Care Standards

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

[2015] 2366.EY-SUS

Heard at Manchester Crown Square on 26 February 2015

BEFORE

Tribunal Judge Melanie Plimmer
Specialist Member Graham Harper
Specialist Member James Churchill

BETWEEN

H

Appellant

v

OFSTED

Respondent

DECISION

1. The appellant has appealed against the respondent's decision dated 4 February 2015 to suspend his registration as a childminder on the Childcare Register for six weeks to 18 March 2015 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').

Restricted reporting order

2. 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 ('2008 Rules'), prohibiting the disclosure or publication of any documents or matter likely to lead

members of the public to identify the children or their parents in this case so as to protect their private lives.

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

3. The appellant is a registered childminder since June 2011. On 3 February 2015 his sister ('R') alleged to the relevant LADO that she was sexually abused by the appellant over a number of years when she was a child. This abuse had previously been the subject of a prosecution in 1993. The case was withdrawn when R retracted her statements. The LADO shared this information with the police and a strategy meeting was held on 4 February.

4. That same day the respondent convened a case review and decided to suspend the appellant. The respondent reviewed its decision on 12 February after receiving the appellant's appeal application but maintained its decision to suspend.

Hearing

5. At the hearing the appellant attended with his wife and the respondent was represented by Ms Birks. The respondent had prepared a bundle of evidence relied upon by both parties. We confirmed that we had read the bundle in its entirety. Both parties confirmed that they understood the applicable legal framework to be as we set it out below and that the focus for this Tribunal should be whether or not, on the evidence available to us, we reasonably believe that the continued provision of childcare by the appellant to any child may expose such a child to a risk of harm.

6. We then heard oral evidence from Ms Madden, followed by oral evidence from the appellant and his wife. Ms Madden accepted that there was very little updating evidence from the police. The appellant and his wife provided us with more detail in order to supplement their statements.

7. We heard helpful submissions from Ms Birks. She reminded us that whilst the burden of proof is on the respondent, the threshold is relatively low. Ms Birks made it clear, as she had done fairly and reasonably throughout the hearing, that the respondent predicated its case on a serious allegation of sexual abuse made by the appellant's sister against him, when she was a child. Ms Birks submitted that it was now clear from the evidence that R is prepared to cooperate with a criminal investigation. Ms Birks did not place reliance, again in our view fairly and reasonably, upon the suggestion in the papers that there might be a second alleged victim.

8. We considered those submissions in light of the available evidence and decided that we did not need to hear from the appellant. We indicated that we would be allowing the appeal, and we now provide our reasons for doing so.

Legal framework

9. The statutory framework for the registration of childminders is provided under the 2006 Act. Section 69(1) of the 2006 Act provides for Regulations to be made dealing with the suspension of a registered persons' registration. The section also provides that the Regulations must include a right of appeal to the tribunal.

10. When deciding whether to suspend a childminder, the test is set out in regulation 9 of the 2008 Regulations as follows:

> *"that the Chief Inspector reasonably believes that the continued provision of childcare by the registered person to any child may expose such a child to a risk of harm."*

11. "*Harm*" is defined in regulation 13 as having the same definition as in section 31(9) of the Children Act 1989:

> "*ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill treatment of another*".

12. The suspension is for a period of six weeks. Suspension may be lifted at any time if the circumstances described in Regulation 9 cease to exist. This imposes an ongoing obligation upon the respondent to monitor whether suspension is necessary.

13. The powers of the Tribunal are that it stands in the shoes of the Chief Inspector and so in relation to Regulation 9 the question for the Tribunal is whether at the date of its decision it reasonably believes that the continued provision of child care by the registered person to any child may expose such a child to a risk of harm.

14. The burden of proof is on the respondent. The standard of proof '*reasonable cause to believe'* is to be judged by whether a reasonable person, assumed to know the law and possessed of the information, would believe that a child might be at risk.

15. **Ofsted v GM & WM** [2009] UKUT 89 (AAC) provides helpful guidance on the proper approach to suspension pending investigation. The

Upper Tribunal made it clear that it did not consider that in all cases, a suspension imposed while there is a police investigation need be maintained until that investigation is formally concluded and that Ofsted may be able to lift the suspension earlier [27] depending on the facts. If Ofsted wish to resist an appeal against a suspension on the ground that further investigations need to be carried out, it needs to make it clear to the Tribunal what those investigations are and what steps it might wish to take depending on the outcome of the investigations.

Findings

16. We make no findings of fact with regard to the allegation made by the appellant's sister against him. We accept Ms Birks' general submission that a historic allegation of sex abuse is a very serious one. Undoubtedly R has made a very serious allegation against the appellant. However when we consider all the evidence currently available we are not satisfied that it supports a reasonable belief that the continued provision of childcare by the appellant to any child may expose such a child to the risk of harm.

17. The evidence relied upon by the respondent is very thin indeed. This is in no way meant to be critical, as in this particular case the respondent is very much the junior investigating statutory agency, dependent upon investigations being carried out by the police and the local authority.

18. Whilst the statutory agencies convened a meeting quickly the respondent was only able to rely upon the following evidence to support its position: R had made the allegation, the police investigation was continuing, R appeared willing to comply with the investigation and to proceed to a criminal prosecution, the local authority and the police considered it appropriate for the appellant to live separately from his wife and children.

