

22 November 2024

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FILE REF: SHA/ 26378

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DECISION MAKING BODY: NORTH EAST AND NORTH CUMBRIA
INTEGRATED CARE BOARD
("the Commissioner")

PHARMACIST: ASDA HARTLEPOOL PHARMACY
("the Appellant")

PREMISES: MARINA WAY
HARTLEPOOL
TS24 0XR

**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:

ASDA Hartlepool Pharmacy
North East and North Cumbria ICB

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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 2pm to 5pm on Wednesday 25 December 2024 (Christmas Day).
- 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 2pm to 5pm on 25 December 2024, a day on which it would otherwise be closed.

2 **The Direction**

In a letter to the Appellant dated 17 October 2024, the Commissioner stated:

- 2.1 "Further to my letter of 17 September 2024, North East and North Cumbria Integrated Care Board (NENC ICB) has given further consideration as to whether or not the provision of pharmaceutical services on Bank Holidays including, Good Friday, Easter Sunday and Christmas Day, meet the reasonable needs of patients and members of the public in your Health and Wellbeing Board Area.
- 2.2 This is to notify you, the contractor, of NENC ICB's proposed changes to the days on which and times at which your premises are to be open.
- 2.3 Your pharmacy is directed to be open on Christmas Day Wednesday 25th December 2024, between the hours of 14:00-17:00 for which you will be paid £274 per hour. Payment will be made on submission of the audit and claim form available on Pharmoutcomes.
- 2.4 Any direction that is issued will meet the requirements of paragraph 25, schedule 4 or paragraph 15, schedule 5 of the NHS Pharmaceutical Services regulations 2013.
- 2.5 Please acknowledge receipt of this letter by 4th November 2024
- 2.6 You may, in accordance with Schedule 4, Part 3, regulation 7 of the NHS Pharmaceutical Services Regulations 2013, appeal, in writing, to the secretary of state within 30 days of receiving this direction (17 November 2024). Please address any such correspondence to the following address:
- 2.7 NHS Resolution

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

2.8 Email: nhsr.appeals@nhs.net"

3 The Appeal

In a letter to NHS Resolution dated 6 November 2024, received 8 November 2024, the Appellant appealed against the Commissioner's decision. The grounds of appeal are:

- 3.1 "I am contacting you to appeal against the direction by the ICB for the ASDA Hartlepool pharmacy to open on Wednesday 25th. December 2024 between the hours of 14.00 – 17.00.
- 3.2 Before I start I want to let you know that I am not contracted to work bank holidays, so this appeal is for my colleagues. I want to point out that we don't mind doing our turn but feel the selection process seems totally unfair,
- 3.3 There are 21 pharmacies in Hartlepool and it is not a large town. This will be the 3rd time in 8 years we have been asked to do it. As far as I can gather only Urgent Care will be open and this is two miles away and the other pharmacy open is 3.8 miles away. When I queried this I was told that we were at the heart of the community for access. We face the sea and have trading estates left and right, a railway track behind us and the town centre so not particularly accessible. There is pharmacy 0.4 miles from Urgent Care and they have not been asked to do Christmas day for the last 11 years??
- 3.4 We are open every bank holiday and one year we were open 09.00 - 18.00 on a bank holiday and were asked to open on the evening so the pharmacist twiddled their thumbs for an hour then reopened. That's crazy but we did it.
- 3.5 We were emailed about this on the 30th September 2024 also, but I was on long term sick due to having COVID four times and it has badly affected my heart so the email in October was the first time I realised that this was happening.
- 3.6 This email about Christmas was the first email I opened after 3 months on sick leave. When I told my colleagues their expressions told me I had to do something. Because the pharmacy is inside the ASDA supermarket, we also have to open the whole supermarket and as such we need security staff to open up and stay until we close, so their Christmas will be ruined also for the 3rd time in 8 years.
- 3.7 There needs to be a robust and transparent process in place for the selection of the pharmacies in Hartlepool to work Christmas Day. I feel the last 10 years needs to be published and circulated to all pharmacies. We need a look at the process and explanations for why certain pharmacies are not chosen. I understand that if you are the centre of a closed off shopping centre, it is difficult.
- 3.8 I hope when you read this you will immediately see, there is something clearly wrong here."

