

Care Standards

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

[2018] 3233.EY-SUS

Heard on 5 February 2018 at the Royal Courts of Justice, London

BEFORE
Mr H Khan (Judge)
Ms W Stafford (Specialist Member)
Mr M Flynn (Specialist Member)

BETWEEN:

Mr Saula Ogunkoya

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal

1. Mr Saula Ogunkoya (“the Appellant”) appeals to the Tribunal against Ofsted’s (“the Respondent”) decision dated 11 January 2018 to suspend his registration to provide childcare on non-domestic premises at Bright Steps Nursery and Daycare, on the Early Years Register and both parts of the Childcare Register for six weeks to 21 February 2018 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’).

Attendance

2. The Appellant was represented by Mr Simon Butler (Counsel). The Appellant attended the hearing along with his wife, Ms Teju Ogunkoya.
3. Ms Juliette Smith, Solicitor, represented the Respondent. The Respondent’s witnesses were Dr Nataliia Moroz (Early Years Regulatory Inspector), Ms Pauline Nazarkardeh (Ofsted Senior Officer) and DC William Hughes (Metropolitan Police).

4. We also had statements from Mr Penny Fisher (Senior HMI) and Ms Anne Allen (Local Authority). It was agreed that these statements would be read.

Late Evidence

5. The Tribunal was asked to admit additional evidence by the Appellant. This included photographs of the setting and the Regulatory Reform Fire Safety Order 2005, Fire Risk Assessment Report completed on 2 February 2018. The Respondent did not object to the admission of the late evidence.
6. The Respondent also sought to admit late evidence including updated statements from Ms Nazarkadeh and Dr Moroz. The Appellant did not oppose their admission.
7. We admitted the late evidence as its admission was agreed between the parties and it was relevant to the issues in dispute. In considering any late evidence, the Tribunal applied rule 15 and took into account the overriding objective as set out in rule 2 of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008.
8. We were also invited by the Appellant to order the disclosure of the email sent to the Respondent on 5 January 2018. This application was opposed on the grounds that email contained the name, address and telephone contact details of the complainant. The advice from the Police to the Respondent was that its disclosure could compromise the criminal investigation.
9. We refused the application on the grounds that there was no dispute that an allegation was made, the Appellant was aware of details of the allegation and that there is an ongoing criminal investigation.

Restricted reporting order

10. 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.

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

11. The Appellant was first registered as a childminder on 16 November 2012. He owns and manages the provision and his wife, Ms Ogunkoya, is employed as the Deputy Manager.
12. There have been a number of previous suspensions. A suspension decision was taken on 10 February 2017 regarding concerns which included unsafe handling of children, behaviour management and safety/hazards in the building.
13. The second suspension decision was taken on 22 November 2017. This was taken following concerns regarding children being handled unsafely in a way that placed them at risk of injury. The suspension was lifted on 14 December 2017 as it appeared that the Appellant had dealt with the immediate risk to children in relation to the safety of the building and had indicated some improvement of his attitude towards safeguarding and behaviour management issues.
14. On 5 January 2018, Local Authority Designated Officer (LADO) contacted the Respondent with a new safeguarding concern about the setting. The Local Authority had been contacted the previous day by a member of the public who stated she saw a member of staff smacking a child aged approximately 3 to 4 years old at the setting. It was alleged that the witness stated that she immediately approached the member of staff and asked for her name and for an explanation as to why the child had been smacked. The member of staff refused to disclose any details. The witness went on to say that she had other concerns about the setting and worried about the safety of children who attend it.
15. The Appellant was sent an email by the LADO on 8 January 2018 requesting his attendance at a strategy meeting 10 January 2018. The Appellant responded to the LADO on 9 January 2018 refusing to attend the meeting as it was taking place within the operating hours of the nursery.
16. The strategy meeting was arranged for 10 January 2018 with senior Local Authority representatives and the Police. The Appellant did not attend this meeting. At the meeting there were also concerns raised in relation to planning permission, building regulation approvals and fire risks at the setting. DC William Hughes informed the meeting that they were investigating the matter and he would be contacting the Appellant to arrange for seizure of the CCTV at the setting.

