

3 December 2024

REF: SHA/26314

**APPEAL AGAINST NOTTINGHAM AND
NOTTINGHAMSHIRE ICB (THE COMMISSIONER)
DECISION REGARDING A BREACH NOTICE AT BOOTS
UK LTD (FYJ21), INTU VICTORIA CENTRE, 11-19
LOWER PARLIAMENT STREET, NOTTINGHAM, NG1
3QS**

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

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

1 Outcome

- 1.1 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I substitute the decision of the Commissioner to issue the Breach Notice with a decision not to issue the Breach Notice.

A copy of this decision is being sent to:

Boots UK Ltd
Nottingham and Nottinghamshire ICB

Advise / Resolve / Learn

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1 The Breach Notice

A Breach Notice dated 30 August 2024 was sent to Boots UK Ltd in respect of Intu Victoria Centre, 11-19 Lower Parliament Street, Nottingham, NG1 3QS.

- 1.1 "Name of Contractor: Boots UK Ltd.
- 1.2 Pharmacy Name: Boots Pharmacy.
- 1.3 Address of premises: Boots Pharmacy, INTU Victoria centre, 11-19 Lower Parliament Street, Nottingham, NG1 3QS.
- 1.4 Date of inclusion in the pharmaceutical list for the area of Nottinghamshire Health and Wellbeing Board: 12 May 1972.
- 1.5 This is a Breach notice issued under regulation 71 of the National Health Services (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.
- 1.6 **Breaches of terms of service: breach notices**

71.(1) Where an NHS chemist (C) breaches a term of service and the breach is not capable of remedy, the NHSCB may by a notice ("a breach notice") require C not to repeat the breach.

(2) To be valid, the breach notice must include—

(a) the nature of the breach; and

(b) an explanation of how C's rights of appeal under regulation 77(1)(c) may be exercised.

(3) If the breach relates to a failure to provide, or a failure to provide to a reasonable standard, a service that C is required to provide, the breach notice may provide that, as regards the period during which there was a failure to provide, or a failure to provide to a reasonable standard, that service, the NHSCB is to withhold all or part of the remuneration due to C under the Drug Tariff or a determination as mentioned in regulation 91(6) in respect of that period.

(4) The breach notice may only provide for the withholding of all or part of the remuneration payable under a determination as mentioned in regulation 91(6) where the breach relates to a failure to provide, or a failure to provide to a reasonable standard, an enhanced service.

1.7 Nature of the breach

- 1.8 Following an assessment of the need for the provision of pharmaceutical services on Tuesday 26 December 2023, and taking into account which pharmacies would be open on that day, Nottingham and Nottinghamshire Integrated Care Board (ICB) directed

Boots UK limited (the contractor) to open the above-mentioned pharmacy between 10:00 and 12:00hrs on Tuesday 26 December 2023. No appeal was made against the decision to issue the direction.

- 1.9 Upon noting that no claim had been made by the contractor, the ICB contacted the contractor to establish why this was the case. A copy of the responsible pharmacist log or other assurance was requested for that day which would evidence when the pharmacy opened. This was not received by the ICB. A remedial notice was also issued so that the pharmacy could send in assurance of opening on the directed day, but this was not provided.
- 1.10 This failure to ensure the pharmacy premises were open for the provision of pharmaceutical services between 10:00 and 12:00hrs on 26 December 2023 was referred to the Pharmaceutical Services Regulations Committee (PSRC) on 20 August 2024. Having taken into account the reasons why the pharmacy did not open on the specified day, the PSRC was of the opinion that there was no good cause. It was therefore satisfied that the contractor breached paragraph 23(1)(c), Schedule 4 on Tuesday 26 December 2023 and determined that it is appropriate to issue this breach notice.
- 1.11 You are required to not repeat the breach again.
- 1.12 You have a right of appeal to the Secretary of State against the issuing of this breach notice. Should you choose to appeal then you should send a concise and reasoned statement of the grounds for your appeal within 30 days of the date of this notice to nhsr.appeals@nhs.net or:
 - 1.12.1 Primary Care Appeals, NHS Resolution, 8th Floor 10 South Colonnade, Canary Wharf, London, E14 4PU.
- 1.13 Please note that should you fail to comply with the requirements of this breach notice we reserve the right to exercise our powers to take further action in relation to your inclusion in the pharmaceutical list in respect of the above named premises. This may include removal of the premises from the relevant pharmaceutical list under regulation 73 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.”

