

Care Standards

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

[2014] 2305.EY

BETWEEN:

JS

APPELLANT

and

OFSTED

RESPONDENT

BEFORE:

GILLIAN IRVING QC
WENDY STAFFORD
PATRICIA MCLOUGHLIN

REPRESENTATION:

The Appellant was unrepresented.

The Respondent was represented by Sarah Ellson, Fieldfisher Solicitors, Manchester

SITTING:

In Manchester on the 23rd – 24th March and 13th – 15th April 2015

Reporting Order

There shall be a Restricted Reporting Order under Rule 14 (1) (b) of the Tribunal Procedure First-tier Tribunal (Health, Education and Social Care) Rules 2008 prohibiting the publication (including by electronic means) in a written publication available to the public, or the inclusion in a relevant programme for reception in England and Wales, of any matter likely to lead members of the public to identify any child or its family mentioned in the appeal. For that reason, the Appellant, her family and users of her services are referred to by their initials.

DECISION

1. On the 2nd November 2014, the Appellant lodged her appeal against the decision of Ofsted to cancel her registration. The chronology attached, which we have prepared, shows that the decision to cancel registration was taken on the 28th April 2014 and served on the Appellant on the 15th July. On the 23rd September 2014 the Appellant's objections were dismissed and the decision to cancel her registration upheld. This appeal was listed to be heard for 3 days.
It became clear quite quickly that the time estimate was deficient. On day 5 of this appeal, after hearing the entirety of the Respondent's witnesses and immediately before the Appellant was due to give evidence, the Respondent gave written notice under Rule 17 of its intention to withdraw its opposition to the appeal. Pursuant to Rule 17(2) our consent to the withdrawal was required. Our consent was given and this decision articulates our reasons for doing so. It also sets out a number of serious concerns which we as a panel share and which arise from the quality of the investigation conducted by the Respondent and its attitude, through its Officers, to these proceedings and the concept of fairness.

2. The Legal Principles Involved

Before looking at the factual background to this appeal, it is appropriate to set out a summary of the relevant legislation helpfully provided by Ms Ellson.

- 1.1. The Childcare (Early Years Register) Regulations 2008 Schedule 1 set out the requirements for someone to be registered on the Early Years Register – this includes the requirements that the person to be registered is suitable (paragraph 1) and that the child minder will secure that the EYFS welfare requirements are complied with (paragraph 5).
- 1.2. The EYFS welfare requirements are contained in section 3 of the EYFS Statutory Framework. This is given statutory force by section 39 of the Act, and from 1 September 2012 the Early Years Foundation Stage (Welfare Requirements) Regulations 2012 and the Early Years Foundation Stage (Welfare Requirements) Order 2007. The net result is that compliance with section 3 of the Statutory Framework document is a requirement of registration on the Early Years Register.
- 1.3. Any allegation that an early years provider has:
 - a. Failed to meet the welfare requirements or
 - b. Failed to have regard to the guidance in Section 3 of the EYFS Statutory Framework may be taken into account by the Chief Inspector in the exercise of his functions under Part 3 of the Act.
- 1.4. The various regulations which govern the General Childcare Registers enable the Chief Inspector to take action, such as cancellation of registration, when a provider has failed to meet the

requirements of those Regulations including that children being cared for are kept safe from harm.

