

4 December 2024

REF: SHA/26349

**APPEAL AGAINST DERBY AND DERBYSHIRE ICB
DECISION REGARDING A BREACH NOTICE AT BOOTS
PHARMACY, UNIT 7, HORSE & JOCKEY YARD,
ASHBOURNE, DERBYSHIRE DE6 1GH**

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 Pharmacy
Derby and Derbyshire ICB

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1 The Breach Notice

A Breach Notice dated 26 September 2024 was sent to Boots UK Limited (“the Appellant”) in respect of Boots Pharmacy, Unit 7, Horse & Jockey Yard, Ashbourne, Derbyshire DE6 1GH. The Breach Notice stated:

1.1 “Name of contractor: BOOTS UK LIMITED

1.2 Pharmacy Name: Boots Pharmacy

1.3 Address of premises: Unit 7, Horse & Jockey Yard, Ashbourne, Derbyshire DE6 1GH

1.4 Date of inclusion in the pharmaceutical list for the area of Leicestershire Health and Wellbeing Board: 01 April 1987.

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 01st April 2024, and taking into account which pharmacies would be open on that day, Derby and Derbyshire Integrated Care Board (ICB) directed Boots UK Limited, Boots Pharmacy, DE6 1GH (the contractor) to open the above-mentioned pharmacy between 10:00-12:00hrs on Monday 01st April 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 Monday 01st April 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 Monday 01st April 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 11 October 2024 addressed to NHS Resolution, the Appellant appealed against Derby and Derbyshire ICB’s (“the Commissioner”) decision. The grounds of appeal are:

- 2.1 **“Appeal of the breach notice received by Boots UK pharmacy FTJ66 located at 7 Horse & Jockey Yard St John Street Ashbourne Derbyshire DE6 1GH**
- 2.2 Further to receiving the attached Breach Notice for the above pharmacy, I am writing to confirm that the pharmacy did open on Monday, 1 April between 10am-12pm.
- 2.3 My apologies that the evidence was not submitted after receiving a copy of the remedial notice however, I have attached a copy of the RP log which verifies the opening.
- 2.4 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.”

3 Summary of Representations

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 opening, 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. This is a summary of representations received on the appeal.

- 3.1 The Appellant

- 3.1.1 “Further to your email and letter requesting further commentary on the below from the Commissioner: 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 10:00-12:00hrs on Monday 1st April 2024”.
- 3.1.2 The Boots UK pharmacy was directed to open on the bank holiday of 1 April 2024 for the hours 10:00 and 12:00. The pharmacy did not breach paragraph 23(1)(c) of the Regulations as it was open 10:00-16:00 as evidenced on the RP log.
- 3.1.3 The core opening hours for FTJ66 are:
- 3.1.4 Monday 09:00-13:30; 15:00-17:30
- 3.1.5 Tuesday 09:00-13:30; 15:00-17:30
- 3.1.6 Wednesday 09:00-13:30; 15:00-17:30
- 3.1.7 Thursday 09:00-13:30; 15:00-17:30
- 3.1.8 Friday 09:00-13:30; 15:00-17:30
- 3.1.9 Saturday 09:00-14:00
- 3.1.10 Sunday -“

No representations were received from the Commissioner.

4 **Observations**

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

5 **Consideration**

- 5.1 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.

- 5.2 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;”

- 5.3 The Regulations contain no definition as to what constitutes a breach of terms of service which is not capable of remedy.

- 5.4 I note that the pharmacy is included on the pharmaceutical list and that there is no dispute between the parties with regard to this.
- 5.5 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).
- 5.6 I note that in the Breach Notice the Commissioner states that the pharmacy had been previously asked to provide assurance that the store was open. The Appellant does not dispute that there was an opportunity for the matter to be resolved prior to the Remedial Notice being issued. Therefore it appears as though some form of local dispute resolution has taken place.
- 5.7 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 Monday 1 April 2024.
- 5.8 I note the Breach Notice states *"the contractor breached paragraph 23(1)(c), Schedule 4 on Monday 01st April 2024 and determined that it is appropriate to issue this breach notice"*.
- 5.9 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;

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

(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) 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.

- 5.11 I note that comments were invited from both parties on this matter as well as confirmation of the Appellant's core opening hours. The only response received was from the Appellant who confirmed their core opening hours as noted above at paragraph 3.1.4 – 3.1.10 which amount to 40 hours a week. This was not disputed by the Commissioner.
- 5.12 The Commissioner has not given an explanation for the application of paragraph 23(1)(c) and I consider it does not apply.
- 5.13 Paragraph 23(1)(e) concerns the situation 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)*".
- 5.14 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;*
- 5.15 As noted 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.
- 5.16 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.*
- 5.17 I am of the view that the pharmacy would normally have been closed on 1 April 2024, which was a public bank holiday, and that this would be in accordance with the Regulations.
- 5.18 In its appeal, the Appellant contends that the pharmacy did open, and apologises that the evidence was not submitted after receiving a copy of the Remedial Notice. I have not been provided with a copy of the Remedial Notice but 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.
- 5.19 I note the copy of the Responsible Pharmacist record, which has not been disputed by the Commissioner, shows that on 1 April 2024, the Responsible Pharmacist started at 10am and finished at 4pm. I further note no response from the Commissioner was received during this process despite the Breach Notice indicating that this would be the type of information needed to demonstrate that the pharmacy was open.
- 5.20 I consider that sufficient evidence has been provided to show that the Appellant was open and providing the directed service.

- 6.1 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.
- 6.2 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