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6 October 2023

REF: SHA/25879

DISPUTE AGAINST DECISION TO RECOVER COVID-19 PAYMENTS FROM LLOYDS PHARMACY ("THE APPELLANT")

1 **OUTCOME**:

1.1 I, as an authorised officer of NHS Resolution, dismiss the appeal and confirm the decision of the NHS Business Services Authority ("the NHS BSA"). The NHS BSA is permitted to recover the amount overpaid directly or by deduction from other remuneration payable to the Appellant.

A copy of this decision is being sent to:

Lloyds Pharmacy Limited
NHS BSA

8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

REF: SHA/25879

DISPUTE AGAINST DECISION TO RECOVER COVID-19 PAYMENTS FROM LLOYDS PHARMACY ("THE APPELLANT")

1 INTRODUCTION

1.1 The Appellant appealed the non-payment of a claim for Covid-19 payments.

1.2 The Secretary of State for Health and Social Care, pursuant to the National Health Service Litigation Authority (Pharmaceutical Remuneration – Payment Disputes) (England) Directions 2022 (the "Payment Disputes Directions"), has directed that NHS Resolution determines this type of appeal on their behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 BACKGROUND

2.1 I provided a previous determination dated 21 June 2023, in which I finally determined certain matters and provided the opportunity for the parties to provide further representations on certain other matters. I indicated that on receipt of comments, I would make a final determination on any outstanding matters.

2.2 In respect of the NHS BSA, I indicated that it should provide:

2.2.1 the original claim from the Appellant;

2.2.2 the Appellant's request for an internal review;

2.2.3 comments on whether the evidence provided by the Appellant is acceptable in relation to the requirements of the Drug Tariff; and

2.2.4 any other comments it considers appropriate, bearing in mind the comments I made in the previous determination.

2.3 In respect of the Appellant, I indicated that it should:

2.3.1 explain why it refers to the payments as "recognition" and the evidence provided refers to a "thank you" or "bonus" payment;

2.3.2 explain how these costs fit under the wording of the Drug Tariff;

2.3.3 provide any other comments it considers appropriate bearing in mind the comments I made in the previous determination, particularly in respect of the type and nature of the evidence provided; and

2.3.4 consider whether it can provide any other evidence that the payments were incurred and recorded during the Relevant Period.

2.4 I also indicated that both parties should provide comments on the category of cost under which the claim was originally made.

2.5 Each party was provided with a copy of the other party's further representations and provided with the opportunity to make any final observations. All comments received have been shared with all parties.

2.6 I indicated in my previous determination that I would not consider comments made in relation to any matter that I have indicated were finally determined in the earlier determination.

3 FURTHER REPRESENTATIONS

3.1 In its further representations, the Appellant stated:

3.1.1 "We refer to your letter dated 21 June 2023 (**Letter**) in respect of the above matter concerning the NHS Business Services Authority's (**BSA**) decision to seek to recover the sum of £1,239,022.66 (the **Sum**) from LPL.

3.1.2 We also refer to our previous letter and to your email, both of which are dated 7 July 2023, agreeing an extension to the deadline for the parties to provide their respective comments in response to your Letter, until 19 July 2023.

3.1.3 For ease, capitalised terms have the same meaning as those set out in your Letter, unless stated otherwise.

3.1.4 This letter addresses the four points outlined at paragraph 1.4 of your Letter, where you asked LPL to:

3.1.4.1 explain why it refers to the payments as "recognition", and the evidence provided refers to a "thank you" or "bonus" payment;

3.1.4.2 explain how these costs fit under the wording of the Drug Tariff;

3.1.4.3 provide any other comments LPL considers appropriate, bearing in mind the comments made in your Letter, particularly in respect of the type and nature of the evidence provided; and

3.1.4.4 consider whether LPL can provide any other evidence that the payments were incurred and recorded during the period between 1 March 2020 and 31 March 2021 (**Relevant Period**).

3.1.5 In respect of your query at paragraph 1.5 of your Letter, LPL confirms that its claim for the Sum was originally made under Category 1 "*Additional staff costs due to Covid-19*". Paragraphs 14-23 below explain why LPL considers the Sum to fall into this category.

3.1.6 **Why LPL refers to the payments as "recognition" and the evidence provided refers to a "thank you" or "bonus" payment**

3.1.7 In March 2021, [KB] (Retail Operations Director) and [BOK] (Head of Retail Central Operations) of LPL decided and informed dispensary colleagues to concentrate on supporting patients during the Covid-19 pandemic and the resulting unprecedented demand for pharmacy, not to spend time focusing on claims for additional costs. LPL informed dispensary colleagues that their additional efforts would be recognised at a later stage.

3.1.8 At the end of March 2021, during LPL's end of year accounting process, [KB] (Retail Operations Director) of LPL, [TA] (Chief Executive Officer for McKesson UK) and [CK] (Chief Financial officer for the UK) of McKesson (part of the LPL corporate group at the relevant time), decided that the way in which LPL would pay dispensary colleagues for their additional hours and efforts above and beyond contractual employment hours between April 2020 and March 2021 would be a payment to all of a pro rata amount of £150 per Full Time Equivalent (**FTE**).

3.1.9 The additional hours worked by employees were not claimed as overtime. The usual overtime process for Retail (including dispensary colleagues) is approved by the Retail Regional Management. Approved overtime only relates to cover for vacant positions in store (i.e. to cover shifts due to holidays, staff sickness, or, in these circumstances, employees who were advised to shield during the pandemic). Additional hours worked by employees at either the start or at the end of shifts are not claimed as overtime. In any event, LPL had no way of recording these additional hours.

3.1.10 As payment of the Sum was outside the usual overtime payment process, internally LPL referred to payment of the Sum as a "*thank you*" payment, "*bonus*" or "*additional staff cost payments paid for additional efforts*" to avoid confusion. However, it has always been the case that payment of the Sum was paid in lieu of additional hours worked by dispensary colleagues, which were not claimed as overtime, from April 2020 to March 2021. This was simply a discretionary payment, and it was communicated to employees as such. It was not a payment that was intended to reflect the hours actually worked.

3.1.11 The nature of Sum is evidenced further in the letters that were issued to LPL employees in July 2021. The employees who met the criteria of LPL's yearly bonus scheme received the letter named "*Bonus Letter – earned bonus plus discretionary FINAL*" which confirms that: a. "*The bonus review has been concluded and I am pleased to confirm that you will be paid a bonus award of £xxx in July's pay, in recognition of your contribution to the business last year*"; and

3.1.12 "*In recognition of the fantastic effort made by all colleagues, and as a thank you gesture to you, for personal contribution last year and the positive impact this had on our results, you have been awarded an additional discretionary payment of £xxxx…"* (**Thank you Gesture**).

3.1.13 In contrast, the employees who did not meet the yearly bonus criteria in July 2021 received the letter named "*FY21 Bonus Letter – discretionary only FINAL (3)*" and was paid the Thank you Gesture only. It is clear that the Thank you Gesture was a separate payment to LPL's yearly bonus scheme. Copies of these letters are enclosed.

