

First-tier Tribunal Health, Education and Social Care Chamber

Care Standards

BR

Appellant

-v-

OFSTED

Respondent

[2013]2126.EY-SUS

B E F O R E:

**Tribunal Judge Meleri Tudur
Ms Heather Reid
Mrs Wendy Stafford**

Representation

The Appellant BR attended the hearing with her husband.

The Respondent was represented by Ms Birks, solicitor. The witness was Mr Matthew Hill, Senior Officer with the Compliance, Investigation and Enforcement Team for Ofsted.

Ms S Scultz and Ms S Norton attended as observers from the Judicial Appointments Commission.

Preliminary

1. At the start of the hearing, the Appellant made an application to adduce in evidence four audio recordings upon which she wished to rely in the appeal. The first was a recording she had made of a telephone conversation between her and the Regulatory Inspector on the 18 November 2013, where the Appellant had alleged that the evidence relied upon by the Respondent was inaccurate. The second was a telephone call made on the 15 November 2013 where she had again spoken to the Inspector. On both occasions she had made the recordings covertly without informing the Inspector of the recording. The third was a recorded telephone conversation with the company responsible for arranging the medical assessment, when she had cancelled the appointment on the 29 November 2013 and finally, a recording made of a visit to school in November 2013 to collect copies of policies, which was estimated to

last at least 30 minutes. On neither occasion had the Appellant informed the others participating in the conversations that they were being recorded.

2. Ms Birks confirmed that the audio recordings had all been heard by the Respondent, having been disclosed in compliance with the Tribunal directions but she did not consider that they contained any information of relevance to the decision to be made by the Tribunal.

3. We considered the requests as a preliminary issue and concluded that the telephone calls on the 18th November and to the medical assessors' company were irrelevant to the decision to be made by the Tribunal in the appeal, as was the recording of the school visit to collect copies of the school policies because it is already accepted that the Appellant disputes the evidence of the school about the events that occurred on the 2 October 2013, it is acknowledged that the Appellant changed the date of the medical assessment arranged for the 29 November 2013 and a conversation between the Appellant and members of the school staff is not relevant to the considerations in the present appeal. It may be that the evidence would be relevant at an appeal against cancellation of registration where the evidence forming the basis of the decision was being challenged, but we have concluded that they are not relevant to the present appeal. If an application is to be made in future proceedings, then it would be useful if the application was supported by a transcript of the recordings.

4. We reserved our position in relation to the telephone call of the 15th November 2013, on the basis that it was not yet clear whether the matters discussed in it were contentious, but that there was a possibility that it could be relevant to the issue to be determined by the Tribunal and we did not consider at that point that it should be refused. We confirmed the Tribunal's view that covert recording of conversations is not an acceptable means of obtaining evidence and that the Appellant should notify those participating in a conversation of her intention to record it, so that they could either consent or bring the conversation to an end. A covert recording is not automatically inadmissible as evidence but we concluded that three of the recordings were irrelevant to the decision that the Tribunal had to make and should not be admitted in evidence.

Appeal

5. The Appellant appealed on the 20 November 2013 against the Respondent's decision dated 15th November 2013 to suspend her registration as a childminder under Section 69 of the Childcare Act 2006, for six weeks until 27th December 2013.

6. 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***, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the children or their parents, or the Appellant in this case so as to protect their private lives.

7. The Appellant has been childminding since September 2012.

8. In about December 2012, she was disqualified from driving until January 2014, having admitted an offence of driving with excess alcohol. The Appellant self reported the conviction to the Respondent, who confirmed that it would not affect her registration, as there were no children in the car at the time of the offence.

9. A previous suspension for a period of six weeks was imposed on the Appellant on the 3 October 2013 until the 14 November 2013. The Appellant did not appeal that decision. The suspension followed an allegation made by a member of staff from Winkfield St Mary's Church of England Primary School, at which three children, minded by the Appellant, were pupils, that the Appellant had arrived at the school on the afternoon of the 2 October 2013 presenting behaviours and in a condition that suggested that she was under the influence of alcohol or drugs.

Evidence

10. The evidence relied upon by the Respondent was set out in witness statements produced as appendices to the statement of Mr Matthew Hill, the Respondent's Senior Officer within the Compliance, Investigation and Enforcement Team. Mr Hill gave oral evidence at the hearing.

