

Primary Care Appeals 2020-21 Case stories

Background

NHS Resolution is responsible for ensuring the prompt and fair resolution of appeals and disputes between primary care contractors and NHS England and NHS Improvement (NHSEI). Primary care contractors include GPs, dentists, opticians and pharmacists. This work is delivered by the Primary Care Appeals service. The relevant regulations relevant to our work are set out below¹.

It is not appropriate for the Appeals service to comment on individual decisions or cases however, in order to facilitate wider learning we highlight the following pharmacy related decisions (where indicated, the full decisions are available on our webpages):

23288 - Unforeseen benefits application

Reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB

In 23288, determined on 28 April 2020, at the end of the oral hearing, the Applicant made the comment in relation to patient choice that Thame is in Oxfordshire whereas Long Crendon and Haddenham are in Buckinghamshire. The two counties have different HWBs and the Applicant queried 'was this relevant to the issue of choice?' The Applicant did not submit that the Committee should discount the available pharmaceutical services in Thame although this may be implied in the comment. However, with the above implication in mind, the Committee nonetheless considered this point.

The Regulation speaks of there being "*a reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB*". The question is whether the words "in the area of the relevant HWB" precludes consideration of services available in a neighbouring HWB. In other words must a Committee ignore the fact that patients may choose to use an excellent pharmacy a few minutes away because it is across an administrative border? Taken to its extreme, is a pharmacy across the road from a patient to be ignored as a choice if the HWB border is down the middle of the road?

The Committee concluded that that was not the intent of the Regulation. It did not prevent the Committee from taking account of a patient choosing to go outside the HWB. The question is whether the choice available to patients including choosing to go across the HWB boundary is reasonable. To interpret the regulation otherwise had the capacity to create a considerable amount of mischief detrimental to the consideration of the provision of pharmaceutical services and potentially the public purse. It placed an arbitrary fetter on the assessment of the real 'on the ground' choices available to and made by patients and the reasons for such choices.

¹ the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 and the National Health Service Litigation Authority (Pharmaceutical Remuneration – Overpayments) (England) Directions 2018

the General Ophthalmic Services Contracts Regulations 2008;
the National Health Service (General Dental Services Contracts) Regulations 2005;
the National Health Service (Personal Dental Services Agreements) Regulations 2005;
the National Health Service (General Medical Services Contracts) Regulations 2015;
the National Health Service (Personal Medical Services Agreements) Regulations 2015;
the National Health Service (Performers Lists) (England) Regulations 2013 (as amended)

In this case it would for example mean disavowing the choice made by a patient who worked or preferred to shop in Thame and obtained their pharmaceutical services there simply because Thame is six or seven minutes south west of Long Crendon rather than six or seven minutes north east.

The Committee saw no contradiction in a resident in one HWB, Buckinghamshire, exercising a choice to go to the nearest town in the adjacent HWB, Oxfordshire. The thrust of the legislation is to ensure that patients have the opportunity to make reasonable choices. It is not intended that the choice must only be exercised in one HWB or another.

The full decision is available at <https://resolution.nhs.uk/wp-content/uploads/2020/05/23288-Pharmaceutical-Decisions-2013-Reg-18-Aylesbury.pdf>

23365 - Unforeseen benefits application

People who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that, in the area of the relevant HWB, are difficult for them to access

In 23665, determined on 11 December 2020, the Committee reminded itself that it was required to address itself to people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that are difficult for them to access. The Committee was also aware of its duties under the Equality Act 2010 which include considering the elimination of discrimination and advancement of equality between patients who share protected characteristics and those without such characteristics.

The Committee was of the view that patients who share protected characteristics are referred to in this subsection as a subset of all patients in order to ensure that the interests of patients who are potentially more vulnerable and/or have particular needs and difficulties are considered. Whilst patients with protected characteristics are part of the general patient population and fall to be considered with everyone else under the issues of choice, access and innovation, this subsection gives them special prominence. However, that prominence is limited by a focus on three questions. One, are there any patients relied on by the applicant who share a protected characteristic? Two, do they have specific needs? Three, do they have difficulty in accessing pharmaceutical services to meet those needs?

In the Committee's view it is not enough simply to say 'we all have protected characteristics because we all have an age, a sex or a racial background etc so any difficulty applies to us all'. Nor is it enough to simply suggest that any population must contain patients with protected characteristics so any difficulty experienced by the population must be experienced by them. If that were the case there would be little point in this subsection.

Whilst the Committee accepted the proposition that in any given population there will be persons with protected characteristics, that was only the starting point. The phrase "*people who share a*" suggests a number of patients with a common characteristic, a group of people with the same feature. Once that group was clearly identified an applicant needed to link that group to the important issues of specific need and difficulty beyond the generalities of access and choice.

The Committee considered whether there was evidence of such persons having specific needs and difficulty in accessing pharmaceutical services to meet those needs. It found there was little or none beyond those dealt with in access and choice.

