First-tier Tribunal Care Standards

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

NCN: [2020] UKFTT 444 (HESC)
[2020] 4125.EY-SUS

Hearing by the Tribunal
On the papers held via video link
on 3 November 2020

Before

Tribunal Judge Scott Trueman
Specialist Member Ms Lorna Jacobs
Specialist Member Ms Sallie Prewett

BETWEEN:

Colin Nicholas Rankine

Appellant

-v-

The Office for Standards in Education, Children's Services and Skills (OFSTED)

Respondent

DECISION

The Application

1. This appeal is brought by Mr Colin Rankine ("the Appellant") against the decision of OFSTED ("the Respondent") by notice dated 6 October 2020 to suspend his registration as a child minder on the Early Years Register and the compulsory and voluntary parts of the Childcare Register for a second period of 6 weeks from 6 October to 19 November 2020 pursuant to section 69 Childcare Act 2006 and the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 ("the 2008 Regulations").

Attendance

2. In his appeal document dated 14 October 2020, the Appellant requested that the appeal be determined on paper without either party attending. The

Respondent agreed to this in its Response to the appeal on 20 October 2020 and accordingly the Tribunal ordered that the appeal be determined on paper on 21 October 2020.

3. We have considered for ourselves as part of this appeal whether the decision was suitable to be made on a consideration of the papers alone and we have determined that it is.

Restricted reporting order

4. The Tribunal makes a restricted reporting Order under rule 14(1) (a) and (b) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (as amended) ("the Tribunal Rules") prohibiting the disclosure or publication of any document or matter in this appeal likely to lead members of the public to identify any child or their parents in this case so as to protect their private lives. The Tribunal has as a result referred to some of the matters in this appeal only in very summary form, recognising that this decision will be made public.

Late Evidence

5. The Respondent applied to admit late evidence on 27 October 2020 in the form of a further witness statement from Mr James Norman, Early Years Senior Officer with the Respondent, also dated 27 October 2020 which dealt with the current position with respect to a section 47 Children Act investigation and ongoing child protection measures. We had no response or objection from the Appellant in relation to this evidence. We admitted this late evidence as it was relevant to the issues in dispute. In doing so we applied rule 15 of the Tribunal Rules and had regard to the overriding objective to deal with cases fairly and justly.

Background

6. The Appellant has been a registered childminder since 2008. He is also the proprietor and head teacher of Homeschool, an independent school providing education for up to 5 pupils between the ages of 5 and 11 years old.

7. On 27 August 2020, the Respondent was notified by the Sandwell Local Designated Officer ("LADO") that an allegation of sexual abuse had been made against the Appellant which was being investigated by the police. Having considered the material available, the Respondent decided to immediately suspend the Appellant's registration on the basis both of those allegations, and also on the basis that the Appellant had previously admitted providing false and misleading documents to the Respondent. The latter admissions occurred during an appeal concerning the independent school which took place in June and July 2020, and were recorded in the Tribunal's judgment on the appeal on 3 August 2020. As a result of the admitted fabrication, the Respondent did not consider that it could rely on the Appellant's honesty in relation to his childminding.

8. The Respondent elaborated somewhat on those allegations in its Response to the first appeal, confirming for the first time that the allegations were of a sexual nature, and saying that the admissions made by the Appellant in the *Homeschool* appeal were part of poor history of compliance with the regulator's requirements.

9. The period of suspension was from 27 August to 7 October 2020. The Appellant appealed against that suspension and the matter came before this Tribunal on 30 September 2020. At that hearing, the Appellant argued that the allegations were false and malicious and had not been investigated properly. He denied any wrong-doing. He denied that any child in his care had come to harm or that he had received any allegations "*within my professional capacity*". He said that the allegations made were racially and politically motivated. He said that the Respondent was racist and continued to say things that had been proved false. He said at the hearing that the Respondent had paid others to make false allegations.

10. In its decision on 6 October 2020, the Tribunal dismissed the appeal and confirmed the suspension. On the same day, the Respondent issued a fresh suspension notice which is now the subject of this appeal to the Tribunal. In that suspension notice, the Respondent relied in support of the suspension on allegations of physical and sexual abuse that had been made against the Appellant and which were the subject of on-going investigation, as well as the poor compliance record and admissions of false documentation. The Appellant appealed on 14 October 2020.

11. In its Response, the Respondent sought an Order to strike out the appeal as having no reasonable prospect of success, pursuant to rule 8(4)(c) of the Tribunal Rules. The Tribunal ordered on 21 October 2020 that this should be considered as a preliminary issue, and we therefore turn to that first.

