

26 April 2024

REF: SHA/26143

**APPEAL AGAINST NHS HERTFORDSHIRE AND WEST
ESSEX INTEGRATED CARE BOARD DECISION
REGARDING A BREACH NOTICE AT ROSEMEAD LTD
T/A TOTAL HEALTH PHARMACY, 14 GREGOR SHANKS
WAY, WATTON, IP25 6FA**

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

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

1 Outcome

1.1 Pursuant to paragraph 9(5)(b) of Schedule 3 to the Regulations, I substitute the decision of the ICB to issue the Breach Notice dated 21 December 2023 with a breach notice stating that the Appellant is in breach of paragraph 23(10) of Schedule 4 of the Regulations in respect of:

1.1.1 Sunday 24 September 2023;

1.1.2 Sunday 1 October 2023;

1.1.3 Sunday 8 October 2023;

1.1.4 Sunday 15 October 2023;

1.1.5 Sunday 22 October 2023;

1.1.6 Sunday 29 October 2023;

1.1.7 Sunday 5 November 2023;

1.1.8 Sunday 12 November 2023;

1.1.9 Sunday 19 November 2023; and

1.1.10 Thursday 9 November 2023.

1.2 Pursuant to paragraph 9(5)(a) of Schedule 3, I confirm the decision of the ICB to issue the Breach Notices dated on 21 December 2023 relating to Regulation 65(2) and paragraph 23(1)(b) of Schedule 4, respectively.

A copy of this decision is being sent to:

Rosemead Ltd
NHS Hertfordshire and West Essex ICB

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1 The Breach Notice

Three Breach Notices dated 21 December 2023 were sent to Rosemead Ltd t/a Total Health Pharmacy (FAD81) in respect of 14 Gregor Shanks Way, Watton, Thetford, Norfolk, IP25 6FA.

Breach Notice 1

1.1 “This is a breach notice issued under regulation 70 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended (the 2013 regulations.).

1.2 Failure to ensure pharmaceutical services are provided for not less than 100 hours each week.

1.3 National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 Core Opening Hours Conditions.

1.4 Regulation 65

(1) If an application to which regulation 13(1)(b) of the 2005 Regulations (exemption from the necessary or expedient test) applied was granted, the inclusion in the pharmaceutical list of the person listed in relation to –

(a) the premises that were listed as a consequence of that application; or

(b) if there has been a relocation of the retail pharmacy business or appliance contractor business at those premises to other premises, those other premises,

is subject to the condition set out in paragraph (2) (“the 100 hours condition”).

(2) The condition is that the premises must be kept open for at least 100 hours per week for the provision of pharmaceutical services.

(3) The NHSCB may not vary or remove the 100 hours condition.

1.5 Nature of the breach:

1.6 Failure to notify the ICB of Temporary Suspensions as required in line with the Terms of Service, Schedule 4, Part 3, Paragraph 23(10) which states:

10. Where there is a temporary suspension in the provision of pharmaceutical services by P (because of illness or another reason) beyond the control of P, P is not in breach of sub-paragraphs (1) and (7), (or of paragraph 23A(5)(a),) provided that –

(a) P notifies the NHSCB of that suspension as soon as possible (as practicable, in the manner required by paragraph 29D(2)(a) and wherever possible before the start of the suspension;)

(aa) P uses all reasonable endeavours to implement the business continuity plan that P is required to have by virtue of paragraph 29D; and)

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

- 1.7 The Pharmacy Contracting Team was made aware that Rosemead Ltd t/a Total Health Pharmacy (FAD81) had not notified the ICB of temporary suspensions in the provision of pharmaceutical services on the following dates:
- 1.7.1 Sunday 24 September 2023
 - 1.7.2 Sunday 30 September 2023 [sic]
 - 1.7.3 Sunday 7 October 2023 [sic]
 - 1.7.4 Sunday 14 October 2023 [sic]
 - 1.7.5 Sunday 21 October 2023 [sic]
 - 1.7.6 Sunday 28 October 2023 [sic]
 - 1.7.7 Sunday 4 November 2023 [sic]
 - 1.7.8 Sunday 11 November 2023 [sic]
 - 1.7.9 Sunday 18 November 2023 [sic]
 - 1.7.10 Thursday 9 November 2023 [sic]
- 1.8 Pharmaceutical services were not provided at times when the pharmacy should have been open and Rosemead Ltd t/a Total Health Pharmacy (FAD81) did not notify the ICB in line with their terms of service.
- 1.9 You are required to ensure that you do not repeat the breach detailed in this notice.
- 1.10 You have a right of appeal to the Secretary of State against the issuing of this remedial [sic] notice. Should you choose to appeal then you should send a concise and reasoned statement of the grounds for your appeal within 30 calendar days of the date of this notice to appeals@resolution.nhs.uk or NHS Resolution, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU.
- 1.11 Please note that should you fail to comply with the requirements of this breach notice we reserve the right to exercise our powers to take further action in relation to your inclusion in the pharmaceutical list in respect of the above named premises.
- 1.12 This may include the removal of the premises from the pharmaceutical list under regulation 73 of the 2013 regulations."

