

22 November 2024

REF: SHA/26287

**APPEAL AGAINST BRISTOL, NORTH SOMERSET AND
SOUTH GLOUCESTERSHIRE INTEGRATED CARE
BOARD DECISION REGARDING A BREACH NOTICE AT
ASDA PHARMACY (FE841), CRAVEN WAY, LONGWELL
GREEN, SOUTH GLOUCESTERSHIRE, BS30 7DY**

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1 Outcome

- 1.1 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I confirm the decision of the Commissioner to issue the Breach Notice.

A copy of this decision is being sent to:

Asda Pharmacy
NHS South West Collaborative Commissioning Hub (on behalf of Bristol, North Somerset and South Gloucestershire ICB)

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1 The Breach Notice

A Breach Notice dated 16 August 2024 was sent to Asda Pharmacy ("the Appellant") in respect of Craven Way, Longwell Green, South Gloucestershire, BS30 7DY.

- 1.1 "This is a Breach Notice issued by NHS South West Collaborative Commissioning Hub, referred to as the Commissioner in this breach notice, on behalf of BNSSG Integrated Care Board (ICB) 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 SW Committee").

Nature of the Breach

- 1.2 Contrary to paragraph 23(1) and 23(7) of the Terms of Service for NHS Pharmacists, the Contractor did not provide pharmaceutical services for its contracted hours on Friday 21 June 2024.

Statement of Reasons

- 1.3 On 21 June 2024, the Contractor had Core opening hours from 09:00 – 12:30, 13:00 – 16:30 & 17:00 – 21:00. There are no Supplementary hours.
- 1.4 On 21 June 2024, the Contractor notified the Commissioner that pharmaceutical services would not be provided between: 09:00 – 21:00 (11 hours) on 21 June 2024 because: *Staff Sickness*
- 1.5 The Commissioner requested further information on 25 June 2024, with a deadline of 10 working days to respond on 9 July 2024. No further information was received from Asda Pharmacy, the Contractor, in response to this.
- 1.6 The SW Committee noted NHS pharmaceutical services were not provided during the period concerned, therefore, the Contractor was considered to be 'closed' for the purpose of the Terms of Service.
- 1.7 The SW Committee considered on 1 August 2024, whether or not:
- 1.7.1 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
- 1.7.2 The contractor had used 'all reasonable endeavours to resume provision of pharmaceutical services as soon as practicable' (paragraph 23(10)(b) of the terms of service).

- 1.8 This was discussed with reference to the South West Community Pharmacy Local Policy for Temporary Suspension of Service ('the policy'), which the SW Committee had adopted on 1 November 2022 and revised 1 April 2024. It was noted the policy had been circulated to all Community Pharmacy providers and Community Pharmacy Locals in the South West.
- 1.9 With reference to the South West Community Pharmacy Local Policy for Temporary Suspension of Service, it was noted the closure triggered the general rule where closures of over 4 hours would be considered by the SW Committee. In these cases, the Contractor should, in accordance with the regulations, notify the Commissioner of any temporary suspension in service; including those for reasons due to illness or causes beyond the control of the Contractor. Contractors must also provide evidence to the Commissioner they have undertaken the following:
 - 1.9.1 a) Notified the Commissioner of the suspension as soon as practical.
 - 1.9.2 b) Used all reasonable endeavours to implement the business continuity plan required by paragraph 29D, Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, and
 - 1.9.3 c) Used all reasonable endeavours to resume the provision of pharmaceutical services as soon as is practicable. (Paragraph 23(1), Schedule 4, of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.
- 1.10 The Commissioner considers that 4 hours is a reasonable period to allow the Contractor to arrange a replacement pharmacist to be present at the pharmacy. Failure to arrange for a replacement pharmacist within this period is therefore a matter 'within the control of the Contractor.'
- 1.11 The SW Committee noted the closure had been properly reported to the Commissioner. However, no response had been received to the request for additional information to provide assurance the Contractor had:
 - 1.11.1 a) Used all reasonable endeavours to implement the business continuity plan that they are required by paragraph 29D, Schedule 4 to have for the pharmacy premises; and
 - 1.11.2 b) Used all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable (paragraph 23(10), Schedule 4).
- 1.12 The SW 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 SW Committee considered that there was not 'good cause' for the Contractor being unable to provide pharmaceutical services for the 11 hours on 21 June 2024 and so there had been a breach of paragraphs 23(1) and (7) of the Terms of Service for NHS Pharmacists.
- 1.14 The SW Committee went on to consider whether it was reasonable and proportionate to issue a breach notice in this case.
- 1.15 The SW Committee considered that the loss of 11 hours service provision did justify the issue of a Breach Notice.

