

20 December 2024

REF: SHA/26354

**APPEAL AGAINST DERBY AND DERBYSHIRE ICB
DECISION REGARDING A BREACH NOTICE AT BOOTS
PHARMACY, 9 THE PARADE, GROSVENOR CENTRE,
NORTHAMPTON, NN1 2BY**

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

Tel: 020 3928 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 Commissioner's decision to issue the Breach Notice with a decision to not issue the Breach Notice.

A copy of this decision is being sent to:

Boots Pharmacy
East Midlands Primary Care Contracting Team

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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, 9 The Parade, Grosvenor Centre, Northampton, NN1 2BY

- 1.1 **“Name of contractor: BOOTS UK LIMITED**
- 1.2 **Pharmacy Name:** Boots Pharmacy
- 1.3 **Address of premises:** 9 The Parade, Grosvenor Centre, Northampton, Northamptonshire, NN1 2BY.
- 1.4 **Date of inclusion in the pharmaceutical list for the area of Northamptonshire Health and Wellbeing Board:** 08 September 1975.
- 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, NN1 2BY** (the contractor) to open the above-mentioned pharmacy between **14:00-16:00hrs** 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 **14:00-16:00hrs** 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 20 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 "Further to receiving a Breach Notice for the above pharmacy, I am writing to confirm that the pharmacy did open on Monday, 1 April.

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 RP log which verifies the opening.

- 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.”

The Appellant provided a copy email dated 17 October 2024 sent from the Appellant to the Commissioner which states:

- 2.4 “Please find attached a photo of the responsible pharmacy book to show that we were open on the 1st April 2024 between 10:30-16:00. The pharmacy didn't close at any point between those opening hours.
- 2.5 If anymore information is required, please let us know.”
- 2.6 A photo of one page of the responsible pharmacist record book was attached.

3 Summary of Representations

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

4 Consideration

- 4.1 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.

- 4.2 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;”

- 4.3 The Regulations contain no definition as to what constitutes a breach of terms of service which is not capable of remedy.
- 4.4 I note that the pharmacy is included on the pharmaceutical list and that there is no dispute between the parties with regard to this.
- 4.5 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).
- 4.6 The Breach Notice states:
- 4.6.1 “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, NN1 2BY** (the contractor) to open the above-mentioned pharmacy between **14:00-16:00hrs** on **Monday**

01st April 2024. No appeal was made against the decision to issue the direction.

4.6.2 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.”

4.7 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.

4.8 I note that the Appellant seeks to appeal against the decision of the Commissioner to issue the Breach Notice for its alleged failure to open for directed hours between 14:00 and 16:00 on Monday 1 April 2024.

4.9 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 14:00-16:00hrs on Monday 01st April 2024*”.

4.10 Paragraph 23(1)(c) states:

4.10.1 **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;

4.11 I further note that paragraphs 23(1)(d) and (e) state:

4.11.1 *(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.

- 4.12 The parties were invited to provide comments regarding the above Regulations, but I note that none were received. The Appellant was also asked to confirm their core opening hours, but did not do so.
- 4.13 The Commissioner has not given an explanation for the application of paragraph 23(1)(c). Without confirmation of the core opening hours I am unable to ascertain which paragraph would apply in this situation, however I am satisfied that I can proceed to consider the appeal in this instance.
- 4.14 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.
- 4.15 The Appellant states in the appeal that the pharmacy did open on Monday 1 April 2024 and apologises that evidence was not submitted after receiving the Remedial Notice. Whilst 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.
- 4.16 The Appellant has provided an extract of the responsible pharmacist log. I note that there is an entry dated "01/04/24" indicating that a pharmacist was present between 10:30 and 16:00. I note that a copy of this was forwarded to the Commissioner on 17 October 2024, after the Breach Notice was issued. I further note that there has been no response from the Commissioner during this process despite the Breach Notice indicating that this would be the type of information needed to demonstrate that the pharmacy was open.
- 4.17 I consider that sufficient evidence has been provided to show that the Appellant was open and providing pharmaceutical services at the premises between 14:00 and 16:00 on Monday 1 April 2024.

5 Decision

- 5.1 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.

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

Head of Appeals
NHS Resolution