Care Standards

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

[2019] 3679.EY

Hearing on 09 – 13 March 2020 at Northampton SSCS
Panel deliberation hearing on 16 March 2020

BEFORE

Mr J. McCarthy (Tribunal Judge)
Ms P. McLoughlin (Specialist Member)
Ms H. Reid (Specialist Member)

BETWEEN:

SB

Appellant

-v-

OFSTED

Respondent

DECISION

The Appeal

1. The appellant appeals against Ofsted's decision dated 28 March 2019 cancelling her registration as a childminder on the Early Years Register and both parts of the Childcare Register under section 68 of the Childcare Act 2006. The appeal is brought under section 74(1) of the same Act.

The venue

2. Before we began to hear the appeal, we consulted with both representatives about the hearing venue, which was an informal hearing room. The efforts

made by HMCTS in the previous week to secure a more suitable hearing room had not borne fruit.

3. Although we had tried to arrange the room to accommodate all parties in a layout as in a formal hearing room, we wanted to check that the representatives would not be disadvantaged when presenting their cases. Both representatives agreed that the venue was not suitable but were confident they could present their cases without difficulty even in the unusual environment.

4. We are grateful for their cooperation because the alternative would be to adjourn to find a more suitable venue, which would result in delay to an appeal that has already been delayed.

Restricted reporting order

5. The Tribunal has made 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, prohibiting the disclosure or publication (even by electronic means) of any document or matter likely to lead members of the public to identify any person who at the time of the events in question was under 18, or may lead to the identification of any child or their family mentioned in this appeal.

6. We anonymise the appellant, her witnesses and the school witnesses called by Ofsted, to reduce the risk of any child being identified. We consider these directions to be proportionate to prevent harm to a child and to protect their private life.

Attendance

7. Ms Jennifer Agyekum, Counsel, represented the appellant. In addition to the appellant, her witnesses were SC and SF.

8. Ms Juliet Smith, Solicitor, represented the respondent. Her witnesses were CM, CT, TK, LC, TB, JS, RS, as well as Ms Sian Extence and Ms Kathryn Bell, both from Ofsted.

9. All witnesses gave their evidence on oath.

Evidence

10. The documentary evidence, including skeleton arguments and a Scott Schedule, was provided in a consolidated bundle of 895 pages, divided into ten sections, A to J, each individually numbered. There was no late evidence.

Background

11. The appellant has been a registered childminder since 1998 and operates from her home address. Her provision has been inspected on four occasions since she was registered. In 2005, she was graded as being satisfactory. In 2008, she was graded as being good. In 2015, she was graded as requiring

improvement. The following year, she was graded as good.

12. On Monday 3 December 2018, Ofsted received concerns that SB had been witnessed inappropriately and roughly handling a child in her care on Friday 30 November 2018. The incident was alleged to have occurred at a school from where the appellant was collecting a minded child. The appellant's registration was suspended immediately so Ofsted could investigate. The appellant did not appeal against the suspension.

13. After the conclusion of those enquiries, Ofsted decided to cancel the appellant's registration on the grounds she had breached the requirements for registration and she was not suitable to remain registered.

14. The issues relating to breach of requirements involved the following matters.

    a. Whether on 30 November 2018, the appellant was physically and verbally aggressive to a child in her care?
    b. Whether the appellant meets the requirements in respect of the appropriate behaviour management of children in her care?
    c. Whether the appellant meets the requirements in respect of her safeguarding practice, knowledge and understanding?
    d. Whether the appellant can adequately supervise the children in her care?
    e. Whether the appellant can maintain appropriate confidentiality in respect of matters concerning children in her care and their families?

15. The issues relating to suitability involved the following matters.

    a. Whether the appellant complies with the welfare requirements of the three Registers?
    b. Whether the appellant lacks honesty, integrity and the ability to work openly with Ofsted?
    c. Whether the appellant lacks the compassion required to care for children?
    d. Whether the appellant lacks emotional stability to provide childcare?

16. In relation to this appeal, the issues are whether the appellant has failed to comply with the registration requirements and to maintain the provision to the minimum standards, and whether the appellant is no longer suitable to provide childcare.

17. These form the foundation of what we have to assess to decide whether Ofsted's decision should be upheld. Before we begin our assessment, we remind ourselves and those reading this decision of the relevant legal framework.