11. Mr Hill produced the case comments file which set out the file notes held by the Respondent about the Appellant's registration. The case comments noted that on the 2 October 2013, the Respondent had received a telephone call from Mr Mike Chesters Head of the school, informing of an incident that day involving the Appellant. Having initially suspended the Appellant on the strength of the information provided by the school, the Compliance and Investigation Team carried out further investigations into the allegations.

12. On the 16 October 2013, the Regulatory Inspector, Diane O'Neill, visited the school and interviewed the head teacher and three other members of staff. The following day, it was decided that a health check should be pursued for the Appellant. On the 21 October 2013, the Appellant was sent a Health Declaration Booklet in order to prove her fitness to continue as a childminder.

13. On the 24 October 2013, the Appellant contacted the Ms O'Neill by telephone and mentioned the possibility of her having suffered from food poisoning but that it was now too late for the Environmental Health Agency to run tests on the food and stool samples she had retained.

14. On the 6 November 2013, the Ms O'Neill spoke by telephone to PC Steve Mitchell who informed her that the Appellant had been stalking him and contacting him

so many times that he had had to take the matter to his superiors. The Inspector noted the information provided by PC Mitchell during the call. She asked him whether he had been able to smell alcohol on the Appellant's breath on the 2 October 2013? He responded that he did not smell alcohol but stated: "She was impaired. She was unsteady on her feet, her eyes were glazed and she was repeating her words." In his professional opinion, she was not fit to take the children. He was reported to have told the Appellant "Would I want you to look after my children, the answer would be no." He confirmed that the Appellant had kept asking to be breathalysed and his expressed concern was that if he breathalysed her and she was under the limit and about to drive a car, she was not in a fit state to do so. It was more an issue about her behaviour.

15. On the 15 November 2013, there was a case review of all the information available and a decision made to impose a further six week suspension because there were still sufficient concerns about the safety of children to justify a further period of suspension. The Investigation team were still awaiting the outcome of the health check and medical screening tests.

16. A case comment note dated the 4 October 2013, recorded that the Appellant had been unwell with a cold, but felt rough at the time of going to pick up the children. She had eaten cold Chinese takeaway, specifically prawns, mushrooms and rice at about 9am and on her way to the school some six hours later felt a sharp pain in her abdomen which then made her vomit. The school had kept the children she was to pick up and said they would contact the parents. As she was unsure about responsibility for the children, the Appellant wanted to stay until the parents had collected them. She claimed that she had been sick for about 12 hours and concluded that the prawns had made her ill.

17. The evidence of the Respondent about the incident is that the Appellant attended at the school to collect the children on the afternoon of the 2 October 2013. She collected two Reception age children from one side of the school, and then moved to the other side to await the third child who was in Year 3. The Teaching Assistant Ms Swain reported in her statement that a parent made enquiries of her about the Appellant and stated that she had been seen to be unsteady on her feet and "at one point fell over and was sick" on the way to school. Ms Swain went to speak to the Appellant, found her crouching hanging on to the railing and seemed unsteady. She believed that she could smell alcohol on her breath and asked her if she had been drinking. The Appellant denied any drinking and Ms Swain then went to get the Head teacher, leaving the Appellant with Mr Searle.

18. The Head, Mr M Chesters, reported that the Appellant was unsteady on her feet, slurred her speech, had vomit on her blouse and stains on her knees where she had fallen over. The Head decided that the Appellant was not in a fit state to have care of the children and took them into the school.

19. The Head then placed the Appellant in a separate room and asked questions of her, concluding that the Appellant was repeating herself and unfit to care for the children. The parents were called to collect the children and the Appellant told that she should leave the premises as she no longer had any reason to be there. The Appellant refused to leave and the police were called. A police constable spoke to the Appellant and he too concluded that the Appellant was under the influence of alcohol and unfit to care for children. The Appellant eventually left with her son, who had turned up to collect her.

20. In the notes of the Investigating Inspector's interview of the staff at Winkfield St Mary's School on the 16 October 2013, Mr Chesters is recorded as informing the inspector that the Appellant's son had informed the Deputy Head, Mr Dust that his mother had been unwell before leaving home and that he had pleaded with her not to collect the children. She had been sick over the dog before leaving and the son had been unable to attend the school with her because he was clearing up and cleaning the dog.

