

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

Old Kirk, Newton Brae, Newton, Cambuslang G72 7UW

Applicant: G&S Healthcare Limited

Health Board : NHS Lanarkshire "the Board"

PPC Decision issued : 9 October 2019

Panel case number : NAP 94 (2019)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1 G&S Healthcare Limited (“the Applicant”) 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 Old Kirk, Newton Brae, Newton, Cambuslang (“the Premises”) . The application was dated 24 July 2019.
- 1.2 The application was considered by the Board at a hearing of its Pharmacy Practices Committee (“the PPC”) on 4 September 2019 and a decision was issued on 9 October 2019. An appeal was lodged against that decision by the Applicant (also referred to herein as “the Appellant”).

2. Grounds of Appeal

- 2.1 The Appellant’s email dated 11 November 2019 sets out the grounds of appeal relied upon.
- 2.2 The grounds of appeal can be summarised as follows:
 - 2.2.1 Ground of Appeal 1: that NHS Lanarkshire distributed out of date information in relation to the population of the neighbourhood to which the application related (“the Neighbourhood”) to the parties and PPC in advance of the hearing;
 - 2.2.2 Ground of Appeal 2: one of the professional members of the PPC appeared to have a professional connection with pharmacies which were proximate to the neighbourhood;
 - 2.2.3 Ground of Appeal 3: the Chair of the PPC allowed the Interested Parties too great an influence in the procedure when he acceded to the request that they provide their submissions in a certain order;
 - 2.2.4 Ground of Appeal 4: reference was made in the submissions on behalf of Boots UK Ltd to documentation which has not been made available to the Applicant;
 - 2.2.5 Ground of Appeal 5: the PPC failed to take account of increased dispensing figures in relation to Lloyds, Boots and Leslies pharmacies;
 - 2.2.6 Ground of Appeal 6: the PPC failed to revisit eMAS figures which were in dispute between the parties during its consideration of the application;
 - 2.2.7 Ground of Appeal 7: the PPC failed to adequately consider the Consultation Analysis Report (“CAR”) or letters of support submitted in favour of the application; and
 - 2.2.8 Ground of Appeal 8: the PPC failed to take account of future developments and potential population growth when considering the adequacy of the existing provision.

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 The Appellant’s concern is that information was circulated by NHS Lanarkshire which was out of date. It was taken from the 2011 Census and more recent and reliable information was available. It is said that this caused confusion throughout the hearing and may have influenced the decision of the PPC.
- 4.2 It is clear from the decision that the PPC has identified that there was a significant dispute between the parties in relation to the population figures. Having done so, it has interrogated the information presented to it, including further information which supported the Applicant’s position in relation to the population of the Neighbourhood. Having done so, it proceeded to take its decision on the basis of population figures which accorded with the Applicant’s submissions.
- 4.3 I consider that the PPC has fully considered the relevant figures presented to it. It is an inevitable part of adversarial proceedings that parties will contest the veracity or relevance of information, including statistics. All parties are entitled to present their perspective. The PPC is an expert tribunal which is perfectly capable of analysing competing submissions, as it has done in this instance.

Ground of Appeal 2

- 4.4 The Regulations prescribe the make-up of the PPC. It must include practicing pharmacists, both those on and not on a pharmaceutical list. The pharmacists are non-voting members of the PPC and are there to assist the lay members in their consideration of potentially technical issues.
- 4.5 The Appellant’s concern is that the PPC pharmacist member who was not included in the pharmaceutical list acted as an Independent Pharmacist Prescriber and, in this capacity, had an existing relationship with the interested parties. The Appellant considers that this created the potential for bias which manifested itself in the soft or unduly credulous questioning of the interested parties by the relevant member.
- 4.6 It is important that proceedings before the PPC are both free from bias and free from the perception of bias. There is a mechanism provided in the Regulations for members of the PPC to declare whether they have an interest in the application or an association with

someone interested in the application. Where they have such an interest they are excluded from deliberations.