Legal framework

18. There is no dispute about the law that applies in this case and it is set out by each representative in their skeleton arguments.

19. Rather than set out in full the various provisions that apply, it is sufficient to

recall that the primary legislation is the Childcare Act 2006 and the secondary legislation is contained in the Childcare (Early Years Register) Regulations 2008 and the Childcare (General Childcare Register) Regulations 2008. It is also necessary to recall that the Statutory Framework for the Early Years Foundation Stage also applies.

20. We recall that the burden of proof lies on the respondent and the standard of proof is a balance of probabilities. We remind ourselves and those reading this decision that we can either confirm the decision to cancel registration, or direct that the respondent's decision shall not have effect. We also remember that if we decide the respondent's decision shall not have effect, that we can impose conditions on the registration of the appellant.

Findings

21. Prior to the hearing, the parties agreed a Scott Schedule and we use that to focus our findings. We use the numbering in the Scott Schedule. Because both representative used this to structure their submissions, we do not need to set out their submissions separately because the arguments will be identifiable from our findings.

PART A

1(a)

22. We do not find the respondent has established that it is more likely than not that the appellant put her hands on the child and handled him aggressively/roughly in the classroom because the evidence of CM and CT is inconsistent about how the appellant interacted with the child in the classroom.

23. CM's evidence is that the appellant "walked in [to the classroom] and took [the child] by the hand, pulling him outside." CT's evidence is that the appellant, "walked straight into the classroom, put her hands on either side of [the child's] shoulders, turned him around aggressively and shuffled him out quite roughly with her hands still on his shoulders. She was standing behand [the child] and was pushing him out of the room." The witnesses were questioned about this difference and each maintained their account. TK's evidence is that she saw the appellant go into the classroom and walked the child out by placing a hand on his shoulder. TK says the child did not go willingly but the appellant was not aggressive.

24. We find the inconsistency is such that we cannot be satisfied that either witness of the events in the classroom is reliable about this incident. Their accounts are at odds because CT places the appellant in front of the child pulling him and CM places her behind him and pushing him. CM and CT say they saw the appellant acting aggressively but this is denied by TK. CT said in her oral evidence that the appellant was not acting aggressively but was forcefully shuffling the child. We take into consideration that the witnesses to this incident, including the appellant, identify that the child was upset in the classroom and was not cooperating with the adults. We recognise that there

may be confusion over what is happening and we find it is likely the adults involved were having to use appropriate interventions to encourage the child to leave. In this context, we do not accept the appellant handled the child aggressively or harshly in the classroom.

1(b)

25. We do not find the respondent has established that it is more likely than not that the appellant spoke to the distressed child inappropriately and aggressively because the evidence of the witnesses is inconsistent when describing what they heard and regarding the appellant's attitude.

26. CM says she heard the appellant shout at the child in a raised and aggressive tone, "You're upsetting the other children, it's only for show." CT says she heard the appellant say at the top of her voice, "Can you stop crying? You're being a baby, you will make the other children cry." When questioned about the issue, neither witness was confident about what they heard.

27. Although we acknowledge that a significant amount of time has passed since the incident, which will affect the ability of the witnesses to recall exact details, we are concerned that the inconsistency in the accounts about what each witness heard undermines their reliability. Those accounts were contemporaneous. Although we are aware there are obvious differences in the evidence from each witness about what the appellant said and the tone used, we find those to be minor inconsistencies. Our concern arises from the different descriptions of the appellant's voice. The inconsistency on which we rely is that CM describes the appellant using a raised and aggressive tone, which we find is materially difference from CT's account that she was speaking at the top of her voice. We cannot reconcile these accounts and cannot identify which is more likely to be accurate and reliable because these differences persist even when the other evidence identified in the Scott Schedule relating to this point is taken into consideration.

1(c)

28. We do not find the respondent has proven that it is more likely than not that the appellant shouted inappropriately at children in her care outside the classroom. Although we accept the appellant shouted into the playground, we do not find her action to be inappropriate because we accept it was directed at a child other than the child she was accompanying from the classroom, who had climbed into a pushchair and was at risk of breaking the pushchair.

