

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

13 Main Street, Saline,

Fife. KY12 9TL

Applicant: Lisa Duncan ("the Applicant")

Appellant: Dears Pharmacy ("the Appellant")

Health Board: NHS Fife ("the Board")

PPC Decision Issued: 21 June 2023

Panel case number: NAP 118 (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 21 June 2023 in relation to the application of Lisa Duncan (“the Applicant”). The Appellant is Dears Pharmacy. It is the second time the decision of the Board has been appealed.
- 1.2. The application was originally made on 23 October 2019. The application was first considered at a meeting of the PPC on 18 March 2022. The PPC issued its decision to refuse the application at that time. The Applicant appealed that decision and in a decision of the Chair, my predecessor, dated 16 August 2022 the Appeal was upheld and remitted back to the Board for reconsideration.
- 1.3. In doing so the then Chair upheld a ground of appeal relating to conflict of interest and apparent bias as well as making some other observations on other grounds of appeal including the quality of the reasons that were given.
- 1.4. The Board reconsidered the application at a Meeting of the PPC on 31 May 2023. That decision, now granting the application, was issued to parties on 21 June 2023.
- 1.5. An appeal was lodged against the decision of the PPC by the Appellant, an interested party, on 30 June 2023.

2. Grounds of Appeal

- 2.1. Ground of Appeal 1. That there has been a procedural defect in the way the application has been considered by the Board, relating to the late recusal of a Member of the PPC.
- 2.2. Ground of Appeal 2. That there has been a failure of the Board to properly narrate the facts or reasons upon which their determination of the application was based.

- 2.3. Ground of Appeal 3. That there has been a failure to explain the application by the Board of the provision of these Regulations to those facts [the facts upon which the determination of the application was based].

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 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 of appeal relates to whether there has been a procedural defect in the way the application has been considered by the Board.
- 4.2. In the Minutes of the Meeting of the PPC dated 31 May 2023 (paragraph 02/23) it is recorded, at the outset of the meeting that morning, that a declaration of interest had been made. This was that one member had been involved at the previous hearing of the PPC; it having been decided this time to reconstitute the PPC in its entirety given, presumably, the ground of appeal that was upheld previously related to conflict of interest and apparent bias.
- 4.3. A substitute member was found that same morning and the hearing was reconvened. The Appellant considers that this was defective insofar as this did not allow the member enough time to familiarise themselves with the relevant material and in turn arrive at a properly considered decision.

- 4.4. The Appellant advances this argument with reference to the Board's Rules of Procedure for the PPC and the requirement in those rules for parties and members to be given the papers relating to the application 14 days before the meeting of the PPC.
- 4.5. In terms of the Regulations, for a defect to exist in the way the application has been considered by the Board that defect will, usually, be with reference to the procedure provided for in the Regulations themselves. Where an oral hearing is held those requirements are set out at paragraph 3(3) of Schedule 3. The Regulations do not mention the 14 day requirements as set out in the Rules. It follows, therefore, that what occurred was not defective in terms of the Regulations.
- 4.6. Recusals occur on a daily basis in Courts and Tribunals throughout the country and decision makers are often called upon to "get up to speed" quickly and then consider matters before them accordingly and it cannot be said that a party is prejudiced by this as a generality.
- 4.7. Though more informal than a Court, an administrative decision-making body must have some form of consistency as to its procedure and the rules of procedure clearly exist to assist in that regard. That being said the Rules, for the most part, simply set out or amplify what is said in the Regulations. Procedure not provided for in the Regulations remains at the discretion of the Chair and this, in my view, includes the application of the rules as was the case here.
- 4.8. I therefore agree with the approach taken by the Chair to adjourn, seek out and appoint a substitute Member all in short order. Adjourning the hearing to a later date to appoint a substitute would have been an inconvenience. It is also important to note, although clearly regrettable that the conflict was identified just prior to the hearing, that the declaration of interests and resulting recusal was a result of the Regulations being followed properly (paragraph 4 of Schedule 4).
- 4.9. Ground of Appeal 2. This relates to whether there has been a failure of the Board to properly narrate the facts or reasons upon which their determination of the application was based.

