

25 July 2024

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FILE REF: SHA/26214

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DECISION MAKING BODY: DERBY AND DERBYSHIRE ICB
("the Commissioner")

PHARMACIST: PCT HEALTHCARE LIMITED T/A PEAK
PHARMACY
("the Appellant")

PREMISES: 9 CHURCH STREET
STAVELEY
DERBYSHIRE
S43 3TL

**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:

PCT Healthcare Ltd
Derby and Derbyshire ICB

Advise / Resolve / Learn

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

**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 10am to 12 noon on 26 August 2024.
- 1.2 The Appellant seeks to appeal to NHS Resolution.

Rights of appeal

- 1.3 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").
- 1.4 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

- 1.5 A pharmacy's opening hours may be categorised as:

- 1.5.1 '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
- 1.5.2 '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

- 1.6 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

- 1.7 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.
- 1.8 Notices under paragraph 23(6)(a) are not subject to review by NHS Resolution.

The Commissioner's Request

- 1.9 The Commissioner wishes the Appellant to open from 10am to 12 noon on 26 August 2024, a day on which it would otherwise be closed.

2 The Direction

In a letter to the Appellant dated 27 March 2024, the Commissioner stated:

- 2.1 **"Your current core opening hours are:**
- 2.2 Monday - Friday: 09:00 - 13:00 14:00 – 18:00
- 2.3 Saturday/Sunday: Closed
- 2.4 **The total opening hours (core & supplementary) of the above pharmacy premises are:**
- 2.5 Monday - Friday: 09:00 - 18:00
- 2.6 Saturday/Sunday: Closed
- 2.7 We consider that the current core opening hours may not meet the needs of people in the area or other likely users of the pharmacy premises for the following reasons:
- 2.8 There is no pharmacy provision in the Derbyshire area on Monday 26th August 2024, following requests by the ICB for a pharmacy to volunteer.
- 2.9 We are carrying out an 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 requiring you to provide pharmaceutical services on the following date and time:
- 2.10 **Summer Bank Holiday – Monday 26th August 2024 - Time 10:00 – 12:00**

2.11 If you wish to make written representations about the proposed direction, they should be sent to england.eastmidsparmacy@nhs.net within 30 days of the date of this letter, i.e. by 26th April 2024.

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

In a further letter to the Appellant dated 25 April 2024, the Commissioner stated:

2.13 “Thank you for your representation regarding the direction of your pharmacy operating on 26 August 2024.

2.14 The Pharmaceutical Services Regulations Committee (PSRC) convened on 16 April 2024 and resolved to maintain the directive for your pharmacy to open on the bank holiday to be held on 26 August 2024, the outcome is as follows:

2.14.1 The Committee believes there is sufficient time for your pharmacy to arrange the necessary staffing.

2.14.2 The location of the pharmacy was not considered a sufficient reason to exempt it from this directive.

2.14.3 The directive aims to serve not only Chesterfield but also the surrounding areas, as travel is a necessity for whichever pharmacy is directed to open. This decision primarily addresses the needs of those with urgent health requirements during the bank holiday held on 26 August 2024.

2.15 Should you wish to appeal this decision, you have the right to do so. Please submit a detailed and reasoned appeal to the Secretary of State within 30 days from the date of this letter by emailing it to nhsr.appeals@nhs.net.

2.16 Or by post:

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

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

In a covering letter to the Appellant dated 26 April 2024, the Commissioner stated:

2.19 “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.

2.20 Your core opening hours on Summer Bank Holiday 26 August 2024 are therefore:
10:00-12:00

2.21 The assessment was completed by Nottingham & Nottinghamshire Integrated Care Board (ICB) and the Local Pharmaceutical Council (LPC).

2.22 We have also reviewed which pharmacies have opened on previous bank holidays to ensure that directing pharmacies to open has taken place on a fair share basis.

2.23 Please be advised that the level of remuneration for Summer Bank Holiday – 26 August 2024, will be £275.00 per hour for a maximum of 2 hours. This should be claimed through PharmOutcomes within 28 days of the day of closure.

- 2.24 Please Ensure that you update the Directory of service and NHS UK using profile manager with the hours that you are being directed to open.
- 2.25 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
- 2.26 By post to:
- 2.27 Primary Care Appeals Case Manager
NHS Resolution
8th Floor 10 South Colonnade,
Canary Wharf,
London,
E14 4PU
- 2.28 If you have any questions, please do not hesitate to contact me.”

