

Care Standards

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

Considered on the papers on 19th June 2017

[2017] 3031.EY-SUS

BEFORE

Ms S Goodrich (Judge)
Ms D Rabbetts (Specialist Member)
Ms H Reid (Specialist Member)

BETWEEN:

Funhouse Childcare Ltd

Appellant

-v-

Ofsted

Respondent

DECISION AND REASONS

The Appeal

1. By notice of application dated 6 June 2017 the Appellant appeals to the Tribunal against the Respondent's decision dated 22 May 2017 to extend the suspension of its registration on the Early Years Register and both the compulsory and general parts of the General Childcare Register for a further six weeks from 23 May 2017 to 3 July 2017 pursuant to section 69 of the Childcare Act 2006 ('2006 Act').
2. The Appellant seeks a direction that the suspension shall cease to have effect so that the Appellant can resume operating its childcare business pending the outcome of the appeal against the decision made by Ofsted on 24 March to cancel registration which is listed to be heard on 16th October 2017.

Paper Determination

3. The Appellant requested consideration on the papers and the Respondent did not object. 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').

4. Although the parties are in agreement about consideration on the papers the Tribunal must also consider that it is able to decide the matter without a hearing. We consider that we have sufficient evidence regarding the nature of the allegations made, the Appellant's response to the allegations and the basis for the decision made. In the circumstances, we consider that we can properly make a decision on the papers without a hearing.

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. In this appeal we will also anonymise some of the names for reasons that will become apparent.

The Background and Chronology

6. We set out below a summary of the background and the main events that led to the original suspension. This has been largely taken from information provided by the Respondent. We acknowledge that much of the Respondent's case is disputed.
 - a) Funhouse Childcare Limited is owned by Mrs T. She is the sole director, the nominated individual and manager of the provision.
 - b) Mrs T has worked as a childcare professional for 11 years. In August 2011, she was awarded the CACHE diploma (Level 3) regarding working with children and young people. She has been registered with Ofsted since 30 October 2014. The Appellant has an agreement with Northumberland District Council to use the community room at Ponteland First School in Newcastle upon Tyne ("The School"). Childcare services are provided by from 7.30 am to 9am and from 3.15 to 6pm during term time and from 7.30am to 6pm during school holidays save for Fridays when it shuts at 5.30. At the material time there were approximately 70 children on roll.
 - c) On 15th January 2016 Ofsted inspected the provision and rated it as "good".
 - d) On 11 October 2016 an incident occurred at the provision involving Mrs T and her daughter C. Precisely what happened is the subject of active dispute but on the face of the evidence before us as the result of what a Year 1 child disclosed, her parent on 12 October disclosed to Mrs Wright, the School's Deputy Designated Safeguarding Lead, that Mrs T had locked her 8 year old daughter C in a cupboard in the community room for a period of 10 minutes causing distress to C and to other

children who had witnessed it. It was said that Mrs T had left the room taking the keys with her and that no other member of staff could therefore open the door in her absence.

- e) Two children were interviewed by Mrs Wright on 12th October. Both said that Mrs T had locked C in a cupboard with a key.
- f) C was also interviewed. She said that her mum had locked her in the cupboard for a short while and she became upset because of this. C said that: she felt frightened; when she is frightened she gets dizzy; her eyes went blurry and she fell down on the beanbag in the cupboard. Children came to ask her if she was OK. Rachael (Rachael Gresty - a member of staff) knocked on the door and asked her what was wrong. Shortly after this her mother unlocked the door
- g) Mrs Wright also took a signed statement from Rachael Gresty. She had been playing with three children. She said that Mrs T had told her that C was having a tantrum “so I have locked her in the cupboard until she calms down.” Mrs T then left to take a couple of children to the toilet. The other children crowded around the cupboard and were distressed. Rachael attempted to open the door. Mrs T returned and handed the keys to Rachael asking her to sort C out. C was breathing heavily, screaming and inconsolable. C attempted to get off the bean bag but flopped back down and appeared disorientated. C then came out. Rachael was concerned by the incident and contacted the school the following day.
- h) On 12 October 2016 Mrs Wright reported the incident to Children’s services and Mr Hall, the LADO for Northumberland, was informed. Mrs T was advised by Mr Hall not to visit the site whilst the matter was investigated.
- i) The LADO advised Mrs T to report the incident to Ofsted which she did on 13 October 2016. The transcript of the call is before us. In brief summary Mrs T said that her daughter had kicked off in a “huge massive tantrum” and she had to lock the door on the cupboard as she was lashing out and it was for the safety of the other children. What she had now put in place was that if it happens again she will remove herself from the situation. She had done a risk assessment on her daughter and was going to do some staff training.
- j) Ofsted considered that the information provided by Mrs T raised serious concerns about safeguarding and behaviour management at the setting and Mrs T’s suitability as the nominated individual which required further investigation.

