

Care Standards

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

Determined on the papers on 19 November 2015

BEFORE

Mr Hugh Brayne (Judge)

Ms Heather Reid

Ms Wendy Stafford

[2015] 2537 + 2538.EY-SUS

BETWEEN:

Mrs JS

and

Little Giggles Nursery

Appellants

-v-

Ofsted

Respondent

DECISION

The appeal

1. The appellant appeals in two capacities: as a registered childminder, against the respondent's decision of 16 September 2015 to suspend her registration; and, as the director/manager of Little Giggles Nursery, against the respondent's decision of the same date to suspend her registration to provide childcare on non-domestic premises at Little Giggles, 7 Marshall walk, Knowle, Bristol BS4 1TR.
2. Both suspensions were initially for six weeks, to 27 October 2015. The respondent extended the periods of suspension for a further six weeks, from 28 October to 8 December, in a notice dated 27 October 2015.
3. The appellant in her notice of appeal also sought to appeal against cancellation of registration. The documents available to the Tribunal show that notice of intention to cancel registration has been served, to which the appellant has responded. They do not show that either

registration has been cancelled and therefore there is no valid appeal in relation to cancellation of registration.

4. The evidence in relation to both appeals is the same and they are therefore considered together.

The legal framework for suspension

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

6. 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.

7. 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.
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. In determining risk, the Tribunal stands in the shoes of the Chief Inspector, looking at reasonable belief both at the date of the original suspension and the date of our own decision.
10. 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.
11. Under sections 36 and 55 of the Childcare Act 2006, the power of suspension applies to providers, such as Little Giggles, as it does to individual childminders.

The hearing

12. 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 appellant, any child minded by the appellant, or any member of the families of these individuals, so as to protect their private lives.

13. The Tribunal members, having read all of the papers, determined the appeal by way of a telephone conference call on 19 November 2015.

The issues

14. There is a history of inspection findings which underpinned the notices of intention to cancel registration issued to the appellant in her individual capacity and as manager/director of Little Giggles on 14 August 2015. However the reasons given in the suspension notices are: :

On 15 September 2015 we received information from the Local Authority Designated Office for Safeguarding in Bristol that, on 7 September 2015, a cupboard fell and the door to the cupboard hit a young child's head at Little Giggles. We have been informed that you did not immediately contact the child's parent or carer as would be expected practice when a child sustains a head injury. We have been informed that you did not seek medical advice in relation to the head injury sustained by the child.

The cupboard was only attached to the wall with two screws and the cupboard next to it appeared to be loose. We have been informed that you commented that the child could have been killed. We have been informed that you stated that you would take down the second cupboard, which was loose, however this was not done when the child returned to your care the following day. We have been informed that the child was able to access the area containing this cupboard as you had not ensured the gate to this area was closed.

Ofsted considers that you have failed to ensure that potential risks are identified and acted upon. You also failed to respond appropriately when a child sustained a head injury while in your care; this put the child at risk of further harm. Ofsted considers that your failure to complete effective risk assessments and to respond appropriately when a child sustained a head injury puts children at risk of harm. The purpose of the suspension is to allow time for steps to be taken to minimise the risk of harm.

15. The purpose of the suspension, which has now lasted nine weeks, was therefore to prevent the risk of harm during a period of investigation, to allow for further investigation, and to enable steps to be taken to eliminate risk. In our view this forms a helpful agenda for the Tribunal's consideration of the evidence.

The evidence

16. We do not need to list all documents, but can summarise the available documentation as follows.
17. The appellant provided submissions to the effect that previous inspections were flawed because they lacked an independent focus. She also explained the circumstances of the cupboard falling and what actions she then took in relation to the individual child and subsequent

risk; she provided previous correspondence sent to Ofsted commenting on the outcomes of inspections over a period of two years; she provided submissions in relation to the respondent's response to the appeal.

