

Care Standards

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

[2015] 2424.EY-SUS

BEFORE

**Judge Gillian Irving
Specialist Member Wendy Stafford
Specialist Member Michael Flynn**

BETWEEN

Little Treasures Children's Day Nursery Limited

Appellant

-v-

Ofsted

Respondent

DECISION

1. The Appellant has appealed against the respondent's decision, dated 22nd April, 2015, to suspend the Appellant's registration as a provider of day care for six weeks, This was a continuation of suspension which commenced 09.03.15 and was made pursuant to section 69 of the Childcare Act, 2006 and the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008, as amended. The Appeal was dealt with on paper at the request of the parties on Monday, May 18th, 2015.

The substantive hearing to deal with the appeal against the notice to cancel the Appellant's registration is listed to commence on 29th June, 2015.

RESTRICTED REPORTING ORDER.

2. 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 enable members of the public to identify any children or their parents in this case, such being necessary to protect their right to privacy and family life.

3. BACKGROUND FACTS AND RELEVANT PROCEDURAL CHRONOLOGY.

3.1 The Appellant has been registered to provide the provision at the current premises since 17th September, 2012. We have been provided with photographs of the premises and, in addition, have been able to research further its location. The service is run from what appears to be a former library. It is situated close to an extremely busy highway, namely Dagenham Road North. The children have to pass close to this road to access the outside play area. This was present and identified as such at the time of registration. There is no fencing around the entirety of the building's curtilage. There is an intermittent low wall through which access is gained to the pavement and the road. We do not know who owns the building nor whether it is in the gift of the Appellant to make alterations to it. Given the concerns now articulated, it is surprising that these matters were not adequately considered and addressed at the time of registration. Certainly the issue of the fire exit and fire door appears to have been raised by an advisory teacher within weeks of the premises opening as a nursery.

3.2 We made a simple inquiry of the Respondent, namely we wished to know how many children could be cared for at any one time under the terms of the Appellant's registration. An oblique and unsatisfactory response was received namely, "The number of children is not specified. (It is for the provider to comply with the Early Years Foundation Stage). Hence we do not know the numbers of children who attend nor their age range. This must be addressed for the final hearing. It was not an issue which was determinative to this aspect of the Appeal

3.3. The chronology provided to us, commencing at D216, identifies that there have been a number of concerns about the provision almost from opening. It is a fact that there was an anonymous complaint made to the Respondent about the provision in June 2014. There have been other concerns reported to the Respondent both by parents and former members of staff. We note that there have been a number of inspections, many unannounced. We make no judgment on the accuracy of the information provided by those referrals we merely note their occurrence. We also observe that there had been a previous suspension in July 2014 which was lifted just over 3 weeks later. A notice of intention to cancel registration was issued on 27/11/2014 and the decision to cancel was affirmed on 14/01/2015. Since that date the following visits and inspections have taken place;

03/02/2015, 05/02/2015, 09/02/2015, 25/02/2015, 05/03/2015, 09/03/2015 and 17/04/2015.

3.4. A notice of suspension of registration was issued on 11/03/2015 and was renewed on 22/04/2015. It is against the latter which the Appellant now appeals. The toolkit dated 17/04/2015, exhibited to the statement of Debra Davey, dated 11th May, 2015; identifies that key to the decision to continue the suspension was :

- a. The alleged lack of an adequate or appropriate risk assessment in relation to the management of the fire doors, and,
- b. The absence of an appropriate or adequate risk assessment in relation to the outdoor play area.

These concerns are confirmed in the statement of Susan Will, dated 07/05/2015.

4. THE LEGAL FRAMEWORK

This is helpfully set out in paragraphs 5 to 9 of the Respondent's case summary. In short, when deciding whether to suspend a child minder, 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'. Harm is ascribed the same definition as that found in section 31(9) of the Children Act, 1989.

That is the test we have to apply when considering the matter today. The burden of satisfying the test remains vested in the Respondent and the civil standard of proof applies.

5. TRIBUNAL'S CONCLUSIONS WITH REASONS

5.1 The parties elected to have this matter decided on the papers before us and it follows we heard no oral evidence. Nonetheless we did not find this a difficult issue to determine and were unanimous in our conclusions and the reasons for them. I should observe that we read all the papers put before us by both parties which we determined were relevant to this appeal.

5.2. Given the location of the premises and the absence of any fencing around the curtilage, the on-going concern expressed by the Respondent about the ability of children to get out through the fire door is understandable and valid. The photographs make clear the proximity of the main road and the volume of traffic. The assertion by the Appellant that the risk of harm emanating to the children can be managed by the positioning of two staff in close proximity to it is impoverished in its rationale, particularly as there has been an on-going issue about the ratio of staff to children. Such a suggestions smacks of an impoverished risk analysis. The doors should be alarmed and it is difficult to understand why that solution, articulated by Debra Davey, has not been embraced. The Appellant has had over 2 years to be proactive and seek solutions to what is an obvious hazard. She has failed and continues to fail to do so with the consequence that the children attending remain at risk of harm.

5.3. Similarly in relation to the management of the children to, and in, the play area outside the premises. The photographs were again very helpful.

The provision of luminous safety jackets and wrist bands really fails to address the issue either adequately or at all. There cannot have been any proper risk evaluation. The fundamental question of whether in fact it is safe for them to play outside does not seem to have been asked. There has been no balance sheet analysis performed. There is then nothing to indicate that there has been any thought given to how you would fully manage the risk. How many children would go to the area at any one time? How many staff would go with them? How many staff do you need per child when the children are outside? e.g what happens if one falls over and need to return inside for medical attention.? Are there to be ball games? How will they manage those games? How will they keep the children safe from contact with others from outside the nursery environment?

This is but a sample of our own thoughts and queries none of which we find addressed anywhere. There have been repeated shortages of staff, a factor acknowledged by the Appellant, hence we cannot be reassured that there would be adequate staff available. The Appellant's claim that she will bring in agency staff if there are staff shortages has in itself consequences for the children. Paragraphs 23 to 25 of the Appellants statement of 14/05/2015 we are afraid reflect but a cursory appreciation of the risks involved.

5.4. It must be clear that we overwhelmingly conclude that the suspension should continue and the appeal against it fail. The Papers suggest that the Appellant has a very poor understanding of and ability to analyse risk. She has shown poor and erratic compliance with the reasonable demands and requests made of her and improvements are sporadic and not maintained. In all the circumstances we believe that the on-going suspension of her registration is a proportionate response to the risk of harm that has been identified.

6. DECISION

The appeal is dismissed and the suspension continues.

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

Date Issued: 20 May 2015.