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

Right of Appeal

- 1.17 You have a right of appeal to the Secretary of State against the issuing of this breach notice and any related 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:
- 1.18 Primary Care Appeals, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU
- 1.19 Email: nhsr.appeals@nhs.net

2 The Appeal

In a letter dated 23 August 2024 addressed to NHS Resolution, the Appellant appealed against Bristol, North Somerset and South Gloucestershire ICB (“the Commissioner”) decision. The grounds of appeal are:

- 2.1 “I would like to appeal the breach notice given to FE841, Asda Pharmacy, Craven Way, Longwell Green, South Gloucestershire, BS30 7DY.
- 2.2 The Pharmacy was closed from 09:00am – 15:55pm. The Resident Pharmacist was scheduled to work 09:00am – 16:00pm but unfortunately phoned in sick, the shift was advertised at emergency rate to all locums but the shift was not filled. A locum was already booked from 15:00pm – 21:00pm, so the Pharmacy would have reopened at 15:00pm but the locum Pharmacist was delayed due to a burst pipe at home and waiting for an emergency plumber, they arrived at 15:55pm and opened the Pharmacy.
- 2.3 Whilst the Pharmacy was closed:
- 2.3.1 A physical sign was placed on the front counter to notify patient’s [sic] of the closure.
- 2.3.2 Two colleagues remained at the Pharmacy signposted customers to the closest open pharmacy, Boots, and advised patients to come back later that afternoon when the locum would be on duty.
- 2.3.2.1 Colleagues took details and contact numbers for patients who wished to be call [sic] back from the Pharmacist later that afternoon.
- 2.3.2.2 Patients also referred to an open Pharmacy or surgery for any medical advice required.
- 2.3.2.3 Two customers returned to the Pharmacy after the Locum Pharmacist called and informed them the Pharmacy was reopen.
- 2.4 The Pharmacy implemented its business continuity plan signposted patients to ensure that patient safety was maintained and they received the advise [sic]/ medication required.”

3 Summary of Representations

This is a summary of representations received on the appeal.

3.1 THE COMMISSIONER

- 3.1.1 “Thank you for your email dated 28 August 2024 inviting representation in response to the appeal received against the decision made by the NHS South West Collaborative Commissioning Hub (NHS SW CCH) to issue a breach notice to Asda Pharmacy (FE841).

- 3.1.2 Please can I ask you to treat the attached as part of NHS SW CCH representations on this appeal:
- 3.1.2.1 Appendix A – Notification of closure from Asda Pharmacy.
 - 3.1.2.2 Appendix B – Update on notification of closure from Asda Pharmacy.
 - 3.1.2.3 Appendix C – Further update on notification of closure from Asda Pharmacy.
 - 3.1.2.4 Appendix D – Final update on notification of closure from Asda Pharmacy.
 - 3.1.2.5 Appendix E – Further information on notification of closure from Asda Pharmacy.
 - 3.1.2.6 Appendix F – Final SW Temporary Suspension Policy (April 2024).
 - 3.1.2.7 Appendix G – SW Pharmaceutical Regulations Committee Temporary Suspension Report and final decision (August 2024 Committee Meeting).
- 3.1.3 The Contractor has the following pharmacy opening hours: core opening hours 09:00 – 12:30, 13:00 – 16:30 and 17:00 – 21:00. There are no supplementary hours.
- 3.1.4 On 21 June 2024 at 10.12am, the NHS SW CCH were informed by the Contractor regarding the temporary suspension of services at Asda Pharmacy FE841 from 09:00 to unknown (time TBC). (Appendix A).
- 3.1.5 On 21 June 2024 at 12.13, the NHS SW CCH received an update from the contractor regarding the temporary suspension of services at Asda Pharmacy FE841 stating: ***UPDATE – Called site and spoke with Louise Jones (General Store Manager). She confirmed the department is still closed and they are still trying to source cover. No ETA is available yet. Update to follow in morning. She will update if re-opened before then**** (Appendix B).
- 3.1.6 On the 21 June 2024 at 4.30pm, the NHS SW CCH received a further update by the contractor regarding the temporary suspension of services at Asda Pharmacy FE841 stating: *FURTHER UPDATE – Called site and spoke with Louise Jones (General Store Manager). She confirmed the department is still closed and they are still trying to source cover. No ETA is available yet. Update to follow in morning. Site will update if re-opened before then.* (Appendix C).
- 3.1.7 The NHS SW CCH emailed the contractor on 21 June 2024 at 4.31pm for confirmation of the premises re-opening. The contractor responded on 24 June 2024 at 4.39pm stating: *UDPDATE – Department re-opened as normal on the 21/06/2024 at 09:00** (Appendix D). This update contradicted information provided in the contractor's previous updates.
- 3.1.8 The NHS SW CCH emailed the contractor on the 25 June 2024 at 8.44am for further information with a deadline of 10 working days to response. [sic] No response was received from the contractor by the deadline of 9 July 2024 (Appendix E).
- 3.1.9 Asda Pharmacy FE841 have appealed this breach notice on the grounds that:
- 3.1.9.1 The pharmacy was closed from 09:00am – 15:55pm. The Resident Pharmacist was scheduled to work 09:00am – 16:00pm but unfortunately phoned in sick, the shift was advertised at emergency