The Respondent's Strike Out application

12. The Respondent applied to strike out the Appellant's case on 19 October 2020. Pursuant to the Tribunal's Order, the Appellant responded to the strike out application on 26 October 2020. The Tribunal may strike out the whole or part of the proceedings under Rule 8 if the Tribunal considers there is "*no reasonable prospect of the Applicant's case, or part of it, succeeding*". The test is similar to that applied in the Civil Procedure Rules for obtaining a strike out of a party's case or obtaining summary judgment. In *Swain v Hillman*[1] it was said in relation to the similar wording of having 'no real prospect of success' that this distinguished between cases where the prospect of success was realistic rather than 'fanciful'. The power to strike out is intended to deal with cases not fit for trial, or where the outcome is for all practical purposes incontestable. It is a high hurdle to overcome, and the burden of proof lies on the Respondent seeking strike out.

[1] [2001] 1 All ER 91, per Lord Woolf MR

13. The Tribunal notes that a lack of dispute about the factual position is not, of itself, a reason for striking out an applicant's case: see *O'T v Immigration Services Commissioner*[2] and the Tribunal notes that in this case, the Appellant is also not legally represented, meaning that some practical flexibility should be given to allow him to make his case, consistently with the overriding objective. The Tribunal notes that in this context the power to strike out is discretionary, and requires us to balance competing considerations, recognising on the one hand that it is a draconian step that should be reserved only for the clearest of cases, and on the other that the Tribunal's time and resources are finite and should be used in determining appeals where there are real issues of merit. We also take into account the overriding objective of the Tribunal Rules, to deal with cases fairly and justly, which includes a proportionate process with parties being able to participate fully, and to have their case heard.

14. We considered the present application for strike out against that legal framework and we refused it for the following reasons. The basis of the Respondent's case was that the appeal had no real prospect of success because '*neither the reasons for the continued suspension nor the appellant's case have changed in any material way which is likely to improve the appellant's prospect of successfully appealing the second suspension notice'*. But that submission pre-supposes that this Tribunal will simply endorse the decision taken by the last Tribunal unless and until there are material changes. At paragraph 16 of its skeleton argument the Respondent continues this argument in relation to the substantive appeal, suggesting that the Tribunal should confine itself to reviewing new material not considered at the first appeal. The approach is misconceived. This is a fresh appeal against a new suspension for which there is a statutory right of appeal; all other things being equal, the Appellant is entitled to have it determined as at today's date, on all relevant material that is available.

15. We are in no sense bound by the findings of another Tribunal on another occasion and are entitled, indeed required, to consider the substance for ourselves unless we consider there is truly no prospect of success. We do not consider that we can make such a finding in this appeal without considering the entirely of the evidence available to us. The Tribunal notes that the Respondent's application to strike out was lodged even before the Appellant had filed any evidence in the appeal; in essence, the Respondent was then asserting that there was no conceivable evidence which the Appellant could put before the Tribunal which could persuade it to lift the suspension. We do not consider that to be appropriate.

16. We consider that it is for the Respondent to make its substantive case on the appeal. We are not prepared to accept that there have been no relevant changes merely on the Respondent's assertion. And we note that the Appellant *has* asserted that there has been a relevant change of circumstances. Whether or not we ultimately accept that that is the case, we consider that in the current circumstances the Appellant is entitled to have this examined substantively and

[2] [2019] UKUT 6 (AAC),

that for an unrepresented litigant, we should not dismiss consideration of his case out of hand.

17. Even though the Respondent draws attention to the short period of time between the hearing on 30 September and the appeal on 14 October, we are considering the matter as at today's date. And the short time frames that apply to these appeals necessarily reflect both the interim nature of the remedy, and the fact that circumstances can, and often do, change rapidly in those periods. We decline to find that the appellant has no reasonable prospect of success.

Legal Framework

18. Childminders are regulated by Part 3 of the Childcare Act 2006 which provides for registration and regulation by the Respondent in one or both of two Registers. Section 69 of that Act provides a power of suspension from the Registers in prescribed, relevant circumstances, and provides for a right of appeal to this Tribunal against any such suspension. The relevant circumstances, and other matters, are prescribed in the 2008 Regulations, referred to at the outset of this decision. Regulation 9 provides, so far as material, that the test for suspension is whether:

"…the Chief Inspector [of OFSTED] *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".*

19. For the purposes of regulation 9, 'harm' has the same meaning as in section 31(9) Children Act 1989, namely '*ill-treatment or the impairment of health or development, including, for example, impairment suffered from seeing or hearing ill-treatment of another*".