On the 11 January 2018, the Respondent considered the information gathered at the strategy meeting and made the decision to suspend the registration of the Appellant. The Respondent claims that the decision to suspend the registration has been made on the basis it reasonably believed that the continued provision of childcare by the Appellant to any child may expose such a child to a risk of harm.”

17. The Respondent's reasons for doing so were that it held a reasonable belief that there may be a risk of harm to children at the setting. It sets out that a serious allegation had been made about a young child being assaulted and the police were investigating.
18. The Respondent was concerned that such an allegation had been made, apparently, on the first day the setting had reopened following the earlier suspension and against the background of concerns about the setting. This was also despite assurances the Appellant had given two inspectors on 13 December 2017 that he and his staff would act to safeguard children. The member of staff in question had allegedly been approached and had seemingly refused to provide details. The Respondent was also concerned about the Appellant's response to the LADO and of his refusal to attend a strategy meeting.
19. The decision was taken to allow for all matters to be investigated including matters raised at the strategy meeting including the unsafe setting, lack of planning permission and risks around fire safety. The Respondent contends that those matters may expose children to risk of harm and required investigation.

Legal framework

20. 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.
21. 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."
22. "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".
23. 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.
24. 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.

25. 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

26. 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.
27. Dr Moroz set out the background to the matter. She explained that on 5 January 2018, she had received a notification of a concern about the setting operated by the Appellant. The Respondent had received an email from the LADO notifying of an allegation made against a member of staff who was seen smacking a child. A strategy meeting had been arranged for 10 January 2018 with senior local authority representatives and the police. The Appellant did not attend the strategy meeting on 10 January 2018.
28. Dr Moroz explained that the Metropolitan Police indicated at the strategy meeting that they were taking the matter seriously and would investigate. The Respondent, therefore, had to allow the police time to conduct their criminal investigation so as not to compromise any police investigation. At the same meeting, there were concerns raised about breaches of housing regulations, building regulations, fire safety issues and a lack of planning permission.
29. Dr Moroz attended a further strategy meeting on 24 January 2018. The Appellant had attended this meeting but had denied being at the setting on 3 January 2018. He also denied that there were any children there on that day. In her view, the Appellant was providing contradictory information to the police. The Appellant had believed that the allegations made were malicious. Dr Moroz did not think that he had the relevant planning permission. She referred to the letter that the chief executive, Ms Gill Steward of London Borough of Bexley had sent to the Head of Ofsted dated 17 January 2018. This referred to the setting not having planning permission to operate as a childcare provider and being in unlawful operation since 2014.
30. However, Dr Moroz accepted that other than carrying out an Internet search of the LA's planning permission records, she had not spoken to anybody from the planning department.

31. Ms Nazarkadeh explained that she had taken the decision to impose a suspension on 11 January 2018. She had considered all the evidence. She set out that the Respondent had not made a decision to impose the suspension immediately after being made aware of the allegation. It had waited to ascertain various matters including what action the Appellant would take (for example, such as by suspending the relevant staff member).
32. However, the Appellant had not attended the strategy meeting on 10 January 2018. This was despite him being informed. Ms Nazarkadeh had taken into account that the police had attended a strategy meeting and had confirmed that they were taking a witness statement from the complainant and were now investigating the matter. In the circumstances, the Respondent's investigation into the allegation received would need to wait the outcome of the police enquiries as the Respondent did not wish to jeopardise the criminal investigation.
33. The Respondent was concerned about the Appellant's response to the allegations and his lack of co-operation. For example, the police were so concerned about his lack of cooperation that they considered arresting him for perverting the course of justice. Ms Nazarkadeh found it concerning that the Appellant was taking this approach given that he was the designated lead for safeguarding at the setting.
34. Ms Nazarkadeh had reviewed the suspension on 18 January and 25th January and had determined that they should continue. She would continue to ensure that the suspension would be reviewed regularly including on receipt of any new evidence.
35. PC Hughes confirmed that there was an ongoing criminal investigation by the Metropolitan Police. He had produced a statement but this has had to be sent to the Metropolitan police legal team for approval. He had attended the LADO meeting on 10 January 2018.
36. Ps Hughes confirmed that they were aware of an allegation made that a witness saw a member of staff smack a child. The witness was credible. There had been some difficulties in getting a witness statement from this witness. There had been one attempt on 19 January 2018 to obtain a witness statement but the witness only had 10 minutes spare due to personal circumstances. However, they had now obtained a witness statement from this witness. There were other lines of enquiry which now needed to be undertaken. This included speaking to other witnesses and obtaining CCTV footage from the area.
37. PC Hughes set out that on Monday, 15 January 2018, he had contact the Appellant about his CCTV system. The Appellant had spoken to him over the phone and when he realised it was a police officer, his manner on the phone changed. The Appellant suddenly became too

