

15 February 2019

1 Trevelyan Square  
Boar Lane  
Leeds  
LS1 6AE

**REF: SHA/20007 & 20008**

**APPEAL AGAINST, NHS COMMISSIONING BOARD,  
NORTH (CHESHIRE AND MERSEYSIDE) AREA TEAM  
("NHS ENGLAND") DECISION REGARDING A BREACH  
NOTICE AT 267 HUNTS CROSS AVENUE, WOOLTON,  
LIVERPOOL, L25 9ND**

Tel: 0113 86 65500  
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Email: [appeals@resolution.nhs.uk](mailto:appeals@resolution.nhs.uk)

## 1 Outcome

- 1.1 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 NHS England or substitute for that decision any decision that NHS England could have taken when it took that decision.
- 1.2 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I substitute the decision of NHS England to issue the Breach Notice dated 25 September 2018 with a breach notice stating that the Appellant is in breach of paragraphs 23(1)(b) and 23(7)(a) of Schedule 4 of the Regulations in respect of both 2 August 2018 and 28 August 2018.

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### Advise / Resolve / Learn

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Accredited  
UNIT 2023



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## 1 The Breach Notice

A breach notice dated 25 September 2018 ("Breach Notice") was sent to AD Health Ltd (t/a Woolton Late Night Pharmacy) ("Appellant") in respect of 267 Hunts Cross Avenue, Liverpool, L25 9ND.

- 1.1 NHS England is writing to you following instances that the above pharmacy was not available to deliver a full range of Pharmaceutical services during NHS contracted hours.
- 1.2 A negative comment was identified on NHS Choices in August stating that no pharmacist was on the premises during contracted hours. NHS England subsequently requested the Responsible Pharmacist (RP) Log for August 2018.
- 1.3 On receiving the RP Log the pharmacy also submitted 2 unplanned closure forms, on 10 September 2018. The unplanned closure forms reflected the RP Log for August and 2 late openings were identified:
- 1.4 **Thursday, 2nd August 2018. Salim Diam signed in at 8.20am**
  - 1.4.1 The unplanned closure form states that the Pharmacist key holder was unwell and tired that morning. No suitable locum could be found at very short notice. Therefore the regular pharmacist decided to work that morning anyway and arrived at the pharmacy at 8.20am.
- 1.5 **Tuesday, 28th August 2015. Daanesh Ahmed signed in at 9.15am**
  - 1.5.1 The unplanned closure form states that the pharmacy staff working the morning shift did not have keys to open up the shop.
- 1.6 The above pharmacy failed to open with appropriate pharmacist availability at its contracted opening times on both occasions above and as such failed to be available to deliver the contractual pharmaceutical services at those times. It is not considered that this closure was beyond the control of the pharmacy to resolve.

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1.7 Schedule 4 Part 3 of The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, outline the terms of service for pharmacy contractors with regard to opening hours.

1.8 Pharmacy opening hours: general ,

*23. (1) An NHS pharmacist (P) must ensure that pharmaceutical services are provided at P's pharmacy premises -*

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

*(7) Where P has notified to the NHSCB 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 premises to which the notification relates on the days and at the times set out in the notification,*

*23. (10) Where there is a temporary suspension in the provision of pharmaceutical services by P for a reason beyond the control of P, P is not in breach of subparagraphs (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.*

1.9 It is the view of NHS England that on the documented occasions above, the pharmacy is in breach of Schedule 4 Part 3 (23)(7)(a) of the regulations in that the contractor failed to open core hours and also failed to satisfy Schedule 4 Part 3(23)(10)(a) to notify NHS England of a failure to open, in a timely manner. As such a breach notice shall be issued. This letter is to be taken as notification of the breach notice in accordance with regulation 71.

1.10 Appeals against decisions under Part 10 of the regulations may be made to the Secretary of State within 30 days of this notification. Such appeals should be addressed FHS Appeal Unit, NHS Litigation Authority, 1 Trevelyan Square, Leeds, LS1 6AE

1.11 You are requested to provide assurance regarding the Business Continuity plans that are in place to prevent subsequent extended closures with specific reference to your extended hours' contract. Please can you provide this by Friday 5th October to the email address above.

## 2 The Appeal

In a letter dated 22 October 2018 and addressed to NHS Resolution, the Appellant, AD Health Ltd (t/a Woolton Late Night Pharmacy) appealed against NHS England's decision. The grounds of appeal are:

### Unplanned Closures

2.1 The letter stated that the Unplanned Closures on 2 August and 28 August were not considered beyond the control of the Appellant to resolve. However in both instances

correct procedures were followed and all reasonable endeavours were made to resume provision of pharmaceutical services as soon as is practicable.

