27 September 2023

REF: SHA/25895

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APPEAL AGAINST NHS ENGLAND (SOUTH WEST AREA TEAM) DECISION REGARDING A BREACH NOTICE AT BOOTS PHARMACY, 6 EAST STREET, ILMINSTER, TA19 0AJ – FA296

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 6 East Street, Ilminster, TA19 0AJ (FA296) for 28 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/25895

APPEAL AGAINST NHS ENGLAND (SOUTH WEST AREA TEAM) DECISION REGARDING A BREACH NOTICE AT BOOTS PHARMACY, 6 EAST STREET, ILMINSTER, TA19 0AJ – FA296

1 Introduction

1.1 The Appellant appealed against NHS England's decision to issue a Breach Notice to Boots UK Ltd in respect of 6 East Street, Ilminster, TA19 0AJ (FA296).

2 Background

2.1 I provided a previous determination dated 22 August 2023, in which I provided the opportunity for the parties to provide further representations on certain matters. I indicted that on receipt of comments, I would make a final determination.

2.2 In respect of the Appellant I indicated that:

2.2.1 it should provide:

2.2.1.1 a Notification to NHS England in the required form that the Ilminster premises (FA296) was open throughout its core and supplementary hours on Wednesday 28 December 2022; and

2.2.1.2 provide a copy of the same Notification to Primary Care Appeals.

2.3 In respect of NHS England I indicated that:

2.3.1 it should:

2.3.1.1 following receipt of the Notification, provide Primary Care Appeals with any further information or comments, including whether the issuing of a Breach Notice remains appropriate.

2.4 Each party was provided with a deadline for providing further representations. I expressly indicated that I would not consider any information provided outside the deadline.

3 Further Representations

3.1 I note that neither party has provided me with the information I requested as set out in the previous determination and set out in paragraph 2 above.

4 Consideration

4.1 This determination should be read alongside my previous determination which set out the relevant provisions of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations") and a detailed explanation of the Appeal and subsequent representations from NHS England.

4.2 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.

4.3 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.

4.4 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;"

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

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

4.7 I note that NHS England received notification that the pharmacy was not open during their core or supplementary hours on the day in question, 28 December 2022. This has been disputed by the Appellant and I shall return to this later.

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

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

4.9 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.

4.10 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".*

4.11 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.

4.12 I note that in response to the request from NHS England for further information the local store stated "*we was unaware of the new process for pharmacy closures, all pharmacy team members have been updated on this new process. We unfortunately processed it through pharm outcomes. … 28/12/2022 we again had no pharmacist so put through another closures, however we sourced a pharmacist and was able to open. We put this through on pharm outcomes, as unaware of the new process. …"* I further note the comments from the Appellant, in their Appeal (of 20 April 2023), that "*The pharmacy*

team sent a closure notice to NHS England on the understanding that a pharmacist could not be located. A pharmacist was then secure and this pharmacy opened and provided services as usual. We would therefore request that this notice is withdrawn." Further, in the spreadsheet with the letter of appeal it was stated "*The pharmacist did not arrive and the pharmacy team submitted a closure notice on PharmOutcomes. Shortly thereafter a pharmacist was located and we were able to open the pharmacy. This breach notice therefore appears to have been issued in error."*

4.13 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.

4.14 On 22 August 2023 I requested further information from the Appellant, in the required form, that the Ilminster premises (FA296) was open throughout its core and supplementary hours on Wednesday 28 December 2022. I note that the Appellant has not provided any further communication or the relevant notification to demonstrate that the pharmacy was open and provided services on Wednesday 28 December 2022.

4.15 Given the lack of additional information before me, I shall now consider the breach in the Breach Notice and the Appellant's grounds of Appeal of 20 April 2023.

4.16 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."

4.17 The Appellant was provided with the opportunity to demonstrate that the pharmacy was open and providing pharmaceutical services on the day and times which are the subject of this Breach Notice.

4.18 In the absence of such confirmation, I have proceeded on the basis that the pharmacy in question did not open for some of its core and / or supplementary hours on the relevant date.

4.19 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.

4.20 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.

4.21 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.

4.22 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).

4.23 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.

4.24 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."

