

4 December 2024

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FILE REF: SHA/26387

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DECISION MAKING BODY: NORTH EAST AND NORTH CUMBRIA ICB
("the Commissioner")

PHARMACIST: G WHITFIELD LIMITED
("the Appellant")

PREMISES: 44 MARKET STREET
HETTON LE HOLE
TYNE AND WEAR
DH5 9DY

**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:

G Whitfield Limited (the Appellant)
North East and North Cumbria ICB (the Commissioner)

Advise / Resolve / Learn

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THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL PHARMACEUTICAL SERVICES) REGULATIONS 2013 ["THE REGULATIONS"]

**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 14:00 to 17:00 on Christmas Day, Wednesday 25 December 2024.
- 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.

The Commissioner's Request

- 1.9 The Commissioner wishes the Appellant to open from 14:00 to 17:00 on Christmas Day, Wednesday 25 December 2024, a day on which it would otherwise be closed.

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 **£274** 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:
- 2.7 NHS Resolution, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU.
Email: nhsr.appeals@nhs.net "

3 The Appeal

In an email to NHS Resolution dated 15 November 2024 the Appellant appealed against the Commissioner's decision. The grounds of appeal are:

- 3.1 "We acknowledge receipt of the email dated 21st October 2024 from North East and North Cumbria ICB, and their direction to change the Bank Holiday rota for Christmas Day 2024. After careful consideration, we would like to appeal this direction.
- 3.2 The current five-year rota, published by NHSE in 2021, has been effectively followed by pharmacies since its introduction. This rota ensured that there would be adequate pharmaceutical provision for the community during Christmas Day until 9pm. Our pharmacy had been directed to open from 7pm until 9pm.
- 3.3 The direction to change the published rota and to open between 2pm and 5pm would mean that there would be two pharmacies open during the afternoon on Christmas Day, but that there would be no community pharmacies open after 5pm in the entire City of Sunderland. In our opinion this would not be providing an adequate pharmaceutical service to the community.
- 3.4 The decision to change the agreed and published rota appears to have been made by the ICB without consultation with the local LPC nor with the local pharmacy contractors themselves.
- 3.5 Changing the schedule at such short notice would also disrupt the goodwill of pharmacists and their teams, who have already made personal and family arrangements for Christmas Day based on the previously published timetable.
- 3.6 Our pharmacists and their teams are already working under significant pressure. As directors, we feel strongly that asking them to accommodate this last-minute change would be unreasonable. Therefore, the pharmacy team proposes that the original rota should apply on Christmas Day to ensure an adequate pharmaceutical provision in the Sunderland area throughout Christmas Day."

4 **Representations**

In an email to NHS Resolution dated 18 November 2024 the Commissioner stated:

- 4.1 "Please find attached the following:
- 4.2 1. Email sent to all pharmacies informing them of the intended directed rota from 2021-2026. The Rota was deemed not fit for purpose, ICB therefore worked around those notified of the intention, but made some slight alterations to the time period to open.

[The Commissioner to Pharmacists dated 8 October 2021]

- 4.3 "LPC representatives believe that our Directions process needs to be more transparent. Accordingly, North East and North Cumbria (NENC) region is adopting a directed rota system, involving all community pharmacies. The attached spreadsheet sets out the rota for this year's festive period.
- 4.4 It is our understanding that LPCs have had an opportunity to talk to members about this proposed change, so you may have seen this information already.
- 4.5 Each locality within a CCG area is colour coded for ease of reading and each calendar year is also colour coded. Row 3 identifies the commissioning periods (ie Xmas / Easter / other holidays). The rota is based on the following principles:
 - 4.5.1 it is forward-looking, commencing with Christmas 2021 and will be operational until New Year's Day 2026;

- 4.5.2 it is equitable with every pharmacy taking its turn to open;
- 4.5.3 this rota includes **all** community pharmacies in each locality;
- 4.5.4 morning / afternoon / evening slots are presented in a way which means the same pharmacy will not be asked to always work the same session (but that said, the number of days to commission are different each year, so sometimes this may happen);
- 4.5.5 that opening times also rotate by area and it is intended that the times of the commissioned slots change before the commencement of the subsequent cycle (Easter 2026 onwards);
- 4.5.6 the frequency of opening for each pharmacy varies because of the different number of pharmacies within each region so clearly some pharmacies may be opening more often;
- 4.5.7 the rota takes absolutely no account of which pharmacy holds palliative care drugs. CCGs commission palliative care drugs and should be making their own arrangements to ensure stocks of palliative care drugs are accessible at all times;
- 4.5.8 it is not based on a gap analysis as in previous years, although the opening hours of prescription generators (eg Walk in Centres/Urgent Treatment Centres/GP Hubs) and activity data from pharmacies over Christmas 2020 have informed the times of the slots;
- 4.5.9 any pharmacies over and above those commissioned which intend to open will be treated as a “plus” for patients, in terms of access and choice of provider;
- 4.5.10 the rota is also premised on those pharmacies which are currently included on the Pharmaceutical List, so it does not take account of any Market Entry applications which are under consideration, particularly consolidation of two pharmacies onto one site. As we cannot foresee when such applications arise, if as a consequence of consolidation the closing pharmacy ceases trading before the date on which they have been directed to open, the pharmacy which will continue to operate would pick up the Direction – even if this means the pharmacy will work on two consecutive years.
- 4.6 Those pharmacies who are being directed over this Christmas period, have already received this information.”
- 4.7 [See Appendix A 5 year rota 2021 to 2025]
- 4.8 2. Notification letter