Breach Notice 2

- 1.13 “This is a breach notice issued under regulation 70 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended (the 2013 regulations).
- 1.14 Failure to ensure pharmaceutical services are provided for not less than 100 hours each week.
- 1.15 Nature of the breach:
- 1.16 Regulation 65 (2) which states that the premise must be kept open for at least 100 hours per week for the provision of pharmaceutical services.
- 1.17 Rosemead Ltd, T/A Total Health Pharmacy is included in the pharmaceutical list for the area of Norfolk Health and Wellbeing Board in respect of Total Health Pharmacy at the above address, and its inclusion is subject to the 100 hours condition set out in regulation 65 of the 2013 regulations.
- 1.18 Regulation 65
- (1) If an application to which regulation 13(1)(b) of the 2005 Regulations (exemption from the necessary or expedient test) applied was granted, the inclusion in the pharmaceutical list of the person listed in relation to –*
- (a) the premises that were listed as a consequence of that application; or*
- (b) if there has been a relocation of the retail pharmacy business or appliance contractor business at those premises to other premises, those other premises,*
- is subject to the condition set out in paragraph (2) (“the 100 hours condition”).*
- (2) The condition is that the premises must be kept open for at least 100 hours per week for the provision of pharmaceutical services.*
- (3) The NHSCB may not vary or remove the 100 hours condition.*
- 1.19 The core opening hours for this pharmacy are as follows:
- 1.19.1 Monday to Friday 08.00 to 23.00
- 1.19.2 Saturday & Sunday 08.00 to 20.30
- 1.20 It is a term of service that Rosemead Ltd, T/A Total Health Pharmacy ensures that pharmaceutical services are provided at the above-mentioned premises for not less than 100 hours each week.
- 1.21 You are required to ensure that you do not repeat the breach detailed in this notice.
- 1.22 You have a right of appeal to the Secretary of State against the issuing of this remedial notice.
- 1.23 You have a right of appeal to the Secretary of State against the issuing of this remedial [sic] notice. Should you choose to appeal then you should send a concise and reasoned statement of the grounds for your appeal within 30 calendar days of the date of this notice to appeals@resolution.nhs.uk or NHS Resolution, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU.

- 1.24 Please note that should you fail to comply with the requirements of this breach notice we reserve the right to exercise our powers to take further action in relation to your inclusion in the pharmaceutical list in respect of the above named premises.
- 1.25 This may include the removal of the premises from the pharmaceutical list under regulation 73 of the 2013 regulations.”

