

8 April 2025

REF: SHA/26436

**APPEAL AGAINST SOMERSET ICB DECISION
REGARDING A BREACH NOTICE AT ASDA PHARMACY
(FX748), CREECHBERROW ROAD, TAUNTON,
SOMERSET, TA1 2AN**

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

Tel: 020 3928 2000
Email: nhsr.appeals@nhs.net

1 Outcome

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

A copy of this decision is being sent to:

Asda Pharmacy (FX748)
Somerset ICB

REF: SHA/26436

**APPEAL AGAINST SOMERSET ICB DECISION
REGARDING A BREACH NOTICE AT ASDA PHARMACY
(FX748), CREECHBERROW ROAD, TAUNTON,
SOMERSET, TA1 2AN**

Tel: 020 3928 2000
Email: nhsr.appeals@nhs.net

1 The Breach Notice

A Breach Notice dated 12 December 2024 was sent to Asda Pharmacy (FX748) ("the Appellant") in respect of Creechberrow Road, Taunton, Somerset, TA1 2AN.

1.1 "BREACH NOTICE

1.2 FX748: Asda Pharmacy, Creechberrow Road, Taunton, Somerset, TA1 2AN (the Contractor)

1.3 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 Somerset 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

1.4 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 Monday 11 November 2024.

Statement of Reasons

1.5 On Monday 11 November 2024 the Contractor's core opening hours were from 09:00 to 12:30 and 14:30 to 17:00. Supplementary opening hours 12:30 to 14:30 and 17:00-20:00.

1.6 On Monday 11 November 2024, the Contractor notified the Commissioner that pharmaceutical services will not be provided between 12:30 and 20:00 (7.5 hours) on Monday 11 November 2024. The reason given for the Temporary Suspension of service was:

1.6.1 *The pharmacy has a backlog of prescriptions and is deemed unsafe to trade until these have been worked through.*

1.7 Asda confirmed their business continuity actions had been completed for this closure.

1.8 The SW Committee noted that NHS pharmaceutical services were not provided during the period concerned and the Contractor was considered to be 'closed' for the purpose of the Terms of Service.

- 1.9 The SW Committee considered on 5 December 2024 whether or not:
- 1.9.1 the closure was for a reason 'beyond the control' of the Contractor (paragraph 23(10) of the terms of service) and for 'good cause' (regulation 69(3)(b)(i), and
 - 1.9.2 the contractor had used 'all reasonable endeavours to resume provision of pharmaceutical services as soon as practicable' (paragraph 23(10)b or the terms of service).
- 1.10 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.
- 1.11 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 the cases the contractor should, in accordance with 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:
- 1.11.1 Notified the commissioner of the suspension as soon as practical.
 - 1.11.2 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
 - 1.11.3 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.
- 1.12 The SW Committee noted the closure had been properly reported to the commissioner. However, the SW Committee was concerned regarding the contractor's decision to close citing 'safety' reasons. It was noted there is no evidence the pharmacy sought support from their Community Pharmacy Local or from the Commissioner about how to continue to deliver safe and effective services, before deciding to close on the 11 November 2024.
- 1.13 The SW Committee was mindful of the need to always consider patient safety, balancing this with looking after NHS staff. It was agreed this could have been achieved by agreeing with the Commissioner a period during which the Contractor reprioritised workload, enabling the Contractor to have remained open to dispense urgent items (as a minimum) and to discuss options with patients for non-urgent items.
- 1.14 The SW Committee agreed a significant amount of risk was created for patients as a result of the Contractor closing and noted not all options had been explored to ensure core service provision could be maintained. The SW Committee was also concerned that managing the resulting workload pressure through temporary suspension of all services may have also impacted on other contractors in the area. It may also have increased workload for the local GP practice.
- 1.15 It was agreed by the SW Committee that the temporary suspension was not for a 'reason beyond the control' of the Contractor and that it did not use all reasonable

endeavours to resume the provision of pharmaceutical services as soon as is practicable.

