

Care Standards

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

[2020] 4038.EY (VKinly)

Hearing held by video on Monday 24th – Friday 28th August 2020

BEFORE

Mr G K Sinclair (Tribunal Judge)
Ms M Harris (Specialist Member)
Ms M Adolphe (Specialist Member)

BETWEEN:

Renea Berry

Appellant

-and-

Ofsted

Respondent

DECISION

Representation : *Appellant :* Estelle Lear (Counsel - Tanfield Chambers)
Respondent : Juliette Smith (Solicitor - Ofsted Legal Services)

Authorities cited :

Agoreyo v Lambeth London Borough Council [2019] EWCA Civ 322; [2019] ICR 1572

Jones v Commission for Social Care Inspection [2004] EWCA Civ 1713; [2005] 1 WLR 2461

Marshall v Commission for Social Care Inspection [2009] EWHC 1286 (Admin)

Welsh Ministers v Care Standards Tribunal and anor [2008] EWHC 49 (Admin); [2008] 1 WLR 2097

Legislation cited :

Care Standards Act 2000, ss. 1, 11, 12, 13, 17–19, 21 & 22

Children's Homes (England) Regulations 2015, reg 28 & Sch 2, para 6

Other material :

ACAS Code of Practice on Disciplinary and Grievance Procedures (2015)

Department for Education : Guide to the Children's Homes Regulations including the

quality standards (April 2015)

The Appeal

1. By application dated 20th March 2020 [G1] Mrs Berry (“the Appellant”) appeals against the decision by Ofsted dated 21st February 2020, under section 13 of the Care Standards Act 2000 [H252], to refuse her application for registration as manager of The Croft, a children’s home operated by Mulberry House Care Homes Ltd (the Registered Provider) and located in Rugeley, Staffordshire.

Procedure adopted for hearing

2. This has been a remote hearing which has been not objected to by the parties. The form of remote hearing was V:Kinly (otherwise known as CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the tribunal was referred to are in a three-part bundle which, with the insertion of several additional documents during the hearing, comprised 1387 pages plus the parties’ respective skeleton arguments, three authorities,¹ and a short Scott Schedule. The order made is described at the end of these reasons.
3. Apart from a few minor technical glitches, all of which were quickly resolved with the assistance of the tribunal’s Video Support Officer, the hearing was uneventful and the parties were pleased that the process had enabled the case to be heard without the need for the parties, their representatives and witnesses to travel and without further delay.

Application to adduce late evidence, etc.

4. At the outset of the hearing the tribunal considered the Respondent’s application dated 10th August 2020 to adduce by way of additional evidence a 3rd witness statement by its witness Tracey Cogan Greig, dated 5th August. This statement sought to adduce hearsay evidence of information provided to her by two non-witnesses concerning a fostering application and the outcome of a disciplinary hearing at iCare on 11th July 2018, and in the latter case the source did not wish to be called as a witness. The application was opposed, but in response to a claim that the Appellant would be prejudiced by her inability to challenge the informants Mrs Smith, for Ofsted, suggested that she would have had time to seek a witness summons. For the Appellant Ms Lear, instructed on a public access basis, said that such an approach ignored the real difficulties faced by a litigant in person in attempting to obtain and serve such a summons without assistance.
5. The tribunal considered that the application was late, prejudicial to the Appellant, and did not really add anything substantive to the case. The application was dismissed.
6. Other matters raised by way of housekeeping at that stage of the hearing were :
 - a. That the Appellant was having great difficulty in contacting one of her witnesses, fellow iCare work colleague Mary Yorgensen. This was explored in more detail in cross-examination of the Appellant, and

¹A fourth authority, *Agoreyo*, was drawn to the parties’ attention by the tribunal during the hearing

ultimately the tribunal had to proceed with her written statement only; thus, depriving the Respondent of the chance to cross-examine her.

- b. That the Appellant had raised with the Information Commissioner's Office and with Ms Griffiths, an independent social care consultant who at the material time was the Responsible Individual for iCare's management of The Grange children's home while the Appellant was employed there, a question about the lawfulness under the Data Protection Act 2018 of her continued retention of personal data concerning the Appellant. The tribunal decided that this would be addressed at a later stage, if necessary. As the law concerning data protection is complex the tribunal would expect full argument on the matter, but queried whether such information being supplied to a statutory regulator in connection with a tribunal would not be lawful under the Act. The argument was not in the end pursued, so the tribunal was not required to rule upon it.

