

Care Standards

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

Heard on 13 and 14 February 2018 at First-tier Tribunals at Royal Courts of Justice.

BEFORE: -

**Ms Melanie Lewis- Tribunal Judge
Ms Lorna Jacobs – Specialist Member
Ms Denise Rabbetts –Specialist Member**

[2017] 3108.EY

BETWEEN: -

Miss ME

Appellant

v

Ofsted

Respondent

DECISION

Representation

The Appellant attended and presented her own case.

The Respondent was represented by Ms. Smith Solicitor Ofsted Legal Services.

Witnesses

We heard oral evidence from the following witnesses:

Respondent

1. Ms Pauline Nazarkardeh (Senior Ofsted Officer)
2. Ms Cheryl Langely (Senior Ofsted Officer)

Appellant

1. Ms ME – Appellant
2. Mr OM - her partner

Reporting order

1. There shall be a Restricted Reporting Order under Rule 14(1)(b) of the Tribunal Procedure Rules (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('the 2008 Rules') prohibiting the publication (Including by electronic means) in a written publication available to the public, or the inclusion in a relevant programme for reception in England and Wales, of any matter likely to lead members of the public to identify any child or its family mentioned in the appeal.

2. Whilst it is in the public interest the decisions to be published with the full name so that the registration process is open and transparent, we anonymise the Appellant in this case as otherwise her own children and those of her partner Mr OM would be identified.

The appeal

3. This is an appeal against Ofsted's decision, dated 11 August 2017, to cancel the registration of the Appellant as a childminder on the Early Years Register and both the compulsory and voluntary parts of the Childcare Register, under Section 68 of the Childcare Act 2006.

The Law

4. The legal framework for the registration and regulation of childminders is to be found in Part 3 of the Childcare Act 2006 ("the Act").

5. Section 32 of the Act provides for the maintenance of two childcare registers.

6. The first register ("the Early Years Register") contains those providers registered to provide early years childminding/childcare for children from birth to the age of five years for which registration is compulsory.

7. The second register ("the General Childcare Register") is divided into two parts:

- 1) A register which contains those providers registered to provide later years childminding/childcare for children aged between 5 and 8 years for which registration is compulsory ("the compulsory part").

2) A register which contains those providers registered to provide later years childminding/childcare for children aged over 8 years for which registration is voluntary (“the voluntary part”).

8. Section 68 of the Act provides for the cancellation of a person’s registration in certain circumstances. Section 68(2) states that Ofsted may cancel registration of a person registered on the Early Years Register or either part of the General Childcare Register, if it appears:

(a) that the prescribed requirements for registration which apply in relation to the person’s registration under that Chapter have ceased, or will cease, to be satisfied,

(c) that he has failed to comply with a requirement imposed on him by regulations under that Chapter.

9. Section 73 of the Act provides that, if it is proposed to cancel registration, Ofsted is required to give notice of the same and set out the reasons for the decision and the rights of the registered person to object either orally or in writing. The registered person must be given the opportunity to object and, if they do so, this will be considered before the decision to cancel is made final. If the final decision is to cancel then, again, notice to the registered person must be given.

10. Section 74(1) of the 2006 Act provides a right of appeal to the Tribunal and the decision does not take effect until either the time limit for lodging an appeal expires, or if an appeal is so lodged, until the conclusion of the proceedings.

11. The Tribunal hears the appeal afresh. The Tribunal is not restricted to consideration of the matters available to Ofsted when the cancellation decision was taken, and therefore can, and should, consider the impact of information that may have come to light since.

12. The powers of the Tribunal can be found in section 74(4) of the 2006 Act. Essentially the Tribunal may either confirm Ofsted’s decision to cancel or direct that it shall not have effect. If the Tribunal decides that cancellation should not have effect, it may impose conditions on the Appellant’s registration, or vary or remove any of the current conditions.

13. The legal burden of proof at appeal lies with Ofsted, who must establish the facts upon which it relies to support cancellation. It must also demonstrate that the decision to cancel the Appellant’s registration is proportionate and necessary. The standard of proof to be applied is the “*balance of probabilities*”.

14. Ofsted has taken steps to cancel this Appellant’s registration on the grounds that the requirements for registration have ceased to be satisfied and/or that the Appellant has failed to comply with a requirement imposed by regulations. The issues for determination in this appeal therefore are:

1) Were there breaches of the relevant requirements?; and/or

- 2) Have the requirements for registration ceased to be satisfied?;
- and
- 3) Is cancellation of the registration a proportionate step?

Background and Agreed Facts.

