

31 March 2023

**FILE REF:** SHA/25869

8<sup>th</sup> Floor  
10 South Colonnade  
Canary Wharf  
London  
E14 4PU

**DECISION MAKING BODY:** BUCKINGHAMSHIRE,  
OXFORDSHIRE & WEST  
BERKSHIRE INTEGRATED CARE  
BOARD (ICB)

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

**PHARMACIST:** WELL PHARMACY T/A FROSTS PHARMACY  
("the Appellant")

**PREMISES:** HARDWICK SHOPPING CENTRE,  
FERRISTON,  
BANBURY,  
OXFORDSHIRE,  
OX16 1XE

**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 I confirm the action of NHS England to issue the direction.

A copy of this decision is being sent to:

Well Pharmacy t/a Frost Pharmacy  
NHS England – South East Area Team

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**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL PHARMACEUTICAL SERVICES) REGULATIONS 2013 ["THE REGULATIONS"]**

**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, working on behalf of the ICB, has requested that the Appellant open from 10am to 1pm on 9 April 2023 (Easter Sunday).
- 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 10am to 1pm on 9 April 2023 (Easter Sunday), a day on which it would otherwise be closed.

*Information provided by parties*

- 2.8 In a letter to the Appellant dated 14 February 2023, NHS England stated:

"We wrote to you on 12<sup>th</sup> January 2023 regarding the proposal for provision of pharmaceutical services on Sunday 9<sup>th</sup> April 2023 at 10:00 – 13:00.

Your representations have been considered, however BOB ICB has reviewed the provision of services in town on Sunday 9<sup>th</sup> April 2023 and it has been determined that pharmacy services are required.

Frost Pharmacy Ltd, Frosts Pharmacy (FA663), Hardwick Shopping Centre, Ferriston, Banbury, Oxfordshire OX16 1XE

is directed to open on Sunday 9<sup>th</sup> April 2023 from 10:00 – 13:00 (a total of three hours) in accordance with Schedule 4 Paragraphs 24 and 25 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 as amended.

A payment of £300.00 per hour will be made on submission of the enclosed claim form. Please submit the claim form within 28 days of fulfilling your rota duties.

Thank you for making appropriate arrangements to deliver the required services.

The reason for the direction is set out in Appendix A.

We have consulted the Local Pharmaceutical Committee in drawing up the arrangements for Bank Holiday cover – including the voluntary enhanced service and directions where they are needed.

Pharmacy opening hours will be shared with other NHS organisations such as NHS 111, hospitals and GPs for signposting patients. However, it is really important that the information is correct on the DoS and NHS website. Please can you ensure that you have updated the NHS Profile Manager so that NHS 111 can direct patients to your service and also so that anyone using the NHS Website will know you are open.

Please can you provide confirmation to [ENGLAND.southeastcommunitypharmacy@nhs.net](mailto:ENGLAND.southeastcommunitypharmacy@nhs.net) that you have received the direction and will open the pharmacy accordingly on Sunday 9<sup>th</sup> April 2023 between 10:00 – 13:00.

You have a right of appeal to the Secretary of State against the issuing of this direction. Should you choose to appeal then you should send a concise and reasoned statement of the grounds for you appeal within 30 days of receiving this notice to [NHS Resolution contact details].

#### Appendix A: Reason for the direction

Pharmacies are not required by their terms of service to open on Christmas Day, Good Friday, Easter Sunday or on a bank holiday, although they may choose to do so. We have asked pharmacies in the area whether they are intending to open. However, we have not been notified of any pharmacies that will be open in Banbury on Sunday 9<sup>th</sup> April 2023.

BOB ICB is obliged to ensure adequate pharmaceutical services are available for the population. This includes arrangements on the aforementioned days when pharmacy contractors are not required to open. (Section 126 of the NHS Act 2006 (Arrangements for pharmaceutical services)).

As part of the process for assessing the need for pharmacy cover in Banbury on Sunday 9<sup>th</sup> April 2023, we have considered reasonable geographical coverage and travel times as well as population density. The opening times being directed are intended to allow the maximum number of people who need to access pharmaceutical services to be able to do so.

