

19 December 2018

DECISION MAKING BODY: **NHS COMMISSIONING BOARD
(LEICESTERSHIRE AND
LINCOLNSHIRE AREA TEAM)
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FILE REF: **SHA/21028**

PREMISES: **171 New Beacon Road
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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.

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- 2.3.2 'supplementary' opening hours (other days on and times at which the pharmacy undertakes to provide pharmaceutical services, as notified to NHS England).

Alteration of 'core' (including 'directed') opening hours

- 2.4 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

- 2.5 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 NHS England, in accordance with paragraph 23(6)(a) without the need to make an application.
- 2.6 Notices under paragraph 23(6)(a) are not subject to review by NHS Resolution

NHS England's Request

- 2.7 NHS England wishes the Appellant (hereafter referred to as "the Appellant") to open from 1pm to 2pm on 25 December 2018 (Christmas Day), a day on which it would otherwise be closed.

Information provided by parties

- 2.8 In a letter to the Appellant dated 30 October 2018, NHS England stated
- 2.8.1 I am writing following my letter dated 27 September 2018 asking for representations about directing you to open on 25 December 2018. As you have not provided any representations within the 30 days, I am therefore assuming that you agree with the initial letter.
- 2.8.2 Therefore subject to Paragraph 25(3)(a), Part 3 of Schedule 4 of the National Health Service (Pharmaceutical Services) Regulations 2013 you are directed to open for one hour between 13:00-14:00 on Tuesday, 25 December 2018.
- 2.8.3 The reason for the direction is that although pharmacies are able to close as per the Terms of Service, the needs of people in the neighbourhood that they serve or other likely users of the pharmacy will still require a suitable level of pharmaceutical provision on this day.
- 2.8.4 Paragraph 24(4), Part 3 of Schedule 4 requires the Leicestershire and Lincolnshire Area Team to ensure that it is satisfied that the pharmacy will receive reasonable remuneration for the additional hours. NHS England has agreed the rate of £201.51 per hour for all Lincolnshire Pharmacies as being reasonable remuneration for this day.
- 2.9 In a letter to NHS Resolution dated 26 November 2018 the Appellant stated:
- 2.9.1 I have been instructed by NHS England to contact you regarding our opening times on Christmas day. The time we have been given is 13.00-14.00, however we are struggling to cover this hour as staff have arrangements which will incur a charge if changed, 12.00-13.00 would be a preferred time.

2.10 In an email to NHS Resolution dated 3 December 2018 NHS England stated:

2.10.1 NHS England issue a notice to direct letter followed by the full direction for the pharmacy to open from 1pm to 2pm (sic). The direction was issued as the pharmacy did not provide any evidence that the access to pharmaceutical services was not needed at that time. Whilst NHS England is sympathetic to the issues around staffing the time was selected to fit with other provision across the whole of the county. The appellant has said that they can get staff but a charge will be incurred. NHS England has already agreed a fee with the LPC to cover directed opening.

Assessment

2.11 I note the letter from NHS England dated 30 October 2018 indicates that NHS England is directing the pharmacy to open for the hour in question under the provisions of paragraph 25 of the Terms of Service.

2.12 I have considered paragraph 25 of Schedule 4 (Determination of pharmacy premises core opening hours instigated by the NHSCB), which reads as follows:

1. *Where it appears to the NHSCB, 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) the NHSCB 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 the NHSCB about the proposed changes.*

3. *When it determines the outcome of its assessment, the NHSCB 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 the NHSCB 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. *The NHSCB 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. *The NHSCB 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 the NHSCB or take any action that the NHSCB 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*

2.13 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.

2.14 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.

- 2.15 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.
- 2.16 I note that NHS England wrote to the Appellant by letter dated 27 September 2018 as part of its consultation process. In its letter to the Appellant dated 30 October 2018 NHS England stated that the Appellant had not provided any representations within the 30 day period. It would appear that this was the only consultation which preceded the issue of the Direction. I note that in a further letter to the Appellant dated 1 November 2018 NHS England acknowledged that the Appellant had requested to change the time of the directed hours, however it was not able to agree the request.
- 2.17 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.
- 2.18 On appeal, I may (in accordance with paragraph 25(8) of Schedule 4) either confirm the action of NHS England or take such other action as it could have taken.
- 2.19 I note the Appellant's concern that it would struggle to cover the hour directed as staff have made arrangements which would incur a charge if changed, however I am of the view that it is a matter for the Appellant to arrange for appropriate staffing in the event they are required to open.
- 2.20 The letters dated 27 September, 30 October and 1 November 2018 and NHS England's representations 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.
- 2.21 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 days and times of opening and how these will no longer be such that they will meet the pharmaceutical needs of relevant persons and the assessment that led to the direction which is a requirement of the Regulations.
- 2.22 On the basis of the information available to me, I am not satisfied that NHS England 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 2018.

3 **Determination**

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

Business Services Manager