

Care Standards

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

Considered on the papers on Wednesday, 7 June 2017

[2017] 3017.EY-SUS

Before
Tribunal Judge T Jones
Specialist Member Mr M Flynn
Specialist Member Ms P McLoughlin

BETWEEN:

Kid City Ltd

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal

1. The Appellant appeals to the Tribunal against the Respondent's decision dated 10 May 2017 to suspend her registration as a childminder on the Childcare Register for six weeks to 21 June 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').

Paper Determination

2. The appeal was listed for consideration on the papers, pursuant to rule 23 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('2008 Rules'). Both parties

must consent, which they have in this case, but the Tribunal must also consider that it is able to decide the matter without a hearing.

3. In this case, we have sufficient evidence regarding the nature of the allegations made and the conclusions reached. In the circumstances, we consider that we can properly make a decision on the papers without a hearing.

Restricted reporting order

4. 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

5. This is a summary of events taken from information provided by the Respondent. It is not a full narrative of the documents the Respondent filed with the Tribunal and supplied to the Appellant.
6. By letter of 10th May 2017 The Respondent notified the nominated individual of the Appellant (Ms Hylton) that the Respondent was continuing to suspend its registration from the Early Years Register and General Childcare register. The period of the further suspension being from 11th May 2017 to 21st June 2017.
7. The Appellant had been registered since 14th December 2009. It was said the setting provided full day care during term and a holiday play scheme for children with provision for forty two children on the roll with twenty seven in the early years and fifteen in the older after school group. A good number of the children have special educational needs (SEN).
8. Three earlier inspections had taken place in 2012, 2015 and; more recently 24th January 2017. On 19th January 2017 the Respondent received a notification that a child age 6 needing special educational needs was taken home by a staff member in a mini bus at 7.20pm (the setting closes at 6pm). The child ran off at the door of its home and was found by police twenty minutes later.
9. An inspection followed on 24th January 2017 and this raised a number of concerns with an outcome of "inadequate". Complaints were received by the Respondent on 15th March 2017 and 24th March 2017 said to amount to breaches of the Early Years Foundation Stage welfare requirements and the compulsory part of the childcare register.
10. An unannounced inspection took place on 27th March 2017 to check

if earlier concerns were being addressed and acted upon.

11. Ms Hylton was not present. She was reported to have told an inspector she had been out for lunch. It is alleged that it was not the case it was later discovered she was working at a nearby school. It is alleged that a deputy to act in her place at the registered premises had not been formally appointed.
12. A volunteer was found to be working without DBS checks having been earlier undertaken. The Respondent believes this had been the case for at least ten months; Ms Hylton when asked said this had been for about three months. A summary of the inspection (27th March 2017) suggested the nursery was chaotic and a number of safety concerns outlined already, as well as children having unsupervised access to electronic devices, and claimed staff unfamiliarity with policies were identified for discussion.
13. Enquiries of Companies House revealed the Registered Company has three Directors (including Ms Hylton). Details of the other two had not been provided to the Respondent in line with registration requirements so that their suitability could be assured. It is said this failure may constitute a criminal offence. Some staff had not had DBS checks undertaken by the Appellant but by the school where Ms Hylton is understood to work.
14. On 18th April 2017 there was a further inspection to see if the (then) suspension might be lifted. It is said that insufficient improvements had been made to warrant the lifting of the earlier suspension.
15. The Respondent later resolved to take steps to cancel the Appellant's registration. Ms Hylton when informed of this on 27th April 2017 made representations that "they have put everything in place", deputies were in place and a further inspection would be requested.
16. An unannounced inspection took place on 2nd May 2017. There had been a request for re inspection by the Appellant who once more asserted that prior concerns had been addressed. After the visit, it was concluded by the Respondent that whilst there had been some improvements, many of the risks that lead to suspension still remained, and further risks were identified.
17. As to further progress in this matter, a notice cancelling registration was sent to the Appellant on 8th May 2017. On 17th May 2017 the Respondent received an objection to this, written notice of objection has been requested by 13th June 2017 and the matter is set to be heard on 20th June 2017.
18. As had been earlier discussed with the Ms Hylton a notice of the current suspension was sent to her on 10th May 2017. On 21st May

2017 she requested a further inspection take to give consideration lifting the suspension stating further improvements had been carried out as the Appellant wished to commence operations from 29th May 2017 which was the half term holidays. The Respondent's officers carried out a further visit on 23rd May 2017, but following discussions generally with Ms Hylton, and concerns as to arrangements for outside visits proposed by the Appellants for children off the premises becoming apparent during this visit, a decision was made not to lift the suspension which is in force until 21st June 2017.

Legal framework

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

20. 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.”

21. “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”.

22. 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.

23. 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.

