

First-tier Tribunal Care Standards

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

**NCN: [2020] UKFTT 469 (HESC)
[2020] 4138.EY-SUS VKinly**

Hearing by the Tribunal
On the papers held via video link
on 18 November 2020

Before

**Tribunal Judge Shelley Brownlee
Specialist Member Mr James Churchill
Specialist Member Mrs Sallie Prewett**

BETWEEN:

Miss Kerri Robbins

Appellant

-v-

**The Office for Standards in Education,
Children's Services and Skills ('Ofsted')**

Respondent

DECISION

The Application

1. This appeal is brought by Miss Kerri Robbins ('the Appellant') against the decision of Ofsted ('the Respondent') by notice dated 23 October 2020 to suspend her registration as a child minder on the voluntary part of the General Childcare Register for a period of 6 weeks from 23 October to 3 December 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. In her appeal document dated 29 October 2020, the Appellant requested that the appeal be determined on paper without either party attending. The

Respondent agreed to this in its response and at a telephone case management hearing on 6 November 2020. Accordingly, the Tribunal ordered that the appeal be determined on paper on that date.

3. We have considered for ourselves as part of this appeal whether the decision was suitable to be made on a consideration of the papers alone and we have determined that it is.
4. We had a witness statement from Caroline Hearn dated 5 November 2020, an Early Years senior officer with Ofsted. We also had a witness statement from the Appellant dated 5 November 2020 and witness statements from two parents (A and B) dated 5 November 2020.

Restricted reporting order

5. The Tribunal makes a restricted reporting order under rule 14(1) (a) and (b) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (as amended) ('the Tribunal Rules') prohibiting the disclosure or publication of any document or matter in this appeal likely to lead members of the public to identify any child or their parents in this case so as to protect their private lives. The Tribunal has as a result referred to some of the matters in this appeal only in very summary form, recognising that this decision will be made public.

Late Evidence

6. The Respondent applied to admit late evidence on 11 November 2020 in the form of a further witness statement from Caroline Hearn also dated 11 November 2020 which dealt with the current position with the investigation and outcome of action on the Appellant's registration, as well as an email from the Appellant dated 9 November 2020 confirming further documents to consider as part of her objection to the notice of intention. We had no objection from the Appellant in relation to this evidence, but we did note that the Appellant explained, in her skeleton argument dated 14 November 2020, that she had received the documents from Ofsted but she had been unable to open them and due to work commitments, she would not have time to read them or respond to them. We reviewed the content of the documents, which consist of an update on the present position and recent submissions from the Appellant as part of the Notice of Intention process. We concluded that the content of the documents is not unknown to the Appellant. Ultimately, we admitted this late evidence as it was relevant to the issues in dispute, acknowledging the reason for the time of the application was the recent developments with the case. In doing so we applied rule 15 of the Tribunal Rules and had regard to the overriding objective to deal with cases fairly and justly.

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

7. The Appellant has been registered on the voluntary part of the General Care Register as a home child carer (or a nanny) since 14 August 2019. This part of the childcare register enables those who are exempt from registration by law to

register. Registration enables parents who use the services which are exempt from registration to access tax credits. It also provides an endorsement to parents that the registered person is suitable to care for children.

