

25 November 2022

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

REF: SHA/24754

**DISPUTE AGAINST NON-PAYMENT BY NHS ENGLAND
IN RESPECT OF COVID-19 COSTS TO FLAGSHIP
(DORSET) LTD T/A THE ABBEY PHARMACY (“THE
APPELLANT”)**

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

1 Outcome

- 1.1 I consider that paragraph 7(1) of Schedule 3 of the Regulations provides discretion for me to determine this appeal in such manner (including with regard to procedures) as I see fit. I therefore substitute the decision of the NHS Business Services Authority (“NHS BSA”), acting on behalf of NHS England, to refuse the claim with the decision to make final determinations on certain aspects of the claim and to provide the parties with a further opportunity to provide comments on the appeal.
- 1.2 For clarity I set out in the paragraphs below my expectations of each party in relation to the further opportunity to provide comments.
- 1.3 In respect of the NHS BSA:
 - 1.3.1 it should provide a clear explanation of the additional staff costs in respect of which it has reimbursed the Appellant and the evidence for those costs that it considered acceptable;
 - 1.3.2 it should confirm whether or not it considers that additional management costs are in scope for reimbursement;
 - 1.3.3 it should confirm whether it has paid claims for increased management time carried out by directors where those claims have been supported with less evidence than the Appellant has supplied;
 - 1.3.4 it should consider whether, for a director of a company running a pharmacy who is indicating that they worked overtime but is not receiving a salary with payslips or invoicing the company for their costs, there is a form of evidence that would satisfy the NHS BSA;
 - 1.3.5 it should consider whether any such claims have been paid and what evidence satisfied the NHS BSA in those cases;
 - 1.3.6 it should comment on whether £45 per hour is an appropriate rate for reimbursement for additional management costs if there were no concerns with the evidence;

Advise / Resolve / Learn

NHS Resolution is the operating name of NHS Litigation Authority – we were established in 1995 as a Special Health Authority and are a not-for-profit part of the NHS. Our purpose is to provide expertise to the NHS on resolving concerns fairly, share learning for improvement and preserve resources for patient care. To find out how we use personal information, please read our [privacy statement at https://resolution.nhs.uk/privacy-cookies/primary-care-appeals/](https://resolution.nhs.uk/privacy-cookies/primary-care-appeals/)



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- 1.3.7 it should clarify what it means when it states that the Accountants letter does not confirm that the costs were added as a liability for the company for the additional hours worked; and
- 1.3.8 it should provide any other comments it considers appropriate bearing in mind the final determinations and other comments I make in this determination.
- 1.4 In respect of the Appellant:
 - 1.4.1 whether the £22,320 includes the cost of locum backfill for management and additional pharmacist capacity. If so, whether any invoices for those locums are available and if not, why not;
 - 1.4.2 whether it can evidence that other contractors have had claims paid including director costs with less evidence than the Appellant has supplied;
 - 1.4.3 it should indicate the usual times the pharmacy would be inhabited, outside of the claim period, i.e. the usual "open" and "closed" alarm times, how the long list of alarm logs provided evidences an increase in the duration the pharmacy was open each day during the claim period and to whom the names listed on the alarm logs relate;
 - 1.4.4 it should consider whether it is or is not possible to provide a timesheet with the days and times of work;
 - 1.4.5 it should clarify the meaning of "*the business being re-tooled to meet the needs of the NHS*";
 - 1.4.6 it should consider whether there is any additional evidence it can provide to support its claim; and
 - 1.4.7 it should provide any other comments it considers appropriate bearing in mind the other comments in this determination, particularly in respect of the type and nature of the evidence provided.
- 1.5 I am setting a strict deadline for receipt of additional comments which is 21 days (not working days) from the date of this determination.
- 1.6 I will not consider any information provided outside the timescale set out above.
- 1.7 The parties should also note that I will not take into account any comments made in relation to any matters that I have indicated are finally determined in this determination.
- 1.8 On receipt of any additional comments provided in the timescales I set out above, I will consider whether it is appropriate to provide the other party with a chance to provide final observations on those comments.
- 1.9 I will then make a final determination on any aspects of this appeal which I have not already finally determined.

A copy of this decision is being sent to:

Flagship (Dorset) Ltd t/a The Abbey Pharmacy
NHS BSA on behalf of NHS England

REF: SHA/24754

**DISPUTE AGAINST NON-PAYMENT BY NHS ENGLAND
IN RESPECT OF COVID-19 COSTS TO FLAGSHIP
(DORSET) LTD T/A THE ABBEY PHARMACY (“THE
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Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

1 Introduction

- 1.1 The Appellant appealed the non-payment by NHS England of a claim by the Appellant for Covid-19 Payments.
- 1.2 The Secretary of State for Health and Social Care, pursuant to the National Health Service Litigation Authority (Pharmaceutical Remuneration – Payment Disputes) (England) Directions 2022 (the “Payment Disputes Directions”), has directed that NHS Resolution determines this type of appeal on their behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 Claim

NHS Resolution has not been provided with a copy of the claim form.

3 Decision

The NHS BSA acting on behalf of NHS England, sent a decision to the Appellant on 1 April 2022 in respect of The Abbey Pharmacy (ODS code FL223). The decision stated:

- 3.1 “Thank you for your help in providing us with additional evidence and documents for your COVID-19 costs claim.
- 3.2 Following the review of this evidence, we have reached a final position on your claim. Please see below our final determination (wording in bold below reflects wording in bold in the determination).

| Category of claim | Claimed amount | Paid to date | Outstanding |
|--|----------------|--------------|-------------|
| Additional COVID-19 staff costs | £102,895.21 | £80,575.21 | £22,320.00 |
| Costs for COVID- secure premises | £13,479.60 | £13,479.60 | £0.00 |
| Additional COVID-19 IT and communication costs | £1,103.15 | £1,103.15 | £0.00 |
| Closures for infection control purposes | N/A | N/A | N/A |

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| | | | |
|-------|-------------|------------|------------|
| Total | £117,477.96 | £95,157.96 | £22,320.00 |
|-------|-------------|------------|------------|

- 3.3 ***Please see attached spreadsheet for a breakdown of the assessed evidence. Note evidence exceeding the amount claimed in one category cannot be used to validate amounts outstanding in another category.**
- 3.4 If you do not agree with the reduction of your payment, you have the right to appeal as specified in the Drug Tariff. To exercise your right to appeal, you must first request an **independent internal review** of the amount/s listed as outstanding in any of the categories of claim above. **You will not be able to progress to an appeal if the disputed amounts have not been reviewed by the independent internal review panel first.**
- 3.5 You have 30 days from receipt of this letter to notify us that you want an independent internal review. To do this, please send us an email by 11:59pm on **Sunday 1st May 2022** to nhsbsa.covidclaims@nhs.net please include in the subject line your account ODS code and the words 'Review Request' to help us identify your request. In the email you must state that you want the amount of the claim that not (sic) has not been assessed as payable, or any part of that amount, to be reviewed by the independent internal review panel. You should state why you disagree with the amount of the claim not payable, including why you believe that the evidence provided supports a higher claim and/or why you believe any rejected costs are in scope of the Drug Tariff Part VIA paragraph 15. We will send the information you have provided to the NHSBSA during the claims process to the independent internal review panel and a copy will be provided to you. **You may include additional supporting evidence for the panel to consider or a further explanation in relation to information previously provided to the NHSBSA if you believe this is relevant. Any additional supporting evidence must be provided by the date above.** The panel will only look at the part of the claim in dispute i.e. the part that you ask to be reviewed."