Background

7. In summary, the Appellant was employed quite happily by Progress Care Solutions Ltd from January 2012 but in 2016 was briefly suspended following an allegation of kicking a child in her care. She was swiftly reinstated once her employer discovered that the complaint was instigated by a jealous co-worker – who was then dismissed. In 2017 she was again suspended following concerns about a too-close relationship with a child in the home, disciplinary action followed and – while child protection concerns were allayed – she received a written warning and was required to undertake further training.
8. In early 2018 she left her employment and took up a post with iCare Children's Services Ltd at The Grange Children's Home in West Bromwich. Following an incident in which a child who was on 2 : 1 care (who had injured both the Appellant and another female member of staff) accused the Appellant of kicking her there was another suspension and investigation. She then faced allegations of assault, non-compliance with physical restraint policies, failure to disclose the 2016 incident in her application form, and non-compliance with staffing policies by leaving the home unattended. There is then a factual dispute. She says that she resigned at the end of June, but she did attend what turned out to be a disciplinary hearing on 11th July 2018, following which her employer claims to have rejected the two serious allegations but upheld the two minor ones. As a probationary employee the Appellant was therefore dismissed, avoiding redundancy just over a month later when the home was closed by Ofsted for financial and other reasons.
9. In September 2019, following her appointment by Mulberry Care Homes Ltd as manager of The Croft Children's Home, Rugeley in July of that year, the Appellant formally applied to Ofsted for registration as manager of that establishment. She completed an online application form and on Friday 13th December attended a "fit person" interview. She attended alone. Dissatisfied by discrepancies in her employment history as submitted, and with some of her answers in interview, the Appellant was given the chance to provide further information by early the following week. Still dissatisfied, Ofsted served a Notice of Proposal to refuse her application. This prompted even more

documentary material from the Appellant, but to no avail. On 21st February 2020 Ofsted served a Notice of Decision to refuse registration as the manager of The Croft [H252]. There remained further concerns about the accuracy of her employment history but, more so, on the misleading accounts she had given about the 2017 and 2018 disciplinary proceedings.

10. It is against that decision that she appeals.

Legal framework

11. By section 1 of the Care Standards Act 2000 an establishment in England is a children's home if it provides care and accommodation wholly or mainly for children. By section 11 any person who carries on or manages an establishment without being registered is guilty of an offence, so by section 12 any person seeking registration must apply to the relevant registration authority; in this case Ofsted. The application must include the prescribed information about prescribed matters and any other information which the registration authority reasonably requires.
12. By section 13(2) :
- If the registration authority is satisfied that—
 - (a) the requirements of regulations under section 22; and
 - (b) the requirements of any other enactment which appears to the registration authority to be relevant,are being and will continue to be complied with (so far as applicable) in relation to the establishment or agency, it shall grant the application; otherwise it shall refuse it.
13. The relevant regulations made under section 22 are the Children's Homes (England) Regulations 2015. In this case reliance is placed by Ofsted on aspects of regulation 28, which concerns the fitness of a manager. Regulation 28(1) provides that :
- A person may only manage a children's home if—
 - (a) the person is of integrity and good character;
 - (b) having regard to the size of the home, its statement of purpose, and the number and needs (including any needs arising from any disability) of the children—
 - (i) the person has the appropriate experience, qualification and skills to manage the home effectively and lead the care of children; and
 - (ii) the person is physically and mentally fit to manage the home; and
 - (c) full and satisfactory information is available in relation to the person in respect of each of the matters in Schedule 2
14. Regulation 28(2) sets out in some detail the nature of the experience required. That does not appear to be an issue here: Ofsted relies only upon (a) and (c) – integrity and good character, and provision of full and satisfactory information about one item in Schedule 2, paragraph 6, viz a full employment history, together with a satisfactory explanation of any gaps in employment.
15. If the registration authority is minded to refuse the application then, by section

17, it must first serve upon the applicant a Notice of Proposal. The applicant can then make submissions challenging that, under section 18, and after giving them due consideration a final decision is reached. If that decision is still to adopt the proposal to refuse the application then a notice of Decision must be given under section 19(3), and the applicant may appeal to this tribunal under section 21. The time limit for appeal is 28 days after service of the Notice of Decision.