- k) Ofsted contacted Mr Hall who advised that he had arranged for an Early Years and Childcare Development Officer to investigate and to consider the impact on C and the other children present. In addition he had asked Ms Brown, a social worker, to complete a Child and Family assessment.
- l) Ms Brown reported that C, without being asked, had stated that her mother had not locked her in the cupboard. When it was explored who could have locked the door C said “it must have been a member of staff.” C said that she was not frightened or anxious. Ms Brown formed the impression that C had been prompted and was trying to protect her mother. C appeared pre-occupied about her mother losing her business and the family losing its source of income.
- m) Ms Prescott, the local authority Early Years and Childcare Development Worker went to the School every morning to support the staff in Mrs T’s absence. She was concerned about the setting’s ability to cope without her input. She considered that EYFS requirements were not being met in areas listed a) – k) on page 169/170. In summary these concerns related largely to safeguarding and included that: members of staff did not know the procedures to follow if they had concern for a child; the deputy manager was unsure of whether all members of staff has a Disclosure and Debarring (“DBS”) check and could not provide evidence of safer recruitment practice; staff did not acknowledge that children who were booked in but not turning up was a possible safeguarding issue; there was a practice of allowing parents to drop their children off in the school car park without signing the children in.
- n) Mrs Prescott stated that on 13 October 2016 she received a phone call from Mrs T who explained how she had locked her daughter in the cupboard. C had asked for a present from the birthday box kept in the cupboard and became upset when Mrs T refused. Mrs T described C as an “angry little girl.” Mrs T admitted to locking C in the cupboard in front of other children.
- o) Mrs Prescott’s concerns included that there was no one suitable to run the setting in Mrs T’s absence. The deputy manager, Mrs Trobe, did not appear fit for work due to recent foot surgery. There was no safeguarding lead and no-one on site appeared to hold a paediatric first aid certificate. (Confirmation of an in-date certificate for Mrs Trobe was later provided.)
- p) Further breaches were discovered when Ofsted attended on 19 October 2016. DBS checks could not be easily viewed: parent/child records were not easily accessible; some details held for children were incorrect. Mrs Trobe, was not able to confirm the names of children in

attendance that day. A notice to improve was served. A decision was made the same day to suspend the Appellant's registration for the period of 6 weeks until 1 December 2016. The purpose of the suspension was to allow the circumstances to be investigated and to reduce or eliminate the risk of harm.

- q) Having been served with the suspension notice Mrs T emailed Ofsted on 22 October 2016 and gave a different account from that in her original notification. She related that C had said that she thinks she locked the door by accident and that she herself "knew that she could not remember locking the door." Mrs T then provided a letter from a parent, Catherine Graydon, dated 20 October to the effect that she heard Mrs T say that she was going to lock C in the cupboard but did not actually do so.
- r) Ofsted interviewed Mrs T on 28 October 2016. She stated that C had "confessed" to locking herself in the cupboard. Mrs T denied that she herself had locked the cupboard but also said that she did not recall. She also said that it was a "knee-jerk reaction".
- s) Mrs T provided an Action Plan. On 11 November 2016 Mrs T met with Ms Blain the Headteacher at the School and told her that she had met with the LADO and Ofsted and that "everything was fine" so she could start operating again immediately if she was supervised by the School. Ms Blain explained that this would not be possible: she was not prepared to allow Mrs T to operate at the site until she had confirmation from Ofsted that Mrs T had the capacity to operate safely.
- t) On 23 November 2016 Mrs Trobe resigned with immediate effect.
- u) At a case review on 24 November 2016. Ms Plewinska, the Early Years Senior Officer, decided to suspend the registration for a further 6 week period for largely the same reasons as before. Mrs T said that she wished to put forward Rachael Gresty as the new deputy manager immediately. Mrs T said that she had never ever said to anyone that she had locked her daughter in a cupboard. When reminded of what she had said in the original notification she said that her head had been "all over the place." Mrs T was told that due to her changing account there were now fresh issues around her honesty and integrity.
- v) Ms Larner of Ofsted met with Ms Gresty to assess her suitability as deputy manager. Ms Larner gained the impression that Ms Gresty did not feel prepared for the role. She has only completed 3 weeks work experience with children during her Early Years degree and had been in post in the setting for six weeks. Her experience was deemed insufficient to satisfy the requirements of the role of deputy manager.

