13 September 2023

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REF: SHA/25893

APPEAL AGAINST NHS ENGLAND (SOUTH WEST AREA TEAM) DECISION REGARDING A BREACH NOTICE AT BOOTS PHARMACY, 123 HIGH STREET, HONITON, EX14 1HR (FL682)

1 Outcome

1.1 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I confirm the decision of NHS England to issue a Breach Notice to 125 High Street, Honiton, EX14 1HR (FL682) for 12 December 2022.

A copy of this decision is being sent to:

Boots UK
NHS England – South West

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

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

REF: SHA/25893

APPEAL AGAINST NHS ENGLAND (SOUTH WEST AREA TEAM) DECISION REGARDING A BREACH NOTICE AT BOOTS PHARMACY, 123 HIGH STREET, HONITON, EX14 1HR (FL682)

1 The Breach Notice

A Breach Notice dated 31 March 2023 was sent by NHS England to Boots UK Ltd in respect of 123 High Street, Honiton, EX14 1HR (FL682).

"BREACH NOTICE

1.1 Boots Pharmacy, 123 High Street, Honiton, EX14 1HR – FL682

1.2 This is a Breach Notice issued by the NHS Commissioning Board ("NHS England") under regulation 71 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. Issue of this Notice has been approved by the NHS England South West Pharmaceutical Services Regulations Committee ("the Committee").

Nature of the Breach

1.3 Contrary to paragraph 23(1) and 23(7) of the Terms of Service for NHS Pharmacists, the Contractor did not and will not provide pharmaceutical services for some of its contracted hours on 12 December 2022.

Statement of Reasons

1.4 On Monday the Contractor has core opening hours from 09:00-13:00 and 14:00-17:00 with supplementary opening hours from 13:00-14:00 and 17:00-17:30.

1.5 On the 12 December 2022, the Contractor notified NHS England that pharmaceutical services had not been provided between 09:00 - 17:30 (8.5 hours) on Monday 12 December 2022 because:

Short notice staff sickness – Covid 19.

1.6 No further information was received from the Contractor in response to NHS England's request of 14 December 2022.

1.7 The Committee [of NHS England] noted that NHS pharmaceutical services were not able to be provided during the period concerned and so was considered to be 'closed' for the purpose of the Terms of Service.

1.8 The Committee [of NHS England] considered whether or not:

- the closure was for reasons 'beyond the control' of the Contractor (paragraph 23(10) of the terms of service) and for 'good cause' (regulation 69(3)(b)(i), and

- the Contractor had used ‘all reasonable endeavours to resume provision of pharmaceutical services as soon as is practicable’ (paragraph 23(10)(b) of the terms of service) and in doing so had regard to the Local policy on monitoring of, and using contractual sanctions in relation to, unplanned closures of community pharmacies (“the policy”) which it had adopted on 1 November 2022, and which had been circulated to contractors on 21 October 2022.

1.9 With reference to the policy, the Committee [of NHS England] noted that the closure triggered the general rule that closures of over 4 hours would generally result in a breach notice unless there were mitigating factors beyond the control of the contractor.

1.10 NHS England considers that 4 hours is a reasonable period to allow the contractor to arrange a replacement pharmacist to be present at pharmacy. Failure to arrange for a replacement pharmacist within this period is therefore a matter ‘within the control of the contractor’.

1.11 The Committee [of NHS England] noted that the closure had been properly reported to NHS England. However, no response had been received to describe the precise circumstances and to confirm what steps were taken to obtain alternative cover and why that was not possible. The Committee [of NHS England] was of the view that staffing was within the control of the Contractor and was not convinced there were any extenuating circumstances.

1.12 Accordingly, the Committee [of NHS England] considered that there was not ‘good cause’ for the Contractor being unable to provide pharmaceutical services for the 8.5 hours on 12 December 2022 and so there had been a breach of paragraphs 23(1) and (7) of the Terms of Service for NHS Pharmacists.

1.13 The Committee [of NHS England] went on to consider whether it was reasonable and proportionate to issue a breach notice in this case.

1.14 The Committee [of NHS England] considered that the loss of 8.5 hours service provision did justify the issue of a breach notice.

Action required.

1.15 The Contractor is required not to repeat the breach.

Payment withholding

1.16 This was the first closure since 1 November 2022, when the revised South West Unplanned Closure Policy came into effect. The Committee [of NHS England] determined a breach notice should be issued but, as this was the first closure since 1 November 2022, there should NOT be a withholding on this occasion.