[The Commissioner to the Appellant dated 17 September 2024]

- 4.9 “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.
- 4.10 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.
- 4.11 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.

- 4.12 Your pharmacy is being notified of this intention, for one or more of the following reasons:
- 4.12.1 You have informed us of your intention to open voluntarily on that day.
 - 4.12.2 Your pharmacy is in a location where pharmaceutical need is considered high.
 - 4.12.3 Your pharmacy is close to an urgent treatment centre.
 - 4.12.4 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.
- 4.13 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.
- 4.14 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.”
- 4.15 3 Direction letter [See paragraphs 2.1 – 2.8 above].
- 4.16 Process followed:
- 4.16.1 1. Gap analysis
 - 4.16.2 2. Review locations using shape to identify pharmacies in the PNA localities to ensure geographical coverage for patient access.
 - 4.16.3 3. Consultation with LPC, Emergency Planning and local delivery teams
 - 4.16.4 4. Sign off by PSRC.
- 4.17 Please let me know if you require anything further.”

5 Observations

In a letter to NHS Resolution dated 28 November 2024 the Appellant stated:

- 5.1 **“These are our further comments further to our appeal:**
- 5.2 **Background**
- 5.3 Since the agreed, voluntary rota of 2021, G Whitfield Ltd has been expecting and planned to open our pharmacy, FRN62 between 7pm and 9pm on the evening of Christmas day this year, 2024. All of the pharmacy team have worked on the basis that this pharmacy would be obliged to open as a result of the rota agreed in 2021. Relevant information is within my letter of 15 November 2024.
- 5.4 We remain willing to open the pharmacy FRN62 for these hours if requested by the ICB.
- 5.5 **There has been no consultation with the LPC**
- 5.6 The ICB did not consult North East Central Local Pharmaceutical Committee as it has stated in its letter of 17 September 2024, contrary to paragraph 25(1) of schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations (paragraph 25(1) of the PLPS). (Although the ICB did consult a regional group of LPCs.)
- 5.7 If the ICB had consulted the LPC, the ICB would have had the opportunity to discuss with the LPC the agreed, voluntary rota of 2021.

- 5.8 **No assessment was carried out in 2021**
- 5.9 The ICB did not '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)' contrary to paragraph 25(1) of the PLPS.
- 5.10 The ICB did not carry an assessment in 2021. Mrs Bosson's email of 8 October 2021, states explicitly that *'it is not based on a gap analysis as in previous years, although the opening hours of prescription generators (eg Walk in Centres/Urgent Treatment Centres/GP Hubs) and activity data from pharmacies over Christmas 2020 have informed the times of the slots'*. She also confirms that it is based on the current pharmaceutical list and does not take account of any subsequent consolidations or other *'Market Entry applications'*.
- 5.11 **There has been no assessment in 2024**
- 5.12 There has not been an assessment carried out in 2024, or, if an assessment was carried out in 2021, there has been no update to that assessment in 2024. We note the ICB states that in 2024 it carried out:
- 5.12.1 1. Gap analysis,
- 5.12.2 2. Review of locations using shape to identify pharmacies in the PNA localities to ensure geographical coverage for patient access.
- 5.12.3 3. Consultation with LPC, Emergency Planning, and Local Delivery Teams.
- 5.12.4 4. Sign off by PSRC – and the reasons given for the direction.
- 5.13 But there is little or no relationship between the process described and the reasons given for the directions.
- 5.14 The ICB's four reasons for notifying G Whitfield Ltd (FRN62) of the proposed changes to the days on which and times at which the premises for the pharmacy FRN62 are to be open – the proposed change to open on Wednesday 25 December, Christmas Day, between 2pm and 5pm, in the afternoon (in the ICB's letter of 17 September 2024) are each considered. First, high pharmaceutical need.
- 5.15 **High pharmaceutical need**
- 5.16 The ICB states that the pharmaceutical need is considered high (reason 2 in its letter of 17 September 2024). There are no recent activity reports to support the statement, no maximum distance that patients are expected to travel, no next nearest pharmacy open, no consideration of the lost opening time in the evening of Christmas day when the G Whitfield Ltd was to open FRN62 and no consideration of a loss of access at this time, and no consideration of the balance of interest of opening in the afternoon versus the evening of Christmas day, as stated in my letter of 15 November 2024:
- 5.17 *'The direction to change the published rota and to open between 2pm and 5pm would mean that there would be two pharmacies open during the afternoon of Christmas Day, but that there would be no community pharmacies open after 5pm in the entire City of Sunderland. In our opinion this would not be providing an adequate pharmaceutical service to the community.'*
- 5.18 For information, as we understand, the other pharmacies directed to open on Christmas Day in Sunderland are:
- 5.18.1 G Hughes, Redhouse, Sunderland 10am-1pm

