First-tier Tribunal Care Standards

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

2024-01040.EY
Neutral Citation Number: [2024] UKFTT 00611 (HESC)

Video hearing via Kinley
On 10, 11, 12 and 13 June 2024

BEFORE:
Tribunal Judge Siobhan Goodrich
Specialist Member Mike Cann
Specialist Member Dr David Cochran

BETWEEN:

NICOLA MARIE MICHAEL

Appellant

- and –

OFSTED

Respondent

DECISION AND REASONS

The Appeal

1. This is an appeal by Ms Michael against the decision made by the Respondent on 9 January 2024 to refuse her application for waiver of disqualification from providing childcare in a domestic setting requiring registration under Chapters 2, 3 and 4 of the Childcare Act 2006 ("the Act").

The Parties

2. The Appellant has worked in various childcare settings in different roles since she left school some 20 years ago. In 2015 she married Mr Humphries. She was first registered to provide childcare in a domestic setting by Ofsted in March 2017. In short, the Appellant was a child minder using her own home. The full history regarding registration is in issue and will be considered hereafter.

3. The Respondent is the Office for Standards in Education, Children's Services and Skills (Ofsted) and is the statutory authority responsible for the registration and regulation of those who wish to provide childcare in a domestic setting.

Restricted Reporting Order

4. The Tribunal made a restricted reporting order under Rule 14(1) (a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents or matters likely to lead members of the public to identify any children to whom reference may be made so as to protect their interests.

Background

5. The immediate background to the decision under appeal is that in September 2023 the Appellant applied to Ofsted to be registered as a childminder. Her husband completed the necessary form as a family member. Ofsted received the DBS certificate for Mr Humphries in November. The Appellant was advised by Ofsted on 24 November 2023 that she was disqualified by association because in 2003 Mr Humphries had been convicted of the offence of Actual Bodily Harm (ABH) contrary to Section 47 of the Offences Against the Persons Act 1861. She was directed to the relevant guidance on how to complete a waiver application form.

6. The Appellant submitted her application for a waiver of the disqualification the very same day. In summary in her application the Appellant referred to the 2003 ABH conviction which had occurred when Mr Humphries was 16 years old. She said that his juvenile supervision order, where he did not harm anybody, should not prevent her from being registered with Ofsted. She explained in detail how she loved her work and was loved and respected by the families she worked for. She said that Mr Humphries is not a risk but a loving and caring person. She had never over 12 years seen him get violent or aggressive ever. She attended an interview regarding her waiver application on 14 December 2023.

The Decision under Appeal

7. The reasons that the Respondent decided not to waive the disqualification on 9 January 2024 included that the Appellant has not acted with honesty and integrity. The entirety of the letter needs to be read in full context. Suffice to say that reliance was placed on the following, amongst many other matters. The Appellant had told the inspectors that she was aware of the offences that Mr Humphries has been convicted of between 2015 and the present date. When asked why these had not been disclosed in the application forms to Ofsted she told the inspectors that she had hoped they would not show on his DBS certificate. The Appellant and Mr Humphries had also denied that he ever

been involved in any other altercations or acts of aggression. The Appellant had maintained at interview that Mr Humphries had lived with her since 2022 which was inconsistent with the information provided in the application. She admitted later in the interview that Mr Humphries had been living with her since 2015. When asked about what she had or had not told Rutland Agency the Appellant said that she was scared that if they found out about the drink driving it would mess up her work. This indicated she had made a conscious decision to be dishonest.

The Appeal

8. In her notice of appeal the Appellant explained what she was seeking. Amongst other matters she said this mistake/misunderstanding should not end her long-standing career. She would be happy for conditions to be put on registration. She said that it would be nice to claim compensation for stress, anxiety, loss of earnings, hardship and damage to her reputation. She has apologised profusely for her mistake, so an apology from Ofsted would be appreciated.

The Response

9. The Respondent contends that Ofsted is unable to consent to waive the Appellant's disqualification due to genuine concerns about her honestly and integrity and the risk to children. Trust is critical for someone who works or wishes to work in childcare particularly in a domestic setting when she would be working alone, and therefore, unsupervised. It is Ofsted's case that the Appellant has not acted with honesty and integrity in past and current applications to Ofsted and that she could not be trusted to operate in an open and honest manner with Ofsted in the future.

The Legal Framework

10. The circumstances that give rise to disqualification are set out in the Childcare (Disqualification) and Childcare (Early Years Provision Free of Charge) (Extended Entitlement) (Amendment) Regulations 2018 ("the 2018 Regulations"). In this case the disqualification by association arises because Mr Humphries has a conviction for assault occasioning actual bodily harm, and he lives in the same household as the applicant who seeks registration to provide childcare in a domestic setting.

The Enforcement Policy

11. When making the decision on whether to waive disqualification Ofsted follows its decision-making process as set out in its Early Years Enforcement Policy. This involves considering a range of factors including the risk to children; the nature and severity of any offences; the age of any offences or orders; repetition of any offences or orders or any particular pattern of offending; the notes of any interviews with the disqualified person, applicant for registration or registered person including their explanation of and attitude to the disqualifying event; any

other information available from other authorities such as the police or local authority, and children's services department; and any mitigating circumstances given.

The Hearing

12. The appeal was listed to be heard over four days between 10 and 13 June 2024. It was originally by way of a Hybrid hearing but the mode of hearing was varied by consent to a full video hearing after the Appellant had been granted permission for her and her witness(es) to attend by video only.

13. The Appellant represented herself. She attended the hearing throughout and was supported during the hearing by her husband, Mr Humphries.

14. At the outset of the hearing the judge checked that the Appellant had before her the main bundles which consisted of two lever arch files comprising 2375 pages in total (in pdf format) and some four supplementary bundles, two of which were duly paginated and labelled as follows: "Supplementary Bundle for Late Evidence" and "Second Supplementary Bundle for Evidence". Having identified by reference to pagination that the Appellant had the same hard copy and properly paginated supplementary bundles as the panel, the judge directed that the "Supplementary Bundle for Late Evidence" should be marked and identified as the "First Supplementary Bundle for Late Evidence".