20. In any appeal, the Tribunal stands in the place of Ofsted's Chief Inspector in reaching its conclusion. The burden of proof lies on Ofsted, and the standard of proof of having a "reasonable cause to believe" lies somewhere between the balance of probabilities and a reasonable cause to suspect. Accordingly, the burden is not an especially high one, and it does not require us to make findings of fact about what has happened. We need to judge any 'belief' on the basis of whether a reasonable person, assumed to know the law and possessed of the relevant information would believe that a child may be at risk. We need to consider the position as at today. Even if the threshold of the regulation is met, we need to consider whether a suspension is necessary and proportionate.

21. The periods of suspension are prescribed by regulation 10 of the 2008 Regulations. Any suspension is for an initial period of 6 weeks, which can be extended for a further 6 weeks where based on the same circumstances. Thereafter, the suspension can only be extended again where it is not reasonably practicable for the Respondent, for reasons beyond its control, to either complete any investigation into the grounds for its 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. Even then, the suspension may only continue until the end of the investigation, or until the steps have been taken. The courts have

emphasised that suspension is intended to be only an interim measure. The Respondent has an ongoing duty to monitor whether suspension continues to be necessary and the suspension may be lifted at any time if the circumstances in regulation 9 cease to exist.

Evidence

22. As we are not making findings of fact in this appeal, we summarise the evidence briefly, referring only in detail to the matters on which we based our decision. As the appeal was dealt with on paper, we did not hear oral evidence from any witness, or from the Appellant. We had a copy of the decision of the Tribunal from the first appeal by the Appellant against suspension from the registers however, and we have taken into account the decision reached and what it said in it about the oral evidence then given.

23. For the Respondent, we had before us 4 witness statements from Mr James Norman, Senior Early Years Officer. These included statements of 22 and 29 September 2020, submitted in the first appeal, and those of 21 and 27 October 2020 submitted in this appeal. In his first statement, Mr Norman confirmed that the decision to suspend the Appellant had been his, and that enforcement action had been under consideration in any event due to a history of uncooperative and obstructive behaviour by the Appellant since his registration in 2008. He said that a decision had also been taken to seek to cancel the Appellant's registration.

24. In his second statement, Mr Norman confirmed that the police were taking no further action in relation to the allegations of sexual or physical assault. He provided further evidence of developments in the section 47 investigation since his first statement and also accepted that the Appellant had, in fact, made some notification of the present allegations to the Respondent although he did not accept that it was done in the right way or contained sufficient information.

25. In his statement of 21 October 2020, Mr Norman set out that he had again taken the decision to continue suspension based on the available evidence and set out that the reasons for it were very similar to the first suspension decision, albeit the Respondent was now able to share more detail with the Appellant. He also set out some of what had occurred in relation to the s. 47 investigation since the last Tribunal hearing, and the basis of his belief that a risk of harm to minded children may exist. He referred to a meeting that occurred on 16 October 2020 and child protection steps which had subsequently been taken.

26. In his last statement of 27 October 2020, Mr Norman responded to an assertion made by the Appellant in his statement to the effect that the Local Authority had upheld his complaint, and ordered a fresh investigation. His statement exhibited a short email from Ms Heidi Henderson of Sandwell Trust, concerning the present status of the s. 47 investigation and subsequent developments. In that email, Ms Henderson confirmed that a number of steps were intended to be taken to accommodate some issues raised by the Appellant going forward, but that the complaint made had not led to the original investigation being set aside or restarted.

27. We had a statement from Ms Janet Russell, independent consultant to Sandwell Local Authority dated 22 September 2020, which set out the history of the dealings between the Appellant and the Local Authority with respect to the allegations of sexual and physical abuse and the course of the s.47 Children Act investigation. It also provided some limited details of the allegations.

28. We had a copy of the decision of this Tribunal in the *Homeschool* case ([2019] 3857.INS) which concerned the imposition of a relevant restriction under section 117 of the Education and Skills Act 2008 on the Appellant's registration as an independent school, to the effect that it might not take any additional pupils, for various failures to comply with the Independent School standards. As part of that decision, the Tribunal recorded a number of statements made by the Appellant to which we will return as part of our consideration.