- 1.16 Accordingly, the Committee considered that there was not 'good cause' for the Contractor being unable to provide pharmaceutical services on 11 November 2024, and so there had been a breach of paragraphs 23(1) and (7) of the Terms of Service for NHS Pharmacists.
- 1.17 The Committee went on to consider whether it was reasonable and proportionate to issue a breach notice in this case.
- 1.18 The Committee decided that the total loss of service provision of 7.5 hours did justify the issue of a breach notice in this instance.

Action Required

- 1.19 The Contractor is required not to repeat the breach.
- 1.20 The Committee determined that a breach notice should be issued in accordance with the SW Community Pharmacy Local Policy for Temporary Suspension of Service which was adopted on 1 November 2022 and revised 1 April 2024. Noting this was a repeated temporary suspension in a 6-month rolling period since the 1st breach, it was agreed a withholding of £50 times the number of hours closed over the 4-hour threshold should be applied. The amount to be withheld has been calculated as follows:
 - 1.21 To reflect costs not incurred because a pharmacist was not employed and the non-availability of pharmaceutical services: £50 per hour x 3.5 hours = £175.
 - 1.22 This is based on the Committee's view that the amount that may be withheld in the event of a temporary suspension needs to be sufficient to provide an incentive to the Contractor to take all necessary steps to prevent, or minimise the length of, the temporary suspension. In this context it should be remembered that the comparison is against the costs that the Contractor may need to incur in resuming service provision (e.g. paying for a last-minute locum and their travel), which may be higher than normal running costs.
 - 1.23 The total amount to be withheld is therefore £175.

Right of Appeal

- 1.24 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: Primary Care Appeals, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU, Email: nhsr.appeals@nhs.net."

2 The Appeal

In an email of 27 December 2024 addressed to NHS Resolution, the Appellant appealed against Somerset ICB's ("the Commissioner") decision. The grounds of appeal are:

- 2.1 "I would like to appeal the breach notice given to FX748 Asda Pharmacy, Creechberrow Road, Taunton, Somerset.
- 2.2 The Pharmacy was working behind closed doors from 12:30pm - 20:00pm as the locum Pharmacist made a decision to close the Pharmacy due to the increased backlog of

prescriptions that needed to be labelled, dispensed and checked. The Pharmacist deemed it unsafe and would impact patient safety if the Pharmacy remained open. The Pharmacist made this decision without following internal processes and SOPs to close the Pharmacy and this decision was not supported by all Pharmacy colleagues. The Pharmacist did not contact the Healthcare Area Manager/Lead Area Manager or the Pharmacy compliance team to discuss the reason for the closure or discuss what support is required or can be offered to ensure that the Pharmacy remained open and safe.

- 2.3 The Pharmacy compliance team, the following day had a 1-2-1 telephone conversation with the Pharmacist in question to state our position and call for their reflection on the decision including the impact this had on the patients. The compliance team were not fully satisfied with the locum's response and have reviewed this locum as part of our internal locum of concern process. We have shared emails with the Southwest team regarding this matter at the time and informed them of the outcome of the process, with other concerns that have been raised, the locum has been removed from the Asda locum database.
- 2.4 Whilst the Pharmacy was closed:
 - 2.4.1 A physical sign was placed on the front counter to notify patients of the closure.
 - 2.4.2 Colleagues were at the Pharmacy to signpost customers to the closest open Pharmacy to ensure that patient safety was maintained, and they received the advice /medication required.
- 2.5 The breach notice states 'to reflect costs not incurred because a pharmacist was not employed and the none availability of pharmaceutical services: £50 per hour x 3.5 hours = £175' is incorrect, as a Pharmacist was present for the duration of the closure. As stated above, it was the Pharmacist that took this decision upon themselves without further consultation in line with our internal processes to close, so I would also like to appeal the decision to withheld £175.00."

