

24 January 2024

REF: SHA/26096 & 26101

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

**APPEAL AGAINST BRISTOL, NORTH SOMERSET AND SOUTH
GLOUCESTERSHIRE INTEGRATED CARE BOARD'S DECISION TO
ISSUE TWO BREACH NOTICES TO THORNBURY PHARMACY (FF121),
8-10 HORSESHOE LANE, THORNBURY BS35 2AZ**

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

1 Outcome

- 1.1 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations, I confirm the decisions of the ICB to issue the Breach Notices.

A copy of this decision is being sent to:

Matrix Pharmacy Ltd t/a Thornbury Pharmacy
South West Collaborative Commissioning Hub on behalf of Bristol, North Somerset and South Gloucestershire Integrated Care Board

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8-10 HORSESHOE LANE, THORNBURY BS35 2AZ**

1 The Breach Notices

1.1 Breach Notices, both dated 10 October 2023, were sent to Thornbury Pharmacy in respect of 8-10 Horseshoe Lane, Thornbury, BS35 2AZ regarding unplanned closures on 11 and 21 April 2023. Both Breach Notices included the same general wording which is set out below. For efficiency, the Breach Notice set out below relates to SHA/26096. Paragraph 2 of this determination indicates where this is different for the Breach Notice in SHA/26101.

1.2 “BREACH NOTICE

Thornbury Pharmacy, 8-10 Horseshoe Lane Thornbury BS35 2AZ – FF121.

1.3 This is a Breach Notice issued by NHS South West Collaborative Commissioning Hub on behalf of the BNSSG Integrated Care Board 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 South West Pharmaceutical Services Regulations Committee (“the Committee”).

Nature of the Breach

1.4 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 11 April 2023.

Statement of Reasons

1.5 On Tuesday the Contractor has core opening hours from 09:00-12:00 & 14:00-18:00 with supplementary opening hours from 12:00-14:00 & 18:00-18:30.

1.6 On the 11 April 2023, the Contractor notified NHS England that pharmaceutical services had not been provided between 09:00-13:40 (4.67 hours) on Tuesday 11 April 2023 because:

1.6.1 *Locum could not be found – Locum no show*

1.7 No further information was received from Thornbury Pharmacy, the Contractor in response to NHS England’s request of 13 April 2023.

1.8 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.

1.9 The Committee considered whether or not:

- 1.9.1 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
- 1.9.2 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, temporary suspension of services in community pharmacies* (“the policy”) which it had adopted on 1 November 2022, and revised July 2023.
- 1.10 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.
- 1.11 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’.
- 1.12 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.
- 1.13 Accordingly, the Committee considered that there was not ‘good cause’ for the Contractor being unable to provide pharmaceutical services for the 4.67 hours on 11 April 2023, and so there had been a breach of paragraphs 23(1) and (7) of the Terms of Service for NHS Pharmacists.
- 1.14 The Committee went on to consider whether it was reasonable and proportionate to issue a breach notice in this case.
- 1.15 The Committee considered that the loss of 4.67 hours service provision did justify the issue of a breach notice.

Action required

- 1.16 The Contractor is required not to repeat the breach.

Payment withholding

- 1.17 This was the first closure count in a six-month rolling period. The Committee determined a breach notice should be issued but, as this was the first closure during the period, there should NOT be a withholding on this occasion.