Whilst demand for the full range of pharmaceutical services may be lower on this day compared to a Sunday that is not a bank holiday, there is still a need for availability of pharmaceutical services for people who live within the area of the BOB ICB or who are visiting the area for the bank holiday period.

Pharmacy services are a vital part of the health service which complement and support other services that are available on bank holidays such as NHS 111, GP Out of Hours Services, A&E and Ambulance services. Your pharmacy will be available to deliver services not only to your immediate community but as there will be limited resources on the day, also to patients from further afield.

In addition to the factor associated with assessment of overall need for a service, when reviewing the need to direct a particular pharmacy we have considered; the pharmacy location, any voluntary opening by other pharmacy contractors, distances from other available services, access including road links, nearby parking, frequency of any previous direction notices and the other pharmacies available in the area excluding Distance Selling pharmacies. We ensure that pharmacies are selected for direction in a fair way that means that all pharmacies in a given area take their turn.”

2.9 In an email to NHS Resolution dated 28 February 2023 the Appellant stated:

“I have had the attached direction forward to me by [P], our Partnerships and Integration Manager.

Well Pharmacy have recently acquired the former Frosts Pharmacy, ODS code FA663. The acquisition process has not been without hiccups which has culminated in the regular pharmacists and a number of pharmacy colleagues choosing to leave the business, resulting in operation challenges. As a consequence of the ongoing operational challenges I'd like to appeal the direction to open on Sunday 9<sup>th</sup> April to support provision of pharmaceutical services over the Easter period.

My understanding from speaking with [P] is that as we are going through this process, and facing day to day challenges in keeping the pharmacy trading, if the direction is upheld, there is a risk that we will not be able to find colleague cover to enable the pharmacy to trade, which would potentially impact on the local population. I would appreciate that this is taken into account when considering this appeal.

We would, of course, be willing to support future directed rotas, once the situation in the pharmacy is stabilised.”

2.10 In a letter to NHS Resolution dated 9 March 2023 NHS England stated:

“Thank you for your letter dated 2<sup>nd</sup> March 2023 informing us of the appeal by Frosts Pharmacy.

For clarity I can confirm that Bestway National Chemists Ltd has a Change of Ownership application in progress for this pharmacy which was granted on 11<sup>th</sup> December 2022. A notice of commencement has not been received for this change of ownership application yet. The pharmacy is therefore still on the pharmaceutical list under Frosts Pharmacy Ltd.

We wish to make the following comments on the appeal.

Paragraphs 25(1) and (2) of Schedule 4

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.

An assessment of the need for pharmaceutical services that will meet the needs of the people in the area of Banbury or other likely users of the pharmacy specifically on Easter Sunday has been undertaken. In addition to the information provided in the appendix to the direction letter, previous activity data, collated from the direction for Easter Sunday 2021 was considered.

The assessment for the Banbury area found that on a previous Easter Sunday, patients in Banbury accessed the pharmacy in the morning with prescriptions dated that day and prior to that day. Patients received advice within the pharmacy that was open and over-the-counter items were obtained.

Easter Sunday 2021 for Banbury:

Total items dispensed	Prescription forms dated on [BH date]	Prescription forms dated prior to [BH date]	Number of people attending the pharmacy	Advice and OTC products
19	7	5	11	3

NHS England has consulted the relevant LPCs in drawing up the Bank Holiday directions and agreeing the enhanced services agreements for the provision of pharmaceutical services over the Christmas and New Year Period's and Easter Sunday across the South East.

The Appellant was given the opportunity to make representation before the direction letter was issued.

The Appellant did submit a representation on 10<sup>th</sup> February 2023; however, the representation was based on potentially not being able to staff the pharmacy and opening on previous Bank Holidays.