2 The Appeal

In an email dated 18 September 2024 addressed to NHS Resolution, Boots UK Ltd (“the Appellant”) appealed against the Commissioner’s decision. The grounds of appeal are:

- 2.1 “Further to receiving the attached Breach Notice for the above pharmacy, I am writing to confirm that the pharmacy did open on Tuesday 26, December 2023 between 10am-12pm.
- 2.2 My apologies that the evidence was not submitted after receiving a copy of the remedial notice however, I have attached a copy of the below documents which verifies the opening, with the details of the professional team involved in the pharmacy provision on this day.
 - 2.2.1 Controlled drugs key log;
 - 2.2.2 A copy of the MyTime rota;
 - 2.2.3 Signed declarations from each of the pharmacists working that day with their GPhC numbers.
- 2.3 I hope that this is enough evidence and will support the retraction of the breach notice. If you need any further details, please do not hesitate to contact me.”

2.4 [Enclosures provided – Appendix A]

3 Summary of Representations

This is a summary of representations received on the appeal.

3.1 BOOTS UK LTD

3.1.1 “Further to your email and letter requesting further commentary on the below from the Commissioner:

3.1.2 *The Commissioner’s breach notice alleges a breach of paragraph 23(1)(c) of Schedule 4 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (the “Regulations”) for “failure to ensure the pharmacy premises were open for the provision of pharmaceutical services between 10:00 and 12:00hrs on 26 December 2023”.*

3.1.3 The Boots UK pharmacy was directed to open on the bank holiday of 26 December 2023 for the hours 10:00 and 12:00. The pharmacy did not breach paragraph 23(1)(c) of the Regulations as it was open 09:00 to 19:00 – a longer period than the actual direction, due to the large retail offering of this store on a Boxing Day.

3.1.4 The core opening hours for FYJ21 are:

Day of the week	Core Hours
Sunday	-
Monday	09:00-14:00, 15:00-17:00
Tuesday	09:00-14:00, 15:00-17:00
Wednesday	09:00-14:00, 15:00-17:00
Thursday	09:00-14:00, 15:00-17:00
Friday	09:00-14:00, 15:00-17:00
Saturday	09:30-14:00, 15:00-15:30”

4 Late Representations

4.1 THE COMMISSIONER

4.1.1 “Thank you for your letter dated 19 September 2024; The East Midlands Primary Care Team on behalf of Nottingham and Nottinghamshire Integrated Care Board (NNICB) would like to make the following representations.

4.1.2 The process that the East Midlands Primary Care Team (EMPCT) follow for directing for all bank holidays on behalf of NNRICB is as follows;

4.1.2.1 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.

- 4.1.2.2 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 Local Pharmaceutical Committee (LPC).
- 4.1.2.3 Following the assessment and engagement, if it is felt that the pharmaceutical provision within any area would not meet the needs of the local population, 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.
- 4.1.2.4 At the end of the 30 days, should representations be received these will be reviewed by the Pharmaceutical Services Regulations Committee (PSRC) who will decide whether a direction is to be issued regarding the contractor's opening hours. If the committee decide to continue with the issue of the direction, a 30- day period is given to the contractor in which they can appeal the direction with NHS Resolution.
- 4.1.3 Please note that the Appellant's usual core opening hours are:
 - 4.1.3.1 Monday – Friday 09:00 - 14:00 and 15:00 – 17:00
 - 4.1.3.2 Saturday 09:30 - 14:00 and 13:00 [sic] – 15:30
- 4.1.4 The Appellant's supplementary hours are:
 - 4.1.4.1 Monday - Friday 14:00 – 15:00 and 17:00 – 19:00
 - 4.1.4.2 Saturday 08:30 – 09:30, 14:00 – 15:00 and 15:30 – 19:00
 - 4.1.4.3 Sunday 11:00 – 17:00
- 4.1.5 Following the assessment of the returns from the Nottingham NG1 area and engagement with the Local Pharmaceutical Committee (as per the process above) a proposal to direct letter was sent to Boots UK LTD, INTU Victoria Centre, 11-19 Lower Parliament Street, Nottingham, Nottinghamshire, NG1 3QS on 21 September 2023. The direction was for the core opening hours of:
 - 4.1.5.1 **26 December 2023 10:00 – 12:00**
- 4.1.6 A subsequent Direction letter was sent on 23 October 2023.
- 4.1.7 Contractors have 28 days (from the day of directed opening) to claim payment on PharmOutcomes. The East Midlands Primary Care Team can confirm that in this instance, the pharmacy did not make the appropriate claim on PharmOutcomes.
- 4.1.8 As a result of this, a Remedial Notice was sent to the pharmacy on 28 June 2024 in which they were given the opportunity to provide evidence that they opened on 26 December 2024 [sic] as directed.

