

Care Standards

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

[2015] 2455.EY-SUS; [2015] 2456.EY-SUS

BEFORE

**Tribunal Judge Melanie Plimmer
Specialist Member Howard Freeman
Specialist Member James Churchill**

BETWEEN

**W
P**

Appellants

v

OFSTED

Respondent

DECISION

1. The appellants have each appealed against Ofsted's decisions dated 19 June 2015 to suspend each of their registrations from the Early Years Register for a period of six weeks to 31 July 2015. In effect they are suspended from undertaking childminding 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').
2. Although the appellants have filed separate appeal applications their appeals are based on the same factual matrix and have been considered together.

Restricted reporting order and anonymity

3. The Tribunal has anonymised the appellants so as to prevent the identification of children who have been cared for by them. The Tribunal also 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 ('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.

Appellants

4. The appellants, P and W, are both very experienced childminders with over 10 years experience each. They childmind from the same home address in Northumberland. They have worked with 'family support children' since 2009 as well as privately paid children.

Events leading to the issue of the notice of statutory suspension

5. The recent events leading to the appellants' suspension are most conveniently summarised by way of chronology.

4 June P collects two siblings at 8am. The younger sister (child X) fell asleep. When she awoke and her nappy was changed at 9.20am, P noticed an impression on her leg consistent with the impression of her nappy. P asked W to look at the impression. They agreed this was not suspicious and marked the accident book accordingly.

The impression disappears by lunch time when P changed child X's nappy again.

P returns child X and her sister to their home at 4pm.

5 June P received telephone calls from Ms Williamson explaining that child X had been seen by a paediatrician, who had observed bruising that might be consistent with non-accidental injury. P disclosed that he had seen a mark the day before but did not believe the mark to be suspicious.

Child X and sister placed in foster care.

P and W told they would not be able to childmind any 'family placement children'. P and W not told they were under investigation.

- 16 June Strategy meeting held by Northumberland County Council ('the LA'). The meeting agreed that there was evidence that child X had non-accidental bruising and there would need to be a finding of fact investigation.
- 17 June Ms Williamson emails P to explain the outcome of the meeting. Email not received.
- 18 June Ms Williamson explains the outcome of the meeting to Ofsted.
- 19 June Ms Lerner attends childminders' home. Private minded children are present but not 'family placement children'.
- Ofsted decision to suspend P and W. No details are provided save that concerns are held and disclosure may prejudice an investigation.
- 22 June Ofsted take steps to find out police and social services contacts and to obtain information regarding the status of the investigation into the bruising and P and W's role. DC Kennedy said that the LADO had given the police the opinion that P and W would be treated as witnesses and not suspects but further checks needed to be made.
- 25 June DC Kennedy informs Ofsted that a decision cannot be made until they receive the paediatrician's report, and that was expected by 1 July.
- 26 June Ofsted provides P and W with further information regarding the reasons for their suspension.
- 1 July Police explain to Ofsted that the pediatrician does not think the bruises are non-accidental but there is an issue around neglect. The police therefore need to see what the childminders have documented in order to decide if they will be witnesses or suspects.
- 2 July Childminders voluntarily attend police station and answer police questions. DC Bunch explains that she

will try to resolve the matter that day after she speaks to the parents of child X. Although P and W have chased the police, the police have not responded to resolve the matter one way or another.

- 6 July Tribunal Order in which Ofsted is ordered to use its best endeavours to ensure that the police and the relevant the LA each provide a written document outlining in relation to each Appellant (i) the investigations that have taken place so far (ii) the current status of the investigations (iii) a precise time tabled estimate to the conclusion of the investigations including what else remains outstanding and when it shall be completed.
- 7 July Ofsted invite the police and the LA to provide a written update regarding the status of the investigations into W and P.
- LADO explains there have been no further developments since she spoke to Ms Lerner on 2 July and the LA is waiting on further information from the police. The LA set out its view that W and P should not childmind *“until the conclusion of the police enquiry or the fact finding court hearing which may establish who was responsible for the child’s bruises.”*
- 9 July Child X’s parents due to be interviewed by the police.
- 10 July Tribunal hearing

Legal framework

6. The statutory framework for the registration of childminders is provided under the 2006 Act. Section 69(1) of the 2006 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.
7. 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.”