Right of appeal

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

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

2 Breach notice for SHA/26101 – individual wording

- 2.1 Paragraph 1.5 above, should read: “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 21 April 2023.”
- 2.2 Paragraph 1.6 should read:” On Friday the Contractor has core opening hours from 09:00-12:00 & 14:00-18:00 with supplementary opening hours from 12:00-14:00 & 18:00-18:30.”
- 2.3 Paragraph 1.7 should read: “On the 21 April 2023, the Contractor notified NHS England that pharmaceutical services had not been provided between 09:00-13:50 (4.83 hours) on Friday 21 April 2023 because: “*Locum could not be found – Unable to source a Pharmacist/Locum Pharmacist*”
- 2.4 Paragraph 1.12 should read: “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.’”
- 2.5 Paragraph 1.14 should read: “Accordingly, the Committee considered that there was not ‘good cause’ for the Contractor being unable to provide pharmaceutical services for the 4.83 hours on 21 April 2023 and so there had been a breach of paragraphs 23(1) and (7) of the Terms of Service for NHS Pharmacists.”
- 2.6 Paragraph 1.16 should read: “The Committee considered that the loss of 4.83 hours service provision did justify the issue of a breach notice.”
- 2.7 Payment withholding paragraphs-
 - 2.7.1 “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.
 - 2.7.2 The Committee determined that a breach notice should be issued and, as this was a second closure in a 6-month rolling period since from the 1st breach after 1st November 2022, that there should be a withholding of the lowest rate times number of hours closed. The amount to be withheld has been calculated as follows:
 - 2.7.2.1 To reflect costs not incurred because a pharmacist was not employed and the non-availability of pharmaceutical services: £50 per hour (£50 x 4.83) = £ 241.67
 - 2.7.2.2 This is based on the Committee’s view that the amount that may be withheld in the event of an unplanned closure needs to be sufficient to provide an incentive to the contractor to take all necessary steps to prevent, or minimise the length of, the closure. In this context it should be remembered that the comparison is against the costs that the contractor may need to incur in resuming service provision (e.g., paying for a last-minute locum and their travel), which may be higher than normal running costs.
 - 2.7.3 The total amount to be withheld is therefore £ 241.67.”

3 The Appeal

In an email dated 16 October 2023 addressed to NHS Resolution, Matrix Pharmacy Ltd (“the Appellant”) appealed against the ICB’s decisions. The grounds of appeal are:

- 3.1 “I wish to appeal the 2 breach notices attached for Thornbury Pharmacy (FF121).
- 3.2 The emails requesting further information South West Collaborative Commissioning Hub (NHS SW CCHub) were received by the branch to the shared NHS mail account (pharmacy.ff121@nhs.net) on 13th April and 24th April. The staff assumed (incorrectly) that I had also received the email directly (mph_ltd@hotmail.co.uk) as I was the one who reported the closure, and they did not forward these on to me. I only learnt of these emails when I received the breach notice on 9th October as I do not work at the branch and do not access their shared mailbox.
- 3.3 I am confused to as why NHS SW CCHub did not send these emails to mph_ltd@hotmail.co.uk as my contact details are clearly stated on the notification form (attached). I sent the closure notifications to NHS SW CCHub from mph_ltd@hotmail.co.uk and also received the breach notice from NHS SW CCHub to mph_ltd@hotmail.co.uk but I received no emails from NHS SW CCHub requesting the additional information. Surely, the additional information should be requested from the person reporting the closure?
- 3.4 In regard to the closures, we were closed on both 11th and 21st April due to pharmacists cancelling at short notice (morning of shift or night before) due to a positive covid test and sickness. We tried desperately hard to find a replacement pharmacist by calling and sending messages to our pool of pharmacists. We also posted the shifts with locum agencies. Despite offering rates of up to £50/hr, there was no one available to do the shifts due to it being in the Easter Holidays when the availability of pharmacists is very limited. We sent our pharmacist from Alveston Pharmacy for a couple of hours in order to reduce risk and support patients on both occasions.
- 3.5 In an email from NHS SW CCHub dated 4th October 2023 called Important- Changes to the South West Temporary Suspension of Services Policy , they made the following change:
 - 3.5.1 CHANGE 3
 - 3.5.2 The update also recognises that splitting closures across two sites reduces risk and supports patients; in doing this, the support site closure (if more than 4hrs) should not count towards increasing the increment. For example: pharmacy A does not open because a locum pharmacist does not arrive; the pharmacist from pharmacy B (the support site) closes pharmacy B at lunchtime, to move to and open pharmacy A in the afternoon.
- 3.6 As you can see my explanation in point 3, we did try to support Thornbury Pharmacy in this way by sending the pharmacist from Alveston Pharmacy for a couple of hours to support patients.
- 3.7 I hope this has explained that the closures were beyond our control, and we took all reasonable endeavours to resume provision of pharmaceutical services as soon as is practicable.
- 3.8 I respectfully ask you to reconsider these breach notices.”