24. 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

25. In applying for the current suspension to be lifted the Appellant was granted an extension of time to file a response. There have been a further reply thereto by the Respondent; and comments thereon from the Appellant which were received on the morning of the date fixed for the Tribunals deliberations. In fairness to all, we state we have taken all of the same into account though we may not recite every detail these documents have all been read and considered by us.
26. The Appellant filed documents in line with an extension of time to do so by noon on Monday 5th June 2017. It includes a detailed statement from Ms Hylton which appears to be sent in draft dated 2nd June 2017 and another copy dated 4th June 2017. We have read both and the attached documentation and check lists.
27. Therein Ms Hylton points to a long career with children with special educational needs. She is employed assisting children with such needs at a nearby school.
28. Ms Hylton has addressed some of the concerns with reference to each of the inspections carried out by the Respondent's officers on 27th March 2017, 18th April 2017 and 2nd May 2017.
29. She accepts many matters in terms of shortcomings; some beading not being cleared away and a child was found with a bead in its mouth, another child was found chewing on a ball sponge/scouring pad and she points to remedial action being taken. She disputes some matters such as the provision of drinking water for children. She has put in place provision of a deputy and better record keeping. She address an issue concerning a member of staff said to be without a DBS certificate being a member of staff who she knows well at the school where she has other employment and his having a DBS certificate issued to him at that school.
30. There are two other directors of the company; they were put in place as Trustees because the nursery and after school club has had some grant funding which required their appointment. They have not been identified to Ofsted as given the recent concerns she has indicated they prefer to resign their directorships.
31. Ms Hylton feels strongly about the issues that have been raised, she resents her integrity being called into question. She states she is working closely with the Local Authority Environmental Health team, cleaning regimes, repairs/replacement of door locks, cupboard doors are locked now, electrical socket guards checked

and a new sink have all been installed in line with recommendations made by the Local Authority and to deal with concerns expressed by the Respondent.

32. She states she has worked tirelessly to deal with any concerns raised to ensure that every area of improvement identified by the Respondent has been rectified.
33. She concludes that the premises and organisation have gone through a big restructure, new equipment has been purchased and a new two year old room has been developed. She feels that the Respondent's officers have not taken any or due account of tracking systems that track individual children's development. A health and safety consultant now visits once a week and risk assessments are updated. She believes the Respondent's inspector wants to continually defame the service provided. When she considered making a complaint about an inspector she claims she was talked out of it in the hope the suspension might be lifted only to find that it was not.
34. She says she has had nothing but support from parents and indeed two supportive e mails from parents were annexed to her submission. It is submitted that she and the staff have nothing but the children's well being and safety as a priority. In her more detailed submission she concludes, "I would like our suspension to be uplifted we have done everything we have been asked and more. We would welcome a full inspection from Ofsted straightaway but from an independent inspector of whom has no personal issue with us".

The Tribunal's conclusions with reasons

35. 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.
36. We reminded ourselves of the lower threshold for confirming the suspension and reminded ourselves that at this stage we are not finding facts or determining the veracity of allegations in this case particularly as to probity, which would require a full hearing. There have been, however, wide ranging serious concerns as to the health safety and well being of children, many of which have been acknowledged by the Appellant though they are said to be rectified. Some documentary matters remain in abeyance seemingly, one example being the position of the other Directors.

37. The Tribunal was concerned that there have been a number of alleged incidents where children are said to have been placed at risk of harm, e.g. children leaving the setting and wandering off without staff noticing.
38. We were also concerned about arrangements for escorting a large number of children from a school to the setting, up to 16 have been mentioned many of whom may have special educational needs.
39. The Tribunal also noted that there had been ten visits from the Local Authority (LA) since January 2017 prompted by concerns expressed for children's safety and the setting operating over permitted ratios. Such concerns caused the LA to contact parents with children with special needs advising them not to use the service as it was not felt to be suitable and that the care of two children funded by the LA had been de commissioned.
40. As late as 2nd May 2017 Ms Hylton and her deputy were said to have confirmed to the inspector when shown a copy of the regulations for the Child care register that they had not seen them.
41. Doubts have been raised about Ms Hylton's probity and honesty. Whilst they cannot be explored here such matters add to the index of concerns.
42. In overview we concluded that we were satisfied that there may be a risk of harm to a child placed in the Appellant's care. Our reasons for doing so included the nature of these allegations, along with fact that some of the current allegations have been identified in the course of further requested inspections when it was asserted all was in order.
43. We take account of Appellant's concerns and frustration regarding difficulties she claims to have with Ofsted inspectors. We cannot determine this matter, but have taken due note of it when considering the submissions made by both sides. This includes any and all responses received even up to the date we entered into our decision making. We have to carry out a risk assessment as set out above under the heading legal framework. We might add whilst reference is drawn from case law as to our "placing ourselves in the shoes of the Chief Inspector", that we are an independent Tribunal making a risk assessment against the threshold set out above.
44. We also concluded that the Respondent is taking all steps necessary, at this stage, and is awaiting further engagement with the Appellant concerning the notice to curtail registration which has its own timetable outlined for us.
45. We acknowledged the positive references from parents that have been provided by the Appellant in support of his appeal. It is not

clear, as the Respondent suggests, what knowledge those contributing had of these proceedings, but, nevertheless, we acknowledged that these were positive references.

46. In reaching our decision, we also took into account a range of factors including the Appellant's circumstances, the parents who use the services and the disputed nature of the allegations. However, in our view, the nature of the allegations led us to conclude that at this point, the action taken is both proportionate and necessary.

47. We reminded ourselves that 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 the suspension is necessary.

48. We conclude therefore that the continued provision of child care by the Appellant to any child may expose such a child to a risk of harm.

Decision

The decision to suspend registration is confirmed and the appeal is dismissed.

**Tribunal Judge T Jones
Primary Health Lists/Care Standards
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 9 June 2017