18. The respondent provided a response to the appeal setting out the history of inspections and the background to its decision to suspend the appellant. It set out the steps it had taken since the decision, including a case review which determined that a further period of suspension was warranted. It provided witness statements from the following:

1. Sarah Haylett, Early Childhood Senior Officer, South West Region, who first visited the appellant on 13 April 2015 to conduct a monitoring visit and described monitoring visits carried out by other Ofsted inspectors on three subsequent occasions. She was involved in the decision to issue a notice of intention to cancel registration on 14 August 2015, and a cancellation of registration (subsequently set aside before it was issued). She made the suspension decision and was involved in the renewal of the suspension decision. She says that the renewal was necessary while the cancellation process was still ongoing (paragraph 19), to allow time for the appellant to present proposals to ensure her risk assessments were sufficiently robust or that she had taken steps to ensure her understanding of paediatric first aid was current. She said the cancellation decision would be taken the following day (28 October).
2. Vanessa Redmond, Early Childhood Regulatory Inspector for Ofsted. She visited the appellant on 16 September 2015 to serve the suspension notice and was provided by the appellant with an explanation of what had happened on 7 September when the cupboard fell.

19. Both witnesses provided exhibits to their witness statements containing other relevant documentation, including toolkits (which record actions, conversations, meetings and decisions on a contemporaneous basis), reports of inspections, and correspondence with the carer of the child concerned and the LADO.

Tribunal's findings and reasons

20. Ofsted has been involved in two parallel processes – a notice of intention to cancel registration, and a suspension triggered by safeguarding concerns when the cupboard fell and injured a child. It appeared to be ready to cancel registration on at least two occasions in the recent chronology: it issued an intention to do so, and indeed decided to do so, but then revoked the decision to cancel before issuing it when deciding to allow the appellant a chance to demonstrate that she had taken appropriate steps to satisfy Ofsted's concerns. It then suspended the appellant because of the injury, in order to investigate and allow the appellant to demonstrate that she met the additional safeguarding concerns raised by the incident.

21. We are not, in determining this appeal, looking at whether cancellation is justified. The tests for suspension and cancellation are different. The question for the Tribunal is straightforward: is there a reasonable cause to believe there is a risk of harm to children?
22. We note, in passing, our concern with the almost total lack of evidence of further investigation since the suspension was issued, and the fact that a decision to cancel has apparently already been taken (see witness statement of Sarah Haylett). The respondent is aware, and has stated this in its notice of suspension, that the purpose of the suspension is to investigate and allow the appellant to demonstrate that she has taken or will take steps to alleviate concerns. In reality none of this appears to be happening; it appears to us that the respondent is not going to get any more information either from its own investigations or from the appellant than it already has. There is no reason not to make, or if indeed it has made it to issue, the decision to cancel (or not to cancel, if that is the case, notwithstanding the evidence of Ms Haylett). We have been unable in any of the evidence to identify any reason why Ofsted will be any better informed on 8 December, when the suspension must expire, than it is today or was on 27 October when the suspension notice was renewed. However, these concerns are, at most, relevant to the question of whether the belief in risk of harm is for reasonable cause. The suspension remains valid if it is, even if nothing is currently happening to take advantage of the suspension period to move matters to a decision.
23. Apart from the cupboard falling, and the appellant's response to that incident, which triggered the suspension, the respondent's concerns arose from a series of inspections, the history of which is set out in paragraphs 8 onwards of the response. The detail can be found in the response, the witness statements and the exhibits, and fall under the headings of hygiene, teaching and learning, leadership and management, health and safety, public liability insurance, use of punishment, understanding of safeguarding, opportunities to develop physical skills, and self-evaluation. These concerns led to the notice of intention to cancel registration and a decision to cancel, subsequently revoked. We only need to consider this earlier history if the risks identified in the notice of suspension do not, in themselves, give rise to a reasonable cause to believe minded children will be at risk if the suspension is not lifted.
24. A falling cupboard is itself an indication of unsafe premises; the failures to report the incident immediately to the child's carer or to understand risk of concussion and need to obtain medical help are in themselves an indication of poor understanding of the responsibilities of a registered childcare provider. Without the appellant's explanations or actions to address these concerns we would have no difficulty in finding the reasonable cause for risk to be established. We cannot criticise the decision to suspend while this was looked into. The further information is now available. The appellant says that the cupboard was installed by a reputable contractor and she has instructed a different contractor to check and secure the other installations. This evidence is

not contradicted by any other evidence and is accepted. She cannot be accused of causing a risk to children through her own actions and appears to have taken appropriate steps to remove the risk caused by failures of other contractors.