- 1.5. Throughout Ofsted's regulatory framework, harm and significant harm are defined by reference to section 31 of the Children Act 1989 under which harm is defined as ill treatment or impairment of physical or mental health or physical, intellectual, emotional, social or behavioural development, including impairment which may be suffered from seeing or hearing another person being ill-treated.
- 1.6. Section 68 in Part 3 of the Childcare Act 2006 provides that Ofsted may cancel in a number of circumstances. Those include by section 68(2)(a) that the prescribed requirements for registration have ceased, or will cease, to be satisfied, or (c) that the person has failed to comply with a requirement imposed on him by regulations under the relevant Chapter, or (d) in the case of a person registered under Chapter 2 [in the Early Years Register], that he has failed to comply with section 40(2)(a) (which are the requirements to secure the learning and development requirements and comply with the welfare requirements).
- 1.7. Ofsted therefore has discretion to cancel registration if it appears that the requirements are not met. Ofsted does not have to establish that a child minder has harmed a child. For a provider to remain registered, Ofsted has to be assured that the child minder is not behaving in a way that may harm a child and that the child minder is meeting the requirement that children being cared for are kept safe from harm.
- 1.8. On appeal, the Tribunal's role is to confirm the cancellation or direct that it shall cease to have effect (section 74(4)).
- 1.9. The legal burden remains vested with the Respondent to prove, on a balance of probability, all those facts and matters it relies upon to justify cancellation as at the date of this appeal hearing.
- 1.10. We have to be satisfied that the decision to cancel registration is a proportionate response by the Respondent to the matters proved. The process of cancellation of the Appellant's registration as a child minder not only engages Article 6, it constitutes an interference with her Article 8 right to privacy and family life. Any interference with that right must be both in accordance with the law and necessary.
- 1.11. Hence the decision making process leading to measures of interference with the Appellant's Article 8 rights runs alongside Article 6 and must be fair. Articles 6 and 8 impose positive obligations of disclosure on the Respondent. The investigative decision making process as well as the trial process must be fair. The Respondent has a clear duty to ensure a transparently fair procedure at all stages.

We proceed on the basis that the Respondent is required to disclose, in order to be convention compliant, the minutes/notes of all meetings and discussions held which are material to the intervention it seeks to persuade us to uphold. The Respondent must ensure that clear, accurate full and balanced notes of all relevant conversations and meetings are kept and disclosed to the Appellant.

Where, as in this case, the Appellant is unrepresented and devoid of any access to legal advice, disclosure of the documentation must extend to the Tribunal seized with making the decision on her appeal. There is even greater obligation upon the Tribunal panel to ensure that an unrepresented party has a fair hearing. It cannot do so if the Respondent seeks to assert, as in this case, that there was no obligation upon it to disclose 'unused' material beyond the Appellant herself. With respect to the Appellant, we doubt that she has heard of Article 6, never mind understood its requirements.

In reading this conclusion we have reminded ourselves of the words of Mr Justice Munby, as he then was, in the cases of *Re: L (Care: Assessment: Fair Trial)* 2002 EWHC 1379 (Fam) and *Re: G (children)* [2003] EWHC 551 (Fam), decisions upon which the Respondent may well wish to reflect and consider.

3. Backcloth

The chronology sets out the history, but it is clear that up until the 15th October, 2013, when an anonymous letter was sent to Ofsted, there were no reported concerns about the Appellant or her care of any child, either within her own home or at any mother and toddler's group.

Upon receipt of the anonymous complaint, Inspector Lorraine Lawton assumed control of the case. We heard from her and considered the paperwork she produced. We observe that full disclosure of relevant material – relevant as it went to the reliability, credibility of key witnesses called by Ofsted, was not made until after the hearing commenced and only after an inquiry by ourselves.

Specifically, there were a number of emails and telephone attendance notes which recorded discussions between Lorraine Lawton & FH and which specifically queried the credibility of FH who was, next to the inspector, the Respondent's key witness. The material also provided information about the way the investigation was being conducted by the inspector.

A detailed attendance note dated 16/12/2014, which recorded discussions with AH, was disclosed to the Appellant but not to us prior to the hearing. It was obvious from what we read that a document from AH expressing his views must exist. It was disclosed to us on day 1. The

content of that document led us to invite AH to attend and give evidence before us. His evidence was relevant, reliable and essential to the proper and fair determination of the issues levied against the Appellant in this case.

4. Our Reasons for Permitting Withdrawal

a. The Approach of the Inspector and her Evidence

In reaching our decision to permit Ofsted to withdraw, a matter which featured large was our assessment that the Inspector had not conducted the investigation in a fair and open way, nor with the necessary forensic approach required. It was clear from her oral evidence and, in particular, her notes of her visits on the 21/10/13, 1/11/13, 8/11/13 and 24/11/13, that she had not approached the complaint with an 'open mind'; she accepted when questioned by us that the notes may give that impression. The notes are peppered with negative evaluation and speculation rather than hard fact. She went into the Appellant's home determined it would seem, to find what was alleged. We reach that conclusion from the notes she has made and our assessment of her oral evidence when she appeared before us. Worse than that, her notes, which she initially sought to persuade us were a contemporaneous account of her visits and discussions with the Appellant, turned out to be no such thing. As was clear from the notes, they very often included additional information gleaned either before or after discussion with the Appellant from other Sources. She admitted that they should not have done so.