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 letter dated 02 January 2025 inviting representation in response to the appeal received against the decision made by the South West Pharmaceutical Services Regulations Committee (the Committee) on behalf of NHS Somerset ICB (the ICB), to issue a breach notice to Asda Pharmacy (FX748) referred to in the breach as the 'contractor'.
- 3.1.2 Please can I ask you to treat the attached as part of the ICBs representations on this appeal:
 - 3.1.2.1 Appendix A - Notification of closure from the contractor
 - 3.1.2.2 Appendix B - Information received from ICB on the contractor
 - 3.1.2.3 Appendix C - Update on notification of closure from the contractor
 - 3.1.2.4 Appendix D - Update from Asda Lead Area Manager on Asda Taunton Pharmacy issues

3.1.2.5 Appendix E - Final SW Temporary Suspension Policy (April 2024)

3.1.2.6 Appendix F - SW Pharmaceutical Regulations Committee Temporary Suspension report and final decision (December 2024 Committee Meeting).

3.1.2.7 Appendix G - Appeal Letter from contractor

- 3.1.3 The contractor has the following pharmacy opening hours: Monday to Saturday - Core opening hours 09:00-12:30 and 14:30-17:00, Supplementary opening hours 12:30-14:30 and 17:00-20:00. Sunday – Core opening hours 11:00 – 13:00 and 14:00 – 16:00, Supplementary opening hours 10:00 – 11:00 and 13:00 – 14:00.
- 3.1.4 On Monday 11 November 2024, the Contractor notified the ICB at 13:07 hours that pharmaceutical services will not be provided between 12:30 and 20:00 (7.5 hours) on Monday 11 November 2024. The reason given for the temporary suspension of service was: *The pharmacy has a backlog of prescriptions and is deemed unsafe to trade until these have been worked through.* (Appendix A)
- 3.1.5 Prior to the notification, at 12:54 on Monday 11 November 2024, the ICB received concerns about the contractor, from Taunton Vale Healthcare medical practice. The practice reported the contractor was refusing to take on any more patients from nearby Blackbrook Pharmacy, including any Pharmacy First referrals. (Appendix B)
- 3.1.6 On Tuesday 12 November 2024, the Contractor notified the ICB at 09:36 hours that the pharmacy had reopened at 09:00 that morning and no further update was required. (Appendix C)
- 3.1.7 On Tuesday 12 November 2024 at an ICB contractual meeting with Asda Pharmacy Head Office, concerns were raised with the Lead Area Manager over the reasons provided to the ICB regarding the closure of the contractor on Monday 11 November 2024 12:30 and 20:00 (7.5 hours). An update was received by the ICB on Monday 18 and Tuesday 19 November 2024, from Asda's Lead Area Manager, confirming the ongoing issues with the resident locum were being addressed and provided assurance the situation would not occur again. (Appendix D).
- 3.1.8 In considering this appeal response the ICB notes from the Contractors appeal (Appendix G) that:
- 3.1.8.1 It was 'working behind closed doors' from 12:30pm - 20:00pm and that Pharmacist did not follow the Contractors systems and processes to escalate a workload pressure prior to doing this.
- 3.1.8.2 A review of the incident has been undertaken by the Contractor, identifying learning, which has been shared with the ICB.
- 3.1.8.3 Whilst the Pharmacy was closed: A physical sign was placed on the front counter to notify patients of the closure.
- 3.1.8.4 Colleagues were at the Pharmacy to signpost customers to the closest open Pharmacy to ensure that patient safety was maintained, and they received the advice /medication required.

3.1.8.5 It challenges the withholding, because a pharmacist was present for the duration of the closure.

Response from the ICB:

3.1.9 In response to the appellant's statement regarding the lack of awareness of the closure (Locum Pharmacist to Asda Head Office)

3.1.10 The contractor reported via email to the ICB on 11 November 2024 the following:

The Pharmacy has closed at 12:30 as they have a back log of Prescriptions to be processed and have deemed it unsafe to trade until these have been worked through. The department will re-open at 09:00 on 12/11/24. Update to follow.

3.1.11 On the email provided to the ICB on 11 November 2024 the Contractor confirmed they had implemented their business continuity plan in accordance with the SW Temporary Suspension Policy; Section 4.2 (Appendix E) and the requirements set out in paragraph 29D, Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013: Schedule 4 Paragraph 29D.