Breach Notice 3

- 1.26 “This is a breach notice issued under regulation 70 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended (the 2013 regulations).
- 1.27 Failure to ensure pharmaceutical services are provided for not less than 100 hours each week.
- 1.28 Nature of the breach:
- 1.29 Pharmacy Opening Hours: General
- 1.30 *Schedule 4, Paragraph 23*
- 1.31 *(1) An NHS Pharmacist (P) must ensure that pharmaceutical services are provided at P’s pharmacy premises –*
- 1.32 *(b) for not less than 100 hours each week; in the case of premises in respect of which a 100 hours condition applies.*
- 1.33 Rosemead Ltd, T/A Total Health Pharmacy is included in the pharmaceutical list for the area of Norfolk Health and Wellbeing Board in respect of Total Health Pharmacy at the above address, and its inclusion is subject to the 100 hours condition set out in regulation 65 of the 2013 regulations.
- 1.34 The core opening hours for this pharmacy are as follows:
- 1.34.1 Monday to Friday 08.00 to 23.00
- 1.34.2 Saturday & Sunday 08.00 to 20.30
- 1.35 It is a term of service that Rosemead Ltd, T/A Total Health Pharmacy ensures that pharmaceutical services are provided at the above-mentioned premises for not less than 100 hours each week.
- 1.36 You are required to ensure that you do not repeat the breach detailed in this notice.
- 1.37 You have a right of appeal to the Secretary of State against the issuing of this remedial notice.
- 1.38 You have a right of appeal to the Secretary of State against the issuing of this remedial [sic] notice. Should you choose to appeal then you should send a concise and reasoned statement of the grounds for your appeal within 30 calendar days of the date of this notice to appeals@resolution.nhs.uk or NHS Resolution, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU.
- 1.39 Please note that should you fail to comply with the requirements of this breach notice we reserve the right to exercise our powers to take further action in relation to your inclusion in the pharmaceutical list in respect of the above named premises.

- 1.40 This may include the removal of the premises from the pharmaceutical list under regulation 73 of the 2013 regulations.”

2 The Appeal

In a letter dated 17 January 2024 addressed to NHS Resolution, Rosemead Ltd t/a Total Health Pharmacy (“the Appellant”) appealed against the ICB’s decision. The grounds of appeal are:

- 2.1 “I wish to appeal against the above 3 breach notices, issued simultaneously on 21/12/23, on the grounds they go against natural justice, and are fundamentally unfair.
- 2.2 I apologise for this, which transpired as a result of a misunderstanding.
- 2.3 1. At some time in the past, 2 qualified ACTs used to run the dispensary, with locums. They altered the Directory of Services (DoS) as required.
- 2.4 2. The DoS system accepted their input hours, and from then they believed no further reporting of unplanned closure was required and we were therefore permitted to close on Sundays, the locums availability being dire.
- 2.5 3. They subsequently resigned, along with 100% of my dispensers, having been recruited away by NHSE (and 80% of our pharmacists).
- 2.6 4. The Retail Manageress [KD] kindly offered to take on this task, but was not made aware of the reporting requirements at 1 above.
- 2.7 5. I confess I was none the wiser believing 2 above to be true.
- 2.8 6. After much engagement with multiple persons at NHS / ICB / LPC, an application for a change to 72 hour has been made, in compliance with regulations.
- 2.9 7. [KD] was made aware of the “unplanned closure notification”, on days we could not procure a locum, and I believe she started doing so recently.
- 2.10 8. The regulations were written some 2 decades ago, under different workforce resources.
- 2.11 9. It seems fundamentally unfair, 20 years later, for the regulatory authority responsible for poaching away all my staff, to then breach us.
- 2.12 10. 8 above has had a massive impact on us, even today, as well as closing down Boots Chemist in Watton.
- 2.13 11. I respectfully ask that you strike out/cancel these 3 breach notices.”

3 Summary of Representations

This is a summary of representations received on the appeal.

3.1 NHS HERTFORDSHIRE AND WEST ESSEX ICB

- 3.1.1 “Please note that from the 1 April 2024, community pharmacy contracting and commissioning has been delegated to Integrated Care Boards (ICB). Hertfordshire and West Essex (HWE) ICB are hosting the function on behalf of the six East of England ICBs.
- 3.1.2 At a meeting on 29 November 2023, the pharmaceutical services regulations committee (PSRC) considered the failure of Total Health Pharmacy to open in

line with its core opening hours on nine Sundays and one Thursday between September and November 2023. Rosemead Ltd who runs the pharmacy had failed to notify the ICB of these temporary suspensions in the provision of pharmaceutical services as required by paragraph 23(10)(a), Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended ('the regulations').

