

Care Standards

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

[2017] 2962.EY-SUS

Heard on 4 April 2017 at the Royal Court of Justice

BEFORE

Mrs J McConnell (Judge)
Mr M Cann (Specialist Member)
Mrs S Prewett (Specialist Member)

BETWEEN

Mrs Ololade Rebecca Amusan-Odunsi

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal

1. The Appellant appeals to the Tribunal against the Respondent's decision dated 6 March 2017 to suspend their registration from the Early Years Register for six weeks to 16 April 2017 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').

Attendance

2. Mrs Amusan-Odunsi attended the hearing to present her appeal. Her witnesses were Ms S. Douadi, employee and Mr N, parent of children placed in Mrs Amusan-Odunsi's care.
3. Mr P. Saigal, PS Law Solicitors, represented OFSTED. Their witnesses were Ms G. Joseph, Ofsted Early Years Regulatory Inspector, Ms M. Mandalia, Ofsted Early Years Regulatory Inspector and Ms M. Mooney,

Ofsted Senior Officer.

Procedural Matters

4. The Appellant made an application for a witness statement from Mr N and an updated letter of support from parents at the nursery to be admitted as late evidence. During the hearing the respondent made an application that extracts from case comments concerning Mr N's calls to Ofsted and a copy of a text he had sent them were admitted as late evidence. Neither party opposed the other's applications. We concluded that to accept all the evidence would support the over-riding objective of the Tribunal to consider cases fairly and justly as it would ensure all parties views were considered in the appeal.

Restricted reporting order

5. The Tribunal makes a restricted reporting order under Rule 14(1) (a) and (b) 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 up to the issue of the notice of statutory suspension

6. The Appellant has been registered with Ofsted since September 2012 and is the proprietor of Oglon Nursery (the Nursery). The setting also provides an afterschool club during term time and in school holidays. When inspected by Ofsted in November 2012 it was rated "satisfactory". The last three inspections were rated "inadequate" in February 2016 and "inadequate with enforcement" in June 2016 and December 2016.
7. As the result of the June 2016 inspection, a Welfare Requirement Notice (WRN) was served dated 29 June 2016 on the appellant to address inadequacies including failure to manage children's behaviour; not having an effective key person system; suitability and enhanced DBS checks not being completed for staff and staff being unaware of safeguarding procedure; teaching across the school being inadequate. On 19 July 2016, 28 July 2016 and 4 August 2016 monitoring visits were made to the nursery by Ofsted inspectors to assess the progress made towards addressing the WRN inadequacies. In addition an Early Years outside consultant was appointed to support the nursery to make changes. A speech and language therapist also provided support to the staff at the nursery to help address children's issues. During monitoring visits during this time further concerns were raised including high staff turnover; unqualified staff being left in sole charge of groups of children; poor supervision of children; inadequate staff ratios/qualifications and vetting of new staff; staff deployment. A further WRN notice was served on 9 August 2016 to specifically address staffing issues. Subsequent monitoring visits on 31 August 2016 and 13 September 2016 noted that staff deployment remained ineffective; staff/child ratios remained inadequate and references/ checks for staff still remained outstanding. In addition the

Ofsted inspector was concerned that the Appellant had not shared the previous inspection reports with parents as required. The outside Early Years consultant repeated concerns that the Appellants inability to make and sustain improvements.