The notes often took several days, and in one instance, weeks, to be entered onto the Respondent's system. For our part, we are not persuaded, having heard her evidence, that the notes show that what was alleged was put clearly to the Appellant nor gave a fair and accurate picture of the Appellant's response to the criticisms made of her and so we could attach little weight to them.

b. The Officer was unable to demonstrate that she had stood back and objectively evaluated and inquired into the allegations that were being made. She appears to have accepted what she was told by FH and JG at a very early stage of her investigation and did not explore other sources of evidence nor challenged the inconsistencies that were apparent within that evidence. For example, the allegations went back to incidents in 2010, 2011, 2012, 2013. They were all alleged to have occurred at the Mother and Toddler's Group in Glossop run by the Church. Not until December 2014, 8 months after the decision to cancel and 15 months after the anonymous letter did she make any inquiry at all of those seized with the management of safeguarding issues, namely the vicar nor the representatives in the Diocese, nor did she look at the accident book or speak to the individual K who ran the group for years before FH. This was despite the fact that she had the contact details for AH from May 2014 and indeed could have sought them

earlier. It was not until December 2014 that she made contact with any of the other groups attended by the Appellant. There were no concerns from those she approached. The evidence of FH and JG suggested that the Appellant had behaved inappropriately to children in her care at the group since 2010. The absence of any complaint to anyone was striking. The only evidence of anything being brought to the attention of AH and the Church was an email provided by FH on the 25/3/2015 to the Respondent's representative. It was dated 10th October 2013 and was non specific. It did not mention the Appellant. AH has no record of ever receiving it. No explanation for its sudden discovery by FH was provided. She had known for several months that her credibility was an issue.

- c. There was of course evidence from other parents but that evidence was achieved only after FH or the Inspector had shared with them the allegations. Both HM and MC had spoken positively about the Appellant and her care of their children prior to learning of the allegations. The email exchanges and telephone attendance notes reveal that the Inspector made clear that she believed the allegations put forward by FH and JG. She did not consider how that might impact upon their accounts when statements were subsequently taken.

In short, this was an example of how not to conduct an investigation and the consequences for the Appellant were devastating. In the small community in which she lived, the interventions of Ofsted became well known. She told us that she has suffered considerable financial hardship and nearly lost her home. Her reputation as a child minder has been left in tatters. Hopefully, this decision by Ofsted and these reasons shall go some way to restore it.

5. It follows that we are not satisfied that those who supervised and evaluated the evidence did so adequately or with sufficient care and objectivity or at all. We heard from Mr Norman, senior officer in Ofsted, who had only assumed responsibility for the case and the officer in February 2014. Prior to January 2014 there appears to have been a system whereby the case was overseen by one manager, but the officer by another.

The decision to cancel registration taken on 28th April 2014 was as a consequence of a telephone discussion between Mrs Lawton and Mr Norman. The manager could not remember what he had seen or read. It is clear that he was very dependent on the impression and analysis of the Inspector. What is clear from the chronology is that there were no signed statements until after the cancellation decision. Those statements were largely drafted following telephone or email discussions between LL and potential witnesses.

We struggle to understand how, if there had been a comprehensive analysis of the evidence, which there should have been, why questions were not asked much earlier about the reliability of the evidence and the approach of the officer. We note that as late as February 2015, the case was considered by Mr Norman and Ms Audaer. There is no record to explain what they considered, how they considered it; nor what they were told by whom and when.

6. The third reason why we gave our consent to the withdrawal concerns our analysis and impression of the Respondent's Key Witnesses, FH and JG. Our opinions arose from (i) our consideration of their written evidence which included details of their correspondence and discussions with the inspector; (ii) their oral evidence and demeanour and presentation when giving that evidence; (iii) the patent inconsistencies within that evidence and (iv) the observations of others about their conduct during and after the relevant period of the Ofsted investigation.