busy to speak with him and said he would call him back. He arranged with the Appellant to collect CCTV from the footage that the Appellant had on 16 January 2018. However, PC Hughes was on leave on 16 January 2018 but the Appellant failed to show up at the venue to allow for the viewing and copying of the CCTV. He did not respond to calls from his colleague, Sgt Roch. The police had even considered arresting the Appellant for his non-cooperation.

38. PC Hughes explained that the Appellant then told the police that his CCTV had been destroyed by a water leak. The Appellant had not responded to requests for information from the Police regarding when the leak occurred, who repaired the leak and documentation to prove this. PC Hughes accepted that the Appellant had brought photographs to the strategy meeting on 24 January 2018 but these had not been shown to the complainant as yet.
39. The police investigation was ongoing. There were witnesses to be spoken to and CCTV to be obtained. PC Hughes explained that as there was a suspension in place, other more pressing matters had been given priority. However, he would be progressing this investigation now that he had a written statement from the witness.
40. The Appellant set out that he did not attend the strategy meeting on 10 January 2018. This was because it was arranged at short notice. He was collecting children on the school run and if he had attended this meeting then the staff ratio would be affected.
41. He accepted he was at the premises on 3 January 2018. His staff were present. However he was in and out of the premises. It was a training day for staff. There were no children present on the day although there was an initial suggestion that his two children were present. He explained that when the suspension was lifted in December 2017, he wanted to make sure there were no more issues and therefore he opened the nursery later in order to allow for the training. The training they were completing was around handling children and behaviour management.
42. An email was sent to him by the LADO regarding the allegation but he only became aware of it when the LADO informed him by telephone on 9 January 2018. He did not get round to telling Ofsted.
43. He denied there were any fire risks. He denied that he was operating without planning permission. He did have planning permission to operate. He had cooperated with the investigation.
44. The Appellant explained that the CCTV had been damaged in mid-November. This was because there was a water leak. He had destroyed the CCTV system in mid-December after waiting for it to dry out. It had stopped working.

45. He denied arranging with the police for them to attend on 16 January 2018. When the police called him on 15 January, he was with a parent. However, he felt PC Hughes was insistent and he agreed to the meeting. On 16 January 2018, he received a call from a number that was withheld. He did not know who had called him. He could therefore not respond.
46. He did not take the allegation made in respect of the incident on 3 January 2018 lightly. This was a serious allegation. He thought the “*safety of a child was paramount*” and “*no stone should be left unturned*” in investigating such allegations. He did not know which staff member it was so could not suspend them. He had spoken to his staff about the allegations.
47. He thought the police had been aggressive with him. He could not understand why the LA were saying he did not have planning permission. He did have planning permission. He has complained in the past about OFSTED’s approach. He considered he did have it. He wasn’t aware what impact a lack of planning permission would have on his public liability insurance.
48. Ms Ogunkoya stated that she was providing the training on 3 January 2018. Their children were being looked after by relatives. The Appellant was in and out of the premises during the day.

The Tribunal’s conclusions with reasons

49. We remind ourselves that 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.
50. We reminded ourselves of the lower threshold for confirming the suspension and reminded ourselves that at this stage we are not finding facts.
51. We found all of the Respondent’s witnesses to be credible and their evidence to be consistent with the documentary evidence in the bundle. Whilst we took into account the Appellant’s concerns regarding the approach Ofsted, the LA and the Police took, we were not presented with persuasive evidence which supported his views that the investigations were somehow either ill-founded or inappropriate in any way.
52. We concluded that we were satisfied that the continued provision of childcare by the Appellant to any child may expose such a child to a risk of harm. Our reasons for doing so are set out below.

