

ES

V

DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY

BEFORE:

HARRY BLACK (CHAIRMAN), AGNES LUNNY, MARY O'BOYLE

Hearing date: 4th and 5th December 2006

1. The Appellant appeals against two decisions of the respondent dated 8th March 2006, namely to include her on the Disqualification from Working with Children (DWC) List and the Disqualification from Working with Vulnerable Adults (DWVA) List.
2. The Appellant was represented by Mr S Patterson of Counsel, instructed by Fisher & Fisher, Solicitors and the Respondent was represented by Mr A. Sands of Counsel, instructed by the Departmental Solicitor.
3. Prior to the commencement of the Hearing the Tribunal made a Restricted Reporting Order under Regulation 19(1). The Decision is published in an anonymised form so as to protect the private lives of the children concerned and their families.
4. For the Respondent we heard oral evidence from JD, a Childminding Network Coordinator and DH a registered Social Worker. PM, who worked in the Child Care Unit also attended to confirm various correspondence and administrative matters leading to the inclusion of the appellant on both lists. We had written statements from these witnesses.
5. We heard oral evidence from the Appellant, her mother SN and from LB, a friend of the appellant who is also a registered Childminder. We also had written statements from 5 persons in support of the Appellant.
6. THE LAW: Appeals against inclusion in the DWC and DWA Lists are governed by Arts 11 and 42 of the Protection of Children and Vulnerable Adults (N.I.) Order 2003. Art 11(3) provides that: If on appeal a Care Tribunal is not satisfied of either of the following, namely:-
 - (a) that the individual was guilty of misconduct (whether or not in the course of his employment) which harmed a child or placed a child at risk of harm; and
 - (b) that the individual is unsuitable to work with children,the Tribunal shall allow the appeal.

Article 42 (3) is in similar terms vis a vis vulnerable adults.

Thus, in order to dismiss the appeal, the tribunal must be satisfied that:

- (i) there was misconduct
 - (ii) The misconduct harmed a child or placed a child at risk of harm and
 - (iii) The individual is unsuitable to work with children.
7. The burden of proof is on the Department and the standard of proof is the civil standard, that is, the balance of probability.
8. **The alleged misconduct which harmed a child or placed at child a risk of harm.** The Appellant ES, at the material time was a registered Childminder and in October 2004 she was caring for two children, C, then aged about 32 months and D, aged about 20 months. She was accustomed to spending some time with these children and her own children in the H Centre where parents and toddlers met to interact and enjoy the facilities. She was present on the premises on the 26th October and according to her and her witness LB, nothing out of the ordinary occurred. JD, who worked in the Centre, was also present on that day, with her own children. Her evidence was that she saw ES lift child D by the upper arms and forcefully put her down onto a sofa. In her opinion this was inappropriate and she didn't think it professional. She decided that she would speak to her line manager later about the incident. JD also gave evidence about a further incident two days later on the 28th October 2004 and again in the H Centre when a Halloween party was scheduled to take place. She said that ES was tense and abrupt and she seemed to have lost control. Child C was very upset and ES was shouting. She, (ES), stormed out of the Centre with Child C and she had not seen her ask anyone to look after Child D while she was gone for a few minutes. She also stated that Child C was under a table at home time and had been pulled out by ES's daughter and taken towards the hall. In her opinion this behaviour was inappropriate, she was concerned about the loss of control and she spoke to her line manager the next day and the matter progressed from then.
9. The appellant denied the allegations throughout. She maintained that nothing unusual happened on the 26th October 04 and that she would never lift a child by the arms. She denied the allegations about loss of control and while she accepted that she may have been on bad form because of a visit to the dentist on 28th October 04 she did not lose control in what was a difficult situation. If she did raise her voice it was because of the noise in the Centre and it was necessary to do so to tell her mother to look after child D while she left to get a dummy to pacify and settle child C. LB gave evidence in her support. She was present on both days. SN, her mother, also supported her account. She was present on the second day.
10. JD was the only witness to give evidence about the events at the H Centre. DH was not an eye witness. She carried out a professional investigation into the complaints. It should also be said that previous concerns had been raised about the appellant. There had been verbal complaints, mostly anonymous, which were fully investigated by DH and she confirmed that nothing adverse had resulted. Indeed the feedback was entirely positive regarding ES's care of children.
11. Having heard and observed JD giving her evidence we formed the impression that she was not a malicious person and undoubtedly the protection and well being of children plays a major part in her life. However we did have some difficulties with parts of her evidence which we were unable to resolve and ultimately put some doubts in our mind about the accuracy and reliability of her purported observations. She could offer

no explanations as to why ES lifted the child and forcefully put her in the chair. There was no suggestion that the child was misbehaving or causing any difficulty for ES. She conceded that the child did not cry or show any kind of distress. She confirmed that ES did not shout at the child. Further if the incident had made a significant impact on JD one may have expected her to document it at the Centre on the day, given that she had access to office facilities. She confirmed that she did not challenge ES on the day and even if a challenge may have been inappropriate at the time there was no evidence that anyone else present reacted to the incident. In cross examination she referred on one occasion as to the behaviour of ES being 'slightly' inappropriate. In relation to the incident on 28th October 04 it was a common case that the room was crowded and there was a significant level of noise. JD was unable to remember what ES was shouting but she did concede that she was not shouting at Child C. She agreed that the child was very upset. We cannot be satisfied that the shouting was anything more than instructions from ES to her mother, in a raised voice, to look after Child D while she had to leave for a few minutes. We accept the evidence from the appellant and her mother in this regard and given her mother's experience with children and her close connection to the children concerned and the events of the day we find that it was not unreasonable in the circumstances for ES to leave Child D in her custody for the few minutes while she was gone with Child C. The fact that she had gone to fetch a dummy from a nearby shop to placate Child C was not disputed. JD accepted that ES displayed no inappropriate physical behaviour to the children on this day and she couldn't say that Child C was upset at being retrieved from under the table by ES's daughter. She did not intervene on the day and again, although there were perhaps more than 30 to 50 individuals present, nobody reacted adversely.

12. Having assessed the evidence we find that on balance JD did see ES lift the child and put her onto the sofa. However given the matters referred to above we cannot be satisfied that the manner of lifting and placing the child in the sofa was inappropriate or forceful which would lead us to conclude that ES was guilty of misconduct. Equally, while ES may have been experiencing a difficult and stressful situation on 28th October 04, on the day of the party, the evidence, in our view, does not persuade us that her behaviour or actions amounted to misconduct. We have reminded ourselves that misconduct has been said in decided cases to include 'poor child care practices in contravention of organisational codes of conduct' and a 'falling short, whether by omission or commission of the standards of conduct expected from members of a profession'. We find, on the evidence, that the Respondent has not discharged the burden of proof and accordingly it is the unanimous decision of the Tribunal that the appeals are allowed.

Harry Black (Chairman)
Agnes Lunny
Mary O'Boyle

8 December 2006