29. For the Appellant, we had his grounds of appeal in both appeals, together with statements dated 22 September 2020 (submitted in the first appeal) and 26 October 2020 (submitted in the second). We had another document which was submitted in response to the strike out application, but in substance this was identical to the statement submitted for the main appeal. In the 22 September 2020 document, the Appellant asserted that the allegations made were false, and that he had not been contacted by the police. He set out a history of his contact with the Respondent in connection with the allegations, and said that he did inform the Respondent of them. He said that the Respondent had no evidence, the allegations made were politically and racially motivated, stemming in part from his intention to run for Mayor and for Police and Crime Commissioner. He said "*as a black male in this hostile environment, I have experienced different agencies prepared to tell untruths without any foundation*". He said that no child had been harmed in his care. He said that he had not provided curriculum materials to the Respondent as they had plagiarised them in the past. He said "*as a childminder, as a teacher, and as a school, no complaints have ever been made against myself and allegations have been fictitious…*".

30. We had a further letter from the Appellant, dated 25 September 2020 which reiterated that the allegations were false and offered evidence in support of the contention that the allegations stemmed from improper motives. In his appeal notice for this appeal, he again repeated that the allegations were false and politically and racially motivated. He noted that the police were intending to take no action. He repeated his previous position in relation to the curriculum materials, and said that Sandwell Local Authority was both institutionally racist and had defrauded him of money. No evidence was offered in support of this last contention.

31. The Appellant maintained these positions in his evidence to the Tribunal in the statement of 26 October 2020. In that statement, however, as mentioned above he claimed that the Local Authority had upheld his complaint and were intending to restart the investigation. He also said that there was evidence to back up his assertions about Sandwell having defrauded him of money, but he did not set this out. We took into account the oral evidence he gave to the Tribunal on 30 September, so far as recorded in that decision.

32. We had a statement from the Appellant's wife, Mrs Mawuena Rankine, and a complaint letter from her to the Respondent about her childminding inspection. Mrs Rankine says that she has never seen any inappropriate behaviour from the appellant. We also had a letter from Mrs L Nugent. We took all of this evidence into account.

The Tribunal's conclusions with reasons

33. We have considered both key grounds relied on by the Respondent in its notice to the Appellant on 6 October 2020, and the elaboration of them contained in the Response to the appeal, together with their evidence, and have considered what the Appellant has said about them in response. We remind ourselves that at this stage we are not making findings of fact, and that the threshold set by regulation 9 is quite low. We note that the police investigation has concluded without further steps being taken but that the s. 47 investigation may be continuing, or has very recently concluded. The Respondent will need to use this short period to make decisions on longer term enforcement action or to conclude that there is no longer a reasonable cause to believe that children may be harmed.

34. Although the Appellant says that no allegations have been made against him *in a professional capacity*, the fact of the allegations is the key issue, not their context. The question which the Tribunal must decide is whether there is a reasonable belief of a risk to any child, and that can be a risk arising from any context which may manifest in others. The evidence of Ms Russell was clear that the allegations of sexual and physical abuse that were under investigation at the time of the first appeal were serious and considered credible, and she set out the steps that had been taken in relation to them since. Taken with Mr Norman's statement of 21 October (and the update to this statement from 27 October 2020, which we admitted by way of late evidence) the position as known to us provides good evidence of the reasonable basis for the belief that a risk of harm to minded children may exist. We say again that it is not for us to make any findings in relation to any such allegations- and we note the Appellant's position that they are strongly denied as fabricated for malicious reasons. We have also considered the Appellant's assertion that the Sandwell LADO had, in effect, upheld his complaint and agreed to undertake a new investigation. That assertion is contradicted by the material from Ms Henderson. In fact, the steps taken by the Local Authority since the first suspension themselves offer additional evidence to support the Respondent's belief.

35. We accept the evidence of Mr Norman, and Ms Russell. We note that the s. 47 Children Act investigation more generally may be continuing or has only recently concluded. Other evidence may emerge from that.

36. In any event, taking the evidence in relation to these allegations of physical and sexual assault as a whole, and considering only the question of a reasonable belief as to the possible existence of risk of harm to minded children, we consider the threshold in regulation 9 to be met in relation to these allegations.

37. Turning to the second ground relied upon by the Respondent, we note (as the Tribunal did on the last occasion) that we are not bound by the views, or conclusions, of another Tribunal sitting to decide a different question. However, it is of note that the matters recorded by the Tribunal in the *Homeschool* case were comments made by the Appellant himself in the course of the hearing, and were to the effect that he had created documents specifically for OFSTED and had not provided them with accurate, or genuine, documents because he was not prepared to disclose such documents to them for fear of plagiarism by the Respondent. We also note that the Appellant says that the *Homeschool* decision is being appealed, although not apparently on the basis that the comments ascribed to him are denied.