8. Following a case review by Ofsted on 15 September 2016 it was decided that despite the support given that there was a persistent failure by the Appellant to meet and maintain the requirements set out in the framework for the EYFS (Early Years Foundation Stage). The decision was taken to cancel the Appellants Ofsted registration and a notice of intention to suspend was served on 10 October 2016.
9. Further monitoring visits took place on 27 October 2016 and 10 November 2016 where some improvements were noted by the inspector. At a hearing to consider the Appellant's objection to cancellation of registration held on the 11 November 2016 the Appellant made assurances that all issues had been successfully addressed and invited Ofsted to make a further inspection as soon as possible. The decision was made to defer the outcome of the objection hearing until after a further inspection.
10. A further Ofsted inspection took place on the 14 December 2016. Although there was some evidence of improvement the provision was again judged "inadequate with enforcement" and resulted in a WRN being issued then amended to address concerns including failure to manage children's behaviour effectively; safeguarding issues and inadequate teaching.
11. At a case review on the 15 December 2016 it was agreed that children were not at immediate risk of significant harm and that suspension was not necessary. It was agreed that there was a risk to children's long term welfare, learning and development and so Ofsted would proceed to cancellation of the provider's registration. Meanwhile a further WRN would be served to continue to monitor the provision closely. A cancellation notice was served on the Appellant on 21 December 2016.
12. On 30 January 2017, a monitoring visit was carried out and concluded that the Appellant had made little progress in improvement and breaches of the WRN were found including behaviour not being effectively managed by staff; poor staffing arrangements leaving children not supervised; staff knowledge of safeguarding being limited. Following review by the Ofsted supervising officer, the WRN was reissued and suspension was again considered but no immediate risk of harm was identified and it was not considered the threshold for suspension was met.
13. The next monitoring visit was made on the 16 February 2016 and the inspector again observed staff failing to tackle behavioural incidents; noted a failure to keep adequate records concerning child protection concerns and staff turnover remained high. As the result of a further case review carried out on the 17 February 2017 the Appellant was given notice that if there was no improvement demonstrated at the next inspection that further

consideration would be given to suspending registration to protect children from risk of harm.

14. A final monitoring visit was made on the 3 March 2017 which raised additional concerns. An apprentice had been recruited by the Appellant who had been previously dismissed from another nursery. She had also been previously interviewed by the Appellant and deemed unsuitable to work in the setting. Despite earlier progress in ensuring safe vetting of staff the inspector found that the Appellant had failed to establish the circumstances under which the apprentice had left her previous setting, they did not have a valid DBS check. The inspector then reported that the apprentice had been left in sole charge of a group of children. In addition, lack of effective supervision of children was observed and poor deployment of staff which led to the conclusion that children were potentially now at significant risk of harm.
15. A case review was held by an Ofsted supervising Officer on 6 March 2017 and the decision was made to suspend the Appellant's registration. Seven separate areas of concern were identified which led Ofsted to conclude they had reasonable cause to believe children are or may be exposed to a risk of harm.
 - The notice of suspension issued the same day detailed the separate areas identified for investigation;
 - Lack of staff understanding of how to safeguard children
 - Behaviour consistently managed ineffectively
 - Staff deployment concerns
 - Staff failing to show initiative to engage purposefully with children
 - Failed to sustain any improvements in provision since the last inspection and new concerns arising
 - Staff team has changed and been significantly depleted
 - Poor practice
16. The Appellant responded to the notice of suspension by requesting that Ofsted interview her as soon as possible. Two Ofsted Inspectors visited the Appellant at the nursery on the 15 March 2017 to consider whether the suspension could be lifted and concluded that it could not.

Legal framework

17. 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 person's registration. The section also provides that the regulations must include a right of appeal to the Tribunal.
18. 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.”

“*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”.

19. 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.
20. 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.
21. 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.

Evidence

22. We took into account all the evidence that was presented in both the core and supplementary evidence bundles as well as the oral evidence given by witnesses under oath during the hearing. We have summarised the evidence we relied upon in reaching our decision.
23. The Appellants case is that as no serious accidents or injury have occurred at the nursery it is evidence that children are safe and not at risk of harm. That Ofsted has failed to recognise that the nursery has addressed the issues raised at inspections and subsequent monitoring visits and that the approach taken by inspectors during visits has been one which has unsettled staff and children leading to a fear of them visiting the nursery. Subsequently they have behaved differently during those visits and that the Inspector observations have not given a fair picture of the provision made in the setting. The Inspectors had also failed to take into account that there was a “different approach for different folk”. The Nursery had been set-up in response to a need in the local community for good, affordable and local child care. Closure of the Nursery had caused anxiety and stress to many parents and children.
24. On the day of the monitoring visit which lead to the suspension the Appellant disputed the events described by the inspector in her report

involving the toy car and a child being seen carrying a pair of scissors. Her view was that these had been reported out of context and had been given exaggerated importance.