4.25 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:

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

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

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

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

4.26 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).

4.27 In respect of the first condition, and based on the lack of information from the Appellant to support its view that the pharmacy did open on the day in question I am of the view that a temporary suspension of pharmaceutical services occurred at the pharmacy on the date in question. This is confirmed by the Appellant notifying NHS England of the closure. The first condition is satisfied.

4.28 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 "*The pharmacist did not arrive and the pharmacy team submitted a closure notice on PharmOutcomes. Shortly thereafter a pharmacist was located and we were able to open the pharmacy. This breach notice therefore appears to have been issued in error*." I note that the Appellant, in their representations has also referred to emails and "*numerous conversations with NHS SW*" regarding the closure reasons. 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.

4.29 I have also had regard to the documents provided by NHS England which include the "NHS England and South West – Community Pharmacy; Local policy on monitoring of, and using contractual sanctions in relation to, unplanned closures of community pharmacies" ("the policy") and "NHS England's Community Pharmacy – Resilience Planning" ("Resilience Planning") document which is sub headed "Temporary Suspension of NHS pharmaceutical services without notice (unplanned closure)".

4.30 The Local Policy sets out the background as to why the policy has been developed and explains why and how breach notices may be used. It puts this into context for the South West and how pharmacies should report and monitor unplanned closures and NHS England's process for considering unplanned closures including aggravating and mitigating factors. The Local Policy also makes reference to how NHS England will implement any payment withholdings.

4.31 The Resilience Planning document sets out the checklist that a pharmacy should follow if they need to suspend NHS pharmaceutical services unexpectedly, as well as setting out how the pharmacy should deal with urgent/acute prescriptions and application of the business continuity plan.

4.32 I note that NHS England has confirmed that prior to the implementation of the policy, both the resilience planning document and the Local Policy were shared with all pharmacies in the South West. I further note that since it was implemented NHS England have continued to share the information via the South West Community Pharmacy bulletin, which NHS England confirmed is sent to all contractors bi-weekly. I note that there is no dispute from the Appellant with regard to the implementation of this policy, in principle, or that the information had not been shared with all of the local stores. I note that the Appellant seeks to appeal on the basis that NHS England did not "apply their own policy fairly and accurately".

4.33 I note that the Appellant also seeks to dispute parts of the Local Policy and I will return to this later in the decision.

4.34 I 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 "*Locum could not be found – unable to source a Pharmacist/Locum Pharmacist"*.

4.35 NHS England sought additional information from the Appellant about the closure on 28 December 2022, however no further information was provided in response to the email from NHS England of 6 February 2023.

4.36 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 28 December 2022.

4.37 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."*

4.38 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. I note that I have not been provided with any information by the Appellant to as to the reasons why there was a temporary suspension of services at the pharmacy in question.

4.39 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, 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.

4.40 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. 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.

4.41 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.

4.42 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.

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

4.44 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.

4.45 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.

4.46 I am of the view that it is a matter for the Appellant to communicate with an individual store 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.

4.47 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 seeking further clarification as to the circumstances surrounding 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.

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

4.49 Returning to the issue of good cause, in light of my decision above, that the temporary suspension of pharmaceutical services on the date in question was not beyond the Appellant's control, I consider that the closure was without good cause. I therefore consider that NHS England satisfied the requirements for local dispute resolution before proceeding with the issuing of the Breach Notice.

Withholding of payment

4.50 I note that NHS England determined that a payment withholding was to apply in respect of all but the first breach notice.

4.51 I further note that the Local Policy from NHS England sets out a tiered approach to a withholding, based on the recurrence of the temporary suspension of services in a rolling 6 month period.

4.52 I note that paragraph 71(3) of the Regulations states:

(3) If the breach relates to a failure to provide, or a failure to provide to a reasonable standard, a service that C is required to provide, the breach notice may provide that, as regards the period during which there was a failure to provide, or a failure to provide to a reasonable standard, that service, the NHSCB is to withhold all or part of the remuneration due to C under the Drug Tariff or a determination as mentioned in regulation 91(6) in respect of that period.

4.53 It is not clear from the letter of Appeal whether the Appellant is seeking to challenge the decision to withhold the payment as indicated in the breach notice. I shall therefore not consider this further.

