[2013] UKFTT 0513 (HESC)
[2013] 2098.EY- SUS

In the First-Tier Tribunal (Health, Education and Social Care)
Considered on Papers
On Monday 7th October 2013

Before

Deputy Chamber President Judge John Aitken
Specialist Member Heather Reid
Specialist Member Dr Sati Ariyanayagam

Mrs Suzanne Holmes
(Munchkins Nursery)

Appellant

v

Ofsted

Respondent

Decision

1. This matter was listed for consideration on the papers. That is permissible under rule 23 of the Procedure Rules. However, not only must both parties consent, which they have but the Tribunal must also consider that it is able to decide the matter without a hearing. In this case we have a good picture of the allegations made, the response and the level of risk present, from the papers. There appears to be no substantial factual dispute which might affect our decision and we consider that we can properly make a decision on the papers without a hearing.

2. The appellant appeals to the tribunal against the respondent's decision dated 24th September 2013 to suspend the appellant's registration to provide childcare on Non Domestic premises, under Section 69 of the Childcare Act 2006 and Early Years for six weeks until 4th November 2013.

Events leading to the issue of the notice of statutory suspension.

3. The appellant has been a registered child care provider and manager of Munchkin's Nursery which was first registered on 25th January 2000. There are

53 children registered at present, although only 47 may be cared for at a time. In April 2013 following her last inspection in November 2012, the care was described as “Good”, this included a comment “*children enjoy a safe and secure play and learning environment because staff carry out daily safety checks, and written risk assessments are completed. Risk assessments are very effective and the premises are secure.”*

4. On 23rd September 2005, a child at the provision was burned with hot custard. Mrs Holmes was prosecuted for this breach of statutory duty and given a conditional discharge. Ofsted’s concern at that stage was that staff should have qualifications and experience in looking after children under 2. That has been complied with.

5. On 23rd September 2013 there was a serious accident at the premises. A child aged about 2 fell out of a first floor window. A review of CCTV shows that the staff were unaware of the child climbing onto the window ledge, subsequently it was established that the windows contained no mechanism to prevent them being opened and the child fell out. A second child also climbed towards the window but was seen and restrained by staff.

6. There is no suggestion that the staff present in the room (who themselves have been suspended by the nursery) were inexperienced or not appropriately qualified. In addition window restrictors have now been fitted following a Local Authority inspection, and it is not likely that such an accident could reoccur.

The Law

7. The statutory framework for the registration of childminders is provided under the Childcare Act 2006. This Act establishes two registers of childminders: the early years register and the general child care register. Section 69 (1) Act provides for regulations to be made dealing with the suspension of a registered persons’ registration. The section also provides that the regulations must include a right of appeal to the tribunal.

8. Under the ***Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008*** when deciding whether to suspend a childminder the test set out in 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.”*

9. The suspension shall be for a period of six weeks. Suspension may be lifted at any time if the circumstances described in regulation 9 cease to exist. This

imposes an ongoing obligation upon the respondent to monitor whether suspension is necessary.

"*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*".

10. 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 child care by the registered person to any child may expose such a child to a risk of harm.

11. 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.

Issues

12. Ofsted are concerned that the appellant has supervised premises where two children have been injured in serious accidents. In the last, an open window led to the fall of the child and a near miss of another. The inability to recognise this risk and the resulting failure of supervision to prevent the fall suggests that a safe environment was not provided in these circumstances.

13. The appellant points out that the staff present were qualified and have been suspended whilst the matter is investigated, that the premises were praised for their safe environment on the last inspection, and unfortunate though it is, it is not symptomatic of something more.

Conclusions

14 We have considered the report of the Ofsted inspectors from April 2013 and whilst we consider it helpful it plainly was not done at a time when the windows were open in the rooms, nor would we consider that an Ofsted inspector should check every window fitting to ensure it is appropriate. Nonetheless it does demonstrate that the nursery gave the appearance of competence in these matters, and we bear that in mind.

17 We note a disturbing similarity in the way the incidents of 2005 and 2013 were dealt with, in 2005 when the child was scalded, the child was not taken for

medical attention which was plainly needed given the description of blistering on her back, rather her parents were contacted and told she needed a doctor, they arrived to find the child highly distressed. In the present case following falling from the 1st floor window there was again a delay in seeking medical assistance, the parents were contacted and they were asked if an ambulance should be called. We are concerned that in circumstances where not attending hospital would be all but inconceivable, i.e. a plainly scalded child, and one who had fallen onto concrete from 3.8 metres the Nursery took no action to ensure prompt expert medical treatment, rather they felt it necessary to wait to see if the parent felt it was necessary.

18. We note also that the explanation for the lack of window restrictors is a long standing one, they have been absent since April 2011, almost 2 ½ years, and given they have been fitted within days of the accident, it is plain that they were unnecessarily and knowingly absent for that period, there is some evidence that there have been other near misses with regard to the windows, when 2 children were leaning out (at page 160)

19. We appreciate and understand that suspending provision is very damaging to a business, it is essential however that one can have confidence in the safety of a provision. The investigation into the circumstances of the accident is not yet complete, although we would need to be persuaded that it could not be concluded by 4th November. We consider that until the investigation has concluded there is a risk to children on the premises because whilst in almost any environment accidents may occur, it is not clear either that the management or leadership has created a safe environment, because of the evidence that a safety matter was known of ignored for years, and caused an accident and other similar situations may exist or that the reaction of staff to emergency medical situations is appropriate.

Decision

The appeal against interim suspension is dismissed, the suspension will continue until 4th November 2013.

Judge John Aitken
Deputy Chamber President
Health Education and Social Care Chamber
Tuesday 8th October 2013