rate to all locums, but the shift was not filled. A locum was already booked from 15:00pm – 21:00pm, so the Pharmacy would have reopened at 15:00pm but the Locum Pharmacist was delayed due to a burst pipe at home and waiting for an emergency plumber, they arrived at 15:55pm and opened the Pharmacy.

3.1.9.2 The Pharmacy implemented its business continuity plans signposted patients to ensure that patient safety was maintained, and they received the advice/medication required. Whilst the pharmacy was closed:

3.1.9.2.1 A physical sign was placed on the front counter to notify patients of the closure.

3.1.9.2.2 Two colleagues remained at the Pharmacy signposted customers to the closest pharmacy, Boots, and advised patients to come back later that afternoon when the locum would be on duty.

3.1.9.2.3 Colleagues took details and contact numbers for patients who wished to be call back [sic] from the Pharmacist from later that afternoon.

3.1.9.2.4 Patients also referred to an open Pharmacy or surgery for any medical advice required.

3.1.9.2.5 Two customers returned to the Pharmacy after the Locum Pharmacist called and informed them the Pharmacy was reopen.

Defence from the NHS SW CCH:

3.1.10 To clarify, the breach issued on the 16 August 2024 was not in relation to when the contractor resumed opening hours. The breach of the terms of service was due to the lack of information provided to the Commissioner in providing assurance their business continuity plan had been actioned as required by 29D, Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.

3.1.11 In response to the appellant's statement regarding when the contractor resumed opening hours:

3.1.11.1 The contractor reported via email to the NHS SW CCH on 21 June 2024; 4.30pm (Appendix D) to the following: *FURTHER UPDATE – Called site and spoke with Louise Jones (General Store Manager). She confirmed the department is still closed and they are still trying to source cover. No ETA is available yet. Update to follow in morning. Site will update if re-opened before then.*

3.1.11.2 The NHS SW CCH emailed the contractor on 24 June 2024 at 4.31pm to request a final update as no further update on the pharmacy had been received over the weekend. The contractor email the NHS SW CCH on 24 June at 4.39pm with the following: *UPDATE – Department re-opened as normal on the 21/06/2024 at 09:00** (Appendix D).

3.1.11.3 The update from the contractor on the 24 June 2024 (Appendix D) stating the '*Department re-opened as normal on the 21/06/2024 at 09:00*' contradicts information provided to the NHS SW CCH in previous notifications received for the closure and in the appeal received by NHS Resolution.