3.1.12 Due to the closure being greater than 4 hours, the temporary suspension in service was reported as a closure of 7.5 hours 12:30 to 20:00 to the Committee on 5 December 2024 (Appendix F) in accordance with the SW Temporary Suspension Policy (Appendix E).

3.1.13 The SW Temporary Suspension Policy; section 4.2 states:

"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."

3.1.14 Section 4.2 of the SW Temporary Suspension Policy states:

"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:

- (a) Notified the commissioner of the suspension as soon as practical.
- (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
- (c) 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."

3.1.15 The Contractor states in their appeal they were not aware of the closure and the locum pharmacist made this decision without following internal processes

and SOPs to close the pharmacy and this decision was not supported by all pharmacy colleagues.

- 3.1.16 The notification of the temporary suspension of service relating to the contractor was received on 11 November 2024 at 13:07 hours by the ICB via accident.enforcement@city-holdings.co.uk who facilitate the reporting of temporary suspension across England for Asda Pharmacy Head Office. The same notification on 11 November 2024 was also copied to compliance.pharmacy@asda.uk; Asda Head Office. It is clear from this, Asda Head Office were aware at the exact same time as the ICB of the closure at 13:07 hours on 11 November 2024, therefore, giving them the opportunity to mitigate the issues arising from the actions of the locum pharmacist at the time (Appendix A).
- 3.1.17 To note the appellant also uses the generic compliance.pharmacy@asda.uk [sic] email address for communication (Appendix G).
- 3.1.18 The requirement to provide pharmaceutical services at Asda Pharmacy, Creechberrow Road, Taunton, Somerset, TA1 2AN is the Contractor's contractual responsibility. A pharmacist was employed by the Contractor to deliver pharmaceutical services between 09:00 and 20:00. Between the hours of 12:30 and 20:00 the pharmacist failed to do this.
- 3.1.19 The Contractor has not followed its own internal escalation processes prior to implementing temporary suspension of services and has not notified the ICB of capacity pressures. Had it done so, the ICB would have worked with the Contractor to prioritise service delivery, to avoid the extreme measure of temporary suspension.
- 3.1.20 There was no evidence provided to the ICB that the Contractor or the locum pharmacist employed on the day sought any support to resume services as soon as practicable, despite being aware of the situation at 13:07 hours on the 11 November 2024.
- 3.1.21 By closing its doors for 7.5 hours, the Contractor created a significant amount of risk to patients, who were unable to access services from the Contractor. The temporary suspension of all services, also resulted in workload pressure for other contractors in the area, including the local GP practice (Appendix B).
- 3.1.22 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.
- 3.1.23 The notification of closure was presented to the South West Pharmaceutical Services Regulations Committee on the 05 December 2024 for consideration of a breach of terms of service (Appendix F). The committee reviewed the closure and agreed the contractor had not used all reasonable endeavour to resume services (Paragraph 23(10), Schedule 4, of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013).
- 3.1.24 The Committee's decision was the contractor was in breach of their terms of service.

In response to the appellant's statement regarding the inappropriate Withholding

- 3.1.25 The appellant states 'to reflect costs not incurred because a pharmacist was not employed and the nonavailability of pharmaceutical services: £50 per hour x 3.5 hours = £175' is incorrect, as a pharmacist was present for the duration of the closure".
- 3.1.26 As the breach in terms of service was the second breach in the last 6 months a financial withholding was applied in accordance with the SW Temporary Suspension Policy, Section 6.2. which states:
- 3.1.27 In accordance with [Payment withholdings: supplementary matters \(The National Health Service Pharmaceutical and Local Pharmaceutical Services Regulations 2013 Part 10 Section 72\)](#) there will be no financial withholding for the first breach relating to temporary suspension of services within a 6-month rolling period. Thereafter, the commissioner will consider making a financial withholding of £50 per hour for a temporary suspension of service as per the payment structure below:

Suspension Event	Contractual Action
1 st Suspension event	Breach Notice: no financial withholding
2 nd or more Suspension event	Breach Notice + £50 per hour withholding

