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

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

8 September 2023

REFS: SHA/26020 - 26023

APPEAL AGAINST NHS ENGLAND (SOUTH WEST AREA TEAM) DECISIONS REGARDING BREACH NOTICES AT VICTORIA PARK COMMUNITY CENTRE, VICTORIA PARK DRIVE, BRIDGWATER, TA6 7AS (FAP96)

1 Outcome

1.1 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I confirm NHS England's decision to issue the Breach Notices identified at paragraph 1.1. and to withhold the amounts detailed at paragraph 5.50.

A copy of this decision is being sent to:

Jhoots Pharmacy
NHS England – South West

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

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

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1 The Breach Notices

Breach Notices dated 31 March 2023 were sent to Jhoots Pharmacy in respect of the premises at Victoria Park Community Centre, Victoria Park Drive, Bridgwater, TA6 7AS regarding unplanned closures on the following dates:

1.1

Case Ref	Date of Breach
26020	18/11/2022
26021	16/12/2022
26022	19/12/2022
26023	17/02/2023

1.2 The Breach Notices contain the following general wording:

"**BREACH NOTICE**

Jhoots Pharmacy, Victoria Park Community Centre, Victoria Park Drive Bridgwater TA6 7AS – FAP96.

1. 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

2. 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 18th November 2022

Statement of Reasons

3. On [day] the Contractor has core opening hours from 09:00-13:00 and 14:00-18:00.

4. On the [date], the Contractor notified NHS England that pharmaceutical services had not been provided between 09:00 - 18:00 (9 hours) on [date] because:

   No cover found - *Unable to source a Pharmacist/Locum Pharmacist*

5. No further information was received from the Contractor in response to NHS England's request of [date].

6. The Committee 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.

7. The Committee 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

8. With reference to the policy, the Committee 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.

9. 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'.

10. 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.

11. Accordingly, the Committee considered that there was not 'good cause' for the Contractor being unable to provide pharmaceutical services for the 9 hours on [date], and so there had been a breach of paragraphs 23(1) and (7) of the Terms of Service for NHS Pharmacists.

12. The Committee went on to consider whether it was reasonable and proportionate to issue a breach notice in this case.

13. The Committee considered that the loss of 9 hours service provision did justify the issue of a breach notice.

Action required.

14. The Contractor is required not to repeat the breach."

1.3 With regard to payment withholding, the first breach notice regarding Friday 18 November 2022 (ref. SHA/26020) states:

"**Payment withholding**

This was the first closure since 1 November 2022, when the revised South West Unplanned Closure Policy came into effect. The Committee 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."

1.4 Payment withholding was applied in the remaining case refs. SHA/26021 - 26023 and the general wording of the breach notices states:

"**Payment withholding**

The Committee 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.

The Committee 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:

• To reflect costs not incurred because a pharmacist was not employed and the non-availability of pharmaceutical services: £[amount] per hour (£[amount] x 9.00) = £[amount]

• 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.

The total amount to be withheld is therefore **£**[amount]."

1.5 The following table details the hours and amount of withholding relating to each breach notice:

1.5.1

Case Ref	**Date of Breach**	**Hours closed**	**Amount of withholding**
26020	18/11/2022	9am to 6pm	None
26021	16/12/2022	9am to 6pm	£450
26022	19/12/2022	9am to 6pm	£900
26023	17/02/2023	9am to 6pm	£1350

2 The Appeals

In a letter dated 30 April 2023 addressed to NHS Resolution, Jhoots Pharmacy ("the Appellant") appealed against NHS England's decisions. The grounds of the Appeal are:

2.1 "I am writing to appeal against the following breach notices (see attachments)

2.1.1 20230405 - Breach Notice - Jhoots Pharmacy Montpelier - FQ150

2.1.2 20230405 - Breach Notice - Jhoots Pharmacy Victoria Road - FH416

2.1.3 20230405 - Breach Notice - Jhoots Pharmacy Kingswood - FG399

2.1.4 20230403 - Breach Notice Jhoots - FMM80

2.1.5 20230403 - Breach Notice - Jhoots Pharmacy - FAP96

2.2 The reason for objection is that we as a company could not find a pharmacist and was;

2.2.1 Beyond the control of Jhoots

2.2.2 All reasonable endeavours to resume provision of pharmaceutical services as soon as is practicable was tried and was not achievable.