3.1.14 Please also find enclosed the spreadsheet named "*FY21 March bonus accrual YEaudit*". This document is a balance sheet reconciliation which was produced by the McKesson UK finance team to support the year end audit for FY 2020-2021, and was reviewed by the company's auditors, Deloitte UK. The "Scheme breakdown" tab lists the various bonus schemes operated by the Hallo Healthcare Group (then McKesson), of which LPL is a part. The discretionary payment appears at rows 144 to 148 and is described as an "*additional thank you bonus*" for the reasons explained at paragraph 9 above. This spreadsheet also confirms (in column AR, rows 144 to 148) that in March 2021, [CK] and [TA] of McKesson asked for the additional discretionary payment to be made in order to recognise the additional work of the dispensary employees during the Covid-19 pandemic.

3.1.15 The nature of the payments is further supported by the accountancy report of Ellacotts Forensic Services (**EFS**) dated 19 July 2023 (**Report**), at paragraphs 2.22 – 2.33, which concludes that "*these payments were not bonuses, per se, as the payments of £150 were: (i) outside of, and separate/additional to, any contractual bonus scheme that existed; and (ii) also paid to employees that were not included within any bonus scheme*".

3.1.16 **How the costs fit under the wording of the Drug Tariff**

3.1.17 LPL submitted its Covid-19 costs claim by way of an Excel document titled "*Pharmacy COVID19 costs claim form*"). This was sent by an email from Joanne Winder to the NHS BSA on 13 August 2021 at 16.27, a copy of which is enclosed. Therefore, the August 2021 version of the Drug Tariff (**August 2021 DT**) is the applicable version, which LPL refers to in this response since this was in force at the time of the submission of the claim (and not the October 2022 version as referred to in your Letter).

3.1.18 Paragraph 15 of Part VIA of the August 2021 DT sets out the relevant payment arrangements in respect of reimbursement of Covid-19 costs incurred between 1 March 2020 and 31 March 2021. This is extracted below.

3.1.19 [I have not reproduced the extract, but it was provided as part of my previous determination]

3.1.20 Under paragraph 15.4 of Part VIA of the August 2021 DT, claims were to be submitted to the BSA between 5 July 2021 and 15 August 2021 by completing and returning the claim form. LPL fully complied with these requirements. LPL's submission also complied with the claims criteria set out in paragraph 15.7 of Part VIA of the August 2021 DT (as shown in the "Declaration" tab of the Excel document submitted on 13 August 2021). Therefore, the BSA was not entitled to reject the claim on this basis (in accordance with paragraph 15.8 of Part VIA of the August 2021 DT).

3.1.21 Table 1 at paragraph 15.6 of Part VIA of the August 2021 DT sets out the 4 categories of costs that could be claimed for. The Sum specifically relates to category 1 (additional staff costs due to Covid-19), which expressly includes "*additional staff costs to deal with the increased demand in / time needed for the provision of NHS pharmaceutical services*". The Sum meets this description because it was a payment recognising the additional efforts made by LPL dispensary employees when dealing with an increased demand for the provision of pharmaceutical services during the Covid-19 pandemic. A non-exhaustive list of the additional duties carried out by the employees included:

3.1.22 arranging and accepting additional deliveries;

3.1.23 cleaning the stores and re-stocking hand gels for customers;

3.1.24 dealing with queue management, including displaying the appropriate signage;

3.1.25 ensuring that social distancing was observed at all times and that customers were wearing appropriate personal protective equipment in accordance with government guidelines at the relevant time;

3.1.26 acting as security guards to ensure that there was the correct number of people in the pharmacies at any one time, in accordance with the government guidelines at the relevant time; and

3.1.27 dealing with an excess number of queries where customers could not speak to their GPs, and on occasions in circumstances where there

was a heightened level of emotion due to the unprecedented nature of the pandemic.

3.1.28 These additional duties led to the employees working additional hours at the beginning and end of their shifts, in order to deal with the increased demands for pharmaceutical services, which were not claimed as overtime for the reasons explained in paragraph 8 above.

3.1.29 Further, "*recognition*", "*thank you*" or staff costs of that type are not expressly excluded in the 4th column of Table 1 (or anywhere else in paragraph 15 of Part VIA of the August 2021 DT). Therefore, LPL had a legitimate expectation that the Sum (which comprises of additional staff costs arising from overtime worked due to Covid-19 pressures during the Relevant Period) would be reimbursable under and in accordance with the Drug Tariff.

3.1.30 Additionally, there is no limit specified in paragraph 15 of Part VIA of the August 2021 DT in respect of the reimbursable costs which may be claimed. Paragraph 15.10 says "…*If some form of capping mechanism proves necessary, then this will be set out in a Drug Tariff determination that will be published in September.*" The September 2021 version does not provide for a capping mechanism either. Therefore, it was reasonable for LPL to assume that no cap would apply to the claims and that all additional staff costs due to Covid-19 would be reimbursed.

3.1.31 We note that the Covid costs reimbursement arrangements still feature in the current version of the Drug Tariff (paragraph 8 of Part VIA of the July 2023 Drug Tariff). This suggests that contractors are still submitting costs and the NHS BSA are continuing to accept submissions despite the Relevant Period ending well over 2 years ago (on 31 March 2021). This therefore implies that other contractors are still able to submit claims provided it can be shown that the costs were incurred (but not necessarily paid) in the Relevant Period. Accordingly, the timing of when LPL actually paid the Sum (which occurred after the end of the Relevant Period) should not be taken into account in the decision as to whether the costs should be reimbursed, since the costs were incurred by LPL during the Relevant Period (see paragraphs 28 to 30 below).

3.1.32 The level of detail and evidence required to support a claim was not set out in paragraph 15 of Part VIA of the August 2021 DT. Therefore, LPL could not have known at the point of submission in August 2021 specifically what level of detail and evidence it would need to provide to the NHS BSA. Further, LPL was not provided with any feedback (by either the NHS BSA or the independent review panel) in relation to the evidence it submitted on 13 August 2021 or that submitted on 10 June 2022. Therefore, this is the first time LPL has specifically been requested to provide further evidence.

3.1.33 This is supported further by the Report of EFS at paragraphs 2.2 – 2.33, which concludes that *"the disputed costs fall under category 1 of Table 1 set out in Part VIA of the Drug Tariff, as they reflect additional staff costs paid by LPL in order to deal with the increased demand in/ time needed for the provision of NHS pharmaceutical services".*

3.1.34 **Any other comments LPL considers appropriate**

3.1.35 As mentioned in your Letter, the NHS BSA has not provided LPL with a reasonable explanation of its decisions in respect of the Sum or any feedback on the evidence provided by LPL in respect of the same.

3.1.36 LPL considers that the NHS BSA has demonstrated a lack of transparency throughout the process which has resulted in LPL being unclear as to what evidence the NHS BSA required in support of LPL's claim relating to the Sum.

