**NCN: [2020] UKFTT 115 (HESC)**

# Care Standards

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

**[2020] 3993.EY-SUS**

Heard on 27 February 2020 Teesside Magistrates Court, Middlesbrough.

**BEFORE**
**Mr H Khan (Judge)**
**Ms D Rabbetts (Specialist Member)**
**Mr P McLoughlin (Specialist Member)**

**BETWEEN:**

**Ms DB**

**Appellant**

**-v-**

**Ofsted**

**Respondent**

## DECISION

### The Appeal

1. DB ("the Appellant") appeals to the Tribunal against the decision of Ofsted ("the Respondent") dated 24 January 2020 to suspend the Appellant's registration as a childminder on the Early Years Register and both parts of the Childcare Register under Section 69 of the Childcare Act 2006 from 27 January 2020 for a period of six weeks until 8 March 2020 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. The Appellant was represented by Mr P Gilmour (Counsel). The Appellant attended the hearing.

3. Ms Juliette Smith, Solicitor, represented the Respondent. The Respondent's witnesses were Ms J Larner (Early Years Regulatory Inspector), Ms Louise Goodger (Early Years Regulatory Inspector) and Ms Diane Plewinska (Early Years Senior Officer, North East Yorkshire and Humberside Region).

4. We also had statements from Ms Elaine McDonnell (Early Years Regulatory Inspector) and Ms RS (a parent).

**Late Evidence**

5. The Tribunal was asked to admit additional evidence by the Appellant consisting of a letter from a parent dated 15th February 2020. There was no objection to the admission of this letter as late evidence. The Respondent sought to admit late evidence in the form of a witness statement from Ms Goodger, signed at the hearing on 27 February but approved on the 26 February 2020. There was no objection to the admission of this statement as late evidence.

6. We admitted the late evidence as its admission was agreed between the parties and we considered that it was relevant to the issues in dispute. In considering any late evidence, the Tribunal applied rule 15 and took into account the overriding objective as set out in rule 2 of the Tribunal Procedure (First Tier Tribunal) (Health Education and Social Care Chamber) Rules 2008.

7. We were informed that RS could not attend the hearing to give oral evidence due to illness. Mr Gilmour sought for the evidence to be excluded on the basis that it could not be challenged, and the Appellant disagreed with it.

8. We took into account the overriding objective and refused the application to exclude the evidence. We recognised that witness RS's evidence could not be challenged but we concluded that we would invite submissions from the parties as to the weight we should attach to the evidence of RS.

**Restricted reporting order**

9. 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 to protect their private lives. In this case we have taken the rare step of anonymising the Appellant's details given the close connection between the Child, the Child's mother and the Appellant.

**Events leading up to the issue of the notice of statutory suspension**

10. The Appellant has been registered with Respondent for a number of years. She has been a childminder for around 28 years.

11. The registration was first suspended by way of a decision letter dated 13 December 2019 informing her that the Respondent was suspending the Appellant's registration immediately from Monday, 16 December 2019 for 6 weeks to midnight on Sunday, 26 January 2020.

12. The suspension was imposed as a consequence of the Respondent receiving an allegation that the Appellant harmed a child placed in her care. The Respondent received the notification from South Tees Multi Agency Children's Hub on 13 December 2019. The child's mother RS had reported that, two weeks previously on 28 November 2019, the Appellant told her that she had 'caught' the child with her fingernail whilst putting the child into a car. When the mother examined the child later, she observed marks to the child's leg. Both Local Authority Designated Officer (LADO) and police were initially investigating. The registration was initially suspended pending these enquiries.

13. The Respondent spoke with the Appellant for the first time on 13 December 2019. The Police spoke to the Appellant on 12 December 2020 The Appellant had not notified the Respondent of causing the injury to the child nor had she notified the Respondent that she had been contacted by the police about the allegation.

14. The Appellant told the Respondent that an incident had taken place on 28 November 2019. She said the Child was having a 'paddy' and she had caught her with a false nail. She stated that it was an accident. However, she did mark the child, and stated her skin was not broken. She said that it looked terrible on the day and that she was horrified. She said that she reported the incident to the child's mother the same day. The Appellant had questioned why the child's mother had waited for two weeks to report the incident.

15. The Respondent spoke with the Appellant on 8 January 2020 when the Appellant spoke again about the incident on the morning of 28 November 2019. The Appellant said she was not aware of the injury until later in the morning when the Child used the bathroom. The Appellant said that she saw the marks on the Child's leg and asked the Child how it happened. The Child said the Appellant had done it in the car. The Appellant said that she apologised to the child and asked the Child if she wanted some 'magic cream', which was declined. The Appellant then took the Child to nursery. The Appellant accepted she did not give the Child any first aid treatment. She denied using any force on the Child. The Appellant did not complete any accident/incident record.

16. In terms of the third party investigations, the police investigated the matter and took no further action. The LADO "substantiated" in the

Section 47 report the allegation that the child had been injured in the care of the Appellant.

17. On 24 January 2020 a decision was taken to further extend the suspension period from 27 January 2020 up to 8 March 2020. This is an appeal against that decision.