1.17 Right of appeal

1.18 You have a right of appeal to the Secretary of State against the issuing of this breach notice and against the payment withholding. Should you choose to appeal, you should send a concise and reasoned statement of the grounds for your appeal within 30 days of the date of this letter to:

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

Email: nhsr.appeals@nhs.net"

2 A second Breach Notice, dated 31 March 2023, was sent by NHS England to Boots UK Ltd in respect of 123 High Street, Honiton, EX14 1HR (FL682). The second Breach Notice was for the same date, 12 December 2022 and contained the same wording as the Breach Notice at paragraph 1 however under "Payment withholding" it stated:

2.1 "The Committee [of NHS England] takes the view that, because this breach relates to a repeated failure to be open and therefore a failure to be available to provide services, a payment withholding is appropriate. As stated above, it is satisfied that there was not 'good cause' for the breach.

2.2 The Committee [of NHS England] determined that a breach notice should be issued and, as this was a second closure since 1 November 2022 when the South West policy was introduced, that there should be a withholding of the lowest rate times number of hours closed. The amount to be withheld has been calculated as follows:

2.2.1 To reflect costs not incurred because a pharmacist was not employed and the non-availability of pharmaceutical services: £50 per hour (£50 x 8.50) = £425

2.2.2 This is based on the Committee's view that the amount that may be withheld in the event of an unplanned closure needs to be sufficient to provide an incentive to the contractor to take all necessary steps to prevent, or minimise the length of, the closure. In this context it should be remembered that the comparison is against the costs that the contractor may need to incur in resuming service provision (e.g., paying for a last-minute locum and their travel), which may be higher than normal running costs.

2.2.3 The total amount to be withheld is therefore £ 425."

3 **The Appeal**

In an email dated 31 March 2023 addressed to NHS Resolution, the store manager at Boots Honiton (FL682) appealed against NHS England's decision. The grounds of appeal are:

3.1 "I have just received a breach notice with a charge of £425 to my Honiton Store in regard to an unplanned closure on Monday 12th December due to our pharmacist having Coronavirus.

3.2 I would like to appeal this charge as we did everything in our power that day to source a Pharmacist so we could open the store. With it being so close to Christmas, there wasn't any Pharmacist around and we continually made efforts all day to no avail.

3.3 We were following Government guidance at the time which stipulated a pharmacy team member could not attend work if they had tested positive to Covid, which was the case for our store-based Pharmacist that day.

3.4 I would have been more than happy to provide more information at the time, but I hadn't been made aware of any e-mail response in regard to the closure at the time.

3.5 I sent off all relevant information from this e-mail address, yet didn't receive any messages to elaborate on this further.

3.6 We always put our patients' best interests and safety first in any decision made, which is why I am disappointed to see that we are penalised for following Governmental laws at the time of this incident.

3.7 It is also a shame that I have received this decision Four months after the incident. If you would like any further information, I would be glad to assist. I hope you can

reassess this decision, as £425 is a lot of money to withhold from our store considering the financial difficulty businesses are currently facing.

3.8 I can assure you that the decision to close was not taken lightly and was only done because of the Government Laws at the time."

In a letter dated 20 April 2023 and addressed to NHS Resolution, Boots UK Ltd appealed against NHS England's decision. The grounds of appeal are:

3.9 "We write in response to the breach notices relating to unplanned closures which were reported to NHS England by Boots UK Limited ("Boots").

Closure of FL682 Honiton on 12 December 2022

3.10 Boots wishes to appeal these notices. Two breach notices have been issued with regards to this closure; this appears to be an administrative error. We would request that, regardless of any decisions taken relating to other notices, one of these is withdrawn and the payment withholding decision overturned.

Workforce Crisis – causing closure at a number of sites

3.11 Boots wish to appeal each of the notices listed below:

3.11.1 Closure of FL682 Honiton on 12 December 2022

3.12 We are appealing these breach notices on the grounds that each of these closures was made with 'good cause'; indeed, beyond the control of Boots.

3.13 The 'NHS England South West – Community Pharmacy Local Policy on Monitoring of and Using Contractual Sanctions in Relation to, Unplanned Closures of Community Pharmacies' ('the policy') states:

"*Generally, contractual action will not be taken when:*

- *The closure is an irregular and unavoidable occurrence and contractors have demonstrated what actions they have taken in the attempt to avoid closing the pharmacy*
- *The contractor has put in place provisions to ensure minimal disruption to patients, including identifying another pharmacy that can meet the demand and taking reasonable steps to notify patients about the closure and their options*
- *Issuing a breach notice, withholdings or removal from the list are not in the best interest of the local population, for example where contractual action would leave a gap in the provision of pharmaceutical services which is unlikely to be addressed or resolved by contractual action being taken*
- *Where a pharmacy has an unplanned closure due to a cause beyond the reasonable control of the pharmacy and the pharmacy notifies NHSE as soon as practical and uses all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable*"

3.14 For all of the notices issued all four of the above points were undertaken or otherwise apply; our appeal is on the basis that the committee [of NHS England] has failed to recognise this and to apply their own policy fairly and accurately. For clarity, the attached spreadsheet details these measures for each closure.