## **2 August**

- 2.2 On 2 August the temporary closure was due to Pharmacist illness. According to The National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 this is considered a reasonable cause for failure to open;

*Schedule 4 Part 3 23;(8) Subject to sub-paragraph (9), where P is prevented by illness or other reasonable cause from complying with P's obligations under subparagraph*

*(1), P must, where practicable, make arrangements with one or more NHS pharmacists or LPS chemists whose premises are situated in the same area for the provision of pharmaceutical services or local pharmaceutical services during that time.*

- 2.3 Actions were followed as directed in the Pharmacy's SOP for Unplanned Pharmacy Closures (Appendix A) as follows:

2.3.1 An attempt was made to find a suitable locum pharmacist to work that morning, however none of the usual locums that the Appellant employs were available or could arrive at short notice. Finding a locum through the locum agencies would have meant a much longer closure whilst the Appellant waited for a response, therefore in spite of the illness the scheduled pharmacist decided to work the rest of the shift himself with a view to seeking a locum later on should he have felt unable to continue.

2.3.2 Morning staff advised on situation;

2.3.3 Potential customers attending the pharmacy could be verbally advised of the delay in opening;

2.3.4 Notification of Temporary Suspension sent to NHS England.

- 2.4 Please see Appendix A1 relating to the above closure.

- 2.5 All of the business continuity processes were followed and the pharmacy opened within 50 minutes of the scheduled opening time.

## **28 August**

- 2.6 On 28 August the temporary closure was due to the staff not having keys to open the pharmacy. This came about due to the key holder leaving her shop key with her car keys. On that particular morning her son had required the car for an emergency to take this sick girlfriend to hospital and failed to notice he had the shop keys with him.

- 2.7 Clearly this is a situation that could not have been planned for or prevented, however the standard procedure was followed correctly in order to limit the closure to the shortest time possible.

- 2.8 Actions were followed as directed in the Pharmacy's SOP for Unplanned Pharmacy Closures (Appendix A4) as follows:

2.8.1 Staff concerned must in the first instance contact Directors or the Administrator;

- 2.8.2 The Directors resolved the issue by contacting another key holder who came to open the pharmacy that morning;
- 2.8.3 Potential customers attending the pharmacy could be verbally advised of the delay in opening;
- 2.8.4 Notification of Temporary Suspension sent to NHS England.
- 2.9 Please see attached Appendix A2 relating to this closure.
- 2.10 All of the business continuity processes were followed and the pharmacy opened within 1 hour 45 minutes of the scheduled opening time.
- 2.11 Both Unplanned Closures resulted from circumstances beyond the Appellants control and the Appellant is unable to see how the situation in either case could have been planned for and prevented or managed more appropriately. Therefore the Appellant asks the Appeal Panel to review the issuing of the Breach Notice in relation to the above unplanned closures.
- 2.12 The Appellant would further request that the Appeals Panel consider the following mitigating circumstances resulting in the delay to submit the required notification to NHS England. During the month of August the Pharmacy was undergoing considerable change due to a big reduction in staff hours, additionally one of the pharmacy administrators was on maternity leave whilst the second was on annual leave. This resulted in a considerable period of stress for the pharmacy manager due to the increased workload pressures. The Appellant would also like to state that the closures were an unusual occurrence and as such the Breach Notification caught them completely by surprise.
- 2.13 The Appellant's expectation would have been that the Local Area Team would make reasonable efforts to communicate with the Pharmacy and either convene a Local Resolution Meeting;
- 2.14 National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013
- Part 10 Point 69. (1) Subject to paragraph (3), before issuing a notice under regulation 70 or 71, the NHSCB must make every reasonable effort to communicate and co-operate with an NHS chemist (C) with a view to resolving any dispute between C and the NHSCB relating to C's compliance with C's terms of service.*
- 2.15 The Appellant may also have expected as described in the regulations that they would be issued a Remedial Notice requiring us to remedy the breach;
- Part 10 Point 70. (1) Where an NHS chemist (C) breaches a term of service and the breach is capable of remedy, the NHSCB may by a notice ("a remedial notice") require C to remedy the breach.*
- 2.16 However no such communication or warning was given before issuing the Breach Notice.
- 2.17 The Pharmacy recently underwent an inspection from NHS England which made recommendations that were all complied with. The Appellant has demonstrated a willingness to make changes to improve their procedures and premises in order to improve the standard of service that they deliver and to better comply with any requirements of the NHS contract. The Appellant therefore feels that this Breach Notice was a disproportionate measure especially when taking into account their willingness and good faith to learn and improve wherever possible.

This is a summary of representations received on the appeal. A summary of those representations made to NHS England are only included insofar as they are relevant and add to those received on the appeal.

