

First-tier Tribunal Care Standards

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

**NCN: [2020] UKFTT 454 (HESC)
[2019] 3888.EY (VKinly)**

Heard by Video link on: 26-29 May: 25, 26, 29 June: 17, 20, 21 August:
2-3 November 2020

Determined by Panel: 4 November 2020

BEFORE

**Laurence J Bennett (Tribunal Judge)
Michele Tynan (Specialist Member)
Brian Cairns (Specialist Member)**

BETWEEN:

Creative Starts Day Nursery Ltd

Appellant

v

Ofsted

Respondent

DECISION

Appeal

1. Creative Starts Day Nursery Ltd (the Company) appeals under Section 74 of the Child Care Act 2006 (the Act) against a decision by Ofsted to refuse registration as a nursery provider on non-domestic premises on both the compulsory and voluntary parts of the Childcare Register (the Nursery appeal).
2. This was a remote hearing. The form of remote hearing is video using Kinly (VKinly). A face-to-face hearing was not possible because of advice from Public Health England and Government guidance.

Mrs Afolabi's appeal

3. The appeal was heard with an appeal by Mrs Mariam Afolabi under Section 74 of the Act in respect of the cancellation of her registration as a Childminder on

the Early Years Register, the compulsory part of the Childcare Register and the voluntary part of the Childcare Register (the Childminder appeal).

4. At the commencement of the hearing on 20 August 2020, Mrs Afolabi stated she no longer wished to carry on with her appeal and applied to withdraw. Mr Toole objected. Noting the submissions made by both parties the Tribunal allowed the withdrawal.

Attendance

5. Mrs Afolabi attended the hearing and represented herself. Her witnesses included a proposed manager of the Nursery and parents of children who used her childminding services.
6. On 2 November 2020 Mr Timothy Afolabi attended the hearing as the sole Director of the Company. The Company was represented by Ms Elizabeth Lanlehin, a Barrister instructed by Mr Karibo Lawson, Solicitor. Mrs Afolabi the former Director of the Company had not been released prior to the adjournment and continued her witness evidence.
7. Mr Duncan Toole, a Solicitor represented Ofsted. It called several witnesses who were Ofsted employees and a witness from Manchester City Council, the relevant Local Authority.

Late evidence

8. The hearing bundle submitted in PDF form comprised 1,725 pages. On both parties' applications additional evidence was admitted during the proceedings.
9. By written application dated 13 August 2020 Ofsted applied under Rule 15(2)(a) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 for the admission of additional evidence; firstly, a witness statement dated 12 August 2020 by Mr Paul Traynor, Fraud Analyst with the Student Loans Company (SLC) and exhibits comprising claim forms and an analysis of claims submitted to SLC by Mrs Afolabi. Secondly; a statement by Ms Ann Law, Ofsted Inspector dated 10 August 2020 and exhibits comprising copies of Mrs Afolabi's weekly attendance records from September 2018.
10. On 17 August 2020 Mr Toole made oral submissions upon Ofsted's application to admit the late evidence specified above. The Tribunal granted the application and admitted the evidence.
11. On 2 November 2020 the Tribunal admitted a statement made 29 October 2020 by Mr Afolabi, a Training Certificate and copy Consultancy Engagement Agreement.

Background

12. Following the withdrawal of the Childminder appeal, the Nursery appeal continued on 21 August 2020, Creative Starts Ltd appeal continued on 21 August 2020. Mrs Afolabi announced she was no longer a Director or shareholder of the Company and Mr Afolabi had been appointed Sole Director. Mr Afolabi stated that the change took place on 18 August 2020 and the Company wished to continue the appeal. Mr Toole advised that the changes appeared on a recent company search.
13. The Scott Schedule submitted in accordance with directions before the combined hearings included 49 allegations with evidence heard over 10 days. Following an adjournment on 21 August 2020 Mr Toole submitted a “condensed” Scott Schedule in respect of the Nursery appeal comprising 5 allegations. This was further amended prior to 2 November 2020 continuation and again amended during the hearing on 3 November 2020 following discussion between the parties. The first allegation which related to Mrs Afolabi’s conduct as a previous Director was particularised in an annex.
14. At the start of the 3 November 2020 Ms Lanlehin requested that the Tribunal heard a preliminary issue. She referred to the guidance requirement that Ofsted assess Mr Afolabi’s suitability as the nominated individual and her instructions to seek direction from the Tribunal ordering such assessment.
15. Mr Toole questioned whether the Tribunal had power to make the order sought and after taking instructions confirmed Ofsted’s opposition to the preliminary application.
16. Both parties made further submissions. Ms Lanlehin stated that the appeal could not succeed unless Ofsted had carried out the required assessment in accordance with published guidance. Mr Toole agreed that the appeal was bound to fail. Both parties made comments on the potential withdrawal of the appeal.
17. The Tribunal reflected the parties’ submissions noting a situation had been reached and acknowledged by the parties where it appeared that the Nursery appeal could not continue as there was no reasonable prospect of the Applicant’s case or part of it succeeding. The Tribunal invited submissions on the application of Rule 8(4)(c) of The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 in respect of striking out the appeal on that ground.
18. Following an adjournment for further instructions Ms Lanlehin said she did not wish to make further submissions. Mr Toole did not address the reasonable prospect of success criterion but asked that the Tribunal make findings on the issues within the condensed amended Scott Schedule.
19. Following adjournment for consideration the Tribunal notified its order striking out the appeal but that in the light of the extensive evidence heard over the several days of the hearing it would make observations on the evidence.