5.18.2 Blue House Pharmacy, Concord 2pm-5pm

5.19 Notification of a decision and process, not reasons

5.20 In its guidance on this, NHS Resolution states:

5.21 SHA/18616 (24 April 2017) is an example of NHS Resolution determining that the reasons provided by NHS England were **not** sufficient:

5.22 *"I am mindful that NHS England 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.*

5.23 ...

5.24 *The letters [from NHS England to the pharmacy] provide me with no information which I consider 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.*

5.25 *The letters explain the process which has taken place and the conclusions reached, but not the reasoning that lies behind the direction, in particular what regard was had to the days and times of opening and how these will no longer be such as they will meet the pharmaceutical needs of relevant persons and the assessment that led to the direction which is a requirement of the regulations."*

5.26 33. It is therefore important to distinguish between:

5.26.1 33.1 notification which sets out what the decision is and the process that has been followed in reaching that decision; and

5.26.2 33.2 notification which explains the actual reasoning behind how a decision has been reached.

5.27

5.28 GUIDANCE NOTE

5.29 Pharmacy Opening Hours

5.30 Part 3 of Schedule 4 of the National Health Service

5.31 (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013

5.32 The guidance note goes on to detail a direction that was upheld by NHS resolution.

5.33 The guidance note considers what is required for an assessment. The ICB's direction simply sets out the decision/direction and the process followed.

5.34 There was no assessment in 2024 and, therefore, the direction is not valid and the appeal should be upheld.

5.35 No further reasoning linked to an assessment – the other 'reasons' in the ICB letter of 17 September 2024 are merely a statement of process.

5.36 Intention to open

- 5.37 It is suggested that the observation that ‘You have informed us of your intention to open voluntarily on that day’ (reason 1) is incomplete and therefore misleading. It suggests that the change is of no real significance or difficulty for the contractor and the contractor’s staff. This is incorrect. G Whitfield Ltd was expecting and planning to open the pharmacy FRN62 on the evening of Christmas Day 2024 as agreed in the voluntary rota of 2021. The pharmacy team have been expecting this for 3 years and accordingly, have made preparations. It is arguably more inconvenient for staff who have planned Christmas Day expecting to work in the evening to change their plans at such short notice – to move at short notice family and friends who have made their plans so that the member of staff can work in the evening. In addition, this is not a reason linked to an assessment, rather an explanation of the process.
- 5.38 **Close to a treatment centre**
- 5.39 Our pharmacy FRN62 is not close to an urgent treatment centre (reason 3).
- 5.40 **Rota**
- 5.41 The relevance of the statement that ‘*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*’ is unclear. G Whitfield Ltd was not previously notified to open on this day, and at this time. If the statement is meant to say that the pharmacy was intended to open on this Christmas Day 2024, that is correct but this is reason 1, addressed above. If the statement is meant to say that a pharmacy may be directed to open in 2024 because it agreed to open at another time that day in a voluntary rota of 2021. It is suggested this is unreasonable. This further demonstrates that there has been no assessment – no consideration of patient needs, no consideration of any other pharmacy being open during Christmas day (see above two that are open) and no consideration of the effect of FRN62 not opening during the evening of Christmas Day.
- 5.42 **Summary – assessment and reasons**
- 5.43 Even if it is considered that there was an assessment in 2021 – and it is suggested this was an agreed, voluntary rota - there was no assessment or update in 2024.
- 5.44 Only one of the three reasons the ICB gives in its letter of 17 September 2024 could start to form the basis of an assessment and reasons for the direction.
- 5.45 The ICB has sought to argue simply that it is Christmas Day, the pharmacy had agreed to open in the evening that day and, therefore will be directed to open in the afternoon. This is not an assessment as required by the NHS Pharmaceutical and Local Pharmaceutical Regulations. In addition, there has been no real consideration of the contractor’s representations.
- 5.46 **Conclusion**
- 5.47 The ICB has set out the decision and the process, but at no stage explained the reasoning behind the 2021 decision – this was an agreed, voluntary rota - and in 2024 has set out its decision and the process, but carried out no assessment or anything that could amount to an updated assessment and provided no reasons based on anything that could amount to an assessment. We believe that we have not been provided with information supporting that our pharmacy is in the best position with regard to accessibility and location.
- 5.48 Further, there is no assessment to indicate that the evening on Christmas Day 2024, **when we are willing to open pharmacy FRN62**, is more or less beneficial to patients in the area than opening in the afternoon. We have not been provided with any information with regard to the level of pharmaceutical cover that may be required during the afternoon and evening of Christmas Day. The ICB has provided no information as to how directing pharmacies to open provides a robust assessment of the need for

