

12 December 2024

REF: SHA/26329

APPEAL AGAINST LINCOLNSHIRE ICB ("THE COMMISSIONER") DECISION REGARDING A BREACH NOTICE AT MORRISONS PHARMACY, HEAPHAM ROAD SOUTH, GAINSBOROUGH, LINCOLNSHIRE, DN21 1XY

8th Floor
10 South Colonnade
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1 Outcome

- 1.1 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I substitute the decision of the Commissioner to issue the Breach Notice with a decision not to issue the Breach Notice.

A copy of this decision is being sent to:

Morrisons Pharmacy
Lincolnshire ICB

Advise / Resolve / Learn

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1 The Breach Notice

A Breach Notice dated 26 September 2024 was sent to Morrisons Pharmacy (“the Appellant”) in respect of Heapham Road South, Gainsborough, Lincolnshire.

- 1.1 “Name of Contractor: WM MORRISON SUPERMARKETS LIMITED.
- 1.2 Pharmacy name: Morrisons Pharmacy.
- 1.3 Address of premises: Heapham Road South, Gainsborough, Lincolnshire, DN21 1XY.
- 1.4 Date of inclusion in the pharmaceutical list for the area of Lincolnshire Health and Wellbeing Board: 1 August 2009.
- 1.5 This is a Breach notice issued under regulation 71 of the National Health Services (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.
- 1.6 **Breaches of terms of service: breach notices**

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.

(2) To be valid, the breach notice must include –

(a) the nature of the breach and

(b) an explanation of how C’s rights of appeal under regulation 77(1)(c) may be exercised

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

(4) The breach notice may only provide for the withholding of all or part of the remuneration payable under a determination as mentioned in regulation 91(6) where the breach relates to a failure to provide, or a failure to provide to a reasonable standard, an enhanced service.

1.7 Nature of the breach

- 1.8 Following an assessment of the need for the provision of pharmaceutical services on **29th March 2024**, and taking into account which pharmacies would be open on that day, Derby and Derbyshire Integrated Care Board (ICB) [sic] directed **WM MORRISON SUPERMARKETS LIMITED, Morrisons Pharmacy, DN21 1XY** (the contractor) to open the above-mentioned pharmacy between **14:00-16:00hrs** on **Friday 29th March 2024**. No appeal was made against the decision to issue the direction.
- 1.9 Upon noting that no claim had been made by the contractor, the ICB contacted the contractor to establish why this was the case. A copy of the responsible pharmacist log or other assurance was requested for that day which would evidence when the pharmacy opened. This was not received by the ICB. A remedial notice was also issued so that the pharmacy could send in assurance of opening on the directed day, but this was not provided.
- 1.10 This failure to ensure the pharmacy premises were open for the provision of pharmaceutical services between **14:00-16:00hrs** on **Friday 29th March 2024** was referred to the Pharmaceutical Services Regulations Committee (PSRC) on **17th September 2024**. Having taken into account the reasons why the pharmacy did not open on the specified day, the PSRC was of the opinion that there was no good cause. It was therefore satisfied that the contractor breached paragraph 23(1)(c), Schedule 4 on **Friday 29th March 2024** and determined that it is appropriate to issue this breach notice.
- 1.11 You are required to not repeat the breach again.
- 1.12 You have a right of appeal to the Secretary of State against the issuing of this breach notice. Should you choose to appeal then you should send a concise and reasoned statement of the grounds for your appeal within 30 days of the date of this notice to nhsr.appeals@nhs.net or:
- 1.12.1 Primary Care Appeals, NHS Resolution, 8th Floor 10 South Colonnade, Canary Wharf, London, E14 4PU
- 1.13 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."

2 The Appeal

In an email dated 28 September 2024 addressed to NHS Resolution, the Appellant appealed against the Commissioner's decision. The grounds of appeal are:

- 2.1 "I am writing to you to appeal the breach notice we have received.
- 2.2 The breach states that we were not open on Friday 29th of March 2024.
- 2.3 I have attached an image of the responsible pharmacist log proving that we were open 9:00 to 17:00. [Appendix A]
- 2.4 Our head office sent over our proposed Bank Holiday opening hours at the start of the year so the health boards should have been aware that we would have been open on Good Friday covering the directed opening hours.
- 2.5 Please let us know if you need to know anything else."

