

21 March 2024

FILE REF: SHA/26137

DECISION MAKING BODY: NHS HEREFORDSHIRE AND
WORCESTERSHIRE ICB
("the Commissioner")

PHARMACIST: BOOTS UK LTD
("the Appellant")

PREMISES: UNIT 15 WEAVERS WHARF,
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**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 On the basis of the Commissioner's decision to rescind the direction, 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:

Boots UK Ltd
NHS Herefordshire and Worcestershire 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 13:00 – 16:00 on 31 March 2024 (Easter Sunday).
- 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 13:00 – 16:00 on 31 March 2024 (Easter Sunday), a day on which it would otherwise be closed.

Information provided by parties

- 2.8 In a letter to the Appellant dated 10 January 2024, the Commissioner stated

- 2.8.1 "We are writing to advise you that Boots UK Ltd trading as Boots UK Ltd has been placed to open on Rota Direction.

You are required to be open on Easter Sunday 31st March 2024 from 13:00 – 16:00.

Please acknowledge receipt of this email within 7 days of the date of this email, **Wednesday 17 January 2024**, stating that you accept the Direction to open. A link for the claims will be sent to you near to the time.

It's a Direction from your ICB, which is issued under paragraph 25 of Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended. If we do not hear from you the Direction will remain in place and we will expect your pharmacy to be open during the Directed hours.

Any queries you have regarding the Direction you have been given please contact the team in order that we have the opportunity to resolve any issues through local resolution. If, however a resolution cannot be found you have a right of appeal to the Secretary of State against the issuing of this Direction.

Should you choose to appeal then you should send a concise and reasoned statement of the grounds for your appeal within 30 days of this notification to: - NHS Resolution, 8th Floor 10 South Colonnade, Canary Wharf, London, E14 4PU."

- 2.9 In a letter to NHS Resolution dated 13 January 2024 the Appellant stated:

- 2.9.1 "On seeking advise [sic] from my senior managers within Boots we would like to appeal this rota direction for opening our pharmacy on Easter Sunday 2024.

Unfortunately, this rota on Easter Sunday will be very difficult to provide in a safe manner due to the size and physical layout of this Boots store. We are

happy to support if the day could be moved to any other Bank Holiday, when we normally open. On Christmas Day and Easter Sunday we are not allowed to open for retail. The main problem is the size of our store, this is a store with a large retail sales floor, not a small local pharmacy. We have no means of securing our store retail area from customers. Our pharmacy is positioned at the rear of the store requiring patients and customers to walk through the whole building to access pharmaceutical services.

The team have had numerous aggressive incidents in recent months. Trying to maintain a pharmaceutical service safe for patients and colleagues from such a large retail area which will essentially not be open for sales will prove emotive and difficult.

As I mentioned before we are happy to support on any other Bank Holiday, whatever the hours you require. I would be very grateful if you could consider this request and a contractor swap could be arranged."

2.10 In an email to NHS Resolution dated 8 February 2024 the Commissioner stated:

2.10.1 "Please be advised that the direction for Boots FE890 has now been rescinded."

2.11 No observations were made by the Appellant in response to the representations from the Commissioner.

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 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 and that this would be in accordance with the Regulations.

2.15 Under normal circumstances, I would proceed to consider the appeal but I note the email from the Commissioner dated 8 February 2024 which states that the direction for the Appellant to open on Easter Sunday has now been rescinded. As a result, the Appellant was invited to withdraw their appeal but has not done so leaving me in the position of having to determine an appeal where the direction effectively no longer exists.

3 Determination

3.1 On the basis of the Commissioner's decision to rescind the direction, the appeal is granted and, pursuant to paragraph 25(3)(c)(ii), no direction is issued.

**Head of Appeals
NHS Resolution**