FH is a woman of high emotion whose perspective may be influenced by some of her personal and difficult life circumstances. She was an unimpressive and unreliable witness. She did not provide consistent accounts of events even between examination-in-chief and cross-examination. Her oral evidence was not consistent with her written evidence in material and relevant respects. At times it was just not credible. There was no doubt that Child 'W' had got his trouser leg stuck in the highchair on or about 3/10/13, but we could not be satisfied that her description of events was not other than blown out of all proportion to the reality. In her discussions with the Inspector on 22 and 23/10/13 she described that all 18 of the parents/carers present had seen the incident. That was not supported by EJ who had been present, nor anyone other than JG who sought to 'play down' the incident when called upon to describe it.

The evidence gleaned from the correspondence and the oral evidence from AH created a picture of FH very much being at the centre of things, sharing the allegations and her alleged observations with parents and indeed with others who had no connection to the children. She was and appeared to want to be, for whatever reason, at the centre of things. In his written evidence he described her as someone who "thrives in a crisis". Her motivation was unclear and it would be wrong for us to speculate. But nonetheless, we unequivocally recognized that we could not rely on her evidence unless the same was adequately and satisfactorily corroborated by other reliable independent evidence.

We were not satisfied that JG was candid about events. Her evidence did not have, in material respects, a ring of truth about it. It is inconceivable that if she saw what she initially alleged she saw and heard she would have done nothing about it for 3 years. We find as a fact and contrary to her assertion, that she did meet with AH for a discussion in early 2014 and reject her assertion that he was not

interested in what she had to say. The reality is she made no complaint to anyone and her oral evidence was at times inconsistent with her written evidence.

7. It is for these reasons we consented to withdrawal by Ofsted. There were other aspects of the investigative process which raised concerns about the fairness of the process adopted but which were not material to our decision.

8. It follows that we allowed the Appeal against the cancellation of registration. It must be apparent had leave not been sought to withdraw we would have allowed the appeal in any event. There were concerns which related to the state of parts of the Appellants property and there were concerns about her failure, on occasion, to ensure she was properly prepared for the needs of some of the children she cared for. By way of example, she sometimes did not have sufficient changes of underwear in case of accidents, work needed doing in the garden and bathroom areas of the house. Additionally records of attendance were not always kept in accordance with the regulations and were not readily available when requested for inspection. There was an occasion, admitted by the Appellant when she exceeded the number of children she should be caring for. On occasion discussions took place in the presence of children which were inappropriate for them to hear.

However, having been informed of such concerns, the evidence from the Respondent was that the Appellant responded positively to them and the inspections post August 2014 were satisfactory. Our own observation of the Appellant during the hearing is that she conducted herself with great dignity even at times when it must have been difficult to hear what was being said about her. Such concerns as there were did not justify a notice of cancellation being served. Such would not have been either a fair or proportionate response to them.

9. We appreciate that the outcome of the appeal shall go on the Ofsted website. It shall also go on the Tribunal website and perhaps on BAILII. Nevertheless, given the impact this process has had upon the Appellant, we invite Ofsted to write to the LADO at Derbyshire County Council and to all those, including the Police, who attended the LADO meetings in September and November 2014 and ensure that they are aware of the withdrawal and the reasoning for it.

10. DECISION:

- (1) Leave is given to the Respondent to withdraw its opposition to the appeal.
- (2) The Appeal is allowed and the certificate of cancellation is quashed.
- (3) There shall be no order as to costs.

Judge Gillian Irving
First-tier Tribunal (Health Education and Social Care)