- 3.1.12 On the 25 June 2024 the NHS SW CCH requested additional information on the closure. No response was received by the 9 July 2024 deadline.
- 3.1.13 The contractor states in their appeal the pharmacy was closed on the 21 June 2024 from 09:00 to 15:55pm. The notification the pharmacy was closed to 09:00 to 15:55 in the appeal letter from the contractor is the first occasion the NHS SW CCH were aware of these closure hours. No previous notifications received by the NHS SW CCH confirmed the closure of these hours. The last update was an email from the contractor confirming the pharmacy re-opened on 21/06/2024 at 09:00. The NHS SW CCH never received a time of re-opening.
- 3.1.14 Due to the closure being greater than 4 hours, the temporary suspension in service was reported as a closure of 11 hours 09:00 to 21:00 to the SW Pharmaceutical Services Regulations Committee on 1 August 2024 in accordance to the SW Temporary Suspension Policy. The closure was reported as a whole day (11-hour) closure to the Committee as the contractor did not provide an updated time of re-opening to the NHS SW CCH.
- 3.1.15 The SW Temporary Suspension Policy; section 4.2 states:
- 3.1.16 As temporary suspension of services is not capable of remedy, any temporary suspension of services reported for greater than 4 hours will be considered by SW PSRC, to decide whether a breach of terms of service has occurred.
- 3.1.17 Section 4.2 of the SW Temporary Suspension Policy, continues to state:
- 3.1.18 In accordance with regulations, contractors must notify the commissioner of any temporary suspension in service; including those for reasons due to illness or causes beyond the control of the contractor. In accordance with pharmacy regulations contractors must provide evidence to the commissioner they have undertaken the following:
- 3.1.18.1a) Notified the commissioner of the suspension as soon as practical.
- 3.1.18.2b) Used all reasonable endeavours to implement the business continuity plan required by paragraph 29D, Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, and
- 3.1.18.3c) Used all reasonable endeavours to resume the provision of pharmaceutical services as soon as is practicable. (Paragraph 23(10), Schedule 4, of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.
- 3.1.19 In the event of a temporary suspension of services the following evidence of action, in accordance with the above regulations, will be requested from the contractor as a minimum requirement, to inform the Committees decision about whether or not there has been a breach of terms of service:
- 3.1.19.1 Notification sent to the commissioner by completing the online Microsoft Form "The Pharmacy Contractor Notification of a Temporary Suspension of Service". (29D of Schedule 4 (2)(a))
- 3.1.19.2 Name of contractor, address, ODS code and contact details provided.
- 3.1.19.3 Date(s) of the temporary suspension of service and its anticipated duration (29D of Schedule 4, 2(a)(ii))

- 3.1.19.4 Times at which pharmaceutical services were not provided. (29D of Schedule 4, 2(a(ii))
- 3.1.19.5 Reason for temporary suspension of service (29D of Schedule 4, 2(a(ii))
- 3.1.19.6 Confirmation the pharmacy has updated their directory of services (DoS) profiles via Profile Manager to show the temporary suspension of services. (29D of Schedule 4, 2(b))
- 3.1.19.7 How has the pharmacy made arrangements for ensuring that patients are not referred to the pharmacy premises for directed urgent care services during the temporary suspension where practicable? (29D of Schedule 4, 2(c))
- 3.1.19.8 How has the pharmacy made arrangements for notifying other pharmaceutical service providers and GP practices about the suspension, and its anticipated duration, where practicable? (29D of Schedule 4, 2(d))
- 3.1.19.9 How has the pharmacy made arrangements for displaying the necessary information to patients about the suspension, and its anticipated duration, in the approved manner, so that it is visible from outside the pharmacy (or for DSPs made the necessary changes to their website). (29D of Schedule 4, 2(e))
- 3.1.19.10 How has the pharmacy made arrangements for the continuity of patient care including for those patients with booked appointments or those attending the pharmacy regularly for the supervised administration of medicines? (29D of Schedule 4, 2(f))
- 3.1.19.11 How has the pharmacy used all reasonable endeavours to implement its business continuity plan?
- 3.1.19.12 Details of any other actions taken.
- 3.1.20 The contractor states in their appeal they completed the following actions as part of their business continuity plan:
 - 3.1.20.1 A physical sign was placed on the front counter to notify patients of the closure.
 - 3.1.20.2 Two colleagues remained at the Pharmacy signposted customers to the closest open pharmacy, Boots and advised patients to come back later that afternoon when the locum would be on duty.
 - 3.1.20.3 Colleagues took details and contact numbers for patients who wished to be call back from the Pharmacist from later that afternoon.
 - 3.1.20.4 Patients also referred to an open Pharmacy or surgery for any medical advice required.
 - 3.1.20.5 Two customers returned to the Pharmacy after the Locum Pharmacist called and informed them the Pharmacy was reopen.
- 3.1.21 All notifications relating to the closure received by the NHS SW CCH from the contractor (Appendix A, B, C and D), state the following actions were taken:

- 3.1.22 *What actions have been taken to reduce the impact to patients? (See options in below advice note): Colleague on department to direct patients, Patients being advised of nearest Pharmacy.*
- 3.1.23 NHS SW CCH requested additional information on business continuity planning from the contractor on 24 June 2024, with a deadline of 9 July 2024 to respond (Appendix E). This was in accordance with the SW Temporary Suspension Policy section 5.2. No response was received from the contractor.
- 3.1.24 Section 4.2 of the SW Temporary Suspension Policy states:
- 3.1.25 In accordance with regulations, contractors must notify the commissioner of any temporary suspension in service; including those for reasons due to illness or causes beyond the control of the contractor. In accordance with pharmacy regulations contractors must provide evidence to the commissioner they have undertaken the following:
- 3.1.25.1 d) Notified the commissioner of the suspension as soon as practical.
- 3.1.25.2 e) Used all reasonable endeavours to implement the business continuity plan required by paragraph 29D, Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, and
- 3.1.25.3 f) Used all reasonable endeavours to resume the provision of pharmaceutical services as soon as is practicable. (Paragraph 23(10), Schedule 4, of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.
- 3.1.26 In the event of a temporary suspension of services the following evidence of action, in accordance with the above regulations, will be requested from the contractor as a minimum requirement, to inform the Committees decision about whether or not there has been a breach of terms of service:
- 3.1.26.1 1. Notification sent to the commissioner by completing the online Microsoft Form "The Pharmacy Contractor Notification of a Temporary Suspension of Service". (29D of Schedule 4 (2)(a))
- 3.1.26.2 2. Name of contractor, address, ODS code and contact details provided.
- 3.1.26.3 3. Date(s) of the temporary suspension of service and its anticipated duration (29D of Schedule 4, 2(a)(ii))
- 3.1.26.4 4. Times at which pharmaceutical services were not provided. (29D of Schedule 4, 2(a)(ii))
- 3.1.26.5 5. Reason for temporary suspension of service (29D of Schedule 4, 2(a)(ii))
- 3.1.26.6 6. Confirmation the pharmacy has updated their directory of services (DoS) profiles via Profile Manager to show the temporary suspension of services. (29D of Schedule 4, 2(b))
- 3.1.26.7 7. How has the pharmacy made arrangements for ensuring that patients are not referred to the pharmacy premises for directed urgent care services during the temporary suspension where practicable? (29D of Schedule 4, 2(c))

- 3.1.26.8 8. How has the pharmacy made arrangements for notifying other pharmaceutical service providers and GP practices about the suspension, and its anticipated duration, where practicable? (29D of Schedule 4, 2(d))
- 3.1.26.9 9. How has the pharmacy made arrangements for displaying the necessary information to patients about the suspension, and its anticipated duration, in the approved manner, so that it is visible from outside the pharmacy (or for DSPs made the necessary changes to their website). (29D of Schedule 4, 2(e))
- 3.1.26.10 10. How has the pharmacy made arrangements for the continuity of patient care including for those patients with booked appointments or those attending the pharmacy regularly for the supervised administration of medicines? (29D of Schedule 4, 2(f))
- 3.1.26.11 11. How has the pharmacy used all reasonable endeavours to implement its business continuity plan?
- 3.1.26.12 12. Details of any other actions taken.
- 3.1.27 The contractor did not provide evidence at the time or preceding the closure when the NHS SW CCH requested additional information, they used all reasonable endeavours to implement the business continuity plan as required by paragraph 29D, Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.
- 3.1.28 The contractor failed to provide assurance they had completed the following actions (in bold) required as part of paragraph 29D of Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.
- 3.1.28.1 6. Confirmation the pharmacy has updated their directory of services (DoS) profiles via Profile Manager to show the temporary suspension of services. **(29D of Schedule 4, 2(b))**
- 3.1.28.2 7. How has the pharmacy made arrangements for ensuring that patients are not referred to the pharmacy premises for directed urgent care services during the temporary suspension where practicable? **(29D of Schedule 4, 2(c)).**
- 3.1.28.3 8. How has the pharmacy made arrangements for notifying other pharmaceutical service providers and GP practices about the suspension, and its anticipated duration, where practicable? **(29D of Schedule 4, 2(d))**
- 3.1.28.4 9. How has the pharmacy made arrangements for displaying the necessary information to patients about the suspension, and its anticipated duration, in the approved manner, so that it is visible from outside the pharmacy (or for DSPs made the necessary changes to their website). **(29D of Schedule 4, 2(e))**
- 3.1.28.5 10. How has the pharmacy made arrangements for the continuity of patient care including for those patients with booked appointments or those attending the pharmacy regularly for the supervised administration of medicines? **(29D of Schedule 4, 2(f))**
- 3.1.28.6 11. How has the pharmacy used all reasonable endeavours to implement its business continuity plan?

