

First-tier Tribunal Care Standards

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

2024-01108.EY-MOU
Neutral Citation Number: [2024] UKFTT 482 HESC)

Video Hearing V KINLY on 04-05 June 2024

Before
Tribunal Judge - Ms Melanie Lewis
Specialist Member - Mr Michael Cann
Specialist Member - Ms Heather Reid

BETWEEN:

AP Care Homes Limited

Appellant

-v-

Ofsted

Respondent

DECISION

Representation:

AP Homes Limited were represented by Mr Iain Simkin KC with Mr. Matthew Coles Solicitor in attendance. Their witnesses were Ms. Leigh Brooks Acting Manager, Ms. Kirsty Thomas Deputy Manager and Mr. William Mulvaney company Director of Wave Care Home.

The Respondent was represented by Mr Dominic Howells Counsel with Ms. Francesca Lewington Lawyer for Ofsted in attendance. Their witnesses were Ms. Catherine Fagin Regulatory Inspector, Ms Lisa Mulcahy Social Care Regulatory manager and Mr. Brendan Prior Former Manager AP Care Homes Limited.

Ms Emma Thornton RI had also filed a witness statement but was unable to attend.

Appeal

1. On 23 April 2024 the Appellant submitted an appeal to the further notice dated 19 April 2024 restricting the accommodation at Moss Farm Children's Home.

Preliminary Issues

2. The reporting restriction in the Order dated 27 April 2024 continues to be in place. It states:-

In order to seek to protect the private life interests of Child A, the Tribunal makes an order under Rule 14 (a) and (b) prohibiting the disclosure or publication of:

- a) Any evidence, exhibits, and documents relating to the proceedings and**
- b) any material likely to lead members of the public to identify Child A whom the Tribunal considers should not be identified.**

The Tribunal is satisfied that such disclosure would be likely to cause Child A serious harm and that, having regard to the interests of justice, including the public interest in transparency, it is necessary and proportionate to make such an order.

3. This was a public hearing. Two journalists attended and at their request it was clarified that the above Order did not prevent them fairly and accurately reporting the hearing. The administration had advised that their earlier request to see the skeleton arguments should be made to the lawyers. Both Counsel confirmed that they did not wish to do so. The application was not repeated to us. They were told the decision would be placed on a public website.

Late Evidence

4. Mr Simkins made an application to adduce late evidence consisting of about 100 pages, consisting mainly of emails to challenge the assertion by Mr Prior the former manager at Moss Farm and now a witness for Ofsted that he did not know that a statement he had made would be used in earlier proceedings and that he felt under pressure to accept Child A.
5. Mr Howells strongly objected to this evidence which was only served just before the hearing and yet would have been available before.
6. The Tribunal considered the application over lunch and ruled that the acceptance of the evidence would cause delay and in any event was not relevant to the limited issue before us, which was one of risk of harm today, in the light of the history. Our task was not to make findings of fact at this hearing and say whose version of events we preferred and why. Mr Simkins was content with that pragmatic approach. Mr Prior left his role as Manager at the Home in March 2024, so could not give evidence about the current position.
7. There is a history of staff changes in this case. The case for the Appellant is that there is now a stable management team consisting of Ms Leigh Brooks the Manager, Ms Kirsty Taylor the Deputy Manager and Mr Daren

Roberts as the Responsible Individual (“RI”). Mr Roberts has been in post since early January 2024 and at the commencement of the hearing the Tribunal queried why there was no witness statement from him and he was not to attend. Mr Simkins said he had a family issue. We then asked if that meant he would not continue in his role. Mr Howells said that Ofsted were not aware of these issues. We clarified that Mr Simkins’ instructions were that he would not attend but with no further detail given. The position came down to that he would continue in role, but if for any reason he could not, then Mr. Mulvaney would be invited to be the RI. In his oral evidence Mr Mulvaney confirmed that if that happened, he would be prepared to consider that role.