Date Issued: 14 May 2015

APPENDIX 1

CHRONOLOGY OF RELEVANT SIGNIFICANT EVENTS

<p>5th June 2008</p>	<p>JS was registered as a childminder on the Early Years Register and the compulsory and voluntary parts of the Child Care Register. That meant she was as a matter of the then Ofsted practice, entitled to care for 6 children at any one time. Only 3 of those children could be 5 or under and only 1 of those could be under 12 months of age.</p>
<p>24th November 2008</p>	<p>The Appellant undergoes an inspection by Ofsted which is recorded as satisfactory.</p>
<p>15th October 2013</p>	<p>An anonymous undated letter is received by Ofsted which makes allegations about the Appellant's conduct to certain children in her care whilst attending a mother and toddlers group in Glossop. It specifically raised an incident alleged to have occurred on 3/10/2013.</p>
<p>21st October 2013</p>	<p>Lorraine Lawton attends the Appellant's home at 2.40pm for an unannounced visit.</p>
<p>22nd October 2013</p>	<p>Lorraine Lawton telephones FH, the recently appointed leader of the mother and toddler group. FH makes a number of allegations against JS.</p> <p>FH indicates she knew that an anonymous complaint had been made to Ofsted prior to her discussion with LL. She asserts she has reported concerns to the vicar.</p> <p>She provides the contact details of JG.</p>

<p>23rd Octo ber 2013</p>	<p>(i) Lorraine Lawton has a further telephone discussion with FH.</p> <p>(ii) Lorrain Lawton contacts JG by telephone. JG makes a number of allegations against JS.</p>
<p>24th Octo ber 2013</p>	<p>AH spoke to FH and learned of Ofsted's involvement. AH went to see the Appellant. [AH maintained that prior to 24/10/2013 neither he nor anyone else at the Church had received or heard of any complaint about the Appellant.]</p>
<p>25th Octo ber 2013</p>	<p>Discussion about case held between Lorraine Lawton and Karen De Lastie.</p>
<p>1st Nove mber 2013</p>	<p>Unannounced visit by Lorraine Lawton who delivered Welfare Notice/Notice to Improve.</p>
<p>5th Nove mber 2013</p>	<p>Discussion about case between Lorraine Lawton and Karen de Lastie.</p>
<p>8th Nove mber 2013</p>	<p>Visit by Derbyshire County Council to the Appellant.</p>
<p>12th</p>	<p>Unannounced visit by Lorraine Lawton. Arrived 14.30</p>

<p>November 2013</p>	<p>Departed 18.30 Notice to improve and welfare requirement notice both met. However, condition imposed in relation to the children's access to the first floor of the premises. Further notice to improve issued.</p>
<p>6th December 2013</p>	<p>Lorraine Lawton telephones HM, mother of WM and CM. LL shares allegations which relate to the children of HM. LL shares involvement of LADO.</p>
<p>12th December 2013</p>	<p>Lorraine Lawton holds a telephone discussion with FH and shares with FH details of her discussions with the Appellant</p>
<p>13th December 2013</p>	<p>(i) C telephones Lorraine Lawton. She had spoken to FH that day. (ii) Lorraine Lawton telephones HM, mother of WM and CM. She discusses the allegations with HM and expresses a view about their accuracy.</p>
<p>14th December 2013</p>	<p>FH rings AH in a distressed state. She is advised to refer all parents to Ofsted if they have any inquiries.</p>
<p>16th December 2013</p>	<p>Lorraine Lawton contacts HM.</p>

<p>Janu ary 2014</p>	<p>Lorraine Lawton contacts Mrs P, mother of FP to discuss the Appellant's care of F.</p>
<p>9th Janu ary 2014</p>	<p>(i) Discussions between Lorraine Lawton and Karen de Lastie about the case.</p> <p>(ii) Lorraine Lawton speaks to JP.</p>
<p>23rd Janu ary 2014 or 27th Febru ary 2014</p>	<p>AH talks to JG, EJ and FH separately.</p>
<p>28th Janu ary 2014</p>	<p>Unannounced visit made by Lorraine Lawton and Mike Charnley.</p>
<p>Febru ary 2014</p>	<p>James Norman became Line Manager for Lorraine Lawton.</p> <p>Formal complaint lodged against Lorraine Lawton by the Appellant.</p>
<p>3rd Febru ary</p>	<p>(i) Case discussion between James Norman and Lorraine Lawton.</p>

2014	(ii) Lorraine Lawton contacts EJ by telephone.
24th March 2014	AH convenes mediation meeting between FH and the Appellant.
27th March 2014	Further telephone discussions takes place between JP and Lorraine Lawton.
16th April 2014	Lorraine Lawton has a telephone conversation with MC.
28th April 2014	Case review conducted by telephone between James Norman and Lorraine Lawton. Decision taken to cancel Appellant's registration.
14th May 2014	FH sends Lorraine Lawton her statement.
15th May 2014	(i) Lorraine Lawton asks FH for the contact details of AH. (ii) G provides a formal statement.
23rd May	Notice of intention to cancel registration sent to Appellant but not received.