- 3.1.3 In addition, Rosemead Ltd had failed to ensure pharmaceutical services were provided for not less than 100 hours in each week as required as paragraph 23(1)(b), Schedule 4 of the regulations, and also appeared to have breached the 100 hours condition defined in regulation 65(1) and (2) of the regulations.
- 3.1.4 At the time, the core opening hours for the pharmacy were:
 - 3.1.4.1 08.00 to 23.00 Monday to Friday
 - 3.1.4.2 08.00 to 20.30 Saturday to Sunday
- 3.1.5 Inclusion of the pharmacy in the pharmaceutical list for the area of Norfolk Health and Wellbeing Board was subject to the 100 hours condition defined in regulation 65(2) of the regulations.
- 3.1.6 The PSRC considered the communications received from Rosemead Ltd on these matters and was of the opinion that it had breached at least three of the terms of service relating to opening hours and that it was therefore appropriate to issue one breach notice in respect of each breach under regulation 71.
- 3.1.7 Please find below information we wish to be considered in relation to the appeal by Rosemead Ltd. We have adopted the structure of the letter of appeal in our response.
- 3.1.8 With regards to the 3 breach notices issued to Rosemead Ltd, these were issued simultaneously. For clarity, breach notice 2 and breach number 3 correlate to the dates as set out in breach notice 1. The decision to issue the 3 breach notices was made in line with the regulations. The regulations pertinent to this matter are set out in Appendix 1.
- 3.1.9 Breach Notice 1: issued for failure to notify the ICB of temporary suspensions as required by paragraph 23(10)(a), Schedule 4.
- 3.1.10 Breach Notice 2: issued in relation to Regulation 65(2) which states that the premises must be kept open for at least 100 hours per week for the provision of pharmaceutical services. The appellant breached this requirement as a result of closing on the dates set out in Breach Notice 1.
- 3.1.11 Breach Notice 3: issued in relation to paragraph 23(1)(b) Schedule 4 as the appellant failed to ensure the provision of pharmaceutical services at the pharmacy premises for not less than 100 hours each week. The appellant breached this regulation as a result of closing on the dates set out in Breach Notice 1.
- 3.1.12 Having reviewed the grounds of the appeal and the information provided by Rosemead Ltd, we remain of the opinion that the breach notices are valid. The appellant has stated that the grounds for the appeal are because the breach notices "go against natural justice and are fundamentally unfair". (Appeal letter page 1).

3.1.13 The appellant sets out 11 points in their letter of appeal (Appeal letter page 1 and 2). For ease of reference these are set out below with our corresponding comments:

1. At some time in the past, 2 qualified ACTs used to run the dispensary, with locums. They altered the Directory of Services (DoS) as required.

3.1.14 We assume that the appellant is referencing two staff members who updated the Directory of Service (DoS) when the pharmacy closed due to temporary suspensions. Whilst updating the DoS is a requirement under the Business Continuity Plan, it does not negate the requirements of paragraph 23(10)(a), Schedule 4 to notify the ICB of a temporary suspension.

3.1.15 Furthermore, Rosemead Ltd is included in the relevant pharmaceutical list under the 100-hour condition. Failure to adhere to Regulation 65(2) and paragraph 23(1)(b) is not negated because staff members updated the DoS to reflect a closure.

2. The DoS system accepted their input hours, and from then they believed no further reporting of unplanned closure was required and we were therefore permitted to close on Sundays, the locums availability being dire.

3.1.16 The DoS system is a reporting tool and inputting amended hours does not negate the obligations on Rosemead Ltd to fulfil the requirements of the regulations as set out in the breach notices. Whilst the PSRC may have sympathy for the appellant in securing a locum, staffing is within the control of appellant. In the event that the pharmacy cannot open due to staffing issues, the requirement to notify the ICB as per the regulations is still necessary.

3. They subsequently resigned, along with 100% of my dispensers, having been recruited away by NHSE (and 80% of our pharmacists)

3.1.17 It is unclear how this is relevant to this appeal and the requirements of the regulations in question.

4. The Retail Manageress Mrs XXXXX kindly offered to take on this task, but was not made aware of reporting requirements, at 1. above.

3.1.18 This is unclear. It is assumed that this is in reference to updating the DoS in event of a temporary suspension. Whilst updating the DoS is a requirement under the Business Continuity Plan, it does not negate the requirements under paragraph 23 10)(a), Schedule 4 to notify the ICB of a temporary suspension. Furthermore, failure to adhere to Regulation 65(2) and paragraph 23(1)(b), Schedule 4 is not negated because staff members updated the DoS to reflect a closure.

5. I confess I was none the wiser, believing 2. above to be true

3.1.19 It is the responsibility of Rosemead Ltd to ensure all regulatory requirements are met. In this case, the regulations set out in the breach notices have not been met.