Background

8. AP Care Homes Limited was incorporated in July 2022 and has one Director, Ms Ampika Pickston. AP Care Homes is only one provision registered with Ofsted Moss Farm Children’s Care Home which is registered for up to 4 female children. Ms Pickston played no part in the proceedings before us.
9. Ofsted’s decision embodied in the notice of 19 April 2024 reflects the findings of a monitoring visit on 17 April 2024 in the context of serious failings previously identified over the relatively short period of time since Moss Farm was first registered on 27 June 2023.
10. We decide the case as at the date of the hearing but the history is relevant, so we set it out in brief detail.
11. The sole statutory director of the appellant is Ms Ampika Pickston. The application to register Moss Farm as a children’s home initially proposed that Ms Pickston would be the Responsible Individual. Ms Pickston accepted after discussion with Ofsted that she had no suitable experience. A suitable manager and Responsible Individual were subsequently identified and the home was registered on 27 June 2023.
12. Initial complaints by staff were that she did not leave decisions to them. Both the Manager and Responsible Individual subsequently resigned, on 12 September 2023 and 17 October 2023 respectively. The independent person’s report for October 2023 also criticised Ms. Pickston’s involvement in management and her decision to take one of the resident children to her own home. The investigation in relation to this identified that professional boundaries were blurred. Despite this finding, Ms Pickston invited children to her home again three weeks later.
13. An inspection took place over 16 and 17 November 2023 carried out by Ms Fargin and Ms Thornton. by which point a new Responsible Individual had been appointed. At this inspection, a number of serious shortcomings were identified, including poor management of safeguarding risks and incidents, poor management of bullying, lack of training, lack of suitably skilled and experienced staff and unsafe recruitment practices.

14. Following this inspection, Ofsted decided to suspend the home's registration with immediate effect through to 8 February 2024, a period of 12 weeks.
15. An inspection to review the suspension notice took place on 3 January 2024. Ofsted must keep a suspension under review and at all times assess if a suspension is both proportionate and necessary. There was a new manager (Mr Brendan Prior) and Responsible Individual (Mr. Daren Roberts) in post, having been appointed just days earlier. Mr Roberts has extensive experience in children's residential care. Mr Prior had a good previous inspection history and had moved from being the manager of an outstanding children's home. Ofsted were satisfied by their assurances that they understood the improvements needed in safeguarding, staff skills and training, safer recruitment and management oversight.
16. Following the lifting of the suspension, a single child (Child 'A ') was placed in the children's home on 22 January 2024. There are a number of issues about the circumstances surrounding that admission, without a full understanding of their very complex needs and behaviours and who was responsible for that. A number of events causing particular concern took place between 26 and 29 January 2024 culminating on 29 January 2024 when the Home decided to end the placement. It was of concern to Ofsted the way in which the termination happened and that this was harmful to the child emotionally.
17. On 30 January 2024, a further monitoring visit took place after which the restriction notice was served.
18. A monitoring visit took place on 6 March 2024 when it was decided that the restriction should remain in place due to ongoing concerns in relation to leadership and management, safeguarding practices and processes, quality compliance, physical intervention and staff knowledge.
19. The Appellant had appealed against this earlier restriction notice but in the event it was withdrawn on the first day of the hearing: Order 25 March 2024.
20. A further monitoring visit took place on 17 April 2024. Mr Roberts and Ms Brooks has taken some action since the last visit, namely updating documents and guidance for staff. Again, however, inspectors considered that safeguarding training materials were process-driven rather than focused on actions and judgments. There were also concerns about safe recruiting; no references or updated DBS information were available for a member of the appellant's secretarial staff but who liaised with placing authorities and took confidential minutes. In her evidence Ms Brooks maintained they had no direct contact with children. Ofsted were not satisfied there was evidence of real progress in relation to previously identified shortcomings.
21. Ofsted have also issued a Notice of Decision to cancel registration. That is subject to a separate appeal.