- 4.1.9 Evidence was not submitted by the pharmacy, within the 30 days deadline and subsequently, a Breach Notice was issued to the pharmacy on 30 August 2024 informing the pharmacy of the nature of the breach.
- 4.1.10 The decision to issue the breach [sic] was based upon the fact that it appeared that the pharmacy had not provided assurances following the remedial notice that they were open as directed on 26 December 2023.
- 4.1.11 Following the issue of the aforementioned Breach Notice, on the 18 September 2024, the pharmacy supplied evidence that they were open on the 26 December 2023 as directed.
- 4.1.12 I would like to take this opportunity to respond to any further representations provided by Boots UK LTD, INTU Victoria Centre, 11-19 Lower Parliament Street, Nottingham, Nottinghamshire, NG1 3QS.”

Letter to the Appellant dated 21 September 2023

- 4.1.13 **“Re: Direction of opening hours on Tuesday 26 December 2023 at Boots Pharmacy, 11-19 Lower Parliament St, INTU (Victoria) Centre, Nottingham, Nottinghamshire, NG1 3QS**
- 4.1.14 **Your current core opening hours are**
 - 4.1.14.1 Monday: 09:00-14:00, 15:00-17:00
 - 4.1.14.2 Tuesday – Friday: 09:00-14:00, 15:00-17:00
 - 4.1.14.3 Saturday: 09:30-14:00, 15:00-15:30
 - 4.1.14.4 Sunday:
- 4.1.15 **The total opening hours (core & supplementary) of the above pharmacy premises are:**
 - 4.1.15.1 Monday: 09:00-19:00
 - 4.1.15.2 Tuesday – Friday: 09:00-19:00
 - 4.1.15.3 Saturday: 08:30-19:00
 - 4.1.15.4 Sunday: 11:00-17:00
- 4.1.16 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:
- 4.1.17 There is no pharmacy provision in the Nottingham area on Tuesday 26 December 2023, following requests by the ICB for a pharmacy to volunteer.
- 4.1.18 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:
 - 4.1.18.1 **Boxing Day, 26 December 2023**
 - 4.1.18.2 **10:00-12:00**

4.1.19 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 21 September 2023.

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

Letter to the Appellant dated 23 October 2023

4.1.21 **“Re: Determination of core opening hours at Boots Pharmacy, INTU Victoria Centre, 11-19 Lower Parliament Street, Nottingham, NG1 3QS**

4.1.22 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.

4.1.23 Your core opening hours on **Tuesday 26 December 2023** are therefore: **10:00-12:00.**

4.1.24 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.

4.1.25 Please be advised that the level of remuneration for Boxing Day 26th December 2023, will be £275.00 per hour.

4.1.26 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

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

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

5 Observations

No observations were received by NHS Resolution in response to the representations received on appeal.

6 Consideration

6.1 Under Regulation 71(1) “Breaches of terms of service: breach notices” of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”), a Breach Notice may be issued:

71. (1) Where an NHS chemist (C) breaches a term of service and the breach is not capable of remedy, NHS England may by a notice (“a breach notice”) require C not to repeat the breach.