38. The Appellant asserts that the timing of the Respondent in raising these issues is suspicious, and says that they are plainly racially and politically motivated, designed to frustrate his political career. However, it seems to the Tribunal that the timing arises principally from the decision of the Tribunal in *Homeschool* at the beginning of August, and whose conclusions about the Appellant's behaviour inevitably caused the Respondent to reassess his earlier interactions with the regulator in that light.

39. The evidence of Mr Norman, which we accept, and the Response to the first appeal, set out a number of matters in the past which the Respondent says mean that the Appellant cannot be trusted to be honest with them. They identified his failure to disclose earlier allegations made about him in 2006 at the time of his registration in 2008 and another failure to report allegations made in 2010. And although some disclosure was made at the outset of these current allegations in August 2020, the Respondent says this was inadequate, and did not disclose the true nature of the allegations made, and that in any event, when asked for more information about it, the Appellant failed to respond. Mr Norman also pointed to the refusal to allow Local Authority officers into the premises in 2016 to undertake a safeguarding audit. All of these matters, the Respondent says, indicate the reasonableness of their belief that the Appellant will not work with them cooperatively.

40. What the Appellant says about these allegations is not entirely clearly discernible from his evidence. However, he admitted in his response to the first appeal that he had not shown everything in his possession to the Respondent on inspection (he says they didn't ask for it) and he repeated his fear of plagiarism. He admitted to the *Homeschool* Tribunal (as recorded at paragraph 63 of their judgment) that he included deliberate mistakes in the materials given to OFSTED to catch them out. He said, when asked about giving them incorrect information, "*the lunatics have taken over the asylum. People don't use the OFSTED system to judge the quality of schools*."

41. Taken with the admissions made as to the fabrication of documents specifically to show to the Respondent, and his admission that he will not comply with all of the Respondent's procedures, we consider that it is reasonable for the Respondent to believe that if a regulated person will not abide by the rules and procedures they put in place, and will fabricate misleading material, they cannot

manage the risks that that person may present; and this may also affect an investigation.

42. Evidence in support of the Respondent's position comes too from the Appellant's antipathy to the Respondent as an organisation. We accept that the Appellant is entitled to hold negative views on the efficacy and efficiency of the Respondent, without that being held against him. But the strength and extremity of his asserted opinions must in our view, entitle the Respondent to be concerned that he does not appear to accept the *legitimacy* of the Respondent's role as regulator. We note that he said to the Tribunal in *Homeschool* that "*Ofsted inspectors make the Ku Klux Klan and the National Front look like Mother Theresa*" and made various assertions to the effect that the organisation was institutionally racist. He repeated these assertions, and accepted they were his views, to the Tribunal on the last suspension appeal. The concern arising from this, that the Appellant will not comply with key safeguarding requirements that he does not agree with, and may not be truthful with the regulator about them during an investigation, is reasonable.

43. Again, it is not for us to decide where the truth of any of these assertions lies. But we consider that this provides more than sufficient evidence to support a reasonable belief by the Respondent that a minded child may be at risk of harm.

44. Looking at the matters offered by the Respondent in support of the suspension, and the position on the s.47 investigation, we are satisfied that a further period of suspension is necessary and proportionate.

45. In closing the Tribunal notes that this continued extension of the suspension will now take the period to the full 12 weeks. To go beyond the 12 weeks, the Respondent will need to demonstrate clear circumstances beyond its control as set out in regulation 10 of the 2008 Regulations. The Tribunal notes that the police investigation is now concluded, and it appeared possible that the section 47 investigation had also now reached a conclusion (though we did not have full evidence in relation to that). Suspensions are an interim remedy. We remind ourselves that the Respondent has an ongoing duty under regulation 9 to continue to monitor whether suspension is necessary.

46. The Respondent should give careful thought to next steps, and to full disclosure of the then current, ongoing situation (and justification) should it intend to seek any further extensions.

Decision:

The Respondent's application of 19 October 2020 to strike out the appeal is dismissed.

The Appeal is also dismissed. The Tribunal confirms the Chief Inspector's suspension of the Appellant's registration.

Judge S Trueman
First-tier Tribunal (Health, Education and Social Care)

Date Issued: 6 November 2020