4 Summary of Representations

A separate representation was received from the ICB in respect of both occasions to which the Breach Notices relate. Both representations included the same general wording but also included wording that was specific to each date when the breach was said to have occurred. For efficiency, the following wording is for SHA/26096. Where this differs from the wording for SHA/26101, it is listed below in paragraphs 4.26 to 4.30 of this determination.

NHS South West Collaborative Commissioning Hub on behalf of the ICB

- 4.1 “Thank you for your email dated 20 October 2023 inviting representation in response to the appeal received against the decision made by the NHS South West Collaborative Commissioning Hub to issue a breach notice to Matrix Pharmacy LTD T/A Thornbury Pharmacy (FF121).
- 4.2 Please can I ask you to treat the attached as part of NHS South West Collaborative Commissioning Hub’s (NHS SW CCH) representations on this appeal:
 - 4.2.1 Appendix 1a & 1b -Notification of the temporary suspension of services at Thornbury and Alveston Pharmacies
 - 4.2.2 Appendix 2- NHS SW CCH’s email to the Contractor requesting further information about the store closure.
 - 4.2.3 Appendix 3- NHS SW CCH’s - Local Policy on Temporary Suspensions of Services (July 2023 update)
 - 4.2.4 Appendix 4- Community Pharmacy Resilience Guide
 - 4.2.5 Appendix 5- Email to Contractors about changes to the South West Temporary Suspensions Policy
- 4.3 On 11 April 2023, we were informed by the Contractor about the temporary suspension of services at Thornbury Pharmacy FF121 (from 09:00-13:40) and Alveston Pharmacy FR737 (from 13:30-15:30) due to the pharmacist not arriving. (Appendix 1a & 1b)
- 4.4 Further to receipt of the notification, an email was sent to the Contractor (Appendix 2) explaining the South West Pharmacy Services Regulations Committee (SW PSRC) was now considering whether the temporary suspension at Thornbury Pharmacy (4.67 hours long) was beyond the reasonable control of the Contractor and, if not, whether to take formal action in respect of the temporary suspension.
- 4.5 In this email, the contractor was given an opportunity to provide any additional information (by 23/04/2023) about the closure that may be helpful in the SW PSRC’s consideration; the NHS SW CCH received no response from the contractor.
- 4.6 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.
- 4.7 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 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. To manage this issue, NHS England South West at the time, in conjunction with ICBs, implemented a revised Community Pharmacy Temporary Suspensions of Services Policy on 1 November 2022.
- 4.8 Prior to implementation of the policy, all South West Community Pharmacy Contractors received copies of the policy (Appendix 3) alongside a Community Pharmacy Resilience Planning Guide (Appendix 4). 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.

