

National Appeal Panel

Constituted under

THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)

(SCOTLAND) REGULATIONS 2009 (AS AMENDED)

(“THE REGULATIONS”)

DECISION

of the

CHAIR

of

THE NATIONAL APPEAL PANEL

In the application relating to

Unit 4, Haddington Retail Park,

Haddington. EH41 3FW

Applicant and Appellant: G. L. M. Romanes

Health Board: NHS Lothian (“the Board”)

PPC Decision Issued: 4 May 2023

Panel case number: NAP 115 (2023)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1. This is an appeal against the decision of the Pharmacy Practices Committee (“the PPC”) of the Board which was issued on 8 May 2023 in relation to the application of G. L. M. Romanes (then “the Applicant”, now “the Appellant”).
- 1.2. The application was originally made on 5 October 2022. The application was considered at a meeting of the PPC on 20 April 2023. At that meeting the application was refused. The Appellant lodged an Appeal against the decision of the PPC on 19 May 2023.

2. Grounds of Appeal

- 2.1. Ground of Appeal 1. This ground is headed “procedural issues” and relates to conduct of the meeting of the PPC which the Appellant is critical of. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 2.2. Ground of Appeal 2. This ground is headed “the decision” and relates to the decision of the PPC to refuse the application and whether in so doing they correctly applied the relevant legal test. Failure to do so as a matter of procedure or with reference to the facts of the case, are grounds of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 respectively.

3. Legislative framework

Appeals

- 3.1. The Regulations provide, at paragraph 5(2B) of Schedule 3, a limited right of appeal against a decision of the Board. These are errors in law in terms of the application of the Regulations and are as follows:

3.1.1. A procedural defect in the way the application has been considered by the Board;

3.1.2. A failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based; or

3.1.3. A failure to explain the application by the Board of the provisions of these Regulations to those facts.

Consideration by the Chair

3.2. The Regulations provide, at paragraph 5 of Schedule 3, that as Chair I am required to consider the notice of appeal and:

3.2.1. To dismiss the appeal if I consider that it discloses no reasonable grounds or is otherwise frivolous or vexatious; or

3.2.2. Remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out in points 3.1.1 to 3.1.3 above have occurred or;

3.2.3. In any other case, convene the National Appeal Panel to determine the appeal.

PPC: Legal test and determination of applications

3.3. The Regulations provide, at Regulation 5(10), the relevant test to be applied by the Board when considering an application to be on the Pharmaceutical list. That test, which has in its previous comparable iteration been the subject of judicial treatment is, put simply, whether the present services are inadequate and, if so, whether the application is necessary or desirable in order to secure adequate provision. If the answer is yes to both of these questions, the Board is to grant the application.

3.4. The Regulations provide, at paragraph 3(1) of Schedule 3, those matters that the Board shall have regard to in considering an application. These matters include current service provision, representations received by the Board, the Consultation Analysis

Report (the “CAR”), the pharmaceutical care services plan (prepared by the Board for its area annually), the likely long term sustainability of the services to be provided by the applicant and any other relevant information available to the Board.

4. Consideration

- 4.1. Ground of Appeal 1. This ground is headed “procedural issues” and relates to conduct of the meeting of the PPC which the Appellant is critical of. I have taken this ground to relate to a perceived procedural defect in terms of the Regulations (paragraph 5(2B)(a) of Schedule 3).
- 4.2. Schedule 3, in particular paragraph 3 of Schedule 3, makes provision as to the procedure to be followed by the Board in considering an application. Where that procedure is not followed this would constitute a procedural defect in terms of the Regulations as mentioned above.
- 4.3. The Appellant is critical of the procedure followed at the meeting of the PPC in several ways including: the meeting being conducted over (Microsoft or MS) Teams, the inability of one member to switch their camera on for the meeting, the inability to refer to slides or other visual aids, the availability of electronic attachments that the Appellant thought had been received by the Board timeously and the interested party referring to the views of another pharmacy who were not a party to the proceedings.
- 4.4. None of these matters relate to those procedural requirements in terms of the Regulations. It follows therefore that there is nothing defective in this regard. I would add to this that over and above those procedural requirements in the Regulations the conduct of the meeting in relation to the PPC’s consideration of an applications falls to the Chair. It appears to me, from the minutes of the meeting of the PPC, that the proceedings were conducted fairly and courteously. No evidence has been presented that would suggest that the contrary is true.

- 4.5. Ground of Appeal 2. This ground is headed “the decision” and relates to the decision of the PPC to refuse the application and whether in so doing they correctly applied the relevant legal test. Failure to do so as a matter of procedure or with reference to the facts of the case, are grounds of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 respectively.
- 4.6. This argument is advanced with reference to the Board’s reasoning regarding neighbourhood, site visits, the concept of a “15 minute neighbourhood”, the results of the CAR, adequacy of existing services in terms of cover and adequacy of existing services in terms of future developments.
- 4.7. It is clear the Appellant disagrees with the reasoning of the PPC but, as is well rehearsed, simply disagreeing with the conclusions of the PPC is not a valid ground of appeal. The PPC is a specialist tribunal and as such is best placed to determine the appropriate standard or weight to be applied to the information and evidence that is before it in reaching a reasoned decision. A successful appeal as to reasoning is, however, possible and in this Appeal the Appellant does so with reference to the relevant legal test.
- 4.8. The relevant legal test is set out above at paragraph 3.3. The relevant case law (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) has made it clear that the decision maker should view adequacy as a binary test. Either the pharmaceutical services available in a neighbourhood are, at the time of considering the application, adequate, or they are not. The decision maker should not view adequacy as a matter of degree or on a spectrum. The ability to make improvements to, or some other possible configuration of, pharmaceutical services would feature on such a spectrum but neither automatically means that existing services are inadequate. That case also clarified that the PPC must have some regard to probable developments when considering adequacy.

- 4.9. In addition there might be, in relation to a particular application, changes or improvements which would be desirable and, directly, without which services may not be adequate, as was discussed in *Lloyds Pharmacy Ltd (Petitioner)* [2010] CSOH 22.
- 4.10. In this Appeal the PPC has, in my view, applied the legal test correctly. Their consideration of the information and evidence before recognises current difficulties in the neighbourhood as relied upon by the Appellant but they have concluded that this falls short of inadequacy and they have given reasons for this conclusion. Their approach also includes the consideration of continued housing developments in the area.
- 4.11. If it brings any comfort to the Appellant however I would describe this case as borderline. That is to say that it would have been, in my view, open to the PPC to also conclude, based on the information and evidence before it, that inadequacy did exist whilst at the same time not falling foul of applying the legal test. However my role is not to substitute one decision for another. There are a range of responses open to the decision maker and this is particularly true when that decision maker is a specialist tribunal. My role is to review whether the decision has been reached in accordance with the Regulations and, in particular, with reference to any of the permitted ground of appeals that are being relied upon.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is dismissed in its entirety as it discloses no reasonable grounds of appeal in terms of the Regulations.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

13 May 2024