8. As home child carer or nanny, the Appellant is entitled to look after children of not more than two families in one of the children's home. The Appellant is prohibited from providing care for children from more than two families or to care for any children in her own home as that would require registration as a childminder on the Early Years Register and the compulsory and voluntary parts of the Childcare Register. Irrespective of the regulatory process, as the Appellant is registered on a voluntary basis, she is not required to be registered with Ofsted to work as a nanny.
9. Between September and November 2019, Ofsted received information that the Appellant was working as a childminder whilst not registered. Ofsted contacted the Appellant and received assurances that she was not undertaking childminding work. On 14 September 2019, the Appellant confirmed in writing that she was working as a home child carer/nanny and that she was aware of the rules and would not jeopardise her career. On 5 November 2019, Ofsted called the Appellant to gather information about her work status and asked whether she was child-minding whilst unregistered. The Appellant confirmed that she was nannying for children from two families two days per week and not working with any other adults. She denied that she was child-minding and stated that she knew she was not allowed to do it without registration. On 20 November 2019, Ofsted carried out an unannounced visit at the Appellant's home address and, according to the visit record, the Appellant was found to be caring for six children from three different families – with another adult present whose suitability had not been verified. The other adult was the Appellant's sister and she confirmed that two other adults worked as assistants. As a result, the Appellant received an enforcement notice.
10. On 11 May 2020, the Appellant applied for registration as a childminder. During the registration process, Ofsted received information that raised concerns about the Appellant. Prior to applying to register as a childminder with Ofsted, the Appellant applied to register with a childminder agency. She was not open and honest with the agency and subsequently, she was not open and honest with Ofsted as to why her agency application was declined. Furthermore, the Respondent identified that the Appellant appeared to have provided inaccurate information to the Official Receiver in relation to bankruptcy proceedings as information held by Ofsted contradicted information held by the Official Receiver.
11. On 20 October 2020, the Appellant withdrew her application. However, by that point, Ofsted had gathered further information which called into question the Appellant's character and integrity. As such, Ofsted considered that the concerns were also relevant to the Appellant's ongoing voluntary registration. As a result, on 23 October 2020 Ofsted issued a Notice of Intention to cancel the Appellant's registration as a home child carer and a suspension notice.

12. The Appellant objected to the intention to cancel her registration and submitted a response and accompanying documents for consideration. On 10 November 2020, the objection hearing took place and on 11 November 2020, the Respondent notified the Appellant of its decision to cancel her registration. The Appellant has indicated that she intends to appeal the decision. The decision of 11 November 2020 does not take effect until after the appeal period has passed or until the disposal of any appeal to the First-tier Tribunal.

Legal framework

13. Ofsted is the body responsible for the regulation of registered providers under the Childcare Act 2006 and its associated regulations. Its primary function is the welfare and safeguarding of children.

14. Registered providers (the Appellant, in this case) are regulated by Part 3 of the Childcare Act 2006 which provides for registration and regulation by the Respondent in one or both of two Registers. Section 69 of that Act provides a power of suspension from the Registers in prescribed, relevant circumstances, and provides for a right of appeal to this Tribunal against any such suspension. The relevant circumstances, and other matters, are prescribed in the 2008 Regulations, referred to at the outset of this decision. Regulation 9 provides, so far as is material, that the test for suspension is whether:

“...the Chief Inspector [of Ofsted] 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”.

15. For the purposes of regulation 9, ‘harm’ is defined in regulation 13 as having the same meaning as in section 31(9) Children Act 1989, namely:

‘ill-treatment or the impairment of health or development, including, for example, impairment suffered from seeing or hearing ill-treatment of another’.

16. In any appeal, the Tribunal stands in the place of Ofsted’s Chief Inspector in reaching its conclusion – as of the date of the decision, does the Tribunal reasonably believe that continued provision of childcare by the Appellant may expose the child to a risk of harm? The burden of proof rests on Ofsted and the standard of proof of having a “reasonable cause to believe” lies somewhere between the balance of probabilities and a reasonable cause to suspect. Accordingly, the threshold is not an especially high one, and it does not require us to make findings of fact about what has happened. We need to judge any ‘belief’ on the basis of whether a reasonable person, assumed to know the law and possessed of the relevant information would believe that a child may be at risk. We need to consider the position as at today. Even if the threshold of the regulation is met, we need to consider whether a suspension is necessary and proportionate.

17. The periods of suspension are prescribed by regulation 10 of the 2008 Regulations. Any suspension is for an initial period of 6 weeks, which can be extended for a further 6 weeks where based on the same circumstances.

Thereafter, the suspension can only be extended again where it is not reasonably practicable for the Respondent, for reasons beyond its control, to either complete any investigation into the grounds for its belief under regulation 9 or for any necessary steps to be taken to eliminate or reduce the risk of harm referred to in regulation 9. Even then, the suspension may only continue until the end of the investigation, or until the steps have been taken. The courts have emphasised that suspension is intended to be only an interim measure. The Respondent has an ongoing duty to monitor whether suspension continues to be necessary and the suspension may be lifted at any time if the circumstances in regulation 9 cease to exist.

