Care Standards

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

[2018] 3434.EY-SUS

Heard on 13 September 2018
At the Employment Tribunal, Leeds

BEFORE
Mr H Khan (Judge)
Mr M Flynn (Specialist Member)
Ms D Rabbetts (Specialist Member)

BETWEEN:

Ms Emma Victoria Battersby

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal

1. Ms Emma Victoria Battersby ("the Appellant"), appeals to the Tribunal against OFSTED's ("the Respondent") decision dated 7 August 2018 to suspend her registration from the Early Years Register for a further period of six weeks from 8 August 2018 to 18 September 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 attended the hearing and was represented by Mr Shaun Perera. She was also accompanied by Ms R Latif.

3. Mr Gordon Reed, Solicitor, represented the Respondent. Ms H Blackburn (Regulatory Inspector) and Ms D. Plewinska (Early Years Senior Officer) attended on behalf of the Respondent. Ms Jane attended as an observer.

Restricted reporting order

4. 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 to the issue of the notice of statutory suspension

5. The Appellant is the sole owner of Flutterbies Nursery, Rotherham, South Yorkshire ("the Setting").

6. The event which precipitated these periods of suspension was an incident which took place on 19 February 2018. On the 19 February 2018, it was alleged that an incident occurred at the nursery just before 1pm which resulted in a member of staff calling the police for emergency support in dealing with Mr S Perera, who was on the premises.

7. The police attended the nursery and as a consequence made a Child Protection Referral to the Local Authority that same afternoon. At 4.45pm the Local Authority Designated Officer (LADO) for safeguarding notified the Respondent that there had been an incident at the nursery that day involving Mr Perera who they believed was the partner of the Appellant.

8. The case was risk assessed as part of Respondent's procedures and it was considered necessary for action to be taken. A first suspension was put in place on 21 February 2018 to remain in force until 3 April 2018. There was no appeal to the Tribunal in relation to that suspension.

9. On 4 April 2018, the Appellant was given notice of a second period of suspension that would continue until 15 May 2018. That was appealed and the suspension was confirmed following a hearing on 10 May 2018 (decision issued on 16 May 2018).

10. On 17 May 2018, the Appellant was given notice of a third period of suspension that would continue until 26 June 2018. That was subject of an appeal to the Tribunal and suspension was confirmed following an oral hearing in a decision dated 27 June 2018.

11. On 3rd July 2018, the Appellant received notice of fourth period of suspension that would continue until 7 August 2018. That was also subject of an appeal to the Tribunal, who confirmed the suspension, having considered it on the papers in a decision dated 2 August 2018.

12. This appeal relates to the fifth suspension and which expires on 18 September 2018.

13. Following the oral hearing, due to insufficient time, we directed the parties to file closing submissions. Both parties filed written submissions as we directed.

14. There were a number of preliminary applications that the Tribunal was invited to consider. Our conclusions in relation to those applications are set out below.

Late Evidence

15. The Tribunal was asked to admit additional evidence by the Appellant. This consisted of a statement from Ms Rafana Latif dated 12 September 2018, a Certificate of Achievement relating to a course entitled "An Awareness of Domestic Violence Including the Impact on Children and Young People" dated 12 September 2018 and a letter from Dinnington Group Practice dated 6 September 2018. The Respondent also sought to admit late evidence which consisted of the Health Declaration Booklet.

16. We admitted the late evidence as 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.

17. We acknowledged that some of the Appellant's evidence including the letter from the Dinnington Group Practice and the Certificate of Achievement had only been completed or received in the days before the hearing. The Appellant accepted that the statement of Ms R Latif was late and that she had no good reason for it. We concluded that although the evidence was late, it was not particularly lengthy and was important to the issues before us. We also agreed to admit the Respondent's Health Declaration. Furthermore, we permitted the the parties to address any issues raised in the late evidence as part of their oral evidence.