15. Before hearing submissions regarding the outstanding application regarding late evidence, the judge explained to the parties the legal principles regarding the nature of an appeal against the refusal to waive disqualification. The judge explained the burden and standard of proof. She explained that the panel was concerned with finding of facts relevant to the exercise of discretion to waive disqualification. This concerned the allegations regarding dishonesty and lack of integrity raised by the Respondent. It was no part of the Respondent's decision making that the Appellant lacked the skills or competence to be a childminder.

16. The judge referred also to the overriding objective. She explained to the Appellant that if she needed any further explanation and/or a break and/or time to consider evidence given she need only ask.

17. The panel monitored the Appellant's ability to participate carefully. During the hearing there were occasions when the Appellant appeared to be stressed and the panel decided of its own motion to have a break. The Appellant/Mr Humphries also requested breaks on occasion which were granted.

18. There were no significant issues regarding that quality of the video or sound or connections during the hearing.

Preliminary Issues

19. The background is that Judge Khan had, with the agreement of the Appellant, granted the Respondent's application to adduce evidence supplemental witness statements dealing with the attendance at the Appellants home on 21 and 22 May 2024 when the Appellant was found to be providing a childcare service when unregistered and disqualified.

20. By a new application dated 5 June 2024 the Respondent applied to adduce yet further evidence from three parents: Natalie Leggatt, Katie Spriggs and Nicola Rees, and a third witness statement from Mrs Wride. This was resisted by the Appellant, essentially because she did not think it fair that Ms Rees who was going to be a witness for her, was now to be a witness for the Respondent.

21. We considered all aspects of the overriding objective. We considered that the new evidence related to the recent evidence which had already been admitted by agreement, dealt with evolving circumstances, and was highly relevant to the exercise of discretion to waive disqualification. The fact that the very recent evidence was now in witness statements was preferable to the Appellant being taken by surprise by supplemental updating oral evidence and/or in cross examination. We decided that it was in the interests of justice and in the interests of the overriding objective that the evidence be received. The judge reassured the Appellant that she was aware from the correspondence that she had been preparing her questions for witnesses. if she needed some more time to prepare her case and her questions for witnesses regarding the new evidence, it would be granted. The Appellant said that she did not.

Other applications

22. Other applications were made during the hearing. It is convenient to deal with the decisions we made now.

23. After the evidence of Mrs Leggatt and Mrs Spriggs was heard the Appellant said that she was disturbed by the facial expressions of some people attending the hearing. She referred to Ofsted witnesses in general, Mr Saigal and parents. It became clear to us from the Appellant's submissions that it was really the presence/behaviour of parents at the video hearing that concerned her.

24. The judge drew the Appellant's attention to paragraph 26 of the Rules. She explained that whilst there is a presumption in favour of open justice this is capable of being displaced. She referred the Appellant to paragraph 26 and in particular subparagraph (5) of the Rules. The panel then rose so that the Appellant might consider how she wished to frame her application in the context of paragraph 26. When the hearing resumed the Appellant submitted that the parent witnesses should be excluded from the hearing and she relied in particular on paragraph 26 (5) (b) and the power of the panel to exclude: "any person whose presence the Tribunal considers is likely to prevent another person from

giving evidence or making submissions freely" The Appellant's ultimate submission was to effect was that "*either they go or I go."*

25. Having heard submissions from Mr Saigal we retired to consider our decision which we then announced, reserving our full reasoning which we now give.

26. We considered the overriding objective and, in particular, the need to facilitate a fair hearing. On the one hand the Appellant contended that she was inhibited from presenting her case because she was put off by the facial expressions of various people. We emphasise that the panel did not see any evidence of inappropriate facial expressions by anyone or any evidence that the Appellant was unable to present her case. The Appellant came across as assertive. Our focus had inevitably been on the witness and the person asking questions, and we had seen nothing untoward in the expressions of anyone attending which were, in any event, in very small "thumbnails". However, that is not to say that the Appellant had not seen something that had made her feel uncomfortable.

27. The principle of open justice is a bedrock principle of very considerable importance to the administration of justice. The presumption is in favour of hearings in public. The Appellant's position is that it is in the interests of justice that parent witnesses (as members of the public) should be excluded from continuing to attend the hearing on the basis that she will be inhibited in giving of her evidence by their presence. We were not persuaded that the presence of parent witnesses would be likely to prevent the Appellant from giving evidence or making submissions freely. However, taking a pragmatic approach we decided that a proportionate way to reconcile any potentially competing interests was to direct that parent witnesses to turn off the video camera on their devices.

28. At a later stage a parent witness entered a comment in the onscreen message facility provided in a CVP hearing. Dr Cochran noticed this and brought the fact that this had occurred to the attention of the panel. The judge arranged that the comment was preserved and bought to the attention of both parties, but without the judge or Mr Cann having been shown it. The judge informed the parties that Dr Cochran considered that he was able to put the contents of the message from his mind. A break was arranged to enable to parties to consider their positions and to liaise.

29. When the hearing resumed Mr Saigal said that the parties were in agreement that the fact that the comment by a witness had been posted did not pose any risk to the fairness of the proceedings: the comment was, essentially, nothing new. The Appellant said that she did not quite agree. She submitted that the posting of the comment supported her earlier position that all parents should be excluded from the hearing.

30. We considered this as a renewal of the Appellant's earlier application. We were not persuaded that what had transpired justified the exclusion

of anybody from the hearing or any other departure from the principle of open justice. In our view it was appropriate to warn parents in attendance that the purpose of the message box facility was for communication about the video hearing itself, and no further messages should be posted.