20. Following an adjournment for the parties to consider the requested observations both parties made closing submissions.

Legal framework

21. Registration and regulation of childcare providers is set out primarily in the Childcare Act 2006.

Refusal of registration

22. Section 36 Childcare Act 2006 sets out the process for making an application to register on the Early years register on non-domestic premises and the circumstances under which an application for registration should be granted or refused. Sections 55 and 63 of the Childcare Act 2006 deal with the process for registration on both parts of the general childcare register on non-domestic premises and the circumstances under which an application for registration should be granted or refused.
23. An application must be granted if the applicant is not disqualified from registration and it appears that any prescribed requirements for registration are satisfied and are likely to continue to be satisfied. An application must be refused if these conditions are not met.
24. Sections 36, 55 and 63 of the Childcare Act 2006 stipulate that the prescribed requirements may include matters relating to, inter alia, the Applicant.
25. The prescribed requirements in the Childcare Act 2006 include matters set out in the Childcare (Early Years Register) Regulations 2008 and the Childcare (General Childcare Register) Regulations 2008.
26. Part 1 Schedule 2 Childcare (Early Years Register) Regulations 2008 state that an applicant must be 'suitable' to provide early years provision.
27. Part 1 Schedule 2 and Part 1 Schedule 5 of the Childcare (General Childcare Register) Regulations 2008 ("the Regulations") stipulate that an applicant for registration on part A (compulsory part) of the General Childcare Register and part B (voluntary part) must be 'suitable' to provide childcare.
28. If Ofsted intends to refuse registration, it must send a notice of this intention (section 73(3) Childcare Act 2006). If, after any objection process, Ofsted decides to refuse registration, it must send a notice of decision (section 73(7) Childcare Act 2006).

Order:

29. The Tribunal confirms its order striking out the appeal. It has taken into account:
 - The original grounds of appeal are no longer relied upon
 - There has been a complete change of ownership and management of the Appellant Company
 - Mr Afolabi has not been assessed by Ofsted

- Neither Mr Afolabi nor his proposed manager has been interviewed by Ofsted
- It is not appropriate for the Tribunal to carry out assessments that would be made by Ofsted Inspectors on first application or registration following a fundamental change. The expectation of it doing so within an appeal constitutes an abuse of process

30. For the above reasons as expressed and acknowledged by both parties the appeal has no reasonable prospect of success.

Observations

31. The Tribunal has heard extensive evidence over several days. Both parties have had an opportunity to present and cross examine witnesses. We find it appropriate to comment on the matters submitted by Ofsted within the condensed Scott Schedule (SS) which is quoted with that prefix.

32. SS1.
The Appellant company has not acted in an honest manner and has acted in a way which lacks integrity.

The following findings are relevant to this issue and are made on the balance of probabilities:-

- Previous director and owner (Mariam Afolabi) has been involved in the submission of forms and claims to the student loans company (for a period at least between 3/9/2018-31/07/2020). These claims include claims that she cared for children, who do not appear on attendance registers supplied by Mrs Afolabi. This includes claiming money for childcare on the same days as she was engaged in presenting her case at Tribunal. The Tribunal conclude that this raises concerns about the honesty and integrity of the previous Director.

Observations

33. Taking into account the witness statements of Mr Traynor and Ms Law and the appended schedule of claims to the SLC and Attendance Registers we find matters require an explanation. Mrs Afolabi gave some information in her evidence, however, we do not find this explains discrepancies between claims and attendance nor do we accept, on the evidence before us, her explanation that payments were bound to follow contracts with Service Users. We are similarly unpersuaded that such contractual payments extend to times she was not available to provide a service. Accordingly, we are not satisfied and although at this stage we have not reached a final conclusion whether Mrs Afolabi has been dishonest, we consider this an open question and one of importance requiring further evidence and consideration by the relevant authorities including SLC with referral to the Courts if appropriate.

34. SS1.
ii) The Appellant company created a website which contained false and misleading information, including that Creative Starts Day Nursery Ltd

was 'one of Manchester's leading providers of high quality childcare' (when in fact it has not been registered) and that it had a 'strong record of excellence and consistently high ratings from Ofsted' (when in fact it had not been registered and had never been inspected by Ofsted). This website was still active as of May 2020, until this information was highlighted to the Appellant by Ofsted. Following this, the website has been amended.