53. There is at present an ongoing criminal investigation into the allegation of assault on a young child by a member of the Appellant's staff. There is no dispute that a serious allegation has been made. The allegation has been made by a witness without any connection to the setting. The investigation has made considerable progress in the last week. However, we took into account that it is not complete.
54. The reason that the police investigation has taken longer than anticipated was due to difficulties obtaining a statement from the witness who saw the alleged assault. We did not consider that the police were in any way delaying the completion of the investigation. PC Hughes made it clear that he had been proactive in contacting the witness to take a statement. We were made aware of the complainant's personal circumstances which may have led to the difficulties in obtaining a statement. PC Hughes made it clear that there are now further lines of enquiry including obtaining CCTV from neighbouring properties and enquiries with further witnesses. We therefore consider that there was still a real possibility that evidence sufficient to support further enforcement action could emerge from any investigation.
55. It was clear to us that where, as in this case, there is a suspicion of an assault on a young child, the LADO, the police and the Respondent are all undertaking their investigations into this matter. These bodies are involved because each has a different role. It was clear from the evidence of Ms Nazarkadeh that the Respondent is unable to complete its enquiries in order to avoid compromising the police investigation. Nevertheless, it was clear that there was coordination between these agencies. For example, it was the Respondent who contacted the individual who made the allegation of assault which resulted in a witness statement being obtained by the police. Dr Morotoz also described almost daily interactions with the Police on the matter. In our view, the Appellant appeared to display a lack of familiarity with the role of the professionals in these organisations when such allegations are made.
56. We acknowledge the Appellant's concerns about the impact that this has had on his business since the suspension was imposed. We also acknowledge the impact it has had on his staff and those that attend the setting. However, we found that the Respondent has taken a considered approach to imposing the suspension and has kept it under review. For example, the Respondent did not immediately move to suspension after the allegations were brought to their attention by the LADO. The Respondent waited until after the strategy meeting on 10 January 2018, when it heard from the police and the LA and took into account the Appellants non-cooperation (which the Appellant says was due to him being unable to attend the strategy meeting due to staff ratio issues) before moving to suspension.

57. We acknowledge that the Appellant attended the strategy meeting on 24 January 2018. However, the police investigation is at present at an important stage. Furthermore, Ms Nazarkadeh has kept the suspension under “*constant review*”. For example, Ms Nazarkadeh has reviewed the matter on 18 January 2018 and 25 January 2018 in order to consider whether the suspension is still appropriate. We had no reason to doubt Ms Nazarkadeh’s evidence that this would remain the case.
58. The Appellant has also not helped matters by failing to fully comply with the police investigation and by providing varying accounts of the position around the existence or otherwise of the CCTV evidence on his premises. The Appellant did not attend the meeting arranged on Tuesday, 16 January 2018 by the police to attend his premises in order to review and copy the CCTV footage at his premises. The email from Sgt Roch dated 22 January 2018 makes it clear that the police had attempted to contact him on 16 January 2018 and were sufficiently concerned about evidence being destroyed that they were considering arresting him. It appeared that he only informed the police that the CCTV system had been destroyed by a water leak on 19 January 2018.
59. Furthermore, whilst we took into account that the Appellant has not taken any action in relation to a staff member as he does not know which staff member was involved, nevertheless, the result is that all the staff members would be working at the setting were the suspension to be lifted before the investigation were to be completed.
60. We acknowledged the positive references from parents that have been referred to by the Appellant in his response to the appeal. It is not clear what knowledge those contributing had of these proceedings, but, nevertheless, we acknowledged that these were positive references.
61. In reaching our decision, we also took into account a range of factors including the Appellants circumstances, the parents who use the services and the disputed nature of the allegations. However, in our view, the nature of the allegations led us to conclude that at this point, the action taken is both proportionate and necessary.
62. 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 is necessary.
63. We conclude therefore that the continued provision of childcare by the Appellant to any child may expose such a child to a risk of harm.

Decision

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

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

Date Issued: 8 February 2018