18. There have also been two Welfare Requirements Notices issued on 16 January 2020 and 4 February 2020 providing the Appellant with various dates by which to comply. The latter Welfare Requirements Notice gave the Appellant until 6 March 2020 within which to comply with the requirements as set out within it. A Notice of Intention to cancel the Appellant's registration has also been served on the Appellant.

**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. Under Regulation 10 (subject to paragraph 3 of Regulation 10) in a case in which a further period of suspension is based on the same circumstances as the period of suspension immediately preceding that further period of suspension, the Chief Inspector's power to suspend registration may only be exercised so as to give rise to a continuous period of suspension of 12 weeks.

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. We took into account all the evidence that was presented in the bundle and what was presented to us at the hearing. We have summarised some of the evidence before us and we wish to make it clear that the following is not intended to be a transcript of the hearing.

26. Ms Larner set out that she was proceeding on the basis that the incident on the 28 November 2019 was "not deliberate". Ms Larner had visited the Appellant on 27 January 2020 in order to monitor compliance with the suspension notice. This was an unannounced visit. Ms Larner confirmed that the Appellant had complied with the terms of the suspension.

27. Ms Larner was concerned that the Appellant was relying on someone else, such as the LA to keep herself updated regarding safeguarding changes and practise. Ms Larner expected the Appellant to keep herself updated and would saw this as her responsibility.

28. Ms Larner confirmed that the police have completed their investigation. No further action would be taken by them. The LA had completed a Section 47 assessment and had "*substantiated*" that the child had been injured whilst with the Appellant. However, Ms Larner set out that as far as she was aware, the LA had not spoken to the Appellant as part of that process.

29. Ms Larner set out that the Appellant had made some progress and had booked a safeguarding course to attend on the 27th February and 6 March 2020. However, she remained concerned that the Appellant would be relying on others as to what to do if an incident occurred.

30. Ms Larner set out that the Respondents concerns included;

    a. The Appellant failed to record the incident on 28 November 2019 or notify any of the appropriate agencies.

b. The Appellant has accepted occasions when she has left children unsupervised and unattended.
c. The Appellant has failed to implement a policy or procedures to safeguard children.
d. The Appellant has failed to maintain adequate knowledge and understanding of safeguarding.

31. Ms Goodger stated that her position was that the incident on the 20 November 2019 was "deliberate". Her reasoning was based on her interpretation of the photographs and of RS's evidence that she had seen. Under cross examination, she acknowledged that she was not a medical expert.

32. Ms Plewinska acknowledged that there had been a "difference in opinion" from the Respondent's witness evidence. However, the incident that had occurred had seen force used. She was concerned that the Appellant had failed to manage a child's behaviour resulting in the child sustaining a significant injury. The suspension had been reviewed since the appeal was lodged and a decision had been taken to maintain the suspension.

33. The Appellant set out that she had "surmised" that she had caused the injury to Child in her attempt to strap the child into her car seat, whilst Child was having a tantrum. She had false nails on and had noticed the injury at around lunchtime after the child had returned from the toilet. She later told the mother of the child about the injury although she could not remember the exact details of the conversation.

34. The Appellant acknowledged that she had failed to tell the Respondent about the injury as the Child was not on her register and she was doing the mother a "favour". She was mortified when she had seen the injury and that it might have been caused by her. She was upset that anyone could think she deliberately injured a child.

35. The Appellant acknowledged that there had been previous occasions when she had left children unattended when going to a shop. These had been lapses in her judgement as a result of a split-second decision (on one occasion she had been trying to buy something for a child to take into the harvest festival to ensure the child did not feel left out). In future, she will ensure that all the children in her care are in the line of her sight and that she would take the children into a shop with her.

36. The Appellant had been a childminder for 28 years and no similar allegation had been made against her. She had refreshed her knowledge of safeguarding children and had bought and read a book called "working with HM Government to Safeguard Children". She had

also read the Prevent Duties guidance obtained from the Respondent's website. She had also spoken to the LA on 5th April 2020 and was clear as to what she needed to inform Respondent about and when.

37. The Appellant was booked on a safeguarding course due to start on 27 February 2020 with the second part of that course to take place on 6 March 2020. She set out that the suspension had had an impact on her as she could not work. The children that she had been looking after had found other childminders due to the delay in the suspension being lifted. The Appellant spoke about "getting her life back".

**The Tribunal's conclusions with reasons**

38. We took into account all the evidence that was included in the hearing bundle and presented at the hearing. We would like to place on record our thanks to all the parties and their witnesses for their assistance at the hearing.

39. We remind ourselves that 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.

40. We reminded ourselves of the lower threshold for confirming the suspension and reminded ourselves that at this stage we are not finding facts.

41. We acknowledged the evidence of the Respondent's witnesses including RS. Although we did not have to make any findings of fact, we observed that the Respondent's own witnesses at the hearing differed in whether they proceeded on the basis that the incident which occurred on 28 November was "deliberate" or otherwise. Ms Plewinska very fairly accepted that there was a "difference in opinion" as Ms Larner indicated the Respondent's position was that it was not deliberate whilst Ms Goodger considered that based on the photographs she had seen that it was deliberate. We did not have to decide this issue and in fairness Ms Goodger accepted the submission put that she was not medically qualified to say it was deliberate based on the photographs.

