

Care Standards

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

[2019] 3802.EY-SUS

IN THE MATTER OF AN APPEAL AGAINST SUSPENSION

Heard at Bury St Edmunds County Court on 16 September 2019

BEFORE

Siobhan Goodrich (Judge)
Mike Cann (Specialist Member)
Mike Flynn (Specialist Member)

BETWEEN:

AL (Les Enfants @The Scout Hut)

Appellant

-v-

Ofsted

Respondent

DECISION

The Appeal

1. By notice dated 23 August 2019 the Appellant appeals against the Respondent's decision made on 9 August 2019 to suspend her registration on the Early Years Register as a childcare provider on non-domestic premises and the compulsory part of the Childcare Register.
2. The right of appeal lies under regulation 12 of the Childcare (Early Years and General Childcare Registers (Common Provisions) Regulations 2009, ("the Regulations"). The Applicant seeks a direction that the suspension shall cease to have effect. The Respondent resists the appeal and requests that the decision to suspend registration be confirmed.
3. The Appellant is a sole registered childcare provider and nominated individual on non-domestic premises, operating under the name 'Les Enfants @ Scout Hut', at Scout Association, Scout Hut, Chesterfield Drive, Ipswich, IP1 6DW (the "setting") The setting operates primarily during school holidays and has been registered since 4 September 2014.

4. The Appellant is also registered to operate a “before and after” school club setting known as Les Enfants@Claydon, in respect of which a later appealable suspension decision has been made. That appeal is not before us.

Restricted Reporting Order

5. The Tribunal makes a restricted reporting order under Rule 14(1) (a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the child or family members in this case. As this is an appeal against an interim order of suspension we consider it appropriate to also anonymise the names of staff at this stage.

The Background and Chronology

6. We set out below a summary of the matters that were relied when suspension was imposed on 9 August 2019:
 - i. On 29 July 2019, a call was made to Ofsted to report a concern following an incident of alleged manhandling a child that had taken place that day on a bus transporting children (registered at the setting), who had been on an outing to Jimmy’s Farm.
 - ii. The caller stated that one of the children (D aged 5 years old) had a good day at the farm and did not want to go home. The caller went on to say that the little boy had a tantrum and that four members of staff were forcing him on to the bus and shouting to ‘get him on the bus’. The caller was unhappy with the actions of the staff, who were being forceful. Once on the bus, the caller stated that the staff were forcing the boy to sit on his seat.
 - iii. On 6 August 2018, Early Years Regulatory Inspector, Jacqueline Mason, attended the setting and spoke with the Appellant. The evidence of Ms Barrett, (based on her reading of Ms Mason’s records) is that Appellant said that: child D was screaming and refusing to get on the bus without any explanation as to why: the child was biting, scratching and spitting at staff; staff ‘guided’ him on to the bus and he ‘walked’ on to the bus: child D was not carried onto the bus and he was not manhandled. The Appellant had explained to Ms Mason that: D was guided onto the bus, and had put her hands out to demonstrate how he was shepherded; she had not touched him. The Appellant described their behaviour management practice and said that they never use restraint or physical force. She explained that if a child was misbehaving, they would be taken to one side to calm down and they would talk to them about their behaviour. The Appellant had said she was *“100% there was nothing wrong with the way child D’s behaviour was managed.”*
 - iv. An Incident form was completed by CP, a play leader on 29 July. In this she stated, amongst other matters, that as D was getting on the bus he became frustrated and was unable to communicate why. He would not get on the

coach and members of staff ensured that he did not run off into the car park as he was displaying frantic behaviour. ZC, TS, CP and AL all guided him onto the coach with no physical force used - bodies were used as barrier. [D] became very aggressive – CP was bitten, scratched and spat on. AL was also scratched and kicked. The witnesses to the incident were listed: AL, ZC, TS, MH and S.