22. In relation to the management of the home, there has been no registered manager in post since 13 September 2023. Two managers and a responsible individual have left within a short time frame before they could register.
23. Ofsted processes require that that they need to be satisfied as to both the suitability and ability of the Manger or Responsible Individual to be registered to a particular home. This process is not portable. The “Fit Person” process varies accord to the situation. In this case concerns have been identified about the suitability of the current proposed manager and RI as whilst both have strong experience, they were dismissed from their last employment. That is not necessarily a bar, but it does need to be explained.
24. Ofsted has been pressing the Appellant since 9 January 2024 to engage with its processes for assessing the suitability of Mr. Roberts, so arranging an interview. Ms. Brooks only formally applied to be registered manager on 11 May 2024 and since then Ofsted has sought to engage in an assessment of her suitability. It emerged at the hearing that she had not received emails sent to her previous deputy manager box. She stated that she would attend for interview and provide a reference from her last employer. Mr. Howells confirmed that this interview could be arranged promptly.

Legal Framework

25. Ofsted is the body responsible for the regulation of registered providers under the Care Standards Act 2000 and the various regulations made under that Act.
26. Section 22B of the Care Standards Act 2000 provides a power for the registration authority to serve a notice on a person who is registered in respect of an establishment, imposing the requirement under subsection (2), which states: -
*(2) The requirement is to ensure that no child is accommodated at the establishment unless the child—
(a) was accommodated there when the notice was served; and
(b) has continued to be accommodated there since the notice was served.*
27. Section 21(1)(c) of the Care Standards Act 2000 specifies that an appeal against a decision to restrict accommodation shall lie to the Tribunal who may confirm the notice or direct that it ceases to have effect.
28. There is no statutory test to be applied when considering the threshold for restricting accommodation. However, Ofsted’s policy is set out in the Ofsted’s Social Care Enforcement Policy which states:
...”we only do so where we reasonably believe that a child may be at risk of harm if we allow further admissions.”

29. It was common ground that on appeal the Tribunal steps into the shoes of the Inspector. We make no findings of fact at this stage but consider “as at the date of its decision, does the Tribunal reasonably believe that a child or young person may be at risk of harm if further admissions are allowed and accommodation is not restricted”.

30. The burden of satisfying us that the threshold test is met lies on Ofsted. 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 may be exposed to a risk of harm.

31. Even if the threshold test is satisfied by the Respondent, that is not an end of the matter because the panel must decide whether the decision is necessary, justified and proportionate in all the circumstances.

The Evidence:

32. This is only a brief summary of the evidence read and heard. In addition we were assisted by detailed Grounds of Appeal and Response, opening skeleton arguments and oral closing submissions by both Counsel.

33. Ms Fargin has been involved from the beginning when AP Care Homes Limited made an application to register on 23 January 2023. In her two statements she set out the background, recorded above.

34. Ms Fargin set out the transition of Child A into the home which was “*not good*”: with questions over whether the provider would admit them as they did not have sufficient information. Mr Prior has now given a statement for Ofsted where he says he admitted the child under pressure, which is denied. Ms Fargin’s statement says that Mr Roberts made the admission. Ms Brooks in her oral evidence said she made the decision. In any event notice was given and Child A left the placement after a week which Ofsted say is a clear causal link between failings in the home and a significant impact on Child A’s emotional well-being.

35. Ms Fargin set out the dates when Mr Roberts had been invited to his Fit Person interview from January 2024 onwards. Some response had been received in April and May 2024 stating he was ill or on holiday. He had not responded to an appointment on 23 May 2024 but she had attended the office in case he came. He did not. It transpired that he would make an appointment but only when he could attend with the Home’s solicitor. Ofsted said this was acceptable but a very unusual course.

36. When cross examined Ms Fargin agreed the Home was at a higher end in terms of comfort. She accepted that Ms Pickston had been spoken to about boundaries on social media and had not breached that.

37. She maintained that the admission of Child A was chaotic and that there had been accepted shortfalls. There had been an investigation by the Local

Authority Designated Officer (LADO) after complaints were received in which Mr Roberts was exonerated. Two staff had been let go after these incidents.