The spreadsheet stated to be attached to the NHS BSA's communication contained the following information:

FJW18*

| File Name | Value of Evidence Provided | Reason for Rejection |
|--|----------------------------|-----------------------------|
| 369608 INVOICE FOR Abbey Pharmacy .pdf | £33.00 | Out of scope of the service |
| 369608 INVOICE FOR Abbey Pharmacy .pdf | £28.74 | Out of scope of the service |
| 369608 INVOICE FOR Abbey Pharmacy .pdf | £31.74 | Out of scope of the service |
| 369608 INVOICE FOR Abbey Pharmacy .pdf | £16.68 | Out of scope of the service |
| 371773 INVOICE FOR Abbey Pharmacy .pdf | £1,187.96 | Out of scope of the service |
| 391088 INVOICE FOR Abbey Pharmacy .pdf | £33.00 | Out of scope of the service |
| 391088 INVOICE FOR Abbey Pharmacy .pdf | £57.48 | Out of scope of the service |
| 391088 INVOICE FOR Abbey Pharmacy .pdf | £18.26 | Out of scope of the service |
| 391088 INVOICE FOR Abbey Pharmacy .pdf | £6.40 | Out of scope of the service |

| | | |
|--|-----------|--|
| 391088 INVOICE FOR Abbey Pharmacy .pdf | £5.48 | Out of scope of the service |
| Invoice APS6801.pdf | £2,721.00 | Out of scope of the service |
| Invoice APS6802.pdf | £2,500.00 | Out of scope of the service |
| Invoice APS6803.pdf | £2,500.00 | Out of scope of the service |
| Invoice INV-0101.pdf | £1,250.00 | Out of scope of the service |
| Invoice INV-0489.pdf | £1,300.00 | Out of scope of the service - dated outside claim period March 2020 - March 2021 |
| Invoice_281215768.pdf | £181.72 | Out of scope of the service - dated outside claim period March 2020 - March 2021 |
| PDM Invoice April 2021.png | £69.90 | Out of scope of the service |
| PDM Invoice August 2020.png | £59.90 | Out of scope of the service |
| PDM Invoice Dec 2020.png | £59.90 | Out of scope of the service |
| PDM Invoice Feb 2021.png | £59.90 | Out of scope of the service |
| PDM Invoice Jan 2021.png | £59.90 | Out of scope of the service |
| PDM Invoice July 2020.png | £24.78 | Out of scope of the service |
| PDM Invoice March 2021.png | £59.90 | Out of scope of the service |
| PDM Invoice Nov 2020.png | £59.90 | Out of scope of the service |
| PDM Invoice Oct 2020.png | £59.90 | Out of scope of the service |
| PDM Invoice Sept 2020.png | £59.90 | Out of scope of the service |
| Sales Invoice_INV10700.pdf | £459.00 | Out of scope of the service |
| VS INVOICE 98677.pdf | £224.40 | Out of scope of the service |
| VS INVOICE 98677.pdf | £224.40 | Out of scope of the service |
| VS INVOICE 98677.pdf | £225.00 | Out of scope of the service |
| VS INVOICE 98677.pdf | £168.75 | Out of scope of the service |
| VS INVOICE 98677.pdf | £0.00 | Out of scope of the service |

FJW18

| File Name | Value of Evidence Provided | Reason for Rejection |
|-----------|----------------------------|----------------------|
|-----------|----------------------------|----------------------|

| | | |
|---------------------------------------|------------|--|
| Additional Payroll Costs by Month.png | £18,377.02 | Evidence unacceptable |
| INV3796 Locate A Locum Jan 21.pdf | £11.68 | Evidence unacceptable Duplicate |
| C19 IT invoice.pdf | £9.82 | Evidence unacceptable Same as IT Costs 2 |
| Invoice_279912685.pdf | 184.92 | Evidence unacceptable Duplicate |
| R Zaskorsi May 2020.doc | 540.00 | Evidence unacceptable Duplicate |
| Sama Invoice 26_12_2020.pdf | £252.80 | Evidence unacceptable Duplicate |
| September 2020 (1).doc | £742.50 | Evidence unacceptable Duplicate |
| September 2020.doc | £742.50 | Evidence unacceptable Duplicate |
| Abbey Alarm Log Analysis.xlsx | N/A | Evidence unacceptable |
| Alarm Log.pdf | N/A | Evidence unacceptable |
| Director Timesheet – [MH].xlsx | £44,640.00 | Evidence unacceptable |
| Screenshot 2021-11-28 at 20.10.27.png | £5,000.00 | Evidence unacceptable |
| Screenshot 2021-11-28 at 20.10.58.png | £5,000.00 | Evidence unacceptable |
| Screenshot 2021-11-28 at 20.11.36.png | £5,000.00 | Evidence unacceptable |
| Screenshot 2021-11-28 at 20.12.09.png | £6,000.00 | Evidence unacceptable |
| Screenshot 2021-11-28 at 20.12.55.png | £3,000.00 | Evidence unacceptable |
| Screenshot 2021-11-28 at 20.13.30.png | £977.00 | Evidence unacceptable |
| Screenshot 2021-11-28 at 20.13.57.png | £2,657.90 | Evidence unacceptable |
| Screenshot 2021-11-28 at 20.14.36.png | £5,000.00 | Evidence unacceptable |
| Screenshot 2021-11-28 at 20.14.55.png | £2,000.00 | Evidence unacceptable |
| Screenshot 2021-11-28 at 20.15.14.png | £3,500.00 | Evidence unacceptable |
| Screenshot 2021-11-28 at 20.15.39.png | £3,500.00 | Evidence unacceptable |

4 Internal Review

The Appellant requested a review of the aforementioned decision. In its email dated 29 April 2022, the Appellant stated:

- 4.1 “We would like to request an independent review of our COVID costs claim. Specifically costs (£22,320) associated with the management response to the pandemic which relate to our Directors.
- 4.2 As we set out in detail in our original claim, I as the Superintendent Pharmacist, and a senior decision maker within the business was required to work an average of 9 hours extra each week in the claim period. This was detailed in a spreadsheet giving a breakdown of how these additional hours were calculated, as we run two pharmacies we calculated the combined cost and divided this by 2 to arrive at the average figure. For the record, I was required to work every day without a break, in the evenings and at weekends. This was both as a pharmacist to cope with the additional workload rising from the pandemic, e.g. checking prescriptions or answering professional queries; but also to cope with the management response to the pandemic. This has included reading and replying to 7,000 covid related emails, attendance at dozens of NHSE webinars and meetings and of course the vital work of adapting our essential services to the changing needs and safety requirements of the NHS. As an example, patient requests for delivery of prescriptions quadrupled in the space of a week, which had to be managed safely as there was simply no other way of these patients receiving their medicines as other local pharmacies had stopped taking on new deliveries and volunteer services were overwhelmed.
- 4.3 Normally within our business my management time is split between our retail and our NHS business. COVID effectively mothballed our retail business which meant that 100% of my costs needed to be attributed to our NHS activity as I was working every minute on the pandemic response - this is the additional cost that we are claiming. For SMEs the cost of the management response is going to overwhelmingly be attributed towards the Directors of the company and I have found the BSA's interpretation of the Drug Tariff rules to be inconsistent in this matter. Other contractors have had claims paid including Directors costs with less evidence than we have supplied, which for the record included copies of our alarm logs (where available), and the Director's timesheet which was produced by detailed examination of multiple sources including email records, diaries and alarm logs and is a true reflection of the management costs related to the pandemic. To support our request for a review we have asked our Chartered Accountants to produce a letter which is attached detailing the underlying assumptions related to our claim. I am aware that other Contractors claims have been paid with such evidence.
- 4.4 As a pharmacist with nearly 20 years of experience, an annual budget of around £2m and 20 subordinates, the hourly costs we have calculated, which include on-cost such as PAYE and pensions liability are in my view entirely reasonable. We have compared this with NHS AfC pay bands to sense-check our claim.
- 4.5 The Abbey Pharmacy has remained open throughout the pandemic and has not lost a single hour of service provision. I find it incredible that the NHS and the BSA think that Owner-Director should have provided their considerable services for free. We have supplied the sorts of evidence suggested by PSNC to evidence our claim and have been frustrated at the lack of understanding of SMEs by the BSA. In order to keep the pharmacy open I have had to work incredibly long hours, both in the pharmacy and at home to ensure that services could be maintained, this includes having to rearrange staff cover to cope with COVID absences, reading and responding to changes to safety regulations such as social distancing, and making sure that we could source medicines to fulfil NHS prescriptions.
- 4.6 In summary, NHS BSA has erred in disallowing this element of our claim because (a) sufficient evidence was supplied with the original claim to justify these costs - this is evidenced by other contractors who have supplied the same or less evidence having their claims paid, (b) those processing the claims do not appear to have a strong understanding of the way that SME's work, and as such there is the risk of the process being unfair to SMEs.

- 4.7 We would urge the independent review to take the additional evidence provided by our accountants into consideration to reinforce the evidence previously supplied to show the reasonable and robust basis on which our claim was calculated.”

Copy letter from Albert Goodman Chartered Accountants dated 27 April 2022 addressed to NHS BSA. The letter stated:

- 4.8 “We act as independent Chartered Accountants to Flagship (Dorset) Limited.
- 4.9 We have reviewed the guidelines agreed between PSNC and the Department of Health and Social Care to reimburse community pharmacy contractors for the extra costs they have incurred due to the COVID-19 pandemic between 1 March 2020 and 31 March 2021 for the delivery of NHS pharmaceutical services.
- 4.10 In connection with the reimbursement of COVID-19 costs incurred by pharmacy contractors between 1 March 2020 and 31 March 2021, our above client has calculated that between 1 March 2020 and 31 March 2021 additional staff costs due to COVID-19 of £22,302 were incurred.
- 4.11 We have reviewed their claim and can confirm:
- 4.11.1 that it is for Covid-19 related costs falling within the acceptable categories incurred between 1 March 2020 and 31 March 2021 for the delivery of NHS pharmaceutical services
- 4.11.2 the hours claimed appear reasonable within the two branches operated and are supported by timesheets
- 4.11.3 the hourly rate applied is appropriate for a senior pharmacist and is equivalent to NHS Agenda for Change pay band 8d
- 4.12 We hope this provides you with sufficient assurance to approve our client’s claim.”

The outcome of the NHS BSA internal review was communicated to the Appellant by email dated 26 July 2022 which stated:

- 4.13 “Following your formal letter requesting an independent review of NHSBSA’s final determination relating to your pharmacy’s COVID-19 costs reimbursement claim, an independent internal review panel met to discuss the disputed amounts of your claim.
- 4.14 As you requested, the sum under review by the panel for account FL223, amounted to £22,320.00.
- 4.15 The review panel concluded that they are not satisfied that the evidence provided merits payment of this amount and agreed with the NHSBSA’s final determination that no additional payments should be made.
- 4.16 If you disagree with the amount of your claim determined to be payable, you can appeal the disputed amount to the Secretary of State under section 9(6) of the NHS Act 2006 within 30 days from the date of receipt of this letter. To do this, please send an email by 11:59pm on **Thursday 25th August** to nhsr.appeals@nhs.net. This email must include:
- 4.16.1 **the full name and email address for the person(s) responsible for the appeal;**
- 4.16.2 **a statement describing the nature and circumstances of the claim;**
- 4.16.3 **what the appellant sees as the appropriate outcome;**

4.16.4 **a copy of this letter, confirming that the process has been exhausted;**

4.16.5 **accompanying bundles of documents should be indexed and paginated. The appellant should not assume that NHS Resolution is familiar with particular systems and processes. Clear and specific reference should be made to any pages in the bundle upon which the appellant relies in support of a particular representation.**

4.17 If no appeal is made to NHS Resolution by the specified deadline, we will consider all payments made to be final and the matter closed.”

5 **The Dispute**

In an email dated 25 August 2022 and addressed to NHS Resolution, the Appellant, via its representative, appealed against the NHS BSA's decision. The grounds of appeal are stated below:

5.1 “Please accept this correspondence as notification of our client’s formal appeal against the decision of the NHSBSA not to reimburse all additional staffing costs incurred by the pharmacy during the COVID19 pandemic period from March 2020 – March 2021.

5.2 To respond to each of the requested appeal points specified by the NHSBSA:

5.3 ***The full name and email address for the person(s) responsible for the appeal;***

5.4 Please address all correspondence to [Brabners LLP].

5.5 ***A statement describing the nature and circumstances of the claim;***

5.6 This information is fully set out in our client’s original claim for reimbursement submitted to NHSBSA, which will be in your possession.

5.7 For reasons which have never been explained, the NHSBSA has not reimbursed £22,320 worth of additional staffing costs incurred by the pharmacy.

5.8 The Drug Tariff Determination ‘Drug Tariff Part VIA – COVID19 Claims and Recovery’ specifies that pharmacy contractors are entitled to recover all additional staffing costs, including staff costs for backfilling ill, shielding or self-isolating staff and staff costs for dealing with the increased demand in/time needed for the provision of NHS pharmaceutical services.

5.9 [Mr H], as one of the pharmacy’s directors and the person who did the additional work which has not been reimbursed, has already provided the NHSBSA with evidence of the considerable additional hours worked by him. This evidence includes bank account statements, the pharmacy alarm logs and [Mr H’s] timesheets. It is important to note that [Mr H] is a pharmacist of impeccable good character, who has at all times been in good standing with both NHSE and the GPhC. His written confirmation that he has genuinely done, and been paid for, the additional hours of work claimed should stand as credible and satisfactory evidence by itself, even if it were not supported by the evidence mentioned.

5.10 No explanation has been provided for the NHSBSA’s rejection of the pharmacy’s claim for reimbursement of the additional costs incurred. The pharmacy is entitled to this reimbursement under the terms of the Drug Tariff, hence the onus is on the NHSBSA to justify and explain any non-payment.