- v. The Inspector returned to the setting on 8 August 2019 to speak with some of the staff members that were present during the incident with child D on 29 July 2019.
- vi. The Inspector collected a written account provided by staff member CP and spoke with staff members ZC, LH and SBP in person. Some staff essentially provided an account similar with that of the Appellant:
 - CP stated that that four staff members ‘guided’ child D on to the coach with no physical force used, with bodies being used as a barrier.
 - ZC stated that they got him on the bus by ‘encouraging and shepherding’ him. She said that she did not see any staff touch or handle him.
 - LH said she did not really see the incident, but A (AL) ‘told staff’ that he walked on to the bus with some guidance, supported by holding his back.
 - SBP said that she did not see anything about the child being brought on to the bus and she has ‘no idea how they got him on to the bus’.
- vii. Ofsted obtained CCTV footage from the bus company on 8 August 2019. This led to the decision to suspend on 9 August for the period allowed under the regulations (six weeks). The reasons given were that:
 - a) There was reason to believe that children are at physical risk of harm due to a child being inappropriately handled in response to their behaviour. The Appellant and the staff spoken to so far had denied that inappropriate behaviour management strategies had been used.
 - b) There was further evidence to support the belief that children are at risk of harm. (The evidence of Ms Barrett is that this referred to the CCTV footage which the police did not wish disclosed prior to the police interview).
 - c) The suspension protects children until the risk of harm is sufficiently reduced or removed and allows Ofsted time to gather evidence about the registered provider’s suitability for registration.

The Appeal

7. In summary, the Appellant's position set out in the grounds of appeal is that the suspension was neither necessary and proportionate and should never have been issued. The setting was rated as "Good" at the last inspection in February 2017. It is successful and has a good reputation. The notice relates to an isolated incident. There was no inappropriate handling. The Appellant was responding to an unforeseen incident. She should never have been placed in this position. The child's behaviour was unexpected. There was concern that he would run into the car park putting himself at risk of harm. Due to his extreme behaviour he was picked up and placed on the bus. As soon as he was there (i.e. on the bus) he was provided with his spiderman jumper and calmed down. There had been a complete failure by the Family Support Practitioner to disclose in the referral that D had any challenging behaviour. The referral simply mentioned speech and frustration through inadequate communication "which is not the same thing at all." This deprived the Appellant of the opportunity to assess his needs or to decline to take the child, on the basis that the setting could not legitimately cater for his needs, or the option that staff attended relevant training so that any challenging behaviour could be well managed. D was safeguarded by being placed onto the bus in the best way they knew how.

Legal Framework

8. 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: see regulations 8-13 of the Regulations.
9. 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."
10. "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".
11. The duration of a suspension under regulation 9 is for a period of six weeks. It may, however, be extended. 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 remains necessary.
12. The powers of the Tribunal are that it stands in the shoes of the Chief Inspector. The first issue to be addressed by the panel is whether, as at today's date, it 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 (the threshold)

13. The burden of satisfying us that the threshold under regulation 9 is met lies on the Respondent. The standard of proof 'reasonable cause to believe' falls somewhere between the balance of probability test and 'reasonable cause to suspect'. The belief is to be judged by whether a reasonable person, assumed to know the law and possessed of the information, would believe that a child might be at risk.
14. We are further guided by **GM** at [21]
"Although the word "significant" does not appear in regulation 9, both the general legislative context and the principle of proportionality suggest that the contemplated risk must be one of significant harm. "
15. Even if the threshold test is satisfied by the Respondent that is not an end of the matter because the panel must decide whether the decision is necessary and proportionate in all the circumstances.

