

2 December 2024

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FILE REF: SHA/26385

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DECISION MAKING BODY: NORTH EAST AND NORTH CUMBRIA ICB
("THE COMMISSIONER")

PHARMACIST: SEACLIFFE PHARMACY
("THE APPELLANT")

PREMISES: HIGH ROAD
KELLS
WHITEHAVEN
CUMBRIA
CA28 9PG

**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:

Seacliffe Pharmacy
North East and North Cumbria ICB

Advise / Resolve / Learn

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**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.

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 **£300** 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:
 - 2.6.1 NHS Resolution, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU
 - 2.6.2 Email: nhsr.appeals@nhs.net

Letter dated 17 September 2024 addressed to the Appellant from the Commissioner

- 2.7 “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.
- 2.8 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.
- 2.9 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.
- 2.10 Your pharmacy is being notified of this intention, for one or more of the following reasons:
 - 2.10.1 You have informed us of your intention to open voluntarily on that day.
 - 2.10.2 Your pharmacy is in a location where pharmaceutical need is considered high.
 - 2.10.3 Your pharmacy is close to an urgent treatment centre.
 - 2.10.4 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.
- 2.11 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.
- 2.12 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.”

3 The Appeal

In an email to NHS Resolution dated 12 November 2024 the Appellant appealed against the Commissioner's decision. The grounds of appeal are:

- 3.1 “I would like to lodge a formal appeal against the direction to open Seacliffe Pharmacy in Whitehaven on the 25th December 2024 for the hours of 2pm - 5pm.
- 3.2 The reason for my disquiet with this direction is that Seacliffe Pharmacy had originally been directed to open on 25th December 2024 from the hours of 6pm - 8pm. This was per a rota produced by North Cumbria CCG in 2021, that was to run until 2026. This meant that we had been well aware of our commitment to open for a number of years, and had made appropriate staffing provisions. At the last minute (93 days notice) the ICB with its new responsibilities decided that it would arbitrarily change this longstanding direction amending the opening hours to 2pm - 5pm leaving me with major staffing problems. Unfortunately the amended hours at such short notice cannot be staffed, after all employment contracts do not allow any Pharmacy to force their staff to work on Christmas Day, and as such I will be left to run the Pharmacy on my own, which as you can imagine is not a scenario which I regard as safe, nor is it one that I am looking forward to. I do not feel that they have given sufficient justification for these changes, indeed in numerous correspondence it simply states that the old rota was not fit for purpose, but have not given me any examples of why this is so. The old rota was produced in such a way that every pharmacy took a turn, and were directed to open for 2 hours not 3 and not as many Pharmacies were open at any one time. The CCG gave various reasonings as to the creation and composition of the old rota, but this all seems to have been disregarded by the ICB.
- 3.3 Additionally, the ICB suggests that the Community Pharmacy Cumbria was consulted on the changes, and indeed goes on to suggest that they were in favour, but as you

will see from the attached e-mails etc it was arbitrarily opposed and not agreed to. As such I would be grateful if NHS Resolution could review this case as a matter of urgency (in view of the timescale involved). The ICB in some of their internal correspondence have noted the fact that if an appeal is not adjudicated in time, then the direction to open will stand.

- 3.4 I have attached what letters and email copies I have, I appreciate that the arguments presented are not up to those of court litigation standards, but unfortunately I am both short of time in terms of deadlines and I also have an extremely busy pharmacy to run and patients to look after, which is where I choose to spend my professional time as I feel it makes the greatest impact. It saddens me that I have to waste my time on such endeavours as this, but unfortunately the ICB has decided to impose their will in such a way that I have no other recourse but to ask you to review the facts.
- 3.5 Please advise me if there is any other information that you require or have provided you information in a format which is not acceptable for this appeal. I have had a quick browse of your website and I cannot see anything that would give me any directions in this appeal."

4 Representations

No representations were made by the Commissioner in response to the appeal.

5 Assessment

- 5.1 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.*

5.2 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.

5.3 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.

5.4 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.

5.5 Following a request to provide a copy of the direction letter, the Commissioner also provided a copy letter sent to the Appellant, dated 17 September 2024 which informs the Appellant of its intention to direct the pharmacy to open on 25 December 2024 and invites written submissions.

5.6 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.

5.7 I am of the view that the Commissioner has undertaken a consultation process as set out in the Regulations.

5.8 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.

5.9 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:*

5.9.1 *You have informed us of your intention to open voluntarily on that day.*

5.9.2 *Your pharmacy is in a location where pharmaceutical need is considered high.*

5.9.3 *Your pharmacy is close to an urgent treatment centre.*

5.9.4 *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."*

5.10 I note in its appeal, the Appellant states that *"Seacliffe Pharmacy had originally been directed to open on 25th December 2024 from the hours of 6pm - 8pm. This was per a rota produced by North Cumbria CCG in 2021, that was to run until 2026. This meant that we had been well aware of our commitment to open for a number of years, and had made appropriate staffing provisions. At the last minute (93 days notice) [the Commissioner] with its new responsibilities decided that it would arbitrarily change this*

longstanding direction amending the opening hours to 2pm - 5pm leaving me with major staffing problems. Unfortunately the amended hours at such short notice cannot be staffed".

5.11 The Appellant continues that it does *"not feel that [the Commissioner has] given sufficient justification for these changes, indeed in numerous correspondence it simply states that the old rota was not fit for purpose, but have not given me any examples of why this is so. The old rota was produced in such a way that every pharmacy took a turn, and were directed to open for 2 hours not 3 and not as many Pharmacies were open at any one time."*

5.12 I note as part of its appeal, the Appellant provided a copy email dated 21 October 2024, from the Commissioner to the Appellant. The Commissioner stated that *"The original Rota was sent out as a notification of intention back in 2001. Since this time, it has been documented on several occasions that the rota as it was, wasn't fit for purpose."*

Following consultation with LPC members, local delivery teams and urgent and emergency care teams. Slight amendments were made to times, but in the main, those that were prepared to open as per rota have been directed."

5.13 In an email to the Commissioner dated 22 October 2024, the Appellant stated *"You state that "those that were prepared to open as per rota have been directed" but in fact whoever had been directed had no choice but to open and preparedness was never a factor. And finally I do not consider a change from two hours of cover from 6pm to 8pm as originally directed and planned for to three hours from 2pm to 5pm on Christmas Day as a "slight amendment"."*

5.14 In response, by email dated 22 October 2024, the Commissioner stated *"Our assessment is based on where we feel patients need a pharmacy. Putting all pharmacies on the rota isn't feasible as some are not located in areas that majority of patients would travel."*

5.15 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.

5.16 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.

5.17 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.

5.18 The correspondence from the Commissioner 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.

5.19 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.

6 Determination

6.1 The appeal is granted and, pursuant to paragraph 25(3)(c)(ii), no direction is issued.

**Head of Appeals
NHS Resolution**