Evidence

18. As we are not making findings of fact in this appeal, we summarise the evidence briefly, referring only in detail to the matters on which we based our decision. As the appeal was dealt with on paper, we did not hear oral evidence from any witness or from the Appellant. We took into account all the evidence that was presented in the bundle, as well as the skeleton arguments submitted by both parties. 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.
19. For the Respondent, we had before us two witness statements from Caroline Hearn with a number of documentary exhibits, including an inspection record dated 20 November 2019 relating to the unannounced visit from Ofsted inspector, Mrs Dominique Allotey, which took place on that date between 3.40 and 5.15 pm. As noted above, the unannounced visit related to the Appellant's voluntary registration which is the subject of this suspension. Mrs Allotey noted that there was a number of children's toys and a double pushchair in the front garden. The Appellant was reluctant to allow Mrs Allotey to enter, but eventually allowed her to come in. The Appellant confirmed that she was minding the six children present at her home address and the woman present with her was her sister, who was working as an assistant. Mrs Allotey noted that on a telephone call with the Appellant approximately two weeks before the visit, the Appellant had confirmed that she was providing nanny services and she understood that she could only do this in one of the children's homes. The Appellant confirmed that she had not introduced herself to people as a childminder at playgroups/in the community and she did not use the name 'Kez' to advertise childminding services. Mrs Allotey noted that Miss Robbins used an email address with the name 'Kez' in it.
20. Mrs Allotey wished to see a child who was asleep upstairs. The Appellant was reluctant to let her follow and wished to wake the child up and bring him downstairs. Mrs Allotey followed the Appellant to the room. The child had been sleeping on a sleeping bag on the floor, which had been folded to provide additional support. The room was full of items and cluttered and the room light was not working. Mrs Allotey did not consider the room to be appropriate for children. Ultimately, Mrs Allotey considered that the Appellant had been obstructive and contradictory throughout the visit and she had concerns about her honesty. She waited outside the property until shortly after 5 pm and the Appellant later emailed Mrs Allotey to confirm that all children had been collected safely by their parents. As a result of the visit, Ofsted issued an

enforcement notice.

21. On 11 May 2020, the Appellant applied to Ofsted to register as a childminder. Ofsted commenced a number of standard suitability checks. On 26 August 2020, during a telephone call with Ofsted, the Appellant indicated that she had applied to a childminder agency, but had not completed her application as the agency was based too far from her home. On 27 August 2020, Ofsted contacted the agency which confirmed that it refused to register the Appellant as she had failed to disclose to them the enforcement notice served by Ofsted, arising out of the visit of 20 November 2019. The Appellant provided differing explanations in response.
22. As part of the suitability checks, the Appellant appeared to have provided incorrect information to either Ofsted and the agency or the Official Receiver. The Appellant confirmed to Ofsted that she had purchased her home in July 2019, but Ofsted had information that the Appellant did not own the home. On 22 October 2020, the Official Receiver confirmed that the Appellant did not own the property, despite the Appellant's insistence that she did.
23. Ofsted had also identified a business called 'Brite Little Buttons Ltd' registered to the Appellant's home address. The business was registered as child day care activities – the address having been updated on 2 May 2020. On 20 October 2020, during a telephone conversation with Ofsted, the Appellant stated that the business was for financial reasons and it was a property business. The Appellant provided an explanation for this, involving a property in Wales and her ex-partner. The Appellant confirmed that she would provide documentation to confirm the status of the business. As of 5 November 2020, Ofsted had not received the documentation.
24. On 2 June 2020, the Appellant appeared to have launched an advertisement to provide child-minding services from her home address – under the name 'Brite – a Childminder in Horfield'. When asked about this, the Appellant denied that this was her advertising account. Later that same day (20 October 2020), the advertising website confirmed that the advertisement had been live since 2 June 2020 and the profile URN was registered to Kerri Robbins.
25. For the Appellant, we had before us a witness statement from the Appellant, as well as two witness statements from Parent A and two witness statements from Parent B, parents who have used the Appellant's nanny services. The Appellant acknowledged that she had made a mistake and she would never do it again. She said that she had immediately stopped providing unregistered childcare after the visit of 20 November 2019. She explained it was never her intention to be dishonest in disclosing her previous history. She also advised that she has now sorted out issues with her insolvency practitioner and she does not understand what her financial situation has to do with her work with children. The Appellant explained that she would never put children at risk or cause any harm, citing an incident from May 2019 to demonstrate that she would always take appropriate safeguarding action. She referred to the role she is fulfilling as a nanny to two parents and the impact the suspension is having on their ability to work as front-line workers in the current pandemic.