### 3.1 NHS ENGLAND

- 3.1.1 Thank you for your letter dated 26 October 2018 seeking representations on the appeal dated 22 October by AD Health Ltd T/A Woolton Late Night Pharmacy against the decision to issue the above pharmacy with a breach notice for failure to open to open core hours on both Thursday 2 August 2018 and Tuesday 28 August 2018, which was notified to the pharmacy in a letter dated 25 September 2018. (copy attached – appendix A).
- 3.1.2 In consideration of its decision to issue a breach notice, NHS England North (Cheshire & Merseyside) Pharmaceutical Services Regulation Committee took into account the previous occasions that the Contractor failed to open in line with Core Hours.
- 3.1.3 On 12 October 2016, the Contractor was issued with a breach notice (copy attached - appendix B) for failure to open core hours on two separate occasions; the reason cited for the first instance was staff not being in possession of appropriate keys and assurances were given that steps had been taken to prevent a repeat occurrence.
- 3.1.4 On 4 July 2017, NHS England North (Cheshire & Merseyside) again wrote to the Contractor (copy attached - appendix B) in response to two reported failures to open core hours. On this occasion a breach notice was not issued but the contractor was reminded of his Contractual obligations and requested to avoid any further breaches in the future.
- 3.1.5 In its appeal to the Litigation Authority Woolton Late night Pharmacy seeks to rely on the fact that the closure on the 2 August was due to Pharmacist illness and according to the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 regulations this is considered a reasonable cause for failure to open.
- 3.1.6 It is the opinion of NHS England that this situation was not beyond the control of the Contractor, as this relates to the general management of the pharmacy, which includes having appropriate levels of staffing to ensure there is cover on any given day when the pharmacy is required to be open. It is a matter for the Contractor to manage this appropriately for example, by having sufficient staffing so as not to have to rely on a single pharmacist (whether that be an employed member of staff or a locum pharmacist), thus limiting the risk of being let down when one does not turn up or is unwell. To not do so is a decision in the hands of the Contractor.
- 3.1.7 In relation to the closure on the 28 August the Contractor states that the member of staff not being in possession of keys was a situation that could not have been planned for or prevented. As this situation had arisen in 2016 and assurances had been provided that steps had been taken to prevent a repeat occurrence; this scenario clearly could have been prevented.
- 3.1.8 For the reasons provided, NHS England maintains its decision to issue this breach under Schedule 4 Part 3 (23)(7)(a) of the regulations in that the contractor failed to open core hours and also failed to satisfy Schedule 4 Part 3 (23)(10)(a) to notify NHS England of a failure to open, in a timely manner.

## 4 Observations

### 4.1 AD HEALTH LTD

- 4.1.1 Further to the letter dated 3 December 2018 the Appellant wishes to provide the following rebuttals to the representations received from NHS England letter dated 12 November 2018.
- 4.1.2 In relation to 12 October 2016 Breach Notice. It is correct that measures were taken to avoid staff not having keys to open the shop. The following was actioned at the time:
  - 4.1.2.1 Extra copies of the shop keys were made and issued to all morning staff
  - 4.1.2.2 Additionally a spare set was kept at the pharmacy at all times
  - 4.1.2.3 All regular staff were made aware of the requirement to bring their shop keys when working morning shifts. As a result there has not been any similar recurrence of this issue for the past two years. Bearing in mind the pharmacy opens a 100 hours a week every day of the week all year round. Situations where morning staff inadvertently forget their keys or misplace them are not within the contractors control.
- 4.1.3 In relation to the letter dated 4 July 2017. There had been no breaches. It related to an occasion where the second pharmacist had signed in a few minutes late on the register despite the pharmacy having opened on time. Also there was an anonymous patient complaint on an unspecified date which was never able to be substantiated. Therefore it was not fair or appropriate to either issue a Breach Note or document any 'failures to open'.
- 4.1.4 In relation to 2 August 2018 Pharmacist Illness. The Appellant repeats that the correct procedures were followed by management in attempting to arrange locum pharmacist. This proved unsuccessful and so by 7:30am the regular pharmacist, although unwell went into work to open the pharmacy. There were contingency measures to give locum a spare set, however no locums were available at very short notice to be available by the pharmacy opening time.
- 4.1.5 In relation to 28 August 2018. The situation came about due to the morning staff not following procedure and forgetting to collect a spare key in advance and also the second key holder themselves inadvertently misplacing her keys as mentioned in the original appeal letter. It was not a failure of the Appellants processes as the Appellant has previously issued keys asking the staff to bring them to open the pharmacy. The situation was therefore out of the Appellants control.
- 4.2 NHS ENGLAND
  - 4.2.1 Further to NHS England's response to this appeal NHS England has received this information (attached at Appendix C) via GPHC. The complaint concerns the pharmacy not being open during core hours and being unable to take receipt of Controlled Drugs. As such NHS England thought the information should be shared with NHS Resolution as the complaint concerns the same theme as that which the breach was issued for.