Evidence and Submissions received after the hearing

31. The evidence and submissions were completed on 13 June at about 4.15pm and the hearing was adjourned for deliberations. The Appellant has since sent a large number of emails to the Tribunal administration. These appeared to the judge to be a repetition of many points the Appellant had made in her written evidence and during the hearing. The judge caused an email to be sent to the Appellant explaining that the evidence and submissions were completed on 13 June 2024. The Appellant sent further emails. One of the many emails received on 5 July 2024 suggested that the Appellant was seeking to rely on "new" evidence/documents from social services (attached by way of a large number of screenshots) but without having made a formal application on notice to the Respondent explaining the significance of the screenshots to the issues to be decided by the panel and/or why it should now be received. Yet further emails were received on 9 July 2024.

32. We decided that the fairest and most efficient course was to consider the emails from the Appellant for their own sake to see if they raised any new evidence that might conceivably justify re-opening the evidence and submissions. Having considered the emails we decided that it was unnecessary to seek representations from the Respondent. The points that the Appellant seeks to make were covered in ample evidence before us and/or are simply not relevant to the issues we have to decide. This is a case which had been carefully case managed on numerous occasions prior to the hearing so as to enable the Appellant's full participation. There comes a time when the evidence must be regarded as complete in the interests of finality. In our view that time was reached when submissions were completed on13 June 2024.

33. Lest we are wrong in that view, we should go further. In our view the emails sent by the Appellant do not materially add to the evidence before us and/or are not relevant. The view of social services as to Appellant's care of her own child is not relevant to the issue we have to decide which, at its core, is whether the Appellant can be trusted to be registered by Ofsted as a childminder for other people's children.

The oral evidence

34. We heard oral evidence as follows:

For the Respondent:
Mrs Dada: the Local Authority Designated Officer for Warwickshire County Council

Mrs Lisa Bennett: Early Years Regulatory Inspector (EYRI)
Mrs Yvonne Johnston, EYRI
Mrs Kamaljit Jandu: Regulatory Inspection Manager (RIM), and the decision maker
Mrs Sally Wride, Senior Inspector

Mrs Nicola Leggatt, parent
Ms Katie Spriggs, parent
Ms Nicola Rees, parent

For the Appellant
Ms Michael
Mr Humphries

35. The statements of witnesses are a matter of record and were adopted as the main evidence in chief. Witnesses answered some supplemental questions before being cross examined on oath by the other party. We will not set out all the oral evidence given but will refer to parts as necessary when giving our reasons.

The Burden and Standard of Proof

36. In an appeal against the refusal of a disqualification waiver it is for the Appellant to satisfy us that a waiver should be granted based on the evidence as at today's date. The standard of proof is the balance of probabilities.

37. However, when a party makes an allegation, that party must prove that which is alleged on the balance of probabilities.

The respective position of the parties

38. By way of overview, the Respondent contends that a waiver of the disqualification by association should not be granted because the Appellant cannot be trusted to be open, honest and transparent with the Regulator. Amongst other matters the Respondent asserts that the Appellant: did not tell the truth regarding her husband's criminal record and suitability when applying for registration in late 2016; hid her husband's presence in the home from which she childminded; did not tell the truth regarding her husband's criminal record and suitability when applying for a waiver in 2023; lied in her responses to Inspectors during the waiver interview in a number of respects; operated as a child minder when she knew that she was disqualified; lied to some parents about whether she had permission to operate as a child minder; was involved in the deliberate manipulation of an email from the Tribunal administration so as to produce a false document which was sent to some parents to persuade recipients that the Tribunal had authorised the Appellant to continue to childmind pending the appeal hearing.

39. In very general terms the Appellant's case is that: she did not know of the conviction of Mr Humphries for ABH in 2003 and some other convictions until the DBS certificate arrived in late 2023; Mr Humphries' convictions were/are not material to her registration because he has nothing to do with her business; she is an excellent childminder as shown by parent testimonials and other evidence; she has worked long and hard over 20 years to establish her career; it is unreasonable and/or unjustified and/or disproportionate not to waive the disqualification so as to enable her to work as a childminder in her own home. She has been treated unfairly by the three inspectors who work in the Birmingham Office. She has been shown no empathy or understanding by Ofsted. She would abide by conditions such as a requirement that Mr Humphries is not present when childminding takes place at the home.

Our Consideration of the evidence and Findings

40. It is common ground that, standing in the shoes of the Regulator, we are required to determine the matter afresh and to make our own decision on the evidence as at today's date.

41. Subject to fairness, we can consider any new information or material that was not available at the date of decision which is relevant in our "de novo" decision-making. It is, for example, open to any appellant in any given case to rely on evidence to show that the facts and circumstances were not as alleged and/or to contend that opinions or views reached were wrong and/or mistaken and/or unjustified/unreasonable and/or that the issues have since been addressed and/or that, whatever the past, he/she now has insight into the core importance of honesty and integrity.

42. In other words, it is open to any appellant to argue that, whatever past facts may or may not be established he/she should be granted a waiver today. Conversely, subject to farness, it is open to the Respondent to rely on evidence that has arisen since the decision which supports that a waiver should not be granted.

43. The redetermination in this appeal includes consideration of the evidence provided by both sides in this appeal as well as the oral evidence which has now been tested in cross-examination. We have considered all the evidence and submissions before us with care. If we do not refer to any particular aspect of the evidence it should not be assumed that we have not taken all of the evidence or submissions into account.

44. It is not necessary for us to make findings on every dispute between the parties: our focus is on the admissions made and our findings in respect of the main matters in dispute. We remind ourselves that the party who makes an allegation bears the burden of proving that allegation on the balance of probabilities. The ultimate burden is on the Appellant to satisfy us that a waiver should be granted.