Exclusion of Mr S Perera

18. The Respondent made an application for Mr Perera to be excluded from the hearing when the Appellant was giving oral evidence due to the evidence of the controlling and intimidatory nature of his relationship with her (as contained, for example, in the police reports) and the risk that this is likely to prevent the Appellant from giving her evidence freely.

19. We heard submissions from both Mr Reed and Mr Perera on behalf of the Appellant following the conclusion of the Respondent's evidence on this issue.

20. We concluded that we would (pursuant to Rule 26) grant the Respondent's application. We were persuaded that there was enough evidence in the witness statements from a number of sources including the Appellant's staff and police reports concerning the nature of the relationship between Mr Perera and the Appellant so that the oral evidence of the Appellant was more likely to not be so freely given if he was present.

21. The Appellant requested (through Mr Perera) that in the event, we were minded to make an order under Rule 26, that we should limit this to any evidence the Appellant gave in relation to matters involving Mr Perera. Mr Reed confirmed that the Respondent did not object to this approach in the event that we were minded to grant the application. We concluded that this was a proportionate approach and Mr Perera was excluded from the hearing when the Appellant was giving evidence in relation to matters involving him. He was, however, present when she was giving evidence in relation other matters.

The Respondent's strike application

22. We considered the Respondent's strike out application. We refused it for the reasons set out below.

23. Under Rule 8 (4) (c) of the 2008 Rules, the Tribunal may strike out the whole or part of the proceedings if the Tribunal considers there is no reasonable prospect of the Applicant's case, or part of it, succeeding. The test is very similar to the test in the Civil Procedure Rules for striking out and summary judgement ("no reasonable grounds" and "no real prospect"). It is a high hurdle.

24. As it was explained in the Three Rivers District Council and Others v Governor and the Company of the Bank of England (3) [2001] UKHL 16, [2001] All ER (D) 269 and in particular by Lord Hope at [87] to [95], the power to dispose of a case summarily is a discretionary power which requires the exercise of judgement in weighing up the prospects of success. The test is essentially whether the prospect of success is fanciful. If serious consideration of the issues is required, such that a mini trial might be necessary that indicates that the power should not be exercised.

25. The power is designed to deal with cases that are not fit for trial at all; Swain v Hillman [2001] 1 All ER 91. The power must be exercised with care and in accordance with the overriding objective of the 2008 Rules to deal with a case fairly and justly. This must include assessing whether there is any realistic possibility that evidence could be adduced at trial to support the case being put, such that it would not be a waste of time and resources to proceed to a hearing.

26. The burden of proof in respect of the strike out application rests with the Respondent.

27. We reminded ourselves that the decision to strike out proceedings involves a balancing of competing considerations. Striking out may be appropriate for a case that cannot succeed and is appropriate if the outcome for the case is realistically and for practical purposes, clear and incontestable. However, we acknowledged that striking out is a draconian step and should be used for the clearest of cases. It is a high hurdle. In dealing with this application, we took into account the overriding objective of the 2008 Rules to deal with a case fairly and justly.

28. These suspension hearings are usually listed within tight timescales pursuant to the Memorandum of Understanding and the practical implications of that is that any strikeout application is more than likely to be heard at the same time as the final hearing.

29. This is in order to ensure that the requirements of rule 8 The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (as amended) ("the 2008 Rules") are met. In accordance with Rule 8(5) of the 2008 Rules, the Tribunal may not strike out the whole or part of the proceedings under 8(4) (c) without first giving the Appellant an opportunity to make representation in relation to the proposed striking out. The Appellant was given an opportunity to respond pursuant to the Order made on 4th September 2018 and provided a written response.

30. We refused the Respondent's application to strike out the proceedings for the reasons set out below.

31. The Respondent refers to previous appeals in its strike application, however, this is an appeal in relation to a new suspension for which there is a statutory right of appeal.