16. As explained by the Court of Appeal in *Jones v Commission for Social Care Inspection*², the burden of proof where the issue of integrity and good character is at stake lies with the applicant (and on appeal by the Appellant); not on the registration authority.
17. A point arose following Ms Knowles confirming in cross-examination that the Appellant ceased working for Mulberry Care Homes Ltd on 21st February 2020, following Ofsted's refusal of her application for registration and the company's request for permission for her to remain in its employ, thus making her continued employment unlawful. However, Ms Knowles confirmed that the post is still being advertised and, should she succeed, the Appellant would be invited to reapply. In *Welsh Ministers v Care Standards Tribunal and anor*³ Davis J held that, since an individual who applied for registration as a manager under Part II of the 2000 Act had to be fit to manage the specific establishment or agency in respect of which the application had been made, such registration had to be related to a specific establishment or agency. However, the tribunal was entitled to take into account wider considerations than the prospective outcome of an appeal in deciding whether to exercise its discretion to strike it out under regulation 4A(1), and so it did not follow that an appeal against a refusal of registration had to be struck out where the post at the premises to which the application related was no longer available.
18. Such an appeal should be permitted to continue where there was a practical advantage to be gained by hearing it, in that a decision on issues other than the lack of a post at the specific premises might later assist either the applicant in making further registration applications in relation to other premises or the registration authority in considering those further applications.
19. In the instant case the point was taken on the final day of the hearing, and as Ofsted recognised that there was a clear practical advantage to the tribunal making findings it would not be applying to strike the appeal out. The post had not been filled and so was still potentially open to the Appellant; another good reason for continuing.

The evidence

20. The tribunal had before it a bundle in three parts. As the case was being heard remotely by video hearing the bundle was served digitally, as a pdf e-bundle. Preparation of the pdf bundle was not satisfactory, as the bookmarking of documents such as statements, and exhibits, etc completely ignored the

²[2004] EWCA Civ 1713; [2005] 1 WLR 2461, per Brooke LJ at [13]; followed by *Marshall v Commission for Social Care Inspection* [2009] EWHC 1286 (Admin)

³ [2008] EWHC 49 (Admin); [2008] 1 WLR 2097

internal page numbering. Some later witness statements were not even bookmarked at all. The bundle was also not searchable.

21. The Respondent, being the party responsible for preparing the e-bundle, accepted that lessons will need to be learnt from the mistakes made here. Attention was drawn to the general guidance on pdf bundles issued jointly by the President of the Family Division, Senior Presiding Judge and Judge in Charge of Live Services, appearing in the 2020 edition of the White Book at paragraph A.3.2. Although prefaced in bold with a statement that “these notes are not intended for use in the tribunals” this tribunal rather suspects that this was because the Senior President of Tribunals had not had the opportunity to see and approve it as well. Much of its content, particularly numbered paragraphs 1–12, is pertinent and well worth adopting.
22. The following witnesses for the Respondent adopted their written statements and gave oral evidence on affirmation :
 - a. Tracey Cogan Greig – Social Care Regulatory Inspector – 2 statements
 - b. Michelle Moss – Social Care Regulatory Inspection Manager
 - c. Karen Wareing – Senior HMI, Social Care (West Midlands Region) – 2 statements
 - d. Philip Owen – Head of Quality Assurance and Compliance, Progress Care Solutions Ltd (conducted the 2017 disciplinary appeal hearing)
 - e. Angela Griffiths – independent social care consultant and responsible individual for iCare at The Grange at the time of the 2018 incident (wrote the terms of reference for the 2018 disciplinary investigation and chaired the hearing on 11th July 2018)
 - f. Paige Foster – registered manager of a children’s home, and manager at The Grange from February 2018 until its closure in August 2018 (carried out the fact finding exercise and prepared an investigation report into the 2018 incident).
23. The following witnesses for the Appellant adopted their written statements and gave oral evidence on affirmation :
 - a. Renea Berry – the Appellant – two statements
 - b. Dr George Harris – psychologist working regularly with the Appellant at The Croft – one statement and one letter (interposed during the Appellant’s evidence)
 - c. Amanda Knowles – registered social worker and director of Mulberry Care Homes Ltd (The Croft)
 - d. Philip McVay – ex-registered children's home manager, director and responsible individual for Mulberry Care Homes Ltd
 - e. Andrew Mugwagwa – child care support worker at The Grange.
24. It was agreed that the following written statements could be read :
 - a. Claire Simkin – former children’s home manager and Regulation 44 independent visitor for up to 18 children’s homes including The Croft
 - b. Sue Riley – the Appellant’s first manager at Portland House (2016–2017)
25. A further witness, Mary Yorgensen, was due to give oral evidence concerning the 2018 incident and the Appellant’s claim to have resigned in June. However,