29. In reaching this conclusion, we have considered the various accounts, including that of the appellant. They are consistent in that the appellant used a raised voice. The accounts are inconsistent about why doing so was inappropriate. We find JS's evidence of particular relevance to this issue. She was upstairs with her back to a window overlooking the playground. She heard a commotion and got up to look out. She says she heard an adult saying, "Get out of the pushchair, you'll break it" but could not see anything. JS says she sat back down, before hearing more shouting. She got up again and looked out. She

says she saw the appellant holding a child's arm upwards onto the pushchair. The child was distressed and calling for his mummy. She could hear the appellant's raised voice but could not hear what she was saying.

30. We say this evidence is of particular relevance because it identifies two separate issues. The instruction to get out of the pushchair could not have been directed to the child she was collecting because that child was not in the playground where the pushchair was. The appellant's voice could not have been raised inappropriately because although JS could clearly hear the child calling for his mother, she could not hear what the appellant was saying. This indicates the voice used by the appellant could not have been inappropriately loud.

31. Overall, having examined all the evidence about this issue, we are satisfied the appellant's action was not inappropriate because we find it more likely than not that the witnesses who have described this event have conflated two issues that were occurring simultaneously. The child the appellant had collected from the classroom was crying loudly and the appellant shouted an instruction to another child in her care across the playground. Once these factors are separated, it is clear to us that there was nothing inappropriate in the appellant's raised voice.

1(d)

32. We do not find the respondent has proven that it is more likely than not that the appellant was seen shouting and grabbing the child in the playground before she dragged the child out of the playground because the witnesses are inconsistent about what they say and when questioned have resiled from some of the strong descriptors used in their written evidence.

33. For example, CM changed her account about whether she saw the appellant go down the steps in the playground and was unable to explain how she could see the appellant put the child's hands on the pushchair when she was between the child and CM's viewpoint, who was looking from the threshold of the outside doorway.

34. TK said she saw the appellant and the child from the same doorway. We find that to be doubtful because although the doorway has double doors, the implication from the evidence was that only one door was open. This was in response to safeguarding issues and restricting access as well as the fact the incident happened on a cold afternoon. TK's evidence is that she could see the appellant place the child's hands onto the pushchair and put her hands over his.

35. We record that TK's account is different from that of CM in that she says she saw the child at the side of the appellant. It is impossible for us to reconcile these accounts since they are markedly different even though the witnesses say they were observing from the same vantage point. Our concerns are exacerbated by the fact TK told us in the hearing that she stayed in the middle of the cloakroom and did not see CM in that area even though CM told us she

was in the same doorway looking out.

36. JS stated that she could see the appellant holding the child's extended arm on the pushchair. She says she also saw from her upstairs window the appellant grab the front of the child's coat when he let go of the pushchair and shouted at him. We record that this account in her witness statement is different from the account initially recorded by Ms Extence. In the initial recording of JS's account, it is recorded that she observed the child pulling his hand away from the pushchair and the appellant grabbing his coat after JS had come downstairs.

37. In answer to our questions, JS resiled from her account that the appellant had aggressively grabbed the child's coat and said it was beyond firm and forceful and was more than necessary but was not aggressive. JS was also unsure where the child had been in the playground when shown photographs of the scene and was unsure if he had been wearing his coat.

38. It is because the evidence is inconsistent that we find it is unclear and therefore conclude the respondent has not discharged the burden of proof in relation to this event.

1(e)

39. We do not find the respondent has proven that it is more likely than not that the appellant pulled/dragged the child as she left the school and/or held his hand forcibly on the pushchair because the evidence is inconsistent.

40. Our primary reason for making this finding is, as admitted by Ms Extence, that TB changed her account as to the side of the road she observed the appellant moving. We record that Ms Bell said that it would have been useful had TB been honest. We find there is no reliable evidence to show that TB or TK could have seen the appellant and the children in her care if they had been walking on the side of the road near the school. This is because the view from the classroom window is obscured by a wall that from the photographs appears to be about five feet in height. At most TB and TK would have been able to see the shoulders and head of the appellant but the pushchair would not have been visible.

41. We have considered whether the passage of time may have caused TB and TK's recollection to falter. We do not think this to be the case. Ms Extence and Ms Bell each confirmed that they had been shown the window that TB and TK looked out of to observe the appellant. They took photographs from that vantage point. They admitted the photographs do not show the pavement near to the school. In addition, we have considered the map and the other photographs. For the appellant to walk to her house from the school, she would need to cross the road. The safest place to cross would be the zebra crossing at the other end of the school frontage from the exit used by the appellant. There would be no reason for her to cross the road before the zebra crossing. Several witnesses, including some from the school including TB, say they saw the appellant use the zebra crossing.