2.3 We at Jhoots as a team did the following.

2.3.1 We spend every day approximately 6-8 hours a day trying to recruit pharmacists or even locums, and it is very difficult to do.

2.3.2 Sent out emails to several thousand pharmacists on Jhoots locum database.

2.3.3 We tried to recruit by locum agencies, this is a national issue.

2.3.4 Every time we recruit a pharmacist they end up not taking on the job as they get poached or become locums.

2.3.5 We called several pharmacists.

2.3.6 We tried to share pharmacists from other stores but had to keep them in the other store due to the fact that they were in the surgery that required there demand there more, thus would have caused more patient harm.

2.3.7 Due to locum cancelling at the other store we had to move the pharmacist from this store to a surgery pharmacy or a store where it could cause more patient harm.

2.3.8 We have had locums cancelling last minute.

2.3.9 Pharmacist managers are leaving to go into other fields and have been trying to recruit but are unable due to.

2.3.9.1 NHS hospitals

2.3.9.2 111 urgent care

2.3.9.3 NHS 111

2.3.9.4 GP surgeries

2.3.9.5 Regulator committees i.e., ICB, LPC, CCG, PCN etc.

2.3.9.6 They are being recruited by the government NHS mails

2.3.10 Funding has been reduced and yet wages have gone up in the pharmacy field so we are struggling to offer same wages as NHS.

2.3.11 NHS have been lenient in some areas of the country as they are aware of the pharmacist shortage, however southwest have been particularly difficult to deal with. It is one of the worst areas being hit by pharmacist shortage however they seem to be dead set of increasing pressure on pharmacy contractors in recruiting pharmacists and penalise us if we struggle. We are already losing revenue due to not having a pharmacist and being slapped with penalty from

NHS we will have no choice to start closing the branches or worst-case scenario close the company. How is that helping us or the NHS?

2.3.12 NHS have been recruiting more and more pharmacists in the following fields recently:

2.3.12.1 NHS hospitals

2.3.12.2 111 urgent care

2.3.12.3 NHS 111

2.3.12.4 GP surgeries

2.3.12.5 Regulator committees i.e., ICB, LPC, CCG, PCN etc.

2.3.13 The number of pharmacists seems to be the same however there are more job advertisements in the field due to point [2.3.10] above.

2.3.14 Department of health has even offered Walk in interviews to recruit more pharmacists thus this tells us there is a huge shortage.

2.3.15 We have been having regular meetings with the regional NHS on a regular basis we advised them of the following points above and below and have not responded and taken on board (see attachment)

2.3.15.1 They advised us that the LPC said it was no difficulties but when I called them they said they still have difficult but is easier to recruit than before but no easy. [sic]

2.3.15.2 The opening hours are incorrect to what the NHS has breached us for we were closed where the Committee 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. This is also incorrect and advised the Regional NHS and they have not responded.

2.3.16 See link 'Nightmare': Locum agency hit with 89 cancellations after Eid rates 'not attractive enough' | Chemist+Druggist :: C+D (chemistanddruggist.co.uk), as to what is happening and this is just what was picked up, not all have been reported and this happens on a regular basis and even daily.

2.3.17 NHS has got wrong opening hours to what is stated, see attached email trends. They have 9 hours a day, when they should be 8 for total opening hours.

2.3.18 The process is to cancel then they get their friends to call and ask for double the money and all providers are seeing this. Now one is reporting this and even who is there is nothing being done about it.

2.3.19 Locums just need to know about any festival and then they increase rates and they have no care for patient safety.

2.3.20 Pharmacy as an industry is struggling, there are many pharmacy closures daily and more to continue happening nationally. If we all start getting fined then more pharmacies will close and the service gaps will increase nationally.

2.3.21 Pharmacies have supported NHS and they are penalising us thinking that we are not recruiting pharmacists.

2.3.22 We as a company have always opted to help on rotas and even down the south west and supported when other pharmacies have rejected and we always opt to help out, even last minute and even then the south west have complimented us to help (see attachment).

2.3.23 See PSNC link PSNC-Briefing-007.23-Regulatory-easements-to-seek-to-reduce-costs-and-bureaucracy-and-ensure-patient-safety.pdf (cpe.org.uk) about closure and pharmacy staff and pharmacy shortage."

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.