The Committee considered whether there was evidence of such persons having specific needs and difficulty in accessing pharmaceutical services to meet those needs. It found there was little or none beyond those dealt with in access and choice. As to 'specific needs', there was little direct evidence. (*Commentary then follows on the specific arguments of the application*).

The Committee has set out the difficulties in accessing pharmaceutical services that all residents at Castle Hill face. These difficulties would necessarily be faced by persons with protected characteristics. Whilst it might be appropriate for an inference regarding difficulty to be drawn in some circumstances (e.g. a number of elderly patients, patients with reduced mobility or with limited faculties such as sight or hearing), without some detail as to the existence of these persons and the difficulties they specifically face no such inference could be drawn in this case.

The Committee considered that all these issues of general needs and general difficulty have been dealt with in the context of access and choice.

The full decision is available at <https://resolution.nhs.uk/wp-content/uploads/2021/01/23365-Pharmaceutical-Decisions-2013-Reg-18-Ebbsfleet-Garden-City.pdf>

23392 - Relocation that do not result in significant change to pharmaceutical services provision

"Existing premises"

In 23392, determined on 5 March 2021, the Applicant submitted that it is the temporarily listed premises that are the "existing premises" for the purpose of the Regulation 24 application on the basis that these are the premises from which the Applicant is currently providing pharmaceutical services. This is important as it has a bearing on the consideration of Regulation 24(1)(a) in respect of the effect of the relocation on the patient groups accustomed to using the pharmaceutical services.

The Committee noted there is no definition of "existing premises" in the Regulations.

The Committee noted provisions of Regulation 29(5) of the Regulations, which states: "*For the period specified under paragraph (3), but subject to paragraph (6) and regulation 118, P2 instead of P1 are to be treated as listed in relation to C for the purposes of these Regulations (albeit that the premises actually listed in relation to C are P1).*"

The temporary relocation pursuant to Regulation 29 is not the subject of this appeal but Regulation 29 contains wording relevant to the consideration of this issue.

The Committee noted that Regulation 29(5) enables the temporary premises to be regarded as the premises listed in respect of a pharmacy for the duration of the period of the temporary relocation. The Committee noted the parties' comments with regard to the meaning of Regulation 29(5).

The Committee considered whether the effect of Regulation 29(5) is that for the purposes of the Regulation 24 application, the references to "existing premises" should therefore be read as references to the temporary premises.

The Committee noted that Regulation 29(5) is expressly subject to Regulation 118 (*see full decision*).

The Committee considered that the meaning of “proceedings” in this context includes a Regulation 24 application.

In the Committee’s view, Regulation 118(a) means that a Regulation 24 application is unaffected by the fact that the Applicant has temporary premises treated as its listed premises. If a Regulation 24 application is unaffected by temporary listed premises, the temporary relocation has no bearing on the consideration of the Regulation 24 application.

The Regulation 24 application, subject to this appeal, is in relation to the relocation of the Applicant’s pharmacy from the premises at Bowls Club to the premises at Bexhill. As the temporary relocation has no bearing on the consideration of the Regulation 24 application, the Committee concluded that the reference to “existing premises” for the purpose of Regulation 24(1)(a) must be read as references to the premises intended to be considered the existing premises pursuant to the Regulation 24 application i.e. the premises at Bowls Club. The Committee therefore considered that for the purpose of its consideration of this appeal, “existing premises” in Regulation 24(1)(a) is to be read as the Bowls Club premises.

The full decision is available at <https://resolution.nhs.uk/wp-content/uploads/2021/04/23392-Pharmaceutical-Decisions-2013-Reg-24-St-Leonards-on-Sea.pdf>

23396, 23398, 24430, 24434, 24437 and 24448 - SCHEDULE 4 [Terms of Service of NHS Pharmacists] PART 3 [Hours of Opening]

Where NHSEI has directed a pharmacist to provide pharmaceutical services for its premises at set times and on set days in accordance with paragraph 25 of Schedule 4 of the Regulations, paragraph 25(7) provides a right of appeal.

Paragraphs 25(1) and (2) require that before any direction is made, an assessment must be undertaken and that, before the assessment is concluded, the pharmacist providing services from the premises must be given notice of the proposed changes and given 30 days to make written representations about the proposed changes.

NHSEI is required by paragraph 25(6) of Schedule 4 to provide reasons for its decision. These reasons should set out the basis of any determination that days and times of opening will no longer be such as will meet the pharmaceutical needs of relevant persons and (if they are, such that a direction *may* be made) the assessment that led to the direction, taking into account any written representations from the pharmacist.

In all six cases, the Appeals service found that no or limited information to substantiate the view as to why the pharmacies would be best placed in terms of access, geography or any other factor to meet any demand for services. In addition, there was no information provided as to what pharmaceutical cover would be required.

The full decisions are available on the Appeals service webpages.