6.2 I note that in the Regulations an NHS Chemist means “an NHS appliance contractor or an NHS pharmacist”. An NHS pharmacist is defined as “a person included in a pharmaceutical list of the type referred to in regulation 10(2)(a);”. Regulation 10(2)(a) states:

10(2) “Those lists (which are pharmaceutical lists) are

(a) a list of persons who undertake to provide pharmaceutical services in particular by way of the provision of drugs;”

- 6.3 The Regulations contain no definition as to what constitutes a breach of terms of service which is not capable of remedy.
- 6.4 I note that the pharmacy is included on the pharmaceutical list and that there is no dispute between the parties with regard to this.
- 6.5 I note the Breach Notice was issued pursuant to Regulation 71(1) and is compliant with the requirements of a breach notice as it includes the nature of the breach and an explanation of the Appellant's right of appeal under Regulation 77(1)(c).
- 6.6 The Breach notice states:
- 6.6.1 *“Following an assessment of the need for the provision of pharmaceutical services on Tuesday 26 December 2023, and taking into account which pharmacies would be open on that day, Nottingham and Nottinghamshire Integrated Care Board (ICB) directed Boots UK limited (the contractor) to open the above-mentioned pharmacy between 10:00 and 12:00hrs on Tuesday 26 December 2023. No appeal was made against the decision to issue the direction.*
- 6.6.2 *Upon noting that no claim had been made by the contractor, the ICB contacted the contractor to establish why this was the case. A copy of the responsible pharmacist log or other assurance was requested for that day which would evidence when the pharmacy opened. This was not received by the ICB. A remedial notice was also issued so that the pharmacy could send in assurance of opening on the directed day, but this was not provided.”*
- 6.7 I note that there is no suggestion that the Appellant did not receive the Commissioner's attempts to contact it, or that it did not receive the Remedial Notice (of which I have not been provided with a copy). I am therefore of the view that the Appellant had the opportunity to enter into local dispute resolution with the Commissioner but did not do so. Given that there is no dispute raised by either party that the local dispute resolution process has not been exhausted, I am content that I can deal with this matter.
- 6.8 The Appellant is seeking to appeal the decision of the Commissioner to issue the Breach Notice for its failure to open for directed hours between 10am and 12pm on Tuesday 26 December 2023.
- 6.9 I note the Breach Notice states *“the contractor breached paragraph 23(1)(c), Schedule 4 on Tuesday 26 December 2023 and determined that it is appropriate to issue this breach notice”*.
- 6.10 I note that paragraph 23(1)(c) states:

23. Pharmacy opening hours: general

(1) Subject to paragraph 23A, an NHS pharmacist (P) must ensure that pharmaceutical services are provided at P's pharmacy premises—

...

(c) if NHS England or a Primary Care Trust, or on appeal the Secretary of State, has directed that pharmaceutical services are to be provided at the premises for fewer than 40 hours per week, provided that the person listed in relation to them provides those services at set times and on set days, at the times and on the days so set;

- 6.11 I also note that paragraphs 23(1)(d) and (e) read as follows:

(d) if NHS England or a Primary Care Trust, or on appeal the Secretary of State, has (under previous Regulations) directed that pharmaceutical services are to be provided at the premises for more than 40 hours per week, and at set times and on set days, at the times and on the days so set, subject to any variation in respect of a rest break in accordance with sub-paragraph (7)(bd); or

(e) if NHS England or a Primary Care Trust, or on appeal the Secretary of State, has directed that pharmaceutical services are to be provided at the premises for more than 40 hours each week, but only on set times and on set days as regards the additional opening hours, or the core opening hours where paragraph 26(4A) applied to the issuing of the direction—

(i) for the total number of hours each week required by virtue of that direction, and

(ii) as regards the additional opening hours for which the person listed in relation to the premises is required to provide pharmaceutical services by virtue of that direction, at the days on which and times at which that person is required to provide pharmaceutical services during those additional opening hours, as set out in that direction, subject to any variation in respect of a rest break in accordance with sub-paragraph (7)(bd),

but NHS England may, in appropriate circumstances, agree a temporary suspension of services for a set period, where it has received 3 months notice of the proposed suspension.

