

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

25 Main Street, Mid-Calder, Livingston, West Lothian

Applicant: Mr David Stevenson

**Appellants: Lindsay & Gilmour Pharmacy, Wm Morrisons Supermarkets Plc and Boots UK Ltd
(collectively referred to as "the Appellants")**

Health Board: NHS Lothian ("the Board")

PPC Decision Issued On: 14 April 2021

Panel Case number: NAP 90/1

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 ("PPC") of the Board, which was issued on 6 May 2021 in relation to the application of David Stevenson ("the Applicant").
- 1.2 This application has a long history. The application was originally made on 14 March 2016. Since then, the PPC has considered the application in 2017, 2018, 2019 and 2021, on each occasion following a remit back to the PPC after an appeal was lodged against the decision.
- 1.3 This decision relates to the latest decision of the PPC was issued following my remit back to the PPC of their 2019 decision for the matter to be considered by a fresh panel.
- 1.4 Appeals were lodged against the present decision of the PPC by the Appellants.

2. Grounds of Appeal

- 2.1 The grounds of appeal submitted by the Appellants raise the following issues:
 - 2.1.1 the Consultation Analysis Report (CAR) is out of date and, as the application was treated as a new application for the purposes of the latest hearing, a new consultation ought to have been carried out and a new CAR prepared;
 - 2.1.2 the CAR did not identify the residents responding to the CAR to allow consideration of their representation of the neighbourhood;
 - 2.1.3 the PPC reached their conclusion in respect of the adequacy of the existing service by addressing the question of whether there was evidence of adequacy, as opposed to evidence of inadequacy;
 - 2.1.4 whether the Applicant was acting as a paid advocate for 3rd parties with a financial interest in the application; and
 - 2.1.2 various concerns about the interpretation of the facts by the PPC and reliance on evidence which the Appellants considered irrelevant.

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 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

Requirement for a new CAR

4.1 The CAR was produced in 2016 prior to the application originally being submitted. As such, there is a real risk that it is now out of date, at least in some respects. It is, however, through no fault of the Applicant that the CAR is out of date. The CAR was prepared prior to the original application being submitted, as the Applicant is required to do by the Regulations. The numerous appeals which have followed are out-with the Applicant’s control.

4.2 The Appellants note that the application has been considered as if it were a new application by the PPC. Whilst this is correct, it provides only a partial picture of the basis on which the PPC considered the application.

4.3 The PPC noted that it was required by my previous decision to consider the matter afresh, with a newly constituted panel. In this sense, they were considering the application anew. They were not, however, considering a new application and nor had the application been re-

submitted. They were reconsidering an existing application. As such, there was no requirement for a new CAR.

4.4 In recognition of the fact that the CAR dated from 2016, the PPC invited all parties to submit additional information to address any areas in which they considered the CAR to be deficient and to provide up to date information. The only CAR was adopted as a base level of information and all parties were invited to provide information to the PPC to supplement it or explain where it was now inaccurate as a consequence of changing events. All interested parties were, therefore, given a fair and equal opportunity to address any issues presented by the age of the CAR. This approach strikes a reasonable balance between the need for up to date information and not prejudicing the position of the Applicant due to the prolonged consideration of his application.

4.5 I consider that this ground of appeal has no prospect of success.

Identification of Respondents to CAR

4.6 Two of the Appellants submit that the CAR is technically deficient as it does not identify the respondents' location. This is said to prevent it being possible to identify the level of support for the application within the neighbourhood as required by Regulation 5A.

4.7 I do not consider this ground of appeal to be well founded. The CAR identifies the number of respondents to the consultation and the number of residents within the neighbourhood. Although it is possible that there may be respondents from out-with the neighbourhood or that the population of the neighbourhood may change, this is not sufficient to undermine the ability of the CAR to reflect the level of support in the neighbourhood for the application.

4.8 It should be borne in mind that the CAR will only ever be able to reflect the support for the application within the neighbourhood to a general extent. There will inevitably be residents who are not aware of the consultation and so do not respond, are unable to respond for one reason or another or, while supportive of the application, choose not to respond. As such, the CAR cannot be expected to show a precise figure for the support of the community for the application. There is, therefore, no requirement for all respondents to be identifiable that the CAR may be interrogated in detail. Such an approach would be unnecessary, invasive and likely to discourage participation in the consultation.

4.9 I consider that this ground of appeal has no prospects of success.

4.10 I would also note that it has not been raised as an issue before now. This is despite the CAR having been considered at 3 previous hearings and appeals. It is most unsatisfactory that such an issue is being raised at this late stage.

Evidence of Adequacy

4.9 At page 56 of its decision, the PPC states that:

“The Committee concluded that there was not enough evidence provided to demonstrate adequacy of the existing pharmaceutical services in and to the defined neighbourhood.”