3.15 In each case, the closure was caused by a lack of available pharmacist, thereby preventing the pharmacy from providing services. The shortage of pharmacists is a

sector-wide issue affecting all community pharmacies, exacerbated by the COVID-19 pandemic. This widely reported workforce crisis is currently resulting in significant resource issues far beyond which could ordinarily be reasonably managed.

3.16 Boots has already taken action to address shortages, including advertising pharmacist positions via various platforms and holding recruitment events. Locum agencies are frequently contacted to discuss options; planners speak with locum agencies every day.

3.17 Before any closure, Boots will explore numerous options, including locum pharmacists, redeployment of Boots relief and store-based pharmacists, and offering extra hours to pharmacists planned to be on their day off. In the event a closure is still unavoidable, the pharmacy will be closed after carefully considering the impact upon patients. Pharmacies with more vulnerable patients (such as residents of care homes) would be prioritised by moving a pharmacist from a different location. Part of the reason certain pharmacies have closed, alongside individual issues around vacancies in those stores, is that need to protect more vulnerable patient groups in other locations.

3.18 Informal communication with NHS England team members has been ongoing, in order to communicate about the steps taken to attempt to avoid closures, and the measures put in place once it becomes clear that a closure cannot be prevented. This is further detailed below.

3.19 Addressing the notices themselves, there are a number of points we wish to challenge in this appeal.

3.20 In each notice, it states:

"NHS England considers that 4 hours is a reasonable period to allow the contractor to arrange a replacement pharmacist to be present at pharmacy. Failure to arrange for a replacement pharmacist within this period is therefore a matter 'within the control of the contractor'."

3.21 It is unclear how the NHS England team arrived at this four hour period. The present workforce crisis in community pharmacy often means that, where it is possible to source a replacement pharmacist, this takes significant effort and pharmacists may need to travel, without notice, from further away than would have been the case before the pandemic. The four hour limit appears to be an arbitrary figure given that in a number of the closures, it took around five hours to locate an alternative pharmacist and for them to arrive.

3.22 The notices also state:

"The Committee noted that the closure had been properly reported to NHS England. However, no response had been received to describe the precise circumstances and to confirm what steps were taken to obtain alternative cover and why that was not possible. The Committee was of the view that staffing was within the control of the Contractor and was not convinced there were any extenuating circumstances."

3.23 Boots team members have had numerous conversations with NHS England South West representatives to explain the background to closures and the actions taken. Regular meetings have been held with [SG] from the NHS England South West team since 23 January 2023. When requested by [S], more detailed reasons for particular closures were provided in a spreadsheet format. It was Boots' understanding that the information provided in these meetings and subsequent emails would be provided to the committee, however, given each notice states that no further information was received when requested this appears not to be the case.

3.24 It should also be noted that emails sent to individual pharmacies requesting details is not necessarily an effective method of communication for these matters. Pharmacy

teams are extremely busy with providing services to patients and, in any case, will not be aware of the actions being taken on their behalf by planning teams, Area Managers and others, to source pharmacists.

3.25 Boots also challenges the view of the committee [of NHS England] that staffing is within the control of the Contractor. As previously stated, community pharmacy faces an ongoing workforce crisis. It is sometimes the case that, despite significant efforts, there is simply not a replacement pharmacist available. The issuing of breach notices fails to recognise this reality and does nothing to prevent future closures.

3.26 Closures are always notified to NHS England by Boots team members as soon as possible. Further, Boots teams are directed to contact other local pharmacies to advise them of the closure and ensure that local pharmacy services are maintained for patients and this applies in reverse when non-Boots pharmacies notify Boots that they are closing (also often due to the workforce crisis) to better allow for patient care.

3.27 Whilst this is a formal appeal, we would welcome further conversation with NHS England South West on how community pharmacies could be supported along with any recommendations they may have on additional actions Boots could take to prevent further closures."

3.28 Excerpt below taken from the spreadsheet provided with the second letter of appeal:

31/03/2023	FL682	Honiton	12/12/2022	8.5	On this date both the pharmacist and pharmacy advisors had COVID-19 and they followed Government/NHS guidance to not attend work. The resulting pharmacist gap was sent to locum agencies but a pharmacist could not be located.

4 Summary of Representations

This is a summary of representations received on the appeal. A summary of those representations made to NHS England are only included insofar as they are relevant and add to those received on the appeal.

