

24 November 2022

FILE REF: SHA/25763

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

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

DECISION MAKING BODY: NHS ENGLAND
(NORTH WEST (CHESHIRE &
MERSEYSIDE) AREA TEAM)

PHARMACIST: DAY LEWIS PLC (“the Appellant”)

PREMISES: DAY LEWIS PLC
11 MOLYNEUX WAY
OLD ROAN
LIVERPOOL
L10 2JA

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:

Day Lewis plc
NHS England – North West (Cheshire & Merseyside)

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**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 12 noon to 2pm on Sunday 25 December 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 12 noon to 2pm on Sunday 25 December 2022, a day on which it would otherwise be closed.

Information provided by parties

- 2.8 In a letter to the Appellant dated 23 September 2022, NHS England stated

“Further to the letter of 9th August 2022 I enclose an updated version of the directed rota service for Christmas Day 2022. Please ensure that you check the attached sheet for the details of your direction.

NHS England North West (Cheshire & Merseyside) acknowledges that your pharmacy is directed to open on a Bank Holiday. NHS England North West (Cheshire & Merseyside) is obliged to provide a directed rota service in order to ensure adequate pharmaceutical provision is provided in a given area on days when many contractors will choose to close.

NHS England North West (Cheshire & Merseyside) does write out to all contractors before producing a directed rota to ask whether anyone would like to volunteer, as we would much rather direct a contractor who wants to open where we have the option. Unfortunately, we have not received a volunteer within your locality. Where it is deemed necessary to direct a rota due to a lack of volunteers, pharmacies are directed in rotation for each bank holiday within localities as agreed with the Local Pharmaceutical Committee (LPC).

In seeking to ensure that pharmaceutical services are provided on such days and at such times as are necessary to meet the needs of people in its area or other likely users of the pharmacy premises, NHS England North West (Cheshire & Merseyside) has followed the Regulations accordingly by directing pharmacies to open. The consideration as to whether to direct a pharmacy to open on Christmas Day 2022 involved a review of services available to patients on this date in this locality.

NHS England North West (Cheshire & Merseyside) considered the local Pharmaceutical Needs Assessment (PNA) to understand the needs of the local population and has taken into consideration the provision and availability of other health care services e.g. GP primary care provision and Out of Hours at the time of the directed rota. The PNAs reference that if NHS England consider there is a need for pharmacy services in an area on any specific day, that we can direct a rota, as such it is established that the Health and Wellbeing Board expects rota provision to be enacted by NHS England North West (Cheshire & Merseyside) at times where it has been established that there is not adequate provision of pharmaceutical services identified. Some commissioned pharmaceutical services for example Community Pharmacy Consultation Service are of their nature a time bound services, which does not take in to account a lack of provision over bank holidays.

NHS England North West (Cheshire & Merseyside) has assessed the need in your locality for the provision of pharmaceutical services. NHS England North West (Cheshire & Merseyside) had regard to location and opening of pharmacies in your locality, the pharmacy needs assessment and responses to consultation from the LPCs. As a result of this assessment it was determined that direction is required to provide adequate pharmaceutical services at the times stated in the attached directed rota. The directed rota is organised using a fair mechanism ensuring that all pharmacies take a turn.

Your pharmacy is directed in line with NHS Pharmaceutical and Local Pharmaceutical services Regulations (2013) (as amended), Schedule 4, Part 3, Regulation 24, to open as detailed on the attached sheet.

You will receive £240 per hour. You will be requested to either submit your responsible pharmacist log or complete a claim form within 28 days of fulfilling your rota duties, to claim your payment.

Your opening hours will be shared with other NHS organisations such as CCGs, NHS 111, hospitals and GPs for signposting patients. It is really important that NHS 111 has this information in order to direct patients to pharmaceutical services, so please can you ensure that you update your DoS profile using the DoS correction tool. Updating your NHS Choices profile is also advised.

This notification can be appealed, within 30 days of the date above. This is in accordance with Schedule 4, Part 3, Regulation 25(7) the NHS (Pharmaceutical Services & Local Pharmaceutical Services) Regulations 2013 (as amended). The appeal must be sent in writing to:

NHS Resolution, Primary Care Appeals service, 1 Trevelyan Square, Boar Lane, Leeds, LS1 6AE, Tel: 0113 866 5500, Fax: 020 7821 0029 Email: appeals@resolution.nhs.uk

A copy of this letter has been sent via 1st class post and via email.”