The Evidence

16. We have read and considered the indexed bundle. We need not relate its contents in detail. We have also been assisted by helpful skeletons from both counsel which we have taken fully into account.
17. The Respondent relies on the statement from Ms Lesley Barrett, Early Years Senior Officer, who made the decision. She gave oral evidence before us. In summary, the main elements of her evidence were that she has sought, and is awaiting, an update from the police regarding progress of their investigation in the light of the interview of the Appellant under caution on 12 September. It was D's mother who had asked the police to pursue her concerns. Ms Barrett outlined the probable nature of the investigation that Ofsted would undertake when the police investigation was concluded. Her concern was that the CCTV footage was very distressing, but the Appellant has said that nothing untoward had occurred. It was very important that providers and staff were transparent with Ofsted and gave truthful information. A significant risk of harm includes emotional and physical harm. D's needs were not met.
18. In answer to Mr Lloyd, Ms Barrett said that she had read the Inspector's account of the interview. This was a step by step account, rather than a summary. The Appellant had engaged through her solicitors. There were alternatives to deal with the incident. She would expect an experienced childcare professional to have the knowledge and skills to handle this sort of situation. There are a wide range of strategies for a child who is frustrated which can be used in any given situation, and not just in a classroom. Quite often a day care setting will have a key worker for a child with needs to make sure that management is consistent. This is not just when the child is within the setting. Whilst the referral form provided limited information it is up to the registered provider to gather further information to ensure there is sufficient information to meet the child's needs. She would expect discussion with the parent to agree strategies to be used at home as well, and/or the seeking of advice from the local authority Early Years Advisory Team if needed. She agreed that the registration was for 48 children at a time and the Appellant had

probably looked after hundreds of children. Ofsted take into account the impact of suspension on the registered person, staff, parents and children but in her view children were at risk of significant harm from the behaviour of the appellant and her staff, and the information provided did not correspond with the information provided by the CCTV.

19. The Appellant relies on her detailed witness statement which was completed and signed on 9 September. We were informed by Mr Lloyd that when the statement was signed the Appellant had not seen the CCTV footage. She saw this on 12th September in the course of a police interview. This was, however, without audio. Reliance was also placed on the written statement of CP (who completed the incident form).

The Tribunal's consideration

20. We will not refer to every aspect of the evidence, skeletons or oral submissions but have taken all the information before us into account.
21. We are not finding facts. Our task is essentially that of a risk assessment as at today's date in the light of the body of evidence before us, about which there is some dispute, and in circumstances where the evidence is necessarily incomplete. Whatever facts may ultimately be found in the event of a substantive hearing, there appear to be significant differences between the parties regarding the assessment of, and/or appropriate approach to the individual needs of a child, and appropriate practice regarding the physical handling of children.
22. We add that whilst reference is drawn from case law as to our "placing ourselves in the shoes of the Chief Inspector", we are an independent Tribunal making a risk assessment as at today's date against the threshold set out in paragraph 9 and on the basis of the evidence available as at today's date. It was agreed that there are two issues to be considered. Has the Respondent discharged the burden of satisfying us that the threshold test in regulation 9 is met and, if so, is suspension necessary and proportionate?
23. Amongst other matters, emphasis is placed on the fact that this was a single incident with reference to one child, where complaint is made about the information provided by the referring Family Support Practitioner, and where child D had sustained no physical injury. In essence, the Appellant's position is that she made a judgement at the time which was reasonable in all the circumstances. Reliance is also placed on the fact that inspections at both settings operated by the Appellant resulted in good judgements with no criticisms were made as to how referrals were managed. The Appellant has some 19 years' experience in childcare.
24. Importantly the evidence regarding 26 May 2018 includes CCTV footage from four different viewpoints on the bus which we have watched. We re-watched the first two minutes or so of the CCTV footage obtained from the viewpoint

which showed the children entering the bus. This is the only footage that is accompanied by audio.