3 Summary of Representations

This is a summary of representations received on the appeal.

Given that the Breach Notice alleges a breach of paragraph 23(1)(c) of Schedule 4 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 but paragraphs 23(1)(d) and 23(1)(e) also apply to directed openings, I considered that it was appropriate to enable both parties to provide information on the Regulations identified, as well as details of the Appellant's core opening hours.

3.1 THE APPELLANT

3.1.1 "The core opening hours are:

3.1.1.1 Sunday – Closed

3.1.1.2 Mon-Fri - 9.00-18.00

3.1.1.3 Sat - 9.00-15.00

3.1.2 Attached original application for opening hours sent to the ICB in Jan '24." [p1-2 Appendix B]

3.1.3 "Attached the RP log as evidence that we were actually open to the public from 9.00-17.00 on that day." [p3 Appendix B]

3.2 THE COMMISSIONER

3.2.1 "Thank you for your letter dated 30 September 2024; East Midlands Primary Care Team would like to make the following representations.

3.2.2 Paragraph 23(1)(c) of Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 states that:

3.2.3 23. Pharmacy opening hours: general

3.2.4 *(1) Subject to paragraph 23A, an NHS Pharmacist (P) must ensure that pharmaceutical services are provided at P's pharmacy premises-*

3.2.5 *(c) if NHS England or a Primary Care Trust, or on appeal the Secretary of State, has directed that pharmaceutical services are to be provided for fewer than 40 hours per week, provided that the person listed in relation to them provides those services at set times and on set days, at the times and on the days so set;*

3.2.6 Morrisons Pharmacy Gainsborough were directed to open on Good Friday (Friday 29th March 2024) 14:00-16:00 which falls within their 40 core hours, which are identified as follows:

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
09:00-13:00 14:00-18:00	09:00-13:00 14:00-18:00	09:00-13:00 14:00-18:00	09:00-13:00 14:00-18:00	09:00-13:00 14:00-18:00	09:00-13:00 14:00-15:00	Closed

3.2.7 In addition, the Pharmacy provides supplementary hours between 18:00 and 20:00 Monday to Friday and 10:00-16:00 on Sundays, but the directed hours on Friday 26th [sic] March 2024 did not impact any of these.

- 3.2.8 As a result of the above, Paragraphs 23 (1)(d) and (e) are not applicable as the Pharmacy was not asked to open outside of their core hours for this Direction.
- 3.2.9 The East Midlands Primary Care Team requests, under paragraph 35(3)(b), Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended, that pharmacies provide their Bank and public holiday opening times information.
- 3.2.10 This information is required in order for the East Midlands Primary Care Team to plan pharmacy provision during holiday periods. The bank holiday opening hours of pharmacies are also communicated to pharmacies, Integrated Care Boards, Out of Hours medical providers and local media to enable signposting and improve access.
- 3.2.11 Morrisons Pharmacy, Gainsborough (FH233) did provide East Midlands Primary Care Team with a list on 31st January 2024 detailing the Bank Holidays they were proposing to open, and the opening times as requested.
- 3.2.12 A review was completed by East Midlands Primary Care Team overseeing the geographical spread and identifying any gaps in provision on Good Friday 2024. As a result of this, Gainsborough was identified as an area requiring Pharmacy provision due to the Urgent Treatment Centre.
- 3.2.13 A review of Pharmacies in Gainsborough was undertaken, and Morrisons Pharmacy (FH233) was identified to open on Good Friday 2024, having not been directed to open on any previous Bank Holidays during 2023/24.
- 3.2.14 An initial rota outlining the Pharmacies who would be directed to open on Good Friday 26th [sic] March 2024 was distributed to all Pharmacies in Lincolnshire on the 14th and 21st September 2023 and we received no comments at this stage from Morrisons Pharmacy (FH233) with regards to them being nominated to open.
- 3.2.15 A Proposal to Direct letter was emailed to the Pharmacy on 27th October 2023 and no representation was received from the pharmacy opposing to this direction. To follow-up a Direction letter was emailed to the Pharmacy on 27th November to which no appeal was received, and East Midlands Primary Care Team continued with the direction as a result.
- 3.2.16 Following the 28-day window for claims on PharmOutcomes for Good Friday 2024, it was identified that FH233 Morrisons Pharmacy had not claimed for their directed hours. As a result, East Midlands Primary Care Team emailed the Pharmacy direct requesting evidence to provide assurance that the Pharmacy was open as directed.
- 3.2.17 Following the deadline for returns of this assurance, Morrisons Pharmacy (FH233) had not provided the Responsible Pharmacist log for Good Friday 29th March 2024 and at this stage a Remedial Notice was issued on 5th August 2024. As this breach was not remedied by the Remedial Notice deadline, a Breach Notice was issued on the 26th September 2024.
- 3.2.18 Whilst Morrisons Pharmacy (FH233) did provide their proposed Bank Holiday opening, as per Paragraph 35(3)(b) of Schedule 4, they did not supply East Midlands Primary Care Team with the requested assurances of opening via their Responsible Pharmacist (RP) Log, submission of a payment claim on PharmOutcomes, or evidence at Remedial Notice stage, resulting in the issuing of the Breach Notice.