- 3.1.29 The closure was presented to the South West Pharmaceutical Services Regulations Committee on the 1 August 2024 for consideration of a breach of terms of service (Appendix G). The committee reviewed the closure and confirmed the contractor had not provided evidence of business continuity planning. The committee's decision was the contractor was in breach of their terms of service.
- 3.1.30 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, neighbouring Community Pharmacies, urgent care, or A & E.
- 3.1.31 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.
- 3.1.32 Therefore, the NHS SW CCH maintains the decision to issue this breach notice to FE841 Asda Pharmacy 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 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, NHS England 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 I note that the pharmacy is included on the pharmaceutical list and that there is no dispute between the parties with regard to this.
- 5.5 The pharmacy listed above was not open for some of its contracted core hours on 21 June 2024 and this has been accepted by the Appellant.
- 5.6 The Commissioner is of the view that as a result of the closures the Appellant is in breach of Schedule 4, part 3, paragraph 23(1) and 23(7) for failure to open during the

contracted hours. The Commissioner considered that the closures were not beyond the control of the Appellant and, as such, proceeded to issue the Breach Notice.

- 5.7 Under Regulation 69(1) before issuing a Breach Notice, the Commissioner 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”

- 5.8 The Regulations contain no definition of what constitutes a *“reasonable effort to communicate and co-operate.”*

- 5.9 I note that the Commissioner communicated with the Appellant on multiple occasions, both via telephone and email, immediately after the closure in order to confirm if and when the pharmacy had reopened. The Commissioner states that the Appellant did not provide any information about the reopening of the pharmacy until 24 June 2024, and this was to confirm that the pharmacy had “re-opened as normal on the 21/06/2024 at 09.00” which I note contradicts the original notification of closure.

- 5.10 I further note that the Breach Notice states that *“the commissioner requested further information on 25 June 2024, with a deadline of 10 working days to respond on 9 July 2024. No further information was received from Asda Pharmacy, the Contractor, in response to this”*. I note that, in the copies of the communication provided by the Commissioner, this request was sent both to the pharmacy specific email address and an email address for Asda Pharmacy headquarters. The Appellant has not disputed that this email was not received. I note that the Appellant has not referred to any lack of local dispute resolution and therefore I determine that the Commissioner has met its obligations under Regulation 69.

- 5.11 I shall now consider the breach as stated in the Breach Notice and the Appellant’s grounds for appeal.

- 5.12 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 day 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 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.”

- 5.13 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.
- 5.14 There is no dispute between the parties that the pharmacy in question did not open for some of its core hours on 21 June 2024 and that this is confirmed by the notification of incident: Pharmacy closure (the “Notification”) submitted by the Appellant to the Commissioner.
- 5.15 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 or 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.
- 5.16 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.
- 5.17 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 related to temporary suspension of services and to which the conditions set out in paragraph 23(10) also apply.
- 5.18 Paragraph 23(1) requires the Appellant to provide pharmaceutical services during its core opening hours. The Breach Notice 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).
- 5.19 As indicated at paragraph 5.16 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.
- 5.20 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.”