- 4.9 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 PSRC's approach to monitoring of and using contractual sanctions in relation to temporary suspensions in Community Pharmacy.
- 4.10 In considering this temporary suspension, the SW PSRC considered the individual circumstances/repeated suspension of service and responses received from the contractor, in order to decide whether to:
 - 4.10.1 Take no further action in relation to the temporary suspension.
 - 4.10.2 Issue a breach in relation to the temporary suspension.
 - 4.10.3 Issue a breach notice with payment withholding in relation to the temporary suspension.
 - 4.10.4 Further engage with a contractor to gain further understanding of ongoing issues.
- 4.11 Matrix Pharmacy Ltd have appealed this breach notice on the grounds that:
 - 4.11.1 The email requesting further information was received by the branch to the shared NHS mail account pharmacy.ff121@nhs.net on 13th April; stating the following; *"The staff assumed (incorrectly) that I had also received the email directly (mph_ltd@hotmail.co.uk) as I was the one who reported the closure, and they did not forward these on to me"*.
- 4.12 The Contractor further states *"I only learnt of these emails when I received the breach notice on 9th October as I do not work at the branch and do not access their shared mailbox"*.
- 4.13 The private email address stated on the notification form was not sent the request for further information, whilst the private email address above had been copied into the breach notice.
- 4.14 NHS South West Collaborative Commissioning Hub maintains contact with Community Pharmacy Contractors via the pharmacy's shared NHSmail. All Community Pharmacy Contractors under the NHS Terms of Service have a duty to access their NHS mail i.e., they must ensure their staff have access to, and are able to send and receive NHS mail from the pharmacy shared NHS mail mailbox in an appropriate and timely manner.
- 4.15 When the NHS SW CCH is notified of temporary suspensions, the pharmacy team request further information about the suspensions in relevant cases; because of the high volume of requests made for information the NHS email (not additional email addresses) is the point of contact. Accessing of the NHS mail in response to fulfilling the terms of service of their contract is a matter for contractors.
- 4.16 The temporary suspension was due to a short notice cancellation and a locum pharmacist was not found to provide cover. A pharmacist from their sister pharmacy - Alveston Pharmacy, later supported service provision.
- 4.17 The SW PSRC considers staffing to be within the control of the contractor and 4 hours (as set out in the documents at Appendix 3 and 4) 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.

- 4.18 In coming to the decision to issue this breach notice, the SW PSRC noted that no further information had been received in response to NHS SW CCH's email on 13/04/2023. Based on the information available in relation to this temporary suspension, 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 a breach notice but there should not be a withholding on this occasion.
- 4.19 An email sent by NHS SW CCH to contractors regarding changes made to locally policy on temporary suspension of services (Appendix 5); the Contractor further provided the extract from the email below:
- 4.19.1 *"The update also recognises that splitting closures across two sites reduces risk and supports patients; in doing this, the **support site closure** (if more than 4hrs) should not count towards increasing the increment. For example: pharmacy A does not open because a locum pharmacist does not arrive; the pharmacist from pharmacy B (the support site) closes pharmacy B at lunchtime, to move to and open pharmacy A in the afternoon".*
- 4.20 The updated policy does recognise that splitting of closures across two sites reduces risk and supports patients, however it applied to the supporting site if closed for more than 4 hours. In this case, the temporary suspension of services applies to the Thornbury Pharmacy on 11 April 2023, but the Alveston Pharmacy (which was the supporting site for Thornbury Pharmacy) would not have been breached if the support they provided resulted in them being closed for more than 4 hours.
- 4.21 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.
- 4.22 Ensuring access to community pharmacy services is also important across both the large rural geography of the South West and in addressing health inequalities. This contractor is located in a largely rural area where access to alternative services is limited and the relationship with their local pharmacy is particularly important in supporting patient needs.
- 4.23 Temporary pharmacy suspensions are particularly concerning, due to their potential negative impact on patient care and 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.
- 4.24 The NHS SW CCH 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.
- 4.25 Therefore, the NHS SW CCH maintains the decision to issue this breach notice to Thornbury Pharmacy, FF121 was justified and necessary and requests that the appeal be rejected.

The ICB's wording in its representations for SHA/26101 differs from that relating to SHA/26096 as follows:

- 4.26 Point 4.3 should read; "On 21 April 2023, we were informed by the Contractor about the temporary suspension of services at Thornbury Pharmacy FF121 (from 09:00-

13:50) and Alveston Pharmacy FR737 (from 13:40-15:20) due to the pharmacist not arriving. (Appendix 1a & 1b)."