5.11 ***What the appellant sees as the appropriate outcome;***

- 5.12 In accordance with the Drug Tariff determination and assurances provided by NHSE, the Appellant wishes to be reimbursed for all additional staffing costs incurred during the March 2020 – March 2021 period.
- 5.13 ***A copy of this letter, confirming that the process has been exhausted;***
- 5.14 Please see NHS England's email below.
- 5.15 ***Accompanying bundles of documents should be indexed and paginated. The appellant should not assume that NHS Resolution is familiar with particular systems and processes. Clear and specific reference should be made to any pages in the bundle upon which the appellant relies in support of a particular representation.***
- 5.16 The NHSBSA Internal Review Panel has not provided any reasons whatsoever for refusing our client's claim for reimbursement of additional staffing costs. In the circumstances, our client's appeal is based on the same grounds of challenge submitted to the NHSBSA on 29 April 2022, rather than new material. Please find a copy of that correspondence attached for your ease of reference."

Following a request by NHS Resolution, for a copy of the information referred to in paragraph 5.9 above, the Appellant through its representative, provided the following information in an email dated 31 August 2022:

- 5.17 "I attach the following key documents from my client's original claim to NHS BSA:
- 5.17.1 Note from director explaining additional staff costs claimed
 - 5.17.2 Letter from Albert Goodman Accountants dated 27 April 2022
 - 5.17.3 Director timesheet showing total cost of £44640 (half of which apportioned to and claimed by FL223)
 - 5.17.4 Alarm log from pharmacy showing director's arrival and departure times."
- Note from Director explaining additional staff costs claimed which stated:
- 5.18 "Additional Staff Costs related to COVID 19
- 5.19 Our claim falls into five categories:
- 5.19.1 Cost of additional members of staff.
 - 5.19.2 Cost of staff reassigned from other roles within the business.
 - 5.19.3 Additional payroll costs.
 - 5.19.4 Cost of management time.
 - 5.19.5 Cost of locum backfill for management & additional pharmacist capacity.
- 5.20 We have submitted information from our payroll records for categories 1 — 3. This is taken directly from information submitted to our external payroll provider (Albert Goodman LLP). This is the most accurate and transparent information that we can provide as the payroll reports normally include a total number of hours paid, and do not necessarily separate overtime out on the payroll system.
- 5.21 With respect to the reassignment of staff within the business, this includes members of staff who normally support non-NHS functions and activities of the business. An

estimate of the amount of time spent on COVID related activities has been included. Where members of staff were furloughed at different times in the pandemic response these have not been included.

- 5.22 To calculate the cost of management time to respond to the pandemic we have used a composite of our alarm logs, work rotas, RP records and a robust estimate of time spent outside of normal hours working from home. This estimate is conservative and reflects the cost of responding to the pandemic only, not for other business related activities. Additional locum pharmacists were employed to provide additional management capacity and a proportion of the overall cost has been included as part of our claim. We also had to buy in additional management support from an external agency to help meet the changing needs of the NHS and patients, we have claimed a proportion of this cost.
- 5.23 Our business has completely re-tooled to meet the needs of the NHS, with huge impacts on business as usual as it now takes longer to handle patient queries such as answering the phones. Since installing a new phone system to cope with the call volumes generated by COVID, we were able to extract data from the system to show that more than 21,000 phone calls were received in a 2 month period between May — July 2020 (chart attached). The cost of this additional workload is c£45,000 but we have not claimed this amount, opting to claim a proportion of some staff members time.”

6 Summary of Representations

This is a summary of representations received by NHS Resolution following the appeal.

6.1 The NHS BSA stated:

- 6.1.1 “As detailed in the NHSBSA’s final determination email (**(1.4.22) Reimbursement for Covid 19 Costs - NHSBSA Final Determination FL223.msg**), an outstanding amount totalling £22,320.00 from Abbey Pharmacy’s claim remains unpaid due to a lack of suitable evidence.
- 6.1.2 Based on correspondence with the contractor and the evidence verified by the NHSBSA to date for the pharmacy, the outstanding amount appears to be related to the director’s costs that were claimed.
- 6.1.3 Evidence provided to the NHSBSA for these costs was an alarm log (**Alarm Log.pdf**), a timesheet (**Director Timesheet – [MH].pdf**) and a letter from an accountant (**4373222-2 (NHS letter).pdf**).
- 6.1.4 The alarm log does not present enough detail to determine who was present at the pharmacy each day and for what duration.
- 6.1.5 The timesheet does not provide sufficient evidence to verify the time worked. In comparison with the alarm log, there are days which [Mr H] has stated hours were worked but their name does not appear on the alarm log e.g. 04/03/2020.
- 6.1.6 The accountant’s letter does not confirm that payment was made, or that the costs were added as a liability for the company for the additional hours worked.
- 6.1.7 In the Drug Tariff Determination which provided details of this service (**Drug Tariff Part VIA - Covid19 claims and recovery.pdf**), alarm logs and timesheets are not listed as acceptable evidence in Table 1 for ‘additional staff costs due to COVID-19’.
- 6.1.8 In the representation provided, on behalf of the contractor, by [Brabners LLP] it is stated that: “His written confirmation that he has genuinely done, and been paid for, the additional hours of work claimed should stand as credible and satisfactory evidence by itself...”

- 6.1.9 Again, a written confirmation is not listed as acceptable evidence in the Drug Tariff.
- 6.1.10 It is the NHSBSA's determination that the evidence provided by the contractor at Abbey Pharmacy is not sufficient both to understand how the sum of the costs was determined, or to verify that the costs claimed were COVID-19 costs. Therefore the costs are not suitable for reimbursement under this scheme.
- 6.1.11 An independent internal review panel, comprised of colleagues with no involvement in the handling of the claims by pharmacy contractors from both the NHSBSA and DHSC, is also in agreement with the NHSBSA's determination."

The NHS BSA's representations also included:

- 6.1.12 A copy of the decision as referred to in paragraph 3 above;
- 6.1.13 A copy of the alarm log as referred to in paragraph 5.17.4 above;
- 6.1.14 The Director timesheet as referred to in paragraph 5.17.3 above;
- 6.1.15 The letter from Albert Goodman Chartered Accountants which is set out in paragraphs 4.8 – 4.12 above; and
- 6.1.16 Wording that appears to have been taken from the Drug Tariff on reimbursement of Covid-19 costs;

7 **Observations**

No observations were received by NHS Resolution in response to the representations received.

8 **Consideration**

- 8.1 Direction 2 of the Payment Disputes Directions directs me to determine a dispute in respect of a decision of NHS England pursuant to a provision of the Drug Tariff not to pay a claim for payment that is made by an NHS pharmacist in respect of Covid-19 related costs.
- 8.2 The Payment Disputes Directions do not define Covid-19 related costs. I refer later in this determination to the section of the Drug Tariff where provisions related to reimbursement of Covid-19 related costs incurred by pharmacy contractors are set out.
- 8.3 Direction 4 of the Payment Disputes Directions requires me to determine the appeal by dismissing it if:
 - 8.3.1 NHS England has advised that an appeal must be brought within 30 days of the date the Appellant was notified of NHS England's decision and the appeal was not brought within that timescale; or
 - 8.3.2 I am of the opinion that notification of the appeal contains no valid grounds of appeal (for example because it amounts to a challenge to the legality or reasonableness of the Payment Disputes Directions, the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (the "Regulations") or the Drug Tariff).
- 8.4 I consider that I am not required to dismiss the appeal pursuant to Direction 4 as:
 - 8.4.1 the NHS BSA advised the Appellant of a 30 days' timescale for appeal and the appeal was received within that timescale; and

8.4.2 the grounds of the appeal are valid.