2.9 In an email to NHS Resolution dated 26 September 2022 the Appellant stated:

“We are wanting to appeal against opening on Christmas day. We already have staff who are away over Christmas and we are struggling to find anyone to be able to cover the 2 hours. We would really appreciate it if you could reconsider the opening hours.”

2.10 In a letter to NHS Resolution dated 25 October 2022 NHS England stated:

“Thank you for your email notifying us that Day Lewis Pharmacy has appealed against NHS England’s decision to direct their pharmacy to open on Christmas Day 2022 (25th December 2022).

We note that Day Lewis have stated that they are unable to find staff to open on Christmas Day 2022, which is why they wish to appeal this direction. NHS England under Schedule 4, Part 3, paragraph 25(2)(b) of the NHS (Pharmaceutical Services and Local Pharmaceutical Services) Regulations 2013 (as amended) has the ability to direct a pharmacy to open where a need is determined. It is the contractor's responsibility to find a way to ensure this happens. The terms and conditions of staffing contracts and annual leave arrangements should be such that this does not restrict opening and will facilitate opening of the pharmacies where they are directed to open in order to provide pharmaceutical services for the needs of the population at key times where, under routine contract arrangements, this provision is deemed necessary, e.g. public and statutory holidays. The contractors staffing arrangements are deemed to be fully under the control of the contractor.

NHS England North West does write out to all contractors before producing a directed rota to ask whether anyone would like to volunteer to provide pharmaceutical service for any period whereby we believe that we may need to direct a rota. This allows us to direct a contractor who wants to open where we have this option or for an SLA to be used to support extended opening where appropriate. NHS England North West did not receive any volunteers within the Aintree, Fazakerley and Melling area for this specific day – 25th December 2022.

The consideration as to whether to direct a pharmacy to open on Christmas Day involved contractors included in the pharmaceutical list in the locality (in this case Aintree, Fazakerley and Melling). In seeking to ensure that pharmaceutical services are provided on such days and at such times as are necessary to meet the needs of people in its area or other likely users of the pharmacy premises, in this case to ensure sufficient cover arrangements are in place on Christmas Day, NHS England North West (Cheshire & Merseyside) has followed processes accordingly by directing pharmacies to open.

Where it is deemed necessary to direct a rota due to a lack of volunteers, pharmacies are directed in rotation for each bank holiday within localities as agreed with the Local Pharmaceutical Committee (LPC). NHS England North West (Cheshire & Merseyside) considered the local Pharmaceutical Needs Assessment to understand the needs of the local population and has taken into consideration the provision and availability of other health care services e.g. GP primary care provision and Out of Hours at the time of the directed rota.

NHS England North West (Cheshire & Merseyside) has chosen to give Day Lewis Pharmacy over four months' notice of the requirement to open on this date in order that the contractor has sufficient time to prepare accordingly. NHS England North West (Cheshire & Merseyside) had regard to all representations including information as to whether other pharmacies may or may not be able to provide cover before moving to direction. NHS England North West (Cheshire & Merseyside) was not in a position to be assured that adequate levels of pharmaceutical service provision, as agreed with the LPCs with regards the needs of the population, would be in place in this locality without moving to direction.

It should also be noted that Day Lewis were given the opportunity to submit representations to NHS England North West (Cheshire & Merseyside) within 30 days of the date of our initial letter advising them that they are being considered for a direction (i.e. by 8th September 2022). Day Lewis did not submit any representation during this period; therefore NHS England North West (Cheshire & Merseyside) moved to full direction on 23rd September 2022.

For the reasons provided above, NHS England North West (Cheshire & Merseyside) maintains its decision to issue this direction to Day Lewis Pharmacy and requests that the appeal be rejected.

I have attached for your information:

Email sent to all contractors asking for volunteers to open on Bank Holidays

Email containing a letter advising contractors that they were being considered for direction on Christmas Day 2022 (25th December 2022) and inviting them to submit representation.

Email containing a letter directing the contractor to open on Christmas Day 2022 (25th December 2022) and notifying them of their right of appeal.

