

## **Care Standards**

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

**Heard on 31 January 2014 on the papers before:**

**Judge Meleri Tudur  
Ms Linda Redford, Specialist Member  
Ms Heather Reid, Specialist Member**

**Mrs Carol Cort**

**V**

**Ofsted**

**[2013] 2069.EY**

### **DECISION**

#### **APPEAL**

1. The Appellant appeals under section 74 of the Childcare Act 2006 against the decision of Ofsted (the Respondent) made on the 19 June 2013 to cancel her registration as a childminder under section 68 of the Childcare Act 2006.

#### **THE LAW**

2. Section 33(1) of the Childcare Act 2006 provides that a person may not provide early years childcare in England unless he is registered in the early years register as an early years childminder.

3. Schedule 2, Part 1, paragraph 1 of the Childcare (Early Years Register) Regulations 2008 requires that applicants for registration be suitable to provide early years provision.

4. Section 68(2) of the Childcare Act 2006 provides that the Chief Inspector may cancel the registration of a person if it appears that the prescribed requirements for registration have ceased or will cease to be satisfied.

## **BACKGROUND**

5. The Appellant has been registered as a childcare provider since 1997. She opened the Barn Nursery School and Day Nursery in 1997 and moved to the current premises and was re-registered under her current registration on 11 July 2003.

6. On 19 February 2013, a child was collected from her parent in the morning and driven by the Appellant in her vehicle to the Nursery. The Appellant parked the vehicle at the side of the Nursery and failed to take the child off the vehicle and into the Nursery. The child, age 3 was left strapped in the vehicle unattended for at least five hours without food, drink or toilet facilities. The Appellant did not realise the child was still in the vehicle until the end of the day after she had driven to a local school to collect other children.

7. The Appellant notified the parent immediately and returned the child home.

8. The Appellant was subsequently charged with an offence and is at the time of the hearing awaiting trial in the magistrates' court for wilful neglect of a child pursuant to section 1 (1) of the Children and Young Persons Act 1933.

9. On the 26 February 2013, the Appellant was served with a suspension notice by OFSTED as a result of the incident, effective immediately.

10. The Notice of Intention to cancel her registration as an Early Years provider was sent to the Appellant on the 12 April 2013 pursuant to Section 73(2) of the Childcare Act 2006. She opposed the request but did not provide any written submissions in support of her objection.

11. On the 14 June 2013, the Appellant was sent a Notice of Decision to Cancel her registration under section 68 of the Childcare Act 2006.

12. On the 17 July 2013, the Tribunal received the Appellant's appeal against the decision to cancel her registration.

## **THE EVIDENCE**

13. The Tribunal received in evidence from the parties a substantial bundle of documents which included two statements from the Appellant, a transcript of the police interview of the Appellant, the statement made by the child's mother, and copies of a psychiatric assessment by Dr Jayawickrama Consultant Forensic Psychiatrist dated 25 November 2013, and letters from Dr Christopherson, Consultant Psychiatrist.

14. At the last Ofsted inspection carried out on the 28 November 2009, the Nursery received an overall rating of Good.

15. A statement from by the Appellant set out the context for the incident. The Appellant explained that on Monday 18 February 2013, she and her daughter went to

visit the Appellant's mother in a nursing home in Cardiff, a visit undertaken at least once a week during term-time and several times a week during school holidays. The Appellant had raised concerns with Social Services about the standard of care provided to her mother and the conditions at the home.

16. On the 18 February 2013, she found her mother in a poor state, agitated and confused, and it took several hours for her mother to calm down. The Appellant reports that she left the nursing home feeling hopeless and thinking about any way in which she could improve her mother's quality of life and conditions in the home. Overnight, she decided to initiate the improvements herself.

17. On the 19 February 2013, she went into the Nursery with her mother's condition preying on her mind. She arrived in time to take a school age child to Great Rissington School, leaving at 8.40am. When she arrived at the school, she found the parent of the child E who attended the Nursery's preschool waiting for her.

