

12 April 2022

FILE REF: SHA/24696

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

DECISION MAKING BODY: NHS COMMISSIONING BOARD
("NHS ENGLAND")

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

PHARMACIST: BOOTS UK LTD ("the Appellant")

PREMISES: BOOTS CASTLE CARY
FORE STREET
CASTLE CARY
BA7 7BG

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:

Boots UK Ltd
NHS England

Advise / Resolve / Learn

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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]**

DIRECTION OF ADDITIONAL CORE OPENING HOURS

1 Introduction

- 1.1 Relying on Paragraph 25 of Schedule 4, NHS England has requested that the Appellant open from 13:00 – 15:00 on 17 April 2022.
- 1.2 The Appellant seeks to appeal to NHS Resolution.

2 Consideration

Rights of appeal

- 2.1 Where NHS England 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").
- 2.2 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

- 2.3 A pharmacy's opening hours may be categorised as:
- 2.3.1 'core' opening hours (days on and times at which the pharmacy is obliged to be open), which may incorporate a direction of NHS England requiring fewer or greater than 40 hours; or
- 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 to open from 13:00 – 15:00 on 17 April 2022 (Easter Sunday), a day on which it would otherwise be closed.

Information provided by parties

- 2.8 In a letter to the Appellant dated 17 March 2022, NHS England stated:

"A Pre-Direction Letter was sent on your pharmacy by email on 15 February 2022 regarding opening hours for Easter Sunday, the 17th April 2022. The pharmacy was given 30 days in which to comment on our proposal to direct you to open for this day.

The pre-direction 30-day consultation period resulted in no response to the pre-direction letter being received.

As you are aware there is an increased level of demand for health advice and services in general extended holidays. With no GP surgeries expected to be open on over this long bank holiday weekend, patients will look to other services to meet any health needs they may have. Accordingly, NHS England and Improvement is of the opinion, that there will continue to be a level of need for pharmaceutical services on Easter Sunday, including:

- Providing advice on self-care, in particular on the treatment of common ailments,
- Selling over-the-counter medication, including Pharmacy-only medicines,
- Dispensing medication prescribed by the out-of-hours medical service, or
- Issuing emergency supplies of prescription medicines which patients may have run out of.

Activity reports from previous years, indicate a need for access to all of the above services for patients. If there were not adequate pharmacy cover, or patients consider any pharmacies which are open to not be reasonably accessible, then patients may contact the out-of-hours service; present at hospital emergency departments or summon an ambulance inappropriately, putting additional pressure on other parts of the NHS. Alternatively, patients may go without treatment and possibly suffer harm.

NHS England and Improvement has sought volunteers to open and if another pharmacy in the area had volunteered it would not be necessary for NHS England to issue this direction. However, in the absence of volunteers, we have

reviewed which pharmacies have opened on previous bank holidays and have tried, where possible, to ensure that directing pharmacies to open has taken place on a fair share basis, according to local need. We consider that on this occasion it is appropriate to direct your pharmacy to open.

We have consulted with the Local Pharmaceutical Committees regarding our general approach to bank holiday provision for this year and the pharmacies we would be directing.

NHS England and Improvement is now exercising its power under paragraph 25 of the Terms of Service (determination of pharmacy premises core opening hours instigated by the NHSCB) to direct pharmacies to open in order to secure the adequate provision of pharmaceutical services in the area.

NHS England and Improvement has found it necessary to direct (FTF48) to open from 13:00-15:00 on the 17th April 2022.

Please note that pharmacies directed to open will be remunerated for the hours worked, at a rate of £350.00 per hour. In order to submit your claim please use the following link Bank Holiday Activity Form to record your activity for the hours you have been asked to open. Please return your activity within 2 weeks of the directed hours to generate your payment and to enable us to use the monitoring information to support commissioning intentions for future pharmaceutical services during bank holiday periods.