25. She admits that another cupboard also presented a risk but it was not accessible. In relation to a child being able to access the area she provides the explanation that for only a short time the gate was open the child was supervised by the child's parent. We do not find this explanation reassuring, as she does not claim to have asked the parent to ensure the child was safe while the gate was open, or acknowledge that the gate should in fact not have been left open after she passed through to collect the child's dummy. She does not acknowledge that responsibility for safety remained her own, even though the child's mother was present. The grandmother's evidence on this point (email to Ofsted 11 November 2015) is somewhat stronger than this explanation: she says that, when she brought the child on 7 November one cupboard "was still falling off the wall" and she told the appellant to ensure the door to that room was locked, but when the child's mother collected her later that day the child "was running freely throughout the nursery and the door was wide open and the cupboard was still hanging on the wall". This is a conflict of evidence which Ofsted must resolve, as the grandmother's version of events suggests the failure is far more serious than the appellant herself is prepared to acknowledge.
26. In relation to actions taken after the child suffered injury from the falling cupboard, she explains that she applied cold water to the bruised area, the child then played normally and after her meal slept for an hour and a half. As noted by the respondent, this shows a failure to appreciate the risk of concussion and the need for medical attention. It is no explanation that the child's mother herself did not take the child to a doctor. It is not the mother who was responsible at the time, or who sets the standards by which a registered childminder is judged. The fact that the complaint to Ofsted only arose several days later is wholly irrelevant. The fact that the local authority safeguarding authorities took no further action is irrelevant to the question of whether the appellant herself has sufficient understanding to avoid future risk from similar incidents. The appellant is reported (witness statement of Ms Redmond) to have decided not to report the accident to the child's mother in order not to disturb the mother at work. This is an error of judgement as it should have been reported immediately. The appellant is reported to have decided not to seek medical attention because the child was fine. This is also an error of judgement, as she is not medically qualified to make that judgement, but should have enough knowledge of accidents including injuries to the head to know that medical attention was needed. She is reported to have told Ms Redmond that a child would turn blue if she has concussion. This is not accurate and shows a worrying disregard for her responsibilities. The appellant denies saying that the child could have been killed. She does accept the child could have died, so the precise words are of no

significance. It was a serious incident. The evidence shows that another cupboard was unstable five days later, but the appellant had taken no steps to secure it because she herself could not pull it off the wall. If a cupboard is loose that is not a satisfactory method of assessing risk.

27. Taking all of the appellant's explanations into account, she has shown to our satisfaction that she is not at fault from the original cupboard having fallen, and has now taken or undertaken appropriate steps to secure the cupboards. However she has demonstrated through her actions at the time and her explanations subsequently an inadequate knowledge of accident procedures, health and safety procedures, medical risk, and an inadequate understanding of her own responsibilities, as opposed to those of parents. Until the appellant can satisfy the respondent that she has addressed these significant concerns, the risk of harm to children minded by her remains and the suspension continues to be justified.
28. Although we find the suspension to be justified on these facts alone, we have, additionally, taken note of the earlier concerns which led to the notice of intention to cancel.
29. It is clear that the appellant is suspicious of Ofsted and that the working relationship between Ofsted and the appellant is poor. This may be the reason that the appellant adopted a defensive approach to the cupboard incident and this appeal; it may even have caused her to minimise, in her mind, rather than address appropriately, the very serious accident. Her attitude may have isolated her from the professional help she should have turned to – medical services, Ofsted, the local authority. She would not have been blamed: the actual cupboard falling was not her fault and the danger had not been spotted by Ofsted on its numerous monitoring visits. Instead she made a series of poor decisions, which she now seeks to justify rather than learn from. We take as an example her letter to the parent (20 October) where she implies that the parent's concern is for financial compensation, and she takes the opportunity to allege that Ofsted is responsible for "numerous lies in the Ofsted report". She fails entirely to address the main issue, which is that a cupboard fell onto the child and the parent was not happy with the way the incident was dealt with.
30. The appellant's ongoing lack of insight into appropriate professional conduct in relation to her responsibilities, the role of the regulator, and relationships with clients and regulator are evidenced in, but not confined to, this letter.
31. In order to be satisfied that there is no longer a risk to minded children, Ofsted needs to investigate all of these matters; it needs to be satisfied that the appellant takes her shortcomings seriously and is actively and professionally working with Ofsted to address them. The fact that Ofsted has done, as far as we can tell, almost nothing during the period of suspension to move matters forward despite saying that is what the purpose of the suspension is will have done nothing to enhance the chances of now building this better professional relationship

Order

The appeal is dismissed.

**Tribunal Judge Hugh Brayne
Care Standards
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 23 November 2015