3 The Appeal

In a letter to NHS Resolution dated 20 May 2024 the Appellant appealed against the Commissioner’s decision. The grounds of appeal are:

- 3.1 “Further to a direction of core opening hours received by email dated 27th March 2024 for the above pharmacy to open on Monday 26th August 2024 (Summer Bank Holiday) at 10:00 until 12:00, PCT Healthcare Limited writes to appeal to the Primary Care Appeals Unit.
- 3.2 There was a previous email sent to the pharmacy FR077 on 27 March 2024, this email was appealed to NHS England.
- 3.3 Firstly, we are aware of the need for adequate pharmaceutical services provision. However, we feel that this particular direction has not been based on adequate research and reasoning by NHS Derby and Derbyshire ICB. There is no detail within the letters of direction to indicate the reasons as to how or why this direction supports an assessment which concluded the pharmaceutical needs of the relevant persons will not be met [sic] on this day that we are required to open our pharmacy, FR077 in Staveley, Chesterfield.
- 3.4 Under Schedule 4 paragraph (25)(6)(a) of the NHS Pharmaceutical and LPS regulations NHS England must include with the notification a statement of “the reasons for the change”. We note that the Regulations envisage the reasons for the direction should be based on the results of an assessment, which followed a consultation, which should conclude with the needs of the local population and likely users of our pharmacy not being met on this day such that we are required to open from 10:00 to 12:00 on Monday 26th August 2024.
- 3.5 The first communication from NHS England [sic] was in an email dated 14 September 2023, which contained a grid indicating which pharmacies would be directed to open on each Bank Holiday in 2023 and 2024. As well as the grid a letter was attached including the following:
- 3.6 *The ICBs and LPCs across the East Midlands have worked in collaboration over the last few months to develop a pharmacy rota to cover bank holidays for the period of December 2023 – March 2025 across the East Midlands, with the view of this being reviewed annually.*
- 3.7 *After listening to feedback from contractors, we believe there are many benefits to this approach, including:*

- 3.7.1 *It will avoid last minute requests to open, which can be difficult to fulfil and a rota ahead of time would be beneficial to all involved.*
- 3.7.2 *It will ensure pharmacy provision for patients on each directed day.*
- 3.7.3 *Pharmacies will be able to forward plan staffing and arrangements that are needed.*
- 3.7.4 *It will help embed a fair and equitable process for all.*
- 3.7.5 *Meeting the needs of the changing pharmacy landscape*
- 3.8 The communication from NHS Derby and Derbyshire ICB dated 26th April 2024 states: *"We have concluded our assessment...and have issued the enclosed direction."* In addition, *"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"*.
- 3.9 In particular, the letter dated 26th April 2024 makes no reference to any specific results linking our pharmacy to any lack of service provision on 26 August 2024. Furthermore, there is no actual details of the findings of a consultation or assessment, and therefore no reasons behind the direction which is contrary to paragraph 25(1) and 25(6) of Schedule 4.
- 3.10 Our appeal is that PCT Healthcare Limited notes in previous letters to our pharmacies that NHS Derby and Derbyshire ICB itself states *"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."*
- 3.11 PCT Healthcare Limited t/a Peak Pharmacy do not believe this direction to meet the requirements of paragraph 25(6) of Schedule 4 as NHS Derby and Derbyshire ICB have not stated in their letter reasons for its decision.
- 3.12 PCT Healthcare Limited is aware that several contractors are already opening on 26th August 2024 in Chesterfield, this detail was given to NHS Derby and Derbyshire ICB in our initial appeal representation to NHS England which the Pharmaceutical Services Regulations Committee (PSRC) dismissed.
- 3.13 In conclusion, our pharmacy has received this direction, however for the reasons discussed above we do not feel it has been made clear as to why our pharmacy, in particular, has been chosen to open at 10:00 to 12:00 on Monday 26th August 2024, as opposed to another pharmacy in Chesterfield."

4 **Representations**

In a letter to NHS Resolution dated 27 June 2024 the Commissioner stated:

- 4.1 "The process that the East Midlands primary care team follow for directing for all bank holidays on behalf of Nottingham and Nottinghamshire ICB [sic] is as follows;
 - 4.1.1 A communication is sent out to all pharmacies in the Health and Wellbeing Board (HWB) twice a year requesting the proposed opening days and times for all bank and public holidays, and Easter Sunday Pursuant to paragraph 35(4) of Schedule 4 (pharmacy contractors) or paragraph 25(3), Schedule 5 (dispensing appliance contractors) to the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 as amended.
 - 4.1.2 Once it is known when the pharmacies in a HWB area will be open, an assessment will be made as to whether a contractor is to open on a particular day or days. Part of the assessment includes engagement with the LPC.