5 Decision

5.1 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.

5.2 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 6 East Street, Ilminster, TA19 0AJ (FA296) for 28 December 2022.

Head of Appeals
NHS Resolution

22 August 2023

REF: SHA/25895

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

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

APPEAL AGAINST NHS ENGLAND (SOUTH WEST AREA TEAM) DECISION REGARDING A BREACH NOTICE AT BOOTS PHARMACY, 6 EAST STREET, ILMINSTER, TA19 0AJ – FA296

1 Outcome

1.1 I consider that paragraph 7(1) of Schedule 3 of the Regulations provides discretion for me to determine this Appeal in such manner (including with regard to procedures) as I see fit. I therefore substitute the decision of NHS England with the decision to make a final determination on the Appeal and to provide a further opportunity to parties to provide Notification, information and comments.

1.2 For clarity I set out in the paragraphs below my expectations of each party:

1.3 In respect of the Appellant:

1.3.1 within 14 days (not working) of this preliminary determination to provide a Notification to NHS England in the required form that the Ilminster premises (FA296) was open throughout its core and supplementary hours on Wednesday 28 December 2022; and

1.3.2 within the same 14 days (not working), provide a copy of the same Notification to Primary Care Appeals.

1.4 In respect of NHS England:

1.4.1 within 14 days (not working) of the expiry of the time limit for the Appellant to provide Notification to NHS England or 14 days (not working) following receipt of the Notification, provide Primary Care Appeals with any further information or comments, including whether the issuing of a Breach Notice remains appropriate.

1.5 I will not consider any information provided outside the timescale set out above.

1.6 On receipt of any additional information provided in the timescales I set out above, I will consider whether it is appropriate to provide the other party with a chance to provide final observations.

1.7 I will then make a final determination on the Appeal.

A copy of this decision is being sent to:

Boots UK
NHS England – South West

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Canary Wharf
London
E14 4PU

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

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APPEAL AGAINST NHS ENGLAND (SOUTH WEST AREA TEAM) DECISION REGARDING A BREACH NOTICE AT BOOTS PHARMACY, 6 EAST STREET, ILMINSTER, TA19 0AJ – FA296

1 **The Breach Notice**

A Breach Notice dated 12 April 2023 was sent by NHS England to Boots UK Ltd in respect of 6 East Street, Ilminster, TA19 0AJ (FA296)

"BREACH NOTICE

1.1 Boots Pharmacy, 6 East Street, Ilminster, TA19 0AJ – FA296

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 28 December 2022.

Statement of Reasons

1.4 On Wednesday the Contractor has core opening hours from 09:30 – 13:15 and 14:15-17:30 with supplementary opening hours from 09:00 – 09:30.

1.5 On the 28 December 2022, the Contractor notified NHS England that pharmaceutical services had not been provided between 12:00 - 17:30 (4.50 hours) on Wednesday 28 December 2022 because:

Locum could not be found – *unable to source a Pharmacist/Locum Pharmacist*

1.6 Further information was received from the Contractor in response to NHS England's request of 12 January 2023.

"*we was unaware of the new process for pharmacy closures, all pharmacy team members have been updated on this new process. We unfortunately processed it through pharm outcomes. Regarding the date 24/12/2022 we were closed all day due to no pharmacist.*

28/12/2022 we again had no pharmacist so put through another closure, however we sourced a pharmacist and was able to open. We put this through on pharm outcomes, as unaware of the new process.

I have got the information from anther manager of new process, I will forward the forms please then let me know if this is all correct and any additional information needed"

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, the response received did not describe the precise circumstances or 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 mitigating 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 8.50 hours [sic] on 28 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 4.50 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 The Committee [of NHS England] takes the view that, because this breach relates to a repeated failure to 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.