32. It is clear that the facts relevant to the outcome of the case are disputed. The Appellant submits that there have been two changes of circumstances which have not been considered by a previous tribunal. These are that Mr Perera has completely left the employment with the Appellant and therefore has no further involvement with nursery operations. The second is that the Appellant's GP has confirmed in writing there are no significant health issues pertaining to the Appellant. The Appellant has also put forward evidence relating to a new course undertaken and referred to above.

33. We concluded that, having regard to the circumstances of the case, that the disputed issues are of a character that ought to be determined after consideration of the evidence. We observed that the Respondent was also relying on updated evidence since the last hearing and which were contained in the witness statements supplied in the hearing bundle. Notwithstanding our observations, all the witnesses were present at the hearing and we did not consider that it would not be a

waste of time and resources to proceed to a hearing.

Legal framework

34. 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.

35. 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."

36. "*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*".

37. The suspension shall be for an initial period of six weeks, which can be extended by a further period of six weeks where based on the same circumstances. Thereafter it can only be extended, under regulation 10 where it is not reasonably practical for the Chief Inspector, for reasons beyond her control, to complete any investigation into the grounds for her belief under regulation 9, or, for any necessary steps to be taken to eliminate or reduce the risk of harm referred to in regulation 9. In those circumstances the suspension may be extended. 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

38. 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.

39. 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

40. We took into account all the evidence that was presented in the hearing bundle and what was presented to us at the hearing. This included the closing submissions filed after 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.

41. Ms Helen Blackburn set out that she remained concerned about Mr Perera's role in the setting. Ms Blackburn acknowledged that the Appellant now said Mr Perera had resigned from the setting. However, there had been confusion as to what his role was at the setting. The Respondent had now commenced cancellation proceedings and Mr Parreira had attended the objection hearing on 1 August 2018 on his own. Ms Blackburn was concerned that the Appellant did not appear to understand the nature of the risk to children and her role in safeguarding children.

42. Ms Blackburn confirmed that since the first appeal against the suspension, the Respondent had continued to make attempts to invite the Appellant to attend a recorded interview. She acknowledged that the Appellant had attended a recorded interview on 13 April 2018. However, since then matters had developed further. There had been correspondence sent in June, July, and July inviting the Appellant for an interview. This including requesting the Appellant to provide details of dates she could attend. However, she acknowledged that some of the correspondence may have been sent whilst the Appellant was on holiday and some correspondence which had been sent by post (as well as by email) might have been received by the Appellant after the date for responding had passed.

43. Ms Blackburn confirmed that the Respondent had initiated medical checks, requesting that the Appellant arrange for her GP to complete a health declaration booklet. The Appellant had been sent reminder letters including on 22 June 2018 and on 9 August 2018, when she had hand-delivered a further letter, health declaration booklet and consent form to the setting. There had been no response. The completed health declaration booklet had not been received from the GP and the latest letter from the GP did not address the issues that would be raised in the health declaration booklet.

44. Ms Diane Plewinska set out that there were four main areas of concern. These concerns included the involvement of Mr Perera in the setting, the Appellant's understanding and acceptance of risk, her ability to effectively safeguard children against risk and the Appellant's health.

45. Further, Ms Plewinska set out that establishing Mr Perera's involvement in the setting is important (not merely his physical presence or not) in view of the historical evidence regarding his

controlling behaviour. If the accounts of the previous incidents are correct then, in her view, he has on occasions displayed uncontrolled anger and no agreement, arrangement or requirement that he stay away from the nursery premises could adequately safeguard against this. Any involvement by him with the nursery, or with the Appellant, therefore carries a risk.

46. Ms Plewinska set out that the Respondent remained very concerned about the Appellant's understanding of risk and her ability to implement effective protection for children. The Respondent has been unable to properly assess any benefit that may have accrued from the first online course which the Appellant undertook, owing to her failure to attend her interview. The second course (An Awareness of Domestic Violence Including the Impact on Children and Young People – Version 2) was attended only the day before this hearing. The Respondent had already checked out this course. It was now known that it was an online course very similar to the first course, although it did contain more information specific to younger children and to the procedures in the Rotherham area. It was also another course which it was impossible to fail; if the wrong answer was given a person could simply try again until they found the right answer. She set out that the Respondent had not yet had any opportunity to evaluate the extent to which the Appellant has been able to take on board anything that she has learned on this course.