NHS ENGLAND

3.1 "Please can I ask you to treat the attached as part of NHS England South West's representations on this appeal:

3.1.1 Folder 1 - Notifications of temporary suspension of services at the Jhoots Pharmacy Victoria Park (FAP96)

3.1.2 Folder 2 - NHS England's emails to the Contractor requesting further information about each store closure.

3.1.3 NHS England South West Community Pharmacy - Local Policy

3.1.4 Community Pharmacy Resilience Guide

3.2 The above-mentioned pharmacy has contractual opening hours on Wednesdays from 09:00-13:00 and 14:00-18:00 Monday - Friday.

3.3 NHS England received notifications of a temporary suspension of services between 09:00-13:00 and 14:00-18:00 (full day closures) at the store on the following days (Folder 1):

3.3.1 18/11/2022 (SHA 26020)

3.3.2 16/12/2022 (SHA 26021)

3.3.3 19/12/2022 (SHA 26022)

3.3.4 17/02/2023 (SHA 26023)

3.4 Further to receipt of each closure notification, an email was sent to the Contractor (Folder 2) explaining that NHS England South West Pharmacy Services Regulations Committee (the SW Committee) was now considering whether the closure reported was beyond the reasonable control of the Contractor and, if not, whether to take formal action in respect of the closure. In the emails, the Contractor was given an opportunity to provide any additional information about the closure that may be helpful in the SW Committee's consideration.

3.5 NHS England received no response to the emails sent to the contractor.

3.6 The NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 contain a clear contractual requirement for pharmacies to open for all 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.

3.7 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 to have their pharmaceutical service needs met. Similarly, urgent care services are impacted by patients returning to them in an attempt to access pharmaceutical services. To manage this issue, NHS England South West, in conjunction with ICBs, implemented a revised Community Pharmacy Unplanned Closure Policy on 1 November 2022.

3.8 Prior to implementation of the policy, all South West Community Pharmacy Contractors received copies of the policy alongside a Community Pharmacy Resilience Planning Guide (both attached). 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.

3.9 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.

3.10 In considering theses temporary suspension of services, the SW Committee considered the individual circumstances/ repeated closures and responses received from the contractor, in order to decide whether to:

3.10.1 Take no further action in relation to the pharmacy closure.

3.10.2 Issue a breach in relation to the pharmacy closure.

3.10.3 Issue a breach notice with payment withholding in relation to a pharmacy closure.

3.10.4 Further engage with a contractor to gain further understanding of ongoing issues.

3.11 Jhoots have appealed these breaches on the grounds that the closures were due to Jhoots stating they '*could not find a pharmacist*' and describe this as being '*beyond the control of Jhoots*'; they further state that '*all reasonable endeavours to resume provision of pharmaceutical services as soon as is practicable was tried and was not achievable*'.

3.12 In coming to the decision to issue these breaches, the SW Committee noted that the closures were a repeated failure by the Contractor to meet their contractual obligation to open the pharmacy and that no further information had been received in response to any of NHS England's emails.

3.13 The SW Committee considers staffing to be within the control of the contractor and 4 hours (as set out in the policy and resilience guidance documents) is sufficient time to source a replacement Pharmacist. The proper resourcing of stores in response to fulfilling the terms of service of their contract is a matter for Contractors.

3.14 Based on the information available in relation to these closures, 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 the breach notices.

3.15 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 all Community Pharmacy provides consistent and high-quality services to its patients. Where service provision is not consistent, there is a significant risk the local general practice teams will stop engaging with the Contractor concerned, reducing the range of services patients can access from that Community Pharmacy setting.

3.16 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.

3.17 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 to reduce the demand on other NHS services.

3.18 NHS England South West maintains the decision to issue these breach notices to Jhoots Pharmacy, Victoria Park FAP96 was justified and necessary and requests that the appeal be rejected."

4 Observations

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

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 The Appellant's pharmacy was not open during its contractual hours on or at the following days and times:

5.6.1 18 November 2022 from 9am to 6pm;

5.6.2 16 December 2022 from 9am to 6pm;

5.6.3 19 December 2022 from 9am to 6pm; and

5.6.4 17 February 2023 from 9am to 6pm.

5.7 I note that the Appellant notified NHS England on each occasion by submitting a "Notification of unplanned temporary suspension of Services" ("the Notifications").