- 4.7 It is inevitable as a consequence of the statutory make up the PPC that the professional members of the PPC will have some professional connection to participants in the process, be they advocates for or opponents of the application. It is a question of degree whether that connection amounts to an association which requires to be declared in terms of the Regulations. When considering the matter it should be borne in mind that the professional members are not entitled to vote.
- 4.8 In the present case, the Chair duly raised the question of declarations prior to the hearing proceeding. No issues were raised in respect of Mr Cassell's participation. The extent of the connection between Mr Cassell and the interested parties in this application which is set out by the Appellant does not in my opinion amount to anything beyond an ordinary professional connection. If routine professional connections of the sort set out by the Appellant were to exclude professional members of the PPC from participating then professional members would be excluded on a regular basis which would hamper the operation of the PPC. I consider that a far greater level of connection between the professional member and an interested party is required to constitute an "association" which would merit their exclusion from the consideration process.

Ground of Appeal 3

- 4.9 The Appellant complains that the PPC, at the request of the representatives of Lloyds and Boots, allowed the interested parties to provide their submissions in a different order to that which had been anticipated.
- 4.10 The order in which submissions are made is entirely a matter for the PPC. It is free to conduct hearings in a manner which it considers appropriate. In this instance, all parties were given the usual opportunity to make submissions and question other parties. The order in which those submissions are made is of no substance. I consider this ground of appeal to be wholly frivolous.

Ground of Appeal 4

- 4.11 The Appellant complains that the submissions made on behalf of Boots contained appendices which were not made available to the Appellant.
- 4.12 There is no requirement within the Regulations for the Applicant to be provided with copies of submissions made to the PPC by interested parties. The PPC is free to consider the matter solely on the papers if it considered it appropriate. There is no requirement to hold a hearing and allow further submissions or questioning of the interested parties. Equally, it should be borne in mind that routine parts of the consideration process by the PPC will exclude certain interested parties from the process. For example, site visits made by the PPC will not convene all interested parties in order that they can comment fully on any information obtained by the PPC during the site visit.
- 4.13 Whilst as a matter of good practice I consider that all papers should be made available to all parties, I do not consider that the failure to do so would amount to a procedural irregularity. The procedure envisaged by the Regulations is not one which anticipates that the representations of the interested parties being received and responded to by the Applicant in the form of submissions and counter submissions. Rather, the PPC operates as an expert tribunal with the ability to interrogate information provided to it by all parties.

Ground of Appeal 5

- 4.14 The Appellant states that the PPC failed to acknowledge the recent increase in dispensing figures by Lloyd, Boots and Leslies.
- 4.15 It is evident from the decision of the PPC that they considered the overall level of dispensing. The PPC specifically considered the overall level of dispensing by pharmacies in Cambuslang and note that it had not increased.
- 4.16 The Appellant's point is that, although that is the case overall, it is attributable to one pharmacy losing a significant amount of business from nursing homes. Whilst the PPC does not require to address every submission made to it directly where it reaches a specific conclusion in relation to arguments before it ought to fully set out its reasoning in that regard.
- 4.17 In this instance, the PPC has considered the fact that there has been no overall increase in dispensing figures in Cambuslang to be significant as it was indicative of there being no increased demand on the existing pharmaceutical services available to the neighbourhood. In light of the representations made by the Applicant in relation to the increase in dispensing at certain practices and the reason for the reduction at others, leading to the overall neutral position, I consider it appropriate for the PPC to set out fuller reasons addressing these points.

Ground of Appeal 6

- 4.18 The Appellant sets out that there was a dispute between the parties in relation to eMAS figures which the PPC indicated would be returned to during the course of deliberations. There is nothing within the reasoning of the PPC which sets out what conclusions they reached in relation to the eMAS figures.
- 4.19 As with Ground of Appeal 5, it requires to be borne in mind that the PPC is not required to address every contentious issue between the parties or submissions made to it when providing its reasons. It may well be that the reduction in the provision of eMAS services is not considered to be significant. However, the reasoning of the PPC does not make that clear as the PPC's reasoning in relation to the adequacy of the existing service does not go much further than a statement to the effect that they were not persuaded that there was evidence of inadequacy. I, therefore, consider it would be appropriate for the PPC to provide reasons as to why it did not consider this to represent an issue with the adequacy of the existing service.