## **5 Further submissions**

- 5.1 I note that the requirement to be open during contractual hours relates to two provisions of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations"). These provisions are:
  - 5.1.1 the total number of hours to be open per week pursuant to paragraph 23(1)(b) of Schedule 4 of the Regulations; and

- 5.1.2 the set days and times the pharmacy is required to be open pursuant to paragraph 23(7)(a) of Schedule 4 of the Regulations.
- 5.2 I note that the information received on the appeal only related to paragraph 23(7)(a) of Schedule 4 of the Regulation.
- 5.3 We therefore invited the parties to provide comments and/or evidence in relation to paragraph 23(1)(b) of schedule 4 of the Regulations.
- 5.4 AD HEALTH LTD
- 5.4.1 According to the NHS England Pharmacy Manual (2016): Chapter 18 - point (16) "There may be occasions when a contractor is unable to open its premises for a reason that is beyond its control". And the Commisioner [sic] must be notified using form Annex 16.
- 5.4.2 The temporary closures were both notified using the appropriate form, and the local NHS England team had acknowledged receipt of these forms.
- 5.4.3 Further, in Chapter 19 - Failures to Open under points 34-36 it states that: "If the contractor does this, they are not in breach of their terms of service".(p281)
- 5.4.4 The basis of the appeal was to indicate that in both instances there were good reasons for the temporary closures, and that these are circumstances that should be deemed as being beyond the contractor's control. As part of the appeal we have submitted further details for consideration, that may not have been previously considered by the Local NHS England team in determining to issue a 'Breach Notice'.
- 5.4.5 We do fully appreciate the position of the Local NHS England Team, and we would like to reassure them, and also the Appeals panel, that in both cases the matter of temporary closure was taken extremely seriously. The appropriate procedures were followed and all reasonable steps were taken to ensure minimal disruption to NHS Pharmacy Services. In both instances there were staff present at the entrance of the pharmacy who could speak with any potential customers. However in both cases the closures were of relatively short duration during the early morning, (with the local GP surgeries being yet to open during the majority of this time) and the staff on duty reported that no prescriptions were affected and were not made aware of any customers who had been unhappy or negatively affected as a result.
- 5.4.6 We hope that the Appeal Panel will now reconsider the decision to issue a 'Breach notice', which could be considered to be disproportionate in light of the above circumstances and in light of the details previously submitted.
- 5.5 NHS ENGLAND
- 5.5.1 Whilst the breach letter issued by NHS England on the 28th August 2018 does not categorically state the breaches pursuant to paragraph 23(1)(b) of Schedule 4 of the Regulations, the temporary suspension of services (failure to open) does necessitate a breach of paragraph 23(1)(b) of Schedule 4 of the Regulations and we have no information from the contractor to state that this breach was remedied in any way by ensuring that the 100 hour "conditions" were met via alternative arrangements.
- 5.5.2 We believe that each of temporary suspension of services documented in the breach letter would also result in a breach of paragraph 23(1)(b) of Schedule 4 of the Regulations as well as the stated breaches of Schedule 4 Part 3 (23) (7) (a) of the regulations in that the contractor failed to open core hours and

also failed to satisfy Schedule 4 Part 3 (23) (10) (a) to notify NHS England of a failure to open.

- 5.5.3 NHS England has no information that on the occasions documented in the breach letter pursuant to 23(1)(b) of Schedule 4 of the Regulations that paragraph 23(1)(b) of Schedule 4 of the Regulations were not also breached. The contractor has not indicated in any of his correspondence any information that would provide NHS England with evidence or information that this was not the case.
- 5.5.4 Whilst paragraph 23(1)(b) of Schedule 4 of the Regulations is cited in the letter we acknowledge that the letter does not explicitly state that this Terms of Service has been breached. This is an omission on our part rather than understanding that the contractor was sighted on this concern and took steps to address this.

## 6 Consideration

- 6.1 Under Regulation 71(1) "Breaches of terms of service: breach notices" of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations"), a Breach Notice may be issued:

*71. (1) Where an NHS chemist (C) breaches a term of service and the breach is not capable of remedy, the NHSCB may by a notice ("a breach notice") require C not to repeat the breach.*

- 6.2 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;"*

- 6.3 The Regulations contain no definition as to what constitutes a breach of terms of service which is not capable of remedy.
- 6.4 I note that the pharmacy is included on the pharmaceutical list and that there is no dispute between the parties with regard to this.
- 6.5 The Appellant's pharmacy was not open during its core hours on the two days in question; 2 August 2018 from 07:30am to 08:20am and 28 August 2018 from 07:30am to 09:15am and this has been accepted by the Appellant.
- 6.6 NHS England is of the view that as a result of the closures referred to in paragraph 6.5, the Appellant was in breach of the following Regulations and a breach notice was issued in respect of:
- 6.6.1 schedule 4, part 3, paragraph 23(7)(a) for failure to open during core hours; and
- 6.6.2 schedule 4, part 3, paragraph 23(10)(a) for failing to notify NHS England of the failure to open in a timely manner.
- 6.7 NHS England considers that the closures were not beyond the control of the Appellant and as such NHS England proceeded to issue the Breach Notice.

