

National Appeal Panel

Constituted under

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL SERVICES)
(SCOTLAND) REGULATIONS 2009 (AS AMENDED)**

**DECISION
of the
CHAIR
of**

THE NATIONAL APPEAL PANEL

In the application relating to

12 Bridge Street, Tranent, East Lothian

Applicant: Scotia Health Ltd

Health Board : NHS Lothian “the Board”

PPC Decision issued : 11 June 2019

Panel case number : NAP 88 (2019)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1 Scotia Health Ltd (hereinafter referred to as “the Applicant“ or “the Appellant”) submitted an application to the Board to be included in the pharmaceutical list of the Board to provide pharmaceutical services from and in respect of premises at 12 Bridge Street, Tranent, East Lothian (“the Premises”) . The application was dated 3 August 2018.
- 1.2 The application was considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 28 May 2019 and a decision was issued on 11 June 2019. The PPC decided that the current provision of services in the neighbourhood defined by the PPC was adequate and, therefore, refused the application.
- 1.3 An appeal was lodged against the decision of the PPC by the Applicant by letter dated 30 June 2019.

2. Grounds of Appeal

- 2.1 The grounds of appeal can be summarised as follows:
 - 2.1.1 Ground of Appeal 1: the Board failed, as required by para 1(1)(b) of Schedule 3 to the Regulations, to provide written notice of the application to the relevant parties within 10 days of an assessment being made in accordance with para 1(1)(a) of Schedule 3 to the Regulations (referred to in paragraph 3.1 below). This is said to amount to a procedural defect. In respect of the failure to notify David Forrest (of the Community Council) it is also said to amount to failure to explain the application of the Regulations to the facts (this ground of appeal is set out as points 1 and 3 of the Appellants letter of appeal, however, as it relates to the same procedural issue I will deal with it as a single ground of appeal);
 - 2.1.2 Ground of Appeal 2: the PPC failed to properly consider the Consultation Analysis Report (“CAR”) by failing to attribute adequate weight to it;
 - 2.1.3 Ground of Appeal 3: the PPC failed to consider submissions made by the Applicant in relation the accuracy of complaints figures;
 - 2.1.4 Ground of Appeal 4: the PPC failed to consider the potential future growth of the neighbourhood; and,
 - 2.1.5 Ground of Appeal 5: the PPC failed to consider the response from the Lothian Area Pharmaceutical Committee.

3. Decision

- 3.1 Under the National Health Service (Pharmaceutical Services) (Scotland) Regulations 2009, as amended, (“the Regulations”), the available grounds of appeal against a decision of the Board are limited to circumstances in which there has been:
 - 3.1.1 an error in law by the Board in its application of the Regulations;
 - 3.1.2 a procedural defect in the way the application has been considered by the Board;
 - 3.1.3 a failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based (“Schedule 3 para 5 (2B)(b)"); or,

3.1.4 a failure to explain the application by the Board of the provisions of these Regulations to those facts (“Schedule 3 para 5 (2B)(c)”).

3.2 I am required to consider the notice of appeal and:

3.2.1 to dismiss the appeal if I consider that it discloses no reasonable ground of appeal or is otherwise frivolous or vexatious;

3.2.2 remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out at points 3.1.2 to 3.1.4 have occurred; or

3.2.3 in any other case, convene the National Appeal Panel to determine the appeal.

4. Consideration of Points of Appeal

Ground of Appeal 1

4.1 Under para 1(1)(b) of Schedule 3 to the Regulations, the Board is required to provide written notice of the application to the relevant parties within 10 days of an assessment being made in relation to whether the neighbourhood to which the application relates is within a controlled locality. The Appellant submits that the application was made on 3 August 2018 and that the relevant notifications were not made until 8 January 2019. It is not stated when the assessment of whether or not the application related to a controlled locality was made.

4.2 The Appellant submits that this represents a procedural defect in the way the application was considered by the Board. The Appellant further submits that in respect of the failure to notify David Forrest of the Community Council this also represents a failure to explain the application of the Regulations to the facts.

4.3 In the first instance, I note that notification requires to be given within 10 days of the assessment of whether the neighbourhood falls within a controlled locality and not within 10 days of the submission of the application. As such, it is not clear from the dates relied upon by the Appellant that there has been a failure by the Board to comply with the timescales for notification. However, on any view, it is not reasonable for the Board to take a period of 3 months to notify the relevant parties of the application when the assessment in relation to the controlled locality requires to be made on receipt of the application.

4.4 Whilst the delay by the Board in notifying the relevant parties is unsatisfactory and may constitute a procedural defect, it is not one which I consider to be material or to have resulted in any prejudice to the Appellant. The requirement for notification is for the benefit of the relevant parties in order that they may make representations in relation to the application should they wish. It is not disputed that the relevant parties, save for Mr Forrest of the Community Council, received notification. As such, despite any delay, they have had the opportunity to participate.

4.5 In respect of notification to Mr Forrest, whilst Mr Forrest may not have been notified it is evident from the minute of the hearing that he has been made aware of the application by the Appellant, had written to the Board in support of the application, had attended the hearing and been given the opportunity to make representations.

4.6 The Appellant’s supplementary point that there has been a failure by the PPC to explain the application of the Regulations to the facts in respect of the lack of notification to Mr Forrest is, in my view, misconceived. The notification or otherwise of Mr Forrest is not a fact which was considered by the Board when deciding whether to grant the application. It was a procedural step. It falls to be considered within the context of that ground of appeal.