1.17 The Committee [of NHS England] determined that a breach notice should be issued and noted this was a third closure since 1 November 2022 when the South West policy was introduced and that there should be a withholding of £100 times number hours closed using the second breach level of the scale set in the South West policy:

- To reflect costs not incurred because a pharmacist was not employed and the non-availability of pharmaceutical services: £100 per hour (£100 x 4.50) = £450

1.18 The total amount to be withheld is therefore £450.

1.19 Right of appeal

1.20 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 The Appeal

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:

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

Notice issued to FA296 Ilminster on 28 December 2022

2.2 The pharmacy team sent a closure notice to NHS England on the understanding that a pharmacist could not be located. A pharmacist was then secured and this pharmacy opened and provided services as usual. We would therefore request that this notice is withdrawn."

2.3 Excerpt below taken from the spreadsheet submitted with the letter of appeal:

12/04/2023	FA296	Ilminster	28/12/2022	4.5	The pharmacist did not arrive and the pharmacy team submitted a closure notice on PharmOutcomes. Shortly thereafter a pharmacist was located and we were able to open the pharmacy. This breach notice therefore appears to have been issued in error

3 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.

3.1 NHS ENGLAND

3.1.1 "Thank you for your email dated 04 May 2023 inviting representation in response to the appeal received against the decision made by NHS England South West to issue a breach notice to Boots Pharmacy, Ilminster (FA296).

3.1.2 Please can I ask you to treat the attached (listed below) as part of NHS England South West's representations on this appeal:

- Appendix 1– Email of 06/02/2023 sent to the contractor specifically requesting further information about the closure on 28/12/2023.
- Appendix 2 – NHS England South West Community Pharmacy – Local Policy
- Appendix 3 – Community Pharmacy Resilience Guide

3.1.3 The above mentioned pharmacy has opening hours from 09:00-17:30 on Wednesdays; on Wednesday 28/12/2023 NHS England received a notification of a temporary suspension of services at the store via Pharmoutcomes (an online platform) stating the store was closed from 09:00. The report submitted by the contractor did not state that the store reopened on the day.

3.1.4 NHS England contacted the Contractor and specifically asked for clarification as to whether they resumed provision at any time of the day (Appendix 1). NHS England did not receive any further information in response to its email on 06/02/2023.

3.1.5 The NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 contain a clear contractual requirement for pharmacies to open for all of their core and supplementary opening hours. Schedule 4-part 3 paragraph 23 specifies that where there is a temporary suspension, for a reason beyond the control of the pharmacy, the pharmacy is not in breach provided they notify the commissioner as soon as practical and use all reasonable endeavours to re-open as soon as possible. The Regulations do not specify what reasons are out of the control of a contractor, which allows for consideration of individual circumstances.

3.1.6 Pharmacies in the South West have logged higher-than-average rates of temporary suspensions in comparison with other regions. Each temporary suspension has a significant impact on continuity of and access to community pharmacy services for patients. It also increases pressure on general practices and neighbour pharmacies, as patients contact them in an attempt to get their pharmaceutical service needs met, Similarly, urgent care services are impacted by patients returning to them in an attempt to access pharmaceutical services.

3.1.7 To manage this issue, NHS England South West, in conjunction with ICBs, implemented a revised Community Pharmacy Unplanned Closure Policy on 1 November 2022.

3.1.8 Prior to implementation of the policy, all South West Community Pharmacy Contractors received copies of the policy (Appendix 2) alongside a Community Pharmacy Resilience Planning Guide (Appendix 3). The policy and the resilience guide have also been repeatedly shared via the South West Community Pharmacy bulletin, which is sent out to all Contractors bi-weekly.

3.1.9 The policy aims to support Community Pharmacy to provide consistent and high-quality dispensing services (and other additional and enhanced service) to its patients and it sets out the SW Committee's approach to monitoring of and using contractual sanctions in relation to unplanned closures in Community Pharmacy.

3.1.10 In considering this Temporary Suspension, the SW Committee took into account the individual circumstances and responses received from the contractor, in order to decide whether to:

- Take no further action in relation to the pharmacy closure.
- Issue a breach in relation to the pharmacy closure.
- Issue a breach notice with payment withholding in relation to a pharmacy closure.
- Further engage with a contractor to gain further understanding of ongoing issues.

3.1.11 The South West Pharmaceutical Services Regulations Committee (the Committee) noted that no further information had been received in response to NHS England's email on 06/02/2023 and that this closure was a repeated closure - the third closure since the implementation of the policy.

