

## Care Standards

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

[2018] 3528.EY – SUS

The hearing on the papers was on 27<sup>th</sup> of November 2018 at 10 am

J D

Appellant

– V –

Ofsted

Respondent

### Tribunal Panel

Judge John Burrow

Specialist member Wendy Stafford

Specialist member Pat McLoughlin

### Decision

#### The Hearing

1. In her application to appeal Ms D indicated she wished the case to be considered on the papers. Ofsted, in their response also indicated their wish for a hearing on the papers. We considered the matter pursuant to rule 23 of the 2008 Rules and concluded the matter was suitable for a hearing on the papers, and proceeded to hear the matter on the papers without oral evidence.

#### Reporting restrictions

2. A restricted reporting order was made under rule 14 (1) (a) and (b) of the 2008 Rules prohibiting the disclosure or publication of any document or matter likely to lead members of the public to identify any child or family member mentioned in the appeal.

#### Evidence

3. The bundle contained documents relating to the case of both parties, submissions, orders, notices, appeal application and response, witness statements and character references for the appellant.

#### The appeal

4. Ms D appeals against the decision of Ofsted on 8 November 2018 to suspend her registration to provide childminding. Ms D is registered on the Early Years Register and the Compulsory and Voluntary parts of the Childcare Register. Notice of suspension under regulation 8 of the 2008 Regulations was served on 8 November 2018, suspending all registrations until 20<sup>th</sup> of December 2018. Ms D appealed against this decision on 14 November 2018, and Ofsted submitted its Response on 20<sup>th</sup> of November 2018.

#### The law

5. Section 61 (1) of the Childcare Act 2006 provides for regulations to be made dealing with the suspension of the registered provider's registration. The relevant regulations are the Childcare (Early Years and General Childcare Registers) (Common Provision) Regulations 2008
6. Regulation 9 of the 2008 Regulations sets out the test for suspension which is where: –  
“the Chief Inspector reasonably believes that the continued provision of childcare by the registered person to any child may expose such child to risk of harm.”
7. Harm is defined in section 31 (9) of the Children Act 1989 as “ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of others.” “Development” means physical, intellectual, emotional, social or behavioural development. “Health” means physical or mental health.
8. Regulation 10 provides that the period of suspension is initially six weeks with provision for an extension for a further six weeks. Suspension may be further extended if for reasons beyond the control of Ofsted investigations are not complete.
9. Regulation 11 provides that Ofsted must keep the decision to suspend under review and if the circumstances described in regulation nine no longer apply suspension must be lifted.
10. Regulation 12 provides for an appeal to the First-tier Tribunal against the Chief Inspector's decision to suspend. The First-tier Tribunal may confirm the Chief Inspector's decision to suspend or direct that the suspension shall cease to have effect. On appeal the First-tier Tribunal steps into the shoes of the Chief Inspector and remakes the decision. Accordingly evidence of events after the

decision is admissible and the question for the Tribunal is whether, at the date of the Tribunal's decision, a child may be exposed to the risk of harm.

11. The burden of proof is on the respondent, Ofsted. The standard of proof is "reasonable cause to believe" which lies 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 the relevant information, would believe a child may be at risk. The decision must be proportionate and necessary.
12. The notice of suspension states the purpose of the suspension is to allow time to investigate whether a child may be exposed to risk of harm, and for steps to be taken to reduce or eliminate the risk of harm.
13. The role of the tribunal in this appeal is to consider the interim decision to suspend registration and to determine whether a child remains at risk of harm. Our role is not to determine findings of fact or resolve disputes of fact. That is for the investigation and any subsequent appeal proceedings to undertake.