4.1 NHS ENGLAND

4.1.1 "Thank you for your email dated 13 April 20223 requesting representations from NHS England to the appeal against a breach notice issued at Boots Pharmacy, Honiton Store, 123 High Street, Honiton Devon EX13 1PQ.

4.1.2 I note that on 31 March 2023, NHS England sent an email to Boots Pharmacy Honiton (FL682) issuing 2 breach notices (FL682 and FL682-2); further to reviewing our records I can confirm that one of these notices (FL682-2) was issued because of a duplicate entry made in error.

4.1.3 I note that on 12/12/2023, we received 2 email notifications from the store staff regarding the store closure on 12 December 2022; both notifications received were consequently recorded on our Community Pharmacy Unplanned Closures Log as 2 separate events.

4.1.4 In issuing the breach notices for unplanned closures, records from our log were utilised and consequently, the Pharmacy was issued 2 notices for the closure on 12 December 2022 in error.

4.1.5 We have since written to the Pharmacy Manager acknowledging the error and apologising for any inconvenience this may have caused. We have notified the pharmacy that we are withdrawing the attachment (FL682-2: (2nd) Breach notice with payment withholding:"

5 Observations

5.1 BOOTS UK

5.1.1 "Thank you for sending the information over in the separate email.

5.1.2 Within your letter you have enclosed the paragraph:

I note that no supporting documentation by way of evidence was provided for any of your appeals. Usually it would be expected that the parties would provide all evidence which they wish NHS Resolution to consider as part of the appeals. I am therefore providing you with the opportunity, as part of your observations, to provide any supporting evidence that you are seeking to rely on to support any of the appeals.

5.1.3 I am disappointed that in my original email to NHS resolutions I did in fact send a spreadsheet that I have re attached for your attention – NHS SW reasons for closures for appeal. [see paragraph 3.28 above] This indicates the full circumstances we were in and I would assume this was our evidence for the appeals process. I have extract [sic] a section from our appeals letter that clearly shows this (Highlighted below). When sending you this information I would wish to emphasis [sic] that comments made in our appeal process are a statement of fact.

5.1.4 I personally has [sic] numerous conversations with NHS SW as highlighted below and did pass on both verbal and spreadsheet updates to NHS SW for our closure reasons and despite in good faith have indicated to them reasons for closure and the efforts we have made to open our Stores. This information we feel was not taken into consideration when issuing Breaches & payment withholdings as we believe NHS SW have acted without considering our factual statements as evidence and have acted without consideration to this. We believe their policy is not founded on evidence and we meet all of their measures stated within.

5.1.5 Indeed we have received Double breaches for two Pharmacies when in god faith [sic] we were supporting local communities by sharing Pharmacist rescource [sic] when shortages occurred to provide Pharmaceutical cover. This was not taken into consideration as evidenced by our factual statements and spreadsheet insights.

5.1.6 We are appealing these breach notices on the grounds that each of these closures was made with 'good cause'; indeed, beyond the control of Boots.

5.1.7 The 'NHS England South West – Community Pharmacy Local Policy on Monitoring of and Using Contractual Sanctions in Relation to, Unplanned Closures of Community Pharmacies' ('the policy') states:

"Generally, contractual action will not be taken when:

- *The closure is an irregular and unavoidable occurrence and contractors have demonstrated what actions they have taken in the attempt to avoid closing the pharmacy*
- *The contractor has put in place provisions to ensure minimal disruption to patients, including identifying another pharmacy that can meet the demand*

and taking reasonable steps to notify patients about the closure and their options

- *Issuing a breach notice, withholdings or removal from the list are not in the best interest of the local population, for example where contractual action would leave a gap in the provision of pharmaceutical services which is unlikely to be addressed or resolved by contractual action being taken*

- *Where a pharmacy has an unplanned closure due to a cause beyond the reasonable control of the pharmacy and the pharmacy notifies NHSE as soon as practical and uses all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable"*

5.1.8 For all of the notices issued all four of the above points were undertaken or otherwise apply; our appeal is on the basis that the committee [of NHS England] has failed to recognise this and to apply their own policy fairly and accurately. For clarity, the attached spreadsheet details these measures for each closure. [This paragraph was highlighted in yellow in the observation].

5.1.9 In each case, the closure was caused by a lack of available pharmacist, thereby preventing the pharmacy from providing services. The shortage of pharmacists is a sector-wide issue affecting all community pharmacies, exacerbated by the COVID-19 pandemic. This widely reported workforce crisis is currently resulting in significant resource issues far beyond which could ordinarily be reasonably managed.

5.1.10 Boots has already taken action to address shortages, including advertising pharmacist positions via various platforms and holding recruitment events. Locum agencies are frequently contacted to discuss options; planners speak with locum agencies every day.