Had requisite clarity been provided initially, LPL (like other contractors) would have ensured that all appropriate evidence was recorded in support of its claims, as opposed to relying on third party guidance (PSNC) that all additional monies spent by pharmacists would be recoverable. LPL complied with the requirements of the August 2021 DT and would have provided the information within this letter sooner, had it understood from the NHS BSA that it was required.

3.1.37 Nevertheless, LPL has collated as much information and documentation as possible (and as available) during the stipulated timeframe to provide the evidence requested in your Letter.

3.1.38 We acknowledge that, as part of the process of providing the additional information and supporting documentation enclosed with this letter, EFS' Report concludes that evidence has only been provided totalling a sum of £1,209,602, as opposed to the full Sum originally claimed of £1,239,023. Whilst we have not been able to conclusively evidence the reason for this discrepancy in the time available, we understand that this is likely to due to certain employees having been paid but then leaving LPL by June 2022, when the relevant list of individual employees was prepared. We therefore consider that the full Sum is properly included in LPL's Appeal. If any further information is required in relation to this, LPL would be happy to consider any request and provide additional information in due course.

3.1.39 **Any other evidence that the payments were incurred and recorded during the Relevant Period**

3.1.40 We confirm that the Sum was paid to employees in July 2021, due to a delay in the clearance of its audit accounts and the time taken to process all payments that fell outside of its usual business processes.

3.1.41 However, as previously stated and explained at paragraph [3.1.7] above, the decision to pay the Sum to employees was made in March 2021.

3.1.42 Further evidence that the payments were incurred and recorded during the Relevant Period is contained in paragraphs 2.8 – 2.21 of the Report, which concludes that *"the payments made related to costs that were incurred in the year-ended 31 March 2021 for financial statements".*

3.1.43 **Conclusion**

3.1.44 As explained in this letter, the Sum:

3.1.44.1 relates to additional hours worked by LPL's dispensary staff;

3.1.44.2 during the Relevant Period;

3.1.44.3 which falls within the category 1 wording in the August 2021 DT being "*additional staff costs to deal with the increased demand in / time needed for the provision of NHS pharmaceutical services*".

3.1.45 LPL, and in particular its dispensary colleagues, undertook high risk work and additional duties during the Covid-19 pandemic outside of their normal hours. This was an uncertain time where dispensary colleagues supported patients by maintaining essential pharmacy services when there was unprecedented demand for the same. LPL rightly compensated colleagues for this work.

3.1.46 LPL, therefore, maintains that the Sum was properly claimed as part of its Covid-19 claim and the NHS BSA should not seek to recover the Sum from LPL.

3.1.47 We hope that the evidence provided in this letter provides NHS Resolution with the comfort it needs to agree with LPL's position.

3.1.48 We look forward to hearing from you, particularly in respect of whether we will be given an opportunity to provide final observations on the comments provided by the NHS BSA, as mentioned at paragraph 1.9 of your Letter.

3.1.49 We would welcome this opportunity as we agree with your comments at paragraph 8.34 of your Letter that to date the NHS BSA has not provided LPL with a reasonable explanation of its decisions in respect of the Sum, including why it is considered to be out of scope (both in the original decision and in the internal review decision). This has meant that to date, LPL has not been able to understand the reasoning of the NHS BSA or respond to that reasoning.

3.1.50 We thank you for your assistance with this matter. In the meantime, all of LPL's rights remain fully reserved."

3.2 The Appellant provided the following:

3.2.1 **EFR Report – LPL and NHS BSA – 19 July 2023.pdf** - ("the **Report**") which is a report prepared by Ellacotts Forensic Services on behalf of the Appellant. It providers EFR's opinions on each of the questions set out for the Appellant in the previous determination and provides the following additional evidence:

3.2.1.1 **Exhibit A.xlsx** – which is the McKesson UK Bonus Provision document from March 2021, described by the Appellant as a balance sheet reconciliation produced to support the year end audit for 2020-2021;

3.2.1.2 **Exhibit B.docx** – this is an SLT briefing note, undated. It sets out the bonus awards being made but also describes the "thank you" payment and the criteria under which it was awarded.

3.2.1.3 **Exhibit C.xlsx** – this is a spreadsheet setting out each of the "Thank You" payments made, the employee number of each recipient and their job title. It shows £1,209,602 payments as having been made.

3.2.1.4 **Exhibit D.pdf** – these are three payslips, each showing a discretionary payment for different amounts (£39, £134 and £130).

3.2.1.5 **Exhibit E.pdf** – this provides 73 further payslips, with different amounts of pay shown on each. It is explained in the Report that this shows payroll from August 2019 to June 2021 for the three employees in Exhibit D, none of the slips show any discretionary payment.

3.2.2 **FY21 Bonus Letter – discretionary only FINAL.docx** – ("**Bonus Letter 1**") this letter was provided to the Appellant's staff who received only the discretionary payment and not any other form of bonus. It explains why the payment was being awarded;

3.2.3 **FY21 Bonus Letter – earned bonus plus discretionary FINAL.docx** – ("**Bonus Letter 2**") this is a separate letter that was sent to members of staff who received a bonus alongside the discretionary payment.

3.2.4 **FY21 March bonus accrual YEaudit.xlsx** – this is the same as Exhibit A, set out at paragraph 3.2.1.1.

3.2.5 **LP Eng Covid Claim - full back up Jun22.xlsx** – this spreadsheet has multiple tabs relating to claimed amount for each pharmacy claimed for by the

Appellant in relation to Additional Covid-19 Staff costs. I note that tab 18 sets out the same information as Exhibit C, at paragraph 3.2.1.3.

3.2.6 **Lloyds Pharmacy Claim.msg** – this email is the one that was sent to the NHS BSA providing the claim form to which this appeal relates.

3.3 In its further representations, the NHS BSA stated:

3.3.1 "In regard to the above, please find further comment from the NHSBSA laid out in such a manner as to answer NHS Resolution's expectations:

3.3.2 In respect of the NHS BSA, it should provide:

3.3.3 1.3.1 the original claim from the Appellant;

3.3.4 Please find this attached to the accompanying email.

3.3.5 1.3.2 the Appellant's request for an internal review;

3.3.6 Please find this attached to the accompanying email.

3.3.7 1.3.3 comments on the whether evidence provided by the Appellant is acceptable in relation to the requirements of the Drug Tariff; and

3.3.8 The evidence is not acceptable in relation to the requirements of the Drug Tariff. The payments were made outside of the relevant time period and if, as NHS Resolution states in its observations:

3.3.9 *8.18 Nevertheless, I consider that simply because payment was made outside the Relevant Period, this does not provide conclusive proof that Covid-19 related costs were not incurred within the Relevant Period. The Drug Tariff Part VIA expressly refers to costs incurred, not costs paid. It states:*

3.3.10 *8.18.1 "Pharmacy contractors can claim for specific categories of Covid-19 related costs incurred between 1 March 2020 and 31 March 2021 [emphasis added] in delivery of NHS pharmaceutical services."*

3.3.11 The evidence provided does not provide conclusive proof that the payments were for the recognition of work carried out within the relevant period.

