

## First-tier Tribunal Care Standards

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

[2023] 4957.EY-SUS  
Neutral Citation number: [2023] UKFTT 444 (HESC)

Hearing held via CVP on 22 May 2023

Before

Ms S Brownlee (Tribunal Judge)  
Ms Heather Reid (Specialist Member)  
Ms Michele Tynan (Specialist Member)

F

Appellant

-v-

Ofsted

Respondent

### DECISION

#### The appeal

1. This is F's ('the Appellant') appeal against a decision of Ofsted ('the Respondent') to suspend her registration as a childminder on the Early Years Register and both the compulsory and voluntary parts of the General Childcare Register for a period of six weeks from 17 April 2023 (due to expire on 29 May 2023). This is the third period of suspension to which the Appellant has been subject, having been continuously suspended since 27 January 2023.
2. The Respondent suspended the Appellant's registration pursuant to Regulations 8, 9 and 10(3)(b) of the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008. The appeal is brought before the First-tier Tribunal pursuant to Regulation 12 of the 2008 Regulations.

#### The hearing

3. The hearing took place on 22 May 2023 as a remote video hearing (CVP). There was no objection to the hearing taking place as a video hearing. In the Tribunal's view, all issues in the appeal could be dealt with effectively at a

remote hearing, given the nature of the decision under appeal and the test the Tribunal was required to apply. There were no connectivity issues.

4. The documents that we were referred to are in the electronic hearing bundle provided in advance of the hearing (161 digital pages). Some participants were working from hard copy bundles and some from digital bundles. We received a skeleton argument from each party and, on 19 May 2023, an application to admit evidence, submitted on behalf of the Respondent.

### **Attendance**

5. The Appellant was in attendance. She was represented by Mrs Emma Waldron, counsel, instructed by Mr Martin Haisley, solicitor at Stephenson Solicitors LLP. The Respondent was represented by Ms Francesca Lewington, senior enforcement lawyer, instructed by Ofsted Legal Services. Mr William Chapman, regulatory enforcement lawyer from Ofsted Legal Services was also in attendance.
6. The Respondent called one witness: Mrs Susan Hyatt, Early Years Regulatory Inspector at Ofsted. The Appellant also gave oral evidence at the hearing.

### **Preliminary issues**

7. At the beginning of the hearing, the Tribunal made an order pursuant to Rules 14(1)(b) of the Tribunal Procedure Rules 2008, prohibiting the disclosure and publication of any matter likely to lead members of the public to identify persons the Tribunal considers should not be identified.
8. On 19 May 2023, the Respondent submitted an application to admit two documents as late evidence in the appeal. The documents were a witness statement from Dr Thanawala, consultant community paediatrician, dated 19 May 2023 and an addendum to a child protection medical examination report dated 17 April 2023, concerning Child A. The Appellant objected to the admission of the documents on the basis that it would be unfair to admit them.
9. Ms Lewington submitted that the documents were highly relevant to the context of the appeal and without them, the Tribunal would find it difficult to make a decision. She explained that the Respondent had indicated to the Appellant that it was seeking social care/medical evidence about the child's injuries and would wish to rely on it as part of the appeal. It was not in dispute that the Respondent notified the Appellant of the intention on 11 May 2023. Ms Lewington explained that the evidence was late with good reason, given that it involved liaising with overwhelmed services.
10. Mrs Waldron objected to the admission of the documents. She submitted that they represented an ambush by the Respondent, given the late stage at which they were disclosed. She made the point that Dr Thanawala was not available for cross examination, whilst at the same time noting that Dr Thanawala could not age the injuries or provide any evidence as to the steps that a childcare

professional should have taken in response to injuries (which Dr Thanawala could not age).