42. The other evidence we have for this incident is from TB and LC, who describe observing the appellant from the main entrance to the school. The photographs show a clear view of the zebra crossing and the map suggests it would be about 50 yards. We recall that the incident happened at the end of the school day at the end of November and we realise it would have been dusk. The photographs do not, therefore, represent the view TB and LC would have had.

43. We found the evidence of SC and SF to be more reliable than that of TB and LC because they were much closer to where the appellant was crossing the road. Their evidence was consistent in describing the appellant's actions and the behaviour of the child. There is no indication from them that the appellant acted inappropriately.

44. Because the best evidence we have for this part of the incident comes from SC and SF, and because we find the evidence of TK, TB and LC to be unreliable, we prefer the evidence of SC and SF. It follows that we reject this allegation.

1(f)

45. We find the respondent has made out its case that the appellant failed to comfort the child who was distressed throughout the incident. We reach this conclusion because this is conceded by the appellant.

2(a)

46. The mother of the child at the centre of this appeal is RS. We heard from RS on the second day of hearing. Because of her background, we treated her as a vulnerable witness as per the Senior President's guidance. To create an environment in which she could give her best evidence, with the agreement of the representatives, we limited the number of people in the hearing room to the minimum. RS asked for TB to sit alongside her for support and we agreed.

47. RS's evidence is central to whether the appellant gave her inappropriate advice regarding behaviour management, including whether she told RS that she was too soft, or that the child did not have autism and was just naughty, or that she did not take any rubbish from children. It is also crucial to whether the appellant told her on 30 November that she had placed the child facing the wall and had turned music up loudly so as not to hear the child, despite being aware the child was averse to loud music.

48. We find RS's evidence to be unreliable and weak. We find there is a significant inconsistency in RS's evidence as to whether she only spoke to school staff about the incident whilst walking from her place of work to the appellant's house, or whether there had been earlier conversations. TB confirmed she had contacted RS earlier in the day and did not know about a later conversation. We add that we find RS's description of what was said when she collected her child on 30 November 2018 to have been embellished.

49. We also find RS to be unreliable in that she denied seeing the boxes in the

appellant's living room when shown a picture of them. This is at odds with the evidence given by Ms Extence, who described seeing the boxes when she interviewed the appellant at her house on 10 December 2018. We find RS denial to be an indication that she wanted the facts to be as she presented them and not as they actually are.

50. We are also concerned that RS would have been looking for advice on parenting and that she discussed behaviour management with the appellant at some time. However, we believe it is likely that RS gave more prominence to the advice that was appropriate because of her dependence on others.

51. The only other evidence we have about the conversations between RS and the appellant is from the appellant. Ofsted relies heavily on her responses when interviewed on 10 December 2018. Although we have no concerns that Ms Extence accurately recorded the discussion, we do not find it is possible to fix the appellant with every comment she made because she was clearly distressed during the interview and at times was unable to answer clearly. This weakens the weight we can give to the appellant's answers during that interview and in fairness we must give her the benefit of the doubt where she has sought to clarify her answers.

52. We add that we have concerns about the conduct of the interview in that it continued for nearly four hours and Ms Extence permitted the appellant's son to sit in after he arrived home from school, despite being only 15 years old. Ms Extence admitted it was a difficult interview and looking at her notes we agree.

53. With these points in mind, we find the following. We accept the child was distressed when he left school. We find he was upset on the way to the appellant's house. We accept he went to kick the appellant when they arrived at her house. We accept that the appellant asked the child to stand by the boxes in her living room for a few minutes to reflect and whilst he stood there she went to the kitchen, put the oven on, and prepared drinks and biscuits. We accept that when she returned to the living room, she comforted the child. We do not accept any other part of the allegation.

54. We do not accept the appellant ever told RS that she was using behaviour management techniques that are now regarded as being inappropriate, such as asking a child in her care to stand in a corner facing a wall. We do not find the appellant described the child as naughty in a way that undermined any special educational needs the child has or may have. There was nothing inappropriate in context because RS used the word first in a text message sent on 12 September 2018, which is the appellant's evidence.