15. This is not a case about what happened but about what weight should be attached to those facts. The case for Ofsted is put upon the basis that whilst individually the factors might not be sufficient to cancel registration, it is the combination of factors that have caused them to take action. Had the Appellant been open and transparent with them and shown insight and ability to learn from her failure to notify them that her own family had been the subject of an investigation by Social Services then the result might have been a different one.

16. The Appellant has been registered with Ofsted as a childminder since 7 June 2012 on the Early Years and both parts of the General Childcare Register. She operates from her home where she resides at the childminding premises with her partner and father of her children, Mr OM and their three children, the eldest of which is now 17 years. At the point of her application for registration however, she declared Mr OM was not living with the family.

17. A social services investigation into the Appellant's family took place between February and July 2015.

18. The Appellant's children were accommodated by the local authority, under section 20 of the Children Act 1989, with foster parents for 11 days before being returned to the Appellants care where they remain. (The parents had not been able to put forward a suitable individual to look after the children whilst the investigation took place).

19. The children were initially placed on a Child Protection Plan under the category of physical abuse which, in March 2015, was downgraded at a child protection conference to a Child in Need Plan.

20. Suffice to record that two of the children had made allegations of excessive chastisement. The Appellant and her partner cooperated with the Local Authority and took part in a parenting course. The case was closed in July 2015 and no further action was taken by the local authority. We record that there has been no subsequent concerns.

21. It is agreed that the Appellant did not notify Ofsted at that or any other time as her registration as a childminder obliged her to do.

22. On a date in May 2016 when the Appellant's eldest child was due to turn 16, Ofsted sent her an automatically generated request to carry out suitability checks. This was not complied with until February 2017 but in closing submissions Ms Smith acknowledged that this had been applied for within weeks of the birthday but there was a delay in it being issued.

23. This check made Ofsted aware of the Social Services investigation that had taken place. Inevitably, they made further enquiries of the relevant local authority and the facts emerged. It is agreed that at no point did the Appellant take the opportunity to tell Ofsted about what had happened with her own children.

24. In June 2016, the Appellant contacted Ofsted to say that her partner was now living on the childcare premises and acknowledged that suitability checks needed to be carried out. The application was only made on 16 May 2017 and the result came back promptly on

25. 28 June 2017, probably because Mr OM had been subject to previous DBS checks because of his other employment.

Evidence and Chronology

26. Ms Pauline Nazarkardeh was the Senior Officer and decision maker. She became involved in the case in October 2017 due to the absence from work of the Senior Officer Ms Gee and the inspector Ms Davey. She confirmed that she had continued to review all the evidence and was not simply adopting the decision of Ms Gee.

27. Her detailed witness statement and supporting appendices set out the chronology. Her second statement was made to exhibit the EYFS form submitted by the Appellant to inform that her child would attain 16 years.

28. During the initial registration process, a concern was raised upon receipt of an enhanced criminal record certificate for the Appellant which revealed concerns about persons connected with the Appellant's address. This issue was however resolved to Ofsted's satisfaction upon confirmation that these persons were previous tenants and had no connection to the Appellant. The Appellant confirmed she lived at the address with her children and she knew she must tell Ofsted about anything relating to her house.

29. There followed a period after registration when Ofsted was unable to contact the Appellant. They made contact only on Friday 18 September 2015 by telephone, when the Appellant said she had not cared for any early years children since registration in 2012. That has since been put in doubt, as she said at the Objection hearing she had minded children since 2014. She was told that if she wasn't looking after children, Ofsted could move to cancel her registration.

30. By Tuesday 22 September 2015 she rang Ofsted to say she now had an early years child on role. As requested, she provided the contract which started on 21 September 2015.

31. The Appellant said she did not want to be inspected at that time, which by this stage was long overdue as she would be moving house at the end of November. Other documents including childminding contracts and the declaration relating to her eldest child, suggested that the family moved on 18

September 2015 but the Appellant said that was the date the lease on the new property started.

32. The Appellant rang Ofsted on 6 October 2015 to say she was moving at the end of November and again on 9 December 2015 to say she had moved. She notified Ofsted that she moved address in December 2015.

33. The Appellant was eventually inspected on 22 April 2016 and rated "Good" with a good understanding of the EYFS requirements.

34. Once the Local Authority involvement came to light, Ofsted realised they had not been notified of the allegations or the social services investigation by the Appellant. The relevant local authority did not notify Ofsted because the Appellant had not made them aware that she was an Ofsted registered childminder. We were taken to documents where the Appellant had variously said that she was unemployed or working as a hairdresser.

35. On 11 May 2017 following a Case Review, the Appellant was suspended. There was particular concern that she had failed to notify Ofsted of any involvement with agencies such as the Police and Social Services and that she failed to provide a DBS for her partner, despite the fact that he had been living in the house for a year by then.