3.3.12 As stated in the email from Lloyds Pharmacy requesting an internal review, "To ensure everyone's focus during this unprecedented period was on dispensary and supporting patients we did not ask for colleagues to log and claim every hour of overtime every week for work above contractual hours." This would suggest that there is no evidence at all of the levels of overtime worked by pharmacy staff.

3.3.13 Also, the methodology used by Lloyds Pharmacy to calculate the payment does not seem to rule out that staff members who began contractual work with Lloyds Pharmacy after the relevant period, received this pro rata payment too.

3.3.14 1.3.4 any other comments it considers appropriate, bearing in mind the comments I make in this determination.

3.3.15 The definition of the word "incurred" in this instance is not necessarily relevant, rather the emphasis should be on whether the incurred costs were "Covid-19 related", as required by the Drug Tariff.

3.3.16 Due to the structure of these payments, a pro-rata £150.00 payment to all staff, this cannot be viewed as related to Covid-19 or else staff would surely warrant payment of much wider ranging, and costlier, amounts for their overtime.

3.3.17 Covid-19 did not directly result in Lloyds Pharmacy incurring these payments. It was a business decision that Lloyds Pharmacy took; asking their staff not to log overtime hours and then later make a pro rata £150.00 payment as "recognition". As stated in the email from Lloyds Pharmacy requesting an internal review, "…it was decided by Senior Management at the end of Lloydspharmacy accounting period (March 2021) to make a payment of £150 per colleague (pro rata for contractual hours) to recognise additional efforts not claimed by staff."

3.3.18 Both parties should provide comments on:

3.3.19 1.5.1 The category of cost under which the claim was originally made.

3.3.20 The NHSBSA has assumed that Lloyds Pharmacy claimed these costs under 'Category 1 – additional COVID-19 staff costs' as it is the only category, on Lloyds Pharmacy's original claim form, that contains a value large enough to encompass the amount. However, neither 'thank you' payments nor overtime payments are listed as a descriptor on the claim form."

3.4 The NHS BSA provided the following:

3.4.1 **Pharmacy COVID19 costs claim form.xlsx** – which is the original claim form sent in by the Appellant.

3.4.2 **Lloyds Pharmacy REVIEW REQUEST.msg** – this email was sent by the Appellant to the NHS BSA requesting the independent internal review of the payment of £1,239,022.66. It sets out the basis for why the Appellant believed the amount was suitable for reimbursement i.e. that it was made in recognition of additional work.

4 FURTHER OBSERVATIONS

4.1 The Appellant stated:

4.1.1 "We write further to our letter dated 19 July 2023 and the paper by the NHS BSA sent to us via link on 24 July 2023. Defined terms below have the meaning given to them in our letter, unless otherwise stated.

4.1.2 The headings used below mirror the headings used in the NHS BSA's paper.

4.1.3 **1.3.3 comments on the whether evidence provided by the Appellant is acceptable in relation to the requirements of the Drug Tariff**

4.1.4 The NHS BSA states that LPL's evidence "*does not provide conclusive proof that the payments were for the recognition of work carried out within the relevant period*".

4.1.5 Our letter (and the Report enclosed with the same) provide this conclusive evidence. Please see paragraph 7 of our letter explaining that the decision to pay the Sum to employees was made in March 2021. Also see paragraphs 2.8 to 2.21 of the Report which conclude that "*the payments made related to costs that were incurred in the year-ended 31 March 2021 for financial statements*". The Report also makes reference to the facts that:

4.1.5.1 LPL's financial statements and corporation tax return reported a provision for the payments which are the subject of the Appeal as a cost in the year ended 31 March 2021; and

4.1.5.2 this treatment was considered to be appropriate by LPL's auditors, Deloitte LLP.

4.1.6 As mentioned at paragraph 25 of our letter, LPL would have provided the above information sooner had it understood from the NHS BSA that the information was required.

4.1.7 It is accepted, as the NHS BSA asserts, that LPL does not have a record of overtime worked by pharmacy staff. As mentioned at paragraph 8 of our letter, LPL had no way of recording the additional hours.

4.1.8 As explained at paragraph 2.26 of the Report: "*LPL took the decision in March 2020 to focus on delivering pharmaceutical services, rather than spend additional time processing formalised overtime claims, which would have required defining new overtime procedures to capture the above time, but considered that the additional efforts of employees during this unprecedented time would ultimately be recognised*."

4.1.9 In respect of the NHS BSA's comments that staff members who began contractual work with LPL after the Relevant Period could have received the pro rata payment in July 2021, we can confirm that this is incorrect. Only those employees who worked between 1 March 2020 and 31 March 2021 received the payment.

4.1.10 **1.3.4 any other comments it considers appropriate**

4.1.11 The NHS BSA's comments under this heading appear to demonstrate a lack of understanding by the NHS BSA of how the pharmacy sector was operating in practice during the Relevant Period. It should be remembered that the situation LPL found itself in was completely unprecedented. The demand for pharmacy services rapidly increased. In addition, staff had to undertake additional duties caused by the Covid-19 pandemic (a non-exhaustive list of these tasks is at paragraph 17 of our letter). LPL's employees were undertaking high risk work on the frontline. During this time, LPL focused on how best to maintain its essential pharmacy services and enable staff to support patients, for the wider pandemic efforts, on the basis of reassurance that those efforts would be recognised, and valued.

4.1.12 Paragraphs 14 to 23 of our letter explain why we consider that the Sum falls within category 1 costs outlined in the August 2021 DT as expressly including "*additional staff costs to deal with the increased demand in / time needed for the provision of NHS pharmaceutical services*". The Sum meets this description because it was a payment recognising the additional efforts made by LPL dispensary employees when dealing with an increased demand for the provision of pharmaceutical services during the Covid-19 pandemic.

4.1.13 The NHS BSA's comment that the pro-rata payment of £150 per FTE cannot be viewed as related to the Covid-19 pandemic or "*else staff would surely warrant payment of much wider ranging, and costlier, amounts for their overtime*" is misplaced.

4.1.14 This comment completely overlooks the state of the pharmacy sector in March 2021 when the decision was made to pay the Sum. At that time, cashflow in the pharmacy industry was very uncertain, with no guarantees of how or if LPL

would be reimbursed for the additional costs LPL had sustained due to the Covid-19 pandemic.

4.1.15 LPL wanted to remunerate colleagues for their extra hours and efforts, but had to be mindful of LPL's overall business and cashflow position. As stated in LPL's accounts for the year ended 31 March 2021 (**Accounts**), in addition to LPL's costs increasing, its turnover reduced by 9.6% due to reduced normal store footfall because of national lockdowns (see paragraph 2.22 of the Report). You will appreciate that there was a balance between additional work needed in the pandemic and that additional work translating into actual revenue for LPL. LPL's Accounts also noted that the future duration and impact of the Covid-19 Pandemic (including variants) were unknown.

4.1.16 It is in the above context that LPL made the decision to pay the Sum. In an ideal world, LPL would have paid its employees that had worked hard on the frontline of the Covid-19 pandemic to serve patients more than these amounts. However, this was the level of payment that LPL could sustain at a time when the pharmacy sector was uncertain and volatile, and the pandemic was not abating. The NHS BSA's comment does not seem to take account of the sheer volume of employees LPL had during the Relevant Period and the logistics of managing such a workforce. Paragraph 2.10 of the Report explains that the cost of the payment during March 2021 had been estimated at £2,000,000, which is not insignificant.

