

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 6, Kinnaird Village, McIntyre Avenue,
Larbert. FK5 4XT**

Applicant: WEB Pharmacy ("the Applicant")

Appellant: A D Healthcare Ltd ("the Appellant")

Health Board: NHS Forth Valley ("the Board")

PPC Decision Issued: 11 July 2024

Panel case number: NAP 111A (2024)

Decision of the Chair of The National Appeal Panel

1. Background

- 1.1. This is an appeal against a reconsideration decision of the Pharmacy Practices Committee (“the PPC”) of the Board which was issued on 11 July 2024 in relation to the application of WEB Pharmacy (“the Applicant”).
- 1.2. The application was originally made on 2 December 2021. The application was considered at a meeting of the PPC on 22 September 2022. At that meeting the application was granted.
- 1.3. The (then) first and second Appellants lodged an Appeal against the decision of the PPC on 31 October 2022 and 1 November 2022 respectively. In a decision dated 25 April 2024 I upheld one ground of appeal and remitted the matter back to the PPC for reconsideration.
- 1.4. The ground of appeal which was upheld (then ground of appeal 2) related to the requirement in the Regulations for the Board to properly narrate the facts and reasons upon which their determination of the application was based – paragraph 3(6)(c) read with paragraph 5(2B)(b) of Schedule 3. The reasons that were given related to matters of convenience rather than adequacy. This also disclosed that the PPC had failed to properly apply the legal test. Failure to do so procedurally speaking or with reference to the facts of the case were grounds of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 respectively.
- 1.5. In remitting the case back to the PPC I encouraged them to consider approaching its consideration of adequacy squarely in terms of the legal test and providing sufficient reasons in this regard.
- 1.6. The PPC reconvened on 9 July 2024 and issued its decision to once again approve the application on 11 July 2024. The remaining Appellant now appeals that decision.

2. Grounds of Appeal

- 2.1. Ground of Appeal 1. This ground relates to whether the CAR has been properly taken into account in terms of the Regulations.
- 2.2. Ground of Appeal 2. This ground relates to whether there has been a failure to explain the application by the PPC of the Regulations to the facts upon which their decision is based.
- 2.3. Ground of Appeal 3. This ground relates to whether the PPC has failed to properly apply the legal test.
- 2.4. Ground of Appeal 4. This ground relates to whether there has been a failure by the Board to provide adequate reasons.

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 appeals if I consider that they disclose no reasonable grounds or are otherwise 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 (the “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 ground relates to whether the CAR has been properly taken into account in terms of the Regulations. Failure to properly consider the CAR, as a matter of procedure, is a Ground of Appeal in terms of paragraph 5(2B)(a) and (c) of

Schedule 3 (procedural defect & duty to give reasons). This is because the reasons given must set out a summary of the CAR and how it was taken into account by the Board in arriving at its decision - paragraph 3(6)(a) and (b) of Schedule 3.

- 4.2. The Appellant is correct to note that what is said in the reconsideration decision in respect of the CAR does not meet these requirements. However the reconsideration decision does say that the PPC was reconvened at the point from which the discussions around the appeal aspect are considered. Most Boards take a similar approach - that is to say, reconvening to address the particular issues on appeal. A full reconsideration will not normally be necessary. It follows that the proper consideration of the CAR at first instance is saved for the reconsideration decision – unless of course that issue was remitted. On this basis the ground of appeal is not upheld, although I would make the point to the Board that to amend the original decision (and highlight those changes) or include the reconsideration decision as an annex to the original decision would make this approach clearer.
- 4.3. Ground of Appeal 2. This ground relates to whether there has been a failure to explain the application by the PPC of the provisions of the Regulations to the facts. Failure to do so is a ground of appeal in terms of paragraph 5(2B) (c) of Schedule 3.
- 4.4. The Appellant advances this ground of appeal in a similar way to ground of appeal 1, that is to say that there are no findings in fact in the reconsideration decision. However, for similar reasons this ground of appeal is not upheld. The original findings in fact are to be found in the original decision.
- 4.5. Ground of Appeal 3. This ground relates to whether the PPC has failed to properly apply the legal test. Failure to do so procedurally speaking or with reference to the facts of the case are grounds of Appeal in terms of paragraph 5(2B)(a) and (c) of Schedule 3 respectively.
- 4.6. In the reconsideration decision the PPC has taken great care not to over rely on issues of convenience but instead to consider the issues of adequacy. In particular whether the present services are inadequate and if so, whether the application of necessary or

desirable to secure adequate provision. In this respect the PPC has addressed what was remitted to them in this regard. This ground of appeal is not therefore upheld.

- 4.7. Ground of Appeal 4. This ground relates to whether there has been a failure by the Board to provide adequate reasons. Failure by the Board to properly narrate the facts and reasons upon which their determination of the application was based is a ground of appeal – paragraph 3(6)(c) read with paragraph 5(2B)(b) of Schedule 3.
- 4.8. When this matter was remitted to the Board they were encouraged to consider adequacy squarely in terms of the legal test and to provide sufficient reasons in this regard. Whilst the PPC have obtempered this first part by looking at adequacy and concluding that services are inadequate they have not provided any reasons as to why this is the case. Specific reasons must be given for it considering that the current provision is inadequate.
- 4.9. The Appellant makes reference to Lord Brown in *South Bucks District Council v Porter (No.2)* [2004] UKHL 33, in particular that “the reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was what conclusions were reach on the principal important controversial issues”. I agree with what is said here and uphold this ground of appeal.

5. Disposal

- 5.1. For the reasons set out above I consider that the appeal is successful in respect of ground of appeal 4. I shall therefore refer the matter back to the PPC for reconsideration.
- 5.2. If inadequacy has been established the PPC must provide sufficient reasons as to why this, in their view, is the case.

(sgd)

C W Nicholson WS

Chair

National Appeal Panel

18 September 2024