4.10 In proceeding on this basis, I consider that the PPC misdirected itself. The PPC was required to consider whether there was evidence that the existing service was inadequate, rather than consider if there was sufficient evidence to demonstrate that the existing service was adequate.

4.11 I consider this to be a clear error in law by the PPC. As such, I am required to uphold this ground of appeal.

Paid Advocate

4.12 This point can be dealt with briefly. The Applicant is making the application in his own name. He is entitled to make representations in support of his own application. Any alternative position would be plainly perverse.

4.13 Whether or not the Applicant currently works for another pharmacist is wholly irrelevant. They are not the applicant and, therefore, he cannot be acting as a paid advocate for them. Even if the application were being made by Omnicare (for whom the Applicant is said to work), the Applicant would be entitled, as an employee of Omnicare, to make representation on its behalf. The vast majority of large pharmacy operators are represented by persons in their employment. This includes the Appellant raising this ground of appeal. If they were prevented from proceeding in this way they would, effectively, be deprived of the right to representation.

Reliance on Irrelevant Factors

4.14 The Appellants raised concerns about the consideration by the PPC of factors which they considered to be irrelevant. In particular, one or more of the Appellants stated that the PPC ought not to have had regard to:

4.14.1 any palliative care services which may be offered by the Applicant;

4.14.2 suggestions made by the Applicant that he may increase Saturday opening hours;

4.14.3 the ability of the Applicant to secure disabled parking; and

4.14.4 any effect the Covid 19 pandemic may have had on the delivery of pharmaceutical services.

- 4.15 In relation to points 4.14.1 – 4.14.3, the complaint is essentially that the PPC could not with any certainty conclude that the undertakings made by the Applicant or parties supporting the application would come to fruition, either because they were not within the control of the Applicant or supporting party or were supported by insufficient information.
- 4.16 These factors cannot reasonably be said to be irrelevant, such that the PPC ought not to have considered them. The question is instead the extent to which weight ought to be given to evidence in relation to which no certain conclusion can be drawn.
- 4.17 On this basis, I consider that the PPC was entitled to have regard to these factors and that it was for the PPC to consider the appropriate weight to give to them, having regard to any uncertainty.
- 4.18 I have some sympathy with the Appellants in relation to any consideration given by the PPC to the effects of the pandemic. The pandemic will have caused enormous disruption and presented difficult challenges to the operation of pharmacies. However, I do not consider it correct to say that the PPC ought not to have regard to these issues. They are undoubtedly relevant to the provision of pharmaceutical services generally. Instead, it is again a question of the PPC giving appropriate weight to considerations related to the pandemic, having regard to the exceptional circumstances the pandemic presented.
- 4.18 Accordingly, I consider that this ground of appeal stands no real prospect of succeeding.

Factually Inaccurate Information

- 4.19 The Appellants raise concerns that the PPC relied on information which they considered to be misleading or factually inaccurate.
- 4.20 Standing my decision in relation to the approach of the PPC to the adequacy of the existing services, I am not required to reach a final decision on these issues. However, in order to assist with bringing this matter to a conclusion without the need for further appeals, I would observe that it is a matter for the PPC to assess the evidence before it and reach a conclusion. Whether the Appellants consider this conclusion is correct is not relevant and I would firmly discourage appeals based broadly on the assertion that the PPC was wrong to reach the conclusion it did. That said, the decision should be objectively justifiable and the reasoning should be comprehensible to a participating party.
- 4.21 Having regard to the above, I would encourage the PPC when reconsidering the decision, to address the factual issues raised by the Appellants and explain the basis upon which it has reached the conclusions it has. Equally, I would encourage the Appellants to accept that the PPC is entitled to reach its own conclusions on the basis of evidence before it and the fact that they may disagree with that conclusion (however strongly) does not constitute a valid ground for appeal.

5. Disposal

- 5.1 For the reasons set out above, I have concluded that the PPC has made an error in law when considering whether the existing services were adequate. It was required to consider not whether there was evidence of adequacy but whether there was evidence of inadequacy.
- 5.2 In these circumstances, I am required to remit the matter back to the PPC for reconsideration. I am content for the same panel to reconsider the matter having regard to my comments about the approach they must adopt to the consideration of adequacy.
- 5.3 In order to avoid any further appeals in relation to what has already been a tortuous process in relation to this application, I would also encourage the PPC to address the concerns of the Appellants in relation to any question of the accuracy of information on which they have based their decision. In relation to any such issues, it would assist if the PPC were to explain clearly the basis on which they have reached the factual conclusions they did. If in reconsidering any of these issues the PPC forms the view that it did indeed draw an incorrect factual conclusion from the evidence before it, it would assist if it would confirm this and make clear whether this would have altered their decision.

JMD Graham

Chair

31st July 2021