8.5 Direction 6 of the Payment Disputes Directions states that I may determine the appeal without hearing any oral representations but if an appellant asks to make oral representations a hearing must be arranged unless I am satisfied that:

8.5.1 a hearing is unnecessary; or

8.5.2 I must dismiss the appeal by virtue of Direction 4.

8.6 The Appellant has not requested a hearing. On the basis of the information before me I have considered that it is unnecessary to hold an oral hearing.

8.7 I have before me the papers considered by the NHS BSA. I also have before me the responses to NHS Resolution’s own statutory consultations.

8.8 I have considered further the requirements relating to payment arrangements set out in the Drug Tariff.

8.9 The relevant provisions are set out in Part VIA of the Drug Tariff. They explain that claims must be submitted to the NHS BSA between 5 July and 15 August 2021 by completing and returning the claim form. No party has indicated that the Appellant’s claim was not submitted in accordance with the timescales and claim form.

8.10 The following table is Table 1 as set out in Part VIA of the Drug Tariff:

| | Category of costs | Includes | Excludes | Acceptable evidence |
|---|--|--|---|---|
| 1 | Additional staff costs due to Covid-19 | <ul style="list-style-type: none"> - Additional staff costs for backfilling staff that were ill, shielding or self-isolating due to Covid-19 - Additional staff costs to deal with the increased demand in/ time needed for the provision of NHS pharmaceutical services | <ul style="list-style-type: none"> - Additional staff costs for regular (non- Covid-19 related) absences - Deferred annual leave - Staff costs for Bank Holiday openings (funded separately) | Includes: <ul style="list-style-type: none"> - Invoices for locums - Overtime paid for staff - Increased overall staff bill compared to previous years |
| 2 | Costs for making premises Covid-secure | <ul style="list-style-type: none"> - Costs for Covid-19 related cleaning/hygiene products - Costs for messaging and barriers - Costs exceeding £300 for adjusting premises to support social distancing | <ul style="list-style-type: none"> - PPE and hand sanitiser (provided/ funded separately) - - Costs up to £300 for adjusting premises to support social distancing (funded separately) | Includes: <ul style="list-style-type: none"> - Invoices/ receipts |

| | | | | |
|---|---|---|--|--|
| 3 | IT and communication costs to support remote working and virtual patient contact due to Covid-19) | <ul style="list-style-type: none"> - Hardware costs (e.g. phones, laptops, webcams) - Software costs (e.g. software licences) | | <p>Includes:</p> <ul style="list-style-type: none"> - Invoices/ receipts <p>Additional evidence is required to demonstrate that the costs are Covid-19 related, e.g. evidence of spend in previous years, justification that these are additional costs as a result of Covid-19</p> |
| 4 | Notified closures for infection control purposes (maximum 14 days) | <ul style="list-style-type: none"> - Notified closures for infection control purposes where all staff had to self-isolate - Notified closures for infection control purposes of pharmacies in health centres - | <ul style="list-style-type: none"> - Closures not notified to NSHE&I - Closures not for the purpose of infections control - Closures for business reasons - Closures exceeding 14 days | <p>Contractors are asked to specify the dates and number of days the pharmacy closed following notification of NHSE&I. Following confirmation from NHSE&I that the contractor notified the closure and that the closure is in scope, contractors will be paid according to paragraph 7d.</p> |

8.11 The following wording is set out in Part VIA under Table 1 above (the numbering is taken from the October 2022 version of the Drug Tariff):

“8.8 Each claim must:

(a) Confirm that it is for Covid-19 related costs in the four categories in table 1, incurred between 1 March 2020 and 31 March 2021 for the delivery of NHS pharmaceutical services.

(b) Specify the amount claimed in each category of costs (categories 1 to 3) and the evidence available to support the claim.

(c) Confirm that the documentation to evidence the value of the claim will be made available to the NHSBSA on request within 5

working days upon receiving a request from the NHSBSA.

(d) Where a claim is made for closures agreed by NHSE&I, confirm that the closure was agreed with NHSE&I, the period of the closure, the number of days the pharmacy was closed and the name of the NHS authority that was notified of the closure. If confirmed by NHSE&I that the closure was notified and is in scope, contractors will be paid their average daily fees in 2019/20 plus their average daily number of dispensed items in 2019/20 multiplied by £0.77 to reflect medicine margin for each day they were closed between 1 March 2020 and 31 March 2021 for a maximum of 14 days.

(e) Be submitted by 15 August 2021.

8.9 Claims that do not meet the criteria set out in paragraph 8.8 will be rejected.

8.10 Claims will be reviewed before or following payment. Where the evidence submitted does not support the claim, the payment will either be reduced before it is made to the contractor or, if payment has taken place, the over-payment will be recovered from the contractor's next monthly payment. If a contractor does not agree with the reduction of their payment or the recovery of the difference between the amount claimed and the amount paid, then they should notify the NHSBSA that they want the amount of the claim that has not been assessed as payable, or any part of that amount, to be the subject of an independent internal review within 30 days from the date of receipt of the letter from the NHSBSA setting out the review process. A contractor should specify in the notification why they disagree with the amount of the claim not payable, including why they believe that the evidence provided supports a higher claim and/or why they believe any rejected costs are in scope of the claims process. A contractor may provide additional evidence to support the independent review. The independent review will only look at the part of the claim that the contractor states is in dispute. The NHSBSA will inform the contractor of the outcome of the independent review and will confirm the additional amount of the claim payable following independent review. If following independent review, a contractor still disagrees with the amount of the claim payable then they can appeal the disputed amount to the Secretary of State under section 9(6) of the NHS Act 2006 within 30 days from the date of receipt of the letter from the NHSBSA informing the contractor of the outcome of the independent review and setting out the appeal process.

8.11 Claims reviewed before payment in full will be made will include:

(a) Claims exceeding one third of annual NHS income in 2020/21 for contractors who opened after March 2019 or an average of 2019/20 and 2020/21 income for contractors who opened before March 2019;

(b) Claims where initial review identifies a risk of a potential error that could result in a significant overpayment.

Partial payment to contractors whose claims fall under categories 8.11a and 8.11b will be made to ensure the recovery of Covid-19 advance during the verification of these claims does not unreasonably affect contractor's cashflow.

Contractors will not automatically receive the amount they have claimed. Once the total number of claims is in, HM Treasury will be asked to determine the funding envelope for the claims. If the envelope is the same as the amount claimed, the claims will be paid in full. If some form of capping mechanism proves necessary, then this will be set out in a Drug Tariff determination that will be published in September."

8.12 I note that I have not been provided with a copy of the Appellant's original claim. I have been provided with the decision of the NHS BSA and the spreadsheet appended to

that decision. I find the spreadsheet difficult to understand for two reasons. The first is that it appears to list items of evidence, namely file names of documents. There is no explanation of those documents, aside from their titles. A number of the documents appear to be invoices (judging from their titles), particularly in the first table set out at paragraph 3.5 of this determination. In the second table, there are also references to alarm logs, timesheets and screenshots. All lack any explanation as to what the documents contain and to which category of costs they relate.

