

10 January 2025

REF: SHA/26351

**APPEAL AGAINST NHS LEICESTER,
LEICESTERSHIRE, AND RUTLAND INTEGRATED CARE
BOARD DECISION REGARDING A BREACH NOTICE AT
BOOTS PHARMACY (FMK29), 18 HIGH STREET,
OAKHAM, RUTLAND, LE15 6AL**

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

Tel: 020 3928 2000
Email: nhsr.appeals@nhs.net

1 Outcome

- 1.1 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.
- 1.2 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.

A copy of this decision is being sent to:

Boots UK Ltd
NHS Leicester, Leicestershire, and Rutland Integrated Care Board

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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, 18 High Street, Oakham, Rutland, LE15 6AL. The Breach Notice stated:

- 1.1 **“Name of contractor: BOOTS UK LIMITED.**
- 1.2 **Pharmacy Name:** Boots Pharmacy.
- 1.3 **Address of premises:** Boots Pharmacy, 18 High Street, Oakham, Rutland, LE15.
- 1.4 **Date of inclusion in the pharmaceutical list for the area of Leicestershire Health and Wellbeing Board:** 01 April 2000.
- 1.5 This is a Breach notice issued under regulation 71 of the National Health Services (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.

Breaches of terms of service: breach notices

- 1.6 **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.
- 1.7 (2) To be valid, the breach notice must include –
 - 1.7.1 (a) the nature of the breach and
 - 1.7.2 (b) an explanation of how C’s rights of appeal under regulation 77(1)(c) may be exercised
- 1.8 (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.
- 1.9 (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.

Nature of the breach

- 1.10 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, LE15 6AL** (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.

- 1.11 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.
- 1.12 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.
- 1.13 You are required to not repeat the breach again.
- 1.14 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:
- 1.15 Primary Care Appeals, NHS Resolution, 8th Floor 10 South Colonnade, Canary Wharf, London, E14 4PU.
- 1.16 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 17 October 2024 addressed to NHS Resolution, the Appellant appealed against Leicester, Leicestershire, and Rutland Integrated Care Board's ("the Commissioner") decision. The grounds of appeal are:

- 2.1 "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.
- 2.2 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.
- 2.4 If you need any further details, please do not hesitate to contact me."
- 2.5 [Enclosures:
 - 2.5.1 Copy of Breach notice dated 26 September 2024 (see paragraph 1 above);
 - 2.5.2 Photograph of Responsible Pharmacist Record dated 27 March 2024 to 4 April 2024.]

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 01st 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 10:00-12:00 as evidenced on the RP log.

3.1.3 The core opening hours for FMK29 are:

Day of the week	Core Hours
Sunday	-
Monday	09:00-13:30; 14:00-18:00
Tuesday	09:00-13:00; 14:00-18:00
Wednesday	09:00-13:00; 14:00-18:00
Thursday	09:00-13:00; 14:00-18:00
Friday	09:00-13:00; 14:00-18:00
Saturday	-

3.1.4 If you require any further information, please do not hesitate to contact me."

3.2 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 The Breach Notice states:
- 5.6.1 *"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, LE15 6AL** (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.*
- 5.6.2 *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."*
- 5.7 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.
- 5.8 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 10:00-12:00hrs on Monday 1 April 2024.

5.9 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.”

5.10 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;

5.11 Paragraphs 23(1)(d) and (e) read as follows:

(d) if NHS England 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.

5.12 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, in its representations, stated its core opening hours as Monday 09:00 to 13:30 and 14:00 to 18:00 and Tuesday to Friday 09:00 to 13:00 and 14:00 to 18:00. This totals 40.5 hours a week. The Commissioner did not respond. I have not been 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 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)”.

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 40.5 hours 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.

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 the Easter bank holiday on Monday 1 April 2024 and that this would be in accordance with the Regulations.

5.18 I note the Appellant states that they were open on Monday 1 April 2024. I note that in the absence of confirmation of opening, the Commissioner issued a Remedial Notice. I have not been provided with a copy of the Remedial Notice but it 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 it.

5.19 I note that the Appellant has provided a photograph of its Responsible Pharmacist log for Boots, Oakham, High Street which shows that on 1 April 2024, the RP signed in from 10:00 to 12:10. The Commissioner has not disputed the information provided, nor has it commented at all on the information, 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 services between 10:00 to 12:10 which encompasses the directed hours of 10:00 to 12:00 on Monday 1 April 2024.

6 Decision

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