- 4.27 Point 4.4 should read: "Further to receipt of the notification, an email was sent to the Contractor 24.04.23 (Appendix 2) explaining the South West Pharmacy Services Regulations Committee (SW PSRC) was now considering whether the temporary suspension at Thornbury Pharmacy (4.83 hours long) was beyond the reasonable control of the Contractor and, if not, whether to take formal action in respect of the temporary suspension."
- 4.28 Point 4.5 should read: "In this email, the contractor was given an opportunity to provide any additional information (by 04/05/2023) about the closure that may be helpful in the SW PSRC's consideration; the NHS SW CCH received no response from the contractor."
- 4.29 Point 4.18 should read: "In coming to the decision to issue this breach notice, the SW PSRC noted that no further information had been received in response to NHS SW CCH's email on 24/04/2023. Based on the information available in relation to this temporary suspension, 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 a breach notice but there should not be a withholding on this occasion."
- 4.30 Point 4.20 should read: "The updated policy does recognise that splitting of closures across two sites reduces risk and supports patients, however it applied to the supporting site if closed for more than 4 hours. In this case, the temporary suspension of services applies to the Thornbury Pharmacy on 21 April 2023, but the Alveston Pharmacy (which was the supporting site for Thornbury Pharmacy) would not have been breached if the support they provided resulted in them being closed for more than 4 hours."

5 Observations

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

6 Consideration

- 6.1 Since 1 April 2023, Integrated Care Boards have taken on delegated responsibility for the commissioning of pharmaceutical services. NHS South West Collaborative Commissioning Hub on behalf of the ICB, made the decisions which are the subject of this appeal. NHS Resolution will issue this decision to the NHS South West Collaborative Commissioning Hub and it is for the Commissioning Hub to inform the relevant ICB.
- 6.2 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.

- 6.3 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;"

- 6.4 The Regulations contain no definition as to what constitutes a breach of terms of service which is not capable of remedy.
- 6.5 The pharmacy is included on the pharmaceutical list and that there is no dispute between the parties with regard to this.
- 6.6 The pharmacy listed above, was not open for some of its core hours and supplementary hours, respectively, on the 11 April and 21 April 2023 and that this has been accepted by the Appellant.
- 6.7 The ICB is of the view that as a result of the closures the Appellant was in breach of Schedule 4, part 3, paragraph 23(1) and 23(7) for failure to open during contracted hours.
- 6.8 The ICB considered that the closures were not beyond the control of the Appellant and as such, the ICB proceeded to issue the Breach Notices.
- 6.9 Under Regulation 69(1), before issuing a breach notice, the ICB 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".*
- 6.10 The Regulations contain no definition of what constitutes *"reasonable effort to communicate and co-operate"*. I note that the ICB wrote to the Appellant a few days after the closure had occurred seeking further information.
- 6.11 I note that the Breach Notices include a comment that no further information was received from the Appellant in response to NHS England's requests of 13 April 2023 and 24 April 2023. On appeal, the Appellant has confirmed that the emails from the South West Collaborative Commissioning Hub were received on 13 April 2023 and 24 April 2023 by the branch to its shared NHS email account (pharmacy.ff121@nhs.net). There is no dispute that this appears to be the principal NHS email account for the pharmacy. I note the Appellant's claim that he does not work at this pharmacy and, his staff assumed incorrectly that the Appellant had also received a copy of the emails to mph_ltd@hotmail.co.uk. They did not therefore pass on the emails to the former email address.
- 6.12 I am aware that the Regulations require that the Appellant together with other members of its staff have access to the NHS email account. In my view, the Appellant's members of staff should have checked that the Appellant had indeed received the 13 and 24 April 2023 emails from the ICB thus giving the Appellant an opportunity to respond. I note that the Appellant has not referred to any lack of local dispute resolution in its appeal and I therefore determine that there is no failure to comply with Regulation 69 in this respect.
- 6.13 I shall now consider the breaches in the Breach Notices and the Appellant's grounds of appeal.
- 6.14 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.”

