

21 March 2024

FILE REF: SHA/26161

DECISION MAKING BODY: NHS NOTTINGHAM & NOTTINGHAMSHIRE
ICB
("the Commissioner")

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

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

PHARMACIST: APPLEGATE CHEMIST
("the Appellant")

PREMISES: 132 ALFRETON ROAD,
RADFORD, NOTTINGHAM,
NOTTINGHAMSHIRE, NG7 3NS

**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:

Applegate Chemist
NHS Nottingham & Nottinghamshire 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 14:00 – 16:00 on Monday 1 April 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 14:00 – 16:00 on 1 April 2024 (Easter Monday), a day on which it would otherwise be closed.

Information provided by parties

- 2.8 In a letter to the Appellant dated 2 February 2024, the Commissioner stated:

- 2.8.1 "The East Midlands Primary Care Team have now completed an assessment as to whether a direction should be issued pursuant to paragraph 25(1) of Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 as amended.

This assessment included a consultation with the LPC and the Integrated Care Board to assess the pharmaceutical provision in the area of Nottingham and Nottinghamshire and the conclusion of this assessment was to continue with the direction.

Your core opening hours on Monday 1 April are therefore: 14:00 - 16:00

Please be advised that the level of remuneration for Easter Monday 1st April, will be £275.00 per hour.

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

If you have any questions, please do not hesitate to contact me."

- 2.9 In a letter to NHS Resolution dated 1 March 2024 the Appellant stated:

- 2.9.1 "I would like to appeal the decision mainly on the grounds;

2.9.2 We are a single branch independent pharmacy. We can not [sic] open safely because I am away on holiday and none of my staff have agreed to work. Our contracts of employment do not allow us to force them to work, so it would not be safe to open with a locum pharmacist who does not know the pharmacy and them being without any support staff (not practical). Also, please note in the nine years I have operated in this area there has never been a shortage of pharmacies open on bank holidays, indeed NG7 normally has two or three pharmacies open as we are in a cluster area of pharmacies as identified by the NHS in 2015/16."

2.10 No representations were made by the Commissioner in response to the appeal.

2.11 The Commissioner confirmed the Appellant's directed opening hours as follows:

2.11.1 14:00 – 16:00 on Monday 1 April 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 Monday 1 April 2024, a bank holiday, and that this would be in accordance with the Regulations.
- 2.15 I note that the Commissioner in its direction letter of 2 February 2024 states “*The East Midlands Primary Care Team have now completed an assessment...*” and that the email trail provided with the appeal contains an email of 1 November 2023 from the Commissioner that states “*Following the publication of the rota for 23/24 and 24/25 in conjunction with the ICB and LPC [sic]. We are proposing to direct your pharmacy to open on Easter Monday 2024 to provide pharmaceutical services to the local population. This will be for 2 hours only and full details are on the letter provided.*” I have not been provided with a copy of the LPC consultation letter that was sent out by the Commissioner.
- 2.16 The Appellant has not disputed that this process has taken place and in the email trail with the appeal, the Appellant stated to the Commissioner on 30 November 2023:
- 2.16.1 “*Historically, NG7 has always had multiple pharmacies volunteer for all 8 bank holidays including Trust Pharmacy, Asda Pharmacy and numerous late night pharmacies within the postcode. The likely you have had none volunteer now is you have increased your forward planning which I understand, but it is so far in advance that these mainly large organisations are unable to react in time to your request. For example, Boots in Victoria Centre can only volunteer after they know the opening plans for the whole shopping centre which is outside their control as only released closer to the actual bank holiday. The same is true for supermarket pharmacies like Asda, where they pharmacy can only open on a bank holiday if the larger store decides to open which is normally closer to bank holiday date. I am very sure closer to the time multiple pharmacies will volunteer as it fits their business model and interest.*
- Unfortunately, I will not be able to cover this bank holiday and wanted to give you advance notice to plan accordingly. As a singled handed owner-operator I do not have the staffing resources or clout over my staff to force them to work a bank holiday. As we are only open week days they are not even used to working weekends and have rejected to come in on a bank holiday even when offered extra pay due to family commitments. My staff have worked extremely hard in particular since Oct 2021, we have been offering COVID and flu jabs every season on offer and have seen unprecedented high demand. Also, I am personally on holiday abroad on this bank holiday and do not want to rely on an unknown locum potentially not turning up that would result in a breach of NHS contract notice, against Applegate pharmacy.”*
- 2.17 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. In its email of 1 November 2023, the Commissioner did not set-out any assessment but simply notified the Appellant of its proposal to direct the Appellant to open.
- 2.18 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.

- 2.19 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.
- 2.20 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 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 why pharmaceutical cover may be required or why the hours of 14:00 – 16:00 on Monday 1 April 2024 will provide this cover.
- 2.21 I am not satisfied with the Commissioner's approach in this regard and further, the Commissioner has not provided any 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.
- 2.22 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.
- 2.23 The letter of 2 February 2024 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.
- 2.24 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 Monday 1 April 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