5.1.11 Before any closure, Boots will explore numerous options, including locum pharmacists, redeployment of Boots relief and store-based pharmacists, and offering extra hours to pharmacists planned to be on their day off. In the event a closure is still unavoidable, the pharmacy will be closed after carefully considering the impact upon patients. Pharmacies with more vulnerable patients (such as residents of care homes) would be prioritised by moving a pharmacist from a different location. Part of the reason certain pharmacies have closed, alongside individual issues around vacancies in those stores, is that need to protect more vulnerable patient groups in other locations.

5.1.12 Informal communication with NHS England team members has been ongoing, in order to communicate about the steps taken to attempt to avoid closures, and the measures put in place once it becomes clear that a closure cannot be prevented. This is further detailed below.

5.1.13 Addressing the notices themselves, there are a number of points we wish to challenge in this appeal.

5.1.14 In each notice, it states:

"NHS England considers that 4 hours is a reasonable period to allow the contractor to arrange a replacement pharmacist to be present at pharmacy. Failure to arrange for a replacement pharmacist within this period is therefore a matter 'within the control of the contractor'."

5.1.15 It is unclear how the NHS England team arrived at this four hour period. The present workforce crisis in community pharmacy often means that, where it is possible to source a replacement pharmacist, this takes significant effort and pharmacists may need to travel, without notice, from further away than would

have been the case before the pandemic. The four hour limit appears to be an arbitrary figure given that in a number of the closures, it took around five hours to locate an alternative pharmacist and for them to arrive.

5.1.16 The notices also state:

"The Committee noted that the closure had been properly reported to NHS England. However, no response had been received to describe the precise circumstances and to confirm what steps were taken to obtain alternative cover and why that was not possible. The Committee was of the view that staffing was within the control of the Contractor and was not convinced there were any extenuating circumstances."

5.1.17 Boots team members have had numerous conversations with NHS England South West representatives to explain the background to closures and the actions taken. Regular meetings have been held with [SG] from the NHS England South West team since 23 January 2023. When requested by [SG], more detailed reasons for particular closures were provided in a spreadsheet format. It was Boots' understanding that the information provided in these meetings and subsequent emails would be provided to the committee, however, given each notice states that no further information was received when requested this appears not to be the case. [This paragraph was highlighted in yellow in the observation].

5.1.18 It should also be noted that emails sent to individual pharmacies requesting details is not necessarily an effective method of communication for these matters. Pharmacy teams are extremely busy with providing services to patients and, in any case, will not be aware of the actions being taken on their behalf by planning teams, Area Managers and others, to source pharmacists.

5.1.19 Boots also challenges the view of the committee that staffing is within the control of the Contractor. As previously stated, community pharmacy faces an ongoing workforce crisis. It is sometimes the case that, despite significant efforts, there is simply not a replacement pharmacist available. The issuing of breach notices fails to recognise this reality and does nothing to prevent future closures.

Double breaches

5.1.20 In addition to the reasons stated above under Workforce Crisis, the closures of FXK77 Hayle, FW085 Porthleven, FW330 Mullion and FQM70 Troon on 28 December 2022 and the closures of FFH24 Camelford and FHR65 Tintagel on 14 January 2023 involved the sharing of two pharmacists across four locations. On these occasions the available pharmacist kindly agreed to work in one pharmacy in the morning and another in the afternoon, in order to provide pharmaceutical services for part of the day in both communities. Boots considers this was the best way to support patients in both communities and considers the issuance of two breach notices by NHS England to be inappropriate. Boots could have avoided one breach notice in each instance by simply keeping one pharmacy closed for the full day but this would not have been in the interests of patients. As such, Boots wishes to appeal these notices on the additional grounds that the issue of two notices for one 'event' is inappropriate and unfair." [This paragraph was highlighted in yellow in the observation].

6 Preliminary Consideration

6.1 Following receipt of this Appeal in which the Appellant challenged the duplicate issuing of a Breach Notice and the subsequent withholding of payment, I note that NHS England has confirmed that the duplicate Breach Notice "FL682 – 2 Breach notice with

payment withholding" has now been withdrawn by NHS England. I note that Boots have confirmed to the withdrawal of the appeal in respect of "FL682-2" (the duplicate Breach Notice with payment withholding). This issue therefore falls away. I note that the original Breach Notice has not been withdrawn. The Appellant, in its letter of 20 April 2023, further sought to appeal the first Breach Notice. I have proceeded to consider the appeal from the Appellant of 20 April 2023 against the issuing of the first Breach Notice to Boots, Honiton (FL682) dated 31 March 2023.

7 **Consideration**

7.1 Since 1 April 2023, Integrated Care Boards have taken on delegated responsibility for the commissioning of pharmaceutical services. NHS England made the decision which is the subject of this appeal. NHS Resolution will issue this decision to NHS England and it is for NHS England to inform the relevant Integrated Care Board.

