

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

(“the Premises”)

Applicant & Appellant: K & L Manson

Health Board: NHS Grampian (“the Board”)

PPC Hearing: 18 March 2022

Panel case number: NAP106 (2022)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1. K & L Manson (t/a Kemnay Pharmacy) (hereinafter referred to as “the Applicant” or “the Appellant”) made application for inclusion in the Pharmaceutical List of the Board to provide pharmaceutical services from and in respect of premises at Unit 2, Neighbourhood Centre, Countesswells, Aberdeen, AB15 8GW (“the premises”). The application was dated 20 January 2022.
- 1.2. The Pharmacy Practices Committee (“the PPC”) under the delegated authority of the Board held a hearing on 18 March 2022 taking evidence from the Applicant and the then Interested Parties following upon which it determined that the current provision of pharmaceutical services in the neighbourhood of which the premises formed part was adequate and accordingly refused the application.
- 1.3. An appeal was lodged against the decision of the PPC by the Appellant.

2. Grounds of Appeal

- 2.1. The PPC had decided that there was adequate provision of pharmaceutical services to the neighbourhood from pharmacies situated out-with the neighbourhood but had given no reasons for their doing so.
- 2.2. The PPC had, in addition, concluded that as the other pharmacies were easily accessible by car and public transport it did so notwithstanding that it had acknowledged that the public transport was infrequent.
- 2.3. The Appellant avers that the provision of prescriptions was only a single aspect of core pharmaceutical services, the remaining services requiring direct face-to-face contact within a pharmacy in order that they are adequately delivered and that the PPC ought not to have focussed on the supply of medicines alone. The Appellant avers in their grounds of appeal that none of the surrounding pharmacies is able to provide face-to-face services such as Pharmacy First, Emergency Hormonal Contraception or UTI in the neighbourhood.

3. Discussion

- 3.1. Having defined the neighbourhood, which the PPC has done and noted that there appears to have been no contention as to its definition it requires to look at the existing services and in particular their adequacy. The test is contained in Rule 5(10) of the Regulations and which requires the consideration of the adequacy of existing core services provided in the neighbourhood by persons whose names appear on the pharmaceutical list.
- 3.2. The PPC should therefore consider the services provided in the neighbourhood by contractors who are located in the neighbourhood (in this case none) and services provided by other contractors who are not located in the neighbourhood but who nevertheless provide services in and to the neighbourhood. When dealing with the question of neighbourhood the PPC do require to look at the customers or patients, the public travelling on foot and those travelling by car and public transport as also the level of deprivation, what needs they have and how their needs are being met. Accordingly in this context the PPC require to look at the existing services in order to consider whether or not they are adequate. It is necessary to look at the range in hours of service and any out of hours arrangements which may exist and whilst not a core service a collection and delivery service (which may be withdrawn at any time). In addition to consider whether these arrangements are adequate bearing in mind the needs of those people

within the neighbourhood, shopping and other services both within and outwith the neighbourhood also require to be considered.

- 3.3 It may be that a PPC considers the existing provision of services in the neighbourhood is inadequate but that does not necessarily mean it is either necessary or desirable to grant the application. The test requires that it is necessary or desirable to *secure* adequate provision of pharmaceutical services. Further, if the Applicant's business is not likely to be viable then it may not achieve the aim of securing adequate provision. The PPC may find that the existing service is inadequate but that granting the application will not secure adequate provision and therefore it should be refused. The viability of existing service providers is also relevant in this context. If granting the application would affect the viability of those who provide services then it may be that granting the application would have a negative effect upon the services in the neighbourhood as a whole
- 3.4 In the circumstances the issues which the PPC will require to consider are the distribution of services in the neighbourhood, the number of people who require the services, the type of people in the neighbourhood who require services, how they can access those services and what services are provided and during what hours, whether GP surgeries are close at hand and, if so, how many and what effect that has on demand and the question of whether or not that provides an adequate service.
- 3.5 Any PPC requires to avoid the convenience factor. It should ask itself whether the application is a question of convenience. It may be convenient to access services from a particular place at particular times of the day but that does not mean that the service in the neighbourhood is not adequate; the Consultation Analysis Report ('CAR') may be favourable to an application but that may be based on convenience and any PPC requires to question whether those who have contributed to the CAR (and the extent of their numbers) are doing so in respect of real demand as a result of an inadequate service in the neighbourhood or have they signed because that is where they effect most of their shopping and other services and it would be convenient for them to have prescriptions dispensed there. If the major shopping and services are situated outwith the neighbourhood the PPC may consider that to lean more in favour of convenience ,