Staffing levels of the pharmacy are not beyond control of the Appellant as the arrangements and the number of the pharmacists employed either as relief pharmacists or as locums procured to cover are a commercial consideration and a matter for the Appellant to ensure that there is sufficient cover. The appellant has previously opened under a Direction on Easter Sunday 2021 and voluntarily opened under an Enhanced Service agreements for the Queens State Funeral Bank Holiday on 19<sup>th</sup> September 2022. Where possible Directions are issued on a rotational basis within the town, Easter Sunday 2023 is Frosts Pharmacy turn to be directed to open.

The Appellant did not demonstrate there wouldn't be a need for pharmaceutical services of the people in the Banbury area on the directed date. The Appellant's representation was subsequently considered and the final decision to issue a direction was notified on 14<sup>th</sup> February 2023.

Schedule 4 paragraph (25)(6)(a)

Schedule 4 paragraph (25)(6)(a) of the NHS Pharmaceutical and LPS regulations state that "the reasons for the change" must be included with the notification.

The direction letter clearly states the reasons for the direction and is based on the results of the assessment mentioned above and in the direction letter. This followed the 30 day consultation period and took into account the written representations received from the Appellant. It was concluded that the needs of the local population and likely users of the pharmaceutical services in Banbury would not be met on Easter Sunday 9<sup>th</sup> April 2023."

NHS England letter to Appellant dated 12 January 2023

"As you will be aware, BOB Integrated Care Board (ICB) needs to ensure that there is access to pharmaceutical services on days when pharmacy contractors are not required to be open.

We have reviewed the usual provision of services on those days in your area and it has been established that provision needs to be made for Sunday 9<sup>th</sup> April 2023.

Your pharmacy below will be asked to open from 10:00 – 13:00 on Sunday 9<sup>th</sup> April 2023. Payment will be made in the sum of £400.00 per hour.

As indicated, we therefore intend to issue a Direction Notice to your pharmacy at –

Frosts Pharmacy Ltd, Frosts Pharmacy (FA663), Hardwick Shopping Centre, Ferriston, Banbury, Oxfordshire, OX16 1XE

in respect of Easter Sunday 9<sup>th</sup> April 2023 and will do so as soon as practicable.

Any direction that is issued will meet the requirements of paragraph 25, schedule 4 or paragraph 15, schedule 5 of the NHS Pharmaceutical Services regulations 201 [sic] as amended.

You have the right to make representations concerning this proposal. Any representations must be made within 30 days of the date of this letter and should be emailed to [england.southeastcommunitypharmacy@nhs.net](mailto:england.southeastcommunitypharmacy@nhs.net).

Representations should be received no later than Saturday 11<sup>th</sup> February 2023.

I would be grateful if you could confirm receipt of this letter by Thursday 19<sup>th</sup> January 2023.”

- 2.11 No observations were made by the Appellant in response to the representations from NHS England.

### **Assessment**

- 2.12 Since 1 July 2022, it has been possible for Integrated Care Boards to take on delegated responsibility for the commissioning of pharmaceutical services. NHS Resolution will issue this decision to NHS England and it is for NHS England to inform the relevant Integrated Care Board.

- 2.13 Before considering the substantive matter, I note that Well Pharmacy has been granted a change of ownership for the premises which is subject to the direction. Whilst I have not been provided with any further information in this regard, I am satisfied that I can consider the appeal.

- 2.14 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.*

2.15 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.*

2.16 I am of the view that the pharmacy would normally be closed on Easter Sunday and that this would be in accordance with the Regulations.

2.17 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.

2.18 I note that NHS England states, in its decision letter of 14 February 2023, that it sought the LPC's comments regarding the proposed arrangements for bank holiday cover, including the Easter 2023 period. I have not been informed if the LPC responded to this request for comments or provided with a copy of the consultation with the LPC. I note that NHS England wrote to the Appellant on 12 January 2023 indicating that it was proposing to direct the pharmacy to open for the hours in question and that the Appellant was provided with 30 days to provide representations regarding the proposal. I further note NHS England's comments that the pharmacy provided representations on the proposal however I have not been provided with a copy of this.