25. The Appellant did confirm that she had not obtained a DBS check for the apprentice before she had started working at the nursery but had seen a DBS from her previous work setting and that the delay was due to a payment error and so was pending at the time of the monitoring visit. She had called the apprentice's previous employer for a reference and to investigate the circumstances under which she was dismissed then had asked for that to be confirmed in a written reference however that had not been obtained. The Appellant explained that the apprentice had not been left alone with children because the Inspector had been present. Both the apprentice and Inspector had been left with sleeping children in one half of the nursery area whilst she escorted a child to the toilet in an area just off of the room.
26. The Appellant called Ms S. Douadi as a witness. Ms Douadi confirmed that she was a prospective employee at the nursery who had been called by the Appellant on the morning of the monitoring visit of the 3 March 2017 to come and give additional staff support. Whilst she had visited the nursery for induction and during the interview process it was her first day of employment. She described in detail the process that the Appellant had followed in recruitment and her satisfaction at the induction she had been given. Ms Douadi gave evidence about the toy car incident that the inspector had reported during the day. Her recollection supported that of the Appellant that the child had not fallen under the car but had slipped as trying to get into it. She had picked the child up after the Appellant had drawn her attention to what had happened.
27. Mr N gave oral evidence to support his written statement in support of the Nursery. He confirmed that he has two children that attend the nursery and that he has been extremely satisfied with the way that they have been cared for whilst being there. He described them as being very happy to go to the Nursery every day. Alternative nursery provisions he had looked at would not give them the freedom to play and learn by their mistakes – they were too formal. During meetings with Ofsted Inspectors over the past year he was shocked to learn that they considered children were not learning. As his experience was that his son was able to count and know his alphabet well because of the input he received. At a recent 2 year check carried out by the health service his daughter had achieved 60/60 when her development was scored. This, he was sure, was due to her time at the nursery. He did not consider that either of his children had ever been at risk of harm during their time there and that Ofsted had an attitude of needing them to be wrapped in cotton-wool. This view was based on the fact that he was regularly in the Nursery at drop-off and pick-up time each day when he would be able to see through the window what was happening. Whilst he had not read the inspection reports in detail his wife had outlined what they had said to him. In his view the issues raised were largely due to the Appellant's failure to understand and carry out

administrative tasks and he had advised her to hire some specific support in this area. Mr N stated that his view of the Nursery reflected that of the parents with children placed there. This was supported by a letter submitted in evidence signed on behalf of parents.

28. The Respondents position is set out in their response to the appeal and explains that the decision to suspend was based on the systematic failings in the nursery to protect children from harm. Despite being aware of the potential safeguarding concerns associated with employing the apprentice the Appellant continued to recruit this new member of staff without the necessary vetting and then left her in sole charge of children. Ofsted were not satisfied that safer recruitment practices would be followed. Additionally she failed to consider information relating to child arriving with existing injuries. The Respondent refers to the Inspector observing “an accumulation of mounting risk to children”. Despite a range of incidents being brought to the Appellant’s attention during the last inspection and subsequent monitoring visits, it was consistently her view that staff’s perceived failure to manage and minimise risks arising from the children’s behaviour was the result of an inspector being present. The Respondent concluded that this showed that the Appellant continued to fail to accept responsibility for unsafe practices and persistent breaches were putting children’s safety and welfare at risk. Ofsted cannot wait for a serious accident to occur before taking action.
29. The Respondent’s case was supported by comprehensive documentation from the 3 inspections that have been most recently carried out, the 10 monitoring visits and 4 case reviews that have taken place since February 2016. Witness statements of their officers Ms G. Joseph, Ms M. Mandalia and Ms M. Mooney provided further details. All three officers attended the hearing and provided additional evidence in response to questions from the Appellant.
30. In oral evidence, both Ms Joseph and Ms Mandalia both confirmed that they had never witnessed an accident at any time that they were visiting the nursery. Both independently confirmed that they had observed children being at risk of harm and had taken action on different occasions to bring incidents to the attention of the Appellant and her staff.
31. The Appellant raised with Ms Mandalia what she considered had been the inspector’s unhelpful attitude, which she considered over authoritative, during monitoring visits which staff found intimidating. Ms Mandalia emphasised that she had come to the nursery for the purpose of inspection/monitoring progress and that she was therefore only doing her job. The Appellant referred Ms Mandalia to a letter contained in the evidence bundle dated 12 February 2016 and headed “Summary of Complaint”. It contains references to the subsequent monitoring visits of the 16 February 2017 and 3 March 2017 which the Appellant put to the witness was evidence that the decision to suspend her registration had been pre-planned. Ms Mandalia explained that because of a technical “glitch” with Ofsted’s IT systems, that a letter remains dated at the date it