- w) At the case review on 9 January 2017 Ms Plewinska, EYSO, made the decision to move to cancellation of registration because it was considered that Mrs T was no longer suitable due to concerns about the manner in which Mrs T had managed her daughter's behaviour during the incident. There were also concerns about Mrs T's honesty and integrity as her account had changed. It was considered that Mrs T had attempted to minimise and obfuscate what had occurred and this raised concerns about Mrs T's ability to be truthful about future notifiable events impacting on children's safety. There were also concerns about Mrs T's ability to assess a deputy as well as concerns about a number of other breaches of EYFS requirements identified during the suspension periods.
- x) Mrs T objected to the notice of intention to cancel. The Objection panel was held on 22 February 2017 and the appeal dismissed by EYSO Kathryn Bell. Mrs T was informed by letter dated 22 March. The decision to cancel registration was made on 24 March on the same grounds as summarised in w) above.
- y) The appeal against the cancellation decision is opposed and is listed for a final hearing on 16th October with a time estimate of 4 days. Meanwhile the suspension was renewed on 14 January, 26 February, 10 April and 23 May 2017. On 6 June 2017 the appellant appealed against the current period of suspension.

Legal framework

7. 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.
8. 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.”*
9. “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”.*
10. 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.

11. The powers of the Tribunal are that it stands in the shoes of the Chief Inspector which basically means that the Tribunal can make any decision open to the Chief Inspector. The first issue to be addressed by the Tribunal is whether as at today's date 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.
12. The burden of satisfying us that the threshold is met lies 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.

Our Consideration of the Evidence

13. We have read and considered the bundle consisting of 191 pages.
14. The bundle includes a detailed statement of case signed by Mrs T on 6th June 2017. In addition to Mrs T's witness statement signed and exchanged on 14 June 2017 (pages 117-127) the Appellant relies, amongst other documents, on the witness statements of:
 - Rachael Gresty dated 20 January 2017
 - Catherine Graydon dated 14 June 2017
 - Letters of support (pages 137 – 152).
15. We have also considered the Action Plan provided in or before 11 November 2016 (pages 55-57).
16. The Respondent relies on the statements from Elaine White (page 180-183) and Ms Lynn Blain (pages 184 -191).
17. In the reply to the Response (page 130-135) the Appellant acknowledges that there is a factual dispute about the incident which occurred on 11 October 2016 and further acknowledges that the Tribunal is not being asked to make any finding at this stage but rather whether there is sufficient evidence to justify a reasonable belief that a child may come to harm and, if so, whether in the circumstances it is necessary and proportionate to extend the suspension.
18. In summary, the Appellant challenges the assertion that any children suffered significant harm in relation to the 11 October incident (see, in particular, para 42 of her statement) or that any such risk remains. She refers to the letters of support and relies on the views of ordinary loving parents who despite the incident were still more than happy to place their

children in her care. She is suitable to be the nominated individual and manager of the setting and has parental and other support. The respondent acted unreasonably and unfairly in rejecting Ms Gresty as a Deputy Manager. In any event if the appeal is allowed she will be able to return to the setting and will be able to provide support, supervision and development for Ms Gresty. She suggests that Ms Blain, the Headteacher, has been motivated to work against her. Although breaches of the EYFS requirements were identified the use of notices to improve or the imposition of conditions would have been a more proportionate response than cancellation. She acknowledges some breaches. There is a new procedure for recording full names of children in the Register so that it is possible to identify which children are present and those whom it was thought would be present.

19. The Respondent's case is that suspension is in accordance with the law and is necessary and proportionate. Ofsted places particular emphasis on the need for trust and confidence in those responsible for childcare facilities.

The Tribunal's conclusions with reasons

20. We reminded ourselves of the lower threshold involved when considering a suspension. We reminded ourselves that at this stage we are not finding facts or determining issues regarding honesty and integrity. Our task is essentially that of a risk assessment as at today's date in the light of the body of evidence before us. We might add that whilst reference is drawn from case law as to our "placing ourselves in the shoes of the Chief Inspector", we are an independent Tribunal making a risk assessment as at today's date against the threshold set out in paragraph 9 and in the context of the further provisions in paragraph 10 of the regulations.
21. There is no dispute about the central fact that following an argument with her mother C was inside a locked cupboard at the setting. The door was thereafter unlocked. Other children were present. There is an issue as to how and by whom the door was locked. In our view on any basis the incident that gave rise to the involvement of the LADO, social services and Ofsted was undoubtedly serious.
22. There appears to be a live dispute as to the impact of the events of 11 October on C and the other children present. During the subsequent investigation concerns arose regarding the adequacy of a number of other safeguarding procedures and there is a body of evidence regarding concerns raised some of which have been acknowledged by the Appellant. They are said to be rectifiable. An Action Plan was formulated before 11th November 2016.