6. After much engagement with multiple persons at NHS/ICB/LPC, an application for a change to 72hr has been made, in compliance with regulations

3.1.20 The ICB can confirm that an application from Rosemead Ltd was submitted on the 5 January 2024 to reduce the pharmacy's core opening hours from 100 hours to 72 hours, in line with the regulations. This was granted with an effective date of 10 February 2024 and a direction was issued. This is a

separate matter and cannot be considered in view of the breach notices issued. The temporary suspension of service and failure to provide 100 hours on the given weeks, took place prior to the submission and approval of the application to reduce from 100 to 72 core opening hours.

7. Mrs XXX was made aware of the "unplanned closure notification", on days we could not procure a locum, and I believe she started doing so recently.

- 3.1.21 This is irrelevant. The regulatory requirements were not being adhered to when the suspension of service took place (as per the dates set out in the notices).

8. The regulations were written some 2 decades ago, under different workforce resources.

- 3.1.22 Regardless of when the regulations were written, Rosemead Ltd gave an undertaking to comply with all the obligations that are its terms of service under regulation. Rosemead Ltd must therefore ensure it has appropriate standard operating procedures in place at the pharmacy to ensure such compliance.

9. It seems fundamentally unfair, 20 years later, for the regulating authority responsible for poaching away all my staff, to then breach us.

- 3.1.23 Regardless of when the regulations were written, Rosemead Ltd must comply with the current regulations. Decisions made by the PSRC must be made against the regulations in place.

- 3.1.24 It is of note that the pharmacy staff appeared to be aware that the DoS profile for the pharmacy must be updated in relation to a temporary suspension. However, this has only been a term of service since May 2023 whereas the requirement to notify the ICB of a temporary suspension has been in the regulations since 1 April 2005 (paragraph 22(9), Schedule 2 of the NHS (Pharmaceutical Services) Regulations 2005).

10. 8 above has had a massive impact on us, even today, as well as closing down Boots Chemists in Watton

- 3.1.25 Regardless of when the regulations were written, Rosemead Ltd must comply with the current regulations. Decisions made by the PSRC must be made against the regulations in place.

11. I respectfully ask that you strike out/cancel these 3 breach notices

- 3.1.26 The PSRC is of the opinion that the specified terms of service have not been met and that the 3 breach notices are valid.

- 3.1.27 The PSRC disputes that the breach notices go against natural justice and are fundamentally unfair. Breach notices have been issued to other contractors who have failed to notify the ICB of temporary suspensions and related terms of service.

- 3.1.28 The PSRC identified that further breaches of the terms of service have occurred but chose not to issue a breach notice or notices in relation to those on this occasion. These include the following.

3.1.28.1 The temporary suspensions in the provision pharmaceutical services was not beyond the control of Rosemead Ltd as they were due to staffing matters which NHS Resolution has previously found to be within the control of the contractor – paragraph 23(10), Schedule 4.

3.1.28.2 Rosemead Ltd failed to use all reasonable endeavours to implement the business continuity plan that it is required to have by virtue of paragraph 29D, Schedule 4 – paragraph 23(10)(aa), Schedule 4. If it had, then it would have known to notify the ICB.

3.1.28.3 Rosemead Ltd failed to use all reasonable endeavours to resume service provision as soon as practicable – paragraph 23(10)(b), Schedule 4.

3.1.28.4 The business continuity plan for the pharmacy does not include all the components of paragraph 29D(2), Schedule 4 otherwise the ICB would have been notified of the temporary suspensions – paragraph 29D(1)(b), Schedule 4.

3.1.29 Details of communications between the ICB and the appellant as part of local dispute resolution, took place prior to the decision made by PSRC on Wednesday 29 November 2023 have been included in Appendix 2. An extract of the minutes relating to this case is enclosed at Appendix 3.