45. We find that:
    a) The Appellant was registered as a childminder with Ofsted from 10 March 2017 until 19 May 2021.
    b) In her application for registration made in late 2016 the Appellant gave her address as 4 Vicarage Lane, Harbury, Leamington Spa, CV33 9HA and stated that she had lived at this address since 4 September 2016. She also provided details of other addresses in the previous five years.
    c) In Section I of the application form ("the form") the Appellant declared that the only person living with her was her child. In the same section she was asked *"Are there any other people living or working on the premises where you intend to provide childminding (aged 16 years or over), but not looking after children?"* to which she answered *"No".*
    d) In Section J of the form, the Appellant was asked *"Do any of the circumstances listed in the guidance on suitability and disqualification apply to you?"* to which she answered *"No".*
    e) To a further question in Section J when asked: *"Are you aware of any other circumstances that might affect your suitability to work with or be in regular contact with children?"* she again answered *"No".*
    f) In Section K the Appellant signed a number of declarations including that all the information she had given in the application form for registration was true to the best of her knowledge and belief, and a separate declaration that she understood that it is an offence to make a statement which is false or misleading in an application for registration.
    g) On the basis of the information provided the Appellant was granted registration on the Early Years Register, the compulsory part of the Childcare Register and the voluntary part of the Childcare Register at the address provided.

46. Following registration the Appellant's service was inspected on 9 July 2019 and 22 November 2019 and on both occasions was judged *"inadequate"*. As already indicated the Respondent's decision to refuse to waive disqualification was not based on competency or performance issues. The sole significance is that the fact of two "inadequate" judgements led to the withdrawal of funding by the Local Authority. On 21 April 2020 and 17 July 2200 concerns were received from the local authority relating to the Appellant's persistent approach to contacting the local authority about funding and raising concerns about her communication, volume, emotional volatility and mental health.

47. During a regulatory visit on 5 August 2020 the Appellant was again found to be in breach of requirements of the Early years foundation stage (EYFS) statutory framework, namely staff: child ratios. In September 2020 further concerns were received from the local authority about the Appellant's "rapid" and "relentless communication" to the local authority and "escalating behaviour".

48. It was against this overall background that the Appellant resigned her own registration with Ofsted in May 2021 and became registered as a childminder with a childminding agency called Rutland Early Years Agency Limited (hereafter "Rutland") on 15 May 2021.

49. On 29 June 2023 Ofsted received an anonymous concern. It is now common ground that this was from the Appellant's aunt. Her comments included:

> *"I would like to report Nicola Michael….*
> *I have just discovered that she has knowingly failed to declare Andrew Humphries (eys?) since starting her business, who is her husband and has a criminal record. He was convicted after several arrests and served time in prison and had his licence suspended…He works from home every day, he does not travel to a workplace and lives there. I am aware that during her most recent inspection, Friday 16 June 2023 she sent him out of the house for 4 hours with her 13 year old daughter who is a vulnerable young person with adhd and autism, to supervise him and in order for the inspection to take place. Which resulted in him going out getting drunk and causing aggressive incidents locally in Southam over a two day period which I and several Southam residents witnessed…"*

This concern was passed by Ofsted to Rutland who launched an immediate investigation. The Appellant was suspended by Rutland pending a full investigation and a referral was also made to the Local Authority Designated Officer (LADO).

50. The records before us support that on 25 July 2023 a Position of Trust ("POT") meeting was convened by Mrs Dada, the LADO, and was attended by relevant professionals who decided that the allegations that the Appellant had failed to declare all adults that were living at her address whilst running her childminding business from her home address, and had withheld this information from professionals since 2017, were substantiated.

51. In this appeal the Appellant has disputed that a POT meeting ever occurred. The basis for this is that she says that she has since been told by social services personnel that they cannot remember being present and/or have questioned that a POT meeting was ever held/and/or have questioned the competence of the decision said to have been made.

52. We have considered all the documentary evidence and the evidence of Mrs Dada. She was a very impressive witness. She explained in detail the role of the LADO in general and the process that had been followed.

Her evidence accords with the panel's experience of best practice in such meetings initiated by the LADO. It also accords with the contemporaneous documents. We accept her evidence.

The Rutland Investigation

53. We did not receive any witness evidence from Rutland. The records made by that agency are, however, before us. These suggest that during the course of Rutland's investigation, and when informing her of the outcome of the POT meeting on 25 July 2023, the Appellant admitted that her husband Andrew Humphries had been living with her when she had applied to Ofsted for registration in 2016, and to Rutland in 2021, but she had failed to declare him as a household member as she feared that may affect her suitability to be registered. The record made is to the effect that the Appellant pleaded with Rutland to be allowed to now add Mr Humphries as a household member but it was explained that it was now too late. Her honesty and integrity had been called into question by the fact that she had failed to declare him at application stage or at any time after, and had actively denied that he was part of her household, or that he was her husband. This meant that she could not be trusted in the future and could no longer be registered with Rutland. Rutland's view was that the Appellant had breached a requirement of the EYFS and had done so knowingly, concealing a person that is likely to affect her suitability.

54. We are satisfied that the nature and quality of the records made by Rutland is such that we can attach weight to the records as reliable evidence of what the Appellant said at that time.

55. On 25 July 2023 Rutland issued the Appellant with a Notice of Intention to cancel her registration. This was followed by a Notice of Decision to cancel registration on 9 August 2023.

56. Following the POT meeting on 25 July 2023, a referral was made to the Disclosure Barring Service (DBS) resulting in the Appellant's DBS certificate being endorsed as follows:

> *"Warwickshire Police holds the following information which is believed to be relevant to the application of Nicola Michael born 25/02/1988 for the child workforce.*
>
> *On the 25.07.2023 Warwickshire Police representatives attended a Position of Trust meeting that was held in respect of Nicola Michael, following an anonymous referral that had been made to the Local Authority Designated Officer (LADO) that Nicola Michael had failed to declare all adults that were living at her address whilst running her childminding business from her home*

address.

During the Position of Trust meeting, all professionals in attendance at the meeting formed the view that Nicola Michael had withheld information from professionals since 2017.