- 6.8 Under Regulation 69(1), before issuing a breach notice, NHS England must
- "make every reasonable effort to communicate and co-operate with an NHS chemist (C) with a view to resolving any dispute between [the chemist] and the NHSCB relating to [the chemist's] compliance with [the chemist's] terms of service".*
- 6.9 The Regulations contain no definition of what constitutes "*reasonable effort to communicate and co-operate*". I note that NHS England wrote to the Appellant before issuing the Breach Notice and requested a copy of the responsible pharmacist log, which revealed that the temporary suspensions of services subject to this appeal.
- 6.10 I note that the Appellant has stated in its appeal letter that it would have expected to be issued with a Remedial Notice requiring it to remedy the breach and that no communication or warning had been provided to the pharmacy.
- 6.11 I consider that opening late on a specific day is an example of an event that cannot be remedied as it has already occurred. It is not an ongoing event that can be stopped by taking some remedial action. There may, of course, be processes that can be put in place to reduce the potential for such an event to re-occur but that is different to remedying an ongoing breach.
- 6.12 I note that NHS England requested the log to check on opening times but did not otherwise communicate its intention to issue a breach notice.
- 6.13 I note that the requirement in Regulation 71 is intended to resolve a dispute about compliance with the terms of service but given the parties agree that the pharmacy was not open at the relevant times, the only dispute appears to have arisen only after the breach notice was issued.
- 6.14 I also note Regulation 69(3)(b)(i) that NHS England need not comply with Regulation 69(1) where NHS England is satisfied it is reasonable to move immediately to issue a breach notice because a pharmacy has not been open during core hours without good cause.
- 6.15 In light of the above, I consider that NHS England could have communicated its intention to issue a breach notice to the pharmacy to enable the pharmacy to have its say but this was not expressly required by Regulation 69.
- 6.16 I shall now consider each breach in the Breach Notice and the Appellant's grounds of appeal in turn.
- 6.17 Schedule 4, part 3, paragraph 23(7) states:
- (7) Where P has notified to the NHSCB (or, before the appointed day, a Primary Care Trust) the days on which and times at which pharmaceutical services are to be provided at P's pharmacy premises (for example, in a return under sub-paragraph (5) or (6) or in an application for inclusion in a pharmaceutical list)—*
- (a) P must ensure that pharmaceutical services are provided at the premises to which the notification relates on the days and at the times set out in the notification (unless the notification has been superseded by a return, or a further return, under sub-paragraph (6)); and*
- (b) P must not change—*
- (i) the days on which or the times at which pharmaceutical services are to be provided at those premises during core opening hours which are neither additional opening hours nor in total less than 40 (if those core*

*opening hours are additional opening hours, or are in total less than 40, regulation 65(5) to (7) and paragraphs 25 and 26 apply),*

*(ii) the total number of any supplementary opening hours (regulation 65(5) to (7) and paragraphs 25 and 26 apply to changes to the total number of core opening hours),*

*(iii) the days on which or the times at which pharmaceutical services are to be provided at those premises during supplementary opening hours, or*

*(iv) the pharmaceutical services which P is ordinarily to provide at those premises,*

*for a period of at least 3 months after that notification was received by the NHSCB (or, before the appointed day, a Primary Care Trust), unless the NHSCB agrees otherwise.*

6.18 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.

6.19 I note that there is no dispute between parties that the pharmacy did not open for some of its core hours on either 2 August 2018 or 28 August 2018 and that this is confirmed by both the responsible pharmacist log for August 2018 as well as the notifications of unplanned temporary suspension of pharmaceutical services (the “Notifications”) submitted by the Appellant to NHS England on 10 September 2018.

6.20 I consider that failure to provide services during core hours amounts to temporary suspension of services. Temporary suspension of services does not necessarily mean that the Appellant was in breach of paragraph 23(7)(a). The Regulations permit temporary suspension of services in certain circumstances without attracting a breach, e.g. where sufficient advance notice has been provided of an intended suspension of services (pursuant to paragraph 23(1) or to cater for situations which are, for example, outside of the contractor’s control.

6.21 The latter is set out in paragraph 23(10) of Schedule 4 of the Regulations, which sets out certain conditions, which, if satisfied, would mean the Appellant would not be in breach of paragraphs 23(7) and 23(1) of Schedule 4 of the Regulations. I return to this further below.