3.2.19 I would like to take this opportunity to respond to any further representations provided by Morrisons Pharmacy (FH233), Heapham Road South, Gainsborough, Lincolnshire, DN21 1XY."

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 I note the Breach Notice was issued pursuant to Regulation 71(1) and is compliant with the requirements of a breach notice as it includes the nature of the breach and an explanation of the Appellant's right of appeal under Regulation 77(1)(c).

5.6 The Breach Notice states:

5.6.1 *"Following an assessment of the need for the provision of pharmaceutical services on **29th March 2024**, and taking into account which pharmacies would be open on that day, Derby and Derbyshire Integrated Care Board (ICB) directed **WM MORRISON SUPERMARKETS LIMITED, Morrisons Pharmacy, DN21 1XY** (the contractor) to open the above-mentioned pharmacy between **14:00-16:00hrs** on **Friday 29th March 2024**. No appeal was made against the decision to issue the direction.*

5.6.2 *Upon noting that no claim had been made by the contractor, the ICB contacted the contractor to establish why this was the case. A copy of the responsible pharmacist log or other assurance was requested for that day which would evidence when the pharmacy opened. This was not received by the ICB. A remedial notice was also issued so that the pharmacy could send in assurance of opening on the directed day, but this was not provided."*

5.7 I note that there is no suggestion that the Appellant did not receive the Commissioner's attempts to contact it, or that it did not receive the Remedial Notice (of which I have not been provided with a copy). I am therefore of the view that the Appellant had the opportunity to enter into local dispute resolution with the Commissioner but did not do

so. Given that there is no dispute raised by either party that the local dispute resolution process has not been exhausted, I am content that I can deal with this matter.

- 5.8 The Appellant is seeking to appeal the decision of the Commissioner to issue the Breach Notice for its failure to open for directed hours between 14:00 and 16:00 on Friday 29 March 2024.
- 5.9 I note the Breach Notice states “*the contractor breached paragraph 23(1)(c), Schedule 4 on Friday 29th March 2024 and determined that it is appropriate to issue this breach notice.*”
- 5.10 I note that Paragraph 23(1)(c) states:

23. Pharmacy opening hours: general

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

...

(c) if NHS England or a Primary Care Trust, or on appeal the Secretary of State, has directed that pharmaceutical services are to be provided at the premises for fewer than 40 hours per week, provided that the person listed in relation to them provides those services at set times and on set days, at the times and on the days so set;

- 5.11 I also note that paragraphs 23(1)(d) and (e) read as follows:

(d) if NHS England a Primary Care Trust, or on appeal the Secretary of State, has (under previous Regulations) directed that pharmaceutical services are to be provided at the premises for more than 40 hours per week, and at set times and on set days, at the times and on the days so set, subject to any variation in respect of a rest break in accordance with sub-paragraph (7)(bd); or

(e) if NHS England or a Primary Care Trust, or on appeal the Secretary of State, has directed that pharmaceutical services are to be provided at the premises for more than 40 hours each week, but only on set times and on set days as regards the additional opening hours, or the core opening hours where paragraph 26(4A) applied to the issuing of the direction—

(i) for the total number of hours each week required by virtue of that direction, and

(ii) as regards the additional opening hours for which the person listed in relation to the premises is required to provide pharmaceutical services by virtue of that direction, at the days on which and times at which that person is required to provide pharmaceutical services during those additional opening hours, as set out in that direction, subject to any variation in respect of a rest break in accordance with sub-paragraph (7)(bd),

but NHS England 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.