We are obliged to notify you of your right of appeal against this direction which must be received within 30 days of this direction. Appeals must be emailed to nhsr.appeals@nhs.net or sent in writing to:

NHS Resolution (Primary Care Appeals), 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU”

2.9 In an email to NHS Resolution dated 21 March 2022 the Appellant stated:

“I am emailing you to appeal [your] direction to open on the grounds of not receiving any correspondence prior to the final notice received dated on the 17 March 2022. I would also like to add that we are already open for a full days trading on Good Friday.”

2.10 In a letter to NHS Resolution dated 1 April 2022 NHS England stated:

“Thank you for your email dated 25 March 2022 inviting representation in response to the appeal received against the decision made by NHS England and Improvement South West to direct the above-mentioned pharmacy on Easter Sunday 2022.

Please can I ask you to treat the following emails, attached, as part of NHS England and Improvement South West’s representations on this appeal:

- Email of 15 February 2022 to the contractor with the pre-direction notification of 30 days to make representations
- Email of 17 March 2022 to the contractor with the direction letter
- Rota claims from the previous special bank holiday (Christmas Day 2022) showing activity (Appendix A)
- Map showing pharmacies directed Easter Sunday 2022 (Appendix B)

Please note that no response to the pre-direction was received from the pharmacy.

As Easter Sunday Day is a bank holiday, no pharmacy contractors are obliged to open and so can choose to close without the need to give notice. In light of this, the decision has been taken to ensure that NHS England and Improvement has directed a pharmacy in each area where there is a need for provision identified as to ensure a minimum level of provision. The provided rota claims from 2021 shows that pharmacies in the area are used by local patients for services on special bank holidays. It also demonstrates that the need is not just for prescription dispensing but also for access to healthcare advice.

The pharmacy at Castle Cary was chosen due to its location. On special bank holidays we routinely allocate rotas to Wincanton and Gillingham which supports this area and the north Dorset Border, however, as both Pharmacies had previously undertaken the two year's Christmas Holiday Rotas we allocated the duty to the nearest pharmacy "Castle Cary" on a fair share basis. Wincanton to Gillingham is 20 minutes and Wincanton to Castle Cary is 15 minutes, which we felt was adequate for the resident populations in these areas. We shared the duties to have an afternoon rota 13:00-15:00 in Castle Cary and evening provision 16:00-18:00 in Gillingham. If these duties were not in place the residents in the Wincanton area would have to travel 40 minutes to Yeovil, 40 minutes to Glastonbury and whilst Gillingham is only 20 minute car ride, residents would only have provision from 16:00-18:00 on that day.

Activity from the previous special bank holiday from the Wincanton Rota, showed 8 patients attended within the two hour rota, with most patients coming from the Wincanton Area and 10 patients attending the Shaftsbury (North Dorset) border, therefore the allocation to Castle Cary from 13:00-15:00 was justified.

The South West Regional Team did not receive a response from the 2022 direction notice sent to the contractor, therefore the formal direction notice was sent out as planned.

Whilst NHS England and Improvement appreciates the pressures facing community pharmacies, NHS England and Improvement South West is of the view that opening on other bank holidays is not a consideration with regards to the Easter Sunday direction to meet the identified needs."

Assessment

2.11 I note the reference in NHS England's letter of 17 March 2022 to paragraph 25 of Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 therefore NHS England is directing the Appellant to open for the hours in question in accordance with paragraph 25 of Schedule 4.

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 Easter Sunday 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 the Appellant states, in their letter of appeal, that they are seeking to appeal “...on the grounds of not receiving any correspondence prior to the final notice received ...”

2.17 In response to this I have been provided, by NHS England, with a copy of an email that was sent to the Appellant on 15 February enclosing a copy of a letter dated 15 February 2022 which sets out the proposal that “...NHS England may need to direct a pharmacy in your locality to be open for a period on Easter Sunday, and so we are giving you notice that NHS England may direct your pharmacy to open between 13:00 – 15:00 on that day...” I further note that the letter also provided the Appellant with the opportunity to make representations about this proposed change however from the papers before me it appears that the Appellant chose not to make any representations.