2014	
13th June 2014	Notice of Decision issued.
July 2014	AH decides to close the mother and toddler group.
7th July 2014	EJ is sent her draft statement.
15th July 2014	Notice of Intention to Cancel Registration re-issued.
23rd July 2014	Unannounced visit made to the Appellant's home.
23rd August 2014	<p>Objection Panel met. It was chaired by Lisa Troop and was attended by Mrs Champa Mia in place of Lorraine Lawton who was under investigation following a complaint by the Appellant and the UKCMA. The Appellant attended with her friend Ms R.</p> <p>However, the views of Lorraine Lawton were sought in the absence of the Appellant and without her knowledge prior to the outcome of the objection being determined.</p> <p>Lorraine Lawton spoke to Lisa Troop (no note provided).</p>
23rd September	Lisa Troop dismisses the Appellant's objection.

2014	
18th September 2014	<p>Strategy meeting held with LADO for Derbyshire County Council. Appellant unaware of the meeting and not invited to contribute.</p> <p>Full list of participants not available. Those present included:</p> <p>Lorraine Lawton Don Innes DS Pope Vicky Bower</p> <p>Ofsted agree to provide all statements, original notes and the anonymous letter to the Police.</p>
1st October 2014	FH telephones Lorraine Lawton with an update.
21st October 2014	Unannounced inspection of the Appellant's home by Ofsted.
2nd November 2014	Appellant lodges her appeal against the Notice of Decision.
14th November 2014	Appeal admitted by Judge Plimmer.

16th November 2014	Incident at St James Church.
18th November 2014	Reconvened strategy meeting with LADO. Appellant unaware of the meeting and not invited to contribute. Police had reviewed information provided by Ofsted. It raised no child protection issues and no further action would be taken by Police.
20th November 2014	Lorraine Lawton visits FH to discuss issues relating to her credibility and to explain why Ofsted had made a referral to Children's Services.
December 2014	Lorraine Lawton makes contact with AH for the first time.
8th December 2014	Lorraine Lawton contacts JG and asks her to complete an additional statement.
10th December 2014	Home visit made by Lorraine Lawton to Mr & Mrs P to discuss their child FP. The purpose of the visit was to collect evidence against the Appellant.
11th December 2014	The Respondent's Solicitors file its response to the Appeal.

<p>12th Dece mber 2014</p>	<p>Telephone Case Management Hearing. Judge Tudur. Case listed for 3 days after 23/3/2015.</p>
<p>16th Dece mber 2014</p>	<p>Lorraine Lawton went with colleague, Ann Law, to speak to AH.</p> <p>This was the first time any face to face contact had been made with him or indeed anyone from the Church by Ofsted. The “incidents” were alleged to have occurred at a mother and toddlers' group organised by the Church and on Church premises.</p> <p>No request was made by Ofsted to see the accident book.</p> <p>AH was informed of two allegations only which were alleged to have occurred in 2013.</p>
<p>2nd Janu ary 2015</p>	<p>Maxine Allmark makes an unannounced visit to the Appellant's home at 15.30 to 18.30.</p>
<p>22nd Janu ary 2015</p>	<p>Lorraine Lawton telephones FH and FH returns the telephone call. Discussion had about concerns surrounding the credibility of FH as an Ofsted witness.</p>
<p>26th Janu ary 2015</p>	<p>Lorraine Lawton contacts AH re: incident at Church on 16/11/14.</p>
<p>2nd Febru ary</p>	<p>MC returns her statement to Lorraine Lawton.</p>

2015	
15th February 2015	(i) Case review held with Lorraine Lawton, James Norman and Judy Audaer.
23rd March 2015	FH sends to Sarah Ellson, Solicitor advocate for Ofsted, an email dated 10/10/2013 which she says she sent to AH. (AH has no record of ever receiving or replying to it). It had not previously been referred to or disclosed.