attempts to contact her were unsuccessful and Mrs Smith, for Ofsted, explored with the Appellant how she came to prepare the statement (and perhaps also a previous letter) on the witness' behalf, ostensibly because she had a poor command of written English according to the Appellant.

26. The Appellant also invited the tribunal to have regard for two "statements" submitted by her to Ofsted as part of her response to the Notice of Proposal :
- a. Julie Lewis [H182] – Progress HR dept – concerning the Progress disciplinary proceedings in 2017 (but she had actually written the outcome letter dated 27th October 2017 that the Appellant appealed to Philip Owen : see [H314])
 - b. Lucy Sparrock [H183] – Progress staff member at Portland House – concerning alleged bullying behaviour by staff there.

No formal witness statements were adduced from these individuals, nor were these documents signed by them. They do not assist with determination of the issues before the tribunal.

27. This case concerns the Appellant's employment at three children's homes, at the last of which she sought registration as manager. The Appellant, then known as Renea Lear, was first employed by Progress Care Solutions Ltd on 16th January 2012, at first in the role of Residential Support Worker. She moved to Regis House on 25th November 2012, had two periods of maternity leave ending in May 2016, and in July 2016 moved to Portland House children's home where she was employed as a Senior Team Leader. That establishment provides care and accommodation for up to six young people with learning disabilities.
28. Her promotion evidently caused some professional jealousy amongst colleagues, leading very soon to an allegation by a child that she had assaulted him. She was immediately suspended pending investigation and the police, the LADO and Ofsted were informed. However, it was swiftly discovered that the boy had been put up to it by one of her co-workers and he in turn was suspended, subjected to a disciplinary process and dismissed. The Appellant was quickly reinstated once the boy admitted the truth.
29. In 2017 Sue Riley, the manager of Portland House, resigned and moved elsewhere. The Appellant had gotten on well with her. In June 2017 she was replaced by Mr Yasser Madugu, with whom the Appellant did not see eye to eye professionally in his approach to child care. Her "therapeutic" approach concerned him, as the Appellant appeared to him – and to other senior staff members – to be stretching professional boundaries as she devoted a lot of attention to one particular child, referred to throughout as "MB". Twelve years of age, he performed socially at the level of a seven-year-old. Matters came to a pass when, as a result of MB racially abusing him, the manager rescinded permission for staff to take him for an outing to London on his birthday. Regarding this as a cruel punishment, and construing it as an instruction not to take the boy to London – where he came from – but that he could be taken anywhere else, the Appellant and another staff member took him out for the day to Manchester and then Liverpool. The manager was not best pleased, and words were exchanged. According to the Appellant (and Mr Madugu, who

is still the manager, did not give evidence) he vowed to get her sacked.