55. We accept the appellant's evidence that she had spoken to RS about the possibility that her child had traits that suggested a possible diagnosis of autism. Because we accept this evidence, which is supported by evidence from the school that such a conversation took place, we find it very unlikely the appellant sought to undermine any special educational needs the child may have had. We record that the child has not been given a diagnosis of autism even though he has been assessed.

56. We accept the appellant's admission that she said she would not accept rubbish from children and accept that was said in the context of children misbehaving. We do not infer that this comment is an indication of the appellant using inappropriate behaviour management techniques or preferring such an approach.

57. We conclude that the respondent has not proven that it is more likely than not that the appellant acted in the ways alleged at point 2(a).

2(b)

58. We accept the respondent has proven that the appellant used inappropriate behaviour management techniques insofar as the appellant concedes this point. However, we do not accept the respondent has proven that it is more likely than not that the appellant used a high chair to restrain younger children because we find the appellant's explanation that she used the high chair as a means of taking a child to another activity to be reasonable.

59. The interview record on which the respondent relies is unreliable for the reasons we have already given and the clarification she has subsequently provided indicate the inferences the respondent makes are not reasonable. We are concerned the respondent has failed to consider the appellant's answers in the context of all the evidence gathered and the conclusions reached arise from "cherry picking" the parts of the interview that show the appellant in the worst light. This is a form of confirmation bias that undermines the assessment made by the respondent.

3(a)

60. We find the respondent has proven that it is more likely than not that the appellant failed to take steps to protect a child in her care who might be at risk from his father. The appellant admits she kept insufficient records and did not pursue her request for information and details from RS. We find this indicates she was not taking the risks to the child sufficiently seriously. We do not find it was sufficient for the appellant to assume there would be no difficulties because she would keep the child near her at all times. Nor do we find the use of a password for collection to be sufficient even though it is good practice. We find the appellant could have sought safeguarding advice, such as from LADO or Social Services and find no reasonable explanation for not so doing. We find the appellant did not adequately assess the risks to the child when she started caring for him and this raises safeguarding concerns.

3(b)

61. We find the respondent has proven that it is more likely than not that the appellant failed to refer her concerns about the way school staff handled a child inappropriately on 30 November 2018 because the appellant admits her failure.

62. Furthermore, we find that it is more likely than not that the appellant did not

raise any concern about the incident until after she was interviewed on 10 December 2018. We reach this conclusion because the Ofsted evidence is very strong. Ofsted has produced its case minutes which indicate that the appellant's enquiries prior to 10 December 2018 related to her own suspension. We find it more likely than not that her enquiries to other agencies at that time were also related to her suspension and not with the intention of reporting a safeguarding incident.

63. This conclusion implies for us that the appellant did not initially consider the handling of the child by CM and CT on 30 November 2018 to have been a safeguarding issue. CM and CT described the incident and it is evident there was no inappropriate handling of the child. This leads us to conclude that it is more likely than not that the appellant had other reasons for reporting the incident late. We find that the reason she did so was because when discussing the events with Ms Extence, the appellant was informed she should have reported the incident. It is likely the appellant decided to do so to protect her position.

3(c)

64. We find the respondent has proven that it is more likely than not that the appellant failed to report her safeguarding concerns that RS had mistreated her child when the appellant noticed a red mark on the child's face, enquired about it and was informed by RS that she had smacked her child. We find this to be proven because it is admitted by the appellant.

4(a)

65. We find the respondent has proven that it is more likely than not that the appellant left children in her care unsupervised when she entered the classroom on 30 November 2018. We find this to be proven because it is admitted by the appellant.

4(b)

66. We do not find the respondent has proven that it is more likely than not that the appellant failed to adequately supervise children in her care by letting them run ahead on the way home. We accept the appellant acted in this way because she admits so doing but we find the respondent exaggerates the situation because the evidence indicates the appellant only allowed the children to run ahead on the straight piece of pavement leading to her house. We accept the appellant kept the children in sight and that she used this technique to motivate the children as a game.

4(c) and 5(a)

67. We do not need to consider these two allegations because we were informed at the hearing the respondent was no longer pursuing them.