Parents A and B are both registered nurses and single parents. They advised that they have no difficulties with the Appellant's services – in fact, she performs an invaluable role for both of them to ensure they can attend work while their children are looked after by the Appellant. Both made clear that the impact of the Appellant's suspension means they are at real risk of losing nursing work.

26. As of 14 November 2020, the Appellant submitted that she continued to look after the child of a single parent who is unable to afford to pay for childcare without support, so the Appellant is doing this for free. The Appellant's points, broadly, are:

- Ofsted breached her Article 8 rights (right to respect for one's private and family life) through two phone calls and a visit in September 2020.
- Intimidation from Ofsted relating to a visit on 6 October 2020.
- Unnecessary email correspondence on 22 October 2020, which was incompetent and an abuse of power.
- The unfair nature of Ofsted's time limits for response during the Notice of Intention process, in light of the fact that the Appellant had been deemed unfit for work between 21 October and 4 November 2020.
- Misleading information regarding suspension and her right to work.
- The impact of the suspension on two parents for whom she provides nannying services.
- Clarification of the reason for the business' registration at her home address – she helps with the accounts and wishes to be a good friend.
- She is in the process of owning the house in which she currently resides, understanding now that she does not currently own the house.
- She continues to be suitable to work with children as if she wasn't, she would not have been registered by Ofsted in the first place. The Appellant accepts that she made a mistake and she will never do it again. She considers that she has learnt from her mistakes and past experiences.
- It was not her intention to be dishonest with the agency to which she applied – she did not think it was necessary to discuss her history with Ofsted and it did not come up in the conversation.
- She feels targeted and victimised by Ofsted.

The Tribunal's conclusions with reasons

27. We have considered both the key grounds relied on by the Respondent in its notice to the Appellant on 23 October 2020, and the elaboration of them contained in the Response to the appeal, together with their evidence, and have considered what the Appellant has said about them in response. We remind ourselves that at this stage we are not making findings of fact, and that the threshold set by regulation 9 is quite low. We note that the regulatory process has concluded with a decision to cancel the Appellant's registration as of 11 November 2020. The Appellant will need to consider the decision carefully and make a decision regarding an appeal. The Respondent's position remains the same, in light of this development – that there is a reasonable cause to believe that children may be harmed.

28. We have accepted the evidence of Ms Hearn in her two witness statements and accompanying documentary exhibits. We noted the fact that the Appellant applied for registration as a childminder in May 2020 and she does not appear to have been open with her regulator as part of that process. This is highly relevant to a more general assessment of her integrity and we concluded that it was appropriate for the Respondent to call into question her voluntary registration. We considered carefully the incidents arising out of the Appellant's application to register as a childminder – from 11 May 2020 until your withdrawal of 20 October 2020. We also considered the incidents arising out of the Appellant's voluntary registration, from 14 August 2019 until the decision of 11 November 2020.
29. We conclude that there is sufficient evidence to support the ground that the Appellant has, at best, provided incomplete information to Ofsted during the second registration process. At worst, the actions could be reasonably viewed as dishonest and misleading. We are not engaging in a fact-finding exercise today, but a risk assessment and we have concluded that there is sufficient evidence to call into question the Appellant's honesty and integrity to such an extent that children in the Appellant's care may be at risk of harm.
30. We noted that the Appellant accepts the incident of 20 November 2019, which led to the issue of an enforcement notice. We took into account the fact that the Appellant was dishonest with her regulator when directly asked if she was providing childminding services at her home address, on two occasions. On 14 September 2019, she provided a dishonest account in writing and on 5 November 2019 in a phone call in response to Ofsted's concerns. The two dishonest accounts, when viewed in the context of the observations of the unannounced visit of 20 November 2019 represent clear regulatory breaches. There is also sufficient evidence to support the conclusion that the Appellant was being obstructive during the unannounced visit and there were clear breaches of acceptable childcare practice. When viewed alongside the evidence as to honesty and integrity, it provides further evidence to support a conclusion that the appellant may expose minded children to risk of harm.
31. It is significant that the Appellant subsequently provided a misleading account to Ofsted regarding her application to register with @homechildcare. She explained that the application was not completed due to distance from home. However, on that same day Ofsted received written confirmation from @homechildcare that they declined to register the Appellant. The agency considered that it had given the Appellant several opportunities to be honest about her regulatory history and the failure to disclose the enforcement notice. We concluded that this was highly significant as by this stage, the Appellant had gone through the consequences of the unannounced visit of November 2019 and the issuing of an enforcement notice, as a result of a failure to be honest with her regulator. She had then gone through an application process with an agency which was rejected because of a further failure to be honest. Finally, she then failed to be honest with her regulator as a consequence. The evidence to support this series of events is sufficiently clear to demonstrate a pattern of misleading accounts from the Appellant which call into question her integrity. The apparent dishonesty is made all the more serious by the