36. When interviewed by Ms Gee, the answers given by the Appellant appeared to minimise the seriousness of the concerns that had led to the 2015 investigation and that she had attended the parenting class because she was obliged to, not because she felt she had anything to learn. She said the children had been placed under pressure to make allegations.

37. Ms Langley conducted the Objection hearing on 4 August 2017, when the Appellant was represented by a barrister. She stated that she had not actually begun caring for children until 2014, which conflicted with other evidence. The barrister submitted on her behalf that she had not deliberately concealed the fact of the investigation around her children but she was inexperienced. She had been to see a solicitor who had advised her she did not need to tell Ofsted as it was a private matter. She had incorrectly thought that her partner's first DBS was acceptable as it was an enhanced DBS, but this would also be a learning experience. He also produced references from parents of children in her care, up until she was suspended. Those references were produced before us, including one from a registered childminder who agreed to act as her mentor.

38. Ms ME gave evidence. She pointed out that the medical examination of her children had shown no signs of abuse or physical injury. She suggested that the Local Authority putting her children on the Child Protection Register in 2105 was without due process and was intended to destroy her 'good conduct built up over the years'. The LADO review in June 2017 had stated *"this was an unusual conference in that we decided to end the child protection plans after only 3 months. I was unclear at the time why the children had been*

made the subjects of child protection plans in the first place because you and the children's father had worked well with the social workers and were continuing to do so."

39. The panel clarified that the Appellant had spoken to a lawyer once in 2015, consulted the CAB about the Notice of Cancellation and had paid for a barrister to advise and attend the Objections hearing with her under the Direct Access scheme. When cross-examined she agreed she had undertaken safeguarding training in 2012, with a refresher course in 2015. She had not understood that safeguarding also related to matters about her own children. She agreed that she had previously used a childminder herself, such that during the registration interview in 2012 she said she had understood the importance of working in partnership with parents and sharing information.

40. The Appellant was cross-examined as to what she had been doing at the point the allegations were investigated in 2015. She had produced a medical report to show that there had been no injuries to the children but under the 'Family & Social History' section it was recorded that the Appellant was currently working as a hairdresser and that her partner was usually residing overseas

41. Additionally the Appellant had produced a CV as an exhibit. This stated that from September 2015 she had been working as a child care assistant at AG Childcare. This fact clearly conflicted with the other information she had given. She initially explained the inclusion of the CV in her documents was a mistake. She then seemed to suggest it was a draft which explained why this was recorded under 'Employment History' rather than references. The address was the same as that of the childminder who had written the reference and said she would be her mentor. Again, the Appellant said she had learnt from this mistake and would be more diligent in future.

42. The Appellant then volunteered and subsequently confirmed that she had prepared the CV because she had visited an employer who told her she lacked recent employment, as she said she had been self-employed. The panel clarified that she understood that if the addressee was contacted, they would either have to support that untruth or deny she had worked there.

43. Mr OM said that at the time of the allegations in 2015, he was visiting the family at weekends but had resolved to move back in with them, after the allegations of 2015 as the children needed a father.

44. He acknowledged that the Appellant had told him he had to get another DBS.

Conclusion and reasons

45. We have concluded that Ofsted have amply made out their case. We have looked at the evidence at the date of the hearing. We have balanced a range of factors.

46. We were assisted by the evidence of the witnesses for Ofsted which was balanced, measured and supported by documentation. Whilst they are bound to apply the relevant law and regulations, there was an understanding that the allegations made by her children and subsequent investigation in 2015 was very distressing to the Appellant. There was also an acknowledgement that as a single parent raising three children and completing a degree, she had been under considerable pressure.

47. We have weighed the same factors in the Appellant's favour but the written and oral evidence far from clarifying issues, did not demonstrate an ability to reflect and learn. Instead, it also threw up further inconsistencies.

48. Our conclusion is that we should cancel registration on all three registers. This is a blanket registration that applies to all age groups. It will mean that the Appellant is a disqualified person for certain related employments.

49. It is accepted that the Appellant failed to notify Ofsted within 14 days as she was required about the investigation. Whilst we can appreciate she may have been very distressed at the time, there was, as the chronology shows a large number of opportunities to do so.

50. This was not one issue in isolation. This is a case where there was not just one mistake from which the Appellant may have learnt, but an overall pattern of inconsistencies and a failure to comply with the regulations. The Appellant consistently relied upon her lack of knowledge. We cannot accept that. She graduated from a related degree in 2015. When interviewed in 2012 for registration and again at the inspection in April 2015 she showed a good understanding of safeguarding issues and has undergone safeguarding training.

51. Probity and honesty must be key characteristics of a childminder. It must be clear which children are on the premises, the address where they are minded and who is living there, with appropriate checks in place.