Ground of Appeal 2

- 4.7 The Appellant submits that the PPC failed to give adequate weight to the CAR. It submits that this constitutes a procedural defect as the Appellant contends that the principal rationale given by the PPC for not giving significant weight to the CAR related to the passage of time since its completion. This is said to have been as a result of the delay in consideration of the application.
- 4.8 In assessing the adequacy of the existing service the PPC is obliged to have regard to the whole body of evidence before it in relation to the adequacy of the service at the point the decision is taken. One of the adminicles of evidence which the PPC requires to consider is the CAR. However, it is not determinative.
- 4.9 It is evident from the decision of the PPC that consideration was given to the terms of the CAR. This is set out clearly in paragraphs 34.2.5 and 34.2.6 of the decision. The PPC then proceeded to consider improvements made in the existing service provision since the conclusion of the CAR, in particular in relation to increased staffing. These submissions from the interested parties were supported by recent independent inspections of the existing pharmacies.
- 4.10 Having considered the evidence before it, the PPC concluded that, at the time of the hearing, the service was adequate. I consider that the PPC had no choice but to consider the adequacy of the existing service provision at the time of the hearing. In doing so, it is able, as an expert tribunal, to determine the appropriate weight to give to evidence before it, including the CAR. In this regard, I do not consider there to have been any procedural irregularity in the way the PPC has taken the decision, including the manner in which it has considered the CAR.
- 4.11 The Appellant's wider point is that the improvements in service after the conclusion of the CAR were only made relevant as a consequence of the delay in the PPC considering the application. In this regard it is apparent that the application was not considered until some 10 months after the application was made. This delay is highly unsatisfactory. The Board must ensure that it considers applications timeously.
- 4.12 Whilst the level of delay in this instance is not acceptable it is, unfortunately, not something for which an adequate remedy exists as part of this appeals process. The PPC was correct to consider adequacy at the point of the hearing. Returning the matter to the PPC to reconsider or constituting a fresh PPC to hear the application of new will not change that. I do, however, wish to record my personal dissatisfaction at the delay in consideration of this matter.

Ground of Appeal 3

- 4.13 The Appellant states that the PPC failed to consider the submissions made by the Applicant in relation to the lack of transparency of complaints figures compiled by contractors themselves and the Applicant's personal knowledge of branch closures.
- 4.14 In relation to the first point, it is not correct to say that the PPC has not considered the submission made by the Applicant in relation to complaints made against existing providers. The PPC sets out its reasoning in relation to the consideration of complaints in paragraph 34.2.9 of its decision. The Applicant's submission to the effect that complaints numbers may not be accurate is not directly noted but the PPC is not required to address every point made

to it in submissions in its decision. It is simply required to provide clear reasoning for its decision which I am satisfied that it has.

- 4.15 I would also observe that the PPC could not reasonably have drawn anything from the Applicant's submission that there may have been further complaints or further information in relation to complaints which were not available to the PPC. This submission acknowledges in its own right that (a) there may or may not have been further information, and (b) any such information was not available for the PPC to consider.
- 4.16 In relation to the second point, the PPC noted the submission of the Applicant in relation to branch closures and evidence of personal knowledge of concerns in relation to the adequacy of services offered at paragraphs 34.2.7 and 34.2.10. The PPC's reasoning in this regard is clear. As noted above, the PPC is not required to expressly address each point made to it in submissions when providing its reasons.

Ground of Appeal 4

- 4.17 The Appellant states that the PPC failed to consider the submissions made by the Applicant in relation to future growth of the population within the neighbourhood.
- 4.18 The reasoning of the PPC in relation to future population growth is set out in paragraphs 34.2.18 to 34.2.21. The PPC's reasoning is clear. It considered that there was potential for population growth within the neighbourhood but that a significant volume of this would be commuter driven and their needs would be likely to be serviced outwith the neighbourhood. To the extent that there was a requirement for increased capacity the PPC considered that this was available at the existing pharmacies within the neighbourhood and that the desire for another pharmacy was based on issues of convenience rather than issues with the adequacy of the existing service.
- 4.19 I am satisfied that the reasoning of the PPC in this regard is more adequately expressed in the decision.

Ground of Appeal 5

- 4.20 The final ground of appeal states that the PPC failed to consider the response from the Lothian Area Pharmaceutical Committee. This is incorrect. The decision lists at paragraph 33.1 the evidence considered by the PPC. This includes the letter from the Lothian Area Pharmaceutical Committee.

Disposal

- 5.1 For the reasons set out above, I have concluded that the grounds of appeal set out by the Appellant disclose no reasonable grounds of appeal.
- 5.2 In reaching this conclusion I am mindful that the test set out in the Regulations for the rejection of an appeal on the basis that it discloses no reasonable grounds of appeal is a high bar. However, I am satisfied that the grounds of appeal advanced have no realistic prospect of success.
- 5.3 I, therefore, dismiss the appeal of the Applicant on the basis that it discloses no reasonable grounds of appeal.
- 5.4 Whilst I have concluded that the appeal must be dismissed, I wish to record my concern in relation to the time it has taken the Board and PPC to consider the application. On any view, it is not acceptable for approximately 10 months to pass before a decision is made in relation

to an application. As is evident from the decision in this instance, such a delay will make it difficult for an applicant to effectively present their application as circumstances will change throughout the process. This creates the clear prospect for prejudice to the application for which there will be no effective remedy. The Board should be mindful of this when dealing with applications.

J Michael D Graham

Interim Chair

7th October 2019