5(b)

68. We do not find the respondent has proven that it is more likely than not that the appellant disclosed sensitive information not relevant to the case during her interview on 10 December 2018 because we are satisfied the appellant was trying to cooperate, was trying to provide as much information as she could to explain her situation. We also note that the respondent raises no similar concerns in relation to the actions of school staff, who disclosed similar information when interviewed.

5(c)

69. We do not find the respondent has proven that the appellant acted inappropriately by disclosing sensitive information to her son. Her son would need to be aware of some of the issues arising from the appellant's role as a childminder because he lives in the same house. We are concerned the interview proceeded with the appellant's son present. Ms Extence was in charge of conducting the interview and should have ensured it did not go ahead with the appellant's 15-year-old son present. We are unable to dissociate the way in which the interview was conducted from the interventions of the appellant's son and this significantly weakens this part of the respondent's case.

PART B

1(a)

70. We find the respondent has not proven that it is more likely than not that the appellant denied and sought to minimise the events of 30 November 2018, or that she has attempted to deflect the allegation by seeking to blame others because we do not accept the respondent's evidence about the events. Furthermore, we find the school staff have sought to maximise the events and have since resiled from that position. This weakens the respondent's case.

71. We also find that the appellant has not demonstrated strong insight into the events of 30 November 2018. The evidence from both sides reveals that it was not an ordinary afternoon. The child was more distressed than usual. The failure of the appellant to immediately comfort him indicates she reacted negatively to him to some degree. There are indications the appellant was not acting professionally because she was being delayed and she was in a hurry that evening as she had a social engagement.

1(b)

72. For the reasons we have already given (see paragraph 62 above), we find the respondent has proven that it is more likely than not that the appellant has been untruthful when she states she tried to report her safeguarding concerns about CM and CT before 10 December 2018.

73. In making this finding, we have taken account of the entry in the Cygnum records on 19 February 2020, which indicates the respondent failed to record a conversation with the appellant on 4 December 2018. However, when we read the case notes we are satisfied the appellant was discussing the allegations

against her and not allegations she was making about the school. We reach this conclusion because safeguarding concerns would not be addressed to Ofsted but to LADO.

1(c)

74. We do not find the respondent has proven that it is more likely than not that the appellant acted dishonestly and made a false allegation against school staff because the evidence about the incident on 30 November 2018 is confused. We accept the appellant would have seen CM and CT handling the child in the classroom: they have admitted to physically handling him to encourage him to leave.

75. Furthermore, we find the evidence merely shows the appellant was acting defensively because there was bad blood between her and school staff. We find this sufficient to explain her negative reaction but do not find the evidence is sufficient to show dishonesty or false representation.

1(d)

76. We find the respondent has proven that it is more likely than not that the record of the interview conducted by Ms Extence is an accurate account of what was discussed. We reach this conclusion because Ms Extence has been trained and has sufficient experience of conducting and recording such interviews. We also take into consideration the fact the appellant told us that she was unable to recall what she said during the interview but then in answer to questions says she could recall exactly what was said. We find that the level of her distress makes her initial explanation that she could not recall what she said to be more likely to be true.

77. We add the following observation. As we have indicted above at several places, we find the respondent seeks to place too much weight on the answers given by the appellant during that interview. We have identified concerns about the interview not because of the record made by Ms Extence but because of the appellant's distressed state. The appellant does not provide clear answers to questions but delivers what can best be described as a stream of consciousness.

1(e)

78. We do not find the respondent has proven that it is more likely than not that the appellant sought to contact RS and blame her and her child for being suspended because we do not find RS to be a reliable witness and this allegation relies on RS's account. Although RS indicates that the telephone conversation was also heard by her friend, there is no supporting evidence.

4(a) [NB there are no items listed between 1(e) and 4(a)]

79. We find the respondent has proven that it is more likely than not that the appellant failed to show compassion to the child, who suffers from separation anxiety, because this is admitted by the appellant. However, we do not find the

appellant did not show compassion when advising RS because we do not believe the testimony given by RS for the reasons we have already given.

80. We add that we are satisfied from the appellant's admission that she recognises the need to show compassion to a distressed child.

5(a)

81. We find the respondent has proven that it is more likely than not that the appellant's emotional response when notified of her suspension was inappropriate because this is admitted by the appellant. We are aware that in times of high emotional stress, people will often exaggerate and seek to blame others. This does not justify the appellant's behaviour but it is in that context that we must assess her behaviour.