11. The Tribunal considered the application carefully, applying Rules 5 and 2 of the Tribunal Procedure Rules 2008. The Tribunal noted that Dr Thanawala's evidence and the evidence from the addendum report effectively itemised a number of injuries on Child A's body (as of 23 January 2023) and set out Dr Thanawala's professional opinion as to the likelihood of each injury being consistent with typical childhood injuries. In the Tribunal's view, neither of the two documents presented evidence which the Appellant appeared to dispute, which is not surprising given that she accepts she failed to take appropriate steps in relation to reporting Child A's injuries from a safeguarding perspective. Furthermore, the Tribunal reminded itself of the role it undertakes in an appeal of this kind – it steps into the shoes of the Respondent. The Respondent is under a duty to continuously review its decision to suspend, applying the test at Regulation 9 of the 2008 Regulations. The duty of continuous review must necessarily involve consideration of any material change or update in information available to the decision maker. Not only that, but the nature of the test is one which requires the Tribunal (the decision maker) to assess relevant information as part of its wider risk assessment (under Regulation 9 of the 2008 Regulations). The Tribunal, in exercising the power to continue a suspension order, is considering a precautionary and preventative response to risk. As such, the Tribunal concluded that the evidence was relevant to its decision. In applying Rule 2 of the 2008 Rules, the Tribunal had regard to the requirement to deal with the case in ways which are proportionate to the importance of the case and the complexity of the issues, amongst other factors. The Tribunal considered it fair and proportionate to admit the evidence, knowing that it is the Tribunal that will attribute a level of weight to the evidence.

### **Background**

12. In October 2011, the Appellant was first registered as a childminder on the Early Years Register and both the compulsory and voluntary parts of the General Childcare Register. She was registered (until the first suspension order was imposed on 27 January 2023) to care for a maximum of five children under eight years old at any one time, with no more than two being in the early years age range. The Appellant has been the subject of three inspections by the Respondent – in 2012, 2016 and 2020 – receiving a rating of 'good' on each occasion, with no concerns raised about the Appellant's safeguarding policy, procedure or previous actions.
13. Child A had been attending the Appellant's setting since October 2021 and was in the early years age range. On 26 January and 27 January 2023, the Appellant notified the Respondent of a significant event, namely that a section 47 (The Children Act 1989) assessment had been started in relation to Child A and a decision made on 26 January 2023 to remove Child A from their parents. The Appellant was made aware of the injury and attendance at hospital on 23 January 2023.

14. On 27 January 2023, after receiving the information from the Appellant, the Respondent contacted the social worker involved with Child A's section 47 assessment. On the same date, the Respondent received information from the Local Authority Designated Officer ('LADO') that Child A has been taken to their GP and then to hospital where they were found to have over 20 bruises on their body and a fractured wrist. The child was removed from the care of their parents. On 27 January 2023, the Respondent held a case review and made a decision to suspend the Appellant's registration as there was a reasonable belief that children may be at risk of harm. The decision was reviewed, and further suspension imposed on 7 March and 17 April 2023. On 5 May 2023, the Respondent sent the Appellant its notice of decision – to cancel the Appellant's registration.
15. The Appellant filed her appeal to the First-tier Tribunal on 28 April 2023.

### **Legal framework**

16. Section 69 of the Childcare Act 2006 makes provision for regulations governing the suspension of registration for, amongst other things, child minders. Section 69 also makes provision for a right of appeal to the First-tier Tribunal. The relevant regulations are the Childcare (Early Years and General Child Care Registers) (Common Provisions) Regulations 2008.
17. The 'test' for suspension (Regulation 9) is 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. Harm is defined in the same way as section 31(9) of the Children Act 1989, namely 'ill treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill treatment of another'. The case of *Ofsted v GM & WM* [2009] UKUT 89 (AAC) confirmed that risk of harm at Regulation 9 meant a risk of significant harm to a child when considered against the general legislative context and the principle of proportionality.
18. Regulation 10(3)(b), which is relied upon by the Respondent for the continuation of suspension beyond 12 weeks, provides that where it is not reasonably practicable (for reasons beyond the control of the chief inspector) for any necessary steps to be taken to eliminate or reduce the risk of harm referred to in Regulation 9 within a period of 12 weeks, the period of suspension may continue until the end of the investigation referred to in sub paragraph (a) or until the steps referred to in sub paragraph (b) have been taken.
19. It is accepted that the threshold is low – with reference to 'may' and 'risk of harm'. The Tribunal 'steps into the shoes' of the chief inspector at the date of the hearing. The burden of proof rests with the Respondent on appeal and the standard of proof is 'reasonable cause to believe', which lies between a reasonable cause to suspect and the balance of probabilities. The Tribunal makes no findings of fact; it exercises a risk assessment, which requires it to consider proportionality.
20. On appeal, the Tribunal must either confirm the decision to suspend or direct

that the suspension shall cease to have effect.