3.1.30 Please note that whilst responding to the appeal, the HWE ICB has noted an administrative error relating to the dates referred to in the PSRC Committee Report Agenda Item 11 (Appendix 2) and the subsequent breach notices. For clarity the temporary suspensions took place on the dates as set out in the right-hand column of the table below:

Date detailed in PSRC Agenda Item 11 and Breach Notices issued	Correct date
Sunday 24 September 2023	Sunday 24 September 2023 (no change)
Sunday 30 September 2023	Sunday 1 October 2023
Sunday 7 October 2023	Sunday 8 October 2023
Sunday 14 October 2023	Sunday 15 October 2023
Sunday 21 October 2023	Sunday 22 October 2023
Sunday 28 October 2023	Sunday 29 October 2023
Sunday 4 November 2023	Sunday 5 November 2023
Sunday 11 November 2023	Sunday 12 November 2023
Sunday 18 November 2023	Sunday 19 November 2023
Thursday 9 November 2023	Thursday 9 November 2023 (no change)

3.1.31 Conclusion

3.1.32 Having reviewed the grounds of the appeal and the information provided by Rosemead Ltd, we remain of the opinion that the 3 breach notices issued to the appellant are valid and the appeal should be quashed.”

4 Observations

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

5 Consideration

- 5.1 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.

- 5.2 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;”

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

- 5.4 The Appellant is included on the pharmaceutical list and that there is no dispute between the parties with regard to this.

- 5.5 The Appellant was not open for part of its core hours on multiple occasions throughout September 2023 – November 2023 and this has not been disputed by the Appellant. The ICB considered that the closures were not beyond the control of the Appellant and, as such, proceeded to issue three separate Breach Notices:

5.5.1 Breach Notice 1 was issued in reference to Schedule 4, Part 3, paragraph 23(10)(a);

5.5.2 Breach Notice 2 was issued in reference to Regulation 65(2);

5.5.3 Breach Notice 3 was issued in reference to Schedule 4, Part 23, paragraph 1(b).

- 5.6 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”.

- 5.7 The Regulations contain no definition of what constitutes “reasonable effort to communicate and co-operate”. I note from the information provided before me that the ICB first contacted the Appellant in relation to the temporary suspensions of service on 26 September 2023, 31 October 2023 and 7 November 2023.

- 5.8 The Appellant replied to the ICB on 8 November 2023, but that these communications did not resolve the matter. I note the contents of the ICB’s earlier emails quoted the relevant Regulations in full and therefore the Appellant would have been reminded of

their obligations under the Regulations when faced with a temporary suspension of service. I therefore determine that there is no failure to comply with Regulation 69 in this respect.

5.9 I shall now consider the Breach Notices and the Appellant's grounds of appeal.

Breach Notice 1

5.10 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 further return, under sub-paragraph (6));

...

(ba) P must not change the days on which or the times at which pharmaceutical services are to be provided at those premises during core opening hours, except for making a change that –

(i) amounts to the inclusion of a rest break which is no longer than one hour, or a change to such a rest break –

(aa) on a Monday to Saturday, which starts at least 3 hours after the start of the pharmacy's opening hours and ends at least 3 hours before the end of the pharmacy's opening hours, or

(bb) on a Sunday; and

(ii) does not change the total number of P's core opening hours on a particular day,

otherwise than as provided for, and in accordance with the procedures set out in, paragraphs 25 and 26;

5.11 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.

5.12 While the ICB identified an error in the Breach Notice which referenced incorrect dates, there is no dispute from the Appellant that the pharmacy did not open for some, or all, of its core hours on the dates in question.

5.13 I consider that a failure to provide services during core 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.

5.14 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 that 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.

5.15 Before I consider whether the Appellant has satisfied the conditions set out in paragraph 23(1) 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.

5.16 I note that the Appellant was, at the time the incidents which led to the Breach Notices being issued, included in the pharmaceutical list to be open for 100 hours per week.

5.17 Paragraph 23(1)(b) of Schedule 4 states:

23.–(1) [Subject to paragraph 23A,] an NHS pharmacist (P) must ensure that pharmaceutical services are provided at P's pharmacy premises –

...

(b) for not less than 100 hours each week, in the case of premises in respect of which a 100 hours condition applies;

...

But the NHSCB may, in appropriate circumstances, agree a temporary suspension of services for a set period, where it has received 3 months notice of the proposed suspension.

5.18 Paragraph 23(1)(b) does not require the Appellant to be open at specific times and days but instead requires the Appellant to be open for not less than 100 hours each week.

5.19 The Appellant has not commented or provided evidence to support a position that it was open for at least 100 hours in each given week in question. Similarly, the ICB has not provided information to suggest that the Appellant was open for at least 100 hours in each given week.

5.20 As indicated at paragraph 5.14 above, the Appellant would not be in breach of paragraphs 23(7) and/or 23(1) of the Regulations if it meets the conditions of paragraph 23(10). I therefore next consider these conditions and the representations provided to me.