Email confirming the correct contact details for NHS Resolution, as these were incorrectly listed in the original letter.”

Assessment

2.11 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*

2.12 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.

2.13 I am of the view that the pharmacy would normally be closed on 25 December, Christmas Day, and that this would be in accordance with the Regulations.

2.14 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.

- 2.15 I note that NHS England state that pharmacies are directed as agreed with the Local Pharmaceutical Committee (“the LPC”). I have not been provided with a copy of the consultation with the LPC. I note that a “proposal to direct” letter was sent to the pharmacy on 9 August 2022 and the pharmacy was provided with 30 days to provide representations with regard to the proposal. In their representations, NHS England state that the pharmacy did not respond. I have been provided with a copy of the “proposal to direct” letter of 9 August 2022 and I note that the Appellant has not sought to dispute the content of this letter, that they did not receive this letter or that they did not reply to this letter.
- 2.16 I note that the letter of 23 September 2022 from NHS England states *“I enclose an updated version of the directed rota services for Christmas Day 2022. Please ensure that you check the attached sheet for the details of your direction.”*
- 2.17 I am of the view that NHS England has undertaken a consultation process as set out in the Regulations and that there is no dispute from the Appellant in this regard.
- 2.18 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.
- 2.19 I note that in the decision letter NHS England state that the reasons for directing the pharmacy to open are *“...we have not received a volunteer within your locality. Where it is deemed necessary to direct a rota due to a lack of volunteers, pharmacies are directed in rotation for each bank holiday within localities as agreed with the LPC.”* The letter goes on to state *“The consideration as to whether to direct a pharmacy to open on Christmas Day 2022 involved a review of services available to patients on this date in this locality.”* NHS England go on to state that they considered the PNA as well as the availability of other health care services, GP Primary care provision and out of hours, at the time of the directed rota but I note there is little supporting information in this regard.
- 2.20 The direction letter concluded that *“NHS England ... has assessed the need in your locality for the provision of pharmaceutical services. NHS England ... had regard to location and opening of pharmacies in your locality, the pharmacy needs assessment and responses to consultation from the LPCs. As a result of this assessment it was determined that direction is required to provide adequate pharmaceutical services at the times stated in the attached directed rota. The directed rota is organised using a fair mechanism ensuring that all pharmacies take a turn.”*
- 2.21 From the information before me, this appears to be the only “assessment” which has preceded the issuing of the direction.
- 2.22 I note that in their representations, NHS England has expanded upon the reasoning for the direction and the assessment that was carried out. I note that no expressions of interest were received by NHS England for the Aintree, Fazakerley and Melling area. I note the comment from NHS England that *“Where it is deemed necessary to direct a rota due to a lack of volunteers, pharmacies are directed in rotation for each bank holiday within localities as agreed with the LPC.”*
- 2.23 I note that I have not been provided with any other information as to how the assessment was carried out or which pharmacies had been identified as part of the assessment as having been directed to open previously in rotation.

- 2.24 I am of the view that I have not been provided with any information to substantiate the view as to why the Appellant's pharmacy will be best placed in terms of access, geography 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 or why the hours of 12noon to 2pm will provide this cover. I am of the view that there is no information from NHS England as to how directing pharmacies, taking into account those which have opened previously, provides a robust assessment of the need for pharmaceutical provision in terms of providing services to patients.
- 2.25 I am not satisfied with NHS England's approach in this regard and I consider that NHS England has provided limited information to support the conclusion reached. Further, NHS England has not set out details of a robust assessment that lies behind the direction to this particular pharmacy, which is a requirement of the Regulations.
- 2.26 On appeal, I may (in accordance with paragraph 25(8) of Schedule 4) either confirm the action of NHS England or take such other action as it could have taken.
- 2.27 The letters dated 9 August 2022 and 23 September 2022 provide me with no information which I consider sufficient to provide reasons on the basis of which I can confirm the decision, nor information upon which I might rely to make a direction for alternative reasons.
- 2.28 The letters explain the process which has taken place and the conclusions reached, but not the reasoning that lies behind the direction
- 2.29 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 Sunday 25 December 2022.

3 Determination

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

**Head of Appeals
NHS Resolution**