19. We note that when R made the allegation in the past it proceeded to a prosecution in 1993 but that she retracted her statements. We are told that R has indicated that she was pressured into doing so by family members and now better and more confident position. There is simply very little evidence to support this. We have not been provided with an interview with R or a summary of any detailed interview to support the submission that R is more confident or her reasons for retracting her statements in the past. We heard measured evidence from both the appellant and his wife. They seemed to us to go to great lengths to tell the truth and adhere to the advice of statutory agencies, even when it apparently went against them. The appellant told us that his sister had

made a number of unfounded allegations (unrelated to the instant allegations) against him in the last year and was pursuing a vendetta against him. This was explained without any exaggeration and in a credible and calm manner. It seems to us, on the information that we have, that the police and local authority have not questioned R in any detail and have not probed her reliability in making these allegations at this time and in the manner that she has. We note that R did not go to the police about the matter but complained first to the LADO. It would have been obvious to her as a childminder that this may have the consequence of suspending the appellant's childminding.

20. We do not accept Ms Birks' submission that R is clearly prepared to cooperate with a criminal investigation at this time. There is no clear evidence to that effect. Ms Madden told us that R had told the LADO that she was willing to '*pursue a criminal case*'. We were not told what R understood this to mean, when it was said by R and to what extent she was probed in relation to it. We accept that the appellant was seen by Detective Constable Lovick ('DC Lovick') about a week ago. The appellant provided very clear evidence about this visit and his understanding of the investigation. The appellant's evidence was supported by his wife in this regard. DC Lovick indicated to the appellant that there was some surprise on the part of R that she would have to provide a formal statement. This seems to call into question R's confidence about pursuing the allegation.

21. In our view the evidence relevant to the focus of the respondent's case, R's allegation and determination to pursue a criminal prosecution again, is sketchy at best. A prosecution was to be brought in 1993 but we have no papers whatsoever from this. We have no recent interview transcript with R. We have no information at all from the police. We note that Ms Madden spoke to the police on 12 February and it was claimed that they would know how the investigation would progress by the week ending 20 February. On 24 February the respondent sought a written update from the police but this has not been provided. Ms Madden tried again on the morning of the hearing to obtain an update but was unsuccessful.

22. The only real tangible information we have about the police investigation comes from the appellant himself. It is the appellant who told us that he had been told that the police would be in touch with his sister in about three weeks from the date of the visit and after that a report would need to be compiled. We accept that a police investigation is continuing but there is very little beyond this. We have no information from the police. We find this surprising given how easy it would have been for the police to have set out an update in an email. We do not know the time limits of the investigation. We do not know

when the police will be able to find the 1993 case papers or how long it will take them to provide a report.

23. We have considered the very limited information we have about the allegation itself and the continuing police investigation alongside the detailed evidence regarding the appellant. We had the benefit of hearing and seeing the appellant and his wife give evidence. We were impressed by the manner in which they have dealt with these very difficult circumstances. We note the appellant's wife has a position of trust and confidence as a primary school teacher. She has known the appellant from before his sister's allegations in 1993 and has been entirely supportive. They have two young children together and he has been a house husband whilst she goes out to work.

24. The appellant himself has demonstrated his commitment to safeguarding issues by recently making a report regarding another provider. He has been a childminder for a number of years and has been rated as good with outstanding aspects. There has not been a single complaint against him. He has worked with children before this without a single complaint. We note some suggestion in the papers that the appellant's registration toolkit contained the extract '*no police/SS involvement'* and that the appellant is somehow to blame for not clarifying the 1993 prosecution. Ms Birks did not rely upon this during the course of her submissions. We were not provided with a copy of the toolkit and do not know with any precision what questions were asked and how they were answered. It is clear that the appellant properly successfully completed all relevant suitability checks. We do not accept on the evidence available that the appellant should have made a withdrawn prosecution in 1993 known to Ofsted in the absence of the relevant documentation explaining what was required of him.

25. We have also had the benefit of numerous signed witness statements including close friends, minded children's parents, work colleagues, who unanimously speak of the appellant's good character and commitment to caring for children in glowing terms. Whilst we have not heard from these witnesses, they come across as entirely credible and cogent, when considered together. We particularly note that the appellant has been honest and open about the allegations against him. Some of the witnesses have specifically considered the allegations and discussed matters with children who know the appellant well. This adds to the weight that we attach to these witness statements, because they contain considered views.

26. We bear in mind that the local authority considered it appropriate to warn the appellant and his wife that unless the appellant resided elsewhere, the children might be taken from them. We do not know

the details, but we are very surprised at such an approach in the circumstances of this case. We note that a new social worker has been assigned to the case and it appears that the relevant enquiries have revealed no evidence to support the appellant being a risk to his own children. The appellant remains living away from the family home. We find this surprising when his wife is at home and is in a position to supervise if that is considered necessary. Whilst we must take into account the views of the local authority and police in reaching their assessments of risk, we must make our assessment on all of the evidence available to us.

Conclusion

27. Whilst we entirely accept that a serious allegation has been made against the appellant and a police investigation is ongoing, on the material available to us and in all the particular circumstances of this case, there is insufficient evidence to support a reasonable belief that continued provision of childcare by the appellant may expose a child to a risk of harm. On the evidence available to us there are cogent reasons to question R's reliability. The state of the police investigation is uncertain. There is credible and cogent evidence from the appellant, his wife and other independent sources that the appellant does not present a risk of harm to children.

Decision

28. The appeal is allowed and the notice of suspension served shall cease to have effect.

Judge Melanie Plimmer
Lead Judge Care Standards & Primary Health Lists
First-tier Tribunal (Health Education, Social Care)
Date Issued: 27 February 2015