- 4.1.3 Following the assessment and engagement, if it is felt that the pharmaceutical provision within any area would not meet the needs of the people or other likely users in the area then a proposal to direct will be issued. As part of the proposal to direct, notice is given to the contractor of the proposed changes to the days on which, or times at which, the premises are to be open. As part of that notice the contractor is advised that it may make written representations about the proposed changes within 30 days.
- 4.1.4 At the end of the 30 days, should representations be received these will be reviewed by the Pharmaceutical Services Regulations Committee who will decide whether a direction is to be issued regarding the contractor's opening hours. If the decision is to issue the direction, a 30 day period is given to the contractor in which they can appeal the direction with NHS Resolution.
- 4.2 Following the assessment of the returns from the Staveley area and engagement with the LPC a proposal to direct letter was sent to PCT Healthcare on 27 March 2024, representations against this proposal was received on 28 March 2024. The pharmacy cited the fact that Tesco Pharmacy was open in the area and therefore the needs of the people were met, however on contact with Tesco head office, assurance could not be given that the pharmacy was going to be open on August Bank holiday 2024.
- 4.3 The representation was reviewed by the PSRC on 16 April 2024 and the decision was made to carry on with the issue of the direction. This decision was based on the fact that assurance could not be given that other pharmacies in the area would be open for the period detailed within the direction.
- 4.4 I would like to take this opportunity to respond to any further representations provided by Peak Pharmacy, 9 Church Street, Staveley, Derbyshire, S43 3TL."

5 Observations

In a letter to NHS Resolution dated 22 July 2024 the Appellant stated:

- 5.1 "Further to the representations received with regards to our appeal PCT Healthcare Limited has the following observations to make.
- 5.2 With respect to the Derbyshire ICB letter dated 27th June 2024 regarding the direction of FR077, the letter states:
- 5.3 *"There is no provision in the Derbyshire area on Monday 26th August"* How does this statement mean that our pharmacy specifically in Staveley (FR077) is required to open on Monday 26th August.
- 5.4 With respect to the Derbyshire ICB letter dated 27th June 2024 regarding our appeal.
- 5.5 Under Regulation 25 (1):
- 5.6 *"Determination of pharmacy premises core opening hours instigated by the NHSCB 25.—(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 people in its area or other likely users of the pharmacy premises."*
- 5.7 The Derbyshire ICB mentions throughout their representation that they have reviewed with Derbyshire LPC (now known as Community Pharmacy Derbyshire), there are no minutes or dates of consultations with the LPC within the representation from Derbyshire ICB. It is the full committee of Community Pharmacy Derbyshire who are the Statutory Body representing community pharmacies in Derbyshire, covering the Chesterfield region. The full committee of Community Pharmacy Derbyshire discussed

the localities and timings of the directions sent out by Derbyshire ICB in their November 2023 meeting. The Committee discussed Directions for Bank Holidays from Christmas Day 2023 until New Year's Day 2025. As Community Pharmacy Derbyshire were discussing these directions after they are issued by Derbyshire ICB, this is contrary to Regulation 25(1).