2.19 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.

2.20 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.

2.21 I note that NHS England in its direction letter states that it "*has asked pharmacies in the area whether they are intending to open. However, [we] have not been notified of any pharmacies that will be open in Banbury on Sunday 9<sup>th</sup> April 2023*".

2.22 I note that NHS England provided reasoning in the direction letter, including:

- 2.22.1 *“As part of the process for assessing the need for pharmacy cover in Banbury on Sunday 9<sup>th</sup> April 2023, [we] have considered reasonable geographical coverage and travel times as well as population density. The opening times are intended to allow the maximum number of people who need to access pharmaceutical services to be able to do so.”*
- 2.22.2 *“Whilst demand for the full range of pharmaceutical services may be lower on this day compared to a Sunday that is not a bank holiday, there is still a need for availability of pharmaceutical services for people who live within the area of the BOB ICB or who are visiting the area for the bank holiday period.”*
- 2.23 I note that in its representations provided to NHS Resolution, NHS England has expanded upon the reasoning for the direction and assessment that was undertaken. NHS England states:
- 2.23.1 *“The assessment for the Banbury area found that on a previous Easter Sunday, patients in Banbury accessed the pharmacy in the morning with prescriptions dated that day and prior to that day. Patients received advice within the pharmacy that was open and over-the-counter items were obtained.”*
- 2.23.2 *“NHS England has consulted the relevant LPCs in drawing up the Bank Holiday directions and agreeing the enhanced services agreements for the provision of pharmaceutical services over the Christmas and New Year Period’s and Easter Sunday across the South East.”*
- 2.23.3 *“The Appellant did submit a representation on 10<sup>th</sup> February 2023; however, the representation was based on potentially not being able to staff the pharmacy and opening on previous Bank Holidays.”*
- 2.23.4 *“The Appellant has previously opened under a Direction on Easter Sunday 2023 and voluntarily opened under an Enhanced Service agreements for the Queens State Funeral Bank Holiday on 19<sup>th</sup> September 2022. Where possible Directions are issued on a rotational basis within the town, Easter Sunday 2023 is Frosts Pharmacy turn to be directed to open.”*
- 2.24 I note that NHS England produced figures for patients accessing pharmaceutical services at the Appellant’s pharmacy when it was directed to open on Easter Sunday 2021 which demonstrated that there is a historical need in the area for pharmaceutical services to be accessed on this Bank Holiday. I further note that the Appellant has not disputed these figures. I must, however, comment on NHS England’s representations that *“The Appellant did not demonstrate there wouldn’t be a need for pharmaceutical services of the people in the Banbury area on the directed date”*. To take this approach risks placing an onus on the Appellant which is not set-out in paragraph 25.
- 2.25 I note that the Appellant states they will not be able to open as directed due to recently obtaining the pharmacy and the difficulty that may occur whilst finding staff to cover the Easter Sunday hours. Whilst I am sympathetic to the issues the Appellant is encountering, I am of the view that this is not a consideration I am able to take into account when determining whether NHS England was correct to issue the direction.
- 2.26 I am of the view that, when combined with the explanation of NHS England’s assessment in its representations on appeal, I have been provided with sufficient information to substantiate the view as to why the Appellant’s pharmacy will be best placed in terms of access and geography to meet the envisaged demand for services.
- 2.27 I am satisfied with NHS England’s assessment and I consider that NHS England has provided sufficient information to support the conclusion reached.
- 2.28 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.

2.29 On the basis of the information available to me, I am 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 9 April 2023 such that it is appropriate to issue a direction requiring the Appellant's pharmacy to open on the days and times indicated in the direction.

2.30 I note that the direction by NHS England states that the pharmacy is eligible for payment of £300.00 per hour compared to the £400.00 stated in the letter of 12 January 2023. I am of the view that this discrepancy in the rate payable is a matter for the Appellant and NHS England.

### **3 Determination**

3.1 I confirm the action of NHS England to issue the direction.

**Head of Appeals**  
**NHS Resolution**