- 6.15 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.
- 6.16 There is no dispute between the parties that the pharmacy in question did not open for some of its core and/or supplementary hours on the relevant dates and that this is confirmed by the notifications of unplanned temporary suspension of pharmaceutical services (the “Notifications”) submitted by the Appellant to the ICB.
- 6.17 I consider that a failure to provide services during contracted hours amounts to a temporary suspension of services. Temporary suspension of services does not necessarily mean that the Appellant was in breach of paragraph 23(7)(a). The Regulations permit temporary suspension of services in certain circumstances without attracting a breach, e.g. where sufficient advance notice has been provided of an intended suspension of services (pursuant to paragraph 23(1)) or to cater for situations which are, for example, outside of the contractor’s control.
- 6.18 The latter is set out in paragraph 23(10) of Schedule 4 of the Regulations, which sets out certain conditions, which, if satisfied, would mean the Appellant would not be in breach of paragraphs 23(7) and 23(1) of Schedule 4 of the Regulations.
- 6.19 Before I consider whether the Appellant has satisfied the conditions set out in paragraph 23(10) in relation to breach of paragraph 23(7), I shall consider whether the Appellant’s temporary suspension of services amounts 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.
- 6.20 Paragraph 23(1) requires the Appellant to provide pharmaceutical services during its core opening hours. The Breach Notices above, include the core opening hours of the pharmacy and these have not been disputed by the Appellant. 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 hours and so the Appellant has breached paragraph 23(1).

- 6.21 As indicated at paragraph 6.17 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.
- 6.22 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:
- 6.22.1 establishing that there has been a temporary suspension of pharmaceutical services;
 - 6.22.2 the temporary suspension of pharmaceutical services arose for reasons beyond the control of the Appellant;
 - 6.22.3 the Appellant notified the ICB of the temporary suspension as soon as practicable; and
 - 6.22.4 the Appellant has used all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable.
- 6.23 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).
- 6.24 In respect of the first condition, there is no dispute between the parties that a temporary suspension of pharmaceutical services occurred at the pharmacy on the dates in question as set out above given that the Appellant submitted a 'Notification of unplanned temporary suspension of services' form to the ICB. The first condition is satisfied.
- 6.25 I next consider whether the temporary suspension was for reasons beyond the Appellant's control. I note that in its Notifications to the ICB the Appellant stated "*No pharmacist arrived*". On appeal, the Appellant claimed that it was closed on 11 and 21 April 2023 due to pharmacists cancelling at short notice (morning of shift or night before) due to a positive covid test and sickness. The Appellant stated that it tried desperately hard to find a replacement pharmacist by calling and sending messages to its pool of pharmacists. The Appellant also posted the shifts with locum agencies. Despite offering rates of up to £50/hr, there was no one available to do the shifts due to it being in the Easter Holidays when according to the Appellant, the availability of pharmacists is very limited.
- 6.26 I have also had regard to the documents provided by the ICB which include the closure Notifications as submitted by the Appellant 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)".
- 6.27 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 the ICB's process for considering unplanned closures including aggravating and mitigating factors. The Local Policy also makes reference to how the ICB will implement any payment withholdings.
- 6.28 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.