- 5.8 As Community Pharmacy Derbyshire did not discuss these directions and localities until their November meeting the localities for 2023- 2025 were not reviewed by the statutory body at the time of circulation to all community pharmacies.
- 5.9 PCT Healthcare Ltd wants to reiterate again that:
- 5.10 There is no detail within the letters of direction sent from Derbyshire ICB; to conclude that our pharmacy, FR077 is required to open for two hours on Bank Holiday Monday 26 August 2024. There are no details within the direction letters of the assessment outcomes to indicate specifically why it is the pharmacy owned by PCT Healthcare Ltd t/a Peak Pharmacy, at 9 Church Street, Staveley, Chesterfield S43 3TL who are required to open on Bank Holiday Monday 26 August 2024.
- 5.11 Under Schedule 4 paragraph (25)(6)(a) of the NHS Pharmaceutical and LPS regulations NHS England must include with the notification a statement of "the reasons for the change". We note that the Regulations envisage the reasons for the direction should be based on the results of an assessment, which followed a consultation with the local LPC (now known as Community Pharmacy Derbyshire), which should conclude with the needs of the local population and likely users of our pharmacy not being met on this day such that we are required to open from 10:00 until 12:00 on Bank Holiday Monday 26 August 2024.
- 5.12 Within the representation from Derbyshire ICB there are no results given regarding the assessment which concluded before the letter dated 26th April 2024 to issue the direction from Derbyshire ICB. There are no specifics given regarding level of patient need within Chesterfield for the summer Bank Holiday, there is no evidence of previous activity for the summer Bank Holiday in Chesterfield. There is no detail of the number of patients accessing a pharmacy on the summer Bank Holiday within the Chesterfield area, more specifically there are no assessment details for the Chesterfield area for our patients requiring pharmaceutical provision.
- 5.13 Derbyshire ICB staff have commented that the audits for usage and demand, though they are issued to pharmacies that take part in the rota service, completion is not mandatory, and the response rate is very low. If there is no evidence of need, how can an assessment be carried out without the activity reports being available.
- 5.14 Derbyshire ICB mention in their letter of 26 April 2024 that the direction is made to meet the needs of patients. The A&E department in Chesterfield is located at Chesterfield Royal Hospital, on Chesterfield Road, Calow Chesterfield S44 5BL this site is located over 4.7 miles away from our pharmacy. There are eighteen closer pharmacies listed on NHS.uk to the A&E department than our pharmacy. Should a patient from Chesterfield A&E wish to access our pharmacy it is a 50-minute bus ride to our pharmacy, after 11am as the bus service will be a "Sunday service" on the Bank Holiday 26th August 2024, patients may have to wait up to 20 minutes for a bus. Taxis will be limited on this day with the higher rate of fares being cost-prohibitive to most patients and a barrier to access for individuals.
- 5.15 In addition, there is no evidence from Derbyshire ICB of any patients/visitors from the deprived areas within Chesterfield accessing pharmaceutical provision on Bank Holiday Monday 26 August 2024, there are no numbers of patients or customers accessing pharmacy services provided nor their postcodes from the assessment undertaken by the ICB.

- 5.16 PCT Healthcare Ltd can confirm that our pharmacy FR077 will be open for our full core and supplementary hours in the week proceeding Bank Holiday Monday 26th August enabling our patient's ample opportunity to collect their prescriptions and access pharmaceutical services.
- 5.17 The Derbyshire ICB state that the localities to select pharmacies to be directed to open on Bank Holidays were based on an assessment.
- 5.18 The expectation of an assessment is that it will cover patient footfall, patient usage of services and ease of access. PCT Healthcare Limited t/a Peak Pharmacy wish to address these areas in turn:
- 5.19 Patient footfall
- 5.20 No evidence supplied by Derbyshire ICB in the Direction Letters, or their representation letter dated 27 June 2024, to state why a direction is necessary in Chesterfield.
- 5.21 Patient usage of service
- 5.22 No details supplied by Derbyshire ICB in the Direction Letters, or their representation letter dated 27 June 2024 of patient usage on Summer Bank Holiday Monday data from PharmOutcome supplied by any contractors opening on previous Summer Bank Holidays.
- 5.23 Ease of access
- 5.24 No evidence supplied that our pharmacy PCT Healthcare Ltd – FR077 which is located to the north of Chesterfield should be selected to open rather than another pharmacy within Chesterfield.
- 5.25 Within the environs of Chesterfield there are 36 pharmacies (data from NHS.uk – including Chesterfield, Clay Cross & Staveley)
- 5.26 PCT Healthcare Limited believe that this direction has not been based on adequate research and reasoning by NHS Derby and Derbyshire ICB. There is no detail within the letters of direction to indicate the reasons as to how or why this direction supports an assessment which concluded the pharmaceutical needs of the relevant persons will not be met on this day that we are required to open our pharmacy, FR077 in Chesterfield.
- 5.27 The letter from NHS Derby and Derbyshire ICB dated 26th April 2024 states:
- 5.28 *"We have concluded our assessment...and have issued the enclosed direction."*
- 5.29 In addition, *"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."*
- 5.30 In particular, the letter dated 26 April 2024 makes no reference to any specific results linking our pharmacy to any lack of service provision on 26 August 2024. Furthermore, there is no actual details of the findings of a consultation or assessment with Community Pharmacy Derbyshire, and therefore no reasons behind the direction which is contrary to paragraph 25(1) and 25(6) of Schedule 4.
- 5.31 PCT Healthcare Limited t/a Peak Pharmacy does not believe this direction meets the requirements of paragraph 25(6) of Schedule 4 as NHS Derby and Derbyshire ICB have not stated in their letter reasons for its decision.