5.8 NHS England is of the view that as a result of the closures referred to in paragraph 5.6, the Appellant was in breach of paragraphs 23(1) and 23(7) of Schedule 4 of the Regulations because in each case "*the Contractor did not and will not provide pharmaceutical services for some of its contracted hours on* [date]" and the Breach Notices were issued in respect of these breaches.

5.9 I note that the Appellant states that its reason for objection is that it "*as a company could not find a pharmacist*", it was "*Beyond the control of Jhoot*s" and further, that "*All reasonable endeavours to resume provision of pharmaceutical services as soon as is practicable was tried and was not achievable.*"

5.10 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".*

5.11 The Regulations contain no definition of what constitutes "*reasonable effort to communicate and co-operate"*. I note that NHS England emailed the Appellant following each instance of closure to inform the Appellant that it was "*now considering whether the closure you have reported was beyond the reasonable control of the contractor and, if not, whether to take formal action in respect of the closure*". The emails requested any additional information about the closure that could aid NHS England in its consideration. I note that NHS England states that the Appellant did not respond to these emails in each instance and this has not been disputed. I note that in total there have been four instances of closure at the Appellant's premises.

5.12 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 breaches identified in the Breach Notices and the Appellant's grounds of Appeal.

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

> *"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 There is no dispute between the parties with regard to the days on which pharmaceutical services are to be provided at the Appellant's pharmacy. I note that the Appellant raises an issue regarding its opening hours, although it is unclear whether this is in reference to the premises in question here. I note that the Appellant has provided a copy of an email dated 16 November 2018 from NHS England to the Appellant which includes the comment "*The hours we currently have recorded for Victoria Park are: Mon-Fri 9am – 1pm with supplementary hours 1-2pm which you have asked to be removed.*" The email also refers to hours being confirmed in an earlier email but the email chain is quite unclear as to which pharmacy premises is being referred to, given that pharmacy code FWF46 is also referenced.

5.16 Irrespective of this, there is no dispute between the parties that the Appellant's pharmacy did not open for some or all of its core and/or supplementary hours on each of the dates set out in the Breach Notices and at paragraph 5.6 above, and that this is confirmed by the Notifications submitted by the Appellant to NHS England.

5.17 I note that paragraph 23(7)(a) requires the Appellant to ensure that pharmaceutical services are provided on the days and at the times notified to NHS England. As the Appellant did not provide pharmaceutical services on the days and at the times set out in the Notifications, it did not ensure that pharmaceutical services were provided at the premises on the days and at the times notified to NHS England and so the Appellant has breached paragraph 23(7)(a).

5.18 The Appellant does not dispute that there have been four instances of temporary suspension of pharmaceutical services, as set out in the Notifications. 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 Appellant's control.

5.19 The latter is set out in paragraph 23(10) of Schedule 4 of the Regulations, which sets out certain conditions, satisfaction of which would mean the Appellant would not be in

breach of paragraphs 23(7) and 23(1) of Schedule 4 of the Regulations. I return to this further below.

5.20 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.

5.21 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 for Monday to Friday are 9am to 1pm and 2pm to 6pm.

5.22 As the Appellant did not provide pharmaceutical services during the hours set out in the Notifications, it did not ensure that pharmaceutical services were provided during its core opening hours and so the Appellant has breached paragraph 23(1).

5.23 As indicated at paragraph 5.19 above, the Appellant would not be in breach of paragraph 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.

5.24 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."*

5.25 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:

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

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

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

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

5.26 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(1) or 23(7).

5.27 As discussed at paragraph 5.18 above, there is no dispute between the parties that the failure to open during core and supplementary hours on the dates indicated at paragraph 5.6 amounts to temporary suspensions of pharmaceutical services and therefore I consider that the first condition set out in 5.25.1 is satisfied.

5.28 I next consider whether the temporary suspensions were for reasons beyond the Appellant's control.

5.29 I have had regard to the Notifications submitted by the Appellant for each unexpected closure. I note that the reason given for each closure is "*Could not source pharmacist cover*".

5.30 I note NHS England's comments that pharmacies in the South West have had a higher rate of temporary suspensions than other regions, and in order to manage the issue it had implemented a revised Community Pharmacy Unplanned Closure Policy ("the Policy") to contractors on 1 November 2022. In conjunction with this, I note that a Community Pharmacy Resilience Planning Guide ("the Guide") was issued. I have been provided with copies of both documents.

