

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 2, Neighbourhood Centre, Burnett Road, Countesswells,

Aberdeen. AB15 8GW

Applicant & Appellant: K & L Manson

Health Board: NHS Grampian (“the Board”)

PPC Decision Issued: (24 March 2022 and) 2 September 2022

Panel case number: NAP 106 (2022)

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 2 September 2022 in relation to the application of K & L Manson (“the Appellant”).
- 1.2. The application was originally made on 20 January 2022. The application was considered at a meeting of the PPC on 18 March 2022. The PPC refused the application on 24 March 2022. An Appeal was lodged by the applicant against the decision of the PPC on 10 April 2022.
- 1.3. The former Chair, my predecessor, considered that Appeal and on 27 June 2022 made a decision remitting the application back to the Board for reconsideration. This is an appeal against that reconsideration decision (dated 22 September 2022) in which the PPC once again refused the application.
- 1.4. Reference is made to the decision of the Chair dated 27 June 2022 and with the appeal reference NAP 106 (2022). The then Chair remitted the decision back to the full PPC to clarify its decision on four grounds.
- 1.5. I have numbered these grounds for consistency and attempted to set out their meaning within the Regulations for ease of reference. Those grounds were:
 - 1.5.1. To give coherent reasons as to why it considers the current provision of pharmaceutical services in the neighbourhood to be adequate. (Ground 1)
 - 1.5.2. To give an explanation of the reasons why it concluded that any access issues did not affect the issue of adequacy. (Ground 2)
 - 1.5.3. To explain whether and to what extent the question of viability of both the proposed and existing pharmaceutical services are relevant. (Ground 3)

- 1.5.4. To set out a summary of the CAR and how it was taken into account in arriving at its decision (Ground 4).
- 1.6. Grounds of Appeal 1 & 2 related to the requirement in the Regulations for the Board to properly narrate the facts and reasons upon which their determination of the application was based – paragraph 3(6)(c) read with paragraph 5(2B)(b) of Schedule 3.
- 1.7. Ground of Appeal 3 was similar to Grounds of Appeal 1 and 2 as to the giving of reasons but also, in order to give those reasons, to address to what extent the question of viability of both the proposed and existing pharmaceutical services are relevant; these are matters the Board are required to have regard to in terms of paragraph 3(1)(a), (b) and (g) of Schedule 3.
- 1.8. Ground 4 related to setting out a summary of the CAR and how it was taken into account in arriving at its decision as required by paragraph 3(6)(a) and (b) of Schedule 3. The CAR is also something the PPC must have regard to in considering an application in terms of paragraph 3(1)(e) of Schedule 3.
- 1.9. Failure to follow the procedural requirements mentioned in Grounds of Appeal 3 and 4 would constitute a procedural defect in terms of paragraph 5(2B)(b) of Schedule 3.

2. Grounds of Appeal

- 2.1. A letter or notice of appeal was, once again, sent by the Appellant. Put broadly the Appellant does not consider that the PPC has clarified those matters (or grounds) that were remitted back to them for reconsideration.
- 2.2. Ground of Appeal 1. This continues to advance the argument that the PPC failed to give coherent reasons as to why it considers the current provision of pharmaceutical services in the neighbourhood to be adequate.

- 2.3. Ground of Appeal 2. This ground continues to advance the argument that the PPC has failed to provide an explanation of the reasons why it concluded that any access issues did not affect the issue of adequacy.
- 2.4. Ground of Appeal 3. This ground continues to advance the argument that the PPC has not adequately explained whether and to what extent the question of viability of both the proposed and existing pharmaceutical services are relevant.
- 2.5. Ground of Appeal 4. This ground advances the argument that the PPC has, in setting out a summary of the CAR, failed to set out how many of the key elements were in turn taken into account in arriving at 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 appeals 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 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. The PPC's reconsideration took the form of a reviewed or updated PPC Report. The additions made to the Report had been highlighted in my papers for completeness.

4.2. Grounds of Appeal 1 and 2. These grounds are closely linked in so far as they (1) require coherent reasons to be given as to why the PPC considers the current provision of pharmaceutical services in the neighbourhood to be adequate and (2) an

explanation of the reasons why it concluded that any access issues did not affect the issue of adequacy.

