

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

163C John Street,

Penicuik. EH26 8AT

Applicant and Appellant: N Johnston

Health Board: NHS Lothian ("the Board")

PPC Decision Issued: 13 December 2023

Panel case number: NAP 123 (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 13 December 2023 in relation to the application of N Johnston (then “the Applicant”, now “the Appellant”).
- 1.2. The application was originally made on 28 February 2023. The application was considered at a meeting of the PPC on 28 November 2023. The PPC issued its decision to refuse the application on 13 December 2023.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellant on 3 January 2024.

2. Grounds of Appeal

- 2.1. Ground of Appeal 1. This ground relates to whether there has been a procedural defect in the way the application has been considered by the Board. In particular the conduct of one of the pharmaceutical members of the PPC; including complaints relating to bias, unprofessionalism and a third party being present with that member on Microsoft or MS Teams.
- 2.2. Ground of Appeal 2. This ground relates to whether the Board has failed to narrate the facts. This is with reference to the discussions about the potential financial impact on existing pharmacies if the application were to be granted.
- 2.3. Ground of Appeal 3. This ground relates to whether the Board has failed to explain the “Regulation of Facts”. Again this is with reference to the discussions about the potential financial impact on existing pharmacies if the application were to be granted, and whether inaccurate information was used by the PPC in reaching its decision.

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 they disclose no reasonable grounds or are 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 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 relates to whether there has been a procedural defect in the way the application has been considered by the Board. In particular the conduct of one of the pharmaceutical members of the PPC; including complaints relating to bias, unprofessionalism and a third party being present with that member on Microsoft or MS Teams.
- 4.2. The Appellant states in their Note of Appeal that one of the pharmaceutical members of the PPC had with them in the MS Teams meeting of the PPC a third party who was not on the list of attendees or introduced as a guest. That same member is alleged to have made a derogatory comment to the third party about the then Applicant. The Appellant considers this to constitute bias towards them and is also concerned about whether the third party was supporting the member during the meeting.
- 4.3. Failure to follow the Regulations in terms of those provisions that safeguard against apparent bias or conflicts of interest would represent a procedural defect in terms of the Regulations (paragraph 5 (2B) (a) of schedule 3). I have therefore approached this ground of appeal on that basis.
- 4.4. The Regulations make provision for the (avoidance) of conflicts of interests and apparent bias in two key places. The first is in relation to the PPC hearing itself, namely,

that those participating declare any interests at the outset (paragraph 4 of schedule 4). The second is in relation to those PPC members who are entitled to vote and those that are not (paragraph 6 of schedule 4). The first safeguard is self-explanatory. The second safeguard is perhaps less common place but it does recognise or distinguish between those providing professional assessments or technical input to a decision maker but who are not involved in taking the decision itself. Such provision is presumably made in recognition that members of the pharmaceutical community in Scotland will come into contact with one another from time to time in terms of competition and their regulation.

- 4.5. The minutes of the meeting of the PPC dated 29 November 2023 disclose a number of things. Paragraph 3.1 discloses those members and others who were present at the meeting. Paragraph 3.8 discloses that members were asked to declare any interests and that none were declared. The Appellant had a number of questions put to him by the pharmaceutical member in question and this exchange is recorded at Paragraphs 6.19 to 6.30. Paragraph 16.12 records that during an exchange between the Appellant and an interested party a derogatory comment was heard to have been made by the pharmaceutical member in question. The Appellant asked whether this was directed towards him or the interested party. The member replied it was not directed towards the PPC but rather something her husband (not a participating or declared third party) was doing. Paragraph 18.17 records a further apology from the member. The member said she was responding to something her husband had shown her, it was unprofessional and not directed towards the PPC. In response the Chair said he assumed the matter was closed. At Paragraph 20.1 the Chair asked the parties to confirm that they had received a fair hearing and had nothing further to add. At that stage the Applicant referred to those matters that will be discussed in relation to Ground of Appeal 2, but not about the comments mentioned above.
- 4.6. Finally, when it came to voting, the pharmaceutical members mentioned withdrew from the meeting (paragraph 23.1) and were not, therefore, decision makers.

- 4.7. The Covid-19 pandemic has been described as the great disruptor and accelerator as to the way in which people contribute to society through work and how they use technology in that regard. This includes the increased use of flexible or hybrid working patterns and the use of platforms like MS Teams to facilitate meetings. This is all beneficial in a number of ways, but care must be taken in shared spaces or the home. This is particularly true when acting as a member of specialist tribunal like the PPC and not simply to perform what is required of them but to safeguard against suggestions of unprofessionalism and bias as is the case here.
- 4.8. The unprofessionalism in what occurred is clear for all to see. It is a matter of regret and, I assume, embarrassment for the pharmaceutical member concerned. As to bias or apparent bias I cannot, on the basis of the evidence provided to me, conclude with any sort of confidence that the comments made were directed towards the Appellant. As a result of the foregoing there is no procedural defect in the way the application has been considered by the Board in terms of declaration of interests or voting; as is noted above the pharmaceutical member was not a voting member or decision maker. This ground of appeal is not upheld.
- 4.9. Ground of Appeal 2. This ground relates to whether the Board has failed to narrate the facts. This is with reference to the discussions relating to potential financial impact on existing pharmacies if the application were to be granted.
- 4.10. The Appellant states in their Note of Appeal that guidance available to the PPC sets out that future funding or an effect on funding of current contractors should not be taken into account in respect when arriving at decision not to grant a new application. The Appellant considers that this was taken into account despite his representations to the contrary.
- 4.11. In the Minutes of the Meeting of the PPC dated 28 February 2023, the PPC notes the terms of the guidance in question at paragraph 22.21. That guidance is NHS Circular: PCA (P) 7 (2011) which was issued in 2011 when the Regulations were last,

substantially, amended. The PPC referred to an excerpt from page 9 which is as follows:

“A possible reduction in income by an existing community pharmacy caused by the opening of an additional pharmacy, is not itself a relevant consideration, unless it could affect the continued viability of the other pharmacies in the neighbourhood – thus affecting the security of the adequate provision of pharmaceutical services. ”

- 4.12. What the appellant says in relation to the document is correct unless, as is noted above, the new pharmacy would affect the continued viability of the other pharmacies in the neighbourhood.
- 4.13. Each Health Board in Scotland is under a statutory duty to make arrangements for their resident populations to have available to them proper and sufficient pharmaceutical services (section 27 of the National Health Service (Scotland) Act 1978). Any registered pharmacist or corporate body (such as a retail pharmacy business) can open and run a pharmacy anywhere in the country provided it is registered with the General Pharmaceutical Council (the regulatory body for pharmacists, pharmacy technicians and pharmacy premises in Great Britain). This does not require permission from a NHS Board. If the registered pharmacy wishes to provide NHS pharmaceutical services, it must seek entry onto the pharmaceutical list of that NHS Board by way of an application.
- 4.14. In considering such an application the PPC, as noted above at paragraph 3.4, shall have regard to the likely long term sustainability of the services to be provided by the applicant. This is commonly referred to as the viability of the proposed application or pharmacy. If one puts to one side the legal test and those other matters the Board is required to have regard to, it is clear that the intention of this requirement is to help secure proper and sufficient pharmaceutical services in a neighbourhood by guarding against over-provision. This is in relation to the viability of the application at hand but also, it follows, existing pharmacies. Put simply, would there be enough work and need to go round? A neighbourhood that can sustain two contracted pharmacies might

not be able to sustain three; a question as to the sustainability of a third pharmacy is patently with reference to the existing two.

- 4.15. The relevant case law (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) has made it clear that an application may be granted that goes further than is necessary to secure adequacy, that is to say an application that would result in some sort of over-provision would nevertheless be desirable. As mentioned above, when considering such matters the PPC shall have regard to the likely long term sustainability of the services to be provided by the applicant. An application that is not viable, including affecting the continued viability of the other pharmacies in the neighbourhood, would not “secure” an adequate provision of pharmaceutical services going forward in terms of the legal test. This could also include situations where inadequacy had been established.
- 4.16. Failure to have regard to this matter or to properly apply the legal test would constitute a procedural defect terms of paragraph 5(2B)(a) of Schedule 3 and I have approached this ground on that basis.
- 4.17. In these circumstances, however, I am satisfied that the PPC properly addressed the potential effect on existing pharmacies and viability in the round, rather than something limited to financial implications. The PPC took the then Applicant’s representations on the matter into account, with reference to the guidance put to them and in turn carefully addressing these points. This much is clearly evidenced at paragraphs 22.21 to 22.22 of the Minutes of the Meeting of the PPC dated 28 November 2023. This ground of appeal is not, therefore, upheld.
- 4.18. Ground of Appeal 3. This ground relates to whether the Board has failed to explain the “Regulation of Facts”. Again this is with reference to the discussions about the potential financial impact on existing pharmacies if the application were to be granted and whether inaccurate information was used by the PPC in reaching its decision.
- 4.19. The argument relating to the potential financial impact on existing pharmacies has been dealt with under Ground of Appeal 2. The remaining limb to this ground of

appeal is whether inaccurate information was used by the PPC in reaching its decision. Failure to explain the application by the Board of the provisions of the Regulations to the facts upon which the determination of the application was based is a ground of Appeal in terms of paragraph 5(2B)(c) of Schedule 3, and I have approached this ground on that basis.

- 4.20. The Appellant considers that the PPC was wrong to come to the conclusions that it did regarding the size of the population in the neighbourhood, and that it had been misled by a comment of a lay member of the PPC regarding the availability of prescription items at a now closed pharmacy.
- 4.21. The conclusions reached by the PPC regarding population size are recorded at paragraph 22.2 of the Minutes of the Meeting of the PPC dated 28 November 2023. The PPC recognised the limitations of the data it had before it and reached a view on what the likely size was. As a specialist tribunal the PPC is best placed to determine the appropriate standard or weight to be applied to the information and evidence that is before it and reach its own conclusions or caveat conclusions, as was the case here. Simply disagreeing with the conclusions of the PPC is not a valid ground of appeal.
- 4.22. The availability of prescription items at a now closed pharmacy was not something that was discussed by the PPC when reaching a conclusion as to adequacy, that is to say it was not a determinative factor even if incorrect. In addition, when this matter was discussed, at the point at which the then Applicant was answering questions from an interested party, it was noted, at paragraph 6.12, that this was historical data. As a result of the foregoing, this ground of appeal is not upheld.

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

19 June 2024