

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

1 SALTIRE SQUARE, EDINBURGH. EH5 1PR

Applicant & Appellant: Tick Pharmacy (“the Appellant”)

Health Board: NHS Lothian (“the Board”)

PPC Decision Issued: 10 March 2023

Panel case number: NAP 114 (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 10 March 2023 in relation to the application of Tick Pharmacy (“the Appellant”).
- 1.2. The application was originally made on 2 September 2022. The application was considered at a meeting of the PPC on 23 February 2023. The PPC issued its decision to refuse the application on 10 March 2023.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellant on 17 March 2023.

2. Grounds of Appeal

- 2.1. The Appellant has advanced 7 “grounds of appeal”. None of these grounds are presented as grounds of appeal generally speaking, they are 17 paragraphs of complaint over 9 pages, and with no reference to those grounds of appeal permitted in terms of the Regulations.
- 2.2. I have, however, attempted to summarise the arguments or complaints being made, consider whether they relate to any of the permitted grounds of appeal (see paragraph 3.1 below) and whether they are, in turn, reasonable grounds of appeal to the extent of being upheld or not.
- 2.3. Ground of Appeal 1. This relates to one of the members of the PPC and their connection to one of the interested parties and a previous application.

- 2.4. Ground of Appeal 2. This relates to the failure of the Lothian Area Pharmaceutical Committee (an interested party in terms of the Regulations) to timeously provide written representations.
- 2.5. Ground of Appeal 3. This relates to the failure of the PPC to note the Pharmaceutical Care Services Plan and further information.
- 2.6. Ground of Appeal 4. This relates to the alleged failure of the minutes of the PPC meeting to fully document what the then applicant now the appellant said at the hearing.
- 2.7. Ground of Appeal 5. This relates to the alleged failure of the minutes of the PPC meeting to disclose information gathered as part of the site visit.
- 2.8. Ground of Appeal 6. This relates to Paragraph 10.5 of the minutes of the meeting of the PPC, insofar as they are said to be inaccurate as to whether the notifications were placed on the Board's social media pages.
- 2.9. Ground of Appeal 7. This relates to whether the PPC took future developments into account when considering (future) adequacy.

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 is 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 (“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 relates to one of the members of the PPC and their connection to one of the interested parties and a previous application. The member nominated by the Area Pharmaceutical Professional Committee for this application is said by the applicant to have been part of the interested party's application for the neighbourhood in 2019 (Lindsay & Gilmour Pharmacy). The appellant considers this to be a serious conflict of interest and breach of natural justice. The appellant goes so far as to say that they wish to "cast aspersions" on the member in this regard.
- 4.2. It is not clear that what being "part of" the interested party's previous application for the neighbourhood (not understood to be these premises) in 2019 means or how that application relates to this one other than the neighbourhood at hand.
- 4.3. As is mentioned above this ground is advanced without reference to those grounds of appeal permitted in terms of the Regulations. That being said, failure to follow the Regulations in terms of those provisions that safeguard against 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 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 recognises or seeks to distinguish between those providing professional assessments or technical input to a decision maker but who are not involved in taking the decision itself. This recognises 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 decision of the PPC dated 10 March 2023 at paragraph 2.2 discloses that members were asked to declare any interests and that none were declared. The Appellant, then

the applicant, was represented at that meeting and made no objections at this point. When it came to voting the member mentioned withdrew from the meeting (paragraph 11.17) and was not, therefore, a decision maker.

- 4.6. Given 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. This ground of appeal discloses no reasonable grounds and is, therefore, refused.
- 4.7. Ground of Appeal 2. This relates to the failure of the Lothian Area Pharmaceutical Committee to timeously provide written representations.
- 4.8. As is mentioned above this ground is advanced without reference to those grounds of appeal permitted in terms of the Regulations. That being said, failure to follow the Regulations in terms of their procedure may constitute 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.
- 4.9. The Board followed the procedure correctly in terms of notifying the various interested parties to the application (paragraph 1 of schedule 3). This included the Lothian Area Pharmaceutical Committee ("the APC") and they "may", in turn, make written representations to the Board; they are not, however, under a duty to do so. The APC lodged representations but outwith the 30 day time period provided for in the Regulations. As a result these were not considered by the PPC; the PPC are only required to consider representations received timeously (paragraph 1 read with paragraph 5 of schedule 3). Regrettable as this may be it does not give rise to any sort of procedural defect in terms of the Regulation. It is not therefore a reasonable ground.
- 4.10. As an aside, although the Board do not have a dispensing or discretionary power to allow late representations it would, in my view, be open to the Board to nevertheless consider such representations as any other relevant information available to it in terms of paragraph 3(1)(d) of schedule 3 if it wanted to do so.
- 4.11. Ground of Appeal 3. This relates to the failure of the PPC to note the Pharmaceutical Care Services Plan and further information. In relation to the further information

mentioned by the appellant it is not clear whether it is being suggested that this was before the Board or ought to have been before the Board, insofar as the Board can consider any information available to it that it considers relevant to the consideration of the application (paragraph 3(1)(d) of schedule 3). In any event, the Board's ability to do so is essentially in addition to the information it is required to have regard to in terms of paragraph 3(1) of schedule 3. This includes the pharmaceutical care services plan (paragraph 3(1)(f) of schedule 3).

- 4.12. Failure to consider the pharmaceutical care services plan would, therefore, constitute a procedural defect in terms of the Regulations (paragraph 3(1)(f) read with paragraph 5 (2B) (a) of schedule 3). Having reviewed the papers that were provided to me in relation to this appeal it would appear that the pharmaceutical care services was not considered by the PPC notwithstanding it was mentioned by the applicant at the meeting of the PPC (paragraph 7.11). I will, therefore, uphold this ground of appeal and remit it back to the Board for reconsideration.
- 4.13. Grounds of Appeal 4, 5 & 6. These relate to criticisms regarding the completeness of the Minutes of the Meeting of the PPC on 23 February 2023. These include whether the applicant's summing up is accurately reflected, an alleged failure of the minutes to disclose information gathered as part of the site visit and whether the notification of the application was placed on the Board's social media pages.
- 4.14. None of these criticisms are advanced with reference to those Ground of Appeal permitted in terms of the Regulations. Having considered whether they relate to any of those permitted grounds of appeal I have concluded that they do not. It would, however, be helpful if the Board could, when reconsidering the application in relation to Ground 3, clarify these matters for the Appellant for the sake of completeness.
- 4.15. Ground of Appeal 7. This relates to whether the PPC took future developments into account when considering (future) adequacy. This ground of appeal is not advanced with reference to those grounds of appeal permitted in terms of the Regulations but it does relate to whether or not the PPC has properly applied the legal test procedurally speaking or with reference to the facts of the case, both of which would be grounds of

appeal in terms of paragraph 5 (2B) (a) and (c) of schedule 3 respectively. I have therefore approached this ground of appeal on that basis.

- 4.16. I do not consider that this ground of appeal has reasonable grounds. The relevant case law on the legal test (*Lloyds Pharmacy Ltd v NAP* 2004 SC 73) has clarified that the PPC must have some regard to probable developments when considering adequacy. At Paragraphs 1.13-16 of the PPC's decision it is clear that they took the current and future developments into account. It has not, in my view, fallen foul of the legal test mentioned.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is successful in relation to Ground of Appeal 3 and I will, therefore, remit the application back to the Board for reconsideration on that basis.
- 5.2. In doing so I am encouraging the Board to clarify those matters that relate to Grounds of Appeal 4, 5, & 6 for the Appellant for the sake of completeness.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

16 April 2024