

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

269 High Street, Linlithgow.

EH49 7EP

Applicant: TPB Partnership LLP ("the Applicant")

Appellants: Boots UK Ltd and Dears Pharmacy (previously Lloyds and LP North Sixteen Ltd) ("the First Appellants" and "Second Appellants" respectively or "the Appellants")

Health Board: NHS Lothian ("the Board")

PPC Decision Issued: 13 June 2024

Panel case number: NAP 121A (2024)

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 dated 10 June 2024 in relation to the application of TPB Partnership LLP .
- 1.2. The application was originally made on 11 April 2023. The application was considered at a meeting of the PPC on 26 September 2023. The PPC issued its decision to grant the application on 12 October 2023 .
- 1.3. Appeals were lodged against the decision of the PPC by the Appellants – (1) Boots UK Ltd and (2) LP North Sixteen (for Lloyds Pharmacy) on 31 October and 27 October 2023 respectively. The Second Appellant is now Dears Pharmacy. I issued my decision allowing the Appeal, in part, on 30 May 2024 (NAP 121 (2024)).
- 1.4. The PPC reconsidered the application on 10 June 2024 and issued its decision once again granting the application on 13 June 2024. The Appellants have now appealed that second decision of the PPC.

2. Grounds of Appeal

- 2.1. I remitted the application back to the PPC for reconsideration in relation to what was then Ground of Appeal 2 and with the instruction to provide sufficient reasons as to their decision making regarding the Pharmacy First issue that has been raised by the First Appellant.
- 2.2. The Appellants now, when taken together, advance three grounds of appeal in relation to the reconsideration decision.
- 2.3. Ground of Appeal 1. That the composition of the PPC was inquorate, as no pharmacy members were present.

- 2.4. Ground of Appeal 2. That the PPC have not provided sufficient reasons in relation to the ground of appeal that was remitted to them, namely the Pharmacy First issue.
- 2.5. Ground of Appeal 3. This relates to what is described as the “Manner of Future Decision Making” and is, put simply, about changes that have taken place during the consideration of the application and appeal and whether these should be taken into account.

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 whether the PPC was quorate in terms of paragraph 5 of Schedule 4 when reconsidering the application.

4.2. It is clear from the Minutes of the Meeting of the PPC dated 10 June 2024 that it was not. This is on the basis that no pharmacist members were present. At least two are required to be present to be quorate, one from a pharmaceutical list and one not. Failure to adhere to these requirements constitute a procedural defect in terms of paragraph 5(2B)(a) of Schedule 3 and I will therefore uphold this ground of appeal.

- 4.3. In upholding this ground of appeal I recognise that the approach of the Board, that is to say sitting without the pharmaceutical members, was an attractive one in terms of efficiency. However, the Regulations are clear about the quorum required when the PPC is meeting even if those pharmaceutical members then withdraw from the meeting at the voting stage as required by paragraph 6 of Schedule 4; and this is the same for an application at first instance or on reconsideration following a successful appeal.
- 4.4. Unless expressly provided for in a NAP decision, an entirely new panel or the participation of the parties will not normally be required. This may be required, however, if there was some sort of nullity or substantial irregularity such as apparent bias at first instance.
- 4.5. The grounds of appeal that are permitted in terms of the Regulations are limited and when an application is remitted back to a PPC it will reconvene to address those particular point(s) and need not reconsider the application in its entirety.
- 4.6. Ground of Appeal 2. This relates to whether the PPC have provided sufficient reasons in relation to the ground of appeal that was remitted to them, namely the Pharmacy First issue.
- 4.7. In the Minutes of the Meeting of the reconvened PPC dated 10 June, paragraphs 2.1 to 2.9 record the discussions relating to the issue before concluding, at paragraphs 3.1. to 3.2, that pressure in the system has been the reason for the low uptake of Pharmacy First services rather than the affluent nature of the area. The PPC considered that this was only one issue that had been taken into account in reaching their original decision and that decision remained, in their opinion, the correct one. In my view the reasons given here are sufficient and this ground of appeal is not therefore upheld.
- 4.8. Ground of Appeal 3. This relates to what is described as the “Manner of Future Decision Making” and is, put simply, about changes that have taken place during the consideration of the application and appeal and whether these should be taken into account.

- 4.9. This argument is advanced with reference to the unsatisfactory conclusion of trading of Lloyds Pharmacy which I considered in NAP 121 (2024). This was to the extent of agreeing with the approach taken by the PPC at first instance in relation to the participation of the second appellant as a successor operator of a former Lloyds branch, as well as the conclusion reached regarding not having enough certainty from the existing pharmacists that planned changes would occur and ensure adequate provision in the future.
- 4.10. The second appellant considers that the facts have now changed in relation to this latter point which was, at the time the application was first considered by the PPC, to be finely balanced. I presume the second appellant is now suggesting that inadequacy is not present. The second appellant also makes reference to the extent to which the CAR can be relied upon.
- 4.11. In any event, and as mentioned above in relation to Ground of Appeal 1, when cases are remitted to the PPC for reconsideration this will be on those grounds of appeal that have been successful - and only those grounds. Succeeding at appeal on a particular point does not automatically entitle a party to a full reconsideration of the application or for new evidence or information to be advanced.
- 4.12. The PPC is required, in various places, to consider an application and, in particular, adequacy, with reference to current provision or provision already in place. This is at the time the application is made and with reference to the supporting evidence of the application. The first decision of the PPC is also taken within 6 weeks of receipt of the CAR. The PPC has no locus to consider changes in circumstances during the lifetime of an application or appeal. It must make a determination based on the information before it at the relevant time.
- 4.13. In relation to the consideration of the CAR itself, as a specialist tribunal the PPC is best placed to determine the appropriate standard or weight to be applied to the evidence and information that is before it and reach its own conclusions. In these circumstances the PPC considered and relied upon the CAR and it was entitled to do

so. The Second Appellant takes issue with this approach when compared to a decision by a different PPC and in relation to a different application to not rely upon the CAR. As was explained in that appeal however, comparative exercises are seldom conclusive as each case will turn on its own merits. In addition, there are a range of responses open to a decision maker. Based on the same information the decision of one PPC may differ from another, but that does not necessarily mean that either decision was incorrectly arrived at, and it is not a valid ground of appeal.

4.14. I consider, therefore, that this ground is not a reasonable one in terms of the Regulations and as a result it is not upheld.

5. Disposal

5.1. For the reasons set out above I consider that the appeal is successful in relation to Ground of Appeal 1 and I will, therefore, remit the application back to the Board for reconsideration on that basis, that is to say with a quorate PPC.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

18 July 2024