- 3.1.28 The financial withholding is calculated on the number of hours closed over the 4-hour threshold where pharmaceutical services have not been provided. On this occasion this amounted to 3.5 hours.
- 3.1.29 The approach to calculating the withholding is set out in the policy at (Appendix E) and is intended to reflect the period of non-delivery of services by the Contractor. To ensure the amount withhold is justifiable and proportionate, the calculation is based on the minimum cost to deliver services: a core staffing cost, at average pay. Whilst the ICB acknowledge the Contractor has now confirmed a pharmacist was on site, the Contractor has not disputed that it was not meeting its Terms of Service for the period in question.
- 3.1.30 The ICB, therefore, determined the Contractors Terms of Service were not met during the period concerned and the contractor was considered to be 'closed' for the purpose of the Terms of Service.
- 3.1.31 Thus, the ICB maintains the decision to issue this breach notice to the contractor, with a financial withholding of £175, 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 I note that the pharmacy was not open during its core and supplementary hours on Monday 11 November 2024 between 12:30pm and 8:00pm and that this has been accepted by the Appellant.

- 5.6 The Commissioner is of the view that as a result of the closure the Appellant was in breach of:

5.6.1 Schedule 4, part 3, paragraph 23(1)(and 23(7) for failure to open during contracted hours.

- 5.7 The Commissioner considered that the closure was not beyond the control of the Appellant and as such the Commissioner proceeded to issue the Breach Notice.

- 5.8 Under Regulation 69(1), before issuing a breach notice, the Commissioner must:

5.8.1 *“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 NHS England relating to [the chemist’s] compliance with [the chemist’s] terms of service.”*

- 5.9 The Regulations contain no definition of what constitutes “reasonable effort to communicate and co-operate”. I note however that meetings were held between the Commissioner and the Appellant following the closure and that there was correspondence between parties, which I have been provided with. I note that the Appellant has not referred to any lack of local dispute resolution in its appeal. I therefore determine that there is no breach of Regulation 69 in this respect.

- 5.10 I shall now consider the breach in the Breach Notice and the Appellant’s grounds of appeal.

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

“(7) Where P has notified to NHS England (or, before the appointed day, a Primary Care Trust) the days on which and times at which pharmaceutical services are to be provided at P’s pharmacy premises (for example, in a return under sub-paragraph (5) or (6) or in an application for inclusion in a pharmaceutical list)—

(a) P must ensure that pharmaceutical services are provided at the premises to which the notification relates on the days and at the times set out in the notification (unless the notification has been superseded by a return, or a further return, under sub-paragraph (6)); and

(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;

(bb) P must not change P's supplementary opening hours in a way that reduces the time for which P's pharmacy is open before or after a rest break on a Monday to Saturday to less than 3 hours (if P wants to change the supplementary opening hours affected by this requirement, P must also change the time of the rest break);

(bc) P must not change—

the total number of P's supplementary opening hours in a way that either reduces or leaves the same the total number of P's supplementary opening hours, or

unless the change relates to an increase of the total number of supplementary opening hours, the days on which or the times at which pharmaceutical services are to be provided at P's premises during supplementary opening hours,

for a period of at least 5 weeks after the day on which that notification was received by NHS England, unless NHS England agrees otherwise; and

(bd) 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, in the case of 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,*

for a period of at least 5 weeks after the day on which that notification was received by NHS England, unless NHS England agrees otherwise.]”