18. The Appellant states that there existed an ad hoc arrangement whereby E would be driven to the Nursery on request as a favour for the parent, when children were dropped at Great Rissington School to save the parents driving down to the Nursery. The Appellant states that this was not the usual method by which E arrived at the Nursery and her attendance days were erratic because the Appellant allowed the parent to swap days freely in order to support her in dealing with various personal problems. E had been absent the preceding week due to a bout of chicken pox and her return was not expected by the Appellant. The parent had not provided any advance warning of her attendance, but the Appellant allowed E to be put into the car to be transported to the Nursery by her. The Appellant had a personal conversation with the parent and stated that she left the parent at about 9.30am.

19. The parent's evidence was that this was a regular arrangement occurring three days a week.

20. The Appellant arrived at the Nursery, collected her handbag and locked the car, completely forgetting that E was in the car with her.

21. She went into the Nursery and phoned her mother's nursing home, and the telephone bill shows the call being made at 9.43am.

22. The Appellant returned to the car at about 3pm unlocked it and drove to Cold Aston Primary School to collect the children who attended the after school club. It was only when she unlocked the car at Cold Aston that she found E sitting exactly as she had been when her mother strapped her in. The Appellant's evidence was that E was dry and showed no signs of distress.

23. Initially, the Appellant didn't realise what had happened assuming that the child had been placed in the wrong vehicle by a member of staff. Only when the child told her that she had been forgotten did the Appellant realise that she had been there all day. On realising what had happened, she took the other children to the Nursery and

drove straight to E's parent's home and told her what had happened. The Appellant was very distressed about the incident.

24. The Appellant confirmed that, by way of making up for the error, she offered E's place at the nursery free of charge.

25. Following the incident, the Appellant's daughter, who worked in the Nursery and who was intended to take over the running of the business when her mother retired, implemented a multiple tier system to ensure that the same thing could not happen again.

26. The psychiatric assessment by Dr Jayawickrama was the result of his receiving instructions from the Appellant's solicitors to comment on her state of mind at the time of the incident on 19 February 2013; whether she was suffering from a mental health disorder at that time; the effect of it on her day to day functioning and comment on her concentration levels or memory skills; an opinion on her current mental health state and any other opinion or comments.

27. The report identifies that the Appellant had no previous history of mental health issues. It records that the Appellant did not report the incident to any member of her family until the 26 February 2013 when she received a visit from the Ofsted inspector to suspend her registration. She visited her GP on the same day and did not mention the incident then.

28. Following the assessment and consideration of the history of the case, Dr Jayawickrama concluded in paragraph 128 of his report that: "There is a likelihood that Carol Cort presented with symptoms suggestive of a depressive illness at the time of the incident on the 19 February 2013. Depressive disorder is a disorder categorised as a mental disorder in ICD 10. It is my view that her depressive disorder at the time was likely to be of a mild to moderate severity." He further concluded that the Appellant did not present with symptoms of a neurodegenerative disorder like dementia and his view was that leading up to the incident the Appellant presented with lapses in concentration and that, due to her lapses in concentration, she had difficulties in retaining information that presented as memory problems, concluding that it is a possibility that her level of concentration was affected on the day.

29. The child's mother's statement identified that it was a regular arrangement since September 2012 on Tuesday, Wednesday and Thursday mornings for Mrs Cort to drive to Great Rissington Primary School where she would meet E with her mother on the Green at about 8.45 to 9am. E usually returned with Mr Cort when he collected the other children from school. This had been a regular arrangement unless E's mother notified Mrs Cort otherwise. The parent acknowledged that on that day she and Mrs Cort spoke for about 15 minutes before she set off back to the Nursery. At 3.15 pm when the parents went to the school to collect her children, E wasn't with Mr Cort and her mother assumed that he was joking when he said that he hadn't seen her. There were other occasions when E had not been returned and was still in the Nursery colouring. At about 3.45 Mrs Cort turned up without warning with E in the car. The Appellant was almost in tears and immediately admitted to the parent what

had happened, appearing distressed and in shock. It was reported that she had told the parent "I've done something awful. I've ruined the Nursery and let everybody now I've ruined it for the children." The parent confirmed the offer of a free place for E. After the Appellant left, E told her mother she had got onto the wrong bus. E's attendance at the Nursery was ended by letter dated 23 March 2013 two days later and the parent reported the matter to the Local Authority.