- 5.32 In conclusion, our pharmacy FR077 has received this direction, however for the reasons discussed above we do not believe it has been made clear as to why our pharmacy, in particular, has been chosen to open at 10:00 to 12:00 on Bank Holiday Monday 26 August 2024, as opposed to another pharmacy in Chesterfield.
- 5.33 There is no evidence specifically provided from the assessment of patient numbers, their postcode and service usage on the August Bank Holiday.
- 5.34 The points we have raised are contrary to the NHS Pharmaceutical Regulations, PCT Healthcare Limited respectfully request NHS Resolution to grant this appeal."

6 Assessment

- 6.1 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 NHS England, 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) NHS England 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 NHS England about the proposed changes.*
 3. *When it determines the outcome of its assessment, NHS England 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 NHS England 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. *NHS England 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. *NHS England 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 NHS England or take any action that NHS England 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.*

6.2 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.

- 6.3 I am of the view that the pharmacy would normally be closed on Monday 26 August 2024, which is a bank holiday, and that this would be in accordance with the Regulations.
- 6.4 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.
- 6.5 I have been provided with two different decision letters dated 25 April 2024 and 26 April 2024 from the Commissioner addressed to the Appellant, each directing the Appellant to open on Monday 26 August 2024. I consider this to be unhelpful and confusing. Further the letters have slight variations in their wording. I have selected the decision letter dated 26 April 2024 (at 2.19 above) for the purpose of my consideration as this letter was the most recent and makes specific reference to the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. However it would be helpful if, in future, the Commissioner could restrict itself to one decision notification.
- 6.6 I note in its letter of 26 April 2024 the Commissioner states that the assessment was completed by the Commissioner in consultation with the LPC, although I have not been provided with a copy of the consultation with the LPC. I note the Appellant's comment that the first communication they received from the Commissioner was an email dated 14 September 2023 containing a grid indicating which pharmacies would be directed to open on bank holidays in 2023/2024. I have not been provided with a copy of the email but note the Appellant states that attached to the email was a letter which stated *"The ICBs and LPCs across the East Midlands have worked in collaboration over the past few months to develop a pharmacy rota to cover bank holidays for the period of December 2023 – March 2025 across the East Midlands, with the view of this being reviewed annually."* I note that a proposed direction letter [copy provided], was sent to the Appellant on 27 March 2024 and the pharmacy was given 30 days to provide representations with regard to the proposal. I note the Commissioner's comment that the Appellant responded within the 30 day period and "cited the fact the Tesco Pharmacy was open in the area and therefore the needs of the people were met". In its representations, the Commissioner stated that *"on contact with Tesco head office, assurance could not be given that the pharmacy was going to be open on August Bank holiday 2024"*. Further the Commissioner stated *"The representation was reviewed by the PSRC on 16 April 2024 and the decision was made to carry on with the issue of the direction. This decision was based on the fact that assurance could not be given that other pharmacies in the area would be open for the period detailed within the direction."*
- 6.7 I note the comment from the Appellant in its observations that *"Community Pharmacy Derbyshire discussed the localities and timings of the directions sent out by Derbyshire ICB in their November 2023 meeting"* and that *"As Community Pharmacy Derbyshire were discussing these directions after they are issued by Derbyshire ICB, this is contrary to Regulation 25(1)"*. I am of the view that as the most recent direction letter was issued to the Appellant on 26 April 2024, the Commissioner has undertaken a consultation process as set out in the Regulations.
- 6.8 I am mindful that 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.
- 6.9 I note that the direction letter dated 26 April 2024 states *"We have also reviewed which pharmacies have opened on previous bank holidays to ensure that directing pharmacies to open has taken place on a fair share basis"*.

- 6.10 I note that the Commissioner, in its representations, has commented further on the process it has undertaken, however it has not expanded on its reasoning or the assessment it carried out. 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 will be best placed such as the consideration of other pharmacies in the area, the locations of those pharmacies and their accessibility or otherwise. I have not been provided with any information as to what pharmaceutical cover may be required or why the hours of 10.00am to 12.00pm on Monday 26 August 2024 will provide this cover.
- 6.11 I am of the view that there is no information from the Commissioner as to how directing pharmacies on the basis of those which have opened previously, provides a robust assessment of the need for pharmaceutical provision in terms of providing services to patients. I am not satisfied with the Commissioner's approach in this regard and I consider that the Commissioner has provided limited 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.
- 6.12 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.
- 6.13 None of the correspondence issued by the Commissioner to the Appellant or its response to this appeal provide me with any 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.
- 6.14 The letters explain the process which has taken place and the conclusions reached, but not the reasoning that lies behind the direction.
- 6.15 On the basis of the limited 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 26 August 2024.

7 Determination

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

Head of Appeals
NHS Resolution