4.1.17 LPL considers that the NHS BSA's comment that the Covid-19 pandemic did not "*directly result*" in LPL incurring the Sum to be incorrect. For the reasons explained in our letter, the Report and above, the Sum was paid as a direct result of the Covid-19 pandemic. LPL had no other way to pay employees for their additional hours and efforts during the Relevant Period, and those efforts were directly related to the pandemic (additional cleaning/signage/policing of footfall in stores etc). LPL rightly chose to focus on maintaining its essential pharmacy services during this time, as opposed to developing policies, procedures and new systems to try to capture the additional hours and process overtime claims.

4.1.18 Paragraph 2.51 of the Report explains that the Sum was:

4.1.18.1 made up of incremental costs, separately identifiable within individual employee payroll records, and in addition to bonus schemes or contractual overtime payments; and

4.1.18.2 not incurred in the year prior to the Relevant Period, and therefore served to *increase* LPL's staff bill in comparison with the previous year.

4.1.19 The above squarely falls within "Acceptable Evidence" of category 1 costs within the August 2021 DT, being an "*Increased overall staff bill compared to previous years*".

4.1.20 The Sum directly related to work undertaken during the Covid-19 pandemic and the Relevant Period, as demonstrated by the letters sent to employees stating as follows (see paragraphs 10 and 11 of our letter):

4.1.21 "*In recognition of the fantastic effort made by all colleagues, and as a thank you gesture to you, for personal contribution last year and the positive impact this had on our results, you have been awarded an additional discretionary payment of £xxxx…*"

4.1.22 LPL do not consider that payment of the Sum can be described as a business decision by LPL as the NHS BSA asserts. The assertion that this was a

business decision is somewhat at odds with the actual mechanics of the pharmacy sector, which LPL had understood the NHS BSA would and could appreciate. For the reasons explained above, payment of the Sum directly remunerated employees for their additional hours and efforts during the Relevant Period.

4.1.23 **Conclusion**

4.1.24 For the reasons explained in this letter, LPL maintains that the Sum was properly claimed as part of its covid-19 claim and the NHS BSA should not seek to recover the Sum from LPL.

4.1.25 As mentioned above, we consider that it is important that LPL's actions during the Relevant Period are considered in the proper context, being an unprecedented global pandemic where LPL was asking its employees to undertake high risk work on the frontline.

4.1.26 LPL was extremely stretched during this period but thanks to the additional efforts of its employees, LPL managed to maintain essential pharmacy services and serve patients. Consideration should be given to the effect of the Covid-19 pandemic on the pharmacy sector as a whole during the Relevant Period and the ongoing uncertainty and volatility in that market at the time that LPL decided to pay the Sum.

4.1.27 We look forward to hearing from you and thank you for your continued assistance with this matter."

4.2 The NHS BSA stated:

4.2.1 "In regard to the above, please find final comments from the NHSBSA.

4.2.2 In paragraph 8 of LPL's letter with further comments, it remarks "In any event, LPL had no way of recording these additional hours." If no recording of these hours was undertaken, the NHSBSA cannot reimburse the amounts in line with the Drug Tariff's requirement for claims to be evidenced. There needs to be evidence that the payments were commensurate with the additional hours worked by staff.

4.2.3 In paragraph 9 of the letter, there is the line "This was simply a discretionary payment and it was communicated to employees as such." The description of the payments as "discretionary" further shows that the costs were incurred by LPL as the result of a business decision. The term discretionary would not be used to indicate a cost that was incurred as a result of the pandemic.

4.2.4 With regard to paragraph 20 of the letter, the NHSBSA disagrees with LPL that "…it was reasonable for LPL to assume…that all additional staff costs due to Covid-19 would be reimbursed." The word 'all' is not used in the Drug Tariff to describe staff costs. The fact that there are inclusions and exclusions listed, demonstrates the opposite; that all staff costs would not be reimbursed.

4.2.5 The Drug Tariff also explicitly states "Claims will be reviewed before or following payment. Where the evidence submitted does not support the claim, the payment will either be reduced before it is made to the contractor or, if payment has taken place, the over-payment will be recovered from the contractor's next monthly payment." The NHSBSA asserts that it was unreasonable for LPL to have assumed that claims for all additional staff costs would be reimbursed.

4.2.6 With regard to paragraph 21 of the letter. It is not the case that contractors are still submitting costs to the NHSBSA for reimbursement under this scheme. It is made clear, presently, in the Drug Tariff that claims had to be made between 5 July and 15 August 2021. This was and still is the case, and the NHSBSA has not reimbursed any claim received after this date. The service remains present in the Drug Tariff whilst appeals are being heard by NHS Resolution.

4.2.7 With regard to paragraph 22 of the letter, the NHSBSA has not specifically requested additional evidence from LPL as it is the NHSBSA's decision that the costs are out of scope, therefore further evidence would not have altered this decision. That said, all contractors that chose to ask the independent panel for a review were afforded the opportunity to provide additional supporting evidence or a further explanation as part of the review. This is outlined in the NHSBSA's email to LPL, dated 02/11/22, with its final determination (***Lloyds Pharmacy Final Determination – Covid Claims Post Payment Verification.msg***).

4.2.8 In paragraph 25 of the letter, LPL states that had more clarity been provided "…LPL…would have ensured that all appropriate evidence was recorded in support of its claims". This is contradictory to LPL's comments in paragraph 8, in which it remarks "In any event, LPL had no way of recording these additional hours." If no recording of these hours was possible "in any event", the NHSBSA is unsure how LPL can claim that it was a lack of clarity which resulted in it not recording appropriate evidence in support of its claims.

4.2.9 Exhibit B, used in Ellacotts Forensic Services (EFS) report, is a briefing note from [TA], CEO for McKesson UK. It appears undeniable from the language used in this note, "…we have taken the decision…", that the payments were bonuses incurred voluntarily by LPL and not as a direct result of Covid-19.

4.2.10 The criteria, imposed by LPL, also suggest that the payments were not reflective of additional hours worked by staff at the beginning or end of their shift, as LPL has stated. Examples of the criteria include:

4.2.10.1 "Those with a live disciplinary warning will not receive a payment" and

4.2.10.2 "Colleagues must have been employed prior to 1st January 2021 to qualify for payment"

4.2.11 However, there is nothing to suggest that these staff members were excused from having to work the additional hours. It is reasonable to assume that LPL may have employed some staff between 1 January 2021 and 31 March 2021, within the relevant claim period, but they did not receive any financial reimbursement for additional hours worked due to LPL's self imposed criteria. Again, this proves that these were not overtime payments reflective of additional time worked and therefore do not fall within eligibility for reimbursement, as detailed in the Drug Tariff.