## **SUBMISSIONS TO THE TRIBUNAL**

30. The Tribunal received submissions on behalf of the Appellant prepared by her counsel on her behalf. It was submitted that the incident was a one-off and inadvertent mistake that thankfully did not result in the child coming to any harm and which was caused primarily as a result of a depressive illness that the appellant had not appreciated that she was suffering at the time. It was submitted that the appellant has and continues to comply with the requirements for registration and that cancellation is entirely inappropriate. The appellant has worked with children for 46 years and has been registered as a childcare provider since 1997. It was submitted that the situation does not indicate that children are at risk from care by the Appellant or are not kept safe and well, pointing to the long and successful career that she has had looking after children. It was submitted that the incident on the 19 February 2013 was an aberration rather than an indication of an underlying tendency to misjudge risk or to expose children to risk unnecessarily.

31. The submissions suggested that the cancellation is the use of the Respondent's powers under section 68 in a punitive fashion and that the attempt to cancel the registration is simply an attempt to punish the Appellant for the consequences of an absent minded mistake caused by a psychiatric illness that did not result in any harm to the child in question. Strategies had been put in place to ensure that such an incident could not happen again by implementing a two tier risk assessment system for checking all vehicles transporting children to and from the Nursery. It was further submitted that the Appellant would be content if the Tribunal considered it appropriate for welfare requirement notices to be issued as an alternative to cancellation to enable her to continue to work in a profession that she is passionate about and in which she has, until now, been very successful.

32. The Respondent's submission was that the incident on the 19 February 2013 raised issues about the Appellant's conduct as the Registered Person: she did not report the incident itself either to her family or more significantly to Ofsted, she placed a child at risk of harm and the incident was sufficiently serious to necessitate a cancellation of registration. It was further submitted that the Appellant had sought to persuade the parent not to report the incident by offering her a free place at the Nursery and that she had failed to report her own mental health difficulties or seek help in respect of them.

33. A number of parents had submitted statements, letters and emails in support of the Appellant, expressing their satisfaction with the services that she offered to the community and provided to their own families.

## **CONCLUSIONS AND DECISION**

34. The Appellant is a long-standing and experienced provider who has been in the child care industry for many years. The testimonials provided by the families who accessed her services are testament to her good service in the past.

35. On the 19 February 2013, however, there was a serious incident involving a young and vulnerable child, who was placed at a significant and substantial risk of harm because of the Appellant's actions. The dispute on facts of the incident itself are minor, in that the Appellant by her own admission left a child of three strapped into her seat in a car for at least five hours. Such an incident could have had several potentially very serious outcomes, but by good luck and chance, E was not physically significantly harmed by the event.

36. We do not accept the evidence of Dr Jayawickrama as being determinative that the Appellant's mental state on the 19 February 2013 was the sole reason for her lapse, although it may have been a contributory factor. His report identifies "a likelihood that Carol Cort presented with symptoms suggestive of a depressive illness at the time" which was "likely to be of a mild to moderate severity". We have taken into account the retrospective nature of the tentative diagnosis of presentation of symptoms suggestive of a mild to moderate depressive illness and note that it is placed no higher than "a likelihood". Whilst Dr Christopherson suggests in his letter of the 3 September 2013 that a depressive episode would make it less likely that the Appellant would identify herself as being in need of help, he also drew attention to her history of not seeking in help and in our view this is a compounding not a mitigating factor.