pharmaceutical provision. We are not satisfied with the ICB's approach in this regard, they have provided limited information to support their conclusion. There is no evidence of a robust assessment which has led to our pharmacy being directed to increase the opening hours by 50%, nor the change in the proposed time, **which is a requirement of the Regulations.**"

6 Assessment

6.1 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.*

6.2 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.

6.3 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.

- 6.4 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.
- 6.5 The Commissioner has provided, in its representations on the appeal, a letter sent to the pharmacy, dated 17 September 2024 which informs the pharmacy of its intention to direct the pharmacy to open on 25 December 2024. I note the Appellant in its appeal refers to *"The current five-year rota, published by NHSE in 2021, has been effectively followed by pharmacies since its introduction. This rota ensured that there would be adequate pharmaceutical provision for the community during Christmas Day until 9pm. Our pharmacy had been directed to open from 7pm until 9pm. The direction to change the published rota and to open between 2pm and 5pm would mean that there would be two pharmacies open during the afternoon on Christmas Day, but that there would be no community pharmacies open after 5pm in the entire City of Sunderland. In our opinion this would not be providing an adequate pharmaceutical service to the community."*
- 6.6 The Commissioner has also indicated in its representations 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. The Appellant is of the view that *"The decision to change the agreed and published rota appears to have been made by the ICB without consultation with the local LPC nor with the local pharmacy contractors themselves."* The Appellant states further in its observations that *"The ICB did not consult North East Central Local Pharmaceutical Committee as it has stated in its letter of 17 September 2024. Although the ICB did consult a regional group of LPCs."*
- 6.7 I note the Appellant disputes as to whether the Commissioner had undertaken a consultation process as set out in the Regulations as referenced by the letter to pharmacists dated 8 October 2021. However, I note the Appellant is not disputing the original rota from 2021 to 2026 and is still, on appeal and in its observations, willing to honour the originally planned opening time of 7pm to 9pm on Wednesday 25 December 2024. I note there is a reference in the Commissioner's representations email to NHS Resolution dated 18 November 2024 which states *"Consultation with LPC, Emergency Planning and local delivery teams."* I have not been provided with information to demonstrate how such a consultation has taken place for the Commissioner to change the 2021 – 2026 rota for the proposed direction for 25 December 2024, as the next letter I have before me is the notification letter dated 17 September 2024 to the Appellant.
- 6.8 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.
- 6.9 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:*
- 6.9.1 *You have informed us of your intention to open voluntarily on that day.*
- 6.9.2 *Your pharmacy is in a location where pharmaceutical need is considered high.*
- 6.9.3 *Your pharmacy is close to an urgent treatment centre.*

6.9.4 *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."*

- 6.10 I note in the Commissioner's representations on appeal, that it has provided a copy of the *"bank holiday rota"* dated 4 October 2021 which indicates that the Appellant was originally scheduled to open from 7pm to 9pm on Christmas Day. I also note the reasoning behind the rota as outlined at 4.5.1 to 4.5.10 above as well as the information provided by the Commissioner in its cover email of 18 November 2024 to NHS Resolution which states *"Process followed: Gap analysis, Review locations using shape to identify pharmacies in the PNA localities to ensure geographical coverage for patient access..."*.
- 6.11 I note in its appeal, the Appellant states that *"Changing the schedule at such short notice would also disrupt the goodwill of pharmacists and their teams, who have already made personal and family arrangements for Christmas Day based on the previously published timetable. Our pharmacists and their teams are already working under significant pressure. As directors, we feel strongly that asking them to accommodate this last-minute change would be unreasonable. Therefore, the pharmacy team proposes that the original rota should apply on Christmas Day to ensure an adequate pharmaceutical provision in the Sunderland area throughout Christmas Day."* The Commissioner has not responded to these points but for the reasons outline below, this is not a factor that I need to consider further.
- 6.12 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 the four potential reasons in the direction at 6.9 above, or why the hours of 2pm to 5pm on Wednesday 25 December 2024 will provide this cover.
- 6.13 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.
- 6.14 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.
- 6.15 The letter of 17 September 2024 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.
- 6.16 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.

7 Determination

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