- 5.12 I note that 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.
- 5.13 I note that there is no dispute between the parties that the pharmacy did not open for some of its core and supplementary hours on the day in question, Monday 11 November 2024 between 12:30pm and 8pm and this is confirmed by the notification of the unplanned temporary suspension of pharmaceutical services (the “Notification”) submitted by the Appellant to the Commissioner.
- 5.14 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 notice, 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.
- 5.15 The latter is set out in paragraph 23(10) of Schedule 4 which sets out certain conditions which, if satisfied, would mean the Appellant would not be in breach of paragraphs 23(7) and 23(1) of Schedule 4 of the Regulations.
- 5.16 Before I consider whether the Appellant has satisfied the conditions set out in paragraph 23(10) in relation to a breach of paragraph 23(7), I shall consider whether the Appellant’s temporary suspension of services amounts to a breach of paragraph 23(1), which also relates to temporary suspension of services to which the conditions set out in paragraph 23(10) also apply.
- 5.17 Paragraph 23(1) requires the Appellant to provide pharmaceutical services during its core opening hours. The Commissioner states the core opening hours of the pharmacy as set out above and this has not been disputed by the Appellant.
- 5.18 I note the comments from the Appellant that there was a pharmacist on duty during the period of the temporary suspension and that they were “*working behind closed doors ... due to the increased backlog of prescriptions that needed to be labelled, dispensed and checked.*” I note that there is no dispute that the Appellant, whilst “working behind closed doors”, was concentrating on dispensing prescriptions. However, I am mindful that the provision of pharmaceutical services is greater than just the dispensing of prescriptions. As the Appellant did not provide pharmaceutical services during the period 12:30pm to 8:00pm, as set out in the Notification, it did not ensure that a full range of pharmaceutical services were provided during its core hours and so the Appellant has breached paragraph 23(1).
- 5.19 As indicated at 5.15 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 representations before me.
- 5.20 Paragraph 23(10) states:

“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 [NHS England] of that suspension as soon [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.”

- 5.21 I consider that paragraph 23(10) sets out five 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;
- 5.21.4 The Appellant implemented its business continuity plan; and
- 5.21.5 The Appellant has used all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable.
- 5.22 I consider that all five conditions must be met in order for paragraph 23(10) to apply and therefore for the Appellant to be deemed not in breach of paragraph 23(7).
- 5.23 In respect of the first condition, there is no dispute between the parties that a temporary suspension of pharmaceutical services occurred between 12:30pm and 8.00pm on Monday 11 November 2024 given that the Appellant submitted the 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 have had regard to the documents, provided by the Commissioner, which include correspondence between the parties prior to the Breach Notice being issued.
- 5.25 I have also had regard to other documents provided by the Commissioner which include the “NHS England South West – Community Pharmacy Local Policy for Temporary Suspension of Service” (“the Local Policy”).
- 5.26 I note that the Appellant accepts that it was the individual pharmacist at the pharmacy in question who provided the Notification to the Commissioner. I note that the Appellant further states *“the Pharmacy made this decision without following internal processes and SOPs to close the pharmacy and this decision as not supported by Pharmacy colleagues.”* The Appellant goes on to state *“The Pharmacist did not contact the Healthcare Area Manager/Lead Area manager or the Pharmacy compliance team to discuss the reason for the closure or discuss what support is required or can be offered to ensure that the Pharmacy remained open and safe.”*