38. At the inspection on 17 April 2024 Mr Roberts said he would not be available, and she met with Ms Brooks. She did not accept that she had shown any form of bias towards her, instead following Ofsted's usual "Key lines of Inquiry". She did not think her manner had been intimidating although that is how it was perceived by Ms Brooks and Ms Taylor. They did not have the same issue about Ms Thornton, the other inspector present. Ms Brooks and Taylor in their evidence both stated that they felt they had produced the documents they were asked to, so felt the Inspection had gone well.

39. Ofsted's conclusions on the existing deficits which were detailed in her statement were not specifically challenged but instead Mr. Simkins focussed on the work and improvements made. This progress was set out in documents prepared by the Independent Visitor pursuant to regulation 44 in April and May 2024.

40. Lisa Mulcahy has also been involved in this case since November 2023 and was the decision maker. After the further monitoring visit on 17 April 2024 by Ms. Fargin and Ms. Thornton, she made the decision that the notice restricting accommodation at the home should remain. She was concerned about the lack of stability and consistency in the leadership and management of the home, the understanding of the leadership and management team of safeguarding practices, safer recruitment practice, allegation management, training of staff and decision-making about children moving into the home and effectiveness of the monitoring and review systems.

41. She had been concerned to find out why Mr. Roberts had not attended for interview and had telephoned him on Thursday 30 May 2024. He confirmed that he knew about the Tribunal hearing and would not attend. He would attend a Fit Person interview but only with his Solicitor.

42. It had been agreed that Mr Prior would give only limited evidence. His last working day was 15 March 2024, when he left his employment as Manager due to him having several concerns. He left without another job to go to. He has not been involved in the Home since. He is now employed elsewhere. He had no issues with Ms Brooks, who confirmed that they had formed a good professional relationship and that he had talked to her about his frustrations in the job. She agreed that his working relationship with Mr Roberts was more problematic.

43. He had contacted Ofsted to explain to them why he was leaving his employment at Moss Farm.

44. Ms Leigh Brooks has previous experience as a Manager of a Children's Home and had been the acting manager at Moss Farm since 14 March 2024. She had therefore been involved in Ofsted Inspections before and had a Fit Person Interview. This was the first time she had been concerned about what she perceived as a negative attitude to her by an Inspector.

45. Regarding the admission of "Child A", whilst not accepting Ofsted's characterisation of it as "chaotic", she accepted that there were some shortfalls which the staff had reflected on.

46. She had employed Mr Mulvaney as their Consultant after researching other companies. Wave Care had completed a 3 day Audit which we clarified was not in evidence before us.

47. When cross examined, she stated that the termination of Child A's placement was justified as they had made clear they did not want to be there and would continue with negative behaviours if forced to remain. She did not feel qualified to say if that had caused them emotional damage. That was a judgement for a psychologist. She accepted there was not enough "*professional curiosity*" about the whole history of Child A before they admitted and that some key information was missing, which we learnt had been her decision on the day.

48. She was asked about the circumstances that she left her previous employer and said she would provide that reference and understood that she would need to explain the circumstances of the termination of her previous employment.

49. She was taken to documents supporting the Homes Safeguarding Policy and she was confident that staff were aware that there were a number of routes to report and a different route, which also took account of possible conflict of interest where members of the same family were employed at the Home. The training matrix's would be fully completed when children came into the Home and only then could they identify training in relation to specific children.

50. Ms Thomas is now the Deputy manager and started working at Moss Farm on 10 November 2023. She had the same concerns as Ms Brooks about the perceived attitude of Ms Fargin on the monitoring visit on 17 April 2024.

51. Mr Mulvaney is a Co-Director of Wave Care Services, which is a National Consultancy and Care Service. He has over 20 years of experience of working in his sector. He is currently the RI of 2 different instituting as well as undertaking consultancy work. He started working with AP Care Homes in March 2024 and created an Action Plan with Kayleigh Grice who works for his company and was the author of most of the Regulation 44 reports. He took the lead on what he described as a 3 day "Deep dive" Audit of the Home, which we clarified was not in evidence before us. Of the 40 actions identified he was confident that there were only 3 outstanding and they could not really be tested until children were in place. He felt the Home was on a wholly positive direction of travel. In cross examination, it was clarified that was based on his visits, but that most of the reports had been prepared by his staff.