5.31 I have had regard to the Policy and note that it details the regulatory background and places this in the context of the situation in the South West area. It further details arrangements for the reporting and monitoring of unplanned closures, including further investigations that will be carried out. The Policy also provides instances in which an unplanned closure would not justify a breach notice; factors which may make the issue of a breach notice more likely, examples of aggravating and mitigating factors, and information regarding the calculation of payment withholdings.

5.32 I have also had regard to the Guide which provides information regarding actions to be taken by a pharmacy in the event of an unplanned closure, including notifications and dealing with urgent/acute prescriptions. The Guide also details steps pharmacies should have in place in order to maintain access to services with minimal disruption, including a Business Continuity Plan, an induction process for new staff and locum packs containing key information for locums.

5.33 I note NHS England's comments that it had noted that "*the closures are a repeated failure by the contractor to meet their contractual obligation to open the pharmacy and that no further information had been received in response to any of NHS England's emails.*" Further that it "*considers staffing to be within the control of the contractor and 4 hours (as set out in the policy and resilience guidance documents) is sufficient time to source a replacement Pharmacist.*"

5.34 I note that in the Appeal the Appellant has explained the difficulties it has faced in recruiting pharmacists and arranging locum cover. I note that it has experienced locums cancelling at the last minute and an assertion that pharmacists are leaving to go into other fields such as hospitals or GP surgeries. I also note the Appellant's comments regarding the general difficulties being experienced by the pharmacy profession, including a reduction in funding meaning that the Appellant is "*struggling to offer the same wages as NHS*".

5.35 I am of the view that generally, staffing issues which result in temporary unplanned closures would not constitute a reason beyond the control of the Appellant as to why it is not able to provide pharmaceutical services during its core or supplementary hours unless I have sufficient evidence to persuade me otherwise. This is because staffing levels of the pharmacy are not beyond control of the Appellant as the arrangements and the number of the pharmacists employed either as relief pharmacists or as locums procured to cover core contracted as well as supplementary hours offered by the Appellant are a commercial consideration and it is a matter for the Appellant to ensure that there is sufficient cover. Therefore, there must be a substantial change which takes the Appellant's ability to staff its pharmacy outside of this control.

5.36 I note that the four closures occurred on three Fridays and a Monday. I note that the reason given in each instance was an inability to source cover. I will consider the general arguments put forward by the Appellant as they apply to this Appeal, however, the lack of contextualised information presents significant difficulties.

5.37 I note that the Appellant has stated in its Appeal that there are issues with locums that occur where there is a known event, such as a "festival". It has also provided evidence of multiple cancellations by locums on 21 April 2023. I note that none of the closures

coincide with 21 April 2023. I also note that none of the reasons supplied by the Appellant for the breaches indicate that a known event was occurring on the dates in question. Therefore, I consider that this line of reasoning does not apply to the Appeal at hand.

5.38 Following this, I consider, more generally, the Appellant's inability to arrange locum cover. The majority of the Appellant's arguments relate to recruitment, rather than the ability to acquire locums, aside from the argument relating to cancellation on festivals that I have already considered. Therefore, given the advanced notice of potential issues, I cannot see any specific explanation provided by the Appellant as to why it was unable to produce locum cover for the days in question.

5.39 Regarding the arguments raised on recruitment, I sympathise with the Appellant regarding the difficulties they are facing. However, it is unclear from the statements provided the reasons behind its inability to successfully recruit a pharmacist to this role. As I have noted, the Appellant's arguments are general in nature, which makes it difficult to understand the way it is suggesting that the 3 closures were beyond its control. I am unable to comment on what would achieve a successful recruitment strategy but I consider that these considerations are commercial in nature. I note specifically that the Appellant has mentioned its inability to compete with other fields in terms of wages, which I consider to be not something beyond the control of the pharmacy as it can in principle choose to offer higher rates of pay. Where it is unable to immediately recruit, it is available to the Appellant to employ locums to fulfil the hours, and as I have stated, I have not been provided with any information to suggest that any attempt to secure locum cover for the dates in question were unsuccessful.

5.40 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 if one should be unavailable for some reason; to not do so is a commercial decision under the control of the Appellant. I consider in order to argue that the lack of available staff was beyond its control the Appellant would need to demonstrate how its arguments relate to each of the closures and to clearly indicate the factors that render it outside of its control. I do not consider that the reasons put forward by the Appellant indicate this fact.

