

20 December 2024

REF: SHA/26325

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**APPEAL AGAINST LEICESTER, LEICESTERSHIRE AND
RUTLAND ICB DECISION REGARDING A BREACH
NOTICE AT 32 MARKET STREET, ASHBY DE LA
ZOUCH, LEICESTERSHIRE, LE65 1AL**

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
East Midlands Primary Care Contracting Team on behalf of Leicester, Leicestershire and Rutland ICB

REF: SHA/26325

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1 The Breach Notice

A Breach Notice dated 26 September 2024 was sent to Boots UK Ltd (“the Appellant”) in respect of Boots Pharmacy, 32 Market Street, Ashby De La Zouch, Leicestershire, LE65 1AL.

- 1.1 **“Name of contractor:** Boots UK Ltd
- 1.2 **Pharmacy name:** Boots Pharmacy
- 1.3 **Address of premises:** 32 Market Street, Ashby De La Zouch, Leicestershire, LE65 1AL
- 1.4 **Date of inclusion in the pharmaceutical list for the area of Leicestershire Health and Wellbeing Board:** 05 July 1948 [sic]
- 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 **29th March 2024**, and taking into account which pharmacies would be open on that day, Derby and Derbyshire Integrated Care Board (ICB) [sic] directed **BOOTS UK LIMITED, Boots Pharmacy, LE65 1AL** (the contractor) to open the above-mentioned pharmacy between **10:00-12:00hrs** on **Friday 29th March 2024**. 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 **10:00-12:00hrs** on **Friday 29th March 2024** was referred to the Pharmaceutical Services Regulations Committee (PSRC) on **17th September 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 **Friday 29th March 2024** 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:
- 1.13 Primary Care Appeals, NHS Resolution, 8th Floor 10 South Colonnade, Canary Wharf, London, E14 4PU.
- 1.14 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."

2 The Appeal

In an email dated 27 September 2024 addressed to NHS Resolution, the Appellant appealed against the decision of the Leicester, Leicestershire and Rutland ICB ("the Commissioner"). The grounds of appeal are:

- 2.1 "I would like to appeal the breach notice emailed to my store Boots, Ashby-de-la-Zouch, LE65 1AL. FLN99. The store was open on 29th March 2024 from the hours of 9:00-17:15. I have attached a copy of the RP Notice log book for that day and also a copy of the Bank Holiday opening hours form that was emailed to england.eastmidsparmacy@nhs.net on 31/01/2024. [see Appendix A]
- 2.2 If you require any further information, please do not hesitate to contact me."

3 Summary of Representations

This is a summary of representations received on the appeal.

Given that the 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 but paragraphs 23(1)(d) and 23(1)(e) also apply to directed openings, I considered that it was appropriate to enable both parties to provide information on the Regulations identified, as well as details of the Appellant's core opening hours.

THE COMMISSIONER

- 3.1 "Thank you for your letter dated 1 October 2024; The East Midlands Primary Care Team on behalf of Leicester, Leicestershire & Rutland Integrated Care Board (LLRICB) would like to make the following representations.
- 3.2 The process that the East Midlands primary care team follow for directing for all bank holidays on behalf of LLRICB is as follows;
 - 3.2.1 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) [sic] 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.
 - 3.2.2 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).
 - 3.2.3 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.
 - 3.2.4 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.
- 3.3 Please note that the Appellant's usual core opening hours are:
 - 3.3.1 Monday – Friday 09:30 – 17:15
 - 3.3.2 Saturday – 09:30 – 17:00
 - 3.3.3 Sunday CLOSED
- 3.4 Following the assessment of the returns from the Leicestershire LE65 area and engagement with the Local Pharmaceutical Committee a proposal to direct letter was sent to Boots Pharmacy, Ashby De La Zouch on 27 November 2023. The direction was for the core opening hours would be:
 - 3.4.1 29 March 2024 10:00 – 12:00

- 3.5 A Remedial Notice was sent on 5 August 2024 after the East Midlands Primary Care Team had followed the process of directing the pharmacy to open on 29 March 2024. The pharmacy was also able to claim for opening via pharmoutcomes which did not happen. They were also asked to provide assurance that the store was open. This evidence was not submitted within the 30 days deadline.
- 3.6 Consequently, a Breach Notice was sent on 26 September 2024 informing the pharmacy of the nature of the breach.
- 3.7 This decision was based on the fact that assurance could not be given, and that this pharmacy had not provided evidence that the store at Ashby De la Zouch was open within the direction. I would like to take this opportunity to respond to any further representations provided by Boots Pharmacy, Ashby De La Zouch, Leicestershire, LE65 1AL."

