

8 February 2024

FILE REF: SHA/26118

DECISION MAKING BODY: LEICESTER, LEICESTERSHIRE AND
RUTLAND ICB
("the Commissioner")

8th Floor
10 South Colonnade
Canary Wharf
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Tel: 0203 928 2000
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PHARMACIST: OUTWOODS PHARMACY
("the Appellant")

PREMISES: 18 Derwent Drive
Loughborough
LE11 3RJ

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL PHARMACEUTICAL
SERVICES) REGULATIONS 2013**

**SCHEDULE 4 [Terms of Service of NHS Pharmacists]
PART 3 [Hours of Opening]**

1 Outcome

1.1 The appeal is granted and, pursuant to paragraph 25(3)(c)(ii), no direction is issued.

A copy of this decision is being sent to:

Outwoods Pharmacy
Leicester, Leicestershire and Rutland ICB

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**SCHEDULE 4 [Terms of Service of NHS Pharmacists]
PART 3 [Hours of Opening]**

DIRECTION OF ADDITIONAL CORE OPENING HOURS

1 Introduction

- 1.1 Relying on Paragraph 25 of Schedule 4, the Commissioner has requested that the Appellant open from 2pm to 4pm on Sunday 31 March 2024.
- 1.2 The Appellant seeks to appeal to NHS Resolution.

2 Consideration

Rights of appeal

- 2.1 Where the Commissioner 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 to the Secretary of State for Health and Social Care ("the Secretary of State").
- 2.2 The Secretary of State has directed NHS Resolution to determine such appeals. As an authorised officer of NHS Resolution, I have considered the appeal and have determined it, in accordance with my delegated powers.

Opening hours

- 2.3 A pharmacy's opening hours may be categorised as:
 - 2.3.1 'core' opening hours (days on and times at which the pharmacy is obliged to be open), which may incorporate a direction of the Commissioner requiring fewer or greater than 40 hours; or

- 2.3.2 'supplementary' opening hours (other days on and times at which the pharmacy undertakes to provide pharmaceutical services, as notified to the Commissioner).

Alteration of 'core' (including 'directed') opening hours

- 2.4 In accordance with paragraph 1(7)(c) of Schedule 2 to the Regulations, the pharmacy must provide, as part of an application for entry in the pharmaceutical list, the proposed core opening hours in respect of the premises during which it will be obliged to provide pharmaceutical services under paragraph 23(1) of Schedule 4 to the Regulations. These may be subject to a direction under paragraph 23(1)(c), (d) or (e).

Alteration of 'supplementary' opening hours

- 2.5 Other days or times at which services are to be provided (as set out in the original application for entry in the pharmaceutical list pursuant to paragraph 23(3) of Schedule 4 as "supplementary hours") may be altered by giving notice to the Commissioner, in accordance with paragraph 23(6)(a) without the need to make an application.
- 2.6 Notices under paragraph 23(6)(a) are not subject to review by NHS Resolution.

The Commissioner's Request

- 2.7 The Commissioner wishes the Appellant to open from 2pm to 4pm on Sunday 31 March 2024, a day on which it would otherwise be closed.

Information provided by parties

- 2.8 In a letter to the Appellant dated 30 November 2023, the Commissioner stated:
- 2.8.1 "We have concluded our assessment as to whether to issue a direction pursuant to paragraph 25(1) of Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended and have issued the enclosed direction.
- 2.8.2 Your core opening hours on Sunday 31 March 2024 are therefore: 14:00 – 16:00hrs.
- 2.8.3 We have reviewed which pharmacies have opened on previous bank holidays to ensure that directing pharmacies to open has taken place on a fair share basis.
- 2.8.4 Please be advised that the level of remuneration for Easter Sunday 31 March 2024, will be £350.00 per hour.
- 2.8.5 You have the right of appeal to the Secretary of State against our decision. Should you choose to appeal, then you should send in writing a concise and reasoned statement of the grounds for your appeal within 30 days of the date of this letter to: nhsr.appeals@nhs.net or
- 2.8.6 By mail to

Primary Care Appeals Case Manager
NHS Resolution
8th Floor 10 South Colonnade,
Canary Wharf,
London,
E14 4PU