5.41 I also note NHS England's 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.*" I am mindful that NHS England has a duty to ensure that pharmaceutical services are made available to patients and that the Appellant's repeated unplanned closures are affecting access to such services. NHS England also has a duty to manage contractual issues as set out in the Regulations and has chosen to do so by issuing the Breach Notices in this case.

5.42 I am of the view that there was insufficient evidence provided by the Appellant that the temporary suspensions of pharmaceutical services on the above dates were beyond the Appellant's control.

5.43 Regarding conditions three and four, I acknowledge that the Appellant reported the closure on each occasion and used reasonable endeavours to resume provision of services as soon as practicable. However, given that I have determined that the Appellant's reasons for the temporary closures on the three dates in question 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.

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

5.45 I note that in the Notifications to NHS England the Appellant had provided the following information to show the actions it took to limit the impact on users of the premises: "*All local surgeries and pharmacies have been contacted to notify of the unplanned closure. a* [sic] *mechanism has been put in place for patients prescriptions to be returned if necessary. Local drug and alcohol service notified for any patient collections. Nearest local pharmacy contacted to be able to fulfil patient prescriptions.*"

5.46 I am mindful of the process followed by the Appellant in each instance to minimise the impact of the closure on customers, however I do not consider this on its own is enough to relieve the Appellant of the requirement to comply with paragraph 23(7) of the Regulations.

Withholding of payment

5.47 I note that NHS England determined that payment withholdings are to apply in respect of all but the first breach i.e. in case references SHA/26021 - 26023.

5.48 I note that paragraph 71(3) of the Regulation 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.

5.49 I note that the section of the Policy titled "Payment withholdings" states:

5.49.1 "*The Committee considers that – while being fair and proportionate – 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.*

5.49.1.1 First breach £50 per hour

5.49.1.2 Second breach within 6 months £100 per hour

5.49.1.3 Third breach within 6 months £150 per hour

5.49.1.4 Fourth breach within 6 months £200 per hour

5.49.2 Application of this ratchet should ensure pharmacies remain focused on provision of service to patients during contracted hours and staffing accordingly.

5.49.3 Above 4 breaches within a 6-month period will be dealt with by additional financial penalties and other contractual levers available.

5.49.4 *The count of breaches will be considered on a rolling 6-month period i.e. 1st August to 31st January, or 15th August to 14th February.*"

5.50 I note that NHS England determined that as the Appellant's first breach on 16 December 2022 was its first since the Policy came into effect on 1 November 2022, it

should not apply a payment withholding. Payment withholdings were then applied to the subsequent breaches. The first withholding was calculated at a rate of £50 per hour, the second at £100 per hour and the third at £150 per hour in accordance with the Policy. A calculation of the amount to be withheld was provided in each of the Breach Notices as follows:

Case Ref	Date of Breach	No. of hours closed	Rate per hour	Amount of withholding = [No. of hours x Rate per hour]
26021	16/12/2022	9	£50	£450
26022	19/12/2022	9	£100	£900
26023	17/02/2023	9	£150	£1350

5.51 I note the Appellant's comments that:

5.51.1 "*NHS have been lenient in some areas of the country as they are aware of the pharmacist shortage, however southwest have been particularly difficult to deal with. It is one of the worst areas being hit by pharmacist shortage however they seem to be dead set of* [sic] *increasing pressure on pharmacy contractors in recruiting pharmacists and penalise us if we struggle. We are already losing revenue due to not having a pharmacist and being slapped with penalty from NHS we will have no choice to start closing the branches or worst-case scenario close the company. How is that helping us or the NHS?*"

5.52 I note that the Appellant has not disputed the methodology set out in the Policy, or that the rates charged were not calculated in a fair and proportionate way, rather that it is unfair to penalise it given the situation it has described.

5.53 I am mindful of the conclusions I have reached above and therefore consider that the withholding of payment is a reasonable action. Given the lack of dispute regarding the methodology used in calculating the amount of payment withholding, I confirm NHS England's decision to withhold the amounts as detailed at paragraph 5.50.

6 Decision

6.1 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.

6.2 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I confirm NHS England's decision to issue the Breach Notices identified at paragraph 1.1. and to withhold the amounts detailed at paragraph 5.50.

Head of Appeals
NHS Resolution