On the 16.08.2023 Nicola Michael was issued with a cancellation letter by Rutland Early Years. This means that Nicola Michael is no longer able to offer childminding services with Rutland Early Years.

After careful consideration, we conclude that this information is relevant and ought to be disclosed to an employer, in this instance, because Nicola Michael is applying to be a childminder and was deregistered by the childcare agency due to her alleged dishonesty. Disclosing this information will allow potential employers to complete an accurate safeguarding assessment.
The interference with the human rights of those concerned has been considered and it has been determined that, in this instance, disclosure is proportionate and necessary.
Approved 17.11.2023"

57. A similar endorsement was made on Mr Humphries' DBS certificate.

58. The Appellant's case is that she did not conceal Mr Humphries' presence in the home from either Ofsted or Rutland. Her case, at least in part, is that the agencies have fabricated evidence/records and/or have confused information from social services about her previous partner with Mr Humphries. She has also said at various times that Mr Humphries was not living with her but would occasionally stay.

59. We have considered the Childcare Investigation Toolkit - Evidence report ("the Toolkit report") which purports to be the record of a visit made by an Ofsted Inspector to the Appellant in her home on 17 February 2017 and signed by "DS". The Appellant said that Mrs Deborah Saunders, an Ofsted Inspector, had visited her on an earlier occasion. She disputed that Ms Saunders (or any Inspector) visited her on 17 February 2017. This is odd because the outcome of the visit was that "DS" considered that the Appellant was suitable to be registered as a childminder and the Appellant was duly registered in March 2017.

60. The Appellant agreed that the background information recorded in the Toolkit report regarding her childminding background was true.

However, she said that key sections under the heading “LOE” (Lines of Enquiry) were a fabrication. It became clear that the parts she considered a fabrication purported to record the Appellant’s own account of: domestic violence by Mr Humphries; the impact of such incidents on her child; a description of an incident involving her child, Mr Humphries and a trampoline; a detailed description of the front window of her house being smashed by Mr Humphries and a trail of blood inside the house; her child living at her grandparents for a couple of weeks until she (the Appellant) “got him to leave the house”. The import of the whole section under the heading “LOE” was that there had been incidents of domestic violence since the last (Ofsted) visit where Mr Humphries had been out drinking and was verbally aggressive on his return. The account recorded was that, even without drinking, he was verbally aggressive and the Appellant had made a decision that he would have to leave and they would lead separate lives.

61. Pausing there, the Appellant’s evidence before us is that this record is a falsification and that the author has mixed up other information from social services regarding her former relationship with the father of her child (not Mr Humphries) who had been abusive to her. She said that the Trampoline incident was something that may have been relayed by her parents or her aunt.

62. In our view it is highly unlikely that this record is anything other than what it purports to be: a record made by “DS” i.e. Deborah Saunders, of what was said to her by the Appellant during the visit on 17 February 2017 when her suitability to be a registered child minder was being considered. It is simply not rational to posit that such material would have been recorded, and in such detail, unless it had come directly from the Appellant. It is also not rational or credible to suggest that the record of the Appellant’s account to DS regarding domestic violence relates to anyone other than Mr Humphries – about whose behaviour she spoke in terms of recent events, and from whom she claimed she was then separated. The record as a whole reads as a comprehensive and detailed account by the Appellant as to why Ofsted need have no concerns about her suitability on account of the domestic violence that she had described. The overall impact of the Appellant’s account as recorded is that she understood why her husband’s domestic violence impacted on her suitability but Ofsted need have no concerns because he no longer lived with her and would not live with her in future. In our view it is simply not rational or credible to suggest (as is implicit from the Appellant’s case) that Ofsted have subsequently fabricated such a record in order to support its refusal to waive the disqualification. We reject the Appellant’s account that this is a falsified record.

63. We find that the record dated 17 February 2017 reflects what the Appellant said to Ms Saunders when her suitability was being considered. The detail is important. This included: that the Appellant lived on her own (with her daughter): her husband now lived on a flat in Leamington but she did not know the address; she had no plans for him

to be part of their lives anymore; her daughter was her first priority and her childminding was the next priority. Importantly, she said *"he does not know where I live and does not have transport because he had been banned for 5 years from incident in 2014 so could not drive to the village".*

64. In her application in September 2023 the Appellant said that she lived at Vicarage Lane since 2015. In his separate application as a household member Mr H said the same. In evidence both said that the year was wrong and it should be 2016 rather than 2015.

65. The Toolkit record made in February 2017 plainly shows that the Appellant was, at the very least, aware of a driving ban for 5 years which she identified as having been imposed in 2014. When her suitability was being assessed she had indeed relied on the fact of the ban to suggest that her husband would not re-appear at her home. However, on their own evidence in this appeal, the Appellant and Mr Humphries had lived together since (at least) 2016. We find that Mr H was living with the Appellant at the time of the interview in Feb 2017 and had been living with the Appellant prior to that date.

66. In his application, under the section headed "Suitability" Mr Humphries was asked 'Are you disqualified from providing childcare for any reason listed in the criteria for disqualification under the Childcare Act 2006' to which he replied "No". To the question "Are you aware of any other circumstances that might affect your suitability" he also replied "No".

67. The form also asked him if he had any criminal convictions or cautions to which he replied:
"2 July 2019, DR30. Driving or attempting to drive then failing to provide a specimen for analysis. Outside on a road. Leamington Court. Driving ban and fine."

68. On 24 November 2023 DBS certificates for the Appellant and Mr Humphries were received. The DBS certificate for Mr Humphries showed that his antecedent history was far more extensive than he had stated on his application form and included a relevant conviction for the purposes of the Regulations.