3.1.12 Based on the information available to the committee in relation to this closure, the Committee decided there had been a breach of paragraphs 23(1) and (7) of the Terms of Service for NHS Pharmacist and to issue of a breach notice with payment withholding on this occasion.

3.1.13 There is a commitment across all South West Health partners and Local Pharmaceutical Committees to maximise the opportunities for Community Pharmacy to become an integrated partner in delivering services that meet the needs of local residents. To achieve this, it is important that Community Pharmacy provides consistent and high-quality services to its patients.

3.1.14 Temporary pharmacy closures are particularly concerning due to their potential negative impact on patient care. Pharmacy closures can severely impact patients and local communities in restricting their access to medication and other services, and displace activity unnecessarily to other parts of the NHS which are already under significant pressure, such as GP practices, urgent care, or A & E.

3.1.15 NHS England South West is of the view that securing sufficient access to pharmaceutical provision is vital to ensure patients can access appropriate support within a reasonable distance in order to reduce the demand on other NHS services.

3.1.16 NHS England South West maintains the decision to issue this breach notice to Boots Pharmacy, Ilminster was necessary and requests that the appeal be rejected."

4 Observations

4.1 BOOTS UK

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

4.1.2 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.

4.1.3 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 2.3 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.

4.1.4 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.

4.1.5 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.

4.1.6 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.

4.1.7 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"*

4.1.8 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].

4.1.9 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.

4.1.10 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.

4.1.11 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.

4.1.12 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.

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

4.1.14 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'."

4.1.15 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.

4.1.16 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."

4.1.17 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 Sharon Greaves from the NHS England South West team since 23 January 2023. When requested by Sharon, 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].

4.1.18 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.

4.1.19 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

4.1.20 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].

5 Consideration

5.1 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.

5.2 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.

5.3 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;"

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

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

5.6 I note that NHS England contends that the pharmacy was not open during some of its core and or supplementary hours on 28 December 2022 as set out above, but that this has been disputed by the Appellant.

5.7 NHS England is of the view that as a result of the closure referred to above, the Appellant was in breach of:

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

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

5.9 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".*

5.10 The Regulations contain no definition of what constitutes "*reasonable effort to communicate and co-operate"*. I note that NHS England wrote to the Appellant on 12 January 2023 seeking further information, to which the Appellant responded on 13 January 2023 indicating that the pharmacy had, in fact, opened, NHS England wrote to the Appellant again on 6 February 2023, again seeking further information however I note that there appears to have been no response to this request.

5.11 In addition to the response from the Appellant of 13 January 2023, 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, 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."*

5.12 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.

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

5.14 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."

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

5.16 I note that the dispute centres around whether or not the pharmacy in question did or did not open for some of its core and / or supplementary hours on Wednesday 28 December 2022.

5.17 I further note that there appears to be contradictory information provided by NHS England in response to this appeal with regard to the alleged times that the pharmacy was closed.

5.18 The Breach Notice of 12 April 2023 states that the pharmacy was closed from 12:00 to 5:30pm on the Wednesday 28 December 2022 (4.50 hours), however in the supporting information from NHS England with its representations it states "*The above mentioned pharmacy has opening hours from 09:00 – 17:30 on Wednesdays; on Wednesday 28/12/2023 NHS England received a notification of a temporary suspension of services at the store via Pharmoutcomes (an online platform) stating the store was closed from 09:00."*

5.19 I further note that in the response dated 13 January 2023 from the Appellant to NHS England they provided additional information:

"we was unaware of the new process for pharmacy closures, all pharmacy team members have been updated on the new process. We unfortunately processed it through pharm outcomes.

…

28/12/2022 we again had no pharmacist so put through another closure, however we sourced a pharmacist and was able to open. We put this through on pharm outcomes, as unaware of the new process.

I have got the information from another manager of new process, I will forward the forms please let me know if this is all correct and any additional information needed."

5.20 I note that NHS England in an email of 6 February 2023 to the Appellant provided them with an opportunity to provide further information:

"You mention that you were able to open the store on 28/12/2022 after sourcing a pharmacist; our records do not show you have reported that the pharmacy reopened and we have it down as a full day closure from 09:00 – 17:30.

