

Care Standards Tribunal

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

**Considered on the papers
On Tuesday 12 August 2014**

BEFORE

**First-tier Tribunal Judge Melanie Plimmer
Specialist Member Denise Rabbetts
Specialist Member Wendy Stafford**

[2014] 2239.EY-SUS

BETWEEN

GILLIAN McDUFF

Appellant

v

OFSTED

Respondent

DECISION

1. This matter was listed for consideration on the papers. That is permissible under rule 23 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('2008 Rules') however not only must both parties consent, which they have in this case, but the Tribunal must also consider that it is able to decide the matter without a hearing. In this case we have sufficient evidence regarding Ofsted's concerns, the response and the level of risk present. In the circumstances 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 14 July 2013 to suspend her registration as a childminder on the Childcare Register for six weeks to 24 August 2014 pursuant to section 69 of the Childcare Act 2006 ('2006 Act') and the

Childcare (Early Years and General Childcare Registers) Common Provisions) Regulations 2008 ('2008 Regulations').

Restricted reporting order

3. The Tribunal makes a restricted reporting order under Rule 14(1) of the 2008 Rules, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the children or their parents in this case so as to protect their private lives.

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

4. The appellant was first registered with Ofsted on 22 March 2003. The events leading to the appellant's suspension began with a written notification by the appellant herself on 10 October 2013 about a situation with her (then) 14 year old daughter. The appellant's daughter alleged that she had been drinking excessively and assaulted her and her brother. After this there were court proceedings regarding residence and contact of the appellant's three older children with her ex-husband. The allegations against the appellant were brought to the attention of the police and social services but no further action was taken.
5. Ofsted visited the appellant on 3 December 2013 and it was decided that a health referral should be made. There was a delay in arranging this but the appellant was seen by Dr Oxlade, an independent consultant psychiatrist on 7 July 2014. He concluded that she should not be permitted to continue childcare work until she has demonstrated attendance at an out-patient program for women with a drinking problem. On 9 July Dr Lisa Birrel, a consultant occupational physician, reviewed Ofsted's Health Declaration Booklet and Dr Oxlade's report and recommended that the appellant is not suitable to continue as a childminder but that this should be reviewed in six months.
6. On 14 July Ofsted suspended the appellant's registration. Ofsted noted that the appellant had begun attending a local alcohol group called NEXUS but stated that "*until Ofsted has had the opportunity to assess all the information relating to your suitability we cannot confirm that children will be safe in your care*".

Legal framework

7. The statutory framework for the registration of childminders is provided under the 2006 Act. Section 69(1) of the 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. When deciding whether to suspend a childminder, the test is set out in regulation 9 of the 2008 Regulations as follows:

“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. “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 suspension is 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.
11. 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.
12. 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.
13. **Ofsted v GM & WM [2009] UKUT 89 (AAC)** provides helpful guidance on the proper approach to suspension pending investigation. If Ofsted wish to resist an appeal against a suspension on the ground that further investigations need to be carried out, it needs to make it clear to the Tribunal what those investigations are and what steps it might wish to take depending on the outcome of the investigations.

Findings

14. We are concerned that Dr Oxlade’s report may not be entirely reliable for a number of reasons. First, he has included the wrong date (Dec 1

2012) in the heading of each page. Whilst this may be a minor error it suggests that the report may have been written whilst using another template. Other erroneous details may have been included in the report. Second, there seem to be factual inaccuracies in the report. The appellant has explained that Dr Oxlade referred to her drinking several glasses of wine during the weekdays when she claims that she told him she only drank at the weekends. In addition Dr Oxlade refers to the appellant as applying to be a registered childminder. He was unaware that she has been a childminder for a number of years and importantly that she can provide a number of impressive references regarding her trustworthiness, honesty and experience in childminding – see for example the reference provided by the head teacher of Danson Primary School dated 21 July 2014. Third, Dr Oxlade himself accepts that he has no evidence (other than intuition) to suggest that the appellant has not been frank and honest with him yet he has indicated that she might be minimising the scope of her problem or may not have been totally frank about her drinking. This is also difficult to reconcile with his view that her account of her drinking is “entirely plausible”. Fourth, Dr Oxlade makes no reference to contacting the appellant’s GP in his report. This is relevant because the GP does not appear to have any cause for concern. Dr Oxlade’s report was prepared in the absence of other relevant information. We note that during the court proceedings the appellant’s ex-husband stated that he did not believe that the appellant’s drinking impacts upon the children who are safe in her care, and no safeguarding issues were identified by CAFCASS. Finally, Dr Oxlade concludes by stating that the appellant is in denial about obtaining treatment yet she has demonstrated a willingness without delay to attend an out-patient programme, which has concluded that she is a low risk.

15. We have considered the witness statements relied upon by Ofsted together with the appellant’s reasons for appealing against the decision to suspend. There are a number of issues that emerge to the appellant’s credit. First, she has made prompt disclosure of all material matters of concern to Ofsted, and where appropriate the police and social services. Second, she has sought to reflect upon the level of her drinking and decided that her weekend drinking might be excessive and therefore to cease drinking altogether. Third, she has acted quickly to seek to address any possible concerns regarding her drinking by seeing her GP and attending an out-patient programme with NEXUS. Fourth, the appellant has put forward a number of entirely plausible explanations for past concerns arising from a previous parent.
16. The current situation can be summarised in the following manner. Dr Oxlade considers the appellant to have a drinking problem. We have

not found his report entirely reliable for the reasons we set out above. On the other hand, there is considerable evidence to suggest that even if the appellant has drunk excessively occasionally on the weekends, she is not alcohol dependent. This emanates from independent reliable sources and very good references. The most up to date evidence from NEXUS categorises her as a low risk. We are however uncertain as to whether this is based purely on self reporting or other matters. A more detailed letter or report from NEXUS would be helpful, if the appellant is prepared to waive client confidentiality.

17. We are satisfied that there is just enough evidence to justify a reasonable belief that a child may come to harm at this stage. We make no findings on the appellant's current or past levels of drinking. There is presently a reasonable prospect of the investigation showing that the suspension is necessary. Ofsted needs time to consider the further evidence that has emerged in this case (particularly since Dr Oxlade's report and the decision to suspend) in the round in order to properly and accurately assess the appellant's past and current approach to alcohol and the associated risk levels and suitability. This evidence includes the NEXUS assessment, the excellent references provided and the steps the appellant has taken and why. We note that Ofsted identified the need to assess all the information relating to suitability as the basis for the suspension. We regard this as remaining appropriate and necessary on the basis of the evidence before us.
18. We have been told within Ofsted's response to the appeal that a decision has been taken to cancel the appellant's registration. We are concerned that on the evidence available to us such a step may be disproportionate and premature, and at odds with what has been said within the suspension decision. We consider that further investigation is necessary including further details from NEXUS and the appellant's GP. Whilst on the evidence available we are satisfied that suspension is proportionate at this stage, this must be kept under review. It is our view that further investigation is necessary. In our view this is one of those rare cases where it would be proportionate to obtain a second opinion from either an experienced and qualified practitioner in alcohol recovery, the appellant's GP or another psychiatrist. Any such instructions should ensure that the report writer has access to all the relevant information.

Decision

19. The appeal is dismissed and the notice of suspension served is confirmed.

[2014] UKFTT 0780 (HESC)

Judge Melanie Plimmer
Lead Judge Care Standards & Primary Health Lists
First-tier Tribunal (Health Education, Social Care)
Date Issued: 13 August 2014