69. The criminal convictions listed on Mr Humphries' DBS certificate are as follows. We include the recorded sentence in *italics.*

> 16 October 2003 - Assault Occasioning Actual Bodily Harm contrary to s.47 of the Offences Against the Persons Act 1861.
>
> 16 October 2003 - Affray contrary to s.3 of the Public Order Act 1986.
> *Sentenced to 12 months Supervision Order, 3 months Curfew Order, all concurrent plus compensation to the victim and costs.*

16 March 2015 - Failing to Provide a Specimen For Analysis (Driving or Attempting to Drive) contrary to s.7(6) of the Road Traffic Act 1988.
Sentenced to 12 months Community Order with Rehabilitation Activity and Programme requirement, disqualified from driving for 60 months, victim surcharge and costs.

22 October 2015 - Failing to comply with the requirements of a Community Order - Criminal Justice Act 2003 Sch.8.
Sentenced to pay a fine, order to continue and costs.

2 July 2019 - Failing to Provide a Specimen For Analysis (Driving or Attempting to Drive) contrary to s.7(6) of the Road Traffic Act 1988.
Sentenced to 12 weeks imprisonment, disqualified from driving for 60 months, victim surcharge and costs.

18 October 2019 - Being Drunk and Disorderly contrary to s.91(1) of the Criminal Justice Act 1967.
Sentenced to 12 months Conditional Discharge, victim surcharge and costs

30 October 2020 - Being Drunk and Disorderly contrary to s.91(1) of the Criminal Justice Act 1967.
Sentenced to pay a fine, victim surcharge and costs.

70. In his evidence Mr Humphries maintained that his limited disclosure of his convictions was not intentional and arose because he was awaiting the arrival of the DBS certificate. We do not accept that this explains the extent of his non-disclosure in the form. We recognise as a general proposition that someone who has a number of convictions may not recall all the detail regarding dates, precise details of offences and/or details re sentence etc. In our view anyone in genuine difficulty recording detail, and dealing with the application with appropriate candour, would have said something in the form to the following or similar effect: I have a number of convictions including one for assault as a juvenile, 2 for failing to provide breath specimens, 2 convictions for being drunk and disorderly – further details and explanation will be provided once the DBS certificate arrives. We do not consider that Mr Humphries' explanation that he was awaiting the DBS certificate is credible. We noted that he disclosed the 2019 offence only and failed to mention that he had been sentenced to 12 weeks imprisonment for that offence (of which six weeks was served).

The Waiver Interview

71. Much criticism is made by the Appellant and Mr Humphries regarding the conduct of the waiver interview on 14 December 2023. It is common ground that Mr Humphries' attendance had not been requested but he arrived with the Appellant. We accept Mrs Bennett's evidence that the

Appellant wanted Mr Humphries to be present throughout the interview. The Appellant and Mr Humphries contend that the Ms Bennett's record is incomplete and missed 80% of what was said. When asked, neither the Appellant nor Mr Humphries was able to describe the 80% content that they alleged was missing. We consider that the allegation made was vague and unsubstantiated. It appears to us overall that the criticism of the accuracy of the record amounts to a general denial of those parts of the interview that damage the Appellant's case.

72. We accept that Mrs Bennett made a contemporaneous note of the key parts of what was said by the Appellant and Mr Humphries. We find that the record she made was a genuine attempt to provide an accurate reflection of what was said. In our view, the reading of the record as a whole shows that Ms Bennett had been at particular pains to try and understand the Appellant's position and had exercised patience, as well as courtesy, when seeking to understand and explore the circumstances. We found Mrs Bennett to be a wholly credible witness. Her evidence was clear, cogent and straightforward.

73. Mrs Johnston was also present at the Interview and asked relevant questions. There was no significant challenge to Mrs Johnston's account of the interview. She too was a straightforward and credible witness.

74. in our view despite prevarication and equivocation the overall effect of the interview was that admissions were made. When asked why she did not disclose Mr Humphries as a household member in her previous applications for registration the Appellant sought to explain this away by claiming that she did not think she needed to disclose this information as he was not present in the house when minded children were in attendance. The Appellant was directed to the correct requirements and guidance that showed that all household members must be disclosed, regardless of the times that they are present. She then stated that she did not disclose the information 'because there would be stuff on his DBS- the driving offences'. She added 'I was scared if they found out about the drink driving that would mess up my work.'

75. We find that it is very obvious from what Mr Humphries said in interview that he had hoped that the DBS would not reveal the full extent of his criminal record.

76. The Appellant's evidence is that she was not aware of Mr Humphrey's 2003 conviction (in particular) until the DBS certificate arrived in late 2023. On the face of it is at least plausible that the Appellant may not have been aware of the 2003 conviction given that it had occurred long before she met Mr Humphries. Suffice to say that the Respondent has not satisfied us on balance that the Appellant was aware of the 2003 conviction when she applied for registration with Ofsted in 2016. The Respondent's concerns are not, however, focussed on this one conviction. It is, of course, the case that the 2003 conviction for ABH is the trigger offence for automatic disqualification by association.

However, consideration of a waiver application involves, amongst other matters, broad consideration of any mitigating circumstances and the extent of any offending. The simple facts disclosed by Mr Humphries' DBS show a number of offences from 2015 which appear to be drink related. His position is that he has never had a drink problem. In our view it was very clearly demonstrated by Mr Humphries responses to Mr Saigal's questions that Mr Humphries is in denial about the circumstances surrounding his offending. It is frankly startling that someone with a prior history (as per the DBS) of refusing to provide a breath specimen on two occasions, and who has actually been imprisoned for such an offence in 2019, and who has been convicted of being drunk and disorderly in public on 2 separate occasions some 12 months apart, does not see that alcohol has been a problem in his life.

77. Mr Humphries placed a great deal of emphasis on the fact that he sadly suffers from a blood disorder which means that any blow to his head could be fatal. We do not doubt that this is so. However, what is startling is that the implication of the drunk and disorderly convictions is that, notwithstanding his medical condition, Mr Humphries has been drunk and out of control in public. This appears reckless given his medical condition. Indeed, when asked in the interview what evidence had been presented of disorderly conduct he simply said that he had too much to drink and had been found on a road behind the Coop "having banged his head".

