

Care Standards

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

[2019] 3897.EY-SUS

Considered on the Papers on 16/12/19

BEFORE

Timothy Thorne (Tribunal Judge)
Wendy Stafford (Specialist Member)
Denise Rabbetts (Specialist Member)

BETWEEN:

DAZU CLUB (A)

Appellant

-v-

OFSTED (R)

Respondent

DECISION

The Appeal

1. Dazu Club (A) appeals to the Tribunal against Ofsted's decision dated 14/11/19 to suspend their registration as a childcare provider on the Early Years Register and the Compulsory Part & Voluntary Part of the Childcare Register for a period of 6 weeks until 25/12/19.

Paper Determination

2. 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). Both parties must consent, which they have in this case, but the Tribunal must also consider that it is able to decide the matter without a hearing.
3. In this case, the panel concludes that it has sufficient evidence regarding the allegations made and the conclusions reached. In the circumstances, the panel considers that it can properly make a decision on the papers without a hearing.

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 users of the service in this case so as to protect their private lives.

Background

5. A is a committee and registered charity. It operates in 2 settings. The one which is the subject matter of the instant appeal is at No.1 John Bradshaw Road Southgate London N14 6BT (No.1). It operates during the school holidays and on occasional Saturdays. It employs 25 staff and cares for 32 children. Some of the children have learning difficulties.
6. Dazu operates under the umbrella of Enfield Children & Young Persons Services (ECYPS) on behalf of Enfield Council. The manager of A is Ms. Claire Whetstone (CW) who is also a director of ECYPS. Lisa Poole is the nominated individual and there are a number of registered individuals. Liz Smith (LS) is described as being a manager of the organisation.

Late Evidence

7. On 13/12/19, Ofsted requested that new material be submitted into evidence. This included a further witness statement from Jennifer Gee.
8. In relation to this new material, the Tribunal applied rule 15 of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 and took into account the overriding objective as set out in rule 2 and admitted the late evidence as it was relevant to the issues in dispute.

Evidence

9. The panel took into account all the evidence that was presented in the bundle. The following is a summary.

The Respondent's Evidence

10. In her witness statement dated 02/12/19 **Ms. Jennifer Gee** indicates that she has been an Ofsted Early Years Senior Officer since 2016. She knew that on 06/11/19 Ofsted received a referral about A from the NSPCC. A complaint had been made to the NSPCC on 02/11/19 by a "whistleblower" about a member of staff at A's premises, No1 called Dan Nathan (DN) who had allegedly been inappropriately touching children at those premises. The witness produced a redacted version of the NSPCC referral to Ofsted as her exhibit JG/2.
11. The information suggested that similar concerns about DN had been raised with A's managers on a number of occasions dating back to 2015. The information also alleged an escalation in his behaviour in January 2019 and

complaints were made to A's manager. The police are currently investigating these complaints and have interviewed children. Even though DN had stopped working directly with children in January 2019, the "whistleblower" was concerned that DN was still working at Dazu in the office in the same building where A operated at No.1.

12. The "whistleblower" also raised concerns that CW and LS had not properly investigated the concerns raised about DN in the past. Exhibit JG/2 indicates that concerns about DN were raised with them in January 2019 but they had not contacted the Local Authority Designated Officer (LADO) until 5 months later. There was a fear that they were seeking to protect him. The managers told the staff member who raised concerns that they were "on a witch hunt" against DN.
13. In addition there were other concerns raised about a lack of risk assessments being carried out by staff. An example was given when in May 2019, children with allergies were taken outside without EpiPens. Moreover, many staff were not trained in first aid.
14. Ms. Gee also stated that "there are also other serious concerns relating to the organisation of which I am unable to disclose at this time. This is because I have been asked by the LADO not to disclose at this time as to do so may prejudice an investigation by other agencies."
15. In addition to the aforementioned incidents, the LADO informed Ofsted that in July 2018 they had received information about a complaint made by an employee of A that DN had been behaving inappropriately with children and feared reprisals for raising the matter. The complaint also outlined that previous similar complaints about DN made to A's management had been ignored and that DN was using his position of authority within the organisation to deter members of staff from reporting such complaints.
16. On 15/08/18 the LADO met with A's committee including CW who alleged that staff had a personal vendetta against DN and appeared very defensive of him. The witness produced a redacted copy of the LADO referral as her exhibit JG/3.
17. Ms. Gee also referred to a number of text messages between members of staff and LS outlining inappropriate behaviour by DN towards a particular child MA. There was also concern as to how CW might react to such complaints.
18. In A's appeal statement a further allegation against DN is disclosed that was made in September 2017 regarding his inappropriate behaviour towards children. DN received a written warning but the LADO was never informed and this was not disclosed by A at the 15/08/18 meeting with the LADO.
19. The LADO also confirmed that allegations were made by a member of staff at A's premises to A's management against DN on 28/01/19. The concerns

were about DN acting inappropriately with the child MA. These allegations were not referred to the LADO by LS until 08/02/19. In their appeal documents, A claims that they referred the matter to Ofsted on 05/03/19 but Ofsted has no record of this. A also claimed that DN was suspended but he remained working for CW in the same building as the children in question being cared for by A at No.1.