47. Ms Plewinska set out that the Respondent was also concerned about whether or not Mr Perera was an owner of the nursery in any way and wanted to explore this further with the Appellant.

48. Ms Plewinska was sympathetic to the Appellant's personal situation, however, the priority was the safeguarding of children. The evidence at present indicated that the Appellant was not able to safeguard children adequately.

49. Ms Plewinska made it clear that the Respondent would need very clear and verified evidence to demonstrate things are different, in particular in relation to the Appellant's ability to recognise risk to children. Ms Plewinska had kept the suspension under review and if any new information became available, the situation would be reviewed straightaway.

50. Ms Blackburn confirmed that the Police investigation into the incident on 19 February 2018 had been completed and that no charges were brought. She also confirmed that the LA did not have a live investigation into the setting at this stage. However, she set out the Respondent was considering its own action (cancellation) and highlighted that a different burden of proof applied to that in any criminal proceedings.

51. The Appellant made it clear that she could not change what happened in the past. She wanted to look to the future. These proceedings had had an impact on her and she had had no income for seven months.

52. She accepted that Mr Perera could pose a risk to children. Her words were "*I can see that he could be a risk to children*". She could also see why the Respondent would be concerned about Mr Perera. She acknowledged that on 19 February 2018, Mr Perera was *"being loud".* This could pose risk to children including children who were asleep. For example, this could affect them in different ways. She did not agree with all the evidence put forward by the Respondent but acknowledged that a large part of the evidence from her staff was evidence she agreed with although there were parts of the evidence that she disagreed with.

53. She confirmed that Mr Perera had resigned and had left her employment on 3 August 2018. However, she was not aware of where he was working as she had not asked him. She referred to his P45 included in the bundle and confirmed that it related to Mr Perera although it referred to another name. She could not explain why the national insurance number was redacted. Mr Perera was assisting her with this appeal as she could not do it on her own. She was not aware that she could get legal assistance from elsewhere.

54. She acknowledged that she had not attended the recorded interview meeting that the Respondent had been trying to arrange. She acknowledged that on some of these dates (around the summer period), she was on holiday and therefore could not have attended. However, she said that some of the Respondent's correspondence gave her limited time to respond (around a day or two) and other correspondence was received by her after the date and time for responding had passed. She acknowledged that she had not been proactive in contacting the Respondent and alerting them to these difficulties so that an alternative date could be arranged. The Appellant stated that she had not thought of this.

55. She said that she was a sole owner of the setting. She was not sure why Mr Perera had claimed ownership of the setting. She speculated that this may have been said in order to provide Mr Perera with greater authority to deal with staffing issues. She had now completed an online course delivered by the Rotherham Safeguarding Board.

56. She considered that a meeting with the Respondent was important to deal with the issues. She was willing to attend any such meeting and provide the reassurances that the Respondent sought in respect of Mr Perera and addressing their concerns.

57. She was given the option by Mr Reed of arranging a date and confirmed at the hearing that she would be able to attend on 26

September 2018 for the recorded interview. She requested a meeting in Rotherham so that it is easier for her to travel to the location.

58. The Appellant also set out that she had completed the health declaration booklet. The issue was that she could not afford the fee that her doctor was requesting in order to complete his part. He had asked her for around £100 in order to complete it. She had not contacted the Respondent to make them aware of this difficulty as she did not think she could do so.

The Tribunal's conclusions with reasons

59. 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.

60. We reminded ourselves of the lower threshold for confirming the suspension and reminded ourselves that at this stage we are not finding facts.

61. 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.

62. We found Ms Helen Blackburn and Ms Diane Plewinska to be credible. They both made it clear that they were willing to engage with the Appellant and would review any action taken to date following any meeting with the Appellant.