8. “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”.

9. 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.
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’ 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.
12. **Ofsted v GM & WM** [2009] UKUT 89 (AAC) provides helpful guidance on the proper approach to suspension pending investigation. The Upper Tribunal made it clear that it did not consider that in all cases, a suspension imposed while there is a police investigation need be maintained until that investigation is formally concluded and that Ofsted may be able to lift the suspension earlier [27] depending on the facts. 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.

Ofsted’s case and the appellant’s response

13. Ofsted has explained that the purpose of the suspension is to allow time for the circumstances that gave rise to observed bruising on child X to be investigated. Ofsted relies upon witness statements from the following: Ms Williamson, a child care development worker at the LA; Ms Plewinska, Ofsted senior officer; Ms Larner, an Ofsted inspector.
14. P and W have also prepared statements in which they explain that any bruising on child X that was observed on 5 June could not have taken place prior to 4pm on 4 June when child X was dropped home. This is

because the markings observed on 4 June were not bruises but marks left by the nappy and clothing leaving an imprint. They claim these markings had disappeared by lunch time and in any event the bruises described by the police to them were different and must have been made after 4pm on 4 June. They are concerned that the investigation has been protracted and the authorities are yet to tell them whether they are suspects or explain the delay in reaching that decision.

Findings

15. Having considered all the evidence currently available we are not satisfied that it supports a reasonable belief that the continued provision of childcare by the appellants to any child may expose such a child to the risk of harm.
16. In our view the evidence relied upon by Ofsted in relation to the appellants' risk to children is very thin indeed. We appreciate that Ofsted is very much the junior investigating statutory agency, dependent upon investigations being carried out by the police and the LA. Ofsted has clearly used its best efforts to obtain as much evidence as possible from the police and the LA. We regard a report from a paediatrician as pivotal evidence in a case such as this. We do not know why the appellants and the Tribunal have not been provided with a copy with the paediatrician's report. We do not know the date of the report, nor the date when the paediatrician actually examined child X. We do not know with any degree of precision the nature of the bruising or a clear assessment of its likely cause. We have however been provided with various types of hearsay evidence of what is understood to be in the report and have considered this. We note in particular that more recently the police understand the paediatrician to be more concerned about neglect rather than non-accidental injury. We simply have been provided with no clear evidence regarding the nature, timing and cause of the bruising. We have still not been told if the appellants are regarded as suspects or witnesses or neither, notwithstanding the passage of over a month.
17. It is disappointing that the police have not found the very short amount of time to provide a short email outlining the current precise status of the investigation when there has already been extensive unexplained delay in the police investigation. It is also regrettable that the police are yet to provide any substantive information to the appellants or the LA or Ofsted after interviewing the appellants.
18. We do not know the time limits of the investigation. We do not know when the police will reach a conclusion. We note that the appellants were told that they should be able to get on with their life after they

answered the police questions. That took place on 2 July but a week later they have still not been provided with a response from the police.