Respective Positions of the Parties

52. The case for Ofsted was that Moss Farm has not made significant or sufficient progress since the restriction notice of 30 January 2024. A monitoring visit which took place on 6 March 2024 and 17 April 2024 confirmed that there

was no sufficient evidence demonstrating learning or improvement in practice from staff or leaders arising from the history. Such training as there had been in relation to safeguarding was focused on reporting and recording rather than the actions and judgments required to keep children safe in practice.

53. Ofsted has concerns about Ms Brooks and Mr Roberts both of whom were dismissed from their previous employment. That might be of concern or not, but it needed to be investigated. The Tribunal could take no view on that as: (i) Mr Roberts did not give evidence at the hearing; and (ii) Ms Brooks has failed to provide references from her previous employment and/or call a witness from her previous employer.

54. The Home had had acute problems and required a strong, skilled and experience team. Those part of those past failings were still part of that team.

55. The case for the Appellant was that the conclusions reach by Ofsted were inevitably speculative given there were no children resident in the home. Ofsted had failed to take account of the policies and procedures currently in place, which Mr Mulvaney who could be treated as an expert stated were sufficient. Unduly forthright questioning by one of the Ofsted Inspectors had placed the staff on guard so there was a real risk this would skew an assessment of their ability.

56. The team now in place at the home had suitable qualifications and experience and easily competent to deal with any future residents. Ms Pickson played no part in the management of the Home. It was unfair to criticize the Appellant for its turnover of staff when what it sought to do was employ highly qualify trained experienced and competent staff and reject those who did not meet those standards. It acknowledged that there have been problems arriving at a settled workforce, however there was now a strong leadership team in place. Where any staff changes have been made, they had only been done to improve the position and lessen risks to children.

Conclusion and Reasons

57. We have fully considered all the evidence written and oral, opening skeleton arguments and closing submissions for both parties. We thank both Counsel for their assistance in this case and for taking a pragmatic approach.

58. The test is that a child may be at risk of harm. That is a low bar but any harm must be significant. We find that Ofsted have discharged the burden of proof that as of today if the restriction is lifted a child may be at risk of harm. We have balanced a range of factors which we set out below.

59. On an overview as a specialist tribunal, we have considered that the children admitted to a Children's Home are likely to be vulnerable and many will have very challenging needs and behaviors. Some may need to be admitted at short notice. It is a dynamic process not an exact science and risks to the child, staff and the wider community must be constantly assessed.

60. We take into account that Homes not in compliance can make a turnaround, sometimes quite quickly. That may be due to a change of management, staff and/or taking advice from external consultants.

61. Ofsted are under a duty to keep a suspension or restriction under review and take the least restrictive option. That is in accordance with established principles set out in case law and their own Policy. They have done so in this case. They lifted the suspension on 16 March 2024, being re-assured by the new management team that had been put in place.

62. This Home has a very serious history of failure in a very short time. The unchallenged history was set out in Ms. Fagin's second witness statement, which states:

71. The home was registered in June 2023. Since registration, four children have resided at the home for differing periods of time. Two of the children had their placements ended abruptly by the provider who were unable to meet their needs and keep them safe. Two children were required to move suddenly due to the serious and widespread safeguarding concerns. Therefore, all four children have been required to move on from the home suddenly, in an unplanned and emergency way which has contributed to their poor experiences.

72. Following the home's registration, the manager remained in position for less than three months. There has not been a registered manager in position since 13 September 2023. There has been three further managers during this time.

73. Additionally, there has been three responsible individuals appointed since the home's registration. The lack of effective and stable leadership has had a significant impact on children's experiences, safety and well-being. The poor leadership has contributed to inconsistent and unsafe care for children.

63. We look at the case today, but as acknowledged by Mr Mulvaney this is an extremely high level of lack of compliance and concerns. In the light of that history this is Home that can expect to come under the most careful scrutiny from Ofsted and placing authorities. A member of the public knowing these facts would expect nothing less.