6.22 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 amount to a breach of paragraph 23(1), which also relates to temporary suspension of services and to which the conditions set out in paragraph 23(10) also apply.

6.23 I note that the Appellant is included in the pharmaceutical list to be open for 100 hours a week.

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

*(1) An NHS pharmacist (P) must ensure that pharmaceutical services are provided at P’s pharmacy premises—*

*(a) ...;*

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

*(c) ...*

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

- 6.25 Paragraph 23(1)(b) does not require the Appellant to be open at specific times and days but instead requires the Appellant to be open for not less than 100 hours each week.
- 6.26 NHS England states in its submissions that it believes that each temporary suspension of services, which are the subject of this appeal, would also result in a breach of paragraph 23(1)(b) of the Regulations in addition to the breaches stated in the Breach Notice. NHS England states that failure to explicitly find the Appellant to be in breach of paragraph 23(1)(b) is an omission on its part.
- 6.27 I note that the Appellant has not commented or provided evidence to support a position that it was open for at least 100 hours in each given week in question.
- 6.28 I note that NHS England does not have information suggesting that the Appellant was open for at least 100 hours in each given week.
- 6.29 I consider that it is reasonable to conclude that by failing to open for 40 minutes on 2 August 2018 and for 1 hour and 45 minutes on 28 August 2018 the Appellant failed to ensure that the pharmaceutical services were provided for no less than 100 hours in each relevant week in question as required by paragraph 23(1)(b).
- 6.30 As indicated at paragraph [6.21] above, the Appellant would not be in breach of paragraphs 23(7) and / or 23(1) of the Regulations if it meets the conditions of paragraph 23(10). I therefore next consider these conditions and the representations before me.
- 6.31 Paragraph 23(10) states:
- “(10) Where there is a temporary suspension in the provision of pharmaceutical services by P for a reason beyond the control of P, P is not in breach of sub-paragraphs (1) and (7), provided that—*
- (a) P notifies the NHSCB of that suspension as soon as practical; and*
- (b) P uses all reasonable endeavours to resume provision of pharmaceutical services as soon as is practicable.”*
- 6.32 I consider that paragraph 23(10) sets out four conditions or tests, which need to be met in order for the Appellant to not be in breach of paragraphs 23(1) and 23(7). These are:
- 6.32.1 establishing that there has been a temporary suspension of pharmaceutical services;
- 6.32.2 the temporary suspension of pharmaceutical services arose for reasons beyond the control of the Appellant;
- 6.32.3 the Appellant notified NHS England of the temporary suspension as soon as practicable; and
- 6.32.4 the Appellant has used all reasonable endeavours to resume the provision of pharmaceutical services as soon as practicable.
- 6.33 I consider that all four conditions must be met in order for paragraph 23(10) to apply and therefore for the Appellant to be deemed not in breach of paragraphs 23(1) and 23(7).

- 6.34 As discussed at paragraph [6.19] above, I consider that failure to open during core hours on 2 August 2018 and 28 August 2018 amounts to temporary suspensions of pharmaceutical services and therefore the first condition set out in [6.32.1] is satisfied.
- 6.35 I next consider whether the temporary suspensions were for reasons beyond the Appellant's control.

#### Temporary suspension on 2 August 2018

- 6.36 I note that the Appellant states that the reason for the temporary suspension in the provision of pharmaceutical services was for a reason beyond its control, as the pharmacist who was scheduled to work on the morning of 2 August 2018 was "unwell and very tired that morning" or "ill" and was therefore, initially, unable to work.
- 6.37 [I am of the view that a problem with the staffing of a pharmacy is not a reason beyond the control of the Appellant as to why the Appellant is not able to provide pharmaceutical services during core or supplementary hours. Staffing levels of the pharmacy are not beyond the control of the Appellant as the arrangements and number of pharmacists employed either as relief pharmacists or as locums procured to cover core contracted as well as supplementary hours offered by the Appellant are a commercial consideration and a matter for the Appellant to ensure that there is sufficient cover.
- 6.38 It is open to the Appellant to employ more than one pharmacist to work during the same hours thus limiting the need for locums to be found at short notice to cover the employed pharmacist or the relief pharmacist if they should be unavailable for some reason; to not do so is a commercial decision under the control of the Appellant.
- 6.39 I am of the view therefore that the reason given for the temporary suspension of pharmaceutical services on the morning of 2 August 2018 was not beyond the Appellant's control.