7.2 Under Regulation 71(1) "Breaches of terms of service: breach notices" of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations"), a Breach Notice may be issued:

71. (1) Where an NHS chemist (C) breaches a term of service and the breach is not capable of remedy, the NHSCB may by a notice ("a breach notice") require C not to repeat the breach.

7.3 I note that in the Regulations an NHS Chemist means "*an NHS appliance contractor or an NHS pharmacist*". An NHS pharmacist is defined as "*a person included in a pharmaceutical list of the type referred to in regulation 10(2)(a);"*. Regulation 10(2)(a) states:

10(2) "Those lists (which are pharmaceutical lists) are

(a) a list of persons who undertake to provide pharmaceutical services in particular by way of the provision of drugs;"

7.4 The Regulations contain no definition as to what constitutes a breach of terms of service which is not capable of remedy.

7.5 I note that the pharmacy is included on the pharmaceutical list and that there is no dispute between the parties with regard to this.

7.6 I note that the pharmacy was not open during either their core or supplementary hours on the day in question, Monday 12 December 2022, and that this has been accepted by the Appellant.

7.7 NHS England is of the view that as a result of the closure, as set out above, the Appellant was in breach of:

7.7.1 Schedule 4, part 3, paragraph 23(1) and 23(7) for failure to open during contracted hours.

7.8 NHS England considered that the closure was not beyond the control of the Appellant and as such NHS England proceeded to issue the Breach Notice.

7.9 Under Regulation 69(1), before issuing a breach notice, NHS England must:

"make every reasonable effort to communicate and co-operate with an NHS chemist (C) with a view to resolving any dispute between [the chemist] and the NHSCB relating to [the chemist's] compliance with [the chemist's] terms of service".

7.10 The Regulations contain no definition of what constitutes "*reasonable effort to communicate and co-operate"*. I note that NHS England wrote to the Appellant after the closure had occurred seeking further information.

7.11 I note that there was no response from the local store to the request from NHS England for further information. However I note the comments from the Appellant that they "*have had numerous conversations with NHS England to explain the back ground to closures and the actions taken*." I further note the comments from the Appellant, in their Appeal (of 20 April 2023), that "*Regular meetings have been held with [SG] from the NHS England South West team since 23 January 2023*. … *more detailed reasons for particular closures were provided."* The Appellant goes on to conclude "*It was [Boots'] understanding that the information provided in these meeting and subsequent emails would be provided to the committee, however given each notice states that no further information was received when requested this appears not to be the case."*

7.12 I requested, as part of the Appellant's observations, that it provide any evidence that it wished to be considered as part of this Appeal. I have not been provided with any of the further communications between the Appellant and NHS England prior to the issue of the Breach Notice, though I note that these communications did not resolve the matter. I note that the Appellant has not referred to any lack of local dispute resolution in its Appeal. I therefore determine that there is no breach of Regulation 69 in this respect.

7.13 I shall now consider the breach in the Breach Notice and the Appellant's grounds of Appeal.

7.14 Schedule 4, part 3, paragraph 23(7) states:

"(7) Where P has notified to the NHSCB (or, before the appointed day, a Primary Care Trust) the days on which and times at which pharmaceutical services are to be provided at P's pharmacy premises (for example, in a return under sub-paragraph (5) or (6) or in an application for inclusion in a pharmaceutical list)—

(a) P must ensure that pharmaceutical services are provided at the premises to which the notification relates on the days and at the times set out in the notification (unless the notification has been superseded by a return, or a further return, under sub-paragraph (6)); and

(b) P must not change—

(i) the days on which or the times at which pharmaceutical services are to be provided at those premises during core opening hours which are neither additional opening hours nor in total less than 40 (if those core opening hours are additional opening hours, or are in total less than 40, regulation 65(5) to (7) and paragraphs 25 and 26 apply),

(ii) the total number of any supplementary opening hours (regulation 65(5) to (7) and paragraphs 25 and 26 apply to changes to the total number of core opening hours),

(iii) the days on which or the times at which pharmaceutical services are to be provided at those premises during supplementary opening hours, or

(iv) the pharmaceutical services which P is ordinarily to provide at those premises,

for a period of at least 3 months after that notification was received by the NHSCB (or, before the appointed day, a Primary Care Trust), unless the NHSCB agrees otherwise."

7.15 I note that there is no dispute between the parties with regard to the day on which and times at which pharmaceutical services are to be provided at the pharmacy.

7.16 I note that there is no dispute between the parties that the pharmacy in question did not open for some of its core and/or supplementary hours on the relevant date.