- 6.29 The ICB 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 the ICB has continued to share the information via the South West Community Pharmacy bulletin, which the ICB has confirmed is sent to all contractors bi-weekly. 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.
- 6.30 I also note that the Appellant refer to amendment 'Change 3' to the Local Policy and I will return to this later in the decision.
- 6.31 I am of the view that, generally, staffing issues in a pharmacy which result in temporary unplanned closures 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. 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 was provided with no evidence to support the Appellant's claim that it had tried desperately hard to find a replacement pharmacist.
- 6.32 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 closure under consideration in this appeal. I am also mindful that it is the ICB'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 the ICB to manage.
- 6.33 Therefore, I am of the view that there was insufficient evidence provided by the Appellant that the temporary suspension of pharmaceutical services on the above dates were beyond the Appellant's control.
- 6.34 Regarding conditions three and four, I acknowledge that the Appellant reported the closures and 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 closures was 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.
- 6.35 I am of the view that the Appellant is in breach of paragraph 23(7) of Schedule 4 of the Regulations.
- 6.36 I note that an email dated 4 October 2023 from NHS South West Collaborative Commissioning Hub to 'All South west Community Pharmacy Contractors' refers to amendments to the 'South West Temporary Suspension of Services (Unplanned Closure) Policy' implemented in the region since 1 November 2022. Under the heading 'Change 3' it states:
- 6.36.1 "The update also recognises that splitting closures across two sites reduces risk and supports patients; in doing this, the support site closure (if more than 4hrs) should not count towards increasing the increment. For example: pharmacy A does not open because a locum pharmacist does not arrive; the

pharmacist from pharmacy B (the support site) closes pharmacy B at lunchtime, to move to and open pharmacy A in the afternoon.”

- 6.37 I note the Appellant’s comment on appeal that it did on 11 and 21 April 2023 send its pharmacist from Alveston Pharmacy for a couple of hours in order to reduce risk and support patients. Whilst I appreciate the efforts that the Appellant took in providing some pharmaceutical services from both locations, the reason for this needing to be done was based on the availability of a pharmacist. I am of the view that the result of the closure was that at the relevant pharmacy in question there was no provision of pharmaceutical services for part of both days.
- 6.38 The Regulations do not make any reference to any time period in respect of a temporary suspension of services, however in the Local Policy under “General Rules” it states:
- 6.38.1 “The threshold of 4 hours has been chosen as being roughly half a day (based on 40 core opening hours provided evenly over five weekdays). This threshold will be applied whether the pharmacy concerned has 40 or 100 core opening hours (or any other number of core opening hours), and whether or not it also has supplementary opening hours.
- This ‘grace’ period is allowed for contractors to take action to deal with unexpected events and resume service provision.”
- 6.39 I note that the Breach Notices include “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.’”
- 6.40 The Regulations are silent on this matter and therefore any temporary suspension of services, irrespective of the length of suspension of services, could be considered a breach. It might be argued that whatever time period the ICB might have determined could be considered arbitrary. I note the reasoning given by the ICB as to why 4 hours was deemed to be appropriate and the undisputed comments from the ICB that the Local Policy as well as the Resilience Planning Guide were communicated to all pharmacies in the South West prior to implementation. I am of the view that it would have been open to the Appellant to raise any objections with NHS England South West prior to implementation. I am of the view that the implementation of the Local Policy is something for the South West team to consider and as such, I take no view on the time period as set out in the Local Policy which would cause a breach notice to be considered.
- 6.41 I am of the view that the Appellant was in breach of paragraph 23(7) of Schedule 4 of the Regulations on both 11 and 21 April 2023.
- 6.42 I am mindful of the process followed by the Appellant to minimise customer impact, 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.
- 6.43 Returning to the issue of good cause, in light of my decision above, that the temporary suspension of pharmaceutical services on 11 and 21 April 2023 were not beyond the Appellant’s control, I consider that the closures were without good cause. I therefore consider that the ICB satisfied the requirements for issuing the Breach Notices.

Withholding of payment

- 6.44 The ICB determined that a payment withholding is to apply in respect of the breach on 21 April 2023. A calculation of the amount to be withheld is as provided in the Breach Notice appertaining to that date (see paragraph 2.7.2.1. above).

6.45 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.

6.46 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.”

6.47 It is not clear from the letter of appeal whether the Appellant was seeking to challenge the decision to withhold payments indicated in the Breach Notice appertaining to that date but given my determination. I shall not consider this further.

7 **Decision**

7.1 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 the ICB or substitute for that decision any decision that the ICB could have taken when it took that decision.

7.2 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I confirm the decisions of the ICB to issue the Breach Notices.

Head of Appeals
NHS Resolution