4 **Observations**

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

5 **Additional correspondence**

By email of 6 November 2024 the Appellant provided the Commissioner with a revised copy of the "RP Log" which covered the period 23 March 2024 to 1 April 2024. This was not provided to NHS Resolution however after a request for the revised log the email trail and log were provided by the Appellant on 20 December 2024.

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 that the Breach Notice was issued pursuant to Regulation 71(1) and is compliant with the requirement 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 29th March 2024, and taking into account which pharmacies would be open on that day, Derby and Derbyshire Integrated Care Board (ICB) [sic] directed BOOTS UK LIMITED, Boots Pharmacy, LE65 1AL (the contractor) to open the above-mentioned pharmacy between 10:00-12:00hrs on Friday 29th March 2024. 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 – 12noon on Friday 29 March 2024.

6.9 The 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 – 12:00hrs on Friday 29th March 2024.”*

6.10 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 further note that paragraph 23(1)(d) and (e) state:

(d) if 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) is 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 409 hours each week, but only on set times or 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 chose to not make any representations, however the Commissioner, whilst not commenting on the Regulations did confirm that the core opening hours of the pharmacy are Monday to Friday from 9:30am to 5:15pm and 9:30am to 5pm on a Saturday. I note that the weekly core hours, as provided by the Commissioner, total 46.25 hours, which has not been disputed by the Appellant, therefore I consider that paragraph 23(1)(c) does not apply.

6.13 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)".

6.14 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;

6.15 As noted above, the Appellant has core hours of 46.25 a week, however the pharmacy is not one where a 100 hour condition applies and therefore I consider that paragraph 23(1)(e) would have been the appropriate Regulation for the Commissioner to apply in this instance.

6.16 I am mindful that paragraph 23(12) of Schedule 4 states:

6.16.1 *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.*

- 6.17 I am of the view that the pharmacy would normally have been closed on the Good Friday bank holiday (Friday 29 March 2024) and that this would be in accordance with the Regulations.
- 6.18 I note that the Appellant has provided, as part of its appeal, a copy of the “Notification of opening hours on bank and public holidays 2024/25” dated 31 January 2024 and that this confirms that for Friday 29 March 2024 the pharmacy was proposing to open from 9:00 to 17:15 and that it would be open all day with no lunchbreak. I am mindful that this document preceded the date in question and whilst the notification confirms the Appellant’s intention to open it is not confirmation that they did actually open on the day in question.
- 6.19 In addition, the Appellant provided a copy of the “Responsible Pharmacist Record” for store number 141, Ashby. I note however that the record covers the period 28 May 2024 to 5 June 2024 and whilst it sets out the times that the “RP” signed in and out and confirms that the pharmacy was open during this period, it does not cover the date in question which is 29 March 2024. This was queried by the Commissioner directly with the Appellant who provided them with a copy of the correct RP log which covers the period 23 March 2024 to 1 April 2024.
- 6.20 I note that the second log as provided by the Appellant shows that on 29 March 2024, the RP signed in at 09:00 and signed out at 17:15. The Commissioner stated “*A Remedial Notice was sent on 5 August 2024 ... they were asked to provide assurance that the store was open. This evidence was not submitted within the 30 day deadline. Consequently a Breach Notice was sent on 26th September 2024...*” The Commissioner after querying the date on the original RP log sent, has not disputed the subsequent information provided, nor has it commented at all on the information, despite it indicating that this would be the type of information needed to demonstrate that the pharmacy was open.
- 6.21 I consider that I have been provided with sufficient evidence to show that the Appellant was open and providing the directed service between 9:00 to 17:15 which encompasses the directed hours of 10:00 – 12:00 on Friday 29 March 2024.

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 a breach notice.

**Head of Appeals
NHS Resolution**