#### Temporary suspension on 28 August 2018

- 6.40 The Appellant states that the reason for the temporary suspension in the provision of pharmaceutical services on the morning of 28 August 2018 was also beyond its control.
- 6.41 The Appellant states that this was due to the person who was supposed to be opening the pharmacy not having the "shop" keys with them.
- 6.42 I note that the letter of appeal dated 22 October 2018, states
- "the temporary closure was due to staff not having keys to open the pharmacy. This came about due to the key holder leaving her shop keys with her car keys. On that particular morning her son had required the car for an emergency to take his sick girlfriend to hospital and failed to notice he had the shop keys with him. Clearly this is a situation that could not have been planned for or prevented, however the standard procedure was followed correctly in order to limit the closure to the shortest time possible."*
- 6.43 In the undated notification form submitted to NHS England, the Appellant in answer to Question 9 "Has anything been done to prevent this particular situation happening again?" states:

*"The dispenser that was required to open the shop that morning was not a usual key holder and did not have any keys. In future any morning staff scheduled to start at opening time would be advised in advance by either the manager in the first instance or administrator second, of the need to get shop keys in advance of them working the shift (confirmed by email). Further a general email has now been sent to all staff*

*advising them of the issue and requiring those who are not key holders to confirm they have keys to open up in the morning”*

- 6.44 There appears to be a discrepancy in the information provided by the Appellant as to the reason why the person opening the pharmacy that morning did not have keys with them. However, irrespective of the circumstances, the reason for the temporary suspension of services was due to the pharmacy not being able to be opened as a result of none of the staff scheduled to work on the morning of 28 August 2018 having the pharmacy keys with them.
- 6.45 I am of the view that whilst it may be unfortunate that the key holder’s car was needed that morning, a problem with the whereabouts of keys is not a problem which is “beyond the control” of the Appellant. The arrangements of staff and keys and the instructions given to them by the Appellant are the responsibility of the Appellant and it is a matter for the Appellant to ensure that those on a particular shift are aware of their responsibilities. It is a matter for the Appellant to ensure that the information given to any member of staff is sufficient so that they are aware of the procedures and their responsibilities at the pharmacy. I do not consider that failure by a pharmacy staff to follow the pharmacy procedures is a reason beyond the control of the pharmacy.
- 6.46 The length of time a pharmacy is open or the number of hours that they provide as their core contracted hours is not a reason as to why a key holder may or may not remember their keys.
- 6.47 I note that NHS England refers to a complaint that has been received about the pharmacy being closed during their core hours. I take no view on this as this is not part of the breach notice before me for the morning of 28 August 2018.
- 6.48 I am of the view therefore that the temporary suspension of pharmaceutical services on the morning of 28 August 2018 was also not beyond the Appellant’s control.
- 6.49 Given that I have determined that the Appellant’s reasons for the temporary closures on both 2 August 2018 and 28 August 2018 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 paragraphs 23(1) and 23(7) of the Regulations.
- 6.50 With this being the case, I consider that I am not required to consider whether or not the Appellant then notified NHS England of the suspension and used all reasonable endeavours to resume the services as soon as practicable.
- 6.51 There are a number of other points raised in the course of this matter that require my consideration

#### Breach of paragraph 23(10)(a) of Schedule 4

- 6.52 The Breach Notice states that the Appellant is in breach of paragraph 23(10)(a) as it had failed to notify NHS England of the temporary suspensions of pharmaceutical services on the dates in question.
- 6.53 I have set out the relevant provision of the Regulations earlier in this determination.
- 6.54 I consider that the Appellant cannot be in breach of paragraph 23(10)(a). As discussed above, paragraph 23(10) sets out conditions, satisfaction of which will prevent the Appellant from being in breach of paragraphs 23(1) and 23(7). This provision is the link between paragraphs 23(1) and 23(7), the latter being the operative provisions, which are capable of being breached.
- 6.55 I note that parties’ submissions in relation to the Notifications, however, I consider that this is not relevant in this determination as I have determined above that the closures

on both 2 August 2018 and 28 August 2018 were not beyond the control of the Appellant.

6.56 I therefore determine that the Appellant is not in breach of paragraph 23(10)(a).

Paragraph 23(8) of Schedule 4 of the Regulations – temporary suspension on 2 August 2018

6.57 The Appellant appears to rely on the reference to illness in paragraph 23(8) of Schedule 4 to claim that the Regulations recognise illness, where this is the basis for the temporary suspension of service, as excusing a contractor from being in breach of the relevant provisions. Paragraph 23(8) states:

*“(8) Subject to sub-paragraph (9), where P is prevented by illness or other reasonable cause from complying with P’s obligations under sub-paragraph (1), P must, where practicable, make arrangements with one or more NHS pharmacists or LPS chemists whose premises are situated in the same area for the provision of pharmaceutical services or local pharmaceutical services during that time.*

6.58 The Appellant considers that paragraph 23(8) applies in that the temporary closure on 2 August 2018 was due to the pharmacist being ill and that:

6.58.1 an attempt was made to find a suitable locum pharmacist to work that morning, however none were available so the scheduled pharmacist decided to work the shift himself;

6.58.2 morning staff were advised of the situation; and

6.58.3 potential customers attending the pharmacy were verbally advised of the delay in opening.