78. In her oral evidence the Appellant supported Mr Humphries' position that he has never had a problem with alcohol and had never been violent towards her. The problem with this evidence is that it flies in the face of the Appellant's position as documented in February 2017 when she succeeded in persuading Ms Saunders that Mr Humphries was not part of her life because she had, indeed, recognised that his drinking and violence were a barrier to her being judged suitable to be a childminder in the home. We find that the Appellant 's application in 2016/2017 was based on the lie that the Appellant lived on her own. Both the Appellant and Mr Humphries have suggested that he was living away. The Appellant also relied on her claimed interpretation of the guidance issued by Ofsted regarding occasional visitors. We find that the Appellant knew full well that the presence of her husband was a problem for her application. That is why she told the lie that she was lived on her own.

79. The overwhelming impression created by the evidence of the Appellant and Mr Humphries is that great effort has gone into creating a joint narrative. However, that narrative is not consistent with past records, and there are very many internal inconsistencies. In our view no real reliance can be placed on the evidence of either the Appellant or Mr Humphries because they are not credible witnesses. It is of particular concern that both the Appellant and Mr Humphries appears to be in complete denial of his offending, and the pattern of offending which, we find, was plainly related to alcohol use. In our view in the interview Mr Humphres showed that he took no real responsibility for his offending or the risks posed by

his behaviour.

80. We should say that we considered the recent letter from the Appellant's aunt produced by the Appellant. We do not consider that this amounts to a retraction regarding the concerns that she had raised with Ofsted. In our view the concerns she raised were well-founded and she was right to have contacted Ofsted.

81. We noted the letters from the Appellant's family and friends as well as all the supportive evidence from the parents whose children have been minded by the Appellant. There are obvious limitations to the weight to be afforded to such evidence.

The Ofsted visits: 21 and 22 May 2024

82. As the result of information received, Mrs Johnston and Mrs Jandu attended the Appellant's home on 21st May 2024 and on the following day.

83. The Appellant complains bitterly that Mrs Johnston and Mrs Jandu had been involved in the decision not to waive disqualification and maintains that this therefore presented some kind of conflict. She contends that both visits were an attempt to gather further evidence and that this was somehow unfair. In our view there is no substance to her complaint: Ofsted had no choice but to send inspectors to find out if the Appellant was indeed operating as a child minder when unregistered and disqualified. If true, this was a criminal offence. We do not consider that the decision to send Mrs Johnston (who had met the Appellant before) and Ms Jandu, the decision maker, can reasonably be criticised. In our view this complaint is an attempt by the Appellant to deflect attention from the real issues. The simple fact, as admitted in evidence, is that the Appellant had, indeed, been providing childminding whilst unregistered and disqualified.

84. The Appellant makes other complaints about the Inspectors' conduct on 21st and 22 May 2024. She has produced some 5 video clips of doorbell evidence. She suggests that one of these videos shows that an inspector "hid" her Ofsted badge. In our view one video shows that whilst waiting for the door to be opened an inspector straightened her jacket under which her badge was hanging on a lanyard around her neck. In our view the suggestion that this video supports that the inspector "hid" her badge is fanciful.

85. The Appellant also relies on a video clip which shows the Appellant ushering out a parent and child. The Appellant suggests that this shows that she was assaulted by Mrs Johnston. In our view the video does not support this at all.

86. We bear fully in mind that these videos are extremely short snapshots of events. When asked about her allegation of assault the Appellant said

that Mrs Johnson had pushed her and also that the inspectors had banged on the garage door. The Appellant appears to believe that because she has made a complaint to the police, who have apparently said they will investigate an allegation of common assault against the Ofsted inspectors, and who have given her a document that appears to be a standard Victim Support leaflet, this somehow proves her allegation of assault. In our view it does not.

87. We find that the Appellant's attitude on 21 and 22 May 2024 was that she was entitled to operate as a childminder because she is right and Ofsted are wrong. Her attitude in May 2024, and at the hearing, was that the Inspectors had no right to attend or to issue an enforcement notice to her. The simple fact is that the Appellant knew that she was unregistered and disqualified by association. She said in evidence that she would act in the same way again.

88. Part of the Appellant's case has been to assert that several agencies such as Social Services, the Information Commissioner and/or Warwickshire County Council support her version of events and/or her complaints about Ofsted. No direct evidence has been provided from such agencies to this effect.

The use of the email purported to have been issued by the Tribunal

89. The Appellant was warned that she need not answer questions about the email in issue because of her right not to incriminate herself. The email in question appeared to be from a member of the Tribunal administration. It stated as follows:

> *"Please find this email as an order with your temporary opening commencing on the 11th Mrch. Given by Judge Khan and the tribunal service.*
> *You are reminded of all the conditions on opening as we discussed and it will be until further notice."*

The Appellant chose to answer questions. She said that a parent had suggested and organised the doctoring of a Tribunal email. In our view it must be the case that the Appellant was directly involved in finding/selecting a past email from the Tribunal administration in her own inbox. She declined to identify the parent she said was involved. She agreed that she had provided the forged email to three parents to support that she was allowed to operate as a childminder by the Tribunal. This was false. In our view the Appellant's attitude to this matter was striking. She still considers that the use of this email was justified because she was "desperate".

90. We should say that we found Mrs Leggatt, Ms Spriggs and Ms Rees were reliable witnesses and we accept their evidence. They each described the impact on them of the Appellant's conduct. The evidence of Ms Rees was particularly poignant because she was a friend and support to the Appellant, and was to have been a witness called by her

until events unfolded regarding the false email which led Ms Rees to contact Ofsted. We found her to be a particularly measured and balanced witness.