- 4.3. The PPC has amplified its reasoning in this regard in several places. There is now a summary of the decision on the face of the decision which is repeated at paragraph 39 as well as additions at paragraphs 32 and 33.
- 4.4. In summary, the PPC concluded that despite there being no pharmacy within the neighbourhood of Countesswells itself, residents had access to a full range of pharmaceutical services from those pharmacies located in the adjoining neighbourhoods of Cults, Kingwells and Peterculter (this included face to face advice as supported by the CAR). Those pharmacies were easily accessible by car or public transport (although it was noted at present public transport was infrequent, but plans were in place to increase the frequency of the buses to the neighbourhood). Those pharmacies also offered collection and delivery services to Countesswells. The PPC considered that whilst a pharmacy in Countesswells would be very convenient it was not necessary given existing provision in the adjoining neighbourhoods. As a result inadequacy had not been proven.
- 4.5. The Appellant considers that this reasoning is to the exclusion of a number of issues. In summary these are: that delivery and collections services are not core services, they could be withdrawn without notice; they do not address the issue of providing face to face advice; and that to access such advice there is a reliance for some residents on public transport which has not improved in the intervening period.
- 4.6. In relation to these grounds of appeal the question to ask is whether the PPC has met what was required of them when these grounds were remitted to them for reconsideration, namely, to provide coherent reasoning in relation to their consideration of adequacy and, in particular, an explanation of their reasons regarding access issues in that regard. In my view they have, for the reasons summarised in paragraph 4.4. above. I recognise that the Appellant is not satisfied

with the PPC's reasoning in this regard, but that is different from failing to meet the requirement to provide reasons.

- 4.7. That is sufficient to dispose of those grounds of appeal, but for the sake of completeness I am going to address the Appellant's outstanding dissatisfaction regarding the PPC's reasoning as to adequacy in terms of the Regulations.
- 4.8. 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. This is recognised in the Regulations with the limited rights of appeal available. A successful appeal which related to reasoning would need to disclose, therefore, some sort of procedural defect, error in fact or, most commonly, an error in law - in applying the relevant legal test. (Whether the PPC has properly applied the legal test procedurally speaking or with reference to the facts of the case, would be grounds of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 respectively).
- 4.9. I do not consider that the PPC has erred in applying the relevant legal test. 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. The PPC has, correctly in my view, viewed convenience, amongst other things, in this way in relation to this application.
- 4.10. Ground of Appeal 3. This ground was remitted back to the PPC with the view to them explaining whether and to what extent the question of viability of both the proposed and existing pharmaceutical services are relevant. In essence this relates to the

viability of the existing pharmacies if the application was granted and the viability of the new pharmacy in the neighbourhood going forward. In terms of the Regulations the PPC is required to have regard to existing services and the likely long term sustainability of the services to be provided by the applicant in terms (paragraph 3(1)(a) and (b) of Schedule 3).

- 4.11. The PPC's consideration of these issues is now included in its decision, in particular, with reference to the CAR at paragraph 34. Put simply responses to the CAR demonstrated a concern by a small number of residents in Kingwells that a new pharmacy would result in over provision and have a negative impact on their pharmacy. The PPC also took into account concerns that existed regarding the progress of the Countesswells development.
- 4.12. The PPC have, albeit barely, explained that these questions were taken into account and relevancy can be assessed only insofar as they are not referenced in the summary of its decision as to adequacy. Despite dissatisfaction with the completeness with the way which the PPC have approached this ground of appeal, I see no merit in remitting it once again; the Regulations have been complied with insofar as the PPC has had regard to these issues and provided reasons.
- 4.13. Ground of Appeal 4. This ground was remitted back to the PPC for it to set out a summary of the CAR and how it was taken into account in arriving at its decision. As mentioned above the PPC has achieved this by the addition of the text at paragraph 34.
- 4.14. In renewing this ground of appeal, the Appellant recognises that the summary has been provided, but contends that it does not set out how many of the key elements were in turn taken into account in arriving at its decision. In particular, the appellant considers that the conclusions of the CAR run contrary to the decision to refuse the application.

- 4.15. The CAR, however, is only one of the sources of information that the PPC is required to have regard to, it is not itself a determining factor and, as is mentioned above, it is for the PPC to determine what weight to apply to it.
- 4.16. The new information at paragraph 34, in particular the concluding paragraph, discloses that the PPC took into consideration the conclusions outlined in the CAR. Many of these conclusions related to convenience which, as mentioned above, the PPC were not led by when considering adequacy.

5. Disposal

- 5.1. For the reasons set out above I consider that the PPC has addressed those matters remitted to it for reconsideration previously.
- 5.2. Accordingly, this appeal is dismissed as it discloses no reasonable grounds of appeal in terms of the Regulations.

(sgd)

C W Nicholson WS
Chair
National Appeal Panel
23 April 2024