4.2.12 Further, none of the criteria mandate that a staff member had to have worked additional hours to receive the payments. Indeed, the briefing note makes no reference at all to these payments being related to additional hours. It is reasonable to infer then, that staff who did not work additional hours, were eligible under LPL's own criteria to receive these discretionary payments. Again, by LPL's own admission, it did not record additional hours worked by its staff so it could not have known if it was making these payments to staff that had worked additional hours.

4.2.13 In paragraph 2.29 of the EFS report, a letter is referred to which includes the wording "…you have been awarded an additional discretionary payment…from

myself and the Executive Leadership Team." If LPL intended these payments as an award from the Executive Leadership Team, then it is not just, or reasonable, that the costs were later claimed for reimbursement from a tax payer funded scheme.

4.2.14 The NHSBSA appreciates the complexity of putting together a claim for a company the size of LPL and understands that the inclusion of these costs may have been an oversight. However, given the language used by LPL, in consistently describing these payments as a bonus awarded to its staff at the discretion of, and as a show of gratitude from, its senior management, the NHSBSA maintains that the payments were out of scope of this scheme and therefore not eligible for reimbursement."

5 CONSIDERATION

5.1 This determination should be read alongside my previous determination dated 21 June 2023 which set out the relevant provisions of the Drug Tariff.

5.2 I note that there are a number of elements to consider in deciding this Appeal, I have divided them as follows:

5.2.1 the amount under consideration;

5.2.2 the date of the payments;

5.2.3 whether the payments are suitable for reimbursement under the Drug Tariff;

5.2.4 the evidence provided by the Appellant to support its claims; and

5.2.5 general points raised.

5.3 I will consider each of these areas in turn.

The amount under consideration

5.4 I consider it necessary to start with determining the actual amount under consideration in this Appeal. I note that, as per the original decision of the NHS BSA on 2 November 2023, recovery was sought for £1,239,022.66. However, as stated by the Appellant, the evidence supporting this claim contained in Exhibit C only covers £1,209,602.00. This is also set out in the Report. I note that the explanation provided is that it is likely due to employees leaving the Appellant's organisation prior to June 2022, but who had already received the payment. However, the Appellant has stated that it does not have conclusive evidence to support this assertion. I note that there is a requirement in the Drug Tariff that any claim made must be properly supported by evidence. I consider that the Appellant has accepted that there is no evidence to support the larger of the two figures. Therefore, I determine that, as a starting point, £29,420.66 is suitable for recovery by the NHS BSA due to a lack of supporting evidence.

5.5 I note that in the Report, reference is made to the possibility of claiming a greater amount due to national insurance contributions which were not included in the original amount. However, the Appellant has at no point claimed this as part of its representations, observations or original Appeal. If I determine that the amount claimed by the Appellant is not suitable for recovery, I will then consider whether national insurance contributions should have been reimbursed by the NHS BSA. Consequently, for the avoidance of doubt, the relevant amount to which the rest of this Appeal relates is £1,209,602.00 ("the **Payments**").

The date of the Payments

5.6 I note that in my previous determination I set out that the Drug Tariff utilises the word "incurred" rather than "paid" when referring to Covid-19 cost payments. Therefore, the relevant information in determining whether the Payments are suitable for reimbursement under the Drug Tariff is the date upon which it is incurred and if that falls between 1 March 2020 and 31 March 2021 ("the **Relevant Period**").

5.7 It is clear from Exhibit A, mentioned at paragraph 3.2.1.1, that the Payments had been decided by the Appellant to be made before March 2021. I note the explanation provided in the Report, as referred to by the Appellant, that sets out, at length, reasons why the Payments should be considered as being incurred during the period required under the Drug Tariff. The key point being that this recording in the financial statement, Exhibit A, indicated that the obligation to make the Payments existed before the end of the Relevant Period, as, if the obligation to pay had not been occurred prior to March 2021, then it would not have been included in the audited financial statements. It also notes the names of those who agreed the Payments, which corroborates the statements made by the Appellant.

5.8 Therefore, I consider that as the decision to make the Payments was taken prior to the end of the Relevant Period, the obligation to pay arose during said period and that suitable evidence has been provided by the Appellant to support this statement. I note that no further comments on this point have been provided by the NHS BSA. Therefore, I determine that the Payments were incurred during the Relevant Period.

Whether the Payments are suitable for reimbursement under the Drug Tariff

5.9 I consider that this is the central issue under consideration in this Appeal. The Appellant has made several lines of argument in its further representations and observations that I will now consider, alongside those comments of the NHS BSA. I have also considered the content of the Report at length. I will reproduce such extracts of the Report as I consider relevant and then determine how they support the Appellant's claims.

5.10 I provided Table 1 from Part VIA of the Drug Tariff in my previous determination. However, I consider it necessary to examine the precise wording of the cost category to which this Appeal relates. To that end, and for ease of reference, I have reproduced an extract from that table:

	Category of costs	**Includes**	**Excludes**	**Acceptable evidence**
1	Additional staff costs due to Covid-19	– Additional staff costs for backfilling staff that were ill, shielding or self-isolating due to Covid-19 – Additional staff costs to deal with the increased demand in/ time needed for the provision of NHS pharmaceutical services	– Additional staff costs for regular (non-Covid-19 related) absences – Deferred annual leave – Staff costs for Bank Holiday openings (funded separately)	Includes: – Invoices for locums – Overtime paid for staff – Increased overall staff bill compared to previous years

5.11 I note that there are two elements covered by the "includes" column. It is clear that the cost under consideration in this Appeal are not for backfilling staff. Therefore it must fall under the second category of included costs. I note that this can be further broken down into two parts:

5.11.1 additional staff costs to deal with the increased demand in the provision of NHS pharmaceutical services; and

5.11.2 additional staff costs to deal with the increased time needed for the provision of NHS pharmaceutical services.

5.12 Therefore, in order to be suitable for reimbursement under the Drug Tariff the Appellant must show that the Payments it is claiming for fall under one of these two parts.

5.13 I note that one of the key elements put forward by the Appellant and the Report is that the Payments were not actually any form of bonus payment:

"*these payments were not bonuses, per se, as the payments of £150 were: (i) outside of, and separate/additional to, any contractual bonus scheme that existed; and (ii) also paid to employees that were not included within any bonus scheme*"

5.14 I consider that it is generally understood that there could be a range of bonus schemes where a sum of money is added to a person's wages as a reward for good performance or other reasons. I note while a bonus can originate from a contractual bonus scheme it is not necessary that it must do so; it can exist at the sole discretion of an employer. It is not clear what the Report is seeking to rely on by way of evidence to support its position that the fact it was not part of a contractual scheme makes it any less of a bonus. I do accept that the Report does set out clearly that the Payments are separate from the contractual bonus scheme operated by the Appellant, but not why they should not be considered a bonus.

5.15 In considering whether the Payments are a bonus I have had regard to the language used by the Appellant in all of its evidence, representations and observations. The key documents that set out the internal understanding of the Payments are Exhibit B, Bonus Letter 1 and Bonus Letter 2.