2.18 I also note the comments from NHS England, in the direction letter to the pharmacy of 17 March 2022, that they “... have consulted with the Local Pharmaceutical Committees regarding our general approach to bank holiday provision for this year and the pharmacies we would be directing to open.”

2.19 I am of the view that NHS England has undertaken a consultation process as set out in the Regulations.

2.20 I note the comments from the Appellant that they are open for a full days trading on Good Friday. I am mindful that the provision of services on other days, when the pharmacy is not required to be open, is a matter for the pharmacy in question and does not have a bearing on the assessment and decision of NHS England with regard to the

needs of those in the area or other likely users and the pharmacy that is best placed to provide services which meet those needs.

- 2.21 The pharmacy opening on Good Friday is a choice for that pharmacy as the pharmacy is permitted to close for Good Friday *“for the purposes of calculating the number of hours that a pharmacy premises are opened during a week that includes ... Good Friday ... it is deemed that the pharmacy premises were open on that day at the time which they would ordinarily have been open on that day of the week”* as set out in paragraph 23(12) of Schedule 4 of the Regulations. The opening of the pharmacy on Good Friday is therefore a commercial decision that the pharmacy has chosen to make. Given that this is an appeal against a direction from NHS England I am of the view that the pharmacy opening on Good Friday is not a relevant consideration when looking at the direction of NHS England for the pharmacy to open on Easter Sunday.
- 2.22 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.
- 2.23 I am mindful that a direction from NHS England to open a pharmacy should be based on an assessment of whether or not the provision of pharmaceutical services will meet the needs of people in the area or other likely users of the pharmacy and should not be reliant on which pharmacies have opened on previous bank holidays or whether it is on a fair share basis.
- 2.24 I note that NHS England has reviewed activity reports from previous years which indicated a need for access to services for patients. I also note that NHS England sought volunteers to open and in the absence of such has *“reviewed which pharmacies have opened on previous bank holidays and have tried, where possible, to ensure that directing pharmacies to open has taken place on a fair share basis, according to local need.”*
- 2.25 I note that I have no information before me with regard to the location of any health bodies in the area which might be generating prescriptions or indeed of any times when these health bodies might be open.
- 2.26 I note the comments from NHS England that *“Activity from the previous special bank holiday from the Wincanton rota, showed 8 patients attending within the two hour rota, with most patients coming from the Wincanton area and 10 patients attending Shaftsbury (North Dorset) Border, therefore the allocation to Castle Cary from 13:00 – 15:00 was justified.”* Whilst this may be the case, I am of the view that this provides limited information with regard to the use of pharmacies at particular times as it merely demonstrates that pharmacies were used. I am of the view that the data demonstrates numbers of patients accessing a pharmacy during the period it was open but does not demonstrate why this particular pharmacy should be directed to open on Easter Sunday.
- 2.27 I note that whilst I have been provided with information with regard to the distances between Castle Cary and the nearest towns of Wincanton, Glastonbury and Yeovil I have no information before me as to why the Appellant’s pharmacy will be best place, in terms of access or any other factor to meet any demand for services. I have not been provided with any information as to what pharmaceutical cover may be required and how the opening times of any health bodies generating prescriptions are met by this direction. I am of the view that there is no information from NHS England as to how directing pharmacies on a “fair share basis, according to local need” provides a robust assessment of the need for pharmaceutical provision if there is no consideration of “local need” or what this means in terms of providing services to patients.

- 2.28 I consider that whilst NHS England has provided some information to support the conclusion reached, it has not set out the reasoning that lies behind the direction to this particular pharmacy, which is a requirement of the Regulations.
- 2.29 I am of the view that the letter dated 17 Mach (Direction to open on 17 April 2022, Easter Sunday) addressed to the Appellant provides me with insufficient reasons on the basis of which I can confirm the decision, nor information upon which I might rely to make a direction of alternative reasons.
- 2.30 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 17 April 2022.
- 2.31 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.

3 Determination

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

Head of Operations, Primary Care Appeals