20. According to the LADO a meeting was held between A's management and the police on 09/04/19 about DN. The police decided to continue with their investigations into the matter. However, according to the minutes of that meeting (exhibited by Ms. Gee) the police were not informed of the previous allegations made against DN in 2017.
21. Moreover, according to the LADO a further complaint was made to her from a social worker about alleged inappropriate behaviour by DN against another child, GE who attended at A's premises at No.1. GE also said that he was worried about DN's behaviour towards the child MA and the other children. The information from the LADO indicated that LS thought that GE and MA were perhaps colluding with each other and "working from a script." The police are actively investigating this complaint and have interviewed the child involved. DN was interviewed as a suspect by the police on 18/10/19.
22. Ms. Gee also stated that it was of particular concern that A had not informed Ofsted of any of the numerous allegations outlined above as they are required to do under the Early Years Foundation Stage (EYFS) at paragraphs 3.7, 3.8, 3.9, 3.77 and 3.78. Ms. Gee was also concerned that the attitude of A's management towards safeguarding was not satisfactory and was not in accordance with the need (outlined in the EYFS) that providers have regard to the government's statutory guidance "Working Together to Safeguard Children 2018."
23. It was also concerning that A's management had failed throughout to inform the LADO in a timely fashion of the numerous allegations made against DN over the years or to seek her advice about risk or procedures. On 21/06/19 the police advised CW to seek the advice of the LADO about whether it was safe to allow DN to continue working in the same building as the children. An email (Exhibit JG/5) from the police to A confirmed this advice. However the LADO informed OFSTED that A never sought their advice about this matter.
24. On 12/11/19 & 13/11/19 Ms. Gee and others held an Ofsted case review. All of the information outlined above was reviewed. Ms. Gee stated that the review identified, "significant concerns about the Appellant and their ability to safeguard children in their care.....The allegations were serious in nature and were concerning sexual abuse of children in their care. It was unclear at this point if the Appellant had acted appropriately to address safeguarding concerns, follow process and respond to allegations."
25. Therefore Ms. Gee decided to suspend A's registration on the basis that children may be exposed to a risk of harm. There was a need for the various

allegations outlined above to be investigated by Ofsted, the police and other agencies. She also said that in coming to her conclusion she considered the consequent loss of income to A, reputational impact and the inconvenience to service users. Nonetheless the decision was considered proportionate.

26. On 19/11/19 a meeting was held between Ofsted and the police. Ofsted was informed that the police and Children's Social Care (CSC) were in the process of a joint investigation into DN and A. Papers are about to be sent to the Crown Prosecution Service. This investigation is considering (inter alia) the allegations made by the NSPCC outlined above. The LADO is also still undertaking investigations into these allegations including concerns about CW. Ofsted is awaiting the outcome of the outstanding investigations being currently carried out by the police and the LADO.
27. In her first witness statement Ms. Gee also outlined various concerns regarding the individuals associated with the registered organisation connected with A. There was some confusion as to the identity of the current members of the committee which oversaw A. It was unclear as to whether A understood their responsibility to inform Ofsted of changes to the makeup of the committee or the identity of the Nominated Individual. There were also concerns that members had not had suitability checks undertaken by Ofsted.
28. However, in her second witness statement dated 10/12/19, Ms. Gee stated that "it is possible that the registration needs to be amended to reflect that Dazu (the charity) should be the registered organisation. If so, my earlier statement about who Ofsted need to check and our position regarding their alleged failure to updated Ofsted regarding members of the committee for the purpose of suitability checks should be set aside. However, if it is the case that registration does not need to be amended.....then our position would remain regarding their alleged failure to update Ofsted regarding members of the committee. I will be making further urgent enquiries with the Appellant about this matter in order to establish the position."
29. In her witness statement dated 02/12/19 **Ms. Pauline Nazarkardeh** indicates that she has been an Ofsted Early Years Senior Officer since 2017. Her evidence supports and repeats much of what was said by Ms. Gee. She considered the appeal documents submitted by A and decided to uphold the suspension decision made by Ms. Gee.

The Appellant's Evidence

30. This included a document produced by A and submitted with a letter dated 25/11/19 and signed by Graham Jimpson the "Chair of Dazu". No witness statements were submitted.
31. The document contained a history of the organisation, its management structure and its policies and procedures. It also set out A's understanding of the following 3 complaints made against DN which can be summarised as follows:

- a. Complaint raised by Elham Asskoumi (EA) on 04/09/17 – This was investigated by CW who gave DN a warning. It was claimed that CW “ran the actions past the LADO verbally who agreed with the actions taken.”
 - b. Complaint about DN from “a Haringey source” in August 2018 - The author of the document stated, “given the above were unfounded it should also be noted that the accusations were predicated [sic] by a personal attack on [DN] not related to safeguarding issues by the complainant.” The author also states, “we did not hear anything further from the LADO.”
 - c. Complaint raised by EA on 28/01/19 – This was investigated by CW and LS. The author of the document states that CW told EA that she must put the complaint in writing because “we needed to be confident that this allegation was factual in the light of the two previous allegations that were not.” EA was accused of having made homophobic remarks about DN. The chair of Dazu then suspended DN. EA was told that “this would go through to the LADO immediately” DN then took up employment with ECYPS in the same building as Dazu at No.1. DN promised not to have any further direct contact with children. A letter was supposedly sent to Ofsted on 05/03/19 informing them of the situation.
32. The author of the document also stated that on 21/06/19 the police came to A’s premises and advised that DN could continue working in the building at No.1 as long as he did not come into contact with children. A also produced the following documents:
- a. Statement of EA dated 29/01/19
 - b. Suspension letter sent to DN dated 31/01/19
 - c. Ofsted report from February 2018
 - d. Email to LADO dated 01/10/19
 - e. Emails from police dated 10/07/19 & 12/07/19
 - f. Accident report book.

Legal framework

33. 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.
34. 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.”
35. “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”.

36. 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 childcare by the registered person to any child may expose such a child to a risk of harm.
37. 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.
38. The Upper Tribunal (UT) laid down the following guidelines in the case of **Ofsted v GM & WM [2009] UKUT 89 (AAC)**:
“ - on an appeal the First-tier Tribunal stands in the shoes of [the Respondent] and must consider whether grounds for suspension exist at the date of the hearing (paragraph 10)
-[The relevant regulation] sets a low threshold – that there “may” be a “risk” – but the fact that the threshold has been passed does not necessarily mean that the power of suspension.....must be exercised (paragraph 22);
-it is difficult to see on what grounds a suspension can be justified other than for the purpose of investigating a belief that there may be a risk or to allow time for a risk to be reduced or eliminated (paragraph 23);

-a suspension imposed on the grounds that there is an outstanding investigation can be justified only as long as there is a reasonable prospect of the investigation showing that further steps to reduce or eliminate a risk might be necessary.”

Conclusions

39. For reasons given below the panel concludes that the Respondent has proved to the requisite standard that the threshold for suspending the registration was met when the Respondent suspended the Appellants' registration and that this threshold continues to be met now. The panel is satisfied that the continued provision of childcare by the Appellant to any child may expose such a child to a risk of harm. The panel is also satisfied that continued suspension is necessary to progress the investigation of that risk.
40. The panel accepts that the witness statements establish that Jennifer Gee & Pauline Nazarkardeh are honest, reliable and credible witnesses. The panel shares their serious concerns that the Appellant is unable or unwilling to adequately recognise risk to children in their care and safeguard them from harm.
41. In particular the evidence establishes that there was possible sexual abuse within A's premises at No.1 by a member of staff over a long period of time. There is an ongoing investigation into these serious allegations by the police and the LADO. These investigations are targeted at DN and A. The

evidence also establishes that there were serious shortcomings on the part of A in relation to their investigation into that member of staff and his subsequent suspension. There is also evidence that despite the serious allegations made against DN, he was allowed to continue working in the same building as children. All of this indicates a risk to children.

42. In addition then evidence establishes that A did not inform Ofsted of the numerous serious allegations made against DN concerning child safety concerns. It is also clear that they did not inform the LADO in relation to many of those same allegations in a timely fashion or at all. This is a breach of A's safeguarding and reporting obligations outlined above. All of this also indicates a risk to children.
43. The evidence also calls into question the ability of A to follow correct reporting and safeguarding procedures and properly protect "whistleblowers" and allow them to come forward and provide information. In A's own appeal statement concerning the complaint raised by EA on 28/01/19, it is stated that CW told EA that she must put the complaint in writing because "we needed to be confident that this allegation was factual in the light of the two previous allegations that were not." All of this indicates a failure to take the allegations seriously and therefore a consequent risk to children.
44. In addition the evidence establishes that there were concerns that staff were not all trained in first aid and that children with allergies had been put at risk. In addition there are ongoing concerns as to whether members of the committee that oversees A need to be registered and provide character information to Ofsted. All of this also indicates a risk to children.
45. In light of all the aforesaid finding therefore, the panel is satisfied that it is reasonable to believe that the continued provision of childcare by the Appellants to any child may expose such a child to a risk of harm.
46. In addition the panel is satisfied that until the outstanding investigations have been concluded or have progressed children in the care of A may be at risk of harm and that the suspension is necessary and proportionate.
47. In coming to this decision the panel has balanced a range of factors including the financial and reputational damage to A and that parents who use their services may depend on it to allow them to work, but nonetheless the panel concludes that the suspension is proportionate and necessary.

Decision

The appeal against the suspension is dismissed.
The suspension in relation to the Appellant shall continue.

**Tribunal Judge Timothy Thorne
Care Standards**

First-tier Tribunal (Health Education and Social Care)

Date Issued: 20 December 2019