23. We considered that we should not allow ourselves to be distracted by the dispute concerning whether Mrs T will or will not be able to access the setting if the appeal were to be allowed. It appears to us that the contract for the use of school premises is likely to be within the control of the County Council.
24. We noted also that there are issues about the fairness of the interview of Ms Gresty conducted by Ms Lerner (although Ms Gresty does not deal with this in the witness statement on which the Appellant relies). Mrs T places reliance in the fact that Ms Gresty has a degree in Early Years. In our view it is a matter of concern that Mrs T would consider that Ms Gresty would be able to become a deputy manager when her practical experience of working with children was limited to 3 weeks placement during her degree and when she had only been in post at the setting for about six weeks. We recognise that Mrs T's case is since the suspension Ms Gresty has now gained experience working with vulnerable adults (see page 133) and is suitable to act as Deputy Manager.
25. We take account of Mrs T's concerns regarding difficulties she claims to have with the Headteacher, Ms Blain. We cannot determine this matter, but have taken due note of it when considering the representations made by both sides.
26. We acknowledged the positive references from parents that have been provided by the Appellant in support of the appeal. It is not entirely clear what knowledge each of the authors had of the basis for the action taken by Ofsted. The Headteacher has stated that Mrs T had "contacted parents and has said that it was just a missing first aid certificate". (see page 191). Nonetheless, looking at the matter in the round we acknowledged that these were positive references. We noted, in particular, the letter from Rachael Scott, a Supervising Social Work Assistant with the Family Support Team who has known Mrs T professionally for over a year and who speaks in positive terms of Mrs T's ability to respond to constructive criticism.
27. Having considered the material before us we consider that there are serious concerns in relation to Mrs Ts' ability to safeguard the well-being of children. We consider that the nominated individual and manager for the setting should be able to apply appropriate behaviour management strategies that would not compromise a child's welfare and well-being, including that of her own child. Further the nominated individual should be in control of her own behaviour. This is not a matter that is acknowledged by Mrs T. We noted with concern that there appears to have been limited reflection by Mrs T as to how she could have managed her daughter's behaviour, and her own response to it, differently. Her basic response was that in future she would walk away and leave other members of staff to deal with C and/or that C should spend less time at the setting and more

time with her grandparents. In our view Mrs T appears to lack insight into the impact of the incident (even taken on the basis of the limited facts that appear to be common ground) upon the well-being of all the children involved. The impact of the evidence as a whole suggests a tendency on the part of Mrs T to minimise the event and its impact on the children involved. There are other concerns about compliance with the EYFS requirements with particular reference to safeguarding. It is also of concern that it appears to be the case that the full names of children in attendance were not recorded and also that there appeared to be a practice of allowing parents to drop their children off in the school car park without signing the children in.

28. The Respondent has satisfied us that there are reasonable grounds for us to believe that the continued provision of childcare by Mrs T to any child may expose such a child to the risk of harm. We considered regulation 10 and decided that it is not currently reasonably practical for any necessary steps to be taken to eliminate or reduce the risk of harm.
29. The Appellant invited the Tribunal to devise conditions as an alternative to the current suspension. In a case where there are substantial issues regarding Mrs T's insight, integrity and suitability we have little or no confidence that any conditions that we might devise would address the perceived risk adequately or at all. It is fundamental that Ofsted should be able to trust that a nominated individual will report all notifiable incidents honestly and with complete candour.
30. We recognise that the decision impacts adversely upon the private life interests of Mrs T in that the extension of the suspension will prevent her from re-starting her business. We are satisfied that the decision we have made is in accordance with the Regulations and is necessary in order to protect the public interest in the safety and welfare of children in the childcare setting.
31. Applying **Ofsted v GM and WM** [2009] UKUT 89 (AAC), we reminded ourselves that Regulation 9 sets a low threshold but the mere fact that the threshold is passed does not necessarily mean that the power of suspension in regulation 8 must be exercised. In our view the continuation of the suspension has a clear purpose and therefore is capable of being proportionate having regard to the adverse consequences not only for the Appellant but also for the children being cared for and their parents.
32. In reaching our decision on the issue of proportionality, we 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. We recognise that the impact of the decision is such that Mrs T will be unable to restart her business at least during the current extension and, very possibly, pending the final hearing (i.e. if further extensions are

made). We recognise the point made that unless the suspension ceases to take effect there may be no business for Mrs T to resurrect/run. We do not agree with the implicit suggestion that the fact that Mrs T will be unable to demonstrate her ability to comply with standards in the setting itself before the hearing is sufficient reason to direct that the suspension should cease to take effect or that this means the final outcome will be fait accompli. Having considered all of the matters placed before us we balanced the harm to the Appellant's private life interests, and the interests of others affected, against the risk of harm. The serious nature of the core allegation and our risk assessment in the context of all the information before us led us to conclude that at this point, the continuation of the current suspension is both necessary and proportionate to the need to protect the public interest engaged.

33. 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.

Decision

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

Tribunal Judge Siobhan Goodrich
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date Issued: 22 June 2017