6.59 I consider that paragraph 23(8) only applies to the Appellant’s obligations under paragraph 23(1), namely that the Appellant is required to ensure that pharmaceutical services are provided for not less than 100 hours. As discussed earlier in this determination, I consider that in addition to failing to provide pharmaceutical services during the set days and times, the Appellant has also failed to open for at least 100 hours in each given week. Therefore, the Appellant is required to comply with provisions of paragraph 23(8).

6.60 Unlike the provisions of paragraph 23(10), I consider that paragraph 23(8) is not a provision which “excuses” the Appellant from being in breach of another provision, it is rather a requirement that where the Appellant fails to provide pharmaceutical services for at least 100 hours, it must, where practicable, make arrangements with another NHS pharmacist in the area to provide service during the time of temporary suspension. It is an additional obligation on the Appellant.

6.61 I note that whilst the pharmacy was closed the Appellant stated that staff were outside the pharmacy advising of the situation. Three customers who came to collect prescriptions were advised of the situation and advised that their prescriptions would be ready to collect that morning and they could return to collect them later on. I note the efforts of the Appellant to find a suitable locum pharmacist to cover and work the morning of 2 August 2018 by contacting the usual locums that the Appellant uses, however I note that none of the Appellant’s usual locums were available to cover at such short notice. The Appellant did not seek to find a locum through locum agencies due to the perceived delay in opening that may occur and as a result the pharmacist decided to work the shift.

6.62 I consider that the above actions undertaken by the Appellant constitute an attempt to ensure that service users are able to access pharmaceutical services during the temporary suspension of services. The actions taken by the Appellant, however, are not the actions which the Appellant is required to take under paragraph 23(8).

6.63 I have not been provided with evidence to show that the Appellant arranged for another NHS pharmacist to provide pharmaceutical services to its service users during the morning of 2 August 2018. In addition, the requirement to make arrangements with another NHS pharmacist are only applicable “where practicable”. I do not have information which would suggest whether it was practicable or not. I have therefore declined making a determination on whether the Appellant is in breach of this provision. As indicated above, if I had determined that the Appellant had not acted in accordance with paragraph 23(1) or 23(7) and also found that the Appellant was not in breach of this provision, I am of the view that compliance with this provision would not excuse a breach of any other provision.

6.64

Paragraph 23(8) of Schedule 4 of the Regulations – temporary suspension on 28 August 2018

6.65 In its appeal, the Appellant referred to paragraph 23(8) in relation to the temporary suspension of pharmaceutical services on the morning of 2 August 2018. I consider that paragraph 23(8) is also applicable to the temporary suspension during the morning of 28 August 2018 as by failing to open for 1 hour and 45 minutes on 28 August 2018, the Appellant has failed to ensure that the pharmaceutical services are provided for not less than 100 hours in that week.

6.66 I note that whilst the pharmacy was closed the Appellant states that staff remained at the pharmacy to signpost patients and explain the situation. I note that the Appellant is not aware of any customers who were affected by the delay in opening the pharmacy.

6.67 As discussed earlier in relation to this provision for the event on 2 August, I consider that I do not have enough information to determine whether the Appellant is in breach of paragraph 23(8), therefore I shall not consider this point any further.

6.68 I note that NHS England issued the Breach Notice for breach of paragraphs 23(7)(a) and 23(10)(a). I further note that NHS England considers that failing to find the Appellant in breach of paragraph 23(1)(b) was an omission on its part.

6.69 I note the steps that the Appellant took to mitigate the consequences for patients, however I do not consider this on its own is enough to relieve the Appellant of the requirement to comply with paragraphs 23(1)(b) and 23(7)(a) of the Regulations.

6.70 I am of the view that the Appellant is in breach of paragraphs 23(1)(b) and 23(7)(b) of the Regulations.

## **7 Decision**

7.1 I am of the view that under NHS Resolution’s powers, as set out in paragraph 9(5) of schedule 3 to the Regulations, I may either confirm the decision of NHS England or substitute for that decision any decision that NHS England could have taken when it took that decision.

7.2 Pursuant to paragraph 9(5)(a) of schedule 3 to the Regulations, I substitute the decision of NHS England to issue the Breach Notice dated 25 September 2018 with a breach notice stating that the Appellant is in breach of paragraphs 23(1)(b) and 23(7)(a) of Schedule 4 of the Regulations in respect of both 2 August 2018 and 28 August 2018.

### **Head of Primary Care Appeals**

A copy of this decision is being sent to:  
AD Health Ltd (t/a Woolton Late Night Pharmacy)  
NHS England – North (Cheshire and Merseyside)