#### The case for Ofsted

14. Child A (the injured child) is aged 17 months and attended the Appellant's childminding provision. On 7 November 2018 the mother of child A contacted Ofsted to say that her child attended the provision on 6 November 2018 and when she collected the child in the evening, she observed bruising to his left leg below the knee which to her looked like thumb and finger marks.
15. According to the Appellant, the mother collected child A at about 5:50 pm on 6 November 2018. At about 7:15pm on 6 November 2018 the mother tried unsuccessfully to contact the Appellant by phone., and at about 7.30 pm the Appellant tried unsuccessfully to contact the mother in response. The mother sent a text with a photograph of the injuries to the Appellant at about 7:46 pm. A little later the two parties managed to speak to each other over the phone and discussed the injury.
16. The Appellant said she hadn't seen any injury, but in a later phone call to the mother of child A stated that another minded child may have caused it while she was going in and out of the kitchen. The Appellant said however that she had not heard child A in any distress. The mother of child A terminated her contract with the Appellant and said she had reported her concerns to the police.

17. About an hour before the mother of child A contacted Ofsted on 7 November 2018, the Appellant had also spoken to Ofsted, reporting that the parent had become abusive to her, saying she would report the matter to Ofsted. There was no reference in the record of the Appellant's telephone call that there had been any injury to child A, or that the Appellant had been accused of causing the injury by the mother of child A.
18. Following the receipt of information from the mother of child A, Ofsted reported the matter to the Local Authority Designated Officer (LADO), who in turn referred the matter to the Multi-agency Safeguarding Hub (MASH), and to the police. A social worker was appointed to investigate the complaint.
19. Ofsted reviewed the information at an urgent case review on 8 November 2018 and decided to suspend the Appellant's registration. As part of the review Ofsted considered the Appellants registration history. She was first registered on 6 November 2013, and she has one assistant registered to work with her with two further assistants currently going through suitability checks.
20. The Appellant has been inspected on three occasions. In May 2014 she received "good" judgement, in April 2018 she received a judgement of inadequate and in September 2018 she received a "good" judgement. On 14 August 2015 a parent contacted Ofsted to raise issues about the Appellants care which were later discussed by an Inspector who found no evidence to confirm any breaches of legal requirements.
21. On being informed of the decision to suspend by an Ofsted inspector, the Appellant was upset and angry. She said she and her assistant knew child A had not received injuries while in her care. She said the mother of child A had been aggressive towards her and had threatened to assault her.
22. On 9 November 2018 a child protection medical was carried out on child A. The bruise to child A was deemed nonaccidental. On 15 November 2018 a meeting was held between the LADO/AAP (Allegation Against Professional) which concluded the Appellant remained in the possible pool of perpetrators along with other adults the child had come into contact with at the time.
23. On 19 November 2018 the police reported that they had spoken to the Appellant and the child A's parent on 8 November 2018, and said they were unable to

ascertain whether the injuries to the child A were caused while in the Appellant's care or elsewhere. On 20 November 2018 the police indicated they were taking no further action because of evidential difficulties including the age of the child, the age of the bruise, and the lack of any way of finding out the cause of the bruise beyond reasonable doubt.

24. On 19 November 2018 Ofsted discussed the case with the LADO and concluded there were concerns about the Appellant's apparent lack of transparency, her failure to refer the concerns to LADO and her failure to notify Ofsted of the allegations during her call on 7 November 2018. There were further concerns that in her appeal statement there were references to other injuries to child A which had not been referred to social care.

25. On 21 November the LADO indicated that Children's Social Care were continuing their investigations in respect of the injury based on the balance of probability, and that assessments remained ongoing under section 47 Children's Act 1989. On 22 November 2018 Ofsted received information from the LADO that the Appellant had provided conflicting information to the allocated social worker regarding the children playing outdoors on the day in question.

#### The case for the Appellant

26. The Appellant said in the statement which accompanied her appeal, that she had been registered as a childminder since 6 November 2013. In respect of the complaint relating to child A, she said the child was delivered to her by his mother on the 6 November 2018 at 1:05 pm. He remained at the premises until 5:50 pm. He was asleep when he arrived and woke up about 1:45 pm when the Appellant changed his nappy. She did not see any bruises or any redness to the legs, but she saw a very small area on the child's bottom which was reddish.

27. After the nappy change, he was fed and the children went to play in the garden with the Appellant supervising them. Child A was happy in the garden and nothing occurred which would have injured him or distressed him in any way. He was running around and playing.