63. We acknowledged that the Police investigation into the incident on 19 February 2018 had been completed and that no criminal charges were brought. We also acknowledged that the LA did not have a live investigation into the setting at this stage.

64. However, the Appellant, herself, accepted in relation to Mr Perera that "*he could be a risk to children".* She also accepted that his behaviour on 19 February 2018, which she described as him being "*loud"* could expose children to the risk of harm. This included accepting that a risk was posed to children who were asleep.

65. It was made clear by Ms Plewinska that the Respondent's fundamental concern is whether the Appellant is able to adequately recognise risk to children and safeguard them from harm. We agreed that given the history to the matter, it was not unreasonable for the Respondent to seek to meet with the Appellant and to address those concerns.

66. We acknowledge that the Appellant stated that Mr Perera had left the setting on 3 August 2018. However, the Appellant had given reassurances previously that she would change the PIN code at the entry to the nursery so that Mr Perera could not come in. However, despite this later, there were allegations of later incidents in which he was said to have been on the premises.

67. We noted that the Appellant accepted the importance of attending a recorded interview with the Respondent. The Appellant acknowledged that the Respondent had made extensive efforts to contact her to arrange a recorded interview. We acknowledge that some attempts were made to contact her whilst she was on holiday after she had informed the Respondent of this. In fairness to the Respondent, Ms Blackburn and Mr Reed both acknowledged this. Ms Blackburn also accepted that although the correspondence referring to the recorded interview was sent by email and post, some of the correspondence sent by post may have been received by the Appellant after the time for responding had passed.

68. We considered that the Appellant, given her stated readiness to cooperate, could have simply contacted the Respondent and informed them of this rather than ignoring the correspondence. The Appellant conceded that she had not thought of this. In our view, the Appellant's annual leave in July 2018 did not explain the other correspondence sent (including August 2018) inviting the Appellant to select a date provided or suggest an alternative date.

69. We noted that this was the fifth suspension imposed and that the registration has been suspended for a period of around seven months. However, in our view, the Appellant has not helped matters by not engaging with the Respondent in order to allow it to complete its investigation and satisfy the Respondent that any necessary steps have been taken to eliminate or reduce the risk of harm.

70. The whole suspension process may well have taken less time had the Appellant fully engaged with the process and done what she has now committed to earlier in the process (for example, attending a recorded interview and completing the health declaration booklet).

71. The Respondent's witnesses made it clear that they were keeping suspension under review and although cancellation proceedings were underway, they were open to considering the matter further with the Appellant as and when a recorded interview can take place.

72. We noted that the Appellant had indicated her willingness to attend a recorded interview with the Respondent on 26 September 2018 and get the Health Declaration booklet completed.

73. We concluded that the reason why any investigation had not been completed or any necessary steps taken to eliminate or reduce the risk

of harm were not reasonably practicable for reasons beyond the control of the Respondent. It was clear to us that the Respondent had taken proactive steps to meet with the Appellant. The Appellant, on her own admission, whilst recognising the importance of meeting with the Respondent, had failed to attend and engage.

74. We acknowledge the Appellant's concerns about the impact that this has had on her business since the suspension was imposed. We also acknowledge the impact it has had on her staff (some of whom we were told were working on an unpaid basis) and those that attended the setting. However, we found that the Respondent has taken a considered approach to imposing the suspension and we have no reason to doubt that it has kept it under review.

75. 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. We were reassured by Ms Plewinska that the suspension was being kept under review and if any new information became available, the situation would be reviewed straightaway.

76. In reaching our decision, we also took into account a range of factors including the Appellant's circumstances 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.

77. There were a number of submissions put forward by the Appellant including the fact that an urgent cancellation power was available to the Respondent. That is another power available to the Respondent. The Respondent has chosen to exercise this power and we were satisfied that the legal framework was correctly applied. We rejected the other submissions put forward including for the reasons set out above.

78. 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

79. The decision to suspend the Appellant's 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: 17 September 2018