30. On the night of 11th September 2017 there was an incident involving MB. The Appellant was sleeping over at the premises, MB was found to be missing from his room - and to have so arranged his bed as to make it appear at a cursory glance that he was in it – and a staff member thought she heard whispering from the Appellant’s room. She claimed that he had knocked on her door and was told to go back to his room, and there were differing accounts about on which floor he was subsequently found. No definitive conclusion was ever reached, but on 13th September the manager reported the incident to LADO. According to the LADO record of the matter the complaint [I 235-236] referred to “holding hands”, spending time in MB’s bedroom putting him to bed at night, no respect for risk assessments, “favouritism”, and “concerns of grooming”.
31. The Appellant was suspended, an external investigator (Carole Moore) was appointed, and she conducted an enquiry – speaking with all concerned, including MB – before reporting back in writing to Progress [H294] on 18th October 2017. On 26th October 2017 a disciplinary hearing was held. The notes appear at [H303–311]. Finding that the allegations against her were substantiated, viz
Failure to carry out all reasonable instructions or follow our rules and procedures and that you have failed to uphold professional boundaries and conduct with a young person in your care, with particular reference to an incident that occurred during the night of 11th September 2017
Ms Julie Lewis wrote an outcome letter to the Appellant [H314–315] on 27th October 2017. This was followed up on 30th October by an outcome meeting [H312] at which the Appellant announced her intention to appeal.
32. She later wrote to Philip Owen, Head of Operations and (from November 2017) Head of Quality Assurance, formally seeking to appeal the findings against her and raising two other issues :
 - a. that she had not been provided with all the written evidence compiled so that she could defend herself at the hearing; and
 - b. that her last supervision document had been “fraudulently falsified” to cover up the lack of supervision she had received from her manager, and to discredit her. A redacted version appears at [I 274]; photographs of a clean version (used by the Appellant to show where the additions commence) start at [H192].
33. The appeal was handled by Philip Owen personally, with the hearing taking place by way of a rehearing. Originally planned for 21st November 2017, it was eventually heard on 4th December. The handwritten notes of the meeting are at [H318–324], [H325] being a blank page of lined paper.
34. Mr Owen agreed and apologised for the fact that the Appellant had not received the required information before the first disciplinary hearing, and after hearing from Yasser Madugu, ordered that the Appellant’s supervision record be amended by deleting notes of subsequent conversations – although it transpired in evidence that such amendment has never taken place. The copies in the bundle are therefore an unamended version.

35. However, despite the Appellant's protestations that there was a lack of evidence about the incident on 11th September, he was satisfied that it was properly investigated and that a number of managers, including senior managers, had expressed their concerns about maintaining appropriate professional boundaries. However, her actions and behaviour had failed to convince people that she had taken that advice and guidance on board. The finding and the written warning were therefore upheld as being fair and proportionate.
36. The Appellant moved to a different part of the company, away from Portland House, and began (she says had virtually completed) a prescribed course of work on the subject of professional boundaries.
37. On 30th January Mr Owen was forwarded by a colleague a request by Newham LBC for a reference for the Appellant, who had applied to foster a child. This was the first that he had become aware of such an application and, knowing that MB came from that borough, his suspicions were raised. His further enquiries of Newham confirmed that her application was indeed in respect of MB. He completed the enquiry form with the comment (quoted in the rejection letter from Newham to the Appellant and her husband at [I 596] – a document produced during her oral evidence) :
- Renea Berry, who is employed by Progress, is currently the subject of a live disciplinary sanction as the direct result of a safeguarding matter in relation to this young person.
- In paragraph 35 of his witness statement, at [H280], Mr Owen commented :
- What it signified to me was that the Appellant was not accepting of professional advice or that she was failing to understand the concerns.
38. Upon receiving news of the rejection of her fostering application the Appellant resigned, leaving Progress in early March 2018. In April she took up an offer from iCare Children's Services Ltd of a post as senior residential worker at The Grange, in West Bromwich. In her application form [I 161], completed online, she answered the question "Have you been subject to any disciplinary action, including any unsubstantiated claims in your current or previous employment?" by indicating YES and stating at [I 166] :
- First written received October 2017. Happy to discuss further.
- Whether she was ever asked to expand upon this in interview remained unclear, but her new employer would later hold this brevity against her.
39. On of the evening 12th May 2018 "KK", a girl prone to self-harming and other disruptive behaviour, wanted to leave the Grange for a meal out. As she was the subject of a 2:1 supervision regime the Appellant and another member of staff accompanied her. The only other child in the home was a habitual absconder, was also out at the time, but had been provided with a mobile phone in order to keep in regular touch with staff. When last contacted he had agreed to meet a staff member in West Bromwich town centre and join KK and the others for a burger. He never showed up, so all three staff members on duty were therefore out of the home, leaving it secure but unattended.
40. After a seemingly pleasant time eating her burger KK left the premises and, in

a nearby alley, succeeded in cutting herself. The Appellant found her, took her back to the home to dress the wound, thought that it was more serious than that, and took KK to the local hospital's A&E Department. After a long but mostly uneventful wait she was seen, refused to have the wound glued, and again went outside. Walking away, and past their car, she angrily pushed a lit cigarette towards the Appellant's face, started being violent and punched Mary Yorgensen in the mouth. Both staff members attempted to restrain KK, including by attempting to stop her kicking the back of the driver's seat while the Appellant was driving them all back to The Grange.