25. We fully recognise that there is a live dispute regarding the facts, and the justification for handling child D in the manner apparently shown by the CCTV. We took fully into account that the perception of those on the ground “in the moment” may well differ to how matters appear on film, and when played and replayed. However, in our view, the CCTV footage raises serious issues regarding the ability of registered provider to appropriately manage behaviour and to safeguard the welfare of children. On the footage the Appellant can be heard to instruct staff to pick up Child D when he was resisting getting on the bus, and within a very short time indeed of his distress (i.e. screaming) having started. The Appellant’s description of appropriate strategies as usual practice by herself and her staff, appears to be at odds with what appears to be shown on the footage. There will obviously be an issue regarding the accuracy of the Appellant’s case that child D’s needs were unforeseeable and/or could not have been previously assessed, because the Appellant can be heard to speak of her lack of surprise that there was difficulty with child D, and to refer to similar difficulties with child D at Colchester Zoo.
26. The other matter of concern is that it appears that the Appellant’s account to the Inspector was that child D was not manhandled and that she had not touched him. Further CP said in the Incident Report Form that no physical force was used. On the face of it, both these assertions are inconsistent with the footage. We also consider that there are significant issues surrounding the accuracy and/or integrity of the accounts given by other staff members.
27. In our view these issues are relevant to our assessment of risk because they impact upon the extent to which any decision maker could have any real confidence that the risk of such handling (with any child) has been eliminated or reduced or that any future incident (whatever the cause) would be reported with complete candour.
28. We consider there is no real substance in the point that there was no evidence of physical injury: “harm” is defined in wide terms under the regulations and, in our view, embraces harm to the emotional well-being to an individual child, as well as others witnessing events.
29. In the light of all the material before us we reasonably believe that the continued provision of childcare by the Appellant to any child may expose such a child to a risk of significant harm. The Respondent has satisfied us that the threshold test under regulation 9 (and applying the guidance on **Ofsted v GM and WM** [2009] UKUT 89 (AAC)), is met.
30. Applying **GM**, we reminded ourselves that regulation 9 sets a low threshold but the mere fact that the threshold has been met does not necessarily mean that the power of suspension in regulation 9 is justified and should be exercised. In our view the continuation of the suspension at the present time has a clear purpose, namely to enable the police investigations to be completed, after which Ofsted will be able to complete its own investigation as the regulator in

order to make a decision as to whether steps can be taken to sufficiently reduce or eliminate the risk and also to allow time for Ofsted to gather evidence about the Appellant's suitability as a registered provider.

31. The issue is proportionality having regard to the serious consequences of suspension not only for the Applicant and the staff, but also for parents and families for whom the setting is an important resource.
32. Mr Lloyd invited us to consider the imposition of conditions on the basis that the Appellant is open to be guided by Ofsted or others regarding behaviour management. There is no provision under regulation 12 for the Tribunal to impose conditions. The Tribunal's power on appeal is to confirm the decision or direct that that suspension cease to have effect. (There is, however, the power to impose conditions (if appropriate) on an appeal against a substantive decision on cancellation.) Consideration of the prospects that risk might be mitigated in some way is, however, a means by which it is possible to mentally cross check the proportionality of suspension. In our view the evidence suggests (quite apart from concerns re honesty and integrity) a lack of insight: the Appellant places particular emphasis on child D's behaviour and does not seem to have recognised her own responsibility to plan for the setting to be able to meet the individual needs of child D, and to meet his needs and/or manage his behaviour by appropriate strategies.
33. We considered the impact of the suspension of the setting on all concerned. We recognise that, if the suspension order is confirmed it is likely it will be extended for another six weeks on or before its expiry on 20 September, and it may well be extended thereafter. We take fully into account that the outcome of the criminal investigation may, in itself, take considerable time and that Ofsted's own investigation will also take some time thereafter. The setting has already been affected by the suspension. The length of time involved in the serial investigations will have an inevitable further impact upon the finances and reputation of the setting in longer term. Suspension is always a serious matter because of the adverse impact on business interests, livelihoods, professional reputation and standing. We have taken full account of the personal and professional impact upon members of staff and the Appellant, as well as the suspension of a resource which, on its last inspection was rated as "Good". We have borne fully in mind that the Appellant is an experienced provider having been registered for some 19 years in other settings, and since 2014 in this setting. There is no history of any prior suspension in any setting.
34. Having considered all the matters placed before us we balanced the harm to the Appellant's interests, and all those affected including staff, and the families and children in need of day care services, against the risk of significant harm to children looked after at the setting. The CCTV shows a serious and very distressing incident which raises serious issues about the ability of the Appellant, and those she employs and leads, to manage needs and/or behaviour appropriately, and to safeguard the best interests of children. In our view the need to protect the health and welfare of children outweighs the adverse impact of suspension on all concerned. The material before us leads

us to conclude that the suspension is necessary and proportionate to the legitimate need to protect the health and welfare of children.

Decision

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

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

Date Issued: 19 September 2019