82. We do not find the respondent has proven that it is more likely than not that the appellant's emotional stability is such that her response to being suspended can be regarded as her normal behaviour. We make this finding in light of the extreme circumstances in which the appellant found herself. She feared losing her livelihood and as a result her home. We find there is no reliable evidence of any underlying mental health concerns. The police visited the appellant at the request of Ofsted and had no concerns. We observed for ourselves that the appellant did not rise to any provocation whilst listening to the evidence of the Ofsted witnesses, even when she was directly accused by RS.

83. We have taken into consideration the unusually large number of testimonials supplied by the appellant, which number more than 100. These do not show any parental concerns. We recognise these might be partial, and that it is unlikely the appellant told each parent contacted of the allegations she faced, but we have to give some weight to the sheer quantity, which indicates the appellant has enjoyed a long and successful career as a childminder. That would not be the case were she to be generally emotionally unstable.

Other findings

84. Of course, we do not limit our findings to issues raised in the Scott Schedule because there are additional factors we find relevant to our decision making.

85. We find it of concern that none of the school staff who gave testimony sought to engage the appellant on 30 November 2018 or intervene in the situation. TB stated she could not intervene without the permission of RS but we know that is not the case if there was a genuine safeguarding concern. The only other explanations we were given was that staff were in shock at what they saw and, in CT's evidence, that she could not leave other children unsupervised. We find these to be weak excuses for not intervening if the incident was as serious as they subsequently have suggested.

86. We conclude that the failure of any of the school staff to intervene is indicative that none considered it to be a safeguarding issue. Our concerns are amplified by the fact some witnesses indicate they went to obtain a "red form" (to record a safeguarding incident) of their own initiative, whilst others indicated they

completed such a form at the request of TB. These concerns fortify us in our conclusions that the evidence provided by the school witnesses about the incident on 30 November 2018 is not reliable.

87. We record that the respondent sought to introduce an additional item into the Scott Schedule, to include an allegation that the appellant favoured "old fashioned ways", which was a reference to behaviour management techniques used in the past that are not suitable or appropriate. We refused to permit such an addition because there was no good reason why the issue had not been referred to when presenting the case. In any event, for reasons analogous to those we have given, we would not find this to be proven because it relied on the testimony of RS who we found to be unreliable.

88. Our final finding relates to whether the appellant may have become complacent in her approach to childminding. We find there is evidence that in some areas of childminding she was complacent. These include the following. Complacency in keeping records, which is shown by the appellant not keeping adequate records and not obtaining satisfactory or adequate evidence about a child in her care. Complacency in her own abilities, which is shown by her failure to obtain advice from others with more knowledge and experience, about a situation which was out of the ordinary in terms of child protection issues. Complacency in not putting the best interests of the children in her care at the forefront of her actions, which is shown by the failure to report a safeguarding concern because of a misplaced loyalty to RS. In addition, the appellant's extreme emotional response to her suspension indicates a focus on her livelihood rather than the best interests of the children in her care.

Our decision

89. Having made our findings, we can move on to making our decision. We must address the following questions.
    a. Have the requirements for registration ceased to be satisfied?, and/or
    b. Were there breaches of the relevant requirements?, and
    c. Is cancellation of the registration a proportionate step?

90. Turning first to the issues listed in paragraph 14 above, drawing on the findings we have made, in relation to breaches of requirements, our decisions on the issues identified are.

    a. We do not find that on 30 November 2018, the appellant was physically and verbally aggressive to a child in her care.
    b. We are satisfied the appellant meets the requirements in respect of the appropriate behaviour management of children in her care. She has recognised and admitted her past failings.
    c. We have concerns about the appellant's safeguarding practice, knowledge and understanding.
    d. We find the appellant can adequately supervise the children in her care.
    e. We are satisfied the appellant can maintain appropriate confidentiality in respect of matters concerning children in her care and their families.

91. Turning next to the issues listed in paragraph 15 above, drawing on the findings we have made, in relation to suitability, our decisions on the issues identified are.

    a. We are satisfied the appellant complies with the welfare requirements of the three Registers.
    b. We have concerns regarding the appellant's honesty, integrity and the ability to work openly with Ofsted.
    c. We do not find the appellant to lack the compassion required to care for children.
    d. We do not find the appellant to lack emotional stability to provide childcare.