41. The following day KK, with mild bruising to her shins, accused the Appellant of kicking her. The outcome was another suspension and investigation. The Appellant then faced allegations of assault, non-compliance with physical restraint policies, failure to disclose the 2016 incident in her application form, and non-compliance with staffing policies by leaving the home unattended. There is then a factual dispute. She says that she resigned on the last working day of June, having decided while going in for a pre-arranged reason to do what she had long thought of, grabbing a sheet of paper and drafting a short handwritten letter which she handed (without an envelope) to Paige Foster. Ms Foster denies this, and an email from her to the Appellant only the previous day (attaching her report into her investigation and inviting comments by email reply) gave no indication that there was any reason for the Appellant to attend the home, which her suspension prevented her from attending. Ms Griffith was quite firm in her view that any such letter would have been rejected, as resignation whilst disciplinary proceedings are under way is not acceptable. Curiously, the Appellant accepts that she did attend what turned out to be a disciplinary hearing on 11th July 2018 – making no comment for the taped record that she had already resigned, denies receiving the outcome letter dated 16th July 2018 [H414], yet seems to have been remarkably incurious about what if anything had been decided about her part in the incident involving KK. She must have expected some outcome – and long before the home was closed at the end of August.
42. Instead, her employer claims to have rejected the two serious allegations but upheld the two minor ones. As a probationary employee the Appellant was therefore dismissed. The outcome letter, drafted by iCare's external HR consultant and amended and signed by the responsible individual, Ms Griffiths, had to have a pay date entered by Ms Foster from the staff records, but even though the letter in the bundle is signed it still includes in the penultimate paragraph on [H415] the instruction "<<insert pay date>>." Perhaps it was simply overlooked. These things happen, but the Appellant's propensity for appealing decisions she disagrees with and her apparent surprise when told by Ofsted in interview that she had been dismissed raise some doubt.
43. Concerning the Appellant's application to Ofsted for registration as manager of The Croft, where her ex-employers, consulting psychologist and regulation 44 independent visitor all rate her performance highly, there is little factual dispute. The employment history she provided in the online form was inaccurate and was corrected in interview. She followed that up a few days later with a revised version – but that repeated a mistaken date by suggesting that she had not left The Grange until 2019, long after the home was closed due to iCare's

liquidation. Upon further enquiry it transpired that the employment history she had given to Mulberry Care (The Croft) earlier in 2019 was even more inaccurate.

44. Of greater concern to Ofsted was the very misleading account given of the Progress disciplinary investigation in 2017. She described this entirely by reference to the refusal of the manager to let MB go to London on his birthday, and the Appellant's reaction to it. The 11th September incident, and the repeated advice – formal and informal – about maintaining professional boundaries were ignored. Also found troubling was her lack of candour about her attempts to foster a child. She told Ofsted in interview that she had not applied to foster through By the Bridge, and that she withdrew her application to Newham LBC after the initial training as the “child moved elsewhere”. This was not true, and nowhere did she admit that the subject child was in fact MB. This came as a considerable surprise to her employer at the time, Progress. She did not mention (but perhaps was not asked about) any other fostering agencies, yet Ofsted records at the top of [H44] information received from Staffordshire about statutory checks having been completed about the Appellant with Rutland Early Years Agency in 2019. (Much of the information supplied has been heavily redacted).

Discussion and findings

45. The least significant criterion here is the employment history. It is and was muddled in her application to Ofsted (and previously when she applied to Mulberry – her most recent, and still supportive, employer). Dates were wrong, the two earliest posts were also in reverse order, and an occasional Saturday job assisting an elderly person was initially overlooked, but the tribunal is satisfied that Ofsted now has a comprehensive employment history – with nothing missed out or a gap of 3 weeks between jobs left unexplained.
46. The fundamental criterion is whether the Appellant is a person of integrity and good character. Here Ofsted relies upon :
- a. The Appellant's failure to disclose to iCare her suspension by Progress in 2016 after a complaint encouraged by a fellow employee that she had kicked a child. After a quick fact find the co-worker became the subject of disciplinary action and was dismissed.
 - b. Her misleading account of the 2017 disciplinary action and outcome (including ongoing training) . It concerned the allegation that she had breached professional boundaries in her dealings with MB; not simply the birthday incident when she disobeyed her manager, Mr Madugu.
 - c. Her account of the 2018 suspension and disciplinary action – not proved and no further action. Reliance by iCare on the 2016 matter was (for the reasons given below) unjustified; her breach of staffing policies when the home was failing may also have been appealable. There is also an important integrity issue concerning whether she resigned, as she claims, or was dismissed.
47. The tribunal is troubled to note the incorrect attitudes demonstrated by various parties, including Ofsted, to disciplinary proceedings. The following are examples :