4 Representations

In an email to NHS Resolution dated 11 November 2024 the Commissioner stated:

- 4.1 "Please find attached the following:

- 4.1.1 Email sent to all pharmacies informing them of the intended directed rota from 2021-2026. The Rota was deemed not fit for purpose, ICB therefore worked around those notified of the intention, but made some slight alterations to the time period to open.
- 4.1.2 Notification letter
- 4.1.3 Direction letter
- 4.2 Process followed:
 - 4.2.1 Gap analysis
 - 4.2.2 Review locations using shape to identify pharmacies in the PNA localities to ensure geographical coverage for patient access.
 - 4.2.3 Consultation with LPC, Emergency Planning and local delivery teams
 - 4.2.4 Sign off by PSRC".

Email of 8 October 2021 referred to at 4.1.1 above

- 4.3 "Dear Pharmacist
- 4.4 LPC representatives believe that our Directions process needs to be more transparent. Accordingly, North East and North Cumbria (NENC) region is adopting a directed rota system, involving all community pharmacies. The attached spreadsheet sets out the rota for this year's festive period.
- 4.5 It is our understanding that LPCs have had an opportunity to talk to members about this proposed change, so you may have seen this information already.
- 4.6 Each locality within a CCG area is colour coded for ease of reading and each calendar year is also colour coded. Row 3 identifies the commissioning periods (ie Xmas / Easter / other holidays). The rota is based on the following principles:
 - 4.6.1 it is forward-looking, commencing with Christmas 2021 and will be operational until New Year's Day 2026;
 - 4.6.2 it is equitable with every pharmacy taking its turn to open;
 - 4.6.3 this rota includes **all** community pharmacies in each locality;
 - 4.6.4 morning / afternoon / evening slots are presented in a way which means the same pharmacy will not be asked to always work the same session (but that said, the number of days to commission are different each year, so sometimes this may happen);
 - 4.6.5 that opening times also rotate by area and it is intended that the times of the commissioned slots change before the commencement of the subsequent cycle (Easter 2026 onwards);
 - 4.6.6 the frequency of opening for each pharmacy varies because of the different number of pharmacies within each region so clearly some pharmacies may be opening more often;
 - 4.6.7 the rota takes absolutely no account of which pharmacy holds palliative care drugs. CCGs commission palliative care drugs and should be making their

own arrangements to ensure stocks of palliative care drugs are accessible at all times;

- 4.6.8 it is not based on a gap analysis as in previous years, although the opening hours of prescription generators (eg Walk in Centres/Urgent Treatment Centres/GP Hubs) and activity data from pharmacies over Christmas 2020 have informed the times of the slots;
 - 4.6.9 any pharmacies over and above those commissioned which intend to open will be treated as a “plus” for patients, in terms of access and choice of provider;
 - 4.6.10 the rota is also premised on those pharmacies which are currently included on the Pharmaceutical List, so it does not take account of any Market Entry applications which are under consideration, particularly consolidation of two pharmacies onto one site. As we cannot foresee when such applications arise, if as a consequence of consolidation the closing pharmacy ceases trading before the date on which they have been directed to open, the pharmacy which will continue to operate would pick up the Direction – even if this means the pharmacy will work on two consecutive years.
- 4.7 Those pharmacies who are being directed over this Christmas period, have already received this information”.