- 5.12 I note that comments were invited from both parties on this matter as well as confirmation of the Appellant's core opening hours. The Appellant, in its representations, stated its core opening hours as Monday to Friday 09:00 to 18:00 and Saturday 09:00 to 15:00. The Commissioner has stated core opening hours as Monday to Friday 09:00 to 13:00 and 14:00 to 18:00 and Saturday 09:00 to 13:00 and 14:00 to 15:00. The Commissioner states that “*the directed hours on Friday 26th [sic] March 2024 did not impact any of these [supplementary hours]*”. The Commissioner added

“As a result Paragraphs 23 (1)(d) and (e) are not applicable as the Pharmacy was not asked to open outside of their core hours for this Direction.” I am of the view that the weekly core hours total either 51 (the Appellant’s figures) or 45 (the Commissioner’s figures). As both sets of figures are over 40 core working hours therefore I consider that paragraph 23(1)(c) does not apply.

5.13 Paragraph 23(1)(e) concerns the position where the Commissioner directs a pharmacy to open for more than 40 hours a week but only on set times and days as regards the additional opening hours. “Additional opening hours” are defined under paragraph 23(13) as *“hours during which P is required to provide pharmaceutical services pursuant to sub-paragraph (1)(e) which are in addition to the hours during which P would be required to provide pharmaceutical services, if P were subject instead to the condition set out in sub-paragraph (1)(a)”*.

5.14 Paragraph 23(1)(a) states:

(1) ...an NHS pharmacist (P) must ensure that pharmaceutical services are provided at P's pharmacy premises—

(a) for 40 hours each week;

5.15 As noted above, the Appellant has core opening hours of either 45 or 51 hours a week. The parties have a difference of opinion as to whether 13:00 to 14:00 Monday to Saturday are core hours. However, the pharmacy is not one where a 100 hour condition applies and therefore I consider that paragraph 23(1)(e) would have been the appropriate Regulation for the Commissioner to apply in this instance.

5.16 I am mindful that paragraph 23(12) of Schedule 4 states:

For the purposes of calculating the number of hours that a pharmacy premises are open during a week that includes Christmas Day, Good Friday, Easter Sunday or a bank holiday, it is to be deemed that the pharmacy premises were open on that day at the times at which they would ordinarily have been open on that day of the week.

5.17 I am of the view that the pharmacy would normally have been closed on the Good Friday bank holiday on Friday 29 March 2024 and that this would be in accordance with the Regulations.

5.18 I note the Appellant states that they were open on Friday 29 March 2024. I note the Commissioner states the Appellant failed to make the claim for Friday 29 March 2024 and subsequently received a Remedial Notice on 5 August 2024. I have not been provided with a copy of the Remedial Notice but it has not been disputed by the Appellant and the Remedial Notice was not appealed against therefore I do not consider it appropriate to take a view on it.

5.19 I note that the Appellant has provided a photograph of its Responsible Pharmacist log which shows that on 29 March 2024, the RP signed in at 09:00 and signed out at 17:00. The Commissioner is of the view that *“As this breach was not remedied by the Remedial Notice deadline, a Breach Notice was issued on the 26th September 2024.”* However the Commissioner has not disputed the information provided, nor has it commented at all on the information, despite it indicating that this would be the type of information needed to demonstrate that the pharmacy was open.

5.20 I consider that sufficient evidence has been provided to show that the Appellant was open and providing the directed service between 09:00 to 17:00 which encompasses the directed hours of 14:00 to 16:00 on the bank holiday Friday 29 March 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 substitute the decision of the Commissioner to issue the Breach Notice with a decision not to issue the Breach Notice.

Head of Appeals
NHS Resolution