- 8.13 The second reason that the spreadsheet is difficult to understand is that it is stated in the NHS BSA's letter to be a breakdown of the assessed information. It, however, only appears to list the evidence that was not accepted. There is no reference to any other evidence that was accepted, which I consider must have been the case because of the original £117,477.96 claimed, the NHS BSA has paid £95,157.96. Furthermore, the comments alongside each piece of evidence as listed in the "reason for rejection" column state only "Out of scope of the service", "Evidence unacceptable Duplicate" or simply "Evidence unacceptable", there is no other explanation.
- 8.14 I note that the NHS BSA's original decision indicates that the Appellant's claim included:
- 8.14.1 additional COVID-19 staff costs;
- 8.14.2 costs for COVID- secure premises; and
- 8.14.3 additional COVID-19 IT and communication costs.
- 8.15 I note that the appeal relates only to additional Covid-19 staff costs. The table in the NHS BSA's original decision letter indicates that the elements of the claim relating to the other two categories were paid in full.
- 8.16 The Appellant originally claimed £102,895.21 in respect of additional staff costs. The NHS BSA indicates that it has paid £80,575.21 which leaves £22,320. The Appellant's appeal letter states that it is appealing the non-payment of this amount.
- 8.17 I note that the NHS BSA's original decision letter does not explain what evidence it accepted from the Appellant in relation to the £80,575.21 of additional staffing costs that it has paid to date. There is no explanation as to why it accepted that evidence and to what type of staffing costs it related.
- 8.18 In the Appellant's request for an internal review of the NHS BSA's original decision, the Appellant refers to the £22,320 as costs "*associated with the management response to the pandemic which relate to our Directors*".
- 8.19 In the Appellant's appeal, it indicates that it is relying on the same grounds of challenge that it submitted to the NHS BSA on 29 April 2022 (i.e. the request for an internal review). On request by NHS Resolution, the Appellant provided further information. The Appellant stated that it was attaching the following documents to its appeal:
- 8.19.1 "*A note from director explaining additional staff costs claimed;*
- 8.19.2 *Letter from Albert Goodman Accountants dated 27 April 2022;*
- 8.19.3 *Director timesheet showing total cost of £44,640 (half of which apportioned to and claimed by FL223); and*
- 8.19.4 *Alarm log from pharmacy showing director's arrival and departure times.*"
- 8.20 The note from the Director indicates that its claim for additional staffing costs fell into five categories:

- 8.20.1 *“Cost of additional members of staff.*
- 8.20.2 *Cost of staff reassigned from other roles within the business.*
- 8.20.3 *Additional payroll costs.*
- 8.20.4 *Cost of management time.*
- 8.20.5 *Cost of locum backfill for management & additional pharmacist capacity.”*
- 8.21 The Appellant goes on to say that for categories 1 to 3 evidence was submitted from its payroll records.
- 8.22 It appears that, if the Appellant is appealing in respect of the £22,320 that was not paid for additional staff costs and that this is the cost associated with the management response, then it is only categories 4 and 5 above that are unpaid, i.e. that the NHS BSA has not accepted evidence in relation to the costs of management time and the cost of locum backfill for management and additional pharmacist capacity. It is important that the parties confirm that this is indeed the case and I invite the parties to confirm this or explain if this assumption is not correct. It is not, for example, expressly stated anywhere if the £22,320 includes category 5 above – cost of locum backfill for management and additional pharmacist capacity. I need this confirmed as it impacts on my assessment of whether the evidence being relied upon is intended to support categories 4 and 5 or just category 4.
- 8.23 On the basis that the £22,320 is the costs for categories 4 and 5 above, I go on to consider in more detail the evidence provided by the Appellant.
- 8.24 It is clear from the wording in Part VIA of the Drug Tariff that claims must be evidenced. If there is no evidence, then the NHS BSA should not reimburse.
- 8.25 I must make the comment at this point that Table 1 does not expressly say what documentation does and what does not constitute acceptable evidence of additional staff costs. There is reference to “acceptable evidence” but this also states “including” which to me is not clear whether the intention was to limit acceptable to the matters listed or whether other forms of evidence could also be acceptable. Looking at the actual list of items that are included as acceptable evidence leads me to consider the latter. I set out why in the paragraphs below.
- 8.26 There is reference to locum invoices as acceptable evidence. I consider that it is generally expected that a locum would present the pharmacy with a formal invoice stating the date and duration of work and the relevant amount. This is relatively objective evidence of additional staff costs paid by a pharmacy.
- 8.27 There is also reference to “overtime paid for staff” but there is no indication as to the form that evidence needs to take. How do they evidence overtime for staff? One way could be in the form of copies of payslips or perhaps print-outs from HR/finance/PAYE software showing that staff members were paid more than in previous months as a result of additional hours worked. This is not expressly stated in Table 1 which leads me to conclude that evidence other than copies of payslips may be acceptable.
- 8.28 Similarly “Increased overall staff bill compared to previous years” is also listed as acceptable evidence in Table 1 but with no indication of the form of documentation. I would expect a certain amount of formality to this information, e.g. the pharmacy’s accounts across the relevant time periods. But again, this could be evidenced in different ways.
- 8.29 Given the language used, I consider that Table 1 leaves a fair amount of discretion to a pharmacy as to how it evidences these matters. Whether a form of documentation is

or is not acceptable will therefore need to be considered from a common-sense, reasonable perspective.

- 8.30 I also make the point that this is public money. Payments should only be made where it is appropriate to do so. I therefore consider that, as an overarching principle in relation to the claims for reimbursement of additional staff, if the evidence provided is of a form, type and nature that reasonably satisfies me that additional staffing costs of a kind and nature listed in Table 1 were incurred and the amount is reasonable taking into account the evidence, then I consider that the claim should be reimbursed.
- 8.31 It must be accepted by a pharmacy that if additional staff are engaged and the pharmacy seeks reimbursement in respect of those additional staff, then the extent of reimbursement will depend on the extent, type and nature of the evidence. The stronger and more cogent the evidence, the higher the likelihood that the reimbursement claim will be successful.
- 8.32 From a common sense perspective, if it can be shown that a person is employed by a pharmacy as additional staff as a result of Covid-19 and receives a payslip each month which indicates the dates of work, the duration of work or number of hours of work, what payment of salary is made in respect of that work, etc, then provision of copies of such payslips will likely constitute acceptable evidence of the pharmacy incurring additional staff costs.
- 8.33 The reference in Table 1 to acceptable evidence including invoices for a locum means, in my view, that arrangements for which there would not be a payslip, are possible. I consider that it would be usual for a locum's invoice to detail the days and times or hours which the locum worked and the financial amount for that work.
- 8.34 I would note at this point that the Appellant states in its request for an internal review that other contractors have had claims paid including Director costs with less evidence than the Appellant has supplied but the Appellant has not provided any evidence of paid claims in this regard.
- 8.35 In its further information, the Appellant refers to the evidence provided – “*a composite of our alarm logs, work rotas, RP records and a robust estimate of time spent outside of normal hours working from home*”. It seems that this is intended to refer to category 4 above – cost of management time. I will refer to this evidence further below.
- 8.36 The Appellant states “*Additional locum pharmacists were employed to provide additional management capacity and a proportion of the overall cost has been included as part of our claim. We also had to buy in additional management support from an external agency to help meet the changing needs of the NHS and patients, we have claimed a proportion of this cost*”. This relates to category 5. As previously highlighted it is not clear if the £22,320 includes these costs. I assume it does otherwise it would not be referenced by the Appellant. On the basis that it is included, I would make the point that invoices would be expected to be provided to evidence costs incurred in engaging locums.
- 8.37 I have mentioned previously that the spreadsheet in the NHS BSA's original decision refers to invoices being “out of scope for this service” or evidence unacceptable” but, to reiterate, it is not clear if those invoices are related to the costs of engaging locums for management support. If, for example, the NHS BSA considered that additional management costs were not in scope of the service, then it may well decide that invoices for these costs are out of scope. The NHS BSA does not state that it views management costs as not being in scope and so I consider this point needs to be clarified before I am able to make a final determination. If there are no invoices for costs paid to locums, then I would want a credible explanation why not from the Appellant.
- 8.38 I return to category 3 and the costs of management time. I will look at these in turn. As indicated above, the evidence consists of:

- 8.38.1 alarm logs;
 - 8.38.2 a Director timesheet;
 - 8.38.3 a note from the Director explaining the additional staff costs claimed; and
 - 8.38.4 a letter from Accountants.
- 8.39 The alarm logs are in the form of print-outs that set out for each day certain times stated to be “open” and “closed”. I assume “open” is the time the alarm was turned off in the morning when the pharmacy opened and turned on in the afternoon/evening when the pharmacy was closed. There appears to be open and closed times for almost every day between 2 March 2020 and 31 March 2021 except Sundays. For each entry, next to the time and the “open” or “closed”, is a name. The names include Mike, Glenda, Janna, Liz, Bekky, Cat, Lauren, Katrina and Josie. There is no explanation of these names.
- 8.40 In its request for an internal review, the Appellant indicates that the Director’s timesheet was produced by detailed examination of multiple sources including email records, diaries and alarm logs and is a true reflection of the management costs. I therefore consider that the alarm logs have been provided to partially support the timesheet.
- 8.41 I note the NHS BSA’s view that the alarm logs do not present enough detail to determine who was present at the pharmacy each day and for what duration.
- 8.42 I agree with the NHS BSA that alarm logs on their own are not enough to reasonably satisfy me that certain amounts were incurred by the pharmacy in relation to staffing costs but I do consider that it is reasonable to consider that they indicate that the pharmacy was operating, whether by being open to the public or inhabited by someone doing pharmacy related work, at those times.
- 8.43 It would be helpful to me for the Appellant to indicate the usual times the pharmacy would be inhabited, outside of the claim period, and so the “open” and “closed” alarm times, how the long list of alarm logs provided evidences an increase in the duration the pharmacy was open each day during the claim period and to whom the names listed on the alarm logs relate.
- 8.44 The Director timesheet consists of pages of dates (seemingly every day) between 1 March 2020 and 31 March 2021 and next to each date a number headed “hours”. The hours number is between 0 and 10. There is also a list of dates under the heading “Weekly total”, e.g. 2 March 2020, 9 March 2020, 16 March 2020, etc. There is a number next to each headed “hours”. I assume this gives the number of hours each week. These range from low single figures to 29. There is then a “Total” number – 992, two numbers next to “Weekly average – 17.7142857 and 8.85714286. There is also a financial value next to the word “Cost” - £44,640. The appeal indicates that this cost is split equally between two pharmacies run by the Appellant.
- 8.45 In the note from the Director, the Appellant states that this is “*a robust estimate of time spent outside of normal hours working from home. This estimate is conservative and reflects the cost of responding to the pandemic only, not for other business related activities.*”
- 8.46 The NHS BSA say, in relation to the timesheet, “*the timesheet does not provide sufficient evidence to verify the time worked. In comparison with the alarm log, there are days which [Mr H] has stated hours were worked but their name does not appear on the alarm log e.g. 04/03/2020.*”
- 8.47 I note that the NHS BSA considers that the alarm logs do not always indicate that the Director’s name is listed on the days that the timesheet indicates that they worked. I consider that if it can be shown that the Director did operate the alarm, then it is

reasonable to consider that the Director was in the pharmacy at those times. I agree with the NHS BSA that for the days that this is not the case, the alarm logs do not support the timesheet but that this does not mean the Director was not carrying out the activity claimed. In other words, I consider it is a lack of supporting information rather than evidence that the Director was not working.

- 8.48 I note that the NHS BSA indicates the timesheet does not provide sufficient evidence to verify the time worked. I consider it correct that the timesheet states a number of hours rather than the actual times of work. The latter would be helpful in considering the evidence in the round. I note however, that the NHS BSA has not indicated this before to the Appellant and so the Appellant has not been provided with an opportunity to provide this information in the internal review or in its appeal letter. I do note however that on receipt of the NHS BSA's comments on the appeal, there was an opportunity for the Appellant to respond to these comments but it has chosen not to.
- 8.49 No explanation has therefore been given on whether it is or is not possible to provide a timesheet with the days and times of work. I indicated earlier in this determination that the extent of reimbursement will depend on the extent, type and nature of the evidence. The stronger and more cogent the evidence, the higher the likelihood that the reimbursement claim will be successful. The opposite is true as well – the less strong the evidence, the higher the likelihood that the claim will not be successful. A timesheet that simply lists the number of hours a day without more information does not appear to be particularly strong evidence.
- 8.50 The financial value attributed to the hours on the timesheet appears to have been based on a rate of £45 per hour (calculated by dividing the £44,640 value by the total number of hours - 992). The Appellant, in its request for an internal review, indicates that this includes on-costs such as PAYE and pensions liability and that an hourly rate that includes these is reasonable. The Appellant also indicates that it has compared the hourly rate with NHS Agenda for Change pay bands to sense-check the claim. The letter from the Accountants indicates it is equivalent to NHS Agenda for Change pay band 8d. The NHS BSA does not comment on this.
- 8.51 The note from the Director is set out earlier in this determination from paragraphs 5.18 to 5.23. I note the reference to the management time being a composite of alarm logs, work rotas, RP records and a robust estimate of time spent outside of normal hours working from home. I have already indicated that the note indicates that the estimate of management time is conservative and reflects the cost of responding to the pandemic only, not for other business related activities. The note also indicates that it now takes longer to handle patient queries such as answering the phones. It is not entirely clear why – the note refers to the business being re-tooled to meet the needs of the NHS – but it is not clear what this actually means. The note refers to taking 21,000 calls between May and July 2020 and a chart shows the cumulative rise of the number of calls within this period. The note states that the cost of this “additional workload” is circa £45,000 but that the Appellant has not claimed this amount, opting to “*claim a proportion of some staff members time.*”
- 8.52 The note provides some further information relating to the management time but I find the comments on this in the Appellant's request for an internal review more explanatory – see paragraphs 4.1 to 4.6 of this determination. This indicates the nature of the work that the Appellant indicates comprised the management costs. It includes working as a pharmacist, checking prescriptions or answering professional queries, reading and replying to 7000 covid-related emails, attendance at NHS England webinars and meetings and adapting essential services to the changing needs and safety requirements of the NHS. An example given is adapting the pharmacy deliveries to ensure it remained safe while there was a quadrupling within a week.
- 8.53 The request for an internal review also raises a point which has not been addressed by the NHS BSA – that the NHS BSA does not have a strong understanding of the way SMEs work. The Appellant states that the cost of management for SMEs is

overwhelmingly attributed to directors of the company. The Appellant considers that the NHS BSA seem to think owner-directors should provide their considerable services for free and that the reimbursement process is at risk of being unfair to SMEs. The NHS BSA does not comment on this.