Notification letter dated 17 September 2024 referred to at 4.1.2 above

- 4.8 “Following consultation with Local Delivery Teams, Urgent and Emergency Care Teams and your Local Pharmaceutical Council representatives, North East and North Cumbria ICB has given consideration as to whether or not the provision of pharmaceutical services during Bank Holidays, including Good Friday, Easter Sunday and Christmas Day, meet the reasonable needs of patients and members of the public in your Health and Wellbeing Board Area.
- 4.9 This is to notify you, the contractor, of North East and North Cumbria ICB's proposed changes to the days on which and times at which your premises are to be open.
- 4.10 Your pharmacy is requested to be open on Wednesday 25 December 2024 between the hours of 14:00-17:00 for which you will be paid per hour.
- 4.11 Your pharmacy is being notified of this intention, for one or more of the following reasons:
 - 4.11.1 You have informed us of your intention to open voluntarily on that day.
 - 4.11.2 Your pharmacy is in a location where pharmaceutical need is considered high.
 - 4.11.3 Your pharmacy is close to an urgent treatment centre.
 - 4.11.4 You were previously notified as part of the bank holiday rota system that was to run from 2021-2026 of the intention to direct this year.
- 4.12 Any direction that is issued will meet the requirements of paragraph 25, schedule 4 or paragraph 15, schedule 5 of the NHS Pharmaceutical Services regulations 2013.
- 4.13 You may make any written representation, within 30 days of this letter (17 October 2024) about these proposed changes to NHS England at the above email address.”
- 4.14 [Direction letter dated 17 October 2024 referred to at 4.1.3 above, see 2.1 to 2.8 above].

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

6 Assessment

6.1 I have considered paragraph 25 of Schedule 4 (Determination of pharmacy premises core opening hours instigated by NHS England), 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 Christmas Day 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 The Commissioner has provided, in its representations on the appeal, a letter sent to the pharmacy, dated 17 September 2024 which informs the pharmacy of its intention to direct the pharmacy to open on 25 December 2024. I note the Appellant in its appeal stated that *"we were emailed about this on the 30th September 2024 also, but I was on long term sick....so the email in October was the first time I realised that this was happening"*. The Appellant has not provided a copy of this email but I consider it to be the email that contained the letter of 17 September 2024.
- 6.6 The Commissioner has also indicated that it consulted the relevant LPC when drawing up the Bank Holiday directions for the provision of pharmaceutical services over the Christmas and Easter period.
- 6.7 I am of the view that the Commissioner has undertaken a consultation process as set out in the Regulations and that there is no dispute from the Appellant in this regard.
- 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 in the proposal to direct letter of 17 September 2024, the Commissioner has stated that *"your pharmacy is being notified of this intention, for one or more of the following reasons:*
- 6.9.1 *You have informed us of your intention to open voluntarily on that day.*
- 6.9.2 *Your pharmacy is in a location where pharmaceutical need is considered high.*
- 6.9.3 *Your pharmacy is close to an urgent treatment centre.*
- 6.9.4 *You were previously notified as part of the bank holiday rota system that was to run from 2021-2026 of the intention to direct this year."*
- 6.10 I note in the Commissioner's representations on appeal, that it has provided a copy of the *"bank holiday rota"* dated 4 October 2021 which indicates that the Appellant was originally scheduled to open from 7pm to 9pm on Christmas Day. I also note the reasoning behind the rota as outlined at 4.6.1 to 4.6.10 above as well as the information provided by the Commissioner in its cover email of 11 November 2024 to NHS Resolution which states *"Process followed: Gap analysis, Review locations using shape to identify pharmacies in the PNA localities to ensure geographical coverage for patient access..."*.
- 6.11 I note in its appeal, the Appellant states that *"there are 21 pharmacies in Hartlepool and it is not a large town. This will be the 3rd time in 8 years we have been asked to do it. As far as I can gather only Urgent Care will be open and this is two miles away and the other pharmacy open is 3.8 miles away. When I queried this I was told that we were at the heart of the community for access. We face the sea and have trading estates left and right, a railway track behind us and the town centre so not particularly accessible. There is pharmacy 0.4 miles from Urgent Care and they have not been asked to do Christmas day for the last 11 years??"*. The Commissioner has not responded to these points.
- 6.12 Whilst I note the reasoning outlined by the Commissioner, it is generic and is not specific to the Appellant's pharmacy. I am of the view that I have not been provided

with information to substantiate the view as to why the Appellant's pharmacy in particular 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, other than one of the potential reasons for the direction is that the Appellant's pharmacy is close to a nearby urgent treatment centre, or why the hours of 2pm to 5pm on Wednesday 25 December 2024 will provide this cover.

- 6.13 I am of the view that there is no information from the Commissioner as to how directing pharmacies, as part of a bank holiday rota system, provides a robust assessment of the need for pharmaceutical provision in terms of 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.
- 6.14 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.
- 6.15 The letter of 17 September 2024 provides me with limited information which I consider is not 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.
- 6.16 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 25 December 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**