42. We found the Appellant to be credible. Her evidence has been consistent since the chain of events started on the 28 November 2019. She had notified the Child's mother of the injury on the day it occurred and did not in our view seek, as was alleged, to minimise the injury or her involvement. We acknowledge that the Appellant had not informed the Respondent, but she accepted that this was a mistake on her part and explained why she had not done so. She clearly accepts that she should have informed the Respondent. We found the Appellant to be

honest in her belief as to what had happened. She clearly is passionate about her work with children and found the idea of anyone suggesting that she had harmed a child "deliberately" deeply upsetting and was visibly upset at such a suggestion.

43. The Respondent submitted that the question for the Tribunal was whether, in the circumstances, there is a reasonable belief that the continued provision of childcare *may* expose children to a risk of harm We concluded that the answer to that question was no. Our reasons for doing so are set out below.

44. We acknowledge that at the time that the first suspension was imposed by a letter dated 13 December 2019, the threshold for suspending the registration was clearly met. At that stage, there was a police investigation as well as Local Authority investigation. In fairness to the Appellant, she did not dispute this. It is clear that where, as in this case, there is a suspicion of an injury on a young child, the LADO, the police and the Respondent are all undertaking their investigations into this matter. These bodies are involved because each has a different role.

45. We reminded ourselves that we were considering the position as at the date of the hearing. At that date, the police investigation was complete. There was no further action that the police were planning to take in relation to this matter. The Local Authority Designated Officer (LADO) had also completed its investigation and a Section 47 assessment had been undertaken. We were not provided a copy of that assessment, but we were told that the allegation that the injury occurred whilst the child was with the Appellant was "substantiated". The Appellant did not dispute that the injury to the Child occurred whilst the Child was with her (although she says that she "surmised" that the injury occurred whilst the Child with the Appellant). Ms Larner informed the Tribunal that she had been told by the LA that the Section 47 assessment had been completed without ever interviewing the Appellant at any stage.

46. We therefore considered that there was now no longer a real possibility that evidence sufficient to support further enforcement action against the Appellant by either the police or the LA could emerge as both investigations had been completed with no further action being taken.

47. The Respondent, as a consequence of the evidence, presented by its officers, informed us that it would now be reviewing the information it had in order to ascertain whether or not the Appellant had sufficient knowledge of safeguarding and how the Appellant managed behaviour in such circumstances. It was not clear why this had not been done to date. This was the second suspension that had been imposed. Ms Plewinska accepted that this aspect should have been reviewed earlier. Ms Goodger had visited the Appellant on the 24 February 2020 and concluded that there were still gaps in her knowledge.

However, the Appellant had engaged with the Respondent, updated her knowledge and had booked herself on a LA safeguarding course to be undertaken on the 27 February 2020 and 6 March 2020. There was no criticism of this course nor any suggestion that it would not be sufficient for the Appellant to refresh her knowledge.

48. We acknowledged that there had been two WRNs served and that the compliance date for the second of those had yet to expire. However, the mere service of the WRNs is not in itself a reason to confirm the suspension. In any event as Mr Plewinska and Ms Goodger made clear that failure to comply with a WRN carries its own consequences separate to this process.

49. We considered the position as set out by Ms Plewinska. Her statement referred to her belief that until such time as a cancellation process can be concluded, children would continue to be at risk of harm at the Appellant setting and that only continued suspension of the registration would protect from this. We reminded ourselves that there was a difference between a suspension (Section 69), cancellation (Section 68) and an urgent cancellation under section 72 of the Childcare Act 2006. The power under section 69 should not be confused with the power under section 72.

50. The Appellant had been a childminder for 28 years. During that period no allegations had been made against her of a similar nature to the incident on the 28 November 2019. In our view, based on what we read and heard, we were not satisfied there is a reasonable belief that the continued provision of childcare by the Appellant *may* expose children to a risk of harm. The Appellant has from day one "surmised" that she may well be responsible for the injury. She has maintained this account throughout the proceedings and prior to the suspension being imposed.

51. We acknowledged the glowing references from parents (as well as previous children who are now adults) that have been referred to by the Appellant in the hearing bundle. It is not clear what knowledge those contributing had of these proceedings, but, nevertheless, these were positive references.

52. 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 (i.e. whether it was deliberate or otherwise). However, taking into account all the circumstances, as at the date of the hearing, we concluded that the suspension is neither proportionate nor necessary.

53. We conclude therefore that as at the date of the hearing and based on what we read and heard, we do not consider that there is a reasonable belief that the continued provision of childcare by the Appellant *may* expose children to a risk of harm.

## Decision

We therefore direct that the suspension imposed on the Appellant pursuant to a decision dated 24 January 2020 continuing the suspension from 27 January 2020 to 6 March 2020 shall cease to have effect.

**Tribunal Judge H Khan**
**Ms D Rabbetts (Specialist Member)**
**Mr P McLoughlin (Specialist Member)**

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

**Date Issued: 04 March 2020**