- a. *The disciplinary process* — this comprises consecutive stages :
 - i. Stage 1 – investigation or fact finding;
 - ii. Stage 2 – is there a case to answer? If No, stop; if Yes, then initiate disciplinary proceedings by notifying the employee, etc;
 - iii. Stage 3 – hearing followed by outcome.
- b. *The role of LADO* — The LADO process reached a supposed finding at the initial POT meeting [I 191] that the allegation made by KK against the Appellant was “substantiated” (per Wareing, at H159 para 8), even though :
 - i. The police were not interested in pursuing the matter [I 193]
 - ii. The employer (iCare) later found that it was not substantiated
 - iii. The Appellant played no role in the proceedings and was unable to put her case.

The most that LADO could do was find that there was a case to answer; i.e that the incident needed to be investigated further.

- c. It was wrong for Ms Wareing (in oral evidence) to treat as equally valid the LADO outcome of “substantiated” and iCare’s finding to the contrary; especially as the latter followed iCare’s more thorough (but still imperfect) enquiry involving the Appellant on 11th July 2018.
- d. iCare is confused about the various stages in a disciplinary process. See [H390] (transcript of the meeting, at the bottom of the page) :

Now, the reason that I put that there is that what we want you to do is explore this allegation, get your side of the story **so that we can make a balanced decision on whether something is proven, or it’s not proven. Because [unclear] proven there’s a case to answer.**

There is a difference between the interim step of establishing that there is a case to answer and the final step of it being found proved.

48. The tribunal rejects the suggestion that the 2016 suspension was “disciplinary” action which needed to be disclosed. The ACAS Code of Practice on disciplinary and grievance procedures, quoted in *Harvey on Industrial Relations and Employment Law* at [218], states that :

It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal [disciplinary] investigatory meeting, such a right may be allowed under an employer’s own procedure.

In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and **it should be made clear that this suspension is not considered a disciplinary action.**

[emphasis added]

49. The latter point was confirmed by the Court of Appeal in *Ageroyo v Lambeth LBC*⁴ :
- I can see nothing in the terms of the Acas Code of Practice which says that suspension is a "neutral act". It does not say that. What it does say is that it should not be considered a disciplinary action and this should be made clear to the employee.
50. The tribunal is satisfied that the Appellant's account of the 2017 concerns and outcome at Progress was blinkered and self-serving. She failed to disclose either to iCare or to Ofsted what were her employer's actual concerns, before then seeking to explain the background and justify her response – to the effect that such concerns were misplaced. Her actions showed a lack of respect both for her manager and other senior staff. If, as claimed both in her witness statements and oral evidence, she had genuine concerns about bullying by her manager and child safeguarding issues she should have reported them to her superiors and/or the relevant authorities, as she claims to have advised Ms Sparrock to do (after the Appellant had already left Portland House). Incidentally, in her informal and unsigned statement [H183] Ms Sparrock does not refer to consulting the Appellant, her former line manager, about what she should do.
51. Non-disclosure to her employer of her attempt to foster MB was also a serious mistake. Mr Owen, whom the tribunal found to be an impressive, fair and balanced witness, had previously thought highly of her as an employee and hoped that the further training had re-emphasised the importance of maintaining professional boundaries. The first he heard of her application to foster a child was when Newham approached the company for a reference. She had said nothing. To learn that the child was MB made matters worse. As Mr Owen says at [H280, para 36] :
- Clearly it is very important for those working with children in care, to form relationships with them and to provide them with emotional warmth and security. Relationships however that arise out of professional contact are very different to those that are developed through personal or social contact. In residential care there is a need to work as member of a team and to follow care plans and risk assessments; to err from this carries risk.
52. In this tribunal's determination, these failings demonstrate a lack of the insight, maturity and understanding of professional boundaries that is required of someone in a managerial role; and who will expect subordinate staff to follow their instructions when a matter has been fully discussed and a decision taken.
53. The 2018 incident raises various issues, and the tribunal has found difficulty in resolving them all satisfactorily. Real life has loose ends. Past form shows that the Appellant is not slow to challenge adverse findings, even though in 2017 the principal allegation against her was upheld on appeal. Having dismissed the allegations of assault against KK and breach of policies concerning physical