37. We have read the evidence of the parent and note that the Appellant immediately told her of the severity of the incident and its implications for the Nursery and the children, yet did not report it to Ofsted or tell her family or GP about it despite the implications of her actions. Only when the suspension notice was served did she admit to the incident to others. We do not consider that such conduct is the conduct of a responsible person who has the responsibility for the welfare of young and vulnerable children upon their shoulders.

38. We note that Mrs Cort has in the past tried to help families in difficult circumstances by offering free child places. We do not read the evidence as indicative of her trying to do anything other than assuage her own guilt at the incident by offering E's mother a free place at the Nursery, and do not conclude that she compounded the events by seeking to blackmail her into not reporting the incident.

39. It is submitted on behalf of the Appellant that there may be single incidents that merit a decision to cancel, but that this is not one of them. We do not accept that submission because the facts as related by the Appellant cause serious concerns about her conduct in her child care arrangements. She refers to the arrangements for collecting E as ad hoc: that the parent had not confirmed the attendance of the child on that day and that the Nursery was not expecting E to attend. The child care

industry is regulated in order to ensure that there is clarity about the quality and the structure of professional care arrangements to ensure the safety and welfare of young and vulnerable children. The elements of risk from a child's attendance not being expected, her name not appearing on the register and an ad hoc arrangement to collect and deliver from home are all significant, and the regulations and expectations of the Regulator are designed to ensure that such risks are minimised. Risk assessments should be undertaken prior to any serious incident rather than afterwards.

40. A professional offering child care for up to 100 children at any one time should be able to say with certainty which children will be attending on any particular day at the very least because the number of children in attendance of particular ages is regulated. It should also be clear to others working in the setting which children are expected on a given day. The sequence of events leading to E being left in the vehicle simply highlighted the risks presented from lax conduct around children's attendance which placed children at unnecessary risk of harm or neglect. Whilst the Appellant's daughter was able to put in place as a result of the incident a system of multi-tier vehicle checks to ensure that children were not left in the Nursery's several vehicles at any time, it is our view that such a strategy should have been in place prior to the incident, as that is the purpose of risk assessing, but does not address the broader issues of the laxity in arrangements regarding the attendance of E and her collection and delivery on an ad hoc basis on days when her name did not appear on the register.

41. By virtue of Section 72(5) of the Childcare Act 2006, it is possible to impose conditions upon the registration of the Appellant but we are not aware of any conditions which could assist in the present circumstances.

42. We sought to identify whether any welfare conditions could be imposed which would ensure that a similar incident could not be repeated. Although this was submitted on behalf of the Appellant as an appropriate course of action, none were identified as possible and we could not identify any welfare conditions which would address the issue of the Appellant not being able to recognise her own condition and difficulties and seek help for them. Even after the incident it was not mentioned to her family for another week, and when she visited her GP on the 26 February 2013, she did not mention the incident nor was it reported to Ofsted who became aware through the Local Authority Designated Officer's referral on receiving information from E's mother. All of these factors indicate that it is more likely than not that the Appellant would not be able to respond positively to a welfare notice and that it would not therefore be an effective means of ensuring the safety of children in her care.

43. We conclude that the incident and the surrounding issues identified are sufficient to merit the cancellation of the Appellant's registration and the appeal should be dismissed.

44. The issue of the closure of the setting and the registration of the Appellant's daughter was clearly not handled well by the Respondent, and had the Appellant and

her daughter been given clear information about the alternative paths available to them during March 2013, then it might not have been necessary for the setting to close. Whilst it is not the Respondent's role to provide advice to registrants, inspectors and officers should be able to provide clear information about the paths available to the registrant when a notice of intention is served. In this case, the Appellant's daughter's registration has been tainted by the officers' conduct and all other conditions being met, this may be a case where the Respondent might consider a waiver in respect of any future registration for the Appellant's daughter.

## **DECISION**

**The appeal is dismissed.**

**Judge Meleri Tudur  
Ms L Redford (Specialist member)  
Ms H Reid (Specialist member)**

**7 February 2014**