Observations

35. We observe that both parties accept this statement is accurate.

36. SS2.

The Appellant company initially put forward a nominated individual (Mariam Afolabi) who failed to satisfy Ofsted of her ability (on behalf of the Appellant company) to meet the prescribed requirements for registration of a non-domestic childcare setting.

Observations

37. We observe that both parties accept this statement is accurate.

38. SS3.

Mariam Afolabi withdrew her appeal against cancellation of registration as a childminder on 20 August 2020. On this date, she became disqualified from matters including, providing childcare and being concerned in the management of a childcare setting which requires registration with Ofsted.

Observations

39. We observe that both parties accept this statement is accurate.

40. SS4.

On 18 August 2020, Mariam Afolabi resigned as a director. On the same day, Timothy Afolabi (the husband of the previous director) was appointed as a director. He is now the sole director of the company. The Appellant company no longer has any person within the organisation, whose suitability has been assessed by Ofsted to be the Nominated Individual.

Observations

41. We observe that both parties accept this statement is accurate.

42. SS5.

The following findings are relevant to the overall suitability of the Appellant company to be a registered childcare provider:-

a) On 18 August 2020, Mariam Afolabi resigned as a Director. On the same day, Timothy Afolabi (the husband of the previous director) was appointed as a director. He is now the sole director of the company. This appeared to be a deliberate attempt to change the make-up of the company 9 days in to a contested hearing. The conduct of the Appellant company in doing so, is of great concern and demonstrates that they are unsuitable to be a childcare provider.

Observations

43. Ms Lanlehin reflected on Mrs Afolabi's evidence that she resigned as a Director because of her health. Mrs Afolabi said that the personal difficulties caused by the application procedure and appeal were such that she felt she could no longer continue to be involved in the nursery although she would provide advice to Mr Afolabi if asked. She detailed her considerable financial investment in the Company and that it was secured by mortgage on the family home.
44. Mr Toole submitted that the background shows that Mrs Afolabi's resignation was an attempt to manipulate the position following the evidence that caused her to withdraw the Childminder appeal.
45. The chronology is clear. Mrs Afolabi resignation and Mr Afolabi's appointment as sole Director immediately followed the admission of late evidence which led Mrs Afolabi to apply to withdraw the Childminder appeal. We accept this must have been a worrying time which caused Mrs Afolabi concern and that the stress of the proceedings would have a cumulative effect. However, the timing raises suspicion. It appears to reflect Mrs Afolabi's realisation that the Company could not be registered if she remained involved. We find the change was tactical to attempt to alter the course of the appeal.
46. We have borne in mind this corporate activity is lawful and in a certain light transfer of management and ownership of the Company might be logical. However, this was during the course of an appeal. The suitability of the new individuals and arrangements has not been assessed by Ofsted. For the reasons in paragraph 29 we do not find it appropriate for the Tribunal to conclude whether they are suitable.
47. SS5.
 - b) The Appellant has stated in evidence that the nominated individual does not need to have previous knowledge and experience of childcare (G13 para 24). This is incorrect. The Appellant has such a lack of knowledge about registration procedures and requirements, that this makes them unsuitable to be a registered provider of childcare.

Observations

48. We note both parties' submissions. We also note several guidance documents and uncertainty about the status of that guidance and Ofsted policy publications. The Tribunal is not able to be conclusive and makes no further observation.
49. SS5.
 - c) The conduct of Mrs Afolabi since she resigned as a director of Creative Starts Day Nursery Ltd on 18 August 2020, is such that it raises concerns about her continued involvement and influence in the Appellant Company in the future, both from a financial and advisory perspective.

Observations

50. Mr Afolabi's evidence shows he has little detailed knowledge of operating or working within a nursery. He has worked as an accountant for the last 25 years. Mrs Afolabi provided evidence of her financial involvement in the Company and confirmed she would provide advice should Mr Afolabi request. Whilst she emphasised her separation from the Nursery, we are not convinced. Mrs Afolabi has a substantial interest in the success of the Company not least because of her financial involvement, she was the promoter of the Nursery and we find the Company would not exist without her involvement. Bearing in mind Mr Afolabi's relative lack of experience we have little doubt that she will be influential upon him and through him, the Company in a financial, managerial and advisory perspective. This accords with our observations of the evidence at the hearing. Although we accept to some extent proposals for a Nursery will have common features, Mr Afolabi's witness statement 29 October 2020, whilst including the name of a new manager Mrs Umeh, contained proposals which appear similar to those of Mrs Afolabi in her evidence.

Order

51. Creative Starts Day Nursery Ltd's appeal is struck out.

Order accordingly



**Laurence J Bennett
Tribunal Judge**

First-tier Tribunal (Health, Education and Social Care)

Dated: 12 November 2020