⁴ [2019] EWCA Civ 312; [2019] ICR 1572, per Singh LJ @ [92]

restraint it was perhaps unfair and unjustified for her employer to latch on to her non-disclosure of the 2016 allegation and, at a time when iCare was struggling unsuccessfully to keep its head above water financially and to provide sufficient staff, blaming her for leaving the home unattended when both children were out was certainly appealable. Why did she not do so?

54. However, as the applicant has retained or obtained significant numbers of documents; some printed emails, some screen-grabbed images or photographs taken using her phone, the one thing that she (as opposed to note-takers in meetings) has never produced is a copy of a handwritten document. The explanation for the absence of the resignation letter, requested by the tribunal at the beginning of day one, came rather late in the day. It was that the letter was a handwritten note decided upon on the spur of the moment while on the way in to The Grange on Friday 29th June 2018 for a pre-arranged meeting with the manager (denied by the latter and the purpose of which could not be explained). Rather like homework done on the bus to school, it was a poor effort and only dents the Appellant's credibility further. That she did not even mention its existence during the recorded part of the disciplinary hearing on 11th July has already been noted.
55. Nevertheless, the tribunal regards the 2017 disciplinary action, and subsequent failures to be candid about it, as the most significant issue affecting the question of the Appellant's integrity.
56. However, the tribunal wishes to draw to Ofsted's attention another important matter which ought to be factored in when making any future decisions affecting the Appellant.
57. It notes the previously favourable view expressed by Phillip Owen of Progress that she was "a valuable member of the team", and the still positive views of her most recent employers (Mulberry/The Croft – Knowles & McVay), Dr George Harris (psychologist) and Claire Simkin, the regulation 44 inspector of The Croft, concerning what she has been able to achieve in positive results at The Croft in a remarkably short time. This does not technically affect the question whether the Appellant has displayed "integrity and good character", but the tribunal would strongly urge Ofsted not to overlook it.
58. The tribunal notes some of the "additional information" appended to the Notice of Decision, at [H264] :

Refusal of your application also means you become disqualified from fostering a child privately under section 68 of the Children Act 1989 ("the 1989 Act"). As such, under section 65(A1) of the 1989 Act you become disqualified from carrying on, being concerned in the management of, or having a financial interest in, a children's home without disclosing this fact to Ofsted and obtaining written consent. A disqualified person who contravenes section 65(A1) of the 1989 Act commits an offence.

In addition, under section 65(A2) of the 1989 Act a provider may not employ in a children's home a person who is disqualified from fostering a child privately unless the provider has disclosed that fact to, and obtained Ofsted's written consent. A registered provider

who contravenes section 65(A2) commits an offence.

[emphasis added]

59. The tribunal notes from the evidence of Amanda Knowles Ofsted's apparent iron-hard attitude to the employment of the Appellant in any capacity whatever. Since obtaining her post at The Croft the Appellant has undertaken a considerable amount of training, much of it online. The significance and volume of some of it must be questionable, however, if fifteen such courses could be undertaken in a single day (15th September 2019) : [I 397] onwards.
60. While rewarding the Appellant with a managerial role just now would ignore the obvious failings that have been identified it is evident from those well qualified to speak that she has undoubted child care skills that should not be ignored. Imposing a permanent ban on playing any role in her chosen career would be excessive.

Decision

For the above reasons :

1. The tribunal dismisses the appeal against Ofsted's decision dated 21st February 2020 to refuse the Appellant's registration as manager of The Croft, 45 Hagley Road, Rugeley, Staffordshire WS15 2AW.
2. The tribunal makes a restricted reporting order under rules 14(1)(a) & (b) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify any of the children mentioned in this case.

Tribunal Judge G K Sinclair
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date: 11 September 2020