Overview

91. We bore in mind the decision in **Wingate and Anr v SRA**; **SRA v Malins** [2018] EWCA Civ 366 where Lord Justice Rupert Jackson said at [102]:

> *"Obviously, neither courts nor professional tribunals must set unrealistically high standards, as was observed during argument. The duty of integrity does not require professional people to be paragons of virtue. In every instance, professional integrity is linked to the manner in which that particular profession professes to serve the public…."*

In our view the importance of honesty and integrity in this appeal goes to the issue of whether the Respondent can reasonably trust that the Appellant has been, or will in the future be, open and honest with the regulator. The issue of trust has to be seen in the context that the Respondent has to be satisfied that a registered person, entrusted with the care of young children, is someone who can be trusted to be honest, open and transparent in all circumstances. To give one example, situations can and do arise in childminding where a registered person must report an incident or event in order to allow appropriate investigation/risk assessment and so safeguard children from the risk of harm. This obligation may well arise in circumstances where the facts that need to be reported by the registered person may very well adversely impact upon their own reputation and/or business interests. It is essential that the regulator (and therefore the public) can have confidence that childminders registered to care for children in a domestic setting can be trusted to tell the truth, and to place the importance of complete candour above their own interests so that all appropriate steps to safeguard children from the risk of harm are taken.

92. In making our decision we stand in the shoes of the Respondent, applying the law to our findings, and through the lens of the Respondent's duties in respect of registration and regulation, and as informed by the published guidance. Having had the opportunity to see and hear the evidence tested in a full judicial process we do not consider that the Appellant can be regarded as someone who, even today, can be trusted to act with honesty and integrity. In our view her continuing mode in defence of her position is to deny and attack. She presents herself as a victim and alleges that Ofsted have bullied her when, in reality, the source of her misfortunes is her own behaviour and the choices she has made. She abused the trust of parents by her use of a false email to the effect that the Tribunal had agreed to her operating pending appeal. She has no insight at all into the effect of her behaviour on others. She has referred to remorse. It was clear to us that what she refers to as remorse is limited to the consequences for her, her business and her own interests. In our view she is not sorry for any of her

behaviour and she has learned nothing from the entire process. We consider it likely that, faced with any challenge regarding her responsibilities as a child minder, it is very likely that she would behave in the same way again. It is likely that she would deny or obfuscate facts that may impact upon her registration or her business. We saw no real evidence of any feeling of regret or shame for the harm the Appellant had inflicted on others in her determined pursuit of her own interests and what she sees as her rights. In our view the Appellant has no understanding of the impact of her behaviour on the rights of others.

93. The Respondent has referred to the Appellant's behaviour as being "unprecedented" in Ofsted's experience. We accept the tenor of this categorisation and will explain why below.

94. This panel has, between its three members, many decades of specialist experience in adjudicating between parties in regulatory law disputes, and also in many situations where an aggrieved party has acted in person. We are very well aware of all of the difficulties and stresses involved in being a litigant in person. Throughout the hearing, and in our consideration of the evidence, we made every reasonable allowance for the difficulties involved. We paid very particular attention to the Appellant's situation in the context of all the material before us regarding her mental health, vulnerability and family background. It was clear to us the Appellant has a troubled family background and is a vulnerable person. We took this fully into account during the hearing and when evaluating the evidence.

95. Our collective experience is that we cannot recall ever before having encountered a situation where an Appellant has admitted that she has knowingly broken the law, and has said that she is willing do so again. We have never before encountered a situation where an Appellant has, on her own evidence, been involved in the dissemination of an email which has been doctored so as tell the lie that the Tribunal had said that she could lawfully childmind pending the hearing of her appeal. The point of this doctored email was to present an entirely false picture to the parents to whom it was shown.

96. The Appellant has shown that she is prepared to act outside the law by providing childcare when unregistered and disqualified by association. In our view, such behaviour, and the use of a forged email, is incompatible with being registered as a childminder.

97. Further it is our view the Appellant has also manifested an unusually profound and entrenched antipathy to her regulator. In our view it is very striking indeed that the Appellant still considers that her behaviour is somehow justified because she felt "desperate". She maintains that her actions were motivated by the interests of the parents and children. In short, she decided that the ends justified the means. We find that her attitude was, and is, utterly wrong. We find that she acted as she did primarily because of her own interests. She has no true understanding

or insight into the impact of her dishonesty upon parents or others. She has no understanding of the role of the Respondent as regulator.

98. The Appellant's ultimate plea is that a plan can be made to enable her to register as a child minder with conditions. In our view this proposal does not bear any serious consideration. We agree that, dependent on the facts in any given case, conditions might be countenanced in a waiver case as an appropriate and proportionate means by which concerns regarding any risk of harm to the public interest might be addressed. We find, however, that the Appellant's conduct here is such that it would be wholly inappropriate to grant a waiver because we have found that she cannot be trusted to work within a regulated system. The Appellant has amply demonstrated that she has no respect for the law or the system of regulation. We find that she could not be trusted to abide by any plan or conditions. In our view she has little or no control over her impulses which are primarily, if not exclusively, driven by her own goals and desires.

99. In view of our findings we consider that it would be wholly inappropriate to exercise discretion to waive disqualification in the Appellant's favour. We recognise the profound impact of our decision on the Appellant's life interests and her ability to pursue her career as a childminder. We also recognise the adverse impact of our decision on the Appellant's prospects of working even in a childcare setting that does not require that she be registered, such as a nursery. We are satisfied that our decision is justified and is necessary in pursuit of the legitimate public interest in effective regulation. In our view the impact of the decision on the Appellant and those affected is far outweighed by the need to uphold and declare the importance of honesty and integrity in registration, and is proportionate to the public interest engaged. The public are entitled to expect that the regulator will only register as childminders those who can be trusted to be open and honest.

Summary

100. The Appellant has not satisfied us that a waiver disqualification should be granted.

Decision

The appeal is dismissed. The Respondent's decision dated 9 January 2024 is confirmed.

Judge Siobhan Goodrich

First-tier Tribunal (Health Education and Social Care)

Date Issued 11 July 2024