- 2.8.7 If you have any questions, please do not hesitate to contact me.”
- 2.9 In a letter to NHS Resolution dated 1 December 2023 the Appellant stated:
- 2.9.1 “Hello Primary Care Appeals Case Manager
- 2.9.2 I received an email this afternoon from [LC] regarding opening on Easter Sunday 31st March 2024 as there was no response to the rota for 2024/25.
- 2.9.3 We have only taken over this pharmacy as of 27th November and received this email dated 30th November 2023, we were not aware that no response had been received from the previous owners. Hence we are not able to open on Easter Sunday as this was was part of our remit once had taken over. [sic]
- 2.9.4 Previously 3D&Co Ltd (FCR26) ran Outwoods Pharmacy, we took over the pharmacy as of 27th November 2023 as Outwoods Pharmacy (FT47) we were not aware of any prior arrangements.
- 2.9.5 We would like to appeal this direction to open.”
- 2.10 Whilst no representations were made by the Commissioner in response to the appeal, the papers received from the Commissioner, which consisted of a copy of the direction letter of 30 November 2023, were circulated by NHS Resolution to the Appellant for information only.
- 2.11 The Commissioner confirmed the Appellant’s opening hours as follows:
- 2.11.1 2pm to 4pm on Sunday 31 March 2024.

Assessment

- 2.12 I have considered paragraph 25 of Schedule 4 (Determination of pharmacy premises core opening hours instigated by the NHSCB), which reads as follows:
1. *Where it appears to the NHSCB, after consultation with or having considered the matter at the request of the Local Pharmaceutical Committee for the area in which the premises are situated, that the days on which or times at which pharmacy premises are or are to be open for the provision of pharmaceutical services will not, or no longer, meet the needs of—*
 - (a) *people in its area; or*
 - (b) *other likely users of the pharmacy premises,*
for the pharmaceutical services available at or from those premises, it must carry out an assessment as to whether to issue a direction requiring the NHS pharmacist (P) whose premises they are to provide pharmaceutical services at the pharmacy premises at set times and on set days (which may include Christmas Day, Good Friday and bank holidays).
 2. *Before concluding the assessment under sub-paragraph (1) the NHSCB must—*
 - (a) *give notice to P of any proposed changes to the days on which or times at which the pharmacy premises are to be open; and*
 - (b) *allow P 30 days within which to make written representations to the NHSCB about the proposed changes.*
 3. *When it determines the outcome of its assessment, the NHSCB must—*
 - (a) *issue a direction (which replaces any existing direction) which meets the requirements of sub-paragraphs (4) and (5);*

- (b) *confirm any existing direction in respect of the times at which P must provide pharmaceutical services at the pharmacy premises, provided that the existing direction (whether issued under regulation 65, this Part, the 2012 Regulations, the 2005 Regulations or the 1992 Regulations) would meet the requirements of sub-paragraphs (4) and (5); or*
 - (c) *either—*
 - (i) *revoke, without replacing it, any existing direction in respect of the times at which P must provide pharmaceutical services at the pharmacy premises (whether issued under regulation 65, this Part, the 2012 Regulations, the 2005 Regulations or the 1992 Regulations), or*
 - (ii) *in a case where there is no existing direction, issue no direction, in which case, by virtue of whichever of paragraph 23(1)(a) or (b) applies, the pharmacy will need to be open for 40 hours each week or for at least 100 hours each week.*
- 4. *Where the NHSCB issues a direction under sub-paragraph (3) in respect of pharmacy premises that are to be required to be open—*
 - (a) *for more than 40 hours each week, it must set out in that direction—*
 - (i) *the total number of hours each week for which P must provide pharmaceutical services at the pharmacy, and*
 - (ii) *as regards the additional opening hours, the days on which and the times at which P is required to provide those services during those hours,*

but it must not set out in that direction the days on which or times at which P is to provide pharmaceutical services during hours which are not additional opening hours; or
 - (b) *for less than 40 hours each week, it shall set out in that direction the days on which and times at which pharmaceutical services are to be provided at the pharmacy premises.*
- 5. *The NHSCB must not issue a direction under sub-paragraph (3) that has the effect simply of requiring pharmacy premises to be open for 40 hours each week on set days and at set times (that is, the direction must have the effect of requiring pharmacy premises to be open for either more or less than 40 hours each week).*
- 6. *The NHSCB must notify P of any direction issued or any other action taken under sub-paragraph (3), and where it sets new days on which or times at which P is to provide pharmaceutical services at pharmacy premises, it must include with the notification a statement of—*
 - (a) *the reasons for the change; and*
 - (b) *P's right of appeal under paragraph (7).*
- 7. *P may, within 30 days of receiving notification under sub-paragraph (6), appeal in writing to the Secretary of State against any direction issued or any other action taken under sub-paragraph (3) which sets new days on which or times at which P is to provide pharmaceutical services.*
- 8. *The Secretary of State may, when determining an appeal, either confirm the action taken by the NHSCB or take any action that the NHSCB could have taken under paragraph (3).*
- 9. *The Secretary of State shall notify P of the determination and shall in every case include with the notification a statement of the reasons for the determination.*