7.17 I consider that a failure to provide services during contracted hours amounts to a temporary suspension of services. Temporary suspension of services does not necessarily mean that the Appellant was in breach of paragraph 23(7)(a). The Regulations permit temporary suspension of services in certain circumstances without attracting a breach, e.g. where sufficient advance notice has been provided of an intended suspension of services (pursuant to paragraph 23(1)) or to cater for situations which are, for example, outside of the contractor's control.

7.18 The latter is set out in paragraph 23(10) of Schedule 4 of the Regulations, which sets out certain conditions, which, if satisfied, would mean the Appellant would not be in breach of paragraphs 23(7) and 23(1) of Schedule 4 of the Regulations.

7.19 Before I consider whether the Appellant has satisfied the conditions set out in paragraph 23(10) in relation to breach of paragraph 23(7), I shall consider whether the Appellant's temporary suspension of services amount to a breach of paragraph 23(1), which also relates to temporary suspension of services and to which the conditions set out in paragraph 23(10) also apply.

7.20 Paragraph 23(1) requires the Appellant to provide pharmaceutical services during its core opening hours. NHS England states that the core opening hours of the pharmacy are as set out in the Breach Notice and this has not been disputed by the Appellant. As the Appellant did not provide pharmaceutical services during the hours, as set out in the Breach Notice, it did not ensure that pharmaceutical services were provided during its core hours and so the Appellant has breached paragraph 23(1).

7.21 As indicated above, the Appellant would not be in breach of paragraphs 23(1) or 23(7) of the Regulations if it meets the conditions of paragraph 23(10). I therefore next consider these conditions and the representations before me.

7.22 Paragraph 23(10) states:

"*Where there is a temporary suspension in the provision of pharmaceutical services by P for a reason beyond the control of P, P is not in breach of sub-paragraphs (1) and (7), provided that—*

(a) P notifies the NHSCB of that suspension as soon as practical; and

(b) P uses all reasonable endeavours to resume provision of pharmaceutical services as soon as is practicable."

7.23 I consider that paragraph 23(10) sets out four conditions or tests, which need to be met in order for the Appellant to not be in breach of paragraphs 23(1) and 23(7). These are:

7.23.1 establishing that there has been a temporary suspension of pharmaceutical services;

7.23.2 the temporary suspension of pharmaceutical services arose for reasons beyond the control of the Appellant;

7.23.3 the Appellant notified NHS England of the temporary suspension as soon as practicable; and

7.23.4 the Appellant has used all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable.

7.24 I consider that all four conditions must be met in order for paragraph 23(10) to apply and therefore for the Appellant to be deemed not in breach of paragraph 23(7).

7.25 In respect of the first condition, there is no dispute between the parties that a temporary suspension of pharmaceutical services occurred at the pharmacy on the date in question as set out above given that the Appellant submitted a 'Notification of unplanned temporary suspension of services' form ("the Notification") to NHS England. The first condition is satisfied.

7.26 I next consider whether the temporary suspension was for reasons beyond the Appellant's control. I have had regard to the documents provided by the Appellant which includes the spreadsheet showing its reasons for the closure which states "*On this date both the pharmacist and pharmacy advisors had Covid-19 and they followed Government/NHS guidance not to attend work. The resulting pharmacist gap was sent to locum agencies but a pharmacist could not be located"*. I note that the Appellant has also referred to emails and "*numerous conversations with NHS SW*" regarding the closure reasons. As I have alluded to above, I consider that no evidence of these conversations has been provided and as such I am unable to comment on the contents of these discussions.

7.27 Whilst I note reference by NHS England to the "Local policy on monitory of, an using contractual sanctions in relation to, unplanned closures of community pharmacies" ("the policy") I have not been provided with a copy of this by either party.

7.28 I further note that I have not been provided with a copy of the Notification to NHS England setting out the reasons for the temporary suspension in the provision of services, however I note that the Breach Notice states the reason given as "*Short notice staff sickness – Covid-19"*.

7.29 NHS England sought additional information from the Appellant about the closure on 14 December 2022, however no further information was provided to NHS England.

7.30 Whilst I do not have a copy of the Notification to NHS England, I note that there is no dispute that one was completed and sent to NHS England and it is on the basis of the information contained within the Notification that it issued the Breach Notice in respect of 12 December 2022.