### **Issues**

21. The key question for the Tribunal is whether, as of today's date, there is a reasonable belief that the continued provision of childcare by the Appellant, to any child, may expose such a child to risk of harm.
22. We had comprehensive skeleton arguments from both parties, which we considered in advance of the hearing and as part of our deliberation, as well as the oral closing submissions made by both parties, which effectively emphasised the key points set out in the skeleton arguments, having reflected on the oral evidence of Mrs Hyatt and the Appellant.

### **The Appellant's position**

23. From the Appellant's appeal application and skeleton argument, it was contended that:
  - (a) The threshold for suspension was met at the time when the suspension was first imposed, but it cannot be said that it is still met in light of the level of remediation undertaken by the Appellant.
  - (b) It is disproportionate to continue to suspend her registration when the Respondent's investigation has now completed and in considering the reputational and financial impact continued suspension is placing on the Appellant.
  - (c) The Respondent has failed to pay appropriate regard to the extent of remediation undertaken by the Appellant and her previous regulatory history.
  - (d) The Appellant should be afforded an opportunity to demonstrate her remediation in action (and can only do so) by allowing her to resume her registration.

### **The Respondent's position**

24. The Respondent contends that the decision to suspend registration continues to be a reasonable one, in light of the following:
  - (a) The seriousness of the failure to report concerns about Child A, which was all the more serious given that the Appellant appeared to understand her safeguarding duties and she failed to report the concerns on more than one occasion.
  - (b) The Respondent's view that the Appellant chose not to report her concerns, in case the reporting placed her relationship with the parents/family in jeopardy.
  - (c) Given the seriousness of the Appellant's failure, there are no steps that the Appellant can take that would eliminate the risk of repetition.

### **Evidence**

25. We considered all the evidence that was presented in the hearing bundle and submitted during the hearing. We have summarised the evidence insofar as it relates to the relevant issues for the Tribunal. What is set out below is not a reflection of everything that was said or presented at the hearing or in the documentary evidence. Mrs Hyatt and the Appellant gave oral evidence, adopting their witness statements and providing further oral evidence.
26. Mrs Hyatt confirmed that the Appellant had sound safeguarding processes and procedures in place, but from her perspective, the issue was that the Appellant had not made a safeguarding referral when one should have been made. She stated that even if the Appellant wish to query the need for a referral, she should have contacted the multi-agency safeguarding hub (MASH) for the Local Authority. From Mrs Hyatt's perspective, at a minimum, the Appellant should have made a referral on 9 January 2023 as at that point, Child A had a worsening bruise on their bottom, which appeared to have grown between 4 January 2023 (when the Appellant first noticed it) and 9 January 2023. In addition, by 9 January 2023, Child A had also sustained an injury to their head. Mrs Hyatt's ongoing concern was that there were no steps that could be taken to eliminate or reduce the risk of harm, there was still a risk of harm to children and that the Appellant could not show that she would report in a timely manner on the next occasion as it is not appropriate to use children to test out actions. Mrs Hyatt was of the view that the Appellant knew what she should have done and made a conscious decision not to refer. She explained that the Respondent had considered whether conditions could meet the level of risk, but the Respondent had concluded that conditions, such as employing an assistant or restricting the age of the children in the Appellant's care, were not workable and proportionate in the circumstances. She also confirmed that even if suspension is not in place, the Appellant would be subject to regulatory review meetings as the Respondent continued to have concerns arising out of its investigation.
27. The Appellant explained that when she is 'put on the spot', she does not always interpret what she is being asked in the right way, so she did not accept that she made a conscious decision not to report her concerns about Child A's injuries to the MASH. The Appellant was still going over things in her head, in that thought process, when Mrs Hyatt first came to speak with her. She stated that she wanted to establish more information by speaking with Child A's father and she regretted that as she now understands that she was undertaking the investigation role, when that was not her role – she was required to report her concerns, not to investigate them or eliminate other explanations for the injury to Child A's bottom or to their hand or head. She explained that since January 2023 she has thought about nothing else – about how she missed this or why she had not seen it. She explained that the past few months have not been very pleasant and she has been very emotional during the period of suspension, thinking about Child A and where they think she has disappeared to, having noted that Child A's mother considered the Appellant a stable presence. She explained that she should have just reported her concerns straightaway rather than waiting to speak to Child A's father or waiting for some form of confirmation.