64. The second issue is whether the Appellant has established that the judgements reached by Ofsted following the Inspection on 17 April 2024 are overly critical and dis-proportionate. Each of their broad areas of concern was not challenged other than in broad terms by the work done to improve their processes and procedures.

65. Mr Mulvaney had considerable experience in this area with oversight of this case on behalf of his company Wave Care with the work being carried out by others. It is to the Home's credit that they sought external advice but we did

not see the terms on which Wave Care was engaged and any specific areas that they had to address.

66. Regulation 44 reports by an Independent visitor, are a process to form an opinion as to whether children in the Home are effectively safeguarded and the conduct of the Home to promote the well-being of the children accommodated. They are not a full “Deep dive” Audit, which would also look at the stability of the Management team.

67. Mr Phillip Marshall also employed by Wave Care Services completed a Quality Audit Service Review on 17 April 2024, which was the same day the Ofsted Inspectors were in and they wished to do their work independent of him. He noted that the Action Plan was being followed up. He also addressed what on our view is a key issue in the case: Regulation 13 The Leadership and Management. He noted some gaps/mismatches in Ms Brook’s record and Mr Roberts which needed to be addressed. (p. I 160).

68. We accept there is some evidence of progress. Ms Brooks and Ms Taylor have clearly spent time updating policies, procedures particularly around safeguarding. Ms Brooks has a commitment to introducing a therapeutic ethos within the Home with advice from the Coastal Child and Adult Therapeutic team (C-CATS) and had met them on a number of occasions.

69. There is evidence that Ms. Brooks, Mr. Roberts and Ms. Taylor are experienced individuals in this area of work. The Regulation 44 reports record Ms Brooks’ and Ms Taylor’s commitment to the Home despite the difficulties and the stress of ongoing litigation.

70. To her credit Ms. Brooks accepted that there were short fallings about how ‘Child A’ was admitted to the Home. She showed insight and took responsibility for her part. We were concerned that on the evidence we read and heard the management team were not working together at that point. That would have required them to take a joint decision on admitting “Child A”, not months later giving conflicting accounts of whether there had been pressure applied or a decision to refuse admission being overridden.

71. Ms. Brooks confirmed that Mr. Prior had shared with her his frustrations in his role and that she was not surprised when he left. This conflicts with what she confirmed that she had written in the Scott Schedule that Mr Prior left as the inspection on 6 March 2024 left him feeling if he did not resign he would no longer have a career in residential care. She referred to him being “*bullied and intimidated*” by Ofsted Inspectors. Mr Prior said something different, so at the very least their perceptions were different.

72. The concern of Ofsted is that two of the same management team are in place, as when child A was admitted has force. The issue today is that any manager who remains in this service, on this history must expect to be the subject of very close scrutiny by Ofsted. At points in her evidence Ms. Brooks was defensive and hurt that her efforts were not acknowledged by Ofsted.

73. We conclude that it is wholly reasonable for Ofsted to want to conduct full “Fit Person” interviews in this case. Ms. Brooks agreed she had been dismissed from her last job. It has been open to her since she applied to be the registered manager on 11 May 2024 and even before when she was acting up, to proactively provide a reference from her last employer and a full explanation of what happened and why she says it is not relevant to her current role.

74. Of more concern was the position of Mr Roberts. Again, there are questions that he has to answer as part of safe recruitment. He chose not to attend the Tribunal, so we have concerns about his commitment to his role going forward. He has had since January 2024 to attend an interview with Ofsted to answer questions about issues that have been raised and how he left his last employment. Again, as an experienced professional he would have known he would have to answer these questions. His lack of engagement is striking.

75. Having found that there is still a reasonable risk that a child may be at risk of harm if we allowed further admissions to the Home, we conclude it is wholly proportionate and necessary for the restriction to remain in force in the light of the history. We note that that restriction could be reviewed once Ms Brooks has supplied the necessary references and attended any Fit Person interview required by Ofsted and once Mr Roberts has attended a Fit Person interview.

Order:

We therefore direct that the continuation of the restriction of accommodation dated 19 April 2024 on Moss Farm children’s Home is CONFIRMED.

Appeal Dismissed

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

Date Issued: 10 June 2024