7.31 I note that the Breach Notice states "*The Committee was of the view that staffing was within the control of the Contractor and was not convinced there were any extenuating circumstances."*

7.32 I am of the view that generally staffing issues in a pharmacy which result in temporary unplanned closure would not constitute a reason beyond the control of the Appellant as to why the Appellant is not able to provide pharmaceutical services during core or supplementary hours, unless I have sufficient evidence to persuade me otherwise. The Appellant has sought to dispel this view, with its further reasons raised in this Appeal. I will therefore consider the other elements of the Appellant's statement. I firstly note that the Appellant has made reference to the COVID-19 pandemic, however it has stated that the temporary closure to which this Appeal relates took place on 12 December 2022. I consider that this puts the closures outside of the period during which the pandemic could be said to have taken place. I note that the Appellant has stated that the reasons for the temporary suspension in the provision of services was as a result of the pharmacist testing positive for Covid-19 and then following the Government/NHS guidance. However, I have not been provided with any further information in support of this statement and I am further of the opinion that Covid-19 is now much the same as any illness that the pharmacist might present with and therefore I do not consider this argument explains how the closure was outside of the Appellant's control.

7.33 I next consider the argument relating to there being a sector-wide issue. I consider that staffing levels of a pharmacy are not usually beyond the control of the Appellant, as the arrangements and number of pharmacists employed, either as relief pharmacists or as locums procured to cover core and supplementary hours offered by the Appellant, are a commercial consideration and a matter for the Appellant to ensure that there is sufficient cover. I note that the Appellant has indicated that the spreadsheet, extract at paragraph 3.28, is the evidence upon which it is seeking to rely in respect of the reasons for closure. I consider that this spreadsheet does not provide sufficient evidence to support the Appellant's suggestion of a "*sector-wide issue*". I consider that it is unclear what this entails, and for what reasons any attempts may have been unsuccessful. I find it difficult therefore to consider the situation to be anything other than a commercial consideration by the Appellant.

7.34 It is the Appellant's responsibility to manage its business in a way which ensures the delivery of pharmaceutical services on specified days and at specified times and that there are no temporary unplanned closures. This requires a future focus on resource allocation and the implementation of robust contingencies, including limiting the need for locums to be found at short notice to cover the employed pharmacist or the relief pharmacist if one should be unavailable for some reason; to not do so is a commercial decision under the control of the Appellant. I have not been provided sufficient evidence by the Appellant to suggest that this construction of how the situation operates was not the case in relation to the closure under consideration in this Appeal.

7.35 Separately I am also mindful that it is NHS England's duty to ensure that there are pharmaceutical services available to patients at times and locations that patients expect to be able to access pharmaceutical services. I am of the view that unplanned temporary suspension of services is a contractual issue, the duty of which falls to NHS England to manage.

7.36 Therefore, I am of the view that there was insufficient evidence provided by the Appellant that the reasons given for the temporary suspension of pharmaceutical services on the above date were beyond the Appellant's control.

7.37 Regarding conditions three and four, I acknowledge that the pharmacy reported the closure and I note the comments from the Appellant that they used reasonable endeavours to resume provision of services as soon as practicable. Given that I have determined that the Appellant's reasons for the temporary closure, as set out above, were not beyond its control, and therefore at least one of the conditions set out in paragraph 23(10) has not been met, I consider that the Appellant cannot rely on paragraph 23(10) of the Regulations to show that it is not in breach of paragraph 23(7) of Schedule 4 of the Regulations.

7.38 I am of the view that the Appellant is in breach of paragraph 23(7) of Schedule 4 of the Regulations.

7.39 I note the comment from the Appellant that the local store may not always be aware of what is happening and the actions being taken by the regional office with regard to finding cover and so communication by NHS England with local stores is not necessarily an effective method of communication.

7.40 I note that NHS England was notified of the temporary suspension of services by the local store and it was the local store who completed the relevant Notification. I note that there is no dispute between the parties that NHS England was notified correctly of the temporary suspension of services.

7.41 Further, I am mindful that the original appeal against this Breach Notice was submitted by the local store. I am of the view that it is a matter for the Appellant to communicate with the individual stores and to have a process in place as to how communications from NHS England are shared with either a head office or in this case a regional office.

7.42 I note that, apart from the statement from the Appellant, I have not been provided with any information with regard to the ongoing communications between NHS England and the Appellant's regional or head office. I note the comment from the Appellant with regard to "no further information" being provided to NHS England, however this was with regard to the initial request which was made by NHS England to the local store within a couple of days of the temporary suspension of services being notified to NHS England. I have nothing before me as to any further discussions between the Appellant and NHS England and take no view on this.

8 Decision

8.1 I am of the view that under NHS Resolution's powers, as set out in paragraph 9(5) of Schedule 3 to the Regulations, I may either confirm the decision of NHS England or substitute for that decision any decision that NHS England could have taken when it took that decision.

8.2 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I confirm the decision of NHS England to issue a Breach Notice to 125 High Street, Honiton, EX14 1HR (FL682) for 12 December 2022.

Head of Appeals
NHS Resolution