28. Since the events in January 2023, she has undertaken training and updated her safeguarding policy, procedure and form for recording incidents. She explained that her practice would now be to complete an incident form as soon as possible, which now requires her to evaluate and consider next steps and record them. She would then audit the incident form against any other incident forms for the child in question and then seek advice from MASH. She explained that she accepted that she didn't pick up the phone to seek advice from MASH at the time and she stated that it can be hard when you are on your own, rather than having the support of other staff. She explained that she knew MASH were the people she should contact when she suspected abuse. She stated that she made a mistake by holding on and waiting for information and no time should have been wasted. The Appellant stated that she now understood that it was not for her to ask questions. She said she thought about contacting MASH on 18 January 2023, having accepted that 9 January 2023 was the first time when she should have considered making the referral and certainly she should have made it by 18 January 2023. She just felt that she needed the 'final piece of the jigsaw' from speaking to Child A's father. She explained that by 18 January 2023, something was starting to 'not feel right' and she knew something was wrong by 18 January 2023. She explained that she should not have delayed and she will have to live with that. She explained that she could kick herself for waiting to speak to the father after 18 January 2023. The Appellant stated that in future she would be more assertive and professionally curious about children's family circumstances. She confirmed that she has made two referrals to MASH, one concerning a choking incident with Child A and one concerning something another child had disclosed to her.
29. The Appellant clarified that she was not friends with the family but did maintain a friendly relationship with them as she aimed to do with all families. She had a mutual friend in common with Child A's mother, but did not accept that she was friends with Child A's family.

### **The Tribunal's conclusions with reasons**

30. For the reasons set out below, the Tribunal has concluded that the appeal shall be allowed because the Tribunal has concluded that it does not reasonably believe that a child may be at risk of harm from the actions or omissions of the Appellant. The Tribunal applied Regulation 10(3)(b) and did not accept the submission that it was not reasonably practicable for necessary steps to be taken to reduce the risk of harm.
31. The Tribunal found both Mrs Hyatt and the Appellant to be credible. Their evidence was open, fair and balanced. The Appellant has made concessions and accepted that she failed to act in an appropriate and timely manner, at the earliest date of 9 January and latest date of 18 January 2023 in reporting concerns about Child A. The Tribunal found the Appellant to be reflective, in her witness statement and her oral evidence. She has taken time to consider where she made mistakes in her practice, she has undertaken appropriate remediation and she has updated her policy and her records to demonstrate a level of evaluation and action which will be prompted each time she has cause to complete an incident form. The Tribunal considered risk of repetition, which

is a necessary component of the risk assessment at Regulation 9, and concluded, that there was a low risk of repetition, in light of the Appellant's explanation as to how she would approach the issue if it arose again. The Tribunal did not conclude that the threshold at Regulation 9, in conjunction with Regulation 10(3)(b) remained at the level where there were no steps that could be taken to reduce risk. The steps taken included the remediation and reflection which the Appellant has undertaken since her accepted failure in January 2023, over a period of continuous suspension of almost four months. Furthermore, the Tribunal has concluded that risk of repetition is at a low level and, in fact, the risk to children of *significant* (our emphasis) harm is also at a correspondingly low level.

32. In considering risk, the Tribunal has applied the principle of proportionality, carefully weighing the seriousness of the allegation, noting that the Appellant has been subject to suspension for almost four months, the Respondent's investigation has completed (and a notice of decision issued) and taking into account the Appellant's previous regulatory history, as well as the impact continued suspension will have on the Appellant's professional and personal circumstances. The Tribunal also considered the nature of the allegation, which concerned a failure to report (in relation to one child) for which the Appellant had provided a frank, consistent explanation, reassurance that she has learnt from the incident and, crucially, understood the significance of her failures and how to ensure such an incident does not reoccur. These factors, on balance, led the Tribunal to conclude that risk is reduced to such a degree that it would not be proportionate to continue to impose suspension.

### **Decision**

The appeal is allowed.

The suspension shall cease to have effect.

**Judge S Brownlee**

**First-tier Tribunal (Health, Education and Social Care)**

**Date issued: 25 May 2023**