92. We are satisfied, therefore, that the respondent's case is made out only insofar as it relates to the appellant's safeguarding practice, knowledge and understanding, and in relation to her honesty, integrity and her ability to work openly with Ofsted.

93. We turn to the question of whether it is proportionate to cancel the appellant's registration. We begin by considering the seriousness of the breach of requirements and the extent the appellant's suitability is undermined.

94. The breach relates to one child in the appellant's care and we are satisfied his case was challenging and raised issues the appellant had not previously had to address. The school had themselves sought guidance from the child's previous school and implemented strategies recommended by the earlier school. They had not shared these strategies with the appellant. The appellant clearly struggled with safeguarding issues in his case, both in terms of RS's concerns regarding possible abduction and in relation to the severity of RS smacking her child. These issues show the appellant's safeguarding ability was not of an appropriate standard and this raises concerns about whether the appellant understands the necessity to make the best interests of the child paramount for each individual child in her care.

95. We have no evidence that the appellant is unable to provide adequate safeguarding in ordinary situations where children do not have the complexities as presented by RS's child. The testimonials and the past Ofsted inspections indicate the appellant has adequate safeguarding policies and procedures in place for ordinary situations. This leads us to conclude that the appellant has the ability to develop additional safeguarding skills and this indicates to us that cancelling her registration would be disproportionate.

96. The issue of the appellant's honesty, integrity and ability to work openly with Ofsted raises concern about her suitability to remain a childminder because a childminder has a position of trust, which is founded on honesty and integrity.

97. We recognise the appellant's ability to work openly with Ofsted is not directly in question. The appellant has cooperated with Ofsted in relation to four past inspections and in relation to its recent investigations that have led to this appeal. The appellant told us she would be able to work with Ofsted because she has enjoyed a good working relationship except when interviewed by Ms

Extence. The appellant confirmed she does not have concerns about Ofsted in general and can work with others in the organisation. We also record the appellant indicated that she had learnt a great deal since being suspended and although was not happy being suspended or threatened with cancellation of registration, understood the process and the reasons.

98. We also recognise that our concerns about the appellant's honesty and integrity are limited. We have not found any evident of dishonesty in the way she has behaved. Our concerns arise from our findings that the appellant did not tell the truth about when she sought to report the safeguarding incident she says she observed at the school and in relation to how she sought to distance herself from the interview record.

99. We do not find these concerns to be of such importance as to undermine the appellant's suitability to be a childminder. We recognise our concerns relate to the appellant's response to her suspension. We have already recognised the appellant's emotional state and although not condoning or excusing it, we realise that it is not evidence that the appellant generally behaves in that way. Again, we are satisfied the appellant can rebuild her skills in this area so that she resumes her professional behaviour previously demonstrated. We conclude it would be disproportionate to cancel her registration.

Conditions

100. Although we find it would be disproportionate to cancel the appellant's registration, we cannot ignore our concerns. We have made our decision on the basis that we are confident the appellant has sufficient insight and ability to rebuild her skills. We are confident this experience has made her reflect and realise she cannot be complacent when it comes to caring for children. Our conditions on registration are to ensure the appellant updates her knowledge and practice in relation to behaviour management and safeguarding, which are areas she has identified for herself after reflecting on the observations made by the respondent. Of course, we must impose realistic conditions and we find those set out under our order below to be appropriate and proportionate.

ORDER

The decision dated 28 March 2019 shall NOT have effect.

The following conditions shall be imposed on the Registration of SB.

a. Within six months of the end of the restrictions on movement resulting from the coronavirus pandemic, the appellant must attend a one-day face to face safeguarding training course.

b. Within six months of the end of the restrictions on movement resulting from the coronavirus pandemic, the appellant must attend a one-day face to face behaviour management training course.

c. Within the six months after each course has been undertaken, the appellant

must attend a further one-day face to face course in safeguarding and behaviour management.

d. To avoid confusion, the conditions are for the appellant to undergo four days face to face training within twelve months from when the restrictions on movement end.

e. The appellant must send Ofsted confirmation and evidence that she has completed each course, so Ofsted can monitor her compliance with these conditions.

Judge John McCarthy
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date Issued: 20 April 2020