5.16 Exhibit B describes the Payments in the following way:

"As an additional thank you, we have taken the decision to make a one-off payment to colleagues who were not participants of a bonus scheme in FY21. This is predominantly retail teams, below pharmacist level, as well as warehouse and driver colleagues; all of whom did a great job last year, keeping the business going through some tough times"

5.17 I note that the rest of Exhibit B relates to the regular contractual bonuses. This extract also makes reference to them. This conflation of the two types of payment within the document suggests that they were understood to be of a similar ilk.

5.18 Having regard to the Bonus Letters, first of all I note that the letter itself describes the Payments as a "bonus". There is no reference to additional time spent, effort put in, overtime, or any indication that this was meant to be some replacement or substitute to compensate staff for the consequences of Covid-19. The letter itself does not even mention that the pandemic was a causative element for this payment. This all seems to suggest that it was a bonus. Bonus Letter 2 provides details on the contractual bonus scheme, but also includes the Payments. Again, this conflation of the two suggest that they were both considered bonuses, but of different kinds.

5.19 I note that none of these documents suggest that the Payments should be considered anything other than bonuses. As a final point, Exhibit A, which has been provided to prove that the cost was incurred during the Relevant Period, is a list of all the bonuses paid out by the Appellant. It is titled "McKesson UK Bonus Provision Mar-21". This again seems to confirm that the internal understanding of the Payments being a bonus.

5.20 I note that there is an explanation provided by the Appellant as to why it is so frequently referred to as a bonus. This is so that it was done to avoid possible confusion between the Payments and any overtime payments. My understanding of this is therefore that

the Appellant is stating that these were payments for additional time spent, but not called that, to avoid them being confused with other payments for additional time spent. I find this construction difficult to understand. If they were not payments for additional time spent, then they must be bonus payments.

5.21 I need to make the point that even if I considered that they were not bonus payments, this would not automatically mean that they are suitable for reimbursement under the Drug Tariff. The Appellant was asked to explain why the Payments were referred to as such but I find its explanation confusing and not supported by the evidence provided. I also note that neither the Report nor the Appellant makes any suggestion of what the Payments could be considered as, if not bonuses. Therefore, I consider that they were in actuality bonus payments, based on the facts and evidence before me.

5.22 This leads me to the second element of the Appellant's reasoning, that the Payments were in lieu of additional time spent by its staff, and, therefore, it meets the requirements of additional staff costs. I have noted that none of the evidence provided by the Appellant supports the suggestion that this is how the Payments were considered internally. There is mention of a meeting where it was discussed that no overtime would be paid:

"that the way in which LPL would pay dispensary colleagues for their additional hours and efforts above and beyond contractual employment hours between April 2020 and March 2021 would be a payment to all of a pro rata amount of £150 per Full Time Equivalent (FTE)."

5.23 However I have not been provided with any emails, meeting minutes, or summaries that support this understanding. Even if I accept this to be the case, then it suggests that the Payments were in fact, some form of overtime payment, but it is clear that this cannot be the case. I first note the Appellant's statement regarding ensuring that the Payments were not confused for overtime. It would seem to me to be odd to want to avoid confusing something for that which it is.

5.24 Secondly, I note the Appellant's statements regarding how overtime payments operated. The Appellant states that overtime is only paid to cover vacant positions, and that additional hours worked at the start or end of shifts are not claimed as overtime. I also note that the Appellant has repeatedly stated that a decision was made in March 2020 (though the Appellant has referred to 2021 in its further representations) that no overtime would be paid in relation to additional time spent. Therefore, in either circumstance, staff would not have been entitled to any additional pay for additional hours worked.

5.25 Returning to the Appellant's statement that the Payments were "*in lieu of additional hours*", this implies that there was some entitlement and expectation of payment by staff. I note that where the Appellant has set out the duties carried out by employees it states that the consequence of this was that it "*led to the employees working additional hours at the beginning and end of their shifts.*" However, as I have just set out, based on the Appellant's own statements in this regard, these hours were not suitable for overtime payment. Consequently, I do not consider that there was any entitlement to overtime being replaced by the Payments. The bonus letters also do not mention that this would be a payment made to cover the additional hours worked, instead the focus is on the additional effort element.

5.26 I note in particular this statement by the Appellant:

"The Sum meets this description because it was a payment recognising the additional efforts made by LPL dispensary employees when dealing with an increased demand for the provision of pharmaceutical services during the Covid-19 pandemic "

5.27 This description does, on initial consideration, seem to fit in with the wording of the Drug Tariff. However, I have had regard to the complete narrative around this, as stated by

the Appellant. I consider, in particular, the use of the words "*recognising"* and "*efforts*". This, I consider to be a failure with the Appellant's line of reasoning. The Payments are in recognition of staff, but are not as a consequence of any obligation the Appellant had to pay. It was not "*in lieu*" of any payment, because there was no payment that it was replacing.

5.28 I therefore consider a key line of reasoning put forward by the NHS BSA – that the Payments were "*bonuses incurred voluntarily by LPL and not as a direct result of Covid-19*". This causative element follows logically from the above conclusion regarding the nature of the Payments. I note that the Drug Tariff specifically states, "Additional staff costs **due to Covid-19** [Emphasis added]". Therefore, it is not enough that it is an additional staff costs; it must also be linked to the Covid-19 element.

5.29 I note the Appellant stated, in response:

"*LPL had no other way to pay employees for their additional hours and efforts during the Relevant Period, and those efforts were directly related to the pandemic (additional cleaning/signage/policing of footfall in stores etc). LPL rightly chose to focus on maintaining its essential pharmacy services during this time, as opposed to developing policies, procedures and new systems to try to capture the additional hours and process overtime claims*"

5.30 I note that this line of reasoning is circular. The reason why there was no way to pay employees for additional hours is two fold – firstly that the Appellant took the decision not to pay for additional hours and so there is no record of it and secondly that there was no entitlement to overtime for working those additional hours. Therefore, the reason for there being no way to pay the employees is because of a decision by the Appellant, not due to there being an absolute absence of ways to carry this out. It was a choice by the Appellant not to pay for additional time, and a choice to make a discretionary payment.

5.31 I also note that the statement at 5.29 does not actually address the issue that, by the Appellant's own admission, there was no obligation to make the Payments. If the Appellant had not decided to make them, it does not appear to me that they could have been in any way forced to do so. It has stated there was no contractual right to the overtime, and I can see no undertaking by the Appellant made to staff that it would be making the Payments. Therefore, while there may not have been any other way to make the Payments, there was the option not to make the Payments at all.

5.32 I also consider that the Appellant's statement does not say that the Payments were directly related to Covid-19, but that the Payments are related to the effort which is directly related. This, I note, illustrates the point I was examining before, that there is a disconnect between Covid-19 and the actual cost. I am not suggesting that staff did not put in a tremendous effort, but I do consider that there is no evidence presented to me of this effort directly creating a "cost" to the Appellant.