19. The appellants have formed the reasonable view on the information they have been provided that any bruising must have taken place after 4pm on 4 June. Ofsted has not relied upon any evidence to dispute this. We find it is a reasonable view to hold and indeed we have reached the same conclusion on the evidence available. This is significant because it demonstrates that there is no cogent reason on the information available to us, to regard either appellant as a perpetrator of non-accidental injury or neglect. We note in this regard that DC Kennedy said that the LADO had given the police the opinion that P and W would be treated as witnesses and not suspects but further checks needed to be made. This appears still to be the case, even after the appellants were interviewed by the police.
20. We also note that the police have explained to Ofsted that the pediatrician appears to no longer believe the bruises to be non-accidental but there may be an issue around neglect. It is very difficult to see how these two highly experienced childminders rated as outstanding at their last inspection, who have been used by the LA to mind children from very difficult backgrounds and who have minded children for many years without a single well founded complaint (that we have been told of) can be said to have been neglectful toward one child (and not any other).
21. We do not accept that in the circumstances of this case it is reasonable for the appellants to be suspended until the conclusion of a finding of fact investigation or the end of the police investigation, as suggested by the LADO. We have been provided with no timetable for this and in the circumstances of this case, we find that this would be disproportionate. Notwithstanding the Tribunal's directions, the LA and the police have contented themselves with supporting the suspension of these experienced childminders without providing any indication whatsoever of the time tabled estimate to the conclusion of the investigations including what else remains outstanding and when it shall be completed. This is most regrettable in the circumstances of this case.
22. We are satisfied that the appellants have demonstrated a clear commitment to and understanding of safeguarding issues. First, P noted an impression on child X's leg, asked W to check it and they recorded their observations in the accident book. The Ofsted inspector was invited to examine these entries but she declined to do so. Second, P and W are experienced in working with 'family placement children' and on numerous occasions have reported their suspicions of

neglect and abuse. This has included giving statements to the police and attending court in relation to children they had concerns about. Third, P and W have reasonably complied with the requests the authorities. They were told they could not have family placement children and respected that decision. We accept their evidence that they did not understand that they could not mind children on a private basis until Ofsted informed them of this. Ofsted has not disputed this. The email said to contain this information after the strategy meeting was never received. It is implicit from Ms Lerner's second statement that Ofsted are critical of P for ringing to clarify whether he could assist a person with childcare who was really stuck, when he was suspended for issues of a safeguarding nature. We accept P's explanation that he was very sympathetic to a grandmother who had recently lost her husband and rang Ofsted to clarify if he could assist her in looking after her grandson at such a difficult time. We do not consider that this telephone call reflects adversely upon P's understanding and appreciation of safeguarding issues – he was simply clarifying a matter with Ofsted and then respected the information he was provided with.

Conclusion

23. Whilst we entirely accept that an allegation has been made of a safeguarding nature regarding child X, we have been provided with no clear updated evidence as to the nature and seriousness of the allegation. We do not have a copy of the paediatrician's report. It appears that it is no longer believed that any bruising is non-accidental but is likely to be as a result of neglect. We do not know the seriousness of the bruising or the seriousness of the alleged neglect. We have been told that when the appellants returned child X to the family there was no bruising and it appears to us highly likely on the evidence that we have, that any bruising was sustained after 4pm on 4 June.
24. We do not accept the submission from the police, the LA and Ofsted to the effect that as there continues to be an ongoing police investigation the appellants should remain suspended. In **Ofsted v GM & WM** [2009] UKUT 89 (AAC) the Upper Tribunal made it clear that it did not consider that in all cases, a suspension imposed while there is a police investigation need be maintained until that investigation is formally concluded and that Ofsted may be able to lift the suspension earlier depending on the facts. Ofsted effectively resist this appeal on the basis that further investigations need to be carried out, yet the LA are waiting on the police investigations and the police have not clearly set out what those investigations are and what steps it might wish to take depending on the outcome of the investigations.

25. Whilst we acknowledge that a police investigation is ongoing, on the material available to us and in all the particular circumstances of this case, there is insufficient evidence to support a reasonable belief that continued provision of childcare by the appellants may expose a child to a risk of harm. There is credible and cogent evidence from these experienced childminders that they are mindful of their safeguarding duties and have worked and continue to work closely with the authorities to ensure that children are not exposed to a risk of harm.

Decision

26. The appeals are allowed and the notices of suspension served against each appellant shall cease to have effect.

**Judge Melanie Plimmer
Lead Judge Care Standards & Primary Health Lists
First-tier Tribunal (Health Education, Social Care)**

Date Issued: 13 July 2015