017, the Local Authority Development Officer (LADO), Mr Andy Kenyon notified the Respondent of the allegations and possible charge of common assault and on the 14 December 2017, Ms Plewinska and Ms Sarah Dimsdale agreed that suspension of the registration was necessary because they concluded that children may be at risk of harm. The case was reviewed on the 18 December 2017 and a decision made to defend the appeal lodged by the Appellant on the 15 December. Ms Plewinska's evidence was that at that point, the police investigation was not concluded and it was not appropriate for Ofsted to bring their own investigation whilst the police were still continuing their enquiries, to avoid any risk of compromising the police investigation.

20. On the 19 December 2017, the Respondent was informed that the police investigation was concluded and there was no further action being taken. A further case review by the Respondent concluded that the appeal should continue to be defended on the basis that there were further enquires to be undertaken which included gathering additional evidenced and interviewing the Appellant. The statement identifies conflicts in the Appellant's evidence which the Respondent wishes to explore. Ms Plewinska confirmed in her statement that the issues for the Respondent is the Appellant's failure to be truthful about notifiable events in the future, as well as the minimisation by the Appellant of the outcome of a previous investigation as well as conflicting evidence to the police about the incident on the plane.

21. At a further case review on the 20 December, further allegations regarding the Appellant's conduct were made, which the Respondent proposes to investigate.

22. The Appellant's reasons for the appeal focus extensively on the facts of the incident on the plane and the sequence of events which unfolded thereafter. She was told by the police that they or the Safeguarding Board would be in contact with her within 48 hours and neither did so. She stated that she had good reason to believe that the allegation had been dropped so as not to waste further police time, and there would be no follow up and she concluded that the allegation was not therefore significant.

23. It was not until the 1 December that the police asked her for a statement, and having received the request, the Appellant notified the Respondent and the LADO. She confirmed that she had heard the allegation made by the mother and the witness after the other passengers had left the plane and she stated that she had told the policeman that she had not done what had been alleged. It is acknowledged by the Appellant that "...the tip of my index finger skimmed passed her hair and just as quickly I pulled my but I have not pulled it (sic) and I have not touched her face or any part of her body."

24. The Appellant has provided a number of witness statements all of which provide character references for her regarding her conduct and childminding activities.

Tribunal's conclusions with reasons

25. The Tribunal has considered the evidence presented and the submissions made by both parties. We have taken into consideration the judgement of the Upper Tribunal in *Ofsted v GM & WM* [2009] UKUT 89 (AAC). We have taken into consideration the statutory framework, the relevant statutory provisions and we have reminded ourselves that on an appeal under Section 69, the Tribunal stands in the shoes of the Chief Inspector in considering the appeal, and that the exercise of the judgment required by regulation 8 will turn very much on the facts of the particular case.

26. We have taken into consideration the guidance in the *Ofsted v GM and WM* judgement that if *Ofsted* wishes to resist an appeal against a suspension on the ground that further investigations need to be carried out, it needs to make it clear to the First-tier Tribunal what those investigations are and what steps it might wish to take depending on the outcome of the investigations. The Tribunal must consider whether any continuation of the suspension has a clear purpose and therefore is capable of being proportionate having regard to the adverse consequences not only for the childminder but also for the children being cared for and their parents.

27. We have reminded ourselves that the standard of proof for civil proceedings is lower than the standard of proof in criminal proceedings: it is only necessary to prove facts on a balance of probability, rather than beyond reasonable doubt. In relation to the decision to be made in the current appeal, the standard of proof is "reasonable cause to believe".

28. The tribunal considered the position and the legal test on the basis of the information available up to the 14 December 2017. There was an allegation of a safeguarding and child protection nature of physical abuse against a child in a context other than the childminder's care. There was an independent witness who made a statement to the police and who was prepared to attend court to give evidence about what she had seen. Secondly, the Appellant was aware of the allegation made, had denied it to the police before leaving the plane, and had provided her contact details for further investigation if necessary. The Appellant made a statement to the police on the 7 December 2017 and was made aware that a possible charge of common assault would follow.

29. The concerns raised by these factors are twofold: first of all the allegation of abuse itself and secondly, the failure by a very experienced childminder to comply with the statutory requirement to notify of a significant incident as soon as reasonably practicable and in any event within 14 days.

30. The Respondent has provided additional information which they may choose to include as part of their further decision making in relation to the Appellant's registration, which both pre-dates and post-dates the main allegation but we did not consider that those allegations to be relevant to the decision to be made today. We have focused on the issues which led to the suspension on the 14 December 2017 and considered whether the need for a

suspension continues.

31. We have concluded in light of the Appellant's admission of contact between her and a child in circumstances where the police were called that there was a safeguarding incident on the 5 November 2017. There are conflicts in the evidence presented about the incident which require clarification and resolution through an interview with the Appellant and further information from the airline jet2 company. Ofsted is under a statutory obligation to carry out an interview with the Appellant and that has not yet been done. Furthermore, the issue of the failure to report a safeguarding and child protection incident is a serious one: the Appellant does not appear to have understood the gravity of the position in which she found herself on the 5 November 2017. As an experienced childminder of many years' standing, she should have a working knowledge and understanding of safeguarding policies and procedures sufficient to meet the legal requirements to notify significant safeguarding incidents. The police were involved and the nature of the allegation made by the parents of the child, whether or not she accepted them as true, may have constituted an issue which should have been reported to Ofsted in compliance with the statutory framework. There may however be a reasonable explanation by the Appellant to the delay in notification and this is another issue which will require further investigation by the Respondent.

32. It does appear from the evidence before the tribunal that there were faults on the part of other agencies, such as the police and the LADO in not referring the incident sooner, but that is not an issue which makes a difference in this context. The obligation on the Appellant is absolute, and any failure either to shoulder her responsibility or to grasp the seriousness of the situation is relevant to the decisions Ofsted must make regarding the safety of children in her care.

33. We are therefore satisfied that the information provided in the case is sufficient to satisfy the tribunal that the continued provision of childcare by the Appellant may place a child at risk of harm.

34. We are also satisfied that there are further investigations to be carried out by Ofsted to complete their statutory obligations, and to satisfy themselves as to the further steps to be taken. We conclude that all of these matters together provide grounds for a reasonable belief that the continued provision of childcare by the Appellant may expose a child to risk of harm and supports the continuation of the suspension in order for the Respondent to conclude their enquiries.

35. We are satisfied on the evidence presented that the suspension continues because the low threshold that there may be a risk of harm to the children in the Appellant's care is met in this case and consequently, the appeal against the suspension fails.

Decision

Appeal dismissed.

The notice of suspension is confirmed.

**Judge Meleri Tudur
Deputy Chamber President
Care Standards & Primary Health Lists
First-tier Tribunal (Health Education, Social Care)**

Date Issued: 5 January 2018