was originally issued. Any subsequent amendments to update information will not change that date and that as a result of the issue being raised by the Appellant that was now being reviewed by Ofsted's IT team. She confirmed that the issues were not only in the Appellant's case but across all Ofsted communications of this type. Ms Mooney in her oral evidence also confirmed that this is the case and referred us to a letter issued 10 August 2016 also in the bundle dated "Summary of Outcome" which also contained dates reflected later monitoring visits.

32. The Appellant questioned Ms Mandalia over the incident that she had reported concerning a baby being trapped under a toy car during her monitoring visit of the 3 March 2017 with reference to a still photograph taken from CCTV monitoring. Ms Mandalia was clear that she had seen the incident and that her written account that was contained in the evidence bundle remains unchanged.
33. Ms Mooney gave oral evidence that it was she as the Senior Case Officer that Ms Mandalia reported to after her monitoring visit on the 3 March 2017 who had taken the decision to suspend the Appellant's registration. Whilst she was aware of the nursery, as the reviewing office who heard the Appellant's Objection to Cancellation of Registration in November 2016, she had not visited the nursery and the decision was taken based on the evidence from Ms Mandalia. Ms Mooney clarified that the incident with the baby under the car formed a very minor part of the decision to suspend registration. The decision to suspend was not pre-planned and she referred us to documents in the evidence bundle from case management review meetings showing that whilst suspension had been considered previously it had been decided that the legal test to be applied had not been met.
34. At the time of the suspension notice being served, the Appellant had been advised to let Ofsted know when she was ready to be interviewed. The response had been that she was ready immediately and on the 15 March 2017 Ms Joseph and Ms Mandalia had visited her to assess her knowledge and ability to comply with the EYFS requirement. They concluded that the Appellant's knowledge and ability to comply remained poor and that she lacked insight into the impact of the failing on children. Ms Mooney gave evidence that in her view the request, and what she considered to be insistence, from the Appellant to be interviewed so quickly following the suspension demonstrated again that there was a failure to accept the issues being raised, take time to consider them, put practice in place to address them and then, when prepared, meet with Ofsted Inspectors. Ms Mooney's view when questioned was that the suspension needed to remain in place until the cancellation of registration hearing was concluded and that there was nothing she could now do which would address the issues raised by the decision to suspension. The fact that Ofsted had carried out 3 inspection visits which resulted in an "inadequate" rating and 10 monitoring visits to consider the progress on WRN issues over a period of a year she considered to have been a fair and proportionate approach. Additional support had been put into place

from an Independent Early Years consultant and a speech and language therapist. The decision to suspend registration had come after none of these approaches seem to have been effective or sustainable and further issues had been observed during the monitoring visit of the 3 March 2017.

35. The reason for the suspension was that they believed that the continued provision of childcare to any child may expose such a child to a risk of harm.

The Tribunals conclusions with reasons

36. The standard required to justify a suspension is not a high one. During the short period of the suspension it is for the Respondent to investigate matters to determine if there is a case for longer-term enforcement action, or whether the outcome of the investigation is that there is no longer reasonable cause to believe children may be harmed.