- 5.21 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:
- 5.21.1 Establishing that there has been a temporary suspension of pharmaceutical services;

- 5.21.2 The temporary suspension of pharmaceutical services arose for reasons beyond the control of the Appellant;
- 5.21.3 The Appellant notified the Commissioner of the temporary suspension as soon as practicable; and
- 5.21.4 The Appellant has used all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable.
- 5.22 I consider that all four conditions must be met in order for paragraph 23(1) to apply and therefore for the Appellant to be deemed not in breach of paragraph 23(7).
- 5.23 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 21 June 2024 given that the Appellant submitted a Notification to the Commissioner. The first condition is satisfied.
- 5.24 I next consider whether the temporary suspension was for reasons beyond the Appellant's control. I note that in its Notification to the Commissioner, the Appellant stated "*Pharmacist illness (less than 24 hours notice)*". On appeal, the Appellant stated that it was closed from 09:00 – 15:55 on 21 June 2024 due to the pharmacist calling in sick and that, despite the shift being advertised at emergency rates, a locum pharmacist was unable to be obtained. The Appellant states that a previously arranged locum pharmacist arrived to open the pharmacy at 15:55. I note this was in time for the core opening hours of 17:00 – 21:00.
- 5.25 I have also had regard to the documents provided by the Commissioner which include the Notification as submitted by the Appellant as well as the "South West Community Pharmacy – Local Policy for Temporary Suspension of Service" document which is sub-headed 'Temporary Suspensions of Services (4 hours or less)' and 'Temporary Suspension of Services (greater than 4 hours)'.
- 5.26 The Local Policy sets out the background as to why the policy has been developed and explains how and why 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 Commissioner's process for considering unplanned closures including aggravating and mitigating factors.
- 5.27 The Local Policy 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 the application of the business continuity plan.
- 5.28 Turning to the reason for closure, 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 its core hours unless I have sufficient evidence to persuade me otherwise. The arrangements and number of pharmacists employed, either as relief pharmacists or as locums procured to cover core hours offered by the Appellant, are a commercial consideration and a matter for the Appellant to ensure that there is sufficient cover. Further, I have not been provided with any information to support the Appellant's claim that it tried to procure a locum pharmacist to cover the period in which the pharmacy was closed.
- 5.29 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 with any evidence by the Appellant to suggest that this construction of how the situation operates was not the case in relation to the closure under consideration in this appeal. The way in which the Appellant conducts its operations and responds to business continuity issues would be set-out in appropriate documentation such as a business continuity plan which the Appellant is required to have by virtue of paragraph 29D, Schedule 4. In this regard, I am also mindful that it is the Commissioner'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 Commissioner to manage which includes requesting evidence of its implementation in instances of closure.

- 5.30 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 date was beyond the Appellant's control.
- 5.31 Regarding conditions three and four, I acknowledge that the Appellant reported the closure and that they used reasonable endeavours in attempt 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.
- 5.32 I note that the Breach Notice refers to the Appellant's pharmacy being closed for a period of 11 hours between 09:00 – 21:00 on 21 June 2024 and further note that the Appellant, in its appeal, states that the pharmacy reopened at 15:55 (this would be in time for the core opening hours that span 17:00 – 21:00). The Commissioner has confirmed, in its representations, that it was not aware of the pharmacy reopening at all on 21 June 2024.
- 5.33 Whilst the Regulations do not make specific reference to any time period in respect of a temporary suspension of services, I note that the "South West Community Pharmacy – Local Policy for Temporary Suspension of Service" under the heading 'Temporary Suspension of Services (4 hours or less)' states:
- 5.33.1 *"Generally, SW PSRC recognises that suspensions lasting 4 hours of less will not normally result in the issue of a breach notice.*
- A temporary suspension of service event of 4 hours or less is sufficient, permitted as a 'grace' period, for contractors to act and deal with unexpected events and resume pharmaceutical services...*
- The threshold of 4 hours has been chosen as being roughly equivalent to 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 it has supplementary opening hours or not."*
- 5.34 I note that the Breach Notice includes *"The Commissioner considers that 4 hours is a reasonable period to allow the Contractor a replacement pharmacist to be present at the pharmacy. Failure to arrange for a replacement pharmacist within this period is therefore a matter 'within the control of the Contractor'".*
- 5.35 The Regulations are silent on this matter and therefore any temporary suspension of service, irrespective of the length of suspension of service, could be considered a breach.

5.36 I am mindful of the process followed by the Appellant to minimise customer impact; however, I do not consider that this on its own is enough to relieve the Appellant of the requirement to comply with paragraph 23(7) of the Regulations.

5.37 I am of the view that the Appellant was in breach of paragraph 23(7) of Schedule 4 of the Regulations on 21 June 2024.

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

6.2 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I confirm the decision of the Commissioner to issue the Breach Notice.

**Head of Appeals
NHS Resolution**