- 4.10. As mentioned above when this Application was remitted back to the PPC previously the then Chair made some observations relating to the quality of the reasons that were given in the original decision. In particular, he said *“The decision was lacking in clarity in that there were no reasons given for its considering that the current provision was adequate”*. He considered, and I agree, that it is not sufficient to simply say “for the reasons set out above” or with reference to the reasons discussed, as they disclose both arguments for and against a finding of inadequacy.
- 4.11. The Appellant, with reference to these comments and the Minutes of the Meeting of the PPC dated 31 May 2023 (the concluding part of paragraph 15.23), says that regrettably the PPC has made the same error this time round and that it remains insufficient for it to simply state that the PPC *“took into account all relevant factors”* and *“all information available to it which was relevant to the application”*. The Committee must actually demonstrate that it has done so by providing reasons for its decision.
- 4.12. I agree with all that the Appellant says in this regard. Although this ground of appeal was not upheld previously, given the first ground had been, the Board were essentially put on notice that reasons like this were not sufficient. It is, therefore, surprising and disappointing that this was not taken into account when framing its decision and providing reasons this time. It will come as a matter of immense frustration to the Applicant to see this matter remitted back to the Board for reconsideration once again. The Applicant is entitled to a decision of sufficient quality, in particular the reasons for that decision, one way or another.
- 4.13. I would urge the Board to reconvene as a matter of urgency to reconsider this application and, in particular, to provide sufficient reasons as to their decision making.
- 4.14. When doing so I would also remind the Board what is required in relation to the CAR. In terms of the Regulations, failure to properly consider the CAR, as matter of procedure, is a Ground of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 (procedural defect & duty to give reasons). This is because the reasons given must set out a summary of the CAR and how it was taken into account by the Board in arriving at its decision - 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. The decision of 31 May 2023 does not appear to me to be sufficient in that regard.

- 4.15. Ground of Appeal 3. This relates to whether there has been a failure to explain the application by the Board of the provision of these Regulations to those facts [the facts upon which the determination of the application was based].
- 4.16. Given what has been said in relation to Ground of Appeal 2, it is difficult to establish whether there has been an error in fact, that is to say whether a fact or facts were arrived at in error and then relied upon when reaching a decision. The same is also true in relation to the application of the relevant legal test mentioned at paragraph 3.3 above which the Appellant also makes reference to; failure to apply the legal test properly would amount to a procedural defect in terms of paragraph 5(2B)(a) of Schedule 3.
- 4.17. With that in mind and given that Ground 2 has been upheld, I do not consider it is necessary to reach a view as to whether Ground of Appeal 3 is a reasonable ground within the meaning of the Regulations. However, I would suggest to the PPC that care is taken when considering adequacy as to not place too much reliance upon matters of convenience, which appears to be the case here, for the reasons mentioned in paragraph 4.17 (below), and that when one does take such matters into account they are factually accurate; for example, the issue of bus timetables, and not issues that a member has volunteered of their own volition, like access to and use of internet services.
- 4.18. 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. This includes matters of convenience.

- 4.19. Finally, for the sake of completeness the Appellant makes reference to the case of *E (& A) v Secretary of State for the Home Department [2004] QB 2004*. That case concerned whether the Immigration Appeal Tribunal and the Court of Appeal had the power to review a decision of the tribunal where it was shown that an important part of the tribunal's reasoning was based on ignorance or mistake of fact, and to admit new evidence to demonstrate the mistake. This was in circumstances where the right of appeal was limited to errors in law. The result being that the case helped clarify that judicial review or an appeal on a point of law is available, in principle, for all species of mistake of fact.
- 4.20. Although clearly an important or leading case as the Appellant puts it, it is not relevant here. The Regulations allow for an appeal based on, amongst other things, an error of fact.
- 4.21. Broadly speaking the Regulations provide the following: (1) a procedural error (including an error of law as to the application of the legal test provided for in the Regulations); (2) a failure to give proper facts and reasons for its decision; and (3) an error of fact in applying the Regulations to those facts in reaching its decision.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is successful in respect of Ground of Appeal 2. I shall therefore refer the matter back to the PPC for reconsideration.
- 5.2. In doing so I would urge the Board to reconvene as a matter of urgency to reconsider this application. In particular, to provide sufficient reasons as to their decision making, taking into account those issues particular to the CAR and, in relation to Ground of

Appeal 3, being mindful of those issues of fact and the application of the legal test as mentioned.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

28 May 2024