4 Decision

- 4.1 Under the Regulations the available grounds of appeal against a decision of the Board are limited to circumstances in which there has been:
- 4.1.1 an error of Law by the Board in its application of the Regulations;
 - 4.1.2 a procedural defect in the way the application has been considered by the Board;
 - 4.1.3 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
 - 4.1.4 a failure to explain the application by the Board of the provisions of these regulations to those facts ["schedule 3 para 5 (2B)(c)"]
- 4.2. I am required to consider the notice of appeal and:
- 4.2.1 to dismiss the appeal if I consider that it discloses no reasonable grounds or otherwise is frivolous or vexatious.
 - 4.2.2. remit the decision back to the Board for reconsideration if I consider that any of the circumstances set out in points 4.1.2 to 4.1.4 have occurred or
 - 4.2.3 in any other case, convene the National Appeal Panel to determine the appeal

5 Consideration of Points of Appeal

- 5.1 The Appellant's grounds for appeal are, in essence, two-fold, although, inextricably linked. Firstly that the PPC had given no "thought process" as to how the neighbouring pharmacies are capable of delivering an adequate pharmaceutical service to the neighbourhood and which I understand to mean that they have not given sufficient reasons for their decision and thus in breach of Schedule 3 para 5(2B) of the Regulations . Whether or not the existing provision of pharmaceutical services is adequate is a core part of the expertise of the PPC and, as such, its decisions in this regard should be afforded a significant degree of discretion and deference. It is an expert Tribunal. However, it is not as simple as that. In terms of the Regulations as mentioned above, an application shall be granted by the Board: "5(10)(a) only if it is satisfied that the provision of pharmaceutical services at the premises named in the application is necessary or desirable in order to secure adequate provision of pharmaceutical services in the neighbourhood in which the premises are located by persons whose names are included in pharmaceutical list..."
- 5.2 In terms of paragraph 3(1) of schedule 3 the PPC considers pharmaceutical services already provided in the neighbourhood of the premises, the pharmaceutical services to be provided in the neighbourhood at those premises, any information available to the PPC (including representations to it) which in its opinion is relevant to consideration of the application, the CAR, the Pharmaceutical Care Services Plan and the likely long term sustainability of the pharmaceutical services to be provided by the Applicant.
- 5.3 The principal consideration of the PPC's decision for the present purposes is whether or not it has exercised its judgement fairly and given adequate reasons for it, and that it does not otherwise offend against the grounds of appeal set out in schedule 3 paragraphs 5(2A) and 5(2B). It is relevant to note that the PPC comprises pharmacists and lay members who may be expected to understand the issues involved in the evidence before it. Equally, it must be understood that the PPC's decision is intelligible and it must be adequate. It must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal issues and not give rise to any substantial doubt that it had erred in Law. Such adverse inference will not readily be drawn. A deficiency in service must exist before an application may be granted. Consequently, the existence of any such deficiency must be identified before it is necessary to consider what may be done to provide a remedy.
- 5.2 As I understand the Appellant's first ground of appeal the PPC have given no reasons as to how the neighbouring pharmacies are delivering an adequate pharmaceutical service to the neighbourhood. The PPC have had the advantage of hearing evidence both from the Applicant and the representatives of two neighbouring pharmacies but no cogent reference has been made by the PPC in the decision as to the differing views of the parties and what weight had been given to those views. It may be that the demographics of the neighbourhood or some other factors had an influence on the PPC's decision as to adequacy but whatever they were is not clear. The second ground of appeal relates to the PPC's statement that the neighbouring pharmaceutical services were readily accessible and adequate and indeed were easily accessible both by car or public transport although it did note that at present public transport was found to be infrequent. Was there a tension between those two statements? If there was it is not clear how the PPC resolved it. It was the Appellant's view that the infrequency and inconvenience of public transport (their evidence was that it required two buses there and back from any of the neighbouring pharmacies) affected access and therefore underscored the inadequacy of the current service. The PPC has not fully addressed this issue.
- 5.3 There was much evidence as to the proposed viability of a pharmacy in Countesswells but no reference has been made to such evidence and what the decision of the PPC was in relation to this and which is another issue that will require to be addressed by the PPC.
- 5.4 In terms of schedule 3.3(6)(a) and (b) there requires to be a summary of the CAR and an explanation of how it was taken into account in arriving at its decision. With regard to the test under Regulation 5(10) no such reference to the CAR has been made in the PPC's decision. It may be that it was the PPC's view that there was insufficient information in the CAR to justify a reference but nevertheless, it is a requirement in terms of the Regulations. In addition, in terms

of schedule 3.3(6)(c) there requires to be reasons for the PPC's determination. No such reasons have been articulated.

6 Disposal

- 6.1 For the reasons set out above, I shall remit the decision back to the full PPC to clarify its decision and, in particular:
 - 6.1.1 to give coherent reasons as to why it considers the current provision of pharmaceutical services in the neighbourhood to be adequate
 - 6.1.2 To give an explanation of the reasons why it concluded that any access issues did not affect the issue of adequacy
 - 6.1.3 To explain whether and to what extent the question of viability of both the proposed and existing pharmaceutical services are relevant
 - 6.1.4 To set out a summary of the CAR and how it was taken into account in arriving at its decision

(sgd) J Michael D Graham
Interim Chair
National Appeal Panel
27 June 2022