Please complete the relevant unplanned closures form (attached) with details of the closure on 28/12/2022 if this is any different to what we have on our records."

5.21 As I have noted above, the Appellant did not reply to this email from NHS England and did not provide it with an updated unplanned closures form.

5.22 I note that in its Appeal the Appellant states *"The pharmacy team sent a closure notice to NHS England on the understanding that a pharmacist could not be located. A pharmacist was then secured and this pharmacy opened and provided services as usual. We would therefore request that this notice is withdrawn."* I further note that the Appellant was provided with a further opportunity to provide any evidence that it wished to be considered as part of this Appeal and chose not to.

5.23 The discrepancy in the information from NHS England as to the length of the closure is not assisted with the lack of information from the Appellant in addressing the questions initially asked by NHS England. I am of the view that this matter could have been easily resolved without the need for a breach notice if the Appellant had responded in a timely manner to the further requests for information from NHS England.

5.24 I have also had regard to the documents provided by NHS England which includes the closure Notifications as submitted by the individual pharmacy branches as well as 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 Local Policy") and "NHS England's Community Pharmacy – Resilience Planning" ("Resilience Planning") document which is sub headed "Temporary Suspension of NHS pharmaceutical services without notice (unplanned closure)".

5.25 The Local Policy sets out the background as to why the policy has been developed and explains why and how breach notices may be used. It puts this into context for the South West and how pharmacies should report and monitor unplanned closures and NHS England's process for considering unplanned closures including aggravating and mitigating factors. The Local Policy also makes reference to how NHS England will implement any payment withholdings.

5.26 The Resilience Planning document sets out the checklist that a pharmacy should follow if they need to suspend NHS pharmaceutical services unexpectedly, as well as setting out how the pharmacy should deal with urgent/acute prescriptions and application of the business continuity plan.

5.27 Whilst I note the comments from the Appellant that they were "*unaware of the new process for pharmacy closures*" NHS England has confirmed that prior to the implementation of the policy, both the resilience planning document and the Local Policy were shared with all pharmacies in the South West. I further note that since it was implemented NHS England have continued to share the information via the South West Community Pharmacy bulletin, which NHS England confirmed is sent to all

contractors bi-weekly. I note that there is no dispute from the Appellant, in its Appeal, with regard to the implementation of this policy, in principle, or that the information had not been shared with all of the local stores.

5.28 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.

5.29 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 form. NHS England, in the Breach Notice, states that "*The Committee noted that the closure had been properly reported to NHS England…"* I therefore take no view on the reporting of the temporary suspension of services to NHS England.

5.30 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.

5.31 Given the uncertainty surrounding the closure of the premises and my desire to achieve fair resolution, I am of the view that I am unable to make a final determination regarding this Appeal. I therefore give both parties additional time to provide Notification, information and/or comment as set out below.

6 Decision

6.1 I consider that paragraph 7(1) of Schedule 3 of the Regulations provides discretion for me to determine this Appeal in such manner (including with regard to procedures) as I see fit. I therefore substitute the decision of NHS England with the decision to make a final determination on the Appeal and to provide a further opportunity to parties to provide Notification, information and comments.

6.2 For clarity I set out in the paragraphs below my expectations of each party:

6.3 In respect of the Appellant:

6.3.1 within 14 days (not working) of this preliminary determination to provide a Notification to NHS England in the required form that the Ilminster premises (FA296) was open throughout its core and supplementary hours on Wednesday 28 December 2022; and

6.3.2 within the same 14 days (not working), provide a copy of the same Notification to Primary Care Appeals.

6.4 In respect of NHS England:

6.4.1 within 14 days (not working) of the expiry of the time limit for the Appellant to provide Notification to NHS England or 14 days (not working) following receipt of the Notification, provide Primary Care Appeals with any further information or comments, including whether the issuing of a Breach Notice remains appropriate.

6.5 I will not consider any information provided outside the timescale set out above.

6.6 On receipt of any additional information provided in the timescales I set out above, I will consider whether it is appropriate to provide the other party with a chance to provide final observations.

6.7 I will then make a final determination on the Appeal.

Head of Appeals
NHS Resolution