5.33 I note that the evidence of a cost is at paragraph 4.1.18. onwards, and does demonstrate that a cost was incurred by the Appellant. However, it is clear that the amount has no reflection of the amount worked, or cost incurred by individual pharmacies or individuals. The Appellant has repeatedly stated that there were no hours recorded and that there was no method for recording them in any case. I note that this is best set out by the Report:

"*The payments were not calculated by reference to specifically documented additional time and effort contributed by each employee in order for LPL to be able to continue to provide NHS pharmaceutical services during the Relevant Period, but were made as a gesture in recognition of the additional efforts made by staff in response to Covid-19.*"

This seems to directly contradict this statement by the Appellant in response to NHS BSA's reasoning:

"… *For the reasons explained above, payment of the Sum directly remunerated employees for their additional hours and efforts during the Relevant Period."*

5.34 There does not appear to be any direct correlation between efforts by employees and the Payments. I consider that, as far as provided by the Appellant, it is a figure that has no clear basis, without any reference to employees but rather that of the needs of the business. I consider that "*directly*" suggests that the sum correlates with some amount of work undertaken, or additional hours worked, but the Appellant has clearly stated that the opposite is true. The sum does not relate directly to additional work. The language of the Letters equally supports this understanding, as I have alluded to already.

5.35 I also note the NHS BSA's statement regarding the fact that Exhibit B mentions criteria imposed by the Appellant as to who would be suitable to receive the Payments. The NHS BSA states that due to this criteria it is possible that some staff who worked additional hours did not receive a bonus but also that it is possible that staff who worked no additional hours may have received it, since actually working additional hours was not one of the criteria. I consider this to be correct, that the Payments were potentially made to those who did not in fact work any more during Covid-19, and not made to those that did.

5.36 As a consequence of this, I cannot see how the Appellant is suggesting that the Payments were incurred as a Covid-19 **cost** [Emphasis added], since it does not appear to directly relate to Covid-19. Therefore, I agree with the NHS BSA that the Payments appear to be a discretionary bonus rather than any cost directly attributable to Covid-19.

The evidence provided by the Appellant to support its claims

5.37 I made comments in my previous determination on the need for evidence and that, as an overarching principle in relation to the claims for reimbursement of additional staff, if the evidence provided is of a form, type and nature that reasonably satisfies me that additional staffing costs of a kind and nature listed in Table 1 were incurred and the amount is reasonable taking into account the evidence, then I consider that the claim should be reimbursed.

5.38 I must reiterate that a pharmacy must accept that if additional staff are engaged and the pharmacy seeks reimbursement in respect of those additional staff, then the extent of reimbursement will depend on the form, type and nature of the evidence. The stronger and more cogent the evidence, the higher the likelihood that the reimbursement claim will be successful.

5.39 I note the Appellant's comments that the level of detail was not set out in the Drug Tariff. I accept that, whilst there is no precise detail, it does state that it must be suitable to evidence the value of the claim. I also note the NHS BSA have responded that the Appellant was afforded the opportunity to provide additional evidence as part of its request for an internal review of the original decision. I further note that I provided the Appellant with additional opportunity to provide evidence as part of this final determination. Therefore, it has had several opportunities to produce evidence, even if it had not done so when submitting the initial claim.

5.40 I also note that this Appeal is not being determined on the basis of a lack of evidence alone but due to the nature of the Payments as per the NHS BSA's decision:

" *[the] decision that the costs are out of scope, therefore further evidence would not have altered this decision*"

5.41 Given the repeated opportunities for the Appellant to produce additional evidence, and the number of additional documents that have actually been provided, the Appellant's line of reasoning does not aid this Appeal.

General points

5.42 I will now consider some of the other points raised by the Appellant as part of this appeal. Firstly:

"" *3.1.29 Further, "recognition", "thank you" or staff costs of that type are not expressly excluded in the 4th column of Table 1 (or anywhere else in paragraph 15 of Part VIA of the August 2021 DT). Therefore, LPL had a legitimate expectation that the Sum"*

5.43 Firstly, it is clear that the 4th column of Table 1, is not an exhaustive list of things that are excluded, these are simply the costs that are expressly excluded. This line of reasoning would suggest that anything not expressly excluded should be considered included. If this were the case then the list of possible payments would be potentially limitless. It is clear that any cost must fit into the requisite cost category, otherwise all possible costs would be suitable for reimbursement. I note that the NHS BSA "*asserts that it was unreasonable for LPL to have assumed that claims for all additional staff costs would be reimbursed*". I consider this correct, the issue is not that "thank you" payments are expressly excluded, but that they do not fit within the Drug Tariff's category of Additional staff costs due to Covid-19. I therefore dismiss this line of reasoning.

5.44 The idea that there was some "*legitimate expectation*" of this being paid is difficult to understand. The relevant Drug Tariff wording was not published at the time the decision to make the Payments was taken, therefore at the time of the Payments there could not have been a legitimate expectation of reimbursement. I therefore, determine that there was no legitimate expectation of reimbursement of the Payments by the Appellant.

5.45 Another line of reasoning suggested by the Appellant is that there is no limit specified in paragraph 15 of the Drug Tariff. This is in reference to the wording in the Drug Tariff that allowed for a capping mechanism if it proved necessary. It is unclear why this is raised by the Appellant as it has not been raised by the NHS BSA with regard to the reasons for recovery. I therefore do not understand what the Appellant is seeking to assert with this. Consequently, I determine that this argument does not apply to the Appeal.

5.46 The Appellant also suggests that the fact that the current version of the Drug Tariff still contains Part VIA, indicates that costs are still being submitted to the NHS BSA. The NHS BSA has clarified that it "*has not reimbursed any claim received after this date*." This date being the 15 August 2021. I consider the NHS BSA has provided a clear explanation for this. The assertions by the Appellant do not appear to be based on fact, but a misunderstanding of why the arrangements are still in the Drug Tariff. This does not aid it in its assertions or its claim. I also note that there is no assertion that the claim was made outside of the period specified in the Drug Tariff. The issue was whether the Payments occurred outside the Relevant Period, and I have already made a determination on this issue. It is therefore unclear what the Appellant is seeking to argue with this statement or how it supports its claim.

5.47 Given the considerations above, I have reached the determination that the Payments were not for Additional staff costs due to Covid-19 as set out in the Drug Tariff. I consider that the evidence and language used by the Appellant supports the decision by the NHS BSA that the Payments were some form of discretionary bonus that was awarded to staff as a result of a business decision, not as a direct result of Covid-19 cost. Therefore, I determine that the entire £1,239,022.66 claimed by the Appellant is outside of the scope of the Drug Tariff reimbursement scheme and suitable for recovery by the NHS BSA.

6 DECISION

6.1 I have had regard to the Payment Disputes Directions which provide me with three options:

6.1.1.1 dismiss the appeal and confirm the decision;

6.1.1.2 substitute for the decision any decision could have been taken; or

6.1.1.3 quash the decision, with or without remitting the matter for it to be taken again subject to such directions as NHS Resolution considers appropriate.

6.2 I, as an authorised officer of NHS Resolution, dismiss the appeal and confirm the decision of the NHS BSA. The NHS BSA is permitted to recover the amount overpaid directly or by deduction from other remuneration payable to the Appellant.

Head of Appeals
NHS Resolution