37. We considered the events that led to the decision to suspend the Appellants registration. The events reported by the Inspector on the 3 March 2017 which triggered the decision to suspend were focused on the failure of the Appellant to follow safeguarding procedure specifically in employing the apprentice and management of behaviour. This was in the context of a persistent failure to improve specifically in the areas identified in the WRN.

38. The safer recruitment process to be followed when engaging new staff had been an issue raised by previous inspections but had been thought by Ofsted too have been successfully addressed. The Appellant gave oral evidence that she had spoken to the apprentice's previous employee by telephone but acknowledged that she had not received any written confirmation from them or made a record of the conversation. At the time of the monitoring visit the Appellant was also aware that the DBS process had not been completed. She then took the decision, despite the fact that Ofsted had warned her that any further issue would potentially result in a suspension of registration, to take the risk and employ the apprentice. We decided that this was a mistake and that it was indeed evidence that the Appellant does not have a clear understanding of the issues that have been persistently raised by Ofsted over what we consider to be an extended period of time. The Appellant did not tell us whether a DBS check had yet been completed or whether a reference has yet been received. This issue of safer recruitment of staff had been raised by Ofsted during previous inspections and in monitoring visits. We are not persuaded that they have been addressed by the Appellant yet and conclude that there may still be a risk of harm to children in the care of the Nursery.

39. There was a clear dispute between the parties as to the effective management of children's behaviour and specifically what had happened on the 3 March 2017 during the monitoring visit concerning the toy car incident and a child walking about with scissors. We do not have to decide whose version of events is right or wrong in this appeal. Both parties agree

that these incidents happened. What we do need to decide is whether this is evidence that a child may be at risk of harm. We decided that whilst the severity of the incident, even in the worst case scenario described by the Ofsted inspector concerning the toy car, could be considered a potentially common type of incident in a nursery setting. However, when examined in the context of it being a monitoring visit; the Appellant should have been aware that the behaviour of children and their supervision by staff was of long- standing concern to Ofsted and that a suspension of registration was the next step that would be taken if concerns remained we found the approach taken by her very troubling. The fact that the Appellant then decided to rely on an unqualified apprentice and a brand new member of staff to support the setting at this time showed very poor judgement. We were not given any evidence by the Appellant that staff levels and arrangement had been improved since the time of suspension and conclude that a risk of harm may still exist if the suspension was to be lifted at this time.

40. We have no doubt that the Appellant has an excellent relationship with children in her care, their parents and that she has provided a much needed service to the local community. We found the evidence of We conclude that at the time of our decision, the continued provision of child care by the Appellant to any child may expose such a child to a risk of harm.
41. was particularly persuasive in supporting this conclusion. However this level of support alone is not enough to ensure that children are not at risk of harm. It has to be supported by positive action being taken to address issues being raised. We agreed with Mr N's suggestion that if the Appellant had employed an administrator the management of the Nursery may have been greatly improved as she could have been able to give more thought and attention to staffing issues.
42. We were not persuaded by the oral evidence given by the Appellant or the limited documentary evidence presented that she understood the serious nature of the issues that had been raised. We considered her reliance on the fact that a serious incident or accident had not happened was evidence that children were not, or may not, be at risk of harm was extremely concerning as it illustrated that she did not recognise the anticipatory duty to be aware and take steps to mitigate risk.
43. The evidence of Ms Mooney was that it was her view that the suspension should remain in place until the appeal against the cancellation of registration is decided. No further steps in the investigation of the reasons for suspension were outlined by Ofsted in their written or oral evidence. We find that this approach concerning as the purpose of a suspension is to allow time for further investigation. The purpose of the power to suspend registration is not to act as an interim cancellation of registration. Whilst we are persuaded that the suspension should stay in place at this time, Ofsted will need to address this matter adequately when reviewing their order on the 16 April 2017 under regulation 11 of the 2008 Regulations.

44. We conclude that at the time of our decision, the continued provision of child care by the Appellant to any child may expose such a child to a risk of harm.

Decision

The Appeal is dismissed and the suspension is confirmed.

Judge Jane McConnell
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date Issued: 7 April 2017