cumulative nature of it – extending to almost one year and over a number of occasions.

32. We carefully considered the Appellant's explanations for the pattern of events above, which represents new material to the Tribunal in exercising our appeal function. We concluded that the explanations demonstrate limited insight from the Appellant and do not give us confidence that the risk of repetition is low. This is highly relevant to the test we have to apply – that we have a reasonably held belief that the Appellant, in providing childcare to any child may expose a child to risk of harm. There is a pattern, over a period of approximately one year and on numerous occasions, of the Appellant failing to act with honesty and integrity – to such a degree that we cannot conclude that the Appellant would act with honesty and integrity if an incident involving a child in the Appellant's care required reporting or escalation, for example.
33. We have also taken into account the evidence from Ms Hearn about the additional occasions where there has been a failure to be open and consistent in accounts given in response to standard inquiries undertaken by Ofsted as part of its assessment of the registration application dated 20 May 2020. There is sufficient evidence to support the allegation that you provided different accounts of your employment history to Ofsted, compared to the account held by the Official Receiver. You have indicated that this issue has now been resolved, but we did not have any supporting evidence. The same concerns exist in relation to accounts you have provided relating to the ownership of your home, the nature of the business 'Brite Little Buttons Ltd' and your relationship to it and the profile owner for 'Britechildminder' on childcare.co.uk. On each of these areas of concern, raised with you by Ofsted, there is sufficient evidence to support the allegation that you have provided inconsistent and misleading information.
34. We took into account the proportionality of the suspension. We noted that the ongoing suspension will impact, to some degree, on childcare arrangements for Parents A and B, but we took into account that the Appellant is still able to carry out childcaring without registration. We note that this will have a financial impact on parents and carers who choose to use the Appellant's services, but it does not represent a total prohibition on her ability to work in her chosen field. In light of the nature of the allegations, we consider that potential exposure to risk of harm outweighs the specific impact on the Appellant and the indirect financial impact on Parents A and B.
35. We have kept in mind the low threshold of the test at regulation 9 of the 2008 Regulations. We have concluded that there is sufficient evidence to support the conclusion that the Appellant has failed to act with integrity and honesty over a period of approximately one year and on numerous occasions. We have also concluded that the Appellant may not comply with key safeguarding requirements that she does not agree with or which she may perceive as detrimental to her, and may not be truthful with the regulator about them during an investigation. As a result, we concluded that children in her care may be exposed to risk of harm.

36. It is not for us to decide where the truth of any of these assertions lies, but we consider that this provides more than sufficient evidence to support a reasonable belief by the Respondent that a minded child may be at risk of harm.
37. Looking at the matters offered by the Respondent in support of the suspension, and the decision of 11 November 2020, we are satisfied that this period of suspension remains necessary and proportionate.

Decision

We therefore direct that the suspension imposed on the Appellant pursuant to a decision dated 23 October 2020 shall continue to have effect until 3 December 2020.

The Appeal is dismissed. The Tribunal confirms the Chief Inspector's suspension of the Appellant's registration.

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

Date Issued: 19 November 2020