10. *If the days on which or times at which P is to provide pharmaceutical services at pharmacy premises have been changed in accordance with this paragraph, P must introduce the changes—*

- (a) if P has not appealed under sub-paragraph (7), not later than 8 weeks after the date on which P receives notification under sub-paragraph (6); or*
- (b) if P has appealed under sub-paragraph (7), not later than 8 weeks after the date on which P receives notification under sub-paragraph (9).*

11. *This paragraph does not apply where regulation 65(5) to (7) applies.*

2.13 I am mindful that paragraph 23(12) of Schedule 4 states:

For the purposes of calculating the number of hours that a pharmacy premises are open during a week that includes Christmas Day, Good Friday, Easter Sunday or a bank holiday, it is to be deemed that the pharmacy premises were open on that day at the times at which they would ordinarily have been open on that day of the week.

2.14 I am of the view that the pharmacy would normally be closed on Easter Sunday, 31 March 2024, and that this would be in accordance with the Regulations.

2.15 I note that the Commissioner, in its direction letter of 30 November 2023, states “We have concluded our assessment as to whether to issue a direction ...” I note that the Appellant advises that they took over the pharmacy on 27 November 2023 and were not aware of the proposed direction or that no response to the consultation had been made by the previous owners. I note that the Commissioner has not responded to these points and further I have not been provided with a copy of the consultation letter that was sent out by the Commissioner.

2.16 I have not been provided with information which demonstrates the consultation process undertaken by the Commissioner and to which the Appellant refers to in their letter of appeal. I am mindful that the Appellant has not disputed that this process has taken place, only that they were not aware of it as they were not the owner of the pharmacy whilst the consultation process was being undertaken.

2.17 Whilst the Appellant states that the change of ownership of the pharmacy was effective from 27 November 2023, which has not been disputed by the Commissioner, the Appellant should have been aware of the potential for a direction of hours for Easter Sunday. I am however conscious that this is something which the previous owner of the pharmacy should have declared to the Appellant whilst the change of ownership was taking place.

2.18 I am conscious that 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. From the information before me, it is unclear if this regulatory requirement has been adhered to in this case.

2.19 The Commissioner is required by paragraph 25(6) of Schedule 4 to provide reasons for its decision. In my view, 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.

2.20 I have not been provided with any information as to how the assessment was carried out or which pharmacies have been identified as potentially suitable for direction. An

assessment based on having opened on previous bank holidays and ensuring that “directing pharmacies to open has taken place on a fair share basis” is not what was envisaged by the Regulations.

- 2.21 I am of the view that I have not been provided with any information to substantiate the view as to why the Appellant's pharmacy is the best placed in terms of access, geography or any other factor to meet any demand of services. I have not been provided with any information as to what pharmaceutical cover may be required or why the hours of 2pm to 4pm on Sunday 31 March 2023 will provide this cover. I am of the view that there is no information from the Commissioner as to how directing pharmacies, taking into account those which have opened previously, provides a robust assessment of the need for pharmaceutical provision in terms of providing services to patients.
- 2.22 I am not satisfied with the Commissioner's approach in this regard and further, the Commissioner has provided no information to support the conclusion reached. Further, the Commissioner has not set out details of a robust assessment that lies behind the direction to this particular pharmacy, which is a requirement of the Regulations.
- 2.23 On appeal, I may (in accordance with paragraph 25(8) of Schedule 4) either confirm the action of the Commissioner or take such other action as it could have taken.
- 2.24 While the apparent failure to give notice to the Appellant and invite representations (mentioned above) may be considered to have been 'cured' by the Appellant having had the opportunity in this appeal to make representations, I must still determine whether I am satisfied that the circumstances exist in which a direction may, and should, be made.
- 2.25 The letter of 30 November 2023 provides me with no information which I consider sufficient to provide reasons on the basis of which I can confirm the decision, nor information upon which I might rely to make a direction for alternative reasons.
- 2.26 On the basis of the information available to me, I am not satisfied that the Commissioner has demonstrated that the needs of people in its area or other likely users of the pharmacy for pharmaceutical services will not be met on Sunday, 31 March 2024.

3 Determination

- 3.1 The appeal is granted and, pursuant to paragraph 25(3)(c)(ii), no direction is issued.

**Head of Appeals
NHS Resolution**