28. After the play in the garden he had a drink and the Appellant then took him to school with her in the pram to collect the other looked after children. This was at 3 o'clock, returning to the house at 3:40 pm. Throughout this trip child A was in the pram and was happy.

29. On return to the childminding premises the Appellant took off child A's jacket and shoes and washed his hands. Child A was walking and playing with trains

and other toys and was being watched all the time. He was happy. His nappy was changed again, and the appellant saw no bruises on the leg. He was again fed around 4:20 pm, his hands were washed, and he played inside in the open area. He played with another child and was quite happy with nothing occurring to result in any injury to his leg or anywhere else. There was a further nappy change between 5.00 and 5.30 pm and again no bruises were seen. He was quite happy and at 5.50 he was collected by his mother.

30. Later that evening at 7:46 pm the Appellant received a text and a photograph of a bruise to child A's leg. This was a surprise to the Appellant because she had changed his nappy three times and had not seen any bruising. She assumed therefore that the bruising must have happened after he left the premises at 5:50 pm and was in his mother's care.
31. The Appellant then spoke to the mother by phone and during the conversation the mother was abusive to her, swearing at her and threatening to beat her up. The Appellant reported the matter to the police because she was frightened.
32. The Appellant asserts that while child A was in her care the bruises were not there. The Appellant then mentioned that on 5 April 2018 child A was brought to her premises with an injury which the mother said was a result of going on a slide. This injury was noted in records held by the Appellant. A further incident was recorded on 24 May 2018 when child A was brought to the childminding premises with a cut and swollen lip. The Appellant was told that child A fell over while jumping on the sofa. Again records were made in the Appellant's documentation.
33. The Appellant produced 10 character references from parents whose children she has minded. The references described the Appellant's childminding premises as a safe peaceful place where the children can develop preschool skills. Parents have said they were extremely happy with the care their children had received and described the Appellant as a great communicator who gains children's confidence. The childminding has been described as impeccable, showing the utmost professionalism, being committed, conscientious and abiding by the Ofsted rules. The Appellant is said to have good rapport and relationship with children and to provide excellent service. The Appellant was described as very helpful and kind providing a friendly atmosphere.

#### Decision by the Tribunal

34. We considered the evidence. There is evidence that child A was minded by the Appellant at her provision on 6 November 2018. There is also evidence that on the evening of 6 November 2018, a bruise was found to the child's leg. A later medical inspection found the bruise to be nonaccidental. The mother of child A

alleges that the bruise was caused while child A was in the care of the Appellant. The Appellant denies the bruise occurred whilst child A was in her care.

35. The current appeal is in the context of an interim suspension order. It is not for this tribunal to determine the facts or resolve conflicts between witnesses. That is for the current ongoing investigation and any future proceedings to determine. We accept that the investigation by the LADO, by Children's Social Care and Ofsted are continuing. The next LADO meeting is due to take place on 17 December 2018, and Ofsted have asked that that meeting be bought forward. We accept that investigation into these allegations have been progressed without undue delay.
36. The injury to child A has been deemed nonaccidental and is currently unexplained. It remains the case that the injury may have been caused whilst child A was in the care of the Appellant. Further there are concerns about the transparency of the Appellant in reporting relevant matters to the LADO and Ofsted.
37. We took into account the registration record of the Appellant and the excellent references she has received. We considered also the proportionality of the suspension bearing in mind the prejudice to the childminder suspension has caused. We concluded that, pending completion of the investigations, there was reasonable belief that continued provision of childcare to any child by the registered person may expose a child to risk of harm and that the risk outweighs any prejudice caused by the suspension to the childminder.
38. We stress that this is not a finding of fact that the injury was caused by the Appellant, merely that pending completion of the investigation, risk of harm remains. We accepted that the suspension was necessary and proportionate.
39. We further stress that the investigations should be concluded as soon as reasonably possible, and that the decision to suspend should be kept under review by Ofsted as required by regulation 11.

40. We dismissed the appeal.

Judge John Burrow

29 November 2018