- 8.54 As indicated earlier, the Appellant claims that other pharmacies have had director management time reimbursed with less evidence. I would welcome any comment from the NHS BSA on this and whether the Appellant can evidence this.
- 8.55 The NHS BSA refers to certain types of evidence not being listed in the Drug Tariff but I do not consider that this is a reason to automatically argue that the evidence is unacceptable. As I indicated earlier in this determination, there is discretion for a pharmacy to provide different types of evidence. It is not clear to me what evidence would be acceptable where additional work is being carried out by owner-directors who presumably are not being paid a salary and are not invoicing the company for their time.
- 8.56 The Accountants letter is set out earlier in this determination. I note the figure in the letter is £22,302 rather than the £22,320 claimed by the Appellant but it does not appear that the Accountants calculated the amount by adding up various amounts as might be expected from accountants. The letter essentially gives the Accountants' view that the claim is for Covid-19 related costs within the categories set out in the Drug Tariff, that the hours claimed appear reasonable and that the hourly rate is appropriate for a senior pharmacist.
- 8.57 With all due respect to the Accountants, the letter does not state that the hours were actually performed. This is clearly outside the knowledge of the Accountants and they simply provide a view that the hours appear reasonable. The NHS BSA states that the letter does not confirm that payment was made, or that the costs were added as a liability for the company for the additional hours worked. I am not sure what the last part of the sentence means. I would welcome an explanation of this from the NHS BSA.
- 8.58 While the Accountants letter provides an additional piece of support for the Appellant's claim, in my view, it does not go to the central issue – objective evidence that the hours claimed were worked for the purposes for which reimbursement can be claimed pursuant to the Drug Tariff.
- 8.59 I have considered whether it is appropriate for the parties to be provided with a further opportunity to provide more comments. I note that the Appellant had the opportunity to provide observations on the NHS BSA's comments but did not do so. I would not usually enable further comments in this situation but there are certain factors that lead me to consider it reasonable to enable further comments.
- 8.60 The NHS BSA did not provide to the Appellant enough information about its original decision to enable the Appellant to clearly understand the reasons why certain elements of the claim were successful and others were not. Furthermore, in the notification of the internal review decision, the NHS BSA does not provide any explanation as to why the evidence is considered unacceptable.
- 8.61 I consider that the Appellant has not had the opportunity prior to the appeal process to understand the reasoning of the NHS BSA and to respond to that reasoning.
- 8.62 I consider that the NHS BSA should have provided full reasons why it deemed any evidence unacceptable when it made its original decision. This would have enabled the Appellant to respond to the reasons as part of the internal review. The internal review decision should also have provided full reasons that the Appellant could then have challenged via the appeal process. There should therefore have been two opportunities before the appeal process for the Appellant to consider the NHS BSA's full reasons for refusal.

- 8.63 I therefore give both parties additional time to comment on the points I have raised in this determination about the claim and the evidence. On receipt of any additional comments provided in the timescales I set out below, I will consider whether it is appropriate to provide the other party with a chance to provide final observations on those comments.
- 8.64 I will then make a final determination on all aspects of this appeal which I have not already finally determined in this determination.
- 8.65 I note that neither party has submitted a claim for interest with regard to this dispute so I make a final determination that no interest is payable on any sums determined to be paid from one party to another in this appeal.

9 Decision

- 9.1 I have had regard to the Payment Dispute Directions which provide me with three options:
- 9.1.1 dismiss the appeal and confirm the decision;
 - 9.1.2 substitute for the decision any decision that NHS England could have taken when it took the decision; or
 - 9.1.3 quash the decision, with or without remitting the matter to NHS England for it to take the decision again subject to such directions as NHS Resolution considers appropriate.
- 9.2 I consider that paragraph 7(1) of Schedule 3 of the Regulations provides discretion for me to determine this appeal in such manner (including with regard to procedures) as I see fit. I therefore substitute the decision of the NHS BSA, acting on behalf of NHS England, to refuse the claim with the decision to make final determinations on certain aspects of the claim and to provide the parties with a further opportunity to provide comments on the appeal.
- 9.3 For clarity I set out in the paragraphs below my expectations of each party in relation to the further opportunity to provide comments.
- 9.4 In respect of the NHS BSA:
- 9.4.1 it should provide a clear explanation of the additional staff costs in respect of which it has reimbursed the Appellant and the evidence for those costs that it considered acceptable;
 - 9.4.2 it should confirm whether or not it considers that additional management costs are in scope for reimbursement;
 - 9.4.3 it should confirm whether it has paid claims for increased management time carried out by directors where those claims have been supported with less evidence than the Appellant has supplied;
 - 9.4.4 it should consider whether, for a director of a company running a pharmacy who is indicating that they worked overtime but is not receiving a salary with payslips or invoicing the company for their costs, there is a form of evidence that would satisfy the NHS BSA;
 - 9.4.5 it should consider whether any such claims have been paid and what evidence satisfied the NHS BSA in those cases;

- 9.4.6 it should comment on whether £45 per hour is an appropriate rate for reimbursement for additional management costs if there were no concerns with the evidence;
 - 9.4.7 it should clarify what it means when it states that the Accountants letter does not confirm that the costs were added as a liability for the company for the additional hours worked; and
 - 9.4.8 it should provide any other comments it considers appropriate bearing in mind the final determinations and other comments I make in this determination.
- 9.5 In respect of the Appellant:
- 9.5.1 whether the £22,320 includes the cost of locum backfill for management and additional pharmacist capacity. If so, whether any invoices for those locums are available and if not, why not;
 - 9.5.2 whether it can evidence that other contractors have had claims paid including director costs with less evidence than the Appellant has supplied;
 - 9.5.3 it should indicate the usual times the pharmacy would be inhabited, outside of the claim period, i.e. the usual “open” and “closed” alarm times, how the long list of alarm logs provided evidences an increase in the duration the pharmacy was open each day during the claim period and to whom the names listed on the alarm logs relate;
 - 9.5.4 it should consider whether it is or is not possible to provide a timesheet with the days and times of work;
 - 9.5.5 it should clarify the meaning of “the business being re-tooled to meet the needs of the NHS”;
 - 9.5.6 it should consider whether there is any additional evidence it can provide to support its claim; and
 - 9.5.7 it should provide any other comments it considers appropriate bearing in mind the other comments in this determination, particularly in respect of the type and nature of the evidence provided.
- 9.6 I am setting a strict deadline for receipt of additional comments which is 21 days (not working days) from the date of this determination.
- 9.7 I will not consider any information provided outside the timescale set out above.
- 9.8 The parties should also note that I will not take into account any comments made in relation to any matters that I have indicated are finally determined in this determination.
- 9.9 On receipt of any additional comments provided in the timescales I set out above, I will consider whether it is appropriate to provide the other party with a chance to provide final observations on those comments.
- 9.10 I will then make a final determination on any aspects of this appeal which I have not already finally determined.