Ground of Appeal 7

- 4.20 The Appellant considers that the PPC assessment of the CAR is unreasonable and dismissive. In particular, the Appellant raises concerns that the PPC considered that a significant positive response in support of an application is common in a CAR and that the majority of the complaints related to issues of convenience rather than inadequacy.
- 4.21 The PPC is obliged to summarise and have regard to the CAR. The CAR is not determinative. There will be many circumstances in which a public survey will be supportive of the establishment of a new pharmacy without the proposal coming anywhere near to satisfying the requirements of the Regulations. There are a number of reasons for this.
- 4.22 As such, the PPC is entirely free to refuse an application notwithstanding a supportive CAR. However, when it does so it is appropriate that it explains its reasoning clearly. In this instance, I share the Applicant's concern that the PPC appears to dismiss the CAR as being of little value in this instance without setting out clearly the basis upon which it considers that to be the position. I consider that it would be appropriate for it to expand upon its reasoning, particularly in relation to what elements of the response it considered to be indicative of concerns in relation to convenience rather than adequacy, why it considered certain elements of the response to be odd and the conclusions it drew from those issues.

- 4.23 The Appellant also complains that the PPC failed to consider letters of support. This is not correct. The PPC expressly notes that there were a number of letters of support. The PPC evidently did not consider them to be significant, however, again its reasoning is lacking in this regard.

Ground of Appeal 8

- 4.22 The Appellant states that the PPC failed to consider future developments and population increases. The Appellant is correct that when considering the adequacy of the existing services, the PPC is required to consider the future provision of services having regard to the anticipated future needs of the neighbourhood. In this instance, it is clear that the PPC has done so. The decision sets out the PPC's consideration of houses under development within its assessment of the relevant population. It also sets out that potential future developments which are not yet under construction have not been factored into its consideration on the basis that they are insufficiently certain.

Disposal

- 5.1 For the reasons set out above, I have concluded that the reasoning of the PPC is lacking in a number of respects. In particular, I consider that the complaints made by the Appellant in Grounds of Appeal 5, 6 and 7 in relation to the lack of reasons provided by the PPC are valid.
- 5.2 I therefore remit the decision back to the PPC to provide further reasons addressing the issues raised by the Appellant in Grounds of Appeal 5, 6 and 7. In particular, it would be of assistance if the PPC were to explain:
- 5.2.1 the basis on which it concluded that there had been no increase in dispensing in Cambuslang;
 - 5.2.2 why it did not consider it relevant that dispensing by certain pharmacies had increased and that the reduction in dispensing by other pharmacies may have been attributable to the loss of nursing home contracts;
 - 5.2.3 why it reached the conclusion based on the above issues that pharmaceutical services were being accessed outwith Cambuslang;
 - 5.2.4 why the PPC did not consider that the reduction in utilisation of eMAS services was significant;
 - 5.2.5 why the PPC considered that the responses to the CAR were indicative of concerns with issues of convenience rather than adequacy; and
 - 5.2.6 why the PPC considered the response to the CAR to be "odd" and what significance, if any, it drew from this.
- 5.3 I would note as a general point that the substantive conclusion of the PPC in this instance was that they did not consider there to be any substantive evidence of the inadequacy of the existing service. The PPC is of course free to reach that conclusion. It may, therefore, consider that none of any of the issues raised by the Applicant are significant. Nevertheless, it would be beneficial for all parties if in those circumstances the PPC would set out reasons why it did not consider the principal issues raised by the Applicant to evidence the inadequacy of the existing service. If nothing else, it would be more likely to satisfy the Applicant that they have had a fair hearing and avoid potentially unnecessary appeals.
- 5.4 I have to add , for the avoidance of doubt, that a re-hearing is neither necessary nor appropriate.

(sgd) J Michael D Graham - Chair

15th February 2020