21. The Appellant maintains that on the 2 October 2013, she was unwell, suffering from a cold and had taken a substantial amount of over the counter medication during the previous night and day. She had also eaten a cold Chinese take-away which included some King Prawns which she believed might have caused her food poisoning, leading to projectile vomiting on the way to the school. She denied being under the influence of alcohol or being unfit to care for the children.

The Law

22. The statutory framework for the registration of childminders is provided under the Childcare Act 2006. The 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.

23. 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."

24. 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.

25. "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”.

26. 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.

27. 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

28. The Respondent is concerned that the presentation and behaviours of the Appellant at the school on the 2 October 2013 are indicative of her being unable to identify when she may be unfit to care for children and when there may be a risk of harm to children in her care.

29. The Appellant maintains that she was not under the influence of alcohol, that the evidence of the witnesses relied upon by Ofsted is inconsistent and does not support the conclusions that have been drawn. She relied on alleged inaccuracies in the evidence to challenge the basis of it and suggested that the witnesses did not have sufficient expertise to decide whether she was under the influence of alcohol or not. In the documentary evidence, she suggested that the head teacher and deputy head teacher’s evidence should not be relied upon because they were biased against her following a historical complaint she had brought against the school. She implied at the hearing that the police constable’s evidence should not be relied upon because he had alleged to the Regulatory Inspector that she was stalking him.

Analysis and Conclusions

30. We consider that the situation in which the Respondent found themselves as the recipient of allegations against the Appellant was a serious one. The evidence was that the Appellant presented as physically unfit to care for young children. Although reported by one person, the evidence of four individuals was that they had concluded that the Appellant presented as if she was under the influence of alcohol or drugs and unfit to care for children. The conclusion had been drawn by Mrs Swains, the teaching assistant, Mr Chesters, the Head Teacher and Mr Searle, a teacher. The police constable’s reported conversation with the Regulatory Inspector noted that he had formed the view that the Appellant was under the influence of drink or drugs and unfit to care for children. There was also the hearsay evidence of the parents who had seen the Appellant fall over and vomit on the way to school and the son’s report of her condition before she set off.

31. We accepted Ms Birks' submissions and Mr Hill's evidence that four of the witnesses were experienced child carers and/or professionals who would be able to form a judgement about a person's fitness to look after young children.

32. The Appellant accepts that she was unwell on the 2 October 2013 and, at the hearing, for the first time in the appeal or in evidence to the Inspector, suggested that she had her mobile phone in her hand because it was her intention to call the children's parents' to collect them. She suggests possible alternative reasons for her ill-health: her cold, which she claimed could produce all of the symptoms described or food poisoning which rendered her immediately and violently sick and use of a large quantity of over the counter medications.

33. We have considered all of the information provided in the appeal, and noted that the Appellant has a recent (December 2012) conviction for drunk driving; the evidence of the head, class teacher and police constable all of whom are professionals with experience of child care and who would be in a position to reach a conclusion about the appropriateness of allowing an adult to take charge of children and ensure their safety. There is also the hearsay evidence from the Appellant's son that she was sick before she left the house on that day and that he had begged her not to fetch the children and from the other parents that she had fallen over and vomited on the way to school.

34. The Appellant did not at any time give any indication that she realised that the cause of the presenting behaviours is of less relevance than the fact that she was unable to identify that in her condition of being unsteady on her feet, slurring in her speech and projectile vomiting, she was not in a fit state to be looking after children and should have made alternative arrangements for them to be collected by someone else from school to ensure their safety and welfare. The lack of insight into the risks posed by her condition is further reason to support the belief that unless the registration was suspended then the children in her care may be at risk of harm.

35. We have concluded that put together, the pieces of evidence which were presented to the Respondent are sufficiently cogent to justify a reasonable belief that there would be a continuing risk of harm if the Appellant's registration was not suspended, and we are satisfied at the date of the hearing that a reasonable person, knowing the law and in possession of that information would believe that a child might be at risk, because of the several reports of the Appellant's physical condition, her own lack of insight into the risk of harm to the children in her care given her very poor physical condition and a known and recent conviction for driving with excess alcohol. The risk of harm would be the risk of physical injury to the children whilst in the Appellant's care when she was physically incapacitated and the potential emotional damage of witnessing the Appellant's condition, regardless of the cause of it.

Decision

The appeal against interim suspension is dismissed.

**Judge Meleri Tudur
Tribunal Judge Care Standards
Health Education and Social Care Chamber**

Dated: Friday 13th December 2013