- 6.12 I note that comments were invited from both parties on this matter as well as confirmation of the Appellant's core opening hours. The Appellant confirmed its core opening hours as Monday to Friday 09:00 to 14:00 and 15:00 to 17:00 and Saturday 09:30 to 14:00 and 15:00 to 15:30. The Commissioner has a record of the same hours as confirmed in its letter dated 21 September 2023 though I note there is a typographical error in its late representations to NHS Resolution which state that the hours for Saturday afternoon are 13:00 to 15:30. I am content that this should read 15:00 to 15:30.
- 6.13 The Appellant also states "*The pharmacy did not breach paragraph 23(1)(c) of the Regulations as it was open 09:00 to 19:00 – a longer period than the actual direction, due to the large retail offering of this store on a Boxing Day.*"
- 6.14 The Commissioner has not given an explanation for the application of paragraph 23(1)(c) and I consider it does not apply.
- 6.15 Paragraph 23(1)(e) concerns the position where the Commissioner directs a pharmacy to open for more than 40 hours a week but only on set times and days as regards the additional opening hours. "Additional opening hours" are defined under paragraph 23(13) as "*hours during which P is required to provide pharmaceutical services pursuant to sub-paragraph (1)(e) which are in addition to the hours during which P would be required to provide pharmaceutical services, if P were subject instead to the condition set out in sub-paragraph (1)(a).*"
- 6.16 Paragraph 23(1)(a) states:
- (1) ...an NHS pharmacist (P) must ensure that pharmaceutical services are provided at P's pharmacy premises—*
- (a) for 40 hours each week;*
- 6.17 As noted at paragraph 3.1.4 above, the Appellant has core opening hours of 40 hours a week. I therefore consider that this would have been the appropriate Regulation for the Commissioner to apply in this instance.

6.18 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.

6.19 I am of the view that the pharmacy would normally have been closed on the bank holiday on 26 December 2023 and that this would be in accordance with the Regulations.

6.20 I note the Appellant states that they were open on 26 December 2023 but failed to make the claim and subsequently received a Remedial Notice on 28 June 2024. I have not been provided with a copy of the Remedial Notice. I note the issue of the Remedial Notice has not been disputed by the Appellant and the Remedial Notice was not appealed against at the time it was issued therefore I do not consider it appropriate to take a view on this.

6.21 I note that the Appellant, in its appeal, provides a copy of the controlled drugs key log which shows one pharmacist signed out the CD keys at 09:00 on Tuesday 26 December 2023 and another signed them back in at 19:00. The Appellant also provided an electronic copy of its rota which shows that on Tuesday 26 December 2023, it had two pharmacists working; one working 09:00 to 18:00 and the second working 10:00 to 19:00. Further, the two pharmacists have provided signed statements with their names and Professional Registration Numbers confirming their working hours on 26 December 2023. The Appellant states “*apologies that the evidence was not submitted after receiving a copy of the remedial notice.*”

6.22 I note that the Commissioner, in its late representations states “*Following the issue of the aforementioned Breach Notice, on the 18 September 2024, the pharmacy supplied evidence that they were open on the 26 December 2023 as directed.*” I am of the view that the Commissioner has not disputed that the information provided in the appeal demonstrates that the Appellant was open from 10:00 to 12:00 on 26 December 2023. I consider that sufficient evidence has been provided to show that the Appellant was open and providing the directed service between 09:00 to 19:00 which encompasses the directed hours of 10:00 to 12:00 on 26 December 2023.

7 Decision

7.1 I am of the view that under NHS Resolution’s powers, as set out in paragraph 9(5) of Schedule 3 to the Regulations, I may either confirm the decision of the Commissioner or substitute for that decision any decision that the Commissioner could have taken when it took that decision.

7.2 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I substitute the decision of the Commissioner to issue the Breach Notice with a decision not to issue the Breach Notice.

**Head of Appeals
NHS Resolution**