- 5.27 I am of the view that pharmacy provision is greater than just the dispensing of prescriptions and whilst I note that there was a pharmacist on duty, and this is not disputed by the Commissioner, the full range of pharmaceutical services were not available to patients as the pharmacist was “working behind closed doors” and appeared to only be dealing with existing prescriptions which the pharmacy had received.
- 5.28 I note the comments from the Appellant that the pharmacy was “closed” due to the pharmacist’s view that patient safety would be compromised. However, I am of the view that the pharmacist should have been aware prior to 12:30pm on Monday 11 November that there could be a potential issue at the pharmacy and should have done something prior to this time.
- 5.29 I also note that I have not been provided with any information as to why there was a backlog of prescriptions on this date in particular which would require the pharmacist to come to the conclusion that to remain open was “*unsafe and would impact patient safety.*”
- 5.30 I am of the view that the management of the pharmacy for all pharmaceutical services, not just limited to the dispensing of prescriptions, is a matter for the pharmacist in conjunction with the local management team of the relevant store as well as the internal compliance team at the Head Office. Further, if the pharmacist felt that there was a need for such action, the Commissioner should have been made aware of this prior to the temporary closure being notified to them.
- 5.31 I am of the view that the Appellant has provided insufficient evidence that the temporary suspension of pharmaceutical services on the date in question was beyond the Appellant’s control.
- 5.32 Regarding the other conditions, I acknowledge that the pharmacist reported the closure.
- 5.33 With regard to the Appellant’s business continuity plan, I note that a physical sign was placed on the counter and that colleagues at the pharmacy signposted customers to alternative pharmacies in the area to ensure that patient safety was maintained, and they were able to receive the advice/mediation required. However, I note the comments from the Appellant that the pharmacist in question “*made this decision without following internal processes and SOPs to close the pharmacy...*”. I also note that I have not been provided with a copy of the Appellant’s business continuity plan. Whilst I accept that pharmacy colleagues did what they were able to manage the situation, I do not consider this on its own is enough to relieve the Appellant of the requirement to comply with paragraph 23(10) of the Regulations.
- 5.34 I now turn to the Appellant using reasonable endeavours to resume provision of pharmaceutical services as soon as practicable. I note the Appellant states “*the pharmacist did not contact the Healthcare Area Manager /Lead Area Manager or the pharmacy compliance team to discuss the reason for the closure or discuss what support is required or can be offered to ensure that the pharmacy remained open and safe.*” The Appellant does not appear to have been made aware that there was a potential for closure and the pharmacist in question did not seek help or guidance from the internal compliance team or the Commissioner. Whilst the Appellant was able to resume the provision of pharmaceutical services the next day, there was a period of closure for 7.5 hours. I am of the view that I have not been provided with any evidence to demonstrate that the pharmacist used reasonable endeavours to resume provision of pharmaceutical services as soon as practicable.

- 5.35 I am of the view that the reasons given for the temporary suspension of pharmaceutical services on Monday 11 November 2024 were not beyond the Appellant's control.
- 5.36 I acknowledge that the Appellant reported the closure as soon as possible, however it does not appear that there were reasonable endeavours to resume the provision of services as soon as practicable. As I have determined that the Appellant's reason for temporary closure were not beyond its control, and therefore at least one of the conditions set out in paragraph 23(10) has not been met, I consider that the Appellant cannot rely on paragraph 23(10) of the Regulations to show that it is not in breach of paragraph 23(7) of Schedule 4 of the Regulations.
- 5.37 I am of the view that the Appellant is in breach of paragraph 23(7) of Schedule 4 of the Regulations.

Withholding of payment

- 5.38 I note that the Local Policy from the Commissioner sets out a tiered approach to a withholding, based on the recurrence of the temporary suspension of services in a rolling 6 month period.
- 5.39 I note that paragraph 71(3) of the Regulations states:
- (3) If the breach relates to a failure to provide, or a failure to provide to a reasonable standard, a service that C is required to provide, the breach notice may provide that, as regards the period during which there was a failure to provide, or a failure to provide to a reasonable standard, that service, NHS England is to withhold all or part of the remuneration due to C under the Drug Tariff or a determination as mentioned in regulation 91(6) in respect of that period.*
- 5.40 I note that the Appellant accepts that the pharmacy was not open during the period in question, however they are seeking to dispute the withholding and in particular the Commissioner's rationale for the withholding that "*costs not incurred because a pharmacist was not employed ...*"
- 5.41 Whilst I accept that there was a pharmacist on duty, I am of the view that the wording of the withholding is greater than just whether there is a pharmacist present and also covers "*non availability of pharmaceutical services*".
- 5.42 I am of the view that the pharmacy was closed between 12:30pm and 8:00pm on Monday 11 November 2024 and there was, during this period no availability of pharmaceutical services.
- 5.43 I note that it was determined that a payment withholding was to apply as this is the second occurrence within a 6 month rolling period, which has not been disputed by the Appellant.
- 5.44 Given my conclusion above, that the Appellant is in breach of paragraph 23(7) of Schedule 4 of the Regulations, and there is no dispute from the Appellant that this was the second temporary closure within the rolling 6 month period, I am of the view that the Commissioner is entitled to apply a withholding as set out in the Regulations and the Local Policy.

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