5.21 Schedule 4, part 3, paragraph 23(10) states:

(10) 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

5.22 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 its terms of services. These are:

5.22.1 Establishing that there has been a temporary suspension of pharmaceutical services;

- 5.22.2 The temporary suspension of pharmaceutical services arose for reasons beyond the control of the Appellant;
- 5.22.3 The Appellant notified the ICB of the temporary suspension as soon as practicable; and
- 5.22.4 The Appellant has used all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable.
- 5.23 I consider that all four conditions must be met in order for paragraph 23(10) to apply and therefore for the Appellant not to be in breach.
- 5.24 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. The first condition is satisfied.
- 5.25 I next consider whether the temporary suspension was for reasons beyond the Appellant's control. I note that the Appellant, in its appeal, states that in the past there were members of staff responsible for inputting hours and reporting temporary suspensions and that it was the staff members', and the Appellant's, belief that doing this one time then "permitted [the Appellant] to close on Sunday" due to locum availability. The Appellant further states that they were "none the wiser" to the further reporting required and did not believe that they were needed to report unplanned closures following the resignation of the members of staff, thus did not communicate to the replacement staff member that this task needed completing.
- 5.26 I am of the view that, generally, staffing issues in a pharmacy which result in a 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 hours unless I have evidence to persuade me otherwise. It is the Appellant's responsibility to manage its business in a way which ensures the delivery of pharmaceutical services on specified days, at specified times, and that there are no temporary unplanned closures. This requires a focus of resource allocation and the implementation of robust contingencies, including the need for locums to be found at short notice to cover the employed pharmacist (including if, as the Appellant states, it has recently seen 80% of its pharmacists and 100% of its dispensers resign); to not do so is a commercial decision under the control of the Appellant.
- 5.27 Although the Appellant states in its appeal that the Breach Notices "go against natural justice and are fundamentally unfair" no further information has been provided to support this assertion. The ICB has 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.
- 5.28 Therefore, I am of the view that there was insufficient evidence provided by the Appellant that the temporary suspension of pharmaceutical services, which spanned numerous dates, were beyond the Appellant's control.
- 5.29 Regarding conditions three and four, I note that in an email provided by the ICB dated 21 November 2023 the ICB approached the Appellant stating: "*It has come to our attention that Rosemead Ltd t/a Total Health Pharmacy (FAD81) may not be opening for their contractual hours, and we do not appear to have received any application to reduce these hours*". Further, the ICB provided evidence in an email dated 30 October 2023 from a Community Pharmacy Clinical Lead following a complaint from a patient that the Appellant was now closed on a Sunday which was restricting the patient's ability to get medication. This, alongside the Appellant's claim to be "none the wiser", leads me to the view that the Appellant did not report the closures and did not use reasonable endeavours to resume provision of services as soon as practicable.

- 5.30 I am of the view that the Appellant is in breach of paragraph 23(10)(a) of Schedule 4 of the Regulations.
- 5.31 As referred to earlier, I note that the ICB, in its representations on appeal, reported an administrative error in the issuing of this breach and that the dates of the closures were incorrect in the original Breach Notice. 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 may have taken when it took that decision.
- 5.32 Pursuant to paragraph 9(5)(b) of Schedule 3 to the Regulations, I substitute the decision of the ICB to issue the Breach Notice dated 21 December 2023 with a breach notice stating that the Appellant is in breach of paragraph 23(10) of Schedule 4 of the Regulations in respect of:
- 5.32.1 Sunday 24 September 2023;
- 5.32.2 Sunday 1 October 2023;
- 5.32.3 Sunday 8 October 2023;
- 5.32.4 Sunday 15 October 2023;
- 5.32.5 Sunday 22 October 2023;
- 5.32.6 Sunday 29 October 2023;
- 5.32.7 Sunday 5 November 2023;
- 5.32.8 Sunday 12 November 2023;
- 5.32.9 Sunday 19 November 2023; and
- 5.32.10 Thursday 9 November 2023.