52. From the Appellant's own evidence there is confusion about when she started to mind children. At the Objections hearing, when she was supported by a barrister she said she began minding children in 2014, but there is no documentation to support that. She said she had minded a child for a limited period whilst the parent was on jury service but this was for free, which we doubt given her financial situation. When pressed on this the Appellant said she had lost contact with the mother so could not ask her to verify this. She told Ofsted on 19 September 2015 she was not minding children and there was no mention of a possibility. However, when she was told she would be deregistered, within days a contract of care was produced.

53. The Appellant failed to inform the Local Authority in 2015 that she was a childminder instead saying she was unemployed. That explains why the Local Authority did not notify Ofsted. We do not accept that they only asked

what she was doing 'at the moment' as such an investigation would involve the family circumstances, which inevitably would include whether anyone was working. She told the doctor she was a hairdresser, although in oral evidence she said that was just an occasional activity with family and friends.

54. It is agreed that the Appellant did not tell any of the parents who used her services about the investigation in 2015. It means that we can attach very little weight to their positive identification of her care. That is not to say that the events of 2015 should follow the Appellant negatively forever. It simply means that as a childminder she must expect to have her history and who is living in her household questioned and be able to offer an explanation.

55. There is also lack of clarity regarding the address the Appellant was living at. The documentation does not support her moving in November 2015, because the child EYFS stated her child had lived at the new address from 18 September 2015 as did the childcare contract put in evidence by the Appellant. It gave her new address and was signed in September 2015. We infer from this evidence that the Appellant was trying to avoid an inspection. There could be a number of reasons for this but this is a requirement and her inability to give a clear account, calls into doubt her candour.

56. It was unclear why the Appellant put in her CV as evidence as it transpired to be an incriminating document. We cannot accept as she said, this was a 'sweetening up' of her CV. The Tribunal Judge had to give her a warning that this could be a criminal offence. The CV was not dated but it is further proof that the Appellant is prepared to state facts that she knows to be untrue to further her goals, even if as she said, it was about 'survival'. It follows, that we can place little weight upon the reference from the childminder who agreed to be her mentor, as the address of the supposed employment was hers.

57. It is key that those in the premises where childminding takes place, are subject to the relevant checks. Mr OM was back living in the home for a year before the enhanced DBS check was applied for and it took the threat of suspension to make this happen. A number of reasons have been put forward, thinking that his work related enhanced DBS would suffice and financial reasons, but the cost was either approximately £50 or £13, so about one days childminding. The Appellant failed for a prolonged period to make sure it was applied for.

Summary of findings

58. The Appellant failed to notify Ofsted of the Social Services investigation that took place in 2015 into allegations of physical abuse in respect of which she had been implicated. This places the Appellant in breach of paragraph 3.8 of the EYFS and paragraph 25 of Schedule 3 of the Childcare (General Childcare Register) Regulations 2008 as set out above.

59. The Appellant failed to ensure the suitability of adult members of her household to be in contact with children and providing an enhanced criminal records certificate in respect of her son for a period of nine months, and her

partner, for a period in excess of 12 months. This places the Appellant in breach of paragraphs 10 and 11 of Part 1 of Schedule 1 of the Childcare (Early Years Register) Regulations 2008 and 3.9 of the EYFS and paragraphs 7 and 8 of Part 1 of Schedule 1 of the Childcare (General Childcare Register) Regulations 2008 as set out above.

60. That the Appellant's actions in failing to notify Ofsted of the Social Services investigation, not disclosing her status as an Ofsted registered childminder and in delaying the suitability checks in respect of the Appellant's partner and son, all call into question the Appellant's honesty and integrity and therefore her suitability to remain registered contrary to paragraphs 1 of Part 1 of Schedule 1 of the Childcare (Early Years Register) and the Childcare (General Childcare Register) Regulations 2008.

61. As an alternative to cancellation the Appellant could be required to improve her practice and understanding by issuing a welfare requirements notice. In the light however, that the Appellant previously satisfied Ofsted of her understanding of the requirements at both registration and inspection, we conclude that she knew what to do to comply but on a number of occasions failed to do so.

62. Having balanced all these factors we conclude that any action short of cancellation would be disproportionate to the risk of harm to which children would be exposed as a result of the Appellant's lack of honesty and poor safeguarding practice.

63. Accordingly we dismiss the appeal and uphold the decision to cancel the Appellant's registration on the Early Years and both parts of the General Childcare Register.

Decision

The appeal is dismissed.

The decision of Ofsted dated 11 August 2017 to cancel the Appellant's registration is confirmed.

Melanie Lewis

Tribunal Judge

Date: 01 March 2018