Breach Notice 2

- 5.33 Regulation 65(2)(a) states:
- “65. – (1) If an application to which regulation 13(1)(b) of the 2005 Regulations (exemption to the necessary or expedient test) applied was granted, the inclusion in the pharmaceutical list of the person listed in relation to –*
- ...
- (2) The condition is that the premises must be kept open for at least 100 hours per week for the provision of services.”*
- 5.34 I note, at the time that the incidents leading to the Breach Notices being issued, that the Appellant was included in the pharmaceutical list to be open for 100 hours a week. I note that the Appellant has since successfully applied to reduce its core opening hours in line with the Regulations and, as of 10 February 2024, is included in the pharmaceutical list to provide pharmaceutical services for 72 hours a week.
- 5.35 I am of the view that the change of circumstance, in this respect being the core opening hours offered by the Appellant's pharmacy, does not stop the Appellant for being accountable for past incidents which may or may not lead to a breach.

- 5.36 There is no dispute between the parties with respect to the unplanned closures taking place. Further, there is no dispute that the unplanned closures took place when the Appellant was included in the pharmaceutical list for provision for 100 hours per week.
- 5.37 I note that the Appellant, in its appeal, states that “the Regulations were written some 2 decades ago, under different workforce resources”. I am of the view that, regardless of when the regulations that were in force at the time of its inclusion in the pharmaceutical list, the Appellant is obligated to comply and provide the services that it gave the undertaking to do so unless an amendment to its contracted core hours had been made. I note that, following an application in January 2024, the core hours have now been amended.
- 5.38 I note that in the evidence provided by the ICB, the Appellant closed for 9 consecutive Sunday’s during September – November 2023 when it was contracted to open 08:00 – 20:30. This amounts to 12 hours 30 minutes each week (plus an additional 15 hours during the week commencing 6 November 2023 when there was an unplanned closure on the Thursday totalling 27 hours 30 minutes for that specific week) that the Appellant was not providing pharmaceutical services.
- 5.39 I consider that it is more than reasonable to conclude that in failing to open for 12 hours 30 minutes (indeed the 27 hours 30 minutes not open during the week commencing 6 November 2023) the Appellant failed to ensure that the pharmaceutical services were provided for no less than 100 hours in each relevant week as described in Regulation 65(2).
- 5.40 I am of the view that the Appellant is in breach of Regulation 65(2).

Breach Notice 3

- 5.41 Schedule 4, Paragraph 23 states:
- “(1) An NHS Pharmacist (P) must ensure that pharmaceutical services are provided at P’s pharmacy premises –*
- (b) for not less than 100 hours each week; in the case of premises in respect of which a 100 hours condition applies.”*
- 5.42 I note that, at the time of the incidents that led to the Breach Notices being issued, the Appellant was included in the pharmaceutical list to be open for 100 hours a week.
- 5.43 There is no dispute between the parties with respect to the temporary suspension of services taking place.
- 5.44 The Appellant has not provided me with any information to support a position that it was open for at least 100 hours in each given week in question.
- 5.45 I consider, in light of the evidence provided by the ICB and my findings at 5.38 and 5.39 above, that the Appellant failed to ensure that pharmaceutical services were provided for no less than 100 hours in each relevant week as required by paragraph 23(1)(b).
- 5.46 I am, therefore, of the view that the Appellant is in breach of paragraph 23(1)(b) of the Regulations.

6 Decision

- 6.1 Pursuant to paragraph 9(5)(b) of Schedule 3 to the Regulations, I substitute the decision of the ICB to issue the Breach Notice dated 21 December 2023 with a breach notice stating that the Appellant is in breach of paragraph 23(10) of Schedule 4 of the Regulations in respect of:

- 6.1.1 Sunday 24 September 2023;
- 6.1.2 Sunday 1 October 2023;
- 6.1.3 Sunday 8 October 2023;
- 6.1.4 Sunday 15 October 2023;
- 6.1.5 Sunday 22 October 2023;
- 6.1.6 Sunday 29 October 2023;
- 6.1.7 Sunday 5 November 2023;
- 6.1.8 Sunday 12 November 2023;
- 6.1.9 Sunday 19 November 2023; and
- 6.1.10 Thursday 9 November 2023.

- 6.2 Pursuant to paragraph 9(5)(a) of Schedule 3, I confirm the decision of the ICB to issue the Breach Notices dated 